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REPORT
OF THE
GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

GEORGE H. RYAN
GOVERNOR

APRIL 15, 2002

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Preamble

On March 9, 2000, shortly after declaring a Moratorium on executions in Illinois, Governor George Ryan appointed this Commission to determine what reforms, if any, would ensure that the Illinois capital punishment system is fair, just and accurate. Today, we are presenting the Governor with our recommendations. Most of these proposals were endorsed unanimously by our Commission. Although individual members of the Commission disagree with some specific proposals, the Commission members are uniform in their belief that the body of recommendations as a whole would, if implemented, answer the Governor's call to enhance significantly the fairness, justice and accuracy of capital punishment in Illinois.

Our deliberations were the product of 24 months of intensive collaboration and research. Consistent with the Governor's original mandate, we carefully scrutinized the cases of thirteen Illinois defendants who have been released from death row in recent years after their convictions were invalidated. We also studied all reported capital decisions in Illinois, whether the death sentence or the underlying conviction was under review. We held public and private sessions where we heard from the surviving family members of murder victims, and from opponents of the death penalty, including some of the defendants who had been released from death row. We consulted with many nationally recognized experts in fields of study related to capital punishment, and we commissioned and conducted studies of our own. We also considered recommendations from across the country made by a number of bodies similar to our own, formed to consider potential capital punishment reforms. In all, our purpose was to thoroughly examine all aspects of the justice system as it relates to capital sentences and to become familiar with the research and learning in this area.

Despite the diversity of backgrounds and outlooks among those on the Commission, we are unanimous in many of our conclusions. All members of the Commission believe, with the advantage of hindsight, that the death penalty has been applied too often in Illinois since it was reestablished in 1977. Accordingly, we are unanimous in agreeing that reform of the capital punishment system is required in order to enhance the level of scrutiny at all junctures in capital cases. All Commission members also agree that if capital punishment is to continue to be imposed in Illinois, achieving a higher degree of confidence in the outcomes will require a significant increase in public funding at virtually every level, ranging from investigation through trial and its aftermath. We all also believe that significant reforms to the capital punishment system have taken place already, through legislation creating the Capital Litigation Trust Fund and through the Illinois Supreme Court's promulgation of extensive new rules governing many aspects of capital trials.

Ordering our proposals according to the procedural stage to which they apply, the following is a summary of some of our specific recommendations:

A. Investigation:

1.We recommend videotaping all questioning of a capital suspect conducted in a police facility, and repeating on tape, in the presence of the prospective defendant, any of his statements alleged to have been made elsewhere.

2. Recognizing an increasing body of scientific research relating to eyewitness identification, we propose a number of reforms regarding such testimony, including significant revisions in the procedures for conducting line-ups.

B. Eligibility for the Death Penalty

3. The Commission unanimously concluded that the current list of 20 factual circumstances under which a defendant is eligible for a death sentence should be eliminated in favor of a simpler and narrower group of eligibility criteria. A majority of the Commission agreed that the death penalty should be applied only in cases where the defendant has murdered two or more persons, or where the victim was either a police officer or a firefighter; or an officer or inmate of a correctional institution; or was murdered to obstruct the justice system; or was tortured in the course of the murder.

4. We also have recommended that the death penalty be barred in certain instances because of the character of the evidence or the defendant. We recommend that capital punishment not be available when a conviction is based solely upon the testimony of a single eyewitness, or of an in-custody informant, or of an uncorroborated accomplice, or when the defendant is mentally retarded.

C. Review of the Prosecutorial Decision to Seek the Death Penalty:

5. In order to ensure uniform standards for the death penalty across the state, we recommend that a local state's attorney's decision to seek the death penalty be confirmed by a state-wide commission, comprised of the Attorney General, three prosecutors, and a retired judge.

D. Trial of Capital Cases:

6. We have proposed a number of additional measures to augment the reforms already adopted by the Illinois Supreme Court to enhance the training of trial lawyers and judges in capital cases. Included are our suggestions for increased funding.

7. We have offered several recommendations aimed at intensifying the scrutiny of the testimony of in-custody informants, including recommending a pre-trial hearing to determine the reliability of such testimony before it may be received in a capital trial.

8. To allow for future audits of the functioning of the capital punishment system, we also suggest that a designated array of information about the nature of the defendant and the crime be collected by the trial court.

E. Review

9. We recommend that when a jury determines that death is the appropriate sentence in a case, the trial judge, who has also heard the evidence, must concur with that determination, or else sentence the defendant to natural life.

10. We recommend that, as in several other states, the Illinois Supreme Court review each death sentence to ensure it is proportionate, that is, consider whether both the evidence and the offense warrant capital punishment in light of other death sentences imposed in the state.

Because capital punishment is presently lawful in Illinois and because it appears to have the support of a majority of Illinois citizens, our deliberations have concentrated primarily on these reforms and other proposals, rather than on the merits of capital punishment. Only at the close of our work did we consider that question. A narrow majority of the Commission would favor that the death penalty be abolished in Illinois. Those favoring abolition did so either because of moral concerns, because of a conclusion that no system can or will be constructed which sufficiently guarantees that the death penalty will be applied without arbitrariness or error, or because of a determination that the social resources expended on capital punishment outrun its benefits. Some members voted that we recommend to the Governor that should the Governor conclude, after studied and supportable analysis, that the legislature will not substantially implement the recommendations of this Report, that the moratorium on the death penalty continue and that the death penalty be abolished in the State of Illinois. A slightly smaller number of Commission members concluded that the death penalty should continue to be applied in Illinois. Those favoring the death penalty believe it retains an important role in our punishment scheme in expressing, in behalf of the community, the strongest possible condemnation of a small number of the most heinous crimes. All members of the Commission have emerged from our deliberations with a renewed sense of the extraordinary complexities presented by the question of capital punishment.

Our divergence on that ultimate question was not unanticipated in light of the varied viewpoints and experience among those whom the Governor chose to serve on the Commission. What is more noteworthy, we believe, is the consistency of judgment among us about how our capital punishment system can be improved. The Commission's discussions have been characterized by an amity and respect for the differences among members, which is, frankly, extraordinary given the sharp divisions that capital punishment has traditionally provoked in the United States. In assessing our work, we are proudest of the broad agreements we have been able to achieve. A strong consensus emerged within the Commission that if capital punishment is retained in Illinois, reforms in the nature of those we have outlined are indispensable to answering the Governor's call to better ensure a fair, just and accurate death penalty scheme.

We anticipate careful reflection about these proposals by the Governor, the legislature, and Illinois citizens at large. Whatever their ultimate conclusions, all members of the Commission have been deeply honored by the opportunity to serve and to contribute to public discussion of so difficult and significant a subject.

April 15, 2002

MEMBERS OF THE COMMISSION ON CAPITAL PUNISHMENT

Chairman, Judge Frank McGarr
Now in private practice with a focus on mediation and arbitration, Judge McGarr served as a federal prosecutor and as First Assistant Illinois Attorney General before spending 18 distinguished years on the federal bench. He served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986.

Co-Chair, Senator Paul Simon
Senator Simon has served the people of Illinois with distinction, both as a member of the Illinois General Assembly and the United States Congress. Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute.

Co-Chair, Thomas P. Sullivan
An accomplished litigator, Mr. Sullivan served as United States Attorney for the Northern District of Illinois from 1977 to 1981. Currently in private practice at Jenner & Block, he is often called upon to lend his legal expertise, judgment and leadership on public interest committees.

Deputy Governor Matthew R. Bettenhausen, Member and Executive Director
Mr. Bettenhausen currently serves as the Deputy Governor for Criminal Justice and Public Safety. A former Assistant United States Attorney in the Northern District of Illinois, he most recently served as the Associate Chief of the Criminal Division. State agencies reporting to him as Deputy Governor include the Illinois State Police, the Illinois Department of Corrections, the Illinois Criminal Justice Information Authority, the Office of the State Fire Marshal, and the Law Enforcement Training Board, among others.

Kathryn Dobrinic, Member
Ms. Dobrinic served for 12 years as the elected State's Attorney for Montgomery County. Having practiced law in central Illinois for more than 20 years, Ms. Dobrinic served as the public defender in Christian County and has also worked in private practice.

Rita Fry, Member
An award winning attorney, Ms. Fry is the Public Defender of Cook County, Illinois. The Office of the Cook County Public Defender is the second largest public defender's office in the nation, with more than 500 attorneys providing indigent defense service in the largest county in the State.

Theodore Gottfried, Member
Mr. Gottfried is the State Appellate Defender of the State of Illinois, and has held the office since 1972. The office of the State Appellate Defender is responsible for providing appellate level and post-conviction indigent legal services throughout the State. With more than 140 attorneys state-wide, Mr. Gottfried's office also provides advice and counsel to capital defense attorneys.

Donald Hubert, Member
Mr. Hubert is a Fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers. A well-respected litigator, he has represented defendants in murder cases as well as

police officer defendants in civil police brutality cases. He serves by appointment of the Illinois Supreme Court as Chairman of the Court's Committee on Professional Responsibility and is a former president of the Chicago Bar Association. He has devoted significant efforts to various charitable efforts, including Chairman of the Board of Trustees of Hales Franciscan High School.

William J. Martin, Member
During his tenure as a prosecutor in the Cook County State's Attorneys office, Mr. Martin is well-known as the man who prosecuted Richard Speck. He also has extensive experience as a criminal defense lawyer, and is well-acquainted with the capital punishment system. His sub-specialty is legal ethics, and he has defended hundreds of lawyers in Illinois disciplinary proceedings.

Thomas Needham, Member
Now in private practice with the firm of Baird & Needham, Mr. Needham most recently served as the Chief of Staff for Chicago Police Superintendent Terry Hillard. Before joining the Superintendent's office, Mr. Needham was a policy advisor to Mayor Daley on public safety issues and a veteran Cook County prosecutor.

Roberto Ramirez, Member
Mr. Ramirez is founder and president of Tidy International, a janitorial and custodial company which is one of the fastest growing Hispanic owned companies in the United States. He immigrated to the United States as a young boy with his widowed mother and eight siblings. In 1996, he founded the Jesús Guadalupe Foundation in honor of his parents, as a means to financially assist Latino students in their pursuit of higher education.

Scott Turow, Member
A partner with Sonnenschein Nath & Rosenthal, Mr. Turow is probably better known across the world as a best-selling author of legal novels. Mr. Turow served as an Assistant United States Attorney in the Northern District of Illinois for several years before entering private practice.

Mike Waller, Member
The elected State's Attorney of Lake County, Illinois, Mr. Waller is a veteran trial lawyer and prosecutor. The Lake County State's Attorney's office is the third largest prosecutor's office in the State.

Andrea Zopp, Member
A successful corporate lawyer, Ms. Zopp has also been a criminal defense lawyer, and formerly served as First Assistant State's Attorney in Cook County. She is also a former Assistant United States Attorney in the Northern District of Illinois.

Judge William H. Webster, Special Advisor to the Commission
A senior partner with the Washington law firm of Milbank, Tweed, Hadley and McCloy, Judge Webster has served as the director of the CIA and FBI. He has also served as a Judge of the U.S. Court of Appeals for the Eighth Circuit; a U.S. District Court Judge and as a federal prosecutor in Missouri.

COMMISSION STAFF

Matthew R. Bettenhausen, Deputy Governor, State of Illinois
Mr. Bettenhausen served as both a member of the Commission and its Executive Director.

Jean M. Templeton, Research Director
An Illinois attorney since 1981, Ms. Templeton served as an Assistant Corporation Counsel for the City of Chicago between 1984 and 1986. In private practice between 1986 and 1994, Ms. Templeton appeared in Federal and state courts in civil rights litigation, as well as other litigation. She is currently pursuing a Ph.D. in Public Policy at the University of Illinois at Chicago, College of Urban Planning and Public Affairs.

THE COMMISSION WOULD LIKE TO THANK THE FOLLOWING
STATE EMPLOYEES WHO PROVIDED STAFF SUPPORT TO THE COMMISSION,
RENDERING SERVICE ABOVE AND BEYOND THEIR ORDINARY RESPONSIBILITIES:

Nancy L. Miller, Bureau Chief, Bureau of Operations
Illinois Department of Corrections (J.D. 1993)

Samantha Chandler, Paralegal Assistant, Legal Services Division
Illinois Department of Corrections

Richard Guzman, Office of the Governor

Michelle Hanneken, Office of the Governor

Patricia Sheerin, Office of the Governor

Acknowledgements

First and foremost, the members of the Commission would like to acknowledge the commitment of Governor George H. Ryan to the process outlined in the executive order creating the Commission. The Governor and his staff endeavored to provide assistance, resources and support for all of the Commission's efforts, while at the same time providing the Commission with the broadest possible mandate to explore issues the Commission deemed important during its examination of the Illinois capital punishment system. Throughout the 24 months that the Commission examined, considered and debated issues pertaining to the imposition of capital punishment in Illinois, Commission members were free to explore any and all issues thought important without limitation or constraint upon the examination process or the time period for deliberations. All members of the Commission were deeply honored to be involved with one of the most important policy issues facing our state and our nation.

Members of the Commission would like to thank all of those who contributed time, effort and information to support the work of the Commission on Capital Punishment. The efforts of the Commission were aided by many lawyers, academics, judges, and members of the public who presented ideas to the Commission and forwarded information that assisted its examination of the Illinois capital punishment system. Those contributing to this effort are too numerous to mention individually. However, all ideas, information and recommendations provided to the Commission were considered carefully and given serious reflection.

Many State agencies contributed to the Commission's efforts to examine capital punishment in Illinois, including the Governor's office, the Illinois Department of Corrections, the Illinois State Police, and the Illinois Criminal Justice Information Authority, whose combined efforts enabled the Commission to give issues covered by its mandate a thorough examination. The Commission would also like to thank the Chicago Police Department, who provided assistance with some data needs. Public employees devoted long hours to developing material that helped the Commission members understand the capital punishment process, and the contribution of public employees to the work of the Commission was significant and meaningful.

Finally, the Commission would like to acknowledge the contributions of Jean M. Templeton, the Commission's Research Director. The Commission benefitted enormously from her research efforts, technical knowledge and organizational skills. Most importantly, Commission members appreciated her patience and tireless efforts to see this project through to completion
despite numerous and diverse demands.

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Chapter 1 -- Introduction and Background

CREATION OF THE GOVERNOR'S COMMISSION

Governor Ryan imposed a moratorium on capital punishment in Illinois on January 31, 2000. The moratorium was prompted by serious questions about the operation of the capital punishment system in Illinois, which were highlighted most significantly by the release of former Death Row inmate Anthony Porter after coming within 48 hours of his scheduled execution date. Porter was released from death row following an investigation by journalism students who obtained a confession from the real murderer in the case. The imposition of the moratorium in Illinois sparked a nation-wide debate on the death penalty. A number of states embarked on detailed studies of their capital punishment systems, or proposed moratoria of their own.[1]

The Commission on Capital Punishment was appointed by the Governor on March 9, 2000 to advise the Governor on questions related to the imposition of capital punishment in Illinois. Commission members represent some of the diverse viewpoints in the state on the issue of capital punishment. Some members publicly opposed capital punishment under any circumstances, while others support capital punishment.

The Executive Order issued by the Governor described the duties of the Commission as follows:

> A. To study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people.
>
> B. To examine ways of providing safeguards and making improvements in the way law enforcement and the criminal justice system carry out their responsibilities in the death penalty process – from investigation through trial, judicial appeal and executive review.
>
> C. To consider, among other things, the ultimate findings and final recommendations of the House Death Penalty Task Force and the Special Supreme Court Committee on Capital Cases and determine the effect these recommendations may have on the capital punishment process.
>
> D. To make any recommendations and proposals designed to further ensure the application and administration of the death penalty in Illinois is just, fair and accurate.

The Governor's moratorium on the imposition of the death penalty in Illinois continued in effect during the pendency of the Commission's deliberations, and is still in effect. This Report

summarizes the Commission's recommendations and findings following its examination of capital punishment in Illinois.

ORGANIZATION OF THE COMMISSION'S WORK

In order to accomplish the goals set forth in the Governor's executive order, the Commission initiated efforts to gather information, to assess the capital punishment system in Illinois and to develop suggested recommendations. The Commission's work encompassed nearly 2 years of concentrated study and discussion.

The Commission divided itself into subcommittees to examine specific issues in detail. The Commission convened as a whole at least once per month for day long meetings, and its subcommittees met monthly as well throughout its review period to intensively study the questions posed about capital punishment and to develop specific suggestions for changes to the system. Public hearings were held in August, September and December of 2000 in both Chicago and Springfield to solicit input with respect to concerns about the capital punishment system from members of the general public.[2] The Commission met privately with representatives of surviving family members of homicide victims in order to understand concerns about capital punishment from this perspective. Private meetings also occurred with some of the thirteen men released from death row in Illinois in order to gain a better perspective on flaws in the system. Other meetings were also conducted with those who had specific recommendations to correct flaws in the system and improve the quality of justice in Illinois.

Commission members reviewed recommendations contained in written reports from other groups that had already studied the system, including the Special Supreme Court Committee on Capital Cases and the Senate Minority Leader's Task Force on the Criminal Justice System. The Commission also benefitted from information in other reports, such as the Report from the Task Force on Professional Practice in the Illinois Justice System.[3] In addition to reviewing Illinois materials, the Commission also had the opportunity to review recommendations from other jurisdictions, including public reports issued by other states and public inquiries by several Canadian provinces into cases of wrongful conviction. The Commission also conducted its own research to develop suggestions for improvements. Those research efforts included:

1. An intensive examination of the cases involving the thirteen men released from death row.[4]
2. A broader review of the more than 250 cases in which a death penalty has been imposed in Illinois since 1977.
3. Special studies by researchers on victim issues in the death penalty process and a separate study on the impact of various factors on the death sentencing process.
4. A review of death penalty laws in the 37 other death penalty jurisdictions related to several issues, including eligibility factors, mitigating factors, and jury instructions.

5. Solicitation of views from various experts in particular areas of concern, such as police practices and eyewitness testimony.
6. An analysis of efforts in other jurisdictions to address specific or systematic problems relating to death penalty prosecutions.

These research efforts underpin many of the recommendations in this Report.

THE ILLINOIS DEATH PENALTY STATUTE AND ITS HISTORY

In 1972, the United States Supreme Court found that state schemes for imposing the death penalty were unconstitutional. States were forced to re-evaluate the imposition of the death penalty in their respective jurisdictions in order to comply with the constitutional mandate imposed in *Furman v. Georgia* , 408 U.S. 238, 92 S. Ct. 2726 (1972.) Following the Supreme Court's decision in *Furman*, the imposition of the death penalty in Illinois was also precluded. See *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972).

Illinois revised its death penalty scheme, contained in Ch.38, par. 1005-8-1A, in 1973.[5] The original scheme contained six eligibility factors[6], and provided that the decision about whether to impose a death sentence would be handled by a three-judge court. The original scheme also provided for an appellate process which began, as with other criminal appeals, with the appellate court.[7] This death penalty scheme was found unconstitutional by the Illinois Supreme Court in *Rice v. Cunningham*, (61 Ill. 2d 353, 336 N.E. 2d 1 (1975)) both for its requirement of a three judge panel, which the Court held would divest the individual judges of their constitutional authority to decide cases, and for its appeal process imposing an intermediate level of review, which the Court held would violate those provisions of the 1970 Constitution which required a direct appeal to the Supreme Court in death penalty cases.

A new death penalty statute was enacted in 1977, which developed the basic structure that is in use today. The 1977 Act authorized the imposition of the death penalty when a first degree murder involved any one of seven eligibility factors. The original statute included among its eligibility factors the murder of a peace officer or fireman, murder of an employee of the Department of Corrections or of someone present in the institution, multiple murders, murder in the course of hijacking, contract murder, murder in the course of one of nine enumerated felonies and the murder of a witness in a prosecution or investigation of the defendant.

Under the 1977 Act, a death penalty hearing only occurs "where requested by the State."[8] The death penalty hearing, often referred to as the "sentencing phase" of the trial, occurs following the defendant's conviction for first degree murder. The sentencing phase of the trial usually occurs in two distinct phases: the eligibility phase and the aggravation/mitigation phase. During the eligibility phase, the prosecution must establish either before the jury or the judge proof beyond a reasonable doubt that one of the eligibility factors is present. The prosecution must also establish that the defendant is eighteen years of age, as Illinois prohibits the imposition

of the death penalty on those under eighteen. When the jury (or the judge in a bench sentencing) determines that the defendant is eligible for the death penalty, the aggravation/mitigation phase commences. During the aggravation/mitigation phase, the prosecution presents information to the jury or the judge which it believes warrants the imposition of the death penalty in a particular case. The defendant presents information in mitigation, or which he or she believes establishes reasons for not imposing the death penalty in a particular case.[9]

Under Illinois law, the jury imposes the death penalty unless it finds sufficient mitigation to preclude the imposition of the death penalty. Once the jury imposes the death penalty, the Illinois Constitution and court rule require a direct appeal to the Illinois Supreme Court.

Amendments to the 1977 Act followed shortly. In 1982, the General Assembly added a new eligibility factor, which provided that death could be imposed if the victim of the murder was under 16 years of age and the murder was committed in a brutal and heinous manner.[10] The legislature subsequently amended this provision to lower the threshold age for the victim from 16 to 12. The same act amended the eligibility factor which authorized the death penalty where the victim was a witness, and the murder was intended to prevent the person from testifying or assisting in any prosecution or investigation of either the defendant or *another*.[11] During the remainder of the 1980's, additional amendments to the statute were prompted by the rewrite of sections of the criminal code.[12]

Beginning in 1989, however, amendments to the death penalty statute began to broaden the scope of factors making a defendant eligible for the death penalty. At present, the Illinois statute contains 20 separate eligibility factors which may result in the imposition of the death penalty. In the spring legislative season of 2001, the legislature enacted HB 1812, which added a 21st eligibility factor. That bill was vetoed by the Governor.[13] During the fall session of the legislature in December of 2001, the legislature passed House Bill 2299, enacting new anti-terrorism provisions. Among other things, the bill added a death penalty eligibility factor for a first degree murder resulting from a terrorist act. The bill was vetoed by the Governor in February of 2002 and returned to the legislature with amendments to its other provisions.[14]

RECENT CHANGES TO THE DEATH PENALTY PROCESS IN ILLINOIS

Prompted by the release of 13 men from death row over a period of little more than 10 years, various groups began to examine the death penalty process in Illinois. Simultaneous examination of the capital punishment system was conducted by a special Supreme Court Committee, a Senate Task Force, a House Task Force, and several private groups, such as the Chicago Council of Lawyers.

Special Supreme Court Committee

The Illinois Supreme Court appointed a Special Committee on Capital Cases, composed of experienced Illinois trial court judges from around the state. The Committee issued a

preliminary report in 1999, conducted public hearings in Chicago and Springfield in 1999, and issued a report containing its Supplemental Findings and Recommendations in October of 2000. The recommendations from the Committee covered a wide range of issues, including the qualification of counsel for capital cases, new discovery rules, new capital case procedures, and new standards for discovery of DNA evidence. Most of these recommendations were enacted into Rules by the Supreme Court, effective March 1, 2001.[15] The Commission considered many of the observations made by the Committee, and has made a number of recommendations based upon those findings in this Report.

Senate Minority Leader's Task Force on the Criminal Justice System
Senate Minority Leader Emil Jones appointed a task force consisting of legislative leaders, state and federal judges, prosecutors, public defenders and the private bar to make specific recommendations for improvements to the criminal justice system in Illinois. The March, 2000 report of the task force covered issues relating to qualification of counsel, police practices (including addressing the question of whether or not to videotape interrogations), and prosecutor misconduct. Although none of the recommendations advanced by the Task Force have been enacted into law, a number of legislative proposals embodying many of the proposals have been introduced in both the Illinois House and Senate. The Commission separately considered many of the recommendations made by the Task Force.

House Task Force As of December 31, 2001, the House Task Force has not yet issued its written report.

RESEARCH INITIATED BY THE COMMISSION

Although the Commission members benefitted from the work undertaken by other committees and task forces, the Commission initiated its own research into issues of concern. The Commission's research initiatives included efforts undertaken by Commission members themselves, staff research, and specific studies the Commission requested be conducted by other researchers. This section summarizes some of the more significant research efforts.

Cases involving the thirteen men released from Death Row
Commission members studied these cases intensively. The review effort included not only reading the reported decisions, but in some cases consulting with the attorneys who handled the underlying case and/or reviewing specific materials related to the case. This intensive review enabled the Commission to develop a framework for identifying specific topics that were of particular concern, and guided much of the ultimate research.

Review of cases in which a death sentence was imposed.
Since Illinois reinstated its death penalty in 1977, more than 275 individuals have been sentenced to death. Of that number, approximately 160[16] are currently on death row. Twelve inmates have been executed under the current statute, and thirteen released from death row. Of

those individuals who have been sentenced to death in Illinois, there are over 250 proceedings in which there has been at least one reported Illinois Supreme Court decision.[17]

Commission members believed that in addition to the intensive review undertaken of the cases in which inmates were released from death row, some broader overview was warranted of all cases in which a death penalty had been imposed at some point in the criminal justice process. In order to accomplish this task, a group of volunteers attorneys was organized to review the case opinions, and to provide information to the Commission staff with respect to factual details. Information provided was then verified for accuracy by Commission staff. Further description of the case review project and the data collected from it is contained in the Technical Appendix to this Report.

Examination of laws of other states with the death penalty

Presently, 37 other states and the federal government have a death penalty. At the outset, it was apparent that the Commission could benefit from understanding the procedures in other states. To that end, statutory provisions were collected[18] from most states in the following areas:

- Definition of capital murder and corresponding aggravating factors
- Statutory mitigating factors
- Jury instructions in specific areas, including consideration of aggravating/mitigating factors, eyewitness testimony, accomplice testimony, in-custody informant testimony
- Post-conviction provisions
- Clemency proceedings
- Proportionality issues

The Commission also benefitted from the willingness of officials from other states to share information about the operation of certain aspects of their death penalty proceedings. In some limited and specific areas, research of decisional law from other states was also undertaken.

Sentencing Study

Early in its process, the Commission heard presentations on the issue of proportionality and the potential impacts of race in decision making as it relates to the death penalty. Most states which conduct proportionality reviews, such as New Jersey, Nebraska, and Georgia, require the collection of extensive factual information from the trial court level. This data permits an examination of proceedings at every stage in the process, from charging decision through sentencing, and enables the reviewing court or researchers to identify trends.

Unfortunately, Illinois does not systematically gather this type of data. Commission members found their efforts to come to grips with the complexities of the death penalty system circumscribed by a lack of reliable information that would provide insight into the range of issues occurring in death penalty cases. There is no state-wide database which would enable an examination, for example, of charging decisions by prosecutors. Even with new Supreme Court rules which require the filing of a notice of intent to seek the death penalty, information is

still not collected in any regularized fashion to document decisions that are made in the process. More important, to be truly valuable, information needs to be collected not only on death penalty cases, but also on all murder cases in which the death penalty is not sought or imposed in order to comparatively examine and review death penalty decisions and the process itself.

The Commission also became acquainted with a number of academic studies which pointed to extra-legal influences in the death sentencing process. Some of those studies examined the impact of race on the ultimate question of who was sentenced to death, and most have found that defendants who kill white victims are much more likely to receive a death sentence than those who kill black victims. Others examined geographic disparities in the death sentencing process. Assessing the degree to which such factors were present in Illinois appeared to Commission members to be an important task.

In view of the lack of existing data, and in view of the complexities in undertaking a global study of this type even with complete data, the Commission elected instead to initiate a more focused inquiry.

The study of Illinois sentencing decisions, completed by Drs. Pierce and Radelet, had several purposes. First, it resulted in the creation of a database combining sentencing data and victim data which should enable further study by scholars. Second, it was also intended to assess the degree to which extra-legal factors, such as race or geographic location, influenced sentencing decisions in Illinois. Finally, it also was intended to assess, in a limited way, the degree to which the death penalty was being applied to the 'worst' offenders, as opposed to being applied haphazardly.

A complete discussion of the methodology of the study and its results is contained in the separate report by Drs. Pierce and Radelet.[19] A brief discussion of the results is included in Chapter 14 of this Report.

RESULTS OF THE RESEARCH

While the research results are discussed in more detail throughout this Report, there are several key facts which emerged from the research described above.

Thirteen released death row inmates

Commission members found a number of common themes in these cases, which provided a framework for analyzing the remaining cases in which the death penalty has been imposed. All 13 cases were characterized by relatively little solid evidence connecting the charged defendants to the crimes. In some cases, the evidence was so minimal that there was some question not only as to why the prosecutor sought the death penalty, but why the prosecution was even pursued against the particular defendant. The murder conviction of former death row inmate Steven Manning was based almost completely upon uncorroborated testimony of an in-custody informer. No physical evidence linked Manning to the murder he was said to have

committed, nor was there any solid corroboration of the alleged statements he made admitting to the murder. Gary Gauger was convicted in McHenry County of the double murder of his parents even though no physical evidence at the scene linked Gauger to either murder, nor was there any satisfactory explanation of a possible motive. The primary evidence against Mr. Gauger were statements, allegedly made by Gauger, that the police claimed were indicative of guilt, made during an interrogation that was not memorialized. Gauger denied the statements. Following a federal investigation, two other persons were subsequently convicted in Wisconsin of murdering Mr. Gauger's parents. Despite scant evidence, each of these cases resulted in a conviction, and a death penalty.

There were a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain. In some cases, this was an accomplice[20], while in other cases it was an in-custody informant. The "Ford Heights Four" case involved the conviction of four men in south suburban Cook County for the 1978 double murder of a man and a woman. Two of the men, Verneal Jimerson and Dennis Williams, were sentenced to death, while the other two were sentenced to extended prison terms. The primary testimony against the men was provided by their alleged accomplice, Paula Gray, who was then 17.[21] All four men were ultimately released in 1996, after new DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime.

Former death row inmate Joseph Burrows was convicted in Iroquois county for the murder of an elderly farmer based upon the testimony of an alleged accomplice, who admitted her own involvement in some of the events. No physical evidence connected Burrows with the crime, and he presented alibi testimony from several witnesses. The alleged accomplice, Gayle Potter, eventually recanted her testimony implicating Burrows and admitted that she committed the murder. There was physical evidence linking Potter to the crime scene.

Testimony from in-custody informants played a significant role in the Steven Manning case, described above, as well as the DuPage county case involving Rolando Cruz and Alex Hernandez. Hernandez and Cruz were tried separately for the 1983 murder of a child. Evidence from in-custody informants was presented against both men at various times, including the testimony from another death row inmate who claimed that Cruz had made incriminating statements while on death row.[22] DNA testing subsequently excluded both Hernandez and Cruz as the source of the semen at the scene. Another man, who was in custody on unrelated charges in another county, made statements suggesting that he had committed the crime.

There were also several cases where there was a question about the viability or reliability of eyewitness evidence. Former death row inmate Steven Smith was convicted and sentenced to death based upon the questionable testimony of one eyewitness, testimony which the Illinois Supreme Court later found unreliable. Anthony Porter's convictions and death sentence rested primarily upon the testimony of two eyewitnesses, both of whom were acquainted with Mr. Porter. Those witnesses later recanted, and another man subsequently confessed to the crime

for which Mr. Porter was convicted. The man who confessed entered a plea of guilty and is currently serving a prison term for that crime.[23] These cases seemed to reaffirm recent academic findings about the potential fallacies of eyewitness testimony.

At least one of the cases involving a released death row inmate included a confession which was later demonstrated to be false. Ronald Jones made statements to police in which he allegedly confessed to raping the victim. Jones later indicated that the statements were made as a result of coercion by the police. DNA testing which occurred after Jones had been convicted and sentenced to death established that he could not have been the source of the semen recovered from the victim.

Other Death Penalty cases

The broader review of the more than 250 cases in which a death penalty has been imposed[24] revealed some areas for concern. Overall, more than half of all of these cases were reversed at some point in the process.[25] Most of the reversals occurred on direct appeal, with roughly 69% of the reversed cases falling into this category. Of the cases reversed on direct appeal, almost 58% of those were reversed on sentence only, and not on the underlying murder conviction.

Reasons for case reversals varied widely. A significant number of cases were reversed based upon legal issues that had little to do with the conduct of the trial itself. Both the United States Supreme Court and the Illinois Supreme Court have, from time to time, announced new rules of law that resulted in reversal of a number of cases that had been pending on appeal. In a number of cases, the Illinois Supreme Court decided that under the facts of that particular case, the death penalty was excessive. In a similar number of cases, the Court found that the prosecution had failed, for one reason or another, to establish that the defendant was eligible for the death penalty under the statute, and reversed the sentence. There were also a number of cases reversed on issues pertaining to the defendant's fitness for trial, based upon the claim that the defendant had been administered small quantities of medication during his pre-trial incarceration. When other reversals based upon legal issues are included, these factors explain some 17% of reversals.

The remainder of the reversals stemmed from the conduct of either the prosecutor, defense counsel or the trial judge.

Following reversals, many defendants were sentenced to life in prison, or a prison term long enough that it was the functional equivalent of a life sentence. About 38% of those defendants whose cases were reversed were sentenced to life or prison terms exceeding 60 years. Some 25% were resentenced to death, and over 20% of the cases in which there has been a reversal are still pending at some point in the process of resentencing.[26]

Outside of the cases involving the 13 men released from death row, cases in which a death sentence is imposed based upon a single eyewitness, an accomplice or an in-custody informant

without some kind of corroboration are more rare. In many of the cases where a defendant has been sentenced to death, there is some kind of forensic evidence -- such as fingerprint evidence, DNA evidence and so forth-- which links the defendant to the crime.

Included among these cases are a small subset often referred to in media reports as the "Death Row Ten."[27] The most common characteristic shared by these cases is the allegation of excessive force by police officers to extract a confession. In some of these cases, the confession represented the most significant piece of evidence linking the defendant to the crime. Judicial proceedings and review continue in most of the "Death Row Ten" cases. Comment on pending proceedings is not appropriate. It is hoped that the judicial review of these cases will be expeditious and thorough. However, in light of the recommendations contained in this report, these cases should be closely scrutinized by the courts, and, if necessary, the Governor, to insure that a just result is reached.

Victim issues

Commission members believed it important to consider the impact of the criminal justice system on the surviving family members of homicide victims, and to understand their perspective on issues related to the death penalty. It is fair to say that, like the general public, there is a diversity of viewpoints among surviving family members about the death penalty. However, it became clear that there were some unanswered needs that should be addressed by prosecutors, courts and our social service network.

It was the view of many Commission members that more attention should be given to the special needs of family members of a murder victim during the time period immediately following the event, including grief counseling. Information and assistance in such matters as obtaining a death certificate, making insurance claims, obtaining Social Security benefits, tax liability and other fiscal matters relating to eligibility for benefits for a family in such a tragic situation should be provided expeditiously.

In addition to hearing views from a number of surviving family members of homicide victims, the Commission also requested several studies to assess different facets of this issue. These studies were completed at the Commission's request by the Illinois Criminal Justice Information Authority (the Authority)[28] during the fall and winter of 2001-2002. Results from all of these studies are discussed in detail in Chapter 14 of this Report. The initial study[29] summarized national research evaluating the needs of crime victims and assessing the effectiveness of victim assistance programs. It also reported on specific research that the Authority had recently completed with respect to intimate partner homicides in Chicago, and the Authority's evaluation of the Cook County Victim Witness Program. Finally, it commented upon the Authority's process to define a plan for investigating the sufficiency of services delivered to crime victims.

As a follow up to this research, the Authority convened a special series of focus groups of the family members of homicide victims in order to elicit views about their experiences with the criminal justice system. Focus groups were conducted in both Chicago and Springfield, and participants' views were elicited through the assistance of a trained facilitator. The Authority's

report[30] provided helpful insights into the challenges facing surviving family members of homicide victims as the criminal case progresses through the system.

In its third and final report[31], the Authority provided a summation of a panel discussion involving individuals who had been wrongfully convicted, including a number of individuals who had been released from death row in Illinois. The wrongfully convicted are also victims, and while some of the cases involving the wrongfully convicted have generated media attention, less effort has gone into identifying the specific needs that should be addressed to assist their re-entry into society following their release from prison.

Sentencing Study

The results of the sentencing study,[32] discussed more fully in Chapter 14, demonstrates the need for improvements to the capital punishment system in Illinois. The study examined first degree murder convictions where the defendant was sentenced between 1988 and 1997 throughout the state, using data provided by the State of Illinois. The examination of the data included an assessment as to whether the imposition of a death sentence could be explained best by legally relevant factors, such as the fact that a defendant had killed two or more persons,[33] or whether "extra-legal" factors such as the race of the defendant or victim played a role in the death sentencing process. This is the first study of its kind to be completed in Illinois in more than twenty years, and it provides firm evidence of potential problems with the sentencing process.

Costs related to the imposition of the death penalty

Commission members had varying views on the question of whether or not the issue of the costs associated with the death penalty should play a role in determinations about its efficacy. Some Commission members were of the opinion that if the death penalty is viewed as an appropriate societal response to certain types of murder, then the costs associated with its implementation were not relevant to the discussion. Other Commission members expressed the view that while costs might be unrelated to the moral question of whether or not the death penalty was an appropriate remedy, it was an important consideration with respect to the allocation of scare resources in the criminal justice system. Some Commission members also observed that, in some respects, the financial resources associated with implementation of the death penalty might be more appropriately spent on addressing the needs of the surviving family members of homicide victims.

While undertaking a detailed study with respect to the costs associated with the death penalty in Illinois was beyond the capacity of the Commission, and in light of the inherent problems associated with studying the cost issue, initiating research is this area seemed unwise. The Commission did identify several studies from other jurisdictions which attempted to articulate the cost differential between capital and non-capital murder prosecutions. A discussion of those studies is presented in Chapter 14 of this Report.

ORGANIZATION OF THIS REPORT

The Commission's report covers a wide variety of subjects, and almost every aspect of the death penalty system. For the convenience of those familiar with the progress of a case through the criminal justice system, the recommendations have been organized more or less in the general order that issues would arise in a case.

Each chapter begins with a short overview of the chapter's contents, which identifies the general subject area of particular recommendations. Specific recommendations are presented in bold type, and all recommendations are numbered. Immediately following the recommendation is a comment which explains the Commission's view on the reasons for the recommendation. Most of the Commission's recommendations were unanimous. Others were approved by a majority of Commission members. Where recommendations were approved by a majority, in some instances members in the minority position believed that a clear expression of the minority viewpoint was helpful to a complete understanding of the issue in question. As a result, some of the recommendations in this Report contain a "Minority View" which is generally to be found immediately following the comment of the majority on the recommendation.

Frequently cited materials

There are a number of reports that are cited frequently throughout this Report. For the ease of the reader, a short description of those reports is provided below, along with the standardized citation that is used in this Report. Other materials are cited either in the body of the Report itself, or in the Notes which follow at the end of each chapter.

Supreme Court Reports

The Illinois Supreme Court Special Committee on Capital Cases has issued two, lengthy reports. The first report was issued in October 1999, and contained a variety of information about new proposals for rules to be adopted by the Court which would address problems associated with the capital punishment system in Illinois. The sixty page report also contained draft rules, materials submitted by various individuals and bar association groups, and an appendix containing 32 separate entries. The Committee then convened public hearings on its draft recommendations, and after consideration of the public comments received both at the hearings and in writing following the hearings, some aspects of the report were modified.

The Supreme Court Committee's final report was issued in October of 2000. The 105 page supplemental report was accompanied by draft rules and commentary forwarded to the Supreme Court for its consideration. Both reports were provided to Commission members, and many of the observations and findings in the two reports have been addressed in this Report.

The *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases, October 1999* will be referred to throughout this Report as "the Sup. Crt. Committee Report, October 1999." The *Special Supreme Court Committee on Capital Cases*

Supplemental Findings and Recommendations, October 2000 will be referred to throughout this Report as "the Sup. Crt. Committee Supplemental Report, October 2000."

Senate Minority Leader's Report

Illinois Senate Minority Leader Emil Jones appointed a task force to examine aspects of the criminal justice system in Illinois as it relates to capital punishment. The task force issued its report during 2000, containing a number of recommendations which were subsequently introduced into the Illinois legislature but failed to pass. The Commission carefully reviewed many of the recommendations contained in the report, and reference is made in a number of places in this Report to its provisions. The *Report of the Illinois Senate Minority Leader's Task Force on the Criminal Justice System* will be cited throughout this Report as: "The Senate Task Force Report, 2000."

The Canadian Inquiries.

Commission members also had available to them information about two Canadian inquiries involving cases of wrongful convictions for homicide. These materials are also cited with regularity in this Report.

The first inquiry involved an investigation into the wrongful conviction of Guy Paul Morin, who had been tried and convicted of the 1984 first degree murder of his neighbor, 9 year old Christine Jessop. He was acquitted on appeal in 1995 on the basis of new evidence tendered jointly by the prosecution and defense. The Commission to investigate the proceedings against Mr. Morin was established in 1996 by the provincial government in Ontario, and the Commission's final report was issued in 1998.

Mr. Morin was 25 at the time of the murder of Christine Jessop. His conviction was based, in part, on hair and fiber evidence which was of questionable reliability. Other evidence provided to support his conviction included statements purportedly made by Mr. Morin to an in-custody informant to whom Mr. Morin allegedly confessed to the murder. He was subsequently acquitted based upon DNA evidence which established that he was not the source of the semen found at the scene.[34] The subsequent inquiry examined almost every aspect of the criminal justice system in Ontario, and made more than 100 recommendations for changes with respect to police investigation, forensic work and prosecution procedures. A complete copy of the two volume report on the Morin inquiry is available from the website of the Attorney General in Ontario, found at : *http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm.*

The second Canadian inquiry involved an investigation into the wrongful conviction of Thomas Sophonow in Manitoba. Mr. Sophonow was accused of strangling 16 year-old Barbara Stoppel in a donut shop in Winnipeg on the 23rd of December, 1981. The first criminal trial resulted in a mistrial, and Mr. Sophonow was retried and convicted. His conviction was overturned, and he was tried a third time and convicted. The Manitoba Court of Appeals acquitted him of all charges in 1985. Mr. Sophonow maintained his innocence throughout the proceedings. In 1998, some 13 years after he was acquitted, the Winnipeg police

reinvestigated the murder. In June of 2000, an announcement was made that Mr. Sophonow was not responsible for the murder, and that another suspect had been identified. The Attorney General of Manitoba apologized to Mr. Sophonow on the same day for his wrongful conviction. A commission of inquiry was appointed to determine whether there were errors made in the investigation and court proceedings, and to determine compensation.

The Sohponow Inquiry examined questionable eyewitness evidence, including police lineups and photo arrays, which led to the convictions. The Special Commissioner also noted the pervasive influence of tunnel vision, which led the police to ignore other suspects in favor of pursuing the conviction of Thomas Sophonow. Mr. Sophonow's case also involved evidence from in-custody informants. Information regarding the inquiry can be obtained from the website of the Province of Manitoba Department of Justice, found at: *http://www.gov.mb.ca/justice/sophonow/.*

These two inquiries are referred to throughout this Report as the "Morin Inquiry" and the "Sophonow Inquiry".

Appendices to this Report.
This report contains a short Appendix, which is bound with the Report, and a longer Technical Appendix, which has been bound separately from this Report. The separately bound Technical Appendix contains complete copies of the research reports initiated at the request of the Commission, data tables displaying information collected on the cases in which individuals have been sentenced to death row in Illinois, and supplementary materials, from Illinois and elsewhere, such as jury instructions.

Notes - Chapter 1

1. States undertaking an examination of their own death penalty systems included Arizona, Indiana, Nebraska and North Carolina. Texas and Maryland considered, but did not pass, a moratorium. *See, e.g.* "Death penalty debate slowly shifts," Chicago Tribune, January 31, 2001.

2. The transcripts from the public hearings are presented in full on the Commission's website, www.idoc.state.il.us/ccp.

3. This report provided an analysis of salary disparities in the criminal justice system, which have the practical effect of discouraging many attorneys from pursuing careers in this area.

4. The names of the thirteen men released from Illinois death row are: Joseph Burrows, Perry Cobb, Rolando Cruz, Gary Gauger, Alejandro Hernandez, Verneal Jimerson, Ronald Jones, Carl Lawson, Steven Manning, Anthony Porter, Steven Smith, Darby Tillis, and Dennis Williams. Citations to the Illinois Supreme Court opinions involving these former inmates may be found in the Technical Appendix.

5. The complete text of P.A. 78-921 is set forth in the Supreme Court decision which subsequently invalidated the scheme.

6. Murder of a police officer or firefighter, murder of employee or person present in a Department of Corrections facility, multiple murders, murder in the course of hijacking, contract murder, murder in the course of a felony.

7. P.A. 78-921 added a new par. 1005-8-1A to chapter 38, which provided, in part: "If the 3 judge court sentences the defendant to death and an appeal is taken by the defendant, the appellate court shall consider the appeal in two separate stages. In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there were errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court finds there were no errors justifying modification or reversal of the findings of the trial court, the appellate court shall conduct an evidentiary hearing to determine whether the sentence of death by the 3 judge court was the result of discrimination. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment."

8. 720 ILCS 5/9-1(d).

9. A copy of the complete statutory provision governing the death sentencing process as it currently exists is contained in the Appendix.

10. *See* P.A. 82-677.

11. *See* P.A. 82-1025. The original eligibility factor was limited to a murder to prevent the testimony of a witness against that defendant; the subsequent amendment broadened the eligibility factor to include the murder to prevent the testimony of witness in *any* criminal prosecution or investigation, whether against that defendant or *another*.

12. A table containing the amendments to the eligibility factors contained in the death penalty statute, showing the public act number and effective date, is contained in the Appendix.

13. On August 17, 2001, Governor Ryan vetoed House Bill 1812, which sought to add a new provision to the State's death penalty sentencing statute making a defendant eligible for the death penalty where the murder was committed in furtherance of the activities of an organized gang. The Governor noted in his veto message that the almost annual effort to add eligibility factors to the statute introduced more arbitrariness and discretion, raising potential constitutional concerns. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.

14. On February 8, 2002, Governor Ryan returned House Bill 2299 to the legislature with significant amendments to its anti-terrorism provisions and deletion of the new death eligibility factor. The bill is currently pending in the legislature. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.

15. The Illinois Supreme Court Rules, with Commentary, can be found on the Supreme Court's website, www.state.il.us/court/SupremeCourt.

16. The number of inmates on death row varies as cases are reversed or are resentenced, or as inmates die from other causes.

17. In some cases, although a death sentence has been imposed by the trial court, no opinion on direct review has yet been issued by the Supreme Court. Trial courts continue to impose death sentences in Illinois, although the Governor's moratorium prevents any executions from occurring.

18. This Report contains citations to various authorities from other states. Some of the materials from other states are included in the Technical Appendix to this Report.

19. A complete copy of the report by Drs. Pierce and Radelet is contained in the Technical Appendix to this report, published separately.

20. The cases of former death row inmates Perry Cobb and Darby Tillis also illustrate the problem of relying upon a witness with something to gain. Their convictions were based upon the testimony of Phyllis Santini, who claimed that Cobb and Tillis had committed the robbery and murder of two men on the north side of Chicago. Her testimony was later impeached in a subsequent trial by a Lake County prosecutor, who testified that he knew Santini and that she had made statements to him that Santini and her boyfriend had committed a robbery. There was one other witness who claimed in one of the trials to have seen men who looked like Cobb and Tillis in the vicinity of the robbery, but this witness had failed to positively identify the men in earlier trials.

21. Ms. Gray recanted her story at one point in the proceedings, and then recanted her recantation. Questions were also raised about Gray's mental capacities. She was, herself, tried in the original proceedings and sentenced to 50 years for her alleged role in the crimes. Her conviction was affirmed (87 Ill. App. 3d 142, 1980). Ms. Gray's conviction was subsequently reversed by the Seventh Circuit Court of Appeals (721 F. 2d 586, 1983) on the ground that she received ineffective assistance of counsel. Her co-defendant, Dennis Williams, had been granted a new trial by the Illinois Supreme Court, based upon ineffective assistance of counsel, and Ms. Gray and Mr. Williams were represented by the same lawyer.

22. In 1987, death row inmate Robert Turner testified in the retrial of Rolando Cruz, claiming that Cruz had described the crime to Turner. Turner claimed that he expected nothing in return for his testimony, a claim which was undercut by the fact that the prosecutor in the Cruz case subsequently testified at Robert Turner's own capital resentencing.

23. Alstory Simon plead guilty to the murder for which Porter was to have been executed, and is currently serving a sentence of 37 years in prison.

24. From re-enactment of the death penalty in 1977 through December 31, 2001, there have been more than 250 cases in which a death penalty has been imposed in Illinois *and* in which the Illinois Supreme Court has issued an opinion. A number of those cases have been reversed, and a sentence other than death imposed.

25. Summary tables for this information are contained in the Appendix bound with this report, while data tables displaying the results in individual cases are in the Technical Appendix. The Summary tables are based upon the data tables found in the Technical Appendix, which is published separately.

26. In some cases, the defendant has died while the case was pending.

27. The "Death Row Ten" are death penalty cases in which allegations were made that excessive force was used by police to extract confessions from defendants. The following defendants are included in this group: Madison Hobley, Stanley Howard, Grayland Johnson, Leonard Kidd, Ronald Kitchen, Jerry Mahaffey, Reginald Mahaffey, Andrew Maxwell, Leroy Orange, and Aaron Patterson. Citations for Illinois Supreme Court opinions involving these defendants are contained in the Technical Appendix.

28. Copies of these research reports are contained in the Technical Appendix to this Report.

29. *Report on Victim and Survivor Issues in Homicide Cases*, Illinois Criminal Justice Information Authority, December 6, 2001.

30. *Victim and Survivor Issues in Homicide Cases: Focus Group Report*, Illinois Criminal Justice Information Authority, February 19, 2002.

31. *The Needs of the Wrongfully Convicted: A Report on a Panel Discussion*, Illinois Criminal Justice Information Authority, March 15, 2002.

32. *Race, Region and Death Sentencing in Illinois, 1988-1997*, Dr. Glenn Pierce and Dr. Michael Radelet, March 20, 2002. A complete copy of this research report is included in the Technical Appendix to this Report.

33. Under Illinois law, the intentional murder of two or more persons in either the same or separate incidents makes the defendant eligible for the death penalty.

34. A summary of the salient proceedings is contained in the Morin Report Executive Summary.

Chapter 2 – Police and Pretrial Investigations

This Chapter recommends improvements to police practices and pretrial investigative efforts that would strengthen the confidence in the ultimate outcome of a capital case. Police agencies and prosecutors are the first to respond to homicides, and the recommendations in this section are intended to bolster early efforts to identify the right suspect and to insure that evidence is carefully preserved. Recommendations in this Chapter include improvements to the methods used to document evidence collected by law enforcement agencies, specific suggestions for documenting custodial interrogations by police, and changes to the methods used to conduct lineups in which suspects are identified by witnesses. The Commission has also recommended insuring that indigent defendants can obtain representation by public defenders during the custodial interrogation process, which should ameliorate some concerns about undue influence during those interrogations. Improving law enforcement training, especially in the area of notification of consular access rights, has also been suggested.

INTRODUCTION

Police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system. In the majority of cases, those efforts result in the apprehension of the person who committed the crime, and, ultimately, his or her conviction. There are a disturbing number of cases, however, where the system goes awry. Whether that is the result of inattention to detail, underfunded and overworked law enforcement personnel or intentional misconduct, the result is that innocent men and women are put at risk of conviction and guilty parties may go free. Neither the interests of the criminal justice system, nor of society at large, are served if the innocent are convicted of crimes which they did not commit, and disastrous consequences result if innocent parties are convicted of crimes which can result in the imposition of capital punishment. Most importantly, the person who actually committed the crime remains at large, free to commit other crimes.

This chapter contains recommendations in four major areas: general police practices, custodial interrogations, eyewitness identification procedures, and training suggestions. The section on custodial interrogations includes the recommendation that custodial interrogations in homicide cases be videotaped in their entirety.

While many of the recommendations in this chapter were unanimous, there were others where divergent views were expressed. Recommendations with respect to videotaping the interrogation process, and with respect to the eyewitness identification procedure, engendered spirited discussion. They also resulted in the expression of minority views, which are contained at the end of the section discussing the recommendation to which they pertain.

SPECIFIC RECOMMENDATIONS

Recommendation 1 :
After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.

The Commission has unanimously recommended that law enforcement agencies take steps to avoid "tunnel vision," where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty. Evidence of such "tunnel vision," or "confirmatory bias," is found in a number of the cases involving the thirteen men who were ultimately released from death row in Illinois.

Pressure always exists for a police department to solve a crime, particularly where that crime is a homicide. Law enforcement agencies very often undertake heroic efforts to bring the guilty to justice, and their efforts in this regard should be applauded and supported. In any investigation, the danger exists that rather than keeping an open and objective mind during the investigatory phase, one may leap to a conclusion that the person who is a suspect is in fact the guilty party. Once that conclusion is made, investigative efforts often center on marshaling facts and assembling evidence which will convict that suspect, rather than continuing with the objective investigation of other possible suspects. There is a fine line to be drawn in such circumstances, but where a homicide is concerned and the suspect may be exposed to the penalty of death, it is extraordinarily important that law enforcement agencies avoid "tunnel vision."

The suggestions contained in this recommendation flow from an article by Professor Stanley Z. Fisher[1], who describes various provisions relating to the collection and disclosure of exculpatory evidence contained in the Criminal Procedure and Investigations Act of 1996[2] (hereinafter "CPIA") adopted in England. Section 23 (1) (a) of the Act provides that a code of practice should be developed to require that ". . . where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued."

This statement represents what is, or should be, good police practice. Articulating this duty in concrete form should serve as a reminder to police agencies that their role is to thoroughly investigate crime, rather than merely build a case against a specific individual who may appear to be a likely suspect. The British Act provides no sanctions for failure by the police to comply with this duty. Police personnel interviewed by Professor Fisher in England suggested that the existence of the statute produced at least some additional effort to investigate reasonable leads in order to avoid a potentially embarrassing cross-examination at trial.[3] More importantly, the codification of this responsibility provided an opportunity for the training and education of officers.

The problem of confirmatory bias is not a problem associated with any one group of police officers or any one department. It is a potential problem in all investigatory agencies. In addition to the specific provisions of the British Act mentioned above, several public inquiries in Canada into cases of wrongful convictions have pointed to this potential problem as well.

The Morin Inquiry in Ontario recommended training for both police and Crown Counsel on how to avoid tunnel vision. Morin Recommendation 74.[4] The Morin Inquiry also recommended that police forces in the province endeavor to foster a culture of policing which values honest and fair investigation of crime, and the protection of the rights of all suspects and the accused. Morin Recommendation 89.[5] The Special Commissioner in the inquiry goes on to suggest that management must make an effort to foster such a culture, in part by not tolerating acts of misconduct. Departments in which a high value is placed upon the pursuit of justice, as opposed to merely clearing cases by arrest, are more likely to be able to admit to instances where errors inevitably occur.

The recent Manitoba inquiry involving Thomas Sophonow specifically identified "tunnel vision" as a serious problem. In the view of that Special Commissioner, "tunnel vision" caused the Winnipeg police to ignore a potential suspect who fit the composite sketch of the murderer much more closely than did Mr. Sophonow.[6] The investigation in that case led the Special Commissioner to observe in his recommendations:

> Tunnel Vision is insidious. It can affect an officer, or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.[7]

That inquiry recommended mandatory, annual training in this area for police officers, as well as training in this area for lawyers and judges.

A concrete statement of this type is important, since, as Professor Fisher notes, prosecutors and trial judges have a limited ability to influence police investigatory practices. One tool that is available to a trial judge to control police behavior is a hearing on a motion to suppress evidence due to some impropriety in the way that evidence was collected. Neither the trial judge, nor, in large measure, the prosecutor, can order the police to manage an investigation in a particular way. As a result, some broader state-wide policy statement with respect to the responsibility of the police to fully investigate all reasonable leads is needed. In this specific instance, development of a standard of this type to guide police agencies represents a better way to achieve a desirable goal than the use of a penalty, such as the suppression of evidence.

Recommendation 2 :

(a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location.

(b) Record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.

(c) The police must give copies of the schedules to the prosecution.

(d) The police must give the prosecutor access to all investigatory materials in their possession.

These recommendations also stem from the Fisher article, and were adopted by the Commission unanimously. They codify the responsibility of the police agency to document all relevant evidence, including exculpatory evidence, and the location of the evidence. The purpose of the documentation is to enable the prosecution to make a reliable judgment about disclosure. As noted in the preceding section, trial judges and prosecutors have a limited ability to control the actions of police agencies. In a number of the cases reviewed, evidence was not fully disclosed to prosecutors. In other cases, evidence was discovered long after a prosecution was complete. As a result, some broader policy statement, which impacts upon all law enforcement agencies, is appropriate and necessary in this area.

These provisions were also developed as a part of the British Criminal Procedure and Investigations Act of 1996. The draft guidelines[8] developed by the Attorney General in Great Britain to implement the disclosure provisions of the CPIA encourage close cooperation between police agencies and the prosecution to insure that the prosecution is fully informed about the evidence in the case. The British guidelines suggest that officers responsible for disclosure under the CPIA specifically draw to the attention of prosecutors material which might undermine the prosecution case or assist the defense. Officers are further encouraged by the guidelines to seek the advice and assistance of prosecutors when in doubt as to their responsibilities. Prosecutors are reminded to be alert for the possibility that material may exist which has not been disclosed to them.[9]

The Illinois Supreme Court has sought to address concerns about full disclosure of evidence through the adoption of new provisions which apply to capital cases. New Supreme Court Rule 416 (g), which requires the prosecution to file a certification with the court not less than 14 days prior to trial that all material information has been disclosed to the defense, places the responsibility on the prosecution to insure that disclosure to the defense has occurred. The prosecution is required to confer with law enforcement agencies to insure disclosure has been complete. The recommendations made by the Commission in this section are intended to place clearly defined responsibilities on police agencies to document, record and retain all relevant evidence, including exculpatory evidence, in order to improve communication between police agencies and the prosecutor.

INTERROGATIONS; VIDEOTAPING THE INTERROGATION PROCESS

Recommendation 3 :
In a death eligible case, representation by the public defender during a custodial interrogation should be authorized by the Illinois legislature when a suspect requests the advice of counsel, and where there is a reasonable belief that the suspect is indigent. To the extent that there is some doubt about the indigency of the suspect, police should resolve the doubt in favor of allowing the suspect to have access to the public defender.

This recommendation was supported by a majority of Commission members. The purpose of the rule is to facilitate access to counsel early in the interrogation process. The general rule, under *Miranda*[10] and its progeny, is that a defendant has the right to be represented by counsel during police interrogation, and the defendant must be further informed that if he or she cannot afford counsel, one will be appointed for him/her. If the defendant requests counsel, questioning should cease.

In Cook County, in a substantial majority of the cases in which a defendant is charged with first degree murder and where the charge is death eligible, defense will likely be provided by the Public Defender, due to the indigency of the defendant. Both the U.S. Supreme Court and the Illinois Supreme Court have recognized the importance of access to counsel during this phase of a case.

In light of this, a majority of Commission members believed that the public defender should be notified when a defendant has requested counsel and there is a reasonable belief that the defendant is indigent. Enabling early intervention by defense counsel during the custodial interrogation process is consistent with the spirit of *Miranda*. The Illinois Supreme Court has recently clarified in its decision in *People v. Chapman* (194 Ill. 2d 186, 210-214; 2000) that defense counsel must be physically present in order to have access to the defendant (requesting access by telephone is insufficient). This recommendation would necessitate a change in the Illinois statutes governing the appointment of the public defender. State statutes currently provide that a public defender will be appointed by the court upon a finding of indigency at the first opportunity that the defendant has to appear before a judge.[11] The statutes should be revised to authorize the public defender to appear *prior to appointment by a judge* in death eligible cases.[12]

There are logistical problems associated with this recommendation. Clearly, there will be cases in which the police may not know for certain that a first degree murder is death eligible, nor whether the suspect is indigent. However, in such situations, the police should be encouraged to exercise their judgment in favor of allowing access to the public defender. The precise method by which public defenders in more populous counties could be placed on call for such activities should be developed by the agencies involved.

The Commission considered the impact of this requirement in suburban areas and in more rural parts of the state. In counties in which a full-time public defender office exists, some provision should be possible to enable such representation in capital cases. The volume of cases is considerably lower in other counties in the state than in Cook County, and the likelihood of

extensive representation at suburban police stations correspondingly reduced. The most significant problem would likely be educating police agencies throughout the state of their responsibilities in this area.

At present, a defendant in custody at a police station who requests the public defender is most often advised that he or she will have to wait for a court appearance to secure the appointment of the public defender. Given the inherent coerciveness in stationhouse interrogations, which *Miranda* recognizes, early access to a competent lawyer may be critical to a defendant's ability to protect his or her rights. Authorizing public defenders to appear in response to a request from a defendant for a lawyer during questioning would protect the rights of the defendant and reduce the prospect of false confessions, while imposing relatively little additional financial burdens on the system. In many of these cases, the suspect is likely to actually be indigent, and will therefore be entitled to the appointment of a public defender in any case. In those situations where the person later proves not to be indigent, the representation by the public defender can be terminated at the very first court appearance by a finding by the trial judge that the defendant is not indigent.

Recommendation 4 :
Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

A majority of Commission members supported the recommendation that custodial interrogations in a police facility should be videotaped in their entirety. Some Commission members who did not support this recommendation believed that while videotaping interrogations might be valuable, it should not be mandatory. The viewpoints of the Commission members in the minority on this issue are included at the end of this section.

There has been a great deal of debate in Illinois on the question of whether or not to videotape the entire interrogation process. The current practice in Cook County has been to videotape any final statements made by a suspect, but not the interrogation process. Media reports detailing the case of Corethian Bell, who gave a videotaped confession to the murder of his mother but was recently released when DNA tests linked someone else to the crime,[13] demonstrate the limitations inherent in such a practice. Videotaping of the complete interrogation process is already the practice in some jurisdictions in Illinois, such as Kankakee, where it has been done since 1996.[14] Tribune articles describing the Corethian Bell case suggest that Cook County State's Attorney Dick Devine would support a pilot program to videotape the interrogation process.

Commission members supported this recommendation in light of other cases in which it has been claimed that suspects confessed to a crime, and it was later established that the suspect was innocent. A notable example from the cases involving the thirteen men released from death row in Illinois is that of Gary Gauger, where others were subsequently convicted for the crime to which Mr. Gauger allegedly confessed.[15] Academic literature is also replete with descriptions of

confessions that were obtained under circumstances that provide significant doubt as to accuracy.[16]

There are reasons why people will confess to crimes they did not commit, and the academic literature on the subject details instances where suspects have confessed as a result of psychological coercion and trickery.[17] There are also examples from Illinois, such as the case involving Mr. Bell, who apparently confessed on videotape to having stabbed his mother, and the four men recently released from prison in connection with the 1986 murder of Laurie Roscetti.[18] Instances of physical coercion in certain police stations under the direction of Lt. Ron Burge have also been well documented.[19]

There are many reasons why videotaping the entire interrogation process can be beneficial. In an article discussing safeguards to protect against questionable confessions,[20] Professor Welsh S. White has noted:

> Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement. 32 Harv.C.R.-C.L.L.Rev.105 at 153-154

Indeed, there are a number of potential benefits to law enforcement to be derived from videotaping the entire interrogation process. A significant benefit which will be derived from the process is that it provides the very best evidence of what went on in the interrogation room – which will enable law enforcement agencies to establish that interrogation tactics did not include physical coercion or undue influence. Instead, as Professor Leo has noted[21], police departments will be able to demonstrate to prosecutors, judges and juries ". . . both the fairness of police methods and the legality of any statements they obtain." The Supreme Court Committee on Capital Cases[22] noted that bills requiring the electronic recording of police interrogations were considered by the Illinois legislature during 1999, and the subject is again under consideration in the 2002 legislative session. Electronic recording is already required in Alaska and Minnesota by court decision. The Committee observed:

> While the committee believes adoption of a recording requirement is best dealt with by the voluntary action of individual executives agencies or by legislative enactment, the committee found that routine electronic recording of all custodial interrogations and confessions would be a major improvement in criminal procedure and should be encouraged by the courts.

Materials accompanying the Committee's Report[23] included a news report from August 1999 indicating that Illinois Attorney General Jim Ryan had written to the Illinois House of Representatives committee studying this issue, expressing his support for permissive videotaping of suspects' interrogations and confessions.[24] Also included is a June 1999 news article[25] reporting that the DuPage County Sheriff's Department adopted a policy that, when feasible, investigators should video and audio tape in-house interrogations and confessions in serious violent crimes, including any case that may result in a death penalty. The article quotes the Sheriff as follows:

> "'Taping interviews is the only way to wipe away any doubt about what happens in that interview room,' Sheriff John E. Zaruba said in a release Wednesday. 'It protects my investigators, the suspects and the integrity of the evidence.'"

The Supreme Court Committee's Supplemental Report[26] subsequently observed:

> In its 1999 Report, the committee expressed its support for legislative action to require electronic recording of interrogations. The committee found that routine recording of all custodial interrogations and confessions would be a major improvement in criminal procedure. Legislation that would have required recording of custodial interrogation was introduced during the last session of the General Assembly, but failed to pass. The committee believes the General Assembly should be encouraged to revisit the issue.

Only a few other states have mandated this practice by judicial interpretation. The Supreme Court of Alaska has by decision required that interrogation of suspects be electronically recorded, and has placed restrictions on the use of unrecorded statements. In *Stephan v. Alaska*, 711 P. 2d 1156, 1162 (1985), the Alaska Supreme Court ruled that the Alaska Constitution Due Process Clause requires that all custodial interrogations in a place of detention must be electronically recorded, from beginning to end. The Court explained (711 P. 2d at 1161):

> The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

The Supreme Court of Minnesota, exercising its supervisory authority to ensure the fair administration of justice under the State Constitution, held that "all custodial interrogation including any information about rights, waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." *State v. Scales*, 518 N. W. 2d 587, 592 (1994).

In Texas, legislation has been enacted which renders oral statements by accused who is in custody (with certain exceptions) inadmissible against them in criminal proceedings unless the statements are electronically recorded. Texas Code of Criminal Procedure, Art. 38.22 (1999).

Professors Richard J. Ofshe and Richard A. Leo[27] discuss at length how and why persons confess to crimes they did not commit. The article contains over 100 pages of examples and explanation of false confessions. The authors conclude (pp. 1122):

> The protection of the innocent is paramount in a criminal justice system whose ideology and rules are predicated on the belief that there can be no worse harm than wrongful conviction and incarceration. Researchers have repeatedly documented the existence of numerous and inexcusable miscarriages of justice arising from police-induced false confession. We need not tolerate these injustices. If courts institutionalized a reasonable standard of confession reliability and required police to record the entirety of all felony interrogations, the suppression hearing would offer significant protection against the admission of false confessions into evidence and the number of miscarriages of justice attributable to false confession would be significantly reduced.

A majority of Commission members thus believed that videotaping of the entire interrogation process is crucial to the fair administration of justice.

There are a variety of objections which have been interposed to videotaping the interrogation process. It has been suggested that videotaping is not feasible, for example, because of space, personnel and funding limitations. The Commission has separately recommended that in conjunction with requiring videotaping of interrogations, the State should provide funding to address these concerns.[28] It is also worthwhile noting that many police officials initially questioned the practice of recording suspects final statements, but have now found it workable.[29]

Commission members were sensitive to these concerns, as well as concerns expressed by various police officials that videotaping the entire interrogation process might inhibit the police from vigorously pursuing interrogations, or reveal techniques. A 1993 study by the National Institute of Justice of police departments which employed videotaping in the interrogation process[30] revealed that once officers adjusted to the idea of being videotaped, they found the process useful. Allegations of misconduct against police officers dropped, and officers were able to adjust their interrogation process to accommodate the presence of the video. Few major problems were encountered. The study showed that videotaping confessions assisted prosecutors and defense lawyers in evaluating cases, helped in negotiations for pleas of guilty, and resulted in more guilty pleas.

The Commission has not suggested that confessions obtained during an untaped interrogation be automatically excluded. While the Commission believes that videotaping of the entire process should be required, the failure to videotape the interrogation session should not be the sole test of admissibility.

Minority view – Videotaping

The Commission members in the minority on this issue expressed the view that mandatory videotaping of suspects puts an unacceptable burden on law enforcement and would significantly lower the successful clearance rate in investigations of serious crimes. Often, in the early stages of an investigation, the police do not have a clear idea of what happened, let alone who the suspects are. To require that all questioning of suspects be videotaped would significantly slow the course of many investigations and create an unacceptable risk for public safety.

To require mandatory videotaping of suspects would also impose an unfunded mandate on law enforcement. Significant additional costs would be imposed on state, county, and municipal law enforcement agencies. In addition to the extra cost for equipment and remodeling interrogation rooms to be made suitable for videotaping, local law enforcement agencies would incur additional personnel costs. There are about 1,100 police departments in Illinois, about half of which have 10 or fewer members. There are 138 suburban police departments in Cook County. Requiring all of these departments to videotape interrogations would be extremely burdensome.

On the other hand, Commission members in the minority believed the use of videotaping should be strongly encouraged. In fact, law enforcement in Illinois has made increased use of videotaping in recent years. The Commission has recommended that the Illinois Eavesdropping Act should be amended to allow for audio-taping and videotaping of police station questioning of suspects and witnesses, without requiring permission of the witness or suspect. (*See* Recommendation 7 of this Report). This amendment would be necessary before any viable mandatory videotaping program could be implemented. In addition, the State of Illinois should provide funding so that all police agencies would have the capability to videotape questioning efficiently and economically. Should those steps be taken, the videotaping of police questioning would increase dramatically, but at the same time public safety would not be compromised.

Recommendation 5 :

Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

This recommendation was favored by a majority of Commission members. Circumstances will arise where videotaping a suspect's statement is simply not practical. A suspect may make statements on the way to the police station, or the police and the suspect may be in a location distant from the station so that videotaping is not realistic. In such instances, a majority of the Commission has recommended that any such statements that are made should be repeated to the suspect on tape. If the suspect acknowledges having made the statements, the police will have established strong evidence of guilt and that evidence will be of a more reliable type than the officers' statements about what the suspect may or may not have said. If the suspect denies the statements, there will at least be a contemporaneous record showing that the officers claimed to have heard such a statement and at what point in the process that statement was heard. In both instances, law enforcement agencies will have provided the trial court with evidence that is helpful to an ultimate determination as to the reliability of any purported statements by the defendant.[31]

Recommendation 6 :
There are circumstances in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audiotaped.

This recommendation is a corollary of the earlier recommendation on videotaping, and a majority of Commission members supported the proposal. The Morin Inquiry similarly recommended that interviews of suspects in a station be either videotaped or audiotaped. The Special Commissioner also recommended that consideration be given to adopting the practice of carrying tape recorders to permit the recording of statements that may occur at some location outside the police station.[32]

In circumstances where police may be in hot pursuit of a suspect or where a suspect is detained at a significant distance from the police station, particularly in rural counties, and the suspect makes a statement or is questioned by police, videotaping the interrogation is not practical. However, there should be some procedure established which requires a uniform approach to recording such interrogations by means that are reliable. A simple tape recording of the interrogation could be a useful means of insuring that an accurate record is made of the statements made by the suspect.

Recommendation 7 :
The Illinois Eavesdropping Act (720 ILCS 5/14) should be amended to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audiotaping of statements as recommended by the Commission. The amendment should apply only to homicide cases, where the suspect is aware that the person asking the questions is a police officer.

The recommendations made above clearly require an amendment to the Eavesdropping Act in order to be effectively implemented. A majority of Commission members support this proposal to modify the eavesdropping statute to permit video and audio taping of interrogations. The Act provides as follows:

> Sec. 14-2. Elements of the offense; affirmative defense. (a) A person commits eavesdropping when he: (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended;

An eavesdropping device is defined as "any device capable of being used to hear or record oral conversation . . . whether such conversation . . . is conducted in person, by telephone, or by any other means." 720 ILCS 5/14-1(a). A conversation means "any communication between 2 or

more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." 720 ILCS 5/14-1(d).

Open and visible recording (audio or video) of a suspect, without the suspect's explicit consent, would probably be held to violate the Eavesdropping Act. See, for example, *In re Marriage of Almquist*, 299 Ill App. 3d 732,736 (3d Dist. 1998). Accordingly, the Commission has recommended the amendment of the Eavesdropping Act to permit police recording of suspects' statements without knowledge or consent. The recommendation for the amendment has limited its application only to homicide cases, and to circumstances where the suspect knows that the person asking the questions is a police officer.

Recommendation 8 :
The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.

This recommendation was supported by a majority of Commission members. It is based upon Recommendation No. 98 of the Morin Inquiry. The Recommendation from that inquiry provides, in pertinent part:

> The Durham Regional Police Service should implement a similar policy for interviews conducted of significant witnesses in serious cases where it is reasonably foreseeable that their testimony may be challenged at trial . . .

This practice is already in use in some departments in Illinois. Law enforcement agencies in Kankakee videotape the statements of witnesses who are thought likely to recant. This recommendation goes further.

Experience in Illinois teaches that the statements of certain witnesses ought to be recorded by police, so that, if the witness' account "evolves", the judge and jury can observe the original version. There are a number of examples in the cases involving the thirteen men released from death row of witnesses whose testimony was questionable. Resolution of questions related to their testimony might have been aided by the existence of a videotape of the initial interrogation.

This recommendation is purposefully stated in general terms. Its implementation will require further study and consultation with prosecutors and police officials.

Recommendation 9 :
Police should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty.

A majority of Commission members supported this recommendation, which would impose upon police a duty to make some reasonable attempt to determine whether a suspect has limited mental capacity before commencing their interrogation. Where the suspect appears vulnerable due to age or mental capacity, the court should carefully consider the length or duration of the interrogation, as well as whether it involved non-leading questions, in order to assess whether or not the resulting statement was voluntary.

As earlier sections of this Report detailed, those who are innocent may ultimately confess to crimes they did not commit when interrogations become coercive. However, those with limited mental capacities may confess to crimes they did not commit[33] even when the interrogation process is not coercive. As Professor White notes with respect to mentally retarded suspects:

> It is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions. It is not only that a retarded suspect may be abnormally "susceptible to coercion and pressure." Even when no pressure is exerted, a retarded suspect "may be inclined to give a false confession out of a desire to please someone perceived to be an authority figure." Mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely. 32 Harv. C.R. - C.L. Rev. 105, 123

Police need to take special care with interrogations of such persons because they may be inclined to agree with the police version of events in an effort to seek approval, or may be easily led. While the Commission does not believe that police officers will be able to make precise determinations in all instances of a suspect's mental capacity, there are going to be obvious cases where the person's mental capacity is so limited that the police should clearly be aware of the potential problems with an interrogation. The Commission has recommended a "reasonable attempt" on the part of police officers, and does not anticipate that a failure to comply with such a recommendation would result in automatic exclusion of the evidence.

LINEUPS AND PHOTOSPREADS

The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law. Concerns about eyewitness testimony have led to new recommendations relating the methods by which witnesses identify suspects through lineups and photospreads.

Generally speaking, the usual practice (at least in Illinois) involves presentation to the eyewitness of either a group of photos (referred to in this report as a photospread) or a live lineup of persons. The eyewitness is then asked if he or she recognizes the perpetrator. If an identification is made, the witness' degree of confidence in the identification is sometimes recorded by police, but often is not recorded contemporaneously. Photospread procedures occur both within and outside the police station, while live lineups usually take place in the station. All are customarily handled by police officers, and the result (no identification or a positive identification) is recorded in writing. Often a still

photograph is taken of live lineups. It is generally not the practice to record either live lineups or photospreads on audio or videotape. The suspect has no right to have a lawyer present during a pre-indictment photospread. *See People v. Bolden*, 197 Ill. 2d 166 (2001.)

Two major articles discussing the challenges presented by eyewitness testimony have contributed significantly to the Commission's discussions in this area. The first, by Professor Gary Wells and others,[34] "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," appears in *Law and Human Behavior*, Vol. 22, No. 6 (1998) beginning at page 603. Throughout the recommendations that follow, a reference to "Wells" will refer to this article. The second article, entitled "Eyewitness Evidence: A Guide For Law Enforcement," was prepared by the Technical Working Group for Eyewitness Evidence, sponsored by the National Institute of Justice, U.S. Department of Justice (October 1999). The Technical Working Group included, among its members, prosecutors, legal experts, police officials (including members of the Chicago Police Department)[35], and academics. Professor Wells, author of the first article, was a member of the group's Planning Panel. Throughout the recommendations that follow, this report will be referred to as the "NIJ study on Eyewitness Evidence."

Recommendations 10 to 15 are intended to apply only to homicide cases.

Recommendation 10 :
When practicable, police departments should insure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect.

A majority of Commission members have recommended that this procedure should be adopted by police departments conducting lineups. The recommendation recognizes that academic literature has identified some ways in which lineup procedures can be improved, although these ideas have not yet been tested in a court of law. Commission members have proposed that these improved procedures be used by police departments when practicable, rather than mandating these procedures be adopted. The Commission has not recommended that a failure to comply with this requirement should result in an automatic suppression of an identification.

The reason for this recommendation is that if the person who administers the lineup or photospread knows the identity of the suspect, the administrator can consciously or unconsciously – for example, by eye contact, facial expression, tone of voice, pauses, verbal exchanges – signal his or her knowledge to the witness. Further, if the witness selects the person believed by the administrator to be the perpetrator, the administrator of the lineup may then confirm this to the witness, which may increase the witness' degree of confidence in the identification, so that the witness' confidence in his/her selection and resultant testimony are no longer based solely on the witness' own observation and memory.[36]

The New Jersey Attorney General has implemented new guidelines for lineups and photospreads which reflect the developing academic literature, including this proposal. Regarding this "double-blind" issue, the Attorney General states in his cover letter implementing the procedures:

> Two procedural recommendations contained in these Guidelines are particularly significant and will represent the primary area of change for most law enforcement agencies. The first advises agencies to utilize, whenever practical, someone other than the primary investigator assigned to a case to conduct both photo and live lineup identifications. The individual conducting the photo or live lineup identification should not know the identity of the actual suspect. This provision of the Guidelines is not intended to question the expertise, integrity or dedication of primary investigators working their cases. Rather, it acknowledges years of research which concludes that even when utilizing precautions to avoid any inadvertent body signals or cues to witnesses, these gestures do occur when the identity of the actual suspect is known to the individual conducting the identification procedure. This provision of the Guidelines eliminates unintentional verbal and body cues which may adversely impact a witness' ability to make a reliable identification.[37]

A majority of Commission members believed that the so-called "double-blind" procedure (neither the witness nor the administrator knows in advance who in the lineup or photospread is the suspect) will improve the accuracy of identification procedures. The majority recommendation recognizes, however, that implementation of these procedures poses special challenges to law enforcement, particularly in smaller departments. In his cover letter implementing the new procedures, the Attorney General of New Jersey has conceded the difficulty in imposing this burden on departments:

> I recognize that this is a significant change from current practice that will not be possible or practical in every case. When it is not possible in a given case to conduct a lineup or photo array with an independent investigator, the primary investigator must exercise extreme caution to avoid any inadvertent signaling to a witness of a 'correct' response which may provide a witness with a false sense of confidence if they have made an erroneous identification.[38]

Minority view - Procedure should be mandatory

Improvements to lineup procedures identified by the academic literature should be implemented at this critical stage of the investigatory process. Members in the minority on this issue remain convinced that the "double-blind" procedure is critical to accurate identification procedures, and that the alternative carries an unacceptable risk of faulty identifications. As a result, imposition of a "double-blind" procedure on all police departments, large and small, is both justifiable and advisable. If required to do so, even the smallest departments will find a way to comply.

Recommendation 11 :
(a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore they should not feel that they must make an identification.

(b) Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

These recommendations were adopted by the Commission unanimously. The first recommendation is made in both the article by Professor Wells[39] and in the NIJ report on Eyewitness Evidence.[40] The purpose of such a statement is to avoid the risk that witnesses will make an inaccurate identification simply because they believe that someone in the lineup or photospread is the suspect and to avoid the possibility that the witness will make a "relative judgment" by picking the person who most resembles the person who committed the crime.

The second recommendation in this section reflects considered discussion by the Commission about how to address the situation where the police officer may, in fact, know who the suspect is, and mandatory procedures requiring "double-blind" lineups or photospreads are not implemented. If double-blind procedures are implemented, then Professor Wells recommends that the witnesses be told that the administrator does not know who the suspect is. However, in the event that the administrator *does* know who the suspect is, the members of the Commission felt that it would be a bad practice to make a misstatement to the witness. As a result, the Commission has advanced a recommendation which should fit with either circumstance, and which should discourage the witness from providing a positive identification merely because he or she believes it is expected.

Recommendation 12 :
If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

This recommendation was supported by a majority of Commission members. The idea behind a sequential procedure is to eliminate a "relative judgment" by which the eyewitness identifies the person in the lineup or photospread who looks the most like the perpetrator, rather than actually identifying the perpetrator. Since the "relative judgment" process may produce a higher incidence of mistaken identity, it is important to address this problem.

This position is based upon the research explained in the article by Professor Wells[41] The authors state that experiments conducted by the six authors and by others in the United States, Canada, Germany and the United Kingdom have established the superiority of a sequential over a simultaneous procedure.[42] The authors state, ". . . The sequential procedure produces a lower rate of mistaken identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups). . . ." The reason is:

> . . . the standard identification procedure, in which the eyewitness examines the full set of lineup members at once, allows for relative judgment processes in ways that a sequential procedure would not. A sequential procedure is one in which the eyewitness views one lineup member at a time, deciding whether or not that person is the culprit before seeing the remaining lineup members. Having not yet seen the remaining lineup members, the eyewitness is not in a position to make a relative judgment. Although the eyewitness could compare the person being viewed to those viewed previously, the eyewitness cannot be sure that the next person to be viewed will not be an even better likeness to the culprit. Hence, the eyewitness must rely more on an absolute judgment process. Wells, p. 617

The authors sound one cautionary note: ". . . the adoption of sequential lineups without the adoption of double-blind testing. . . might be worse than using simultaneous lineups without double-blind testing. Although we do not have specific empirical evidence to support this view, we fear that the influence of the lineup administrator who knows which person is the suspect would be greater with the sequential procedure because the administrator could more easily discern which photo or lineup member was being observed by the eyewitness at a given moment than is true of the simultaneous procedure." Wells, p. 640.

The NIJ report on Eyewitness Evidence identifies similar concerns. The draft was reviewed and commented on by 95 organizations and individuals representing a broad spectrum of knowledgeable and interested persons and views[43]. The report represents a consensus of its authors, but does not necessarily reflect the official position of the U.S. Department of Justice. In an introduction to the report, Attorney General Janet Reno states:

> Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade. The National Institute of Justice convened a technical working group of law enforcement and legal practitioners, together with these researchers, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system. NIJ report on Eyewitness Evidence, p. iii.

The authors of the report set forth procedures for *both* simultaneous and sequential lineups and photospreads[44]. In the Introduction, the authors explain in the section titled "Future Considerations":

> Advances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence. The following examples illustrate areas of potential change.

> Scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially – one at a time – rather than simultaneously. Although some police agencies currently use sequential methods of presentation, there is not a consensus on any particular method or methods of sequential presentation that can be recommended as a *preferred* procedure; although sequential procedures are included in the *Guide*, it does not indicate a preference for sequential procedures. NIJ report on Eyewitness Evidence, p. 8-9.

Regarding sequential procedures, the New Jersey Attorney General states in his cover letter (p. 2):

> The Guidelines also recommend that, when possible, 'sequential lineups' should be utilized for both photo and live lineup identifications. 'Sequential lineups' are conducted by displaying one photo or one person at a time to the witness. Scientific studies have also proven that witnesses have a tendency to compare one member of a lineup to another, making relative judgments about which individual looks most like the perpetrator. This relative judgment process explains why witnesses sometimes mistakenly pick someone out of a lineup when the actual perpetrator is not even present. Showing a witness one photo or one person at a time, rather than simultaneously, permits the witness to make an identification based on each person's appearance before viewing another photo or lineup member. Scientific data has illustrated that this method produces a lower rate of mistaken identifications. If use of this method is not possible in a given case or department, the Guidelines also provide recommendations for conducting simultaneous photo and live lineup identifications.[45]

While Professor Wells and his colleagues support the concept of sequential procedures, they do not include sequential procedures among the four recommendations[46] for immediate implementation by police agencies. The chief reason given is:

> . . . we believe that the four rules we recommend are readily understandable to justice people in terms of how they work and why they are necessary. Because our recommendations are directed at the legal system, we think that each rule should have this 'self-evident' nature. The sequential procedure, however, relies on a more complex understanding of the problem based on the relative-judgment conceptualization that we do not think is a part of the intuitions of legal policy makers at this point. Fourth, the rules we recommend at this time do not require significant deviations from current police practices, which involve simultaneous presentations. The sequential procedure, on the other hand, calls for a set of operations that is quite different from the usual practices of police departments. Finally, the four rules that we recommend in no sense prevent police from using sequential procedures. If sequential procedures are used, the same four rules apply. Wells, p. 640.

***Minority view -- sequential procedures*:**
Commission members who were in the minority on this issue expressed concern about implementing such a procedure which has not been tested or approved as yet in the courts. Even the NIJ guide acknowledges that these procedures may not fit every jurisdiction and that they should provide opportunity for further study. It may be that these procedures will produce more reliable identifications in the long run, but this method does present a radical shift from the method traditionally employed to conduct lineups and photospreads, and thus should be approached with caution. The sequential lineup procedure varies considerably from present practice, and it is likely that defense attorneys would immediately attack such a procedure on various grounds.

While the New Jersey Attorney General has recommended implementation of these new procedures, he also acknowledges that they may not be suitable in every case, and that identification procedures conducted in the traditional manner should not be presumed invalid merely because he has now recommended a new procedure.

Recommendation 13 :
Suspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitnesses' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

This recommendation was adopted unanimously by the Commission, and comports with what is good police procedure. However, some lineups or photospreads are constructed so that the non-suspect "fillers" more or less resemble the person who has been identified as the potential suspect, rather than insuring that the "fillers" resemble the descriptions given by the witnesses. This is an important distinction.

Both the article by Professor Wells[47] and the NIJ report on Eyewitness Evidence suggest that it is important that the other members of the lineup resemble the suspect in terms of significant features. Professor Wells suggests that the non-suspect "fillers" in the lineup match the physical description provided by the witness, rather than being chosen so that they resemble the suspect. They should not, however, be chosen so as to emphasize any particular physical characteristic of the suspect.

Chicago Police Department General Order 88-18, Par. II G, is to the same general effect.[48]

Recommendation 14 :
A clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

The Commission has unanimously recommended that witness statements at the time of the identification procedure be documented in writing. One of the significant issues that has arisen with respect to eyewitness testimony has to do with the degree to which the witness was confident in his or her identification of the suspect at the time of the first identification. Professor Wells points out in his article that juries often pay more attention to the level of confidence expressed by the witness when testifying than to the actual circumstances under which the witness may have made the identification.[49] A witness making a hesitant or tentative identification at first may receive reinforcement for the identification as the case proceeds.

One way to address this problem is to insure that police officials make a contemporaneous record not only as to whether or not the eyewitness had identified the suspect, but also as to the level of confidence expressed by the witness *at the time of the initial identification.* This should include expressions of uncertainty on the part of the witness.

Guidelines issued by the Attorney General of New Jersey suggest that the lineup administrator should undertake the following actions when recording statements made by the witness: 1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is. 2. Ensure that the results are signed and dated by the witness. 3. Ensure that no materials indicating previous identification results are visible to the witness. 4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures. These suggested procedures make clear the importance of insuring that the information about the identification represents what the witness has actually said about the identification or nonidentification.

Eyewitness identification was of particular importance in the Sophonow inquiry in Manitoba. A host of recommendations were made with respect to lineup and photospread procedures, including the recommendations that:

> All statements of the witness on reviewing the lineup must be both noted and recorded verbatim and signed by the witness.
>
> At the conclusion of the line-up, if there has been any identification, there should be a question posed to the witness as to the degree of certainty of the identification. The question and answer must be both noted and recorded verbatim and signed by the witness. It is important to have this report on record before there is any possibility of contamination or reinforcement of the witness.[50]

The Sophonow inquiry also suggested that, at least with respect to photo spreads, police officers should not speak to eyewitnesses after the lineups regarding their identification or their inability to identify anyone, as it could raise concerns that a potentially questionable identification was somehow reinforced.

Recommendation 15 :
When practicable, the police should videotape lineup procedures, including the witness' confidence statement.

It was the unanimous view of Commission members that videotaping lineup procedures would also aid in resolution of disputes regarding the identification. Chicago Police Department rules currently require two photographs of any formal lineup which results in the identification of a suspect (General Order 88-18, par. II H). The Illinois Supreme Court has stated that judicial appraisal would be aided by photographs of the lineup. *People v. Pierce*, 53 Ill. 2d 130, 136, (1972). Also recommending photos or videos of the persons who are in the lineup, see ALI Model Code Section 160.4(2) (pp. 87 to 88, 449 to 450; DOJ Guide (10/99), Sec. III C, pp. 36 to 37 (live lineups to be documented by photo or video).

The Commission's recommendation goes beyond these procedures, so that the entire lineup process, from beginning to end, is to be recorded on video. Professor Wells and his colleagues hesitated to recommend videotaping of the entire lineup procedure[51]:

> Although we encourage videotaping lineups, we are not willing to make videotaping one of the core rules at this time for several reasons. First, unlike the four rules we have proposed, videotaping is not, in and of itself, a procedure that lessens the chances of false eyewitness identifications. We know of no evidence that videotaping leads eyewitnesses to be less likely to make identification errors, for instance. Instead, videotaping falls into a category of record keeping for the purpose of post hoc review.
>
> Second, we do not believe that videotaping will be nearly as effective in detecting problems in actual practice as it is in theory unless there are at least three cameras operating in synchrony. Videos are very limited in their visual scope, so there would have to be one camera focused on the eyewitness, one on the agent administering the lineup, and one on the lineup itself. In order to link any nonverbal behaviors of the agent or the lineup members to the reactions of the eyewitness, the cameras must be synchronized. In addition, the audio portion of a video is routinely very poor when nonprofessionals are making it.
>
> Also, unlike the four rules we propose, there is additional cost to law enforcement in time, equipment, and materials associated with videotaping. In this sense, it violates a significant premise of our rules, namely that they are not associated with increased costs to law enforcement.
>
> It is also important to note that we are uncertain at this time as to what effect videotaping might have on the behaviors of eyewitnesses. At least some in law enforcement have suggested to us that eyewitnesses would become even more anxious knowing that they were being videotaped, some would refuse to attempt an identification under such conditions, and so on. In the absence of empirical evidence one way or the other, we think it best to not make this one of our core rules at this time.

A final reason for not including the videotaping idea among the core rules is the fear that law enforcement would skirt Rule 1 (double-blind testing) on the excuse that video is available to the defense to see if there was any suggestiveness in the procedures. The existence of video, however, is no substitute for double-blind testing because of the limitations of video for capturing such influences.

We acknowledge that video might actually help prevent suggestive influence practices by lineup agents who might fear what a video could reveal to outside observers. However, we believe that adherence to Rule 1 (double-blind testing) is the only effective way to prevent systematic influence of this type from the lineup agent. We also agree that having some video, even if it is poorly done, might be better than having no video at all. Hence, we encourage the use of video, even while not making it one of the core rules.

The Sophonow inquiry similarly recommended that all proceedings in the witness room during the lineup should be recorded, preferably by videotape, but, if not, then by audiotape.

TRAINING AND OTHER RECOMMENDATIONS

Recommendation 16 :
All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

1. The risks of false testimony by in-custody informants ("jailhouse snitches").
2. The risks of false testimony by accomplice witnesses.
3. The dangers of tunnel vision or confirmatory bias.
4. The risks of wrongful convictions in homicide cases.
5. Police investigative and interrogation methods.
6. Police investigating and reporting of exculpatory evidence.
7. Forensic evidence.
8. The risks of false confessions.

Commission members were unanimously of the view that additional training for police officers in these areas was important. The recommendations for training outlined above are based primarily upon recommendations made in the report on the Morin Inquiry and to some extent on the Fisher article[52]. The Commission has unanimously recommended that all prosecutors and all defense lawyers who are members of the Capital Trial Bar, all judges who handle capital cases and police who work on homicide cases receive periodic training in these areas. The sources are:

1. In-custody informers: *Morin Inquiry Recommendations 37-38, 53, 58, 60-61, 64*
2. Risks of accomplice testimony *Cases involving the Ford Heights Four and Burrows*[53]

3. Dangers of tunnel vision: *Morin Inquiry Recommendations 74*; *Article by Professor Fisher, p. 137*; *Sophonow Inquiry Recommendations*
4. Risks of wrongful convictions: *Morin Inquiry Recommendations 73 B, 93*
5. Police investigative/interrogation methods: *Morin Inquiry Recommendations 101-108*
6. Police investigating/reporting of exculpatory evidence: *Morin Inquiry Recommendation 94; Article by Professor Fisher*
7. Forensic evidence: *Morin Inquiry Recommendations 1-18*
8. Risks of false confessions: *Article by Professor White; the Gauger case,*[54] *Tribune series on confessions*[55]

These areas are where the potential for systemic error is significant. A number of the cases involving the thirteen men released from death row in Illinois provide examples of problems in one or more of these categories. Particularized training should have the effect of improving the overall quality of justice, as well as diminishing the likelihood that errors will be made which result in wrongful conviction. Examination of those areas in the criminal justice system where errors have been made in the past should serve as a reminder how problems can be avoided in the future.

Recommendation 17 :
Police academies, police agencies and the Illinois Department of Corrections should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention of foreign nationals.

The Commission has unanimously recommended that training curricula be improved to reflect treaty obligations. Under the Vienna Convention on Consular Relations (VCCR), the United States is required to notify foreign nationals of their right to consular access upon arrest. The foreign national's consul may also arranged for legal representation for the person detained. Although both the Chicago Police Department and the Cook County State's Attorneys office have undertaken efforts to inform detainees of their right to consular access, more consistent efforts in this regard would serve to protect the rights of foreign nationals.

On June 27, 2001, the International Court of Justice found the United States in violation of the Vienna Convention for the Arizona execution of two German nationals, Walter and Karl LeGrand.[56] An August, 2001 report by Amnesty International found that there is widespread disregard for the consular rights of foreign nationals throughout the United States, even for those who are charged with capital crimes.[57]

The Illinois Supreme Court has been presented with this issue in at least one case involving a Polish national. *See People v. Madej*, 193 Ill. 2d 395, 739 N.E. 2d 423 (2000). Although the Court disposed of the arguments in that case largely on procedural grounds, the case highlights the importance of insuring that proper training is provided to all those who are connected with the criminal justice system with respect to the rights of consular access and notification.[58]

It is important that police agencies and other law enforcement agencies be fully informed about their responsibilities with respect to compliance with the VCCR. The U.S. State Department publishes a written guide for law enforcement agencies which explains in very simple terms the responsibilities related to consular notifications.

Recommendation 18 :
The Illinois Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake regular reviews of the measures taken by state and local police to ensure full compliance. This could include publication of a guide based on the U.S. State Department manual.

It was the unanimous view of the Commission that the Illinois Attorney General could provide improved leadership in this important area. In Texas, the office of the Attorney General has published a pamphlet entitled: "Magistrate's Guide to the Vienna Convention on Consular Notifications." The guide, based upon the State Department publication, provides advice on what steps should be taken to comply with the VCCR. While the Illinois Attorney General is not directly responsible for supervising all law enforcement agencies in the state, the Office of the Attorney General provides a valuable statewide resource for disseminating information of this kind throughout the 102 counties of Illinois. As the population of the state becomes more diverse, it becomes increasingly important that areas outside of the City of Chicago and Cook County understand the requirements of the VCCR in order to insure that the rights of detainees are fully protected.

Recommendation 19 :
The statute relating to the Illinois Law Enforcement Training and Standards Board, 50 ILCS 705/6.la, should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

The Commission has unanimously recommended that police perjury, regardless of conviction, should be a basis upon which the certification of a police officer may be revoked. Illinois has a statute entitled "Illinois Police Training Act" which creates the Illinois Law Enforcement Training and Standards Board[59]. The Act enables the Board to set training standards and certify police officers for employment. Police officers cannot be employed without being certified under the Act.

All police departments have rules against knowingly providing false testimony or submitting false reports. However, some concerns have been expressed about whether police agencies are sufficiently vigilant in enforcing these rules, or whether there are adequate sanctions for officers who try to obtain a conviction by lying under oath. The Commission recommends an amendment to the Illinois Law Enforcement Training and Standards Board Act (ILETSB) to add a provision that the ILETSB would have the authority to de-certify any police officer in Illinois who is found to have intentionally lied under oath in a criminal case. The ILETSB is currently mandated by law to de-

certify police officers automatically upon conviction of any felony offense and certain misdemeanor offenses.[60] This amendment would permit a similar de-certification for instances of perjury, regardless of whether the police officer has been convicted of that crime.

Difficult issues remain to be resolved in legislation effectuating this recommendation, including what would trigger an ILETSB decertification inquiry, staffing and funding for the ILETSB, the due process rights of the police officer, and what (if any) appeal rights would be afforded. These issues could be resolved, however, and this recommendation could provide an important avenue to correct improper conduct by police officers throughout the state.

Notes - Chapter 2

1. "The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England," 68 *Fordham Law Review* 101, April 2000.

2. A copy of the relevant portions of the CPIA is contained in the Appendix at the end of this Report. The Act is also available at http://www.hmso.gov.uk/acts/acts1996/96025–f.htm.

3. *See:* Fisher, "The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England," 68 *Fordham Law Review* at 129-131 (April 2000).

4. Recommendation 74 provides: One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.

5. Recommendation 89 provides: Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.

6. The details regarding the Thomas Sophonow inquiry can be found on the website maintained by the Province of Manitoba devoted to this report: www.gov.mb.ca/justice/sophonow.

7. *See* Sophonow Inquiry recommendations.

8. The Attorney General's draft guidelines are also located in the Appendix at the end of this Report. The guidelines are available at http://www.lslo.gov.uk/disclosure.htm.

9. *See* Guidelines, Par. 11: "Prosecutors must be alert to the possibility that material may exist which has not been revealed to them and which they are required to disclose."

10. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602; *See also Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964).

11. *See* 725 ILCS 5/109-1, 725 ILCS 5/113-1 et seq.; *See also*: 55 ILCS 5/3-4006.

12. Funding should probably be identified to support the additional burdens placed upon the public defenders who will appear during the custodial interrogation phase for death eligible cases.

13. *See* "DNA voids murder confession", Chicago Tribune, January 5, 2002; "Cops urged to tape their interrogations", Chicago Tribune, January 6, 2002.

14. *See also People v. Oaks* (169 Ill. 2d 409, 662 N.E. 2d 1328, 1334, 1996), describing the videotaping of statements in Iowa as "routinely done" by Iowa authorities.

15. Other instances where questionable confessions were used to convict men later released from death row include Rolando Cruz (the "vision" statement), Alex Hernandez (inclupatory statment obtained under questionable circumstances), Ronald Jones (alleged physical brutality), and Paula Gray (both grand jury testimony and courtroom testimony) in the cases involving Dennis Williams and Verneal Jimerson.

16. *See*: Drizin and Colgan, "Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confessions" *Loyola University Chicago Law Journal*, Vol. 32, No. 2, Winter 2001, 339; especially 345-378; Johnson, "False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations," *Boston University Public Law Journal*, Vol. 6, p. 719; especially at p. 721-726, Spring 1997); *See also: Actual Innocence* by Barry Scheck and Peter Neufeld, New York: Doubleday (2000).

17. *See*, for example, Leo, "The Impact of Miranda Revisited," *Journal of Criminal Law and Criminology*, Vol. 86, p. 621 (1996), especially at 689-692 and notes 288 to 292; Johnson, 6 B.U.Pub.L.J 719; 726-735; Ofshe and Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action," *Denver University Law Review*, Vol. 74, p. 979 (1997).

18. In both instances, individuals were cleared on the basis of DNA evidence.

19. *See*: "Due Process and the Death Penalty In Illinois", Chicago Council of Lawyers, March 2000 pp. 26-32; Senate Task Force Report, 2000 pp. 9-12.

20. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 32, p. 105 (1997).

21. 86 *J. Crim. L. & Criminology* at 682.

22. Sup. Crt. Committee Report, Oct. 1999, pp. 60-61.

23. Tab 31.

24. Chicago Daily Law Bulletin, August 13, 1999, p. 20. In his letter, dated August 10, 1999, the Attorney General indicated that while he encouraged the use of video recording as early in the custodial interrogation process as practicable, he favored permissive use of videotaping over "making its use mandatory." The Attorney General noted also that "Police agencies that are already using videotape in Illinois report almost uniformly agreeable results, finding that videotaping provides the most accurate method of proving what was said, defeats claims of coercion or confusion and increases professionalism by allowing peer review of and training in methods of questioning after interviews are completed. Videotaping also clearly protects the rights of suspects as well." Letter from Attorney General Jim Ryan to Representative Monique D. Davis and Representative Sara Feigenholtz,

Chairpersons of the House Committee on Videotaping of Interrogations and Confessions, August 10, 1999, p. 2.

25. "DuPage County Sheriff to tape interrogations," Chicago Tribune, June 29, 1999, p. 20.

26. Sup. Crt. Committee Supplemental Report, October 2000, p. 103.

27. 74 *Denver U.L. Rev.* 979.

28. *See* Chapter 13 of this Report, Recommendation 82.

29. "Cops urged to tape their interrogations", Chicago Tribune, January 6, 2002.

30. Geller, "Videotaping Interrogations and Confessions," National Institute of Justice, March 1993

31. This recommendation has, as its source, a recommendation from the Morin Inquiry, 96 (c), which provides: "Where oral statements, which are not videotaped or audiotaped, are allegedly made by a suspect outside of the police station, the alleged statement should then be re-read to the suspect at the police station on videotape and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded and sign it, if it is regarded as accurate."

32. Morin Inquiry Recommendation No. 96 (b) provides: "The Durham Regional Police Service should investigate the feasibility of adopting the practice of the Australian Federal Police of carrying tape recorders on duty for use when interviewing in other locations or indeed, for use when executing search warrants or in analogous situations."

33. Recent media reports on the case involving Corethian Bell describe Bell as mildly mentally retarded and with a history of mental illness, which could account for his willingness to confess to a crime he did not commit. See "Cops Urged to Tape their Interrogations," Chicago Tribune, January 6, 2002.

34. The authors include Gary Wells, from Iowa State University; Mark Small, Southern Illinois University (Carbondale); Steven Penrod, University of Nebraska (Lincoln); Roy Malpass, University of Texas (El Paso), Solomon M. Fulero, Sinclair College and Wright State University School of Medicine (Dayton); and C.A.E. Brimacombe, University of Victoria, (Victoria, British Columbia.)

35. The Planning Panel included Sgt. Paul Carroll from the Chicago Police Department, and Officer Patricia Marshall, also of the Chicago Police Department, served on the Technical Working Group.

36. See Wells, supra, at pages 627 to 629.

37. A copy of the cover letter and proposed guidelines is contained in the Appendix at the end of this Report.

38. A copy of the New Jersey Attorney General's letter of April 18, 2001 transmitting the new guidelines is contained in the Appendix attached to this Report.

39. See p. 629-30.

40. See p. 32.

41. Pages 639 to 640.

42. Pages 616 to 617, and 640 to 641.

43. NIJ report on Eyewitness Evidence, pp. 7-8.

44. NIJ report on Eyewitness Evidence, pp. 33 to 37.

45. A copy of the cover letter and proposed guidelines is contained in the Appendix at the end of this Report.

46. Professor Wells and his colleagues recommend four rules that should be adopted: the person who conducts the lineup should not be aware of which member of the lineup is the suspect, eyewitnesses should be told that the person in question might not be in the lineup and they should not feel compelled to make an identification, suspects should not stand out in the lineup, and a clear statement should be taken at the time of the identification as to the confidence level of the witness about the identification. *See* Wells, p. 627-636.

47. At p. 630 to 635.

48. A copy of Chicago Police Department General Order 88-18 is contained in the Appendix at the end of this Report.

49. See Wells Article, p. 635-36.

50. *See* recommendations from the Sophonow Inquiry.

51. pp. 640 - 641.

52. Stanley Z. Fisher, 68 *Fordham L. R.* 101 (April 2000).

53. The "Ford Heights Four" are the four men convicted of a double murder in 1978. The four defendants in that case were Kenneth Adams, Verneal Jimerson, William Rainge and Dennis Williams. Jimerson and Williams were sentenced to death. An alleged accomplice, Paula Gray, implicated Jimerson, Rainge and Williams in some of the trials in the case. In 1996, all four men were subsequently exonerated and released from prison based upon DNA evidence which excluded them as sources of semen recovered from the victim and subsequent statements by others who confessed to the crime. Two of the men who confessed to the crime in 1996 pled guilty and were sentenced to life

without parole.

Joseph Burrows was convicted of murder in Iroquois County based largely upon the evidence of his supposed accomplice, Gayle Potter, who admitted her involvement in the murder and implicated Burrows and another man. No physical evidence linked Burrows to the crime, and he provided alibi testimony. Potter subsequently recanted her testimony, and confessed that she had committed the murder. Physical evidence linked her to the scene. Burrows won a new trial, and the prosecutor dropped the charges.

54. Gary Gauger was charged with the double murder of his parents in McHenry County, despite no physical evidence actually linking him to the murders. His death sentence was subsequently reduced to life without parole by the trial judge; the Illinois Appellate Court reversed his conviction and suppressed his confession. The prosecutor did not retry Gauger. In 1998, two members of a Wisconsin motorcycle gang were indicted in the federal district court in Wisconsin for the murder of the Gaugers; one pled guilty in 1998 and the other was found guilty in 2000.

55. The Chicago Tribune ran a series of articles on problems with confessions obtained by the Chicago Police Department in criminal cases. The series included the following articles: "Coercive and illegal tactics torpedo scores of Cook County murder cases," Chicago Tribune, December 16, 2001; "Illegal arrests yield false confessions," Chicago Tribune, December 17, 2001; "Veteran detective's murder cases unravel," Chicago Tribune, December 17, 2002; "Officers ignore laws set up to guard kids," Chicago Tribune, December 18, 2001; and "When jail is no alibi in murders," Chicago Tribune, December 19, 2001.

56. A copy of the opinion can be obtained from the web site of the International Court of Justice, http://www.icj-cji.org/.

57. *See*: "United States of America: A time for action-Protecting the consular rights of foreign nationals facing the death penalty," Amnesty International, August 2001 (AI Index 51/106/2001).

58. The dissenting opinions of Justice McMorrow and Justice Heiple comment upon the important reciprocal rights guaranteed by this treaty.

59. 50 ILCS 705/1 et. seq.

60. The decertification provisions of the Act are as follows:

> Sec. 6.1. Decertification of full-time and part-time police officers.
> (a) The Board must review police officer conduct and records to ensure that no police officer is certified or provided a valid waiver if that police officer has been convicted of a felony offense under the laws of this State or any other state which if committed in this State would be punishable as a felony. The Board must also ensure that no police officer is certified or provided a valid waiver if that police officer has been convicted on or after the

effective date of this amendatory Act of 1999 of any misdemeanor specified in this Section or if committed in any other state would be an offense similar to Section 11-6, 11-9.1, 11-14, 11-17, 11-19, 12-2, 12-15, 16-1, 17-1, 17-2, 28-3, 29-1, 31-1, 31-6, 31-7, 32-4a, or 32-7 of the Criminal Code of 1961 or to Section 5 or 5.2 of the Cannabis Control Act. The Board must appoint investigators to enforce the duties conferred upon the Board by this Act.

Chapter 3 - DNA and Forensic Testing

This Chapter discusses the important issue of forensic testing. Advances in science now provide law enforcement agencies with an unparalleled opportunity to conclusively identify those suspected of having committed crimes where biological evidence exists. DNA and other forensic testing has revolutionized the investigation of crime in just the last 5 years. The Commission has recommended in this Chapter that the State undertake significant improvements related to its forensic laboratories, that the Federal and State governments establish and fund a comprehensive DNA database, and that defendants should have access to that database in appropriate cases. The Commission also supports adequate funding for DNA and other forensic testing in capital cases.

INTRODUCTION

The testing of DNA – the common abbreviation for deoxyribonucleic acid – is used with increasing frequency in the criminal justice system to make determinations about guilt or innocence. DNA is the genetic material present in the cells of all living organisms, and parts of the DNA structure can provide a genetic fingerprint that will differentiate one person from another.[1] The two most commonly used DNA tests, RFLP[2] and PCR[3], can make distinctions even between people who are biologically related.[4] DNA testing has impacted not only pending cases, but has also resulted in the re-evaluation of cases which were thought to have been concluded.

DNA testing has the potential to exonerate those who have been wrongly convicted, as evidenced in the recent release of Omar Saunders, Larry Ollins and Calvin Ollins from prison after having been convicted of the murder of Lori Roscetti in 1986.[5] DNA evidence played a role in the release of at least five of the thirteen men released from death row in Illinois.[6] Improvements to DNA testing have also provided a powerful tool to law enforcement to link suspects even to very old murders, provided that DNA evidence has been properly preserved. Those technological advances enabled authorities in Washington State to arrest a long-time suspect believed to be responsible for a rash of murders occurring nearly 20 years ago.[7] Here in Illinois, DNA technology resolved seven outstanding murder investigations and resulted in Paul F. Runge being charged for a series of killings in Cook and DuPage Counties.[8] It has also recently enabled the Chicago Police to link two new suspects to the 1986 Roscetti murder.[9] The high degree of reliability found in DNA testing will likely lead to its increasing use in all manner of criminal cases, not just murders investigations.

SPECIFIC RECOMMENDATIONS

Increased reliance on forensic testing, particularly DNA testing, has led to a re-examination of laboratory practices throughout the country. During the summer of 2001, Oklahoma Governor Frank Keating announced a wide-ranging investigation into the activities of Joyce Gilchrist, formerly a laboratory scientist with the Oklahoma City Police lab.[10] The Oklahoma attorney general is conducting a re-examination of capital cases in which Gilchrist analyzed evidence or testified.[11] A federal appeals court has reversed the death sentence of an inmate against whom Ms. Gilchrist provided testimony, finding that she provided evidence which she ". . . knew was rendered false and misleading by evidence withheld from the defense." *Mitchell v. Gibson*, 262 F. 3d 1036, 1064 (10th Cir. 2001).[12]

An eighteen month investigation of certain units in the Federal Bureau of Investigation's forensic laboratory was conducted by the Department of Justice Office of the Inspector General (OIG), resulting in a 517 page report documenting testimonial errors, substandard analytical work and deficient practices.[13] The deficiencies included testimony beyond the particular examiner's expertise, improper preparation of laboratory reports, insufficient documentation of test results and some scientifically flawed reports.[14] A one year follow-up report in 1998 indicated that while many of the OIG's recommendations had been accepted by the lab and improvements had been made, ". . . periodic internal and external reviews should be conducted to ensure that the policies, practices, and protocols adopted by the FBI are followed in practice."[15]

Recommendation 20 :
An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision.

A significant majority of Commission members supported the idea that the State should create an independent forensic lab that is not under the control of a police agency. The State's existing forensic lab is currently a division of the Illinois State Police. It was the view of the majority that the overall quality of forensic services would be improved if the laboratory personnel were truly independent. As a result, the Commission has recommended that the forensic lab be established as its own state agency, not under the jurisdiction of the Illinois State Police.[16]

The quality and professionalism of the forensic work being performed by scientists in crime labs across the country has been the subject of increasing debate. Recently, in some highly-publicized cases, it has been alleged that incompetence or even intentional misconduct has resulted in defendants being accused or convicted of crimes they did not commit. Some critics have claimed that the problem stems from the fact that crime labs have traditionally operated as part of the local or state police agency. According to a recent national survey of DNA labs, 42% of labs nationwide are operated by State police agencies, and another 25 % of labs were part of a local police or sheriff's department.[17] According to author Barry Scheck,

> Scientific evidence, properly handled, can be the best evidence in a case. Clearly, forensic science has yet to achieve the status of an independent third force, unbeholden to prosecutors or defense lawyers, consisting of professionals who will not misrepresent or slant data for either side . . . Neither the laboratory nor its budget should be under the supervision of the police department or a prosecutor's office.[18]

Scheck suggests that misconduct occurs and is overlooked because of "a culture of protective secrecy that silences criticism, encourages non-disclosure of scientific work-product, and discourages any admission of error."[19] In order to overcome these problems, labs should have strong quality assurance programs, be subject to periodic inspections, and spot check technician's work to deter fraud.[20]

The importance of scientific evidence in criminal cases will grow in the future. Public confidence in the integrity of the forensic work being done on behalf of the state is crucial. Crime labs should function as an "independent third force in the criminal justice system."

An independent lab should promote more confidence on the part of both prosecution and defense that results have been fairly and completely analyzed, and honestly reported.

Minority view

While the concept of an independent forensic lab may be attractive in many respects, there are a number of reasons why creating an independent state-wide lab poses certain problems. The reality is that no matter how "independent" this separate state agency is, the bulk of its work will still be for police agencies and prosecutors. As is true today for the vast majority of cases, the forensic experts will be called to testify by the prosecution and these experts will undoubtedly continue to be subject to cross-examination for that testimonial history. As a result, an "independent" laboratory will be subject to criticism as a "police/prosecutor" lab even if it is not under the direct control and management of a police agency, because of the nature of its day to day work. The creation of a stand-alone laboratory system is also not likely to result in fewer petitions by defense counsel for third-party testing to re-examine the results of the "government" laboratory and the "government's" experts.

It is important to recognize that the forensic scientists hired by the current State laboratory are already civilian employees. The ISP Laboratory System was also the first in the United States to obtain accreditation by the American Society of Crime Laboratory Directors, and they were the first to establish a Quality Assurance Program. The FBI laboratory system, after the DOJ Inspector General's investigation, has now agreed to such outside review and they have since established internal quality assurance programs. Any independent laboratory would be subject to the very same external auditing and review that the ISP laboratories currently undergo as to their policies, practices, protocols and training. Accordingly, it is difficult to imagine that the creation of a separate state agency will either remove the stigma of being "police and prosecutor" oriented lab, or result in better quality forensic work.

The creation of another agency will to prove to be a costly proposition that can be ill afforded, particularly at a time when the criminal justice system is seriously underfunded. As noted earlier, a "independent" laboratory will continue to be viewed as a "state" or "government" lab and requests for outside testing will be unabated. Such an independent agency, will, no doubt, soon need to retain its own legislative liaisons, press information officers, lawyers and clerks, all of which will add to the potential administrative costs. The realities of state funding, and accountability, need to be considered when contemplating the creation of such a stand-alone agency. This new agency will have to compete with other, larger agencies for scarce state resources. Retaining the forensic laboratory system as part of the Illinois State Police provides an opportunity for achieving economies of scale and administration, as well as security in funding and accountability that might not otherwise be available for a much smaller, stand-alone agency left to fend for itself.

While this recommendation has facial appeal, it is a better overall policy to ensure that defense attorneys and defendants have access to truly independent forensic work by providing adequate funding for the retention of forensic experts who will advise and consult with the defense on pertinent questions. The state has already taken a major step towards this kind of funding commitment through the creation of the Capital Litigation Trust Fund, which provides for the hiring of third-party experts, with court approval, to review the work of the state's experts. It is believed that a better recommendation and a more comprehensive solution to this issue would be provided by state funding for the creation of a permanent cadre of forensic experts available to defense attorneys for consultation and review of forensic and scientific evidence. Such a group of permanently retained experts would provide a ready and consistent resource for information and assistance to defense attorneys (both privately retained and publicly appointed) about complicated areas of science that are not usually taught in law schools or easily understood. A permanent cadre of experts of this type would save the state and counties money in the long-run. More importantly, a defense scientific services center would guarantee that defendants and defense counsel have access to such expertise without requiring the intervention or permission of the courts or the agreement of prosecutors. There should also be no doubt that such an established and permanently retained cadre of defense experts will serve as an important additional check on the work product of the ISP laboratory system and each of its experts and technicians.

Recommendation 21 :

Adequate funding should be provided by the State of Illinois to hire and train both entry level and supervisory level forensic scientists to support expansion of DNA testing and evaluation. Support should also be provided for additional up-to-date facilities for DNA testing. The State should be prepared to outsource by sending evidence to private companies for analysis when appropriate.

The Commission unanimously supported improvements to funding for forensic scientists in the State lab, regardless of whether the lab becomes an independent entity.[21] Improvements in the technology associated with DNA testing have made it a valuable tool for both prosecution and defense, and

demand for pre-trial DNA testing has increased significantly as testing procedures have improved. The strong demand for DNA testing has created a significant backlog in the State Crime lab with respect to DNA testing. An analysis by the Illinois State Police Division of Forensic Services during 2000 revealed that the average time for completion of DNA testing in state labs was 16.5 months. Recent estimates suggest the backlog has been reduced somewhat. This backlog presents a serious problem as demand for DNA testing to resolve cases continues to expand.

The ISP Division of Forensic Services indicated in 2000 that there were several reasons for the backlog, including staffing issues associated with hiring new entry level forensic scientists and hiring/retention of supervisory personnel. Training of newly hired forensic scientists can take from one to three years, depending on specialty. As a result, even an immediate increase in funding would not begin to address the backlog of DNA cases until some future date. There is also a need to increase supervisory personnel as well. At a legislative hearing in 2001, Illinois State Police Director Sam Nolen indicated that the agency hoped to eliminate the "chronic" backlog of cases awaiting testing by the end of fiscal year 2003 through additional hiring and outsourcing of DNA testing for a three year period.[22] The Governor has already made a significant commitment to both hiring of new forensic scientists and the outsourcing of DNA testing.[23]

The backlog is not merely a problem in Illinois, it is also a problem nationwide. A report by Bureau of Justice Statistics released in February 2000 indicated that as of December 1997, 69% of publicly operated forensic crime labs across the nation reported a DNA analyses backlog 6,800 subject cases and 287,000 convicted offender samples.[24] Indeed, the U.S. Department of Justice announced this summer that it would spend some thirty million dollars to help states complete their analysis work.[25] The funding is designed to help eliminate a backlog of some 180,000 crime scene cases nationwide and offender samples from about 750,000 convicts.[26] The latest report from the Bureau of Justice Statistics, released in January 2002, indicated that in the year 2000, *81%* of DNA laboratories across the country reported backlogs.[27] The backlog of subject cases in 2000 was 16,081, as compared to 6,800 in 1997. It is evident that laboratory backlogs with respect to DNA testing is a national problem, which will require a substantial commitment of both state and federal funds to solve.

Recommendation 22 :
The Commission supports Supreme Court Committee Rule 417, establishing minimum standards for DNA evidence.

The Commission has unanimously supported the provisions contained in new Supreme Court Rule 417. The Rule applies to all felony proceedings, not just capital cases, and has as its stated purpose:

> Rule 417. DNA Evidence
> (a) Statement of Purpose. This rule is promulgated to produce uniformly sufficient information to allow a proper, well-informed determination of the admissibility of DNA evidence and to insure that such evidence is presented competently and intelligibly. The rule is designed to provide a minimum standard for compliance concerning DNA evidence, and is not intended to limit the production and discovery of material information.

It mandates discovery not only of DNA test results, but of underlying technical data which

> . . . are intended to provide the information necessary for a full understanding of DNA test results, and to aid litigants and the courts in determining the admissibility of those results. The rule requires disclosure of information that is, or should be, readily available from any laboratory performing DNA testing. Standardized disclosure requirements should also make responses to disclosure requests less burdensome for laboratory personnel. Committee Comments, Sup. Crt. R. 417

The goal of Rule 417 is to identify, as consistently as current technology will allow, the important information that should be disclosed in connection with DNA testing. In doing so, the Supreme Court Committee recognized that the fast-paced change of DNA technology made such identification an "elusive goal."[28]

Recommendation 23 :
The Federal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database.

The Commission unanimously supports the full funding of a comprehensive DNA database. The creation of a DNA database of potential offenders is part of a nationwide effort to enable law enforcement to solve "cold" cases in which there is little or no information to help identify a suspect other than DNA evidence. This type of database could have provided an earlier resolution of cases such as the Roscetti murder, which occurred more than 15 years ago. The new suspects in the case have both served prison terms, and collection of their DNA might have enabled police to identify the correct suspects at a much earlier point in the investigation.[29]

Such comprehensive DNA databases are being developed as part of CODIS (Combined DNA Index System).[30] All 50 states and the District of Columbia have passed legislation requiring offenders convicted of certain crimes to provide DNA samples. Analysis of those samples results in a DNA profile unique to each individual. These samples are entered into the convicted offender section of CODIS. DNA samples from crime scenes are entered into the forensic index of CODIS. These two indexes are used to generate investigative leads. CODIS began in 1992, and currently holds information from 621,582 convicts and 26,397 crime scenes.[31]

Illinois has adopted a statute which provides for the mandatory testing of certain types of offenders for inclusion in a DNA databank of potential suspects. *See* 730 ILCS 5/5-4-3. The Act was recently amended to expand the database by requiring persons convicted of a broader array of offenses to contribute mandatory blood samples.[32] These DNA databases provide law enforcement with a powerful tool to locate suspects. Some law enforcement agencies have discovered that use of such a database may lead to persons who are already incarcerated for other crimes. It is important to note, however, that mandating the collection of DNA samples from incarcerated persons is only the first, and easiest, step in the process. It is the analysis of the DNA samples by professional laboratory personnel that is time-consuming and costly. The DNA samples collected are all but useless for law enforcement purposes if they are not analyzed and made part of the CODIS system, so that the data can be used by those investigating crime.

The Governor has already committed to the development of a new CODIS laboratory, with construction of facilities anticipated during 2002, to support increased activity related to the development of the CODIS database. Full development of the CODIS database requires a sustained commitment from both State and Federal sources. Substantial funding should be provided for this initiative, in order to promote effective law enforcement. Collection of such samples, and completion of the resulting DNA analyses to permit the data to be included in CODIS is a significant undertaking. The National Commission on the Future of DNA Evidence has recommended ". . . the expeditious analysis and input of untested backlogged samples into the CODIS database system," along with the development of effective systems for the collection of samples.[33] Inconsistencies in federal standards, of course, exacerbate backlogs by requiring re-analysis of previously tested materials. Like existing fingerprint databases, the CODIS system needs to be developed on a national basis to realize the full potential of this investigatory tool. The federal government, with its recent recommendations, must make it a priority to assist every state and local police department in using this technology that can clear the innocent and reliably convict the guilty.

Recommendation 24 :

Illinois statutes should be amended to provide that in capital cases a defendant may apply to the court for an order to obtain a search of the DNA database to identify others who may be guilty of the crime.

The members of the Commission also unanimously supported amending Illinois statutes to insure that the defendant in a capital case has an independent right to search the DNA database to identify those who may be guilty of the crime. In Illinois, an accused may attempt to prove that someone else committed the crime with which he is charged. *People v. Morgan*, 142 Ill. 2d 410, 441 (1991); *People v. Enis* 139 Ill. 2d 264, 281 (1990). In light of the high degree of reliability associated with DNA testing, it has the potential to provide reliable evidence of the involvement of another person in the crime. The evidence is reliable enough that a man recently charged with murder, who gave a

videotaped confession to the State's Attorney, was released and charges dismissed on the basis that the DNA evidence collected at the scene connected another person to the murder.[34]

Illinois has adopted a statute which provides for the mandatory testing of certain types of offenders for inclusion in a DNA databank of potential suspects. 730 ILCS 5/5-4-3. This act was recently amended, effective June 29, 2001, to expand the database by requiring persons convicted of a broader array of offenses to contribute mandatory blood samples.[35] This is similar to statutes adopted in other states, including Florida, North Carolina and Virginia, to develop such databases and is part of a nationwide effort to create offender databases. The Illinois statute limits access to the database as follows:

> (f) The genetic marker grouping analysis information obtained pursuant to this Act shall be confidential and shall be released only to peace officers of the United States, of other states or territories, of the insular possessions of the United States, of foreign countries duly authorized to receive the same, to all peace officers of the State of Illinois and to all prosecutorial agencies. Notwithstanding any other statutory provision to the contrary, all information obtained under this Section shall be maintained in a single State data base, which may be uploaded into a national database, and may not be subject to expungement. 730 ILCS 5/5-4-3.

In Florida, access to such database searches is authorized for "criminal justice agencies." *See* 943.325 (7). The term "criminal justice agencies" is defined by Florida statute as 1. A court, 2. The department [of law enforcement], 3. The Department of Juvenile Justice, 4. The protective investigations component of the Department of Children and Family Services, which investigates the crimes of abuse and neglect, 5. Any other governmental agency or subunit thereof which performs the administration of criminal justice pursuant to a statute or rule of court and which allocates a substantial part of its annual budget to the administration of criminal justice. This definition could be construed to authorize a defendant in Florida, under the authority of a court order, to search the DNA database to locate the offender actually responsible for the crime.

North Carolina statutes similarly provide that in addition to law enforcement agencies, information from the state database shall also be made available "upon receipt of a valid court order directing the SBI to release these results to appropriate parties not listed above, when the court order is signed by a superior court judge after a hearing." Section 15A-266.8 DNA database exchange.

Permitting a defendant to access the DNA database may not only provide information which will potentially exonerate him or her, but may also provide substantive evidence to identify the person actually responsible for the crime. There are instances in other states where such database searches have identified someone else as the person actually responsible for the crime.[36]

Recommendation 25 :

In capital cases, forensic testing, including DNA testing pursuant to 725 ILCS 5/116(3), should be permitted where it has the scientific potential to produce new, noncumulative evidence relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant.

The Commission unanimously adopted this recommendation. The statutory provisions contained in 725 ILCS 5/116 (3) enable a defendant to obtain post-conviction forensic testing. The statute provides as follows:

> Sec. 116-3. Motion for fingerprint or forensic testing not available at trial regarding actual innocence. (a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice of the motion shall be served upon the State. (b) The defendant must present a prima facie case that: (1) identity was the issue in the trial which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect. (c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; (2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

Illinois was at the forefront of efforts to expand post-conviction forensic testing, as one of only two states in the country to offer defendants the opportunity for post-conviction forensic testing to establish innocence.[37] In fact, Illinois served as the model for many of the provisions of the pending federal legislation to create the "Innocence Protection Act". Divergent views with respect to the interpretation of the Illinois statute[38] recently arose in the Illinois Appellate Court. The Illinois Supreme Court granted leave to appeal, *People v. Savory* , 188 Ill. 2d 578 (2000), and resolved the divergent views. The central question in these cases was whether the statute required that the forensic testing be so conclusive so as to completely vindicate the defendant.

The Illinois Supreme Court rendered a decision in *People v. Savory* in May of 2001[39] The Court rejected the restrictive interpretation of the statute adopted by the Third District Appellate Court, noting:

> Thus, evidence which is "materially relevant" to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim. The language used by the legislature in section 116-3 does not support the appellate court's restrictive interpretation of

> the statutory requirements. As our appellate court has noted in other cases involving section 116-3, if the legislature had intended to limit application of the statute to the instances in which a test result favorable to the defendant would, standing alone, lead to his complete vindication, it would have chosen a different way of expressing the statutory requirements. *People v. Savory*, 197 Ill. 2d 203, 213.

The Commission unanimously supports the Supreme Court's interpretation of the statute. Post-conviction DNA testing has already exonerated a significant number of individuals in Illinois. In cases where actual innocence is involved, the better practice is to afford a defendant every reasonable opportunity to establish facts which could lead to his or her exoneration.

Last year, Governor Ryan signed into law an aggressive statute with respect to evidence retention. Illinois statutes now require, effective January 1, 2001, that physical evidence in a murder prosecution must be preserved indefinitely. See 725 ILCS 5/116-4. Under 116-4 (b)(1), retention and preservation of the evidence shall be "permanent" unless the law enforcement agency obtains a court order, with notice to the defendant, permitting its destruction. 116-4 (c.). The requirement that physical evidence be preserved, along with the provisions permitting post-conviction forensic testing, should provide more confidence that every defendant will have the opportunity to establish his or her innocence, whether before or after trial.

Recommendation 26 :

The provisions governing the Capital Litigation Trust Fund should be construed broadly so as to provide a source of finding for forensic testing pursuant to 725 ILCS 5/116-3 when the defendant faces the possibility of a capital sentence. For non-capital defendants, provisions should be made for payment of costs of forensic testing for indigents from sources other than the Capital Litigation Trust Fund.

The Commission has also unanimously recommended that funding under the Capital Litigation Trust Fund[40] be construed broadly to support forensic testing under this section. The statute, which the Governor signed into law in 1999, provides for forensic testing of materials where such testing has the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's claims of actual innocence. The Illinois Supreme Court has construed the statute broadly, so as to eliminate the need for the defendant to demonstrate that testing will completely exonerate him. The Commission has recommended that in capital cases, the statute should be broadly construed so as to permit testing even where the results will not completely exonerate the defendant.

In light of these recommendations and the decision by the Supreme Court, it is prudent to state clearly that the Commission contemplates that where a defendant facing the death penalty is indigent, the costs of forensic testing should be born by the Capital Litigation Trust Fund. Additional funding sources should be identified to provide funds for payment of forensic testing for indigent defendants in non-capital cases.

Notes - Chapter 3

1. For a general discussion of DNA testing, *See Postconviction DNA Testing: Recommendations for Handling Requests,* National Institute of Justice, September 1999, Chapter 3.

2. Restriction Fragment Length Polymorphism Testing.

3. Polymerase Chain Reaction testing of Nuclear DNA.

4. For a more detailed discussion of the differences in testing, see "Postconviction DNA Testing: Recommendations for Handling Requests," National Institute of Justice, September 1999, Ch. 3.

5. *See*, "Three Cleared by DNA Tests Enjoy Liberty After 15 Years," New York Times, December 6, 2001; Chicago Tribune series re: same.

6. More sophisticated DNA testing became available during the 1990's, and played a role in the ultimate release of Verneal Jimerson and Dennis Williams (two of the four men referred to as the "Ford Heights Four"), Ronald Jones, Rolando Cruz, and Alex Hernandez.

7. "Seattle man charged in Green River Cases: DNA tests link truck worker to 4 deaths in '80s," Chicago Tribune, December 6, 2001. The Tribune article described the December arrest of Gary Leon Ridgway, after "new and sophisticated DNA tests" linked him to semen found in four murder victims, all killed in the early 1980's.

8. "Man Charged in 7 Slayings," Chicago Tribune, June 15, 2001.

9. *See* "State offers new Roscetti case details," Chicago Tribune, February 9, 2002.

10. "Oklahoma Police Lab Scientist Probed," Chicago Tribune, May 2, 2001.

11. "Oklahoma to revisit 3 murders," Chicago Tribune, July 18, 2001.

12. According to the opinion, Ms. Gilchrist testified at trial that a follow up DNA test by the FBI lab was "inconclusive" when, in fact, her own notes of the telephone conversation with the FBI lab indicate that the FBI results did not implicate the defendant and in fact, undermined Ms. Gilchrist's opinions. 262 F. 3d 1063-4.

13. A complete copy of the 1997 report, and the one year follow-up report, is available on the U.S. Department of Justice website: http://www.usdoj.gov/oig/igspecr1.htm.

14. *See*: *The FBI Laboratory: an Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, U.S. Department of Justice, Office of the Inspector General, April, 1997, Executive Summary; http://www.usdoj.gov/oig/fbilab1/00exesum.htm.

15. *See: The FBI Laboratory One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (June, 1998)*, U.S. Department of Justice, Office of the Inspector General, June, 1998; http://www.usdoj.gov/oig/fbi11yr.htm.

16. The recent events involving the Roscetti murder, in which the conduct of an employee of the state lab has been called into question, have received much attention in the media. Although the person involved currently is employed by the state forensic lab, the allegations of misconduct stem from work completed at a time when she was employed by a crime lab operated by the Chicago Police Department. The Chicago Crime lab was merged with the State lab in 1996. See "Crime lab defends itself, analyst," Chicago Tribune, July 20, 2001.

17. *Survey of DNA Crime Laboratories, 1998*, Bureau of Justice Statistics, U.S. Department of Justice, February 2000, NCJ 179104 .

18. Barry Scheck, Peter Neufeld, Jim Dwyer, *Actual Innocence*, New York: Doubleday (2000), p. 122.

19. Id.

20. Id. at 125.

21. Overall funding issues are discussed in Chapter 13 of this Report.

22. "Crime lab defends itself, analyst," Chicago Tribune, July 20, 2001.

23. A firm commitment was made by Governor Ryan during 2001 to the hiring of additional staff, and the state has begun the hiring process for some 80 new forensic scientists. In addition, the state has been outsourcing DNA testing for almost 3 years, involving an annual funding commitment of approximately 2.5 million dollars.

24. "Subject" cases refer to cases in which DNA is collected at a crime scene; "convicted offender samples" are for the computerized database CODIS.

25. "U.S. Targets DNA backlog: Agency to spend $30 million to aid state crime labs," Chicago Tribune, August 2, 2001.

26. Id.

27. *See: Survey of DNA Crime Laboratories, 2001*, Bureau of Justice Statistics, U.S. Department of Justice, January 2002, NCJ 191191.

28. Report, p. 67.

29. *See*: "State offers new Roscetti case details," Chicago Tribune, February 9, 2002.

30. *Survey of DNA Crime Laboratories*, 1998, Bureau of Justice Statistics Special Report, February 2000, NCJ 179104, p. 8.

31. "U.S. targets DNA backlog," Chicago Tribune, August 2, 2001.

32. P.A. 92-0040.

33. Information about the recommendations of the National Commission DNA Evidence can be found at www.ojp.usdoj.gov/nij/dna/codisrc.html.

34. "Cops urged to tape their interrogations," Chicago Tribune, January 6, 2002; the article details the arrest and release of Corethian Bell, who confessed in a videotaped statement that he stabbed his mother. According to the article, Mr. Bell is mildly mentally retarded, and DNA testing ultimately linked another person already in jail for a similar crime, to the murder.

35. P.A. 92-0040.

36. *See*: *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice Research Report, 1996 (case of Ronald Cotton).

37. See: Barry Scheck and Peter Neufeld, "DNA and Innocence Scholarship," in *Wrongly Convicted: Perspectives on Failed Justice*, ed. by Saundra D. Westervelt and John A. Humphrey, Rutgers University Press: New Brunswick; 2001, p. 245.

38. Compare: *People v. Savory*, 309 Ill. App. 3d 408 (1999; Third Dist.), *People v. Rokita*, 316 Ill. App. 3d 292 (2000; Fifth Dist.) and *People v. Urioste*, 316 Ill. App. 3d 307 (2000; Fifth Dist.).

39. *People v. Savory*, 197 Ill. 2d 203 (2001).

40. The Capital Litigation Trust Fund was created as part of the Capital Crimes Litigation Act. A complete copy of the Act is contained in the Technical Appendix to this Report, published separately.

Chapter 4 – Eligibility for Capital Punishment

Not every first degree murder case is eligible for the death penalty. This Chapter addresses the issue of how eligibility for the death penalty should be determined. The United States Supreme Court requires that States narrow the potential class of those eligible for capital punishment by adoption of statutes which apply the death penalty to some, but not all murders. The Commission recommends substantial revision to the factors which enable the state to seek the death penalty. Members of the Commission unanimously agreed that the list of 20 eligibility factors existing under Illinois law should be reduced, and a majority of members favor limiting death eligibility to just five well-defined factors. While Commission members believe that all murders are very serious, the death penalty should be reserved for only the most heinous of these crimes.

INTRODUCTION

In Illinois, as elsewhere, statutes imposing capital punishment identify certain factors related to the murder which make it death-eligible. The United States Supreme Court has found that sentencing schemes which do not channel the discretion of the sentencer violate the Constitution. The death penalty cannot be applied broadly to every murder case[1]. In the years following *Furman*, states with the death penalty adopted a variety of standards to distinguish between those murders deserving of a sentence of death and those deserving of a lesser punishment.

These standards are referred to in this Report as "eligibility factors." Some states refer to them as "aggravating factors". In Illinois, a person convicted of first degree murder cannot be sentenced to death unless one of the statutory eligibility factors is present. The purpose of these eligibility factors is to narrow the class of people upon whom the sentence of death may be imposed. *Zant v. Stephens*, 462 U.S. 872, 103 S. Ct. 2733 (1983) As the United States Supreme Court noted in *Zant*:

> . . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . Our cases indicate, then that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. 462 U.S. 862 at 878.

In Illinois, the death penalty is imposed in a bifurcated proceeding. The first step in the proceeding is to establish that the crime committed by the defendant fits into one of the defined factors that will make the defendant death eligible. It is the responsibility of the prosecution to prove beyond a reasonable doubt

that the defendant fits into one of the statutory eligibility factors. The prosecution is also required to prove that the defendant was 18 years of age or older at the time of the crime, as Illinois does not impose the death penalty on persons under the age of 18.[2] Once the defendant is found to be death eligible, the proceedings move on to the second stage, where the prosecution may present additional material in aggravation to establish why this particular defendant should receive the death penalty. The defendant is entitled to present mitigating evidence, that is, evidence which establishes why the death penalty should not be imposed.

Although Illinois has 20 eligibility factors, an analysis of the cases in which a death penalty has been imposed since 1977 reveals that only about half of those eligibility factors have ever been relied upon in reported opinions, and a relatively few of them are used regularly.[3] The vast majority of death penalty cases in Illinois are based either upon the multiple murder eligibility factor[4] or the "course of a felony" eligibility factor[5]. Other eligibility factors appear at much lower rates in reported decisions.[6]

SPECIFIC RECOMMENDATIONS

Recommendation 27 :
The current list of 20 eligibility factors should be reduced to a smaller number.

The Commission unanimously recommended that the current list of eligibility factors be reduced. The Illinois death penalty statute contains a list of twenty eligibility factors which can result in the imposition of the death penalty. The statute, in its entirety, is set forth in the Appendix to bound with this Report. The current list of eligibility factors contained in the statute covers a broad array of circumstances, including multiple murders, murder of a police officer, and murders occurring in correctional institutions (both inmates and staff). Some have suggested that due to the large number of eligibility factors, nearly every first degree murder in Illinois could be eligible for the death penalty under one theory or another.[7] There is no prohibition against basing death eligibility on more than one factor, and a number of cases in Illinois involving the death penalty rely upon allegations that the defendant is death eligible based upon two, and sometimes three, eligibility factors.[8]

The original post-*Furman* death penalty act in Illinois, subsequently found invalid in *Rice v. Cunningham*, 61 Ill. 2d 353 (1975), contained six eligibility factors.[9] The subsequent 1977 statute, when originally enacted, had only seven eligibility factors. The Act included as eligibility factors the murder of a peace officer or firefighter; a murder of a correctional officer or a murder at a correctional facility; multiple murders; murder occurring in the course of a hijacking; contract murder; murder in the course of one of nine enumerated felonies; and the murder of a witness.[10]

Aside from minor changes and some technical amendments to reflect recodifications of other laws, the basic framework for the death penalty statute remained unchanged through much of the 1980's. Major additions to the statute began to occur in the late 1980's, and in the early 1990's, which ultimately expanded the scope of the statute to its present structure with some 20 eligibility factors.[11] The

"course of a felony" eligibility factor has been amended to include some 15 qualifying felonies, which has also expanded the range of cases eligible for the death penalty.

It appeared to the members of the Commission that to the extent that the death penalty was to remain an effective statute in terms of achieving its constitutional objective of narrowing the class of cases to which the penalty should be applied, the number of eligibility factors should be reduced. There are other, very serious penalties available under Illinois law to punish those committing first degree murder. Illinois has among its sentencing options, the penalty of "natural life", which means that a defendant is never eligible for parole.[12] Leaving aside moral issues about retribution, the penalty of "natural life" represents a serious penalty which both punishes the perpetrator and protects society from further harm. The Commission members unanimously expressed the view that the current proliferation of eligibility factors, as found in the Illinois death penalty statute, was unwise.

In addition, although Illinois has a statute with some 20 eligibility factors, relatively few of them are actually used. An analysis of the more than 250 cases in which the death penalty has been imposed in Illinois since 1977 revealed that, although Illinois has some twenty separate factors which might make a first degree murder case eligible for the death penalty, only two eligibility factors account for the vast majority of cases in which capital punishment has been imposed.[13] Almost half of the cases in which the death penalty has been imposed have been based upon the multiple murder eligibility factor, (b)(3). A large number of cases also involve the "course of a felony" eligibility factor (b)(6).[14] These two eligibility factors occur together in roughly 17% of the cases.[15] After eliminating those cases in which the multiple murder factor and the "course of a felony" factor appear together, the "course of a felony" eligibility factor accounts for just over 40% of the cases in which the death penalty has been imposed. The other eligibility factors which appear in reported decisions of the Illinois Supreme Court, six eligibility factors altogether, appear at much lower rates in reported decisions.

Reducing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied in Illinois, and provide greater clarity in the statute, while retaining capital punishment for the most heinous of homicides. The scope of the statute should be narrowed.[16]

Recommendation 28 :
There should be only five eligibility factors:

(1) The murder of a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.

(2) The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
(3) The murder of two or more persons as set forth in 720 ILCS 5/9-l(b)(3), as that provision has been interpreted by the Illinois Supreme Court.

(4) The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.

(5) The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

A majority of Commission members supported this recommendation to reduce the eligibility factors under Illinois law to the five factors enumerated above. This recommendation represents, in the Commission majority's view, a list of eligibility factors which will serve to achieve the Constitutional requirement of appropriately limiting the class of those who are eligible for the death penalty in Illinois.

Making any recommendation of this type necessitates a determination about which murders should be eligible for the death penalty. Any comparison of the gravity of individual murders is inherently problematic. In every murder case, the loss to the victim, and to his or her surviving loved ones, is immeasurable. Consoling the surviving family members of homicide victims for such a loss is particularly difficult because the death has resulted not from illness or accident, but from the conscious act of another human being. Yet in reauthorizing the death penalty in several cases[17], the United States Supreme Court has said that execution is not permissible for all first-degree murders, and that a state must have a rational manner, free of arbitrariness, for choosing those deliberate killings to be punished capitally.

It was the considered and unanimous judgment of the Commission that the number of eligibility factors in the Illinois death penalty scheme needed to be reduced. The continued expansion of the list of eligibility factors has placed significant burdens upon the criminal justice system, as prosecutors and courts struggle to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system, and, more important, reflect a degree of arbitrariness, when decisions across the state are compared.

There are various policy rationales which are advanced in support of the death penalty. One rationale that is frequently mentioned is that the death penalty operates as a general deterrent to murder. The merits of this proposition have been debated for decades now. Clear statistical evidence that would support capital sentencing on this basis is lacking; indeed, many academics suggest that existing studies tend to show that capital punishment is *not* a general deterrent to murder. *See: Murder, Capital Punishment, and Deterrence: A review of the evidence and an examination of police killings,* by William C. Bailey and Ruth Peterson (50 Journal of Social Issues 53 (Summer 1994); *Deterrence and the Death Penalty: The Views of the Experts* by Michael L. Radelet and Ronald L. Akers (Journal

of Criminal Law and Criminology, Northwestern University, Vol. 87, No. 1, Fall 1996) and *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, by Craig J. Albert (60 U.Pitt.L.Rev.321, Winter, 1999). While there have been some studies which claim to have found a deterrent effect (Ehrlich, I, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, American Economic Review, Vol. 65, 397-17; Dezhbakhsh, H. et al, *Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, January 2001), the greater weight of the research finds no evidence that the death penalty is a measurable general deterrent to murder. It is the view of those Commission members in the majority on this point that general deterrence cannot be used to justify the death penalty.

Accordingly, the Commission members in the majority have recommended significantly reducing the number of factual circumstances qualifying a person convicted of murder for eligibility for the death penalty, limiting it to the most heinous homicides and to other circumstances widely regarded as presenting compelling public policy concerns in favor of execution. There are several principal policy rationales which seemed to provide compelling justification for capital punishment to those who do not reject the death penalty on moral or other grounds:

1. Certain crimes, even when compared to other first-degree murders, are so heinous and shocking that any other community response minimizes the magnitude of the offense, and

2. Incapacitating persons with a clearly demonstrated propensity to murder again, and

3. To provide punishment in factual situations where a capital sentence is the only form of meaningful punishment, such as where a person already sentenced to life imprisonment commits murder, and

4. Circumstances where paramount state interests have long been believed to exist, such as in the case of murdered law enforcement officers and firefighters whose lives are at risk every day for the sake of public safety.

If the death penalty continues to be applied in Illinois, a majority of Commission members believed that it should be tailored to further these objectives, while minimizing the opportunities for arbitrary application of this most severe form of punishment.

<u>Murders of peace officers, firefighters and of any person at a correctional institution</u>
There are some unique situations where a unique societal response is extremely important from a public policy point of view, and where paramount state interests have long been believed to exist. These proposed eligibility factors were included in the original death penalty scheme, subsequently held unconstitutional by the Illinois Supreme Court in *Rice*, and in the 1977 Act which replaced the 1973 Act . Police officers and firefighters are placed in dangerous situations on a daily basis, including the risks associated with potentially violent situations. The most severe penalties available should be imposed on someone convicted of the murder of a police officer or firefighter.

The context of a correctional institution also presents a unique situation requiring such a unique response. These institutions are responsible for the care and management of a population which is significantly more violent than the population outside. Correctional officers similarly place themselves, on a daily basis, in a job which exposes them to a significant risk of harm. It is also important that fellow inmates be protected from violent conduct and risk of death so that order can be maintained in correctional institutions. Furthermore, because many prisoners are already serving extended prison terms or life sentences, the death penalty serves as the only punishment for murder. Any defendant who is convicted of a murder occurring at a correctional institution of any person in the institution, such as a correctional officer, inmate or visitor, should be eligible for the death penalty.

Multiple murders

The Commission has also recommended retention of the multiple murder eligibility factor, as it has been construed by the Illinois Supreme Court. That eligibility factor provides as follows:

> (3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another;

The provisions of the multiple murder eligibility factor require either that the defendant commit two murders in a single incident, or that the defendant commit only one murder but has a prior conviction for first degree murder. The eligibility factor is already narrowly drawn to require that the defendant be convicted of either intentional murder, or of acts which he should know would result in death or great bodily harm.

The Illinois Supreme Court has construed this eligibility factor so as to require the State to show a specific mental state – either intentional murder or "knowing" murder, where the State establishes that the defendant knew that the activity would cause death or a strong probability of death.[18] Under this interpretation, a conviction for first degree murder based upon a felony murder theory would not, by itself, justify the imposition of the death penalty. The Supreme Court has held in a series of cases that the State *must* prove the requisite mental state. *See People v. Chapman*, 194 Ill. 2d 186 (2000), (jury's finding of guilt on two separate counts of intentional murder legally sufficient to sustain their subsequent finding of death eligibility under (b)(3)); *People v. Caballero* 102 Ill 2d 23 (1997) (intent required for felony murder is only that to commit underlying felony; (b)(3) requires separate intent to kill (as does (b)(6)), although defendant may be convicted on an accountability theory for conduct evidencing his intention to commit premeditated murder); *People v. West*, 187 Ill. 2d 418, (1999) (reversing death sentence on the ground that the State had failed to affirmatively prove that the defendant's prior murder conviction involved intentional or knowing murder).

Murder involving torture

This recommendation also suggests a revised statement of the eligibility factor concerning torture. Consistent with the view of the Commission's majority that a death penalty scheme should address the most aggravated and shocking murders, a recommendation has been made to clarify the terms under which a person committing a murder involving torture would be eligible for the death penalty. Illinois currently has an eligibility factor based on torture, which reads as follows:

> The murder was intentional and involved the infliction of torture. For the purpose of this section, torture means the infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the victim. 720 ILCS 5/9-1(b)14

The Commission recommends that the language be altered to provide as follows:

> The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.

A number of states include an eligibility factor within their death penalty schemes based upon circumstances of the death demonstrating brutal, heinous activity or activity involving wanton cruelty. The Commission examined provisions from several states with respect to definitions of torture, including Arkansas[19] and New York[20]. The recommendation advanced above is a combination of the provisions contained in the Arkansas and New York statutes.

Murder which impacts the judicial system

The final provision that the Commission majority recommends has to do with a murder that essentially obstructs justice or impedes the investigation or prosecution of a crime. Illinois has a provision relating to the murder of a witness, which provides as follows:

> the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another 720 ILCS 5/9-1(b)(8)

The Commission majority has recommended that a provision be retained substantially as follows:

> The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

The intention of the recommendation is to broaden the scope of (b)(8) somewhat by making a murder of anyone connected with the system, whether as a witness, juror, judge, prosecutor, defense attorney or investigator, eligible for the death penalty. This adjustment reflects an analysis of the eligibility factors from other states, and advances the goal of insuring the integrity of the judicial system. Murders which seek to obstruct justice or impede the investigation or prosecution of a crime affect the underlying integrity of the system in a serious way. As important, for a defendant or suspect facing the prospect of a prison term for much or all of his life, a death sentence will often represent the only significant enhancement in punishment beyond that which the offender already faces.

Exclusion of "course of a felony" eligibility factor

Commission members in the majority on this recommendation recognize that one of the more controversial issues with respect to the proposal for the new and severely curtailed death penalty scheme is the elimination of the "course of a felony" eligibility factor (9-1(b)(6)). The exclusion of this factor was not an oversight by the Commission, and there are a number of reasons for the recommendation.

The "course of a felony" eligibility factor, when originally enacted in the 1977 Act, enumerated nine felonies which resulted in the potential for death eligibility. The list of felonies contained in the "course of a felony" eligibility factor has now increased to fifteen.[21] Despite the fact that the eligibility factor is narrowly drawn in terms of its requirement for actual participation in the killing by the defendant and intent on the part of the defendant, the long list of felonies included within its scope could make almost any first degree murder eligible for the death penalty. While a majority of Americans both inside and outside Illinois support the concept of a death penalty, it is unlikely that support extends to making every murder death eligible. A statutory scheme which makes every murder death eligible would also run afoul of constitutional concerns.

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.

A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murderers, this eligibility factor

does not advance that goal. Under this eligibility factor, all that is required for death eligibility is that the defendant personally participate in (or be legally accountable for) conduct which he knows will cause death or which he should know will cause death, and that the activity is committed in the course of one of the enumerated felonies. This means that a defendant who robs a store, and who commits a single murder during the course of that robbery, can be sentenced to death even if this is a first offense and there is no substantial criminal record. While such a defendant *should* be subject to a serious punishment for the taking of a life, this type of offense differs substantially from a situation where the defendant has killed multiple times. Although making judgments which differentiate between murders may be difficult, it must be done in order to insure that the capital sentencing process sufficiently narrows the class of those eligible for the death penalty.

It is true that the "course of a felony" eligibility factor reaches some murders which are also heinous and brutal. However, it was the view of Commission members in the majority on this proposal that it invites the possibility of excessiveness in the death sentencing process and should therefore be eliminated as a factor making the defendant eligible for the death penalty. Other serious penalties exist which will serve the ends of justice sufficiently in this instance.

Research undertaken by the Commission with respect to eligibility factors revealed that although this eligibility factor is used frequently by Illinois prosecutors, it is also frequently combined with other eligibility factors.[22] In light of this, its elimination will not necessarily limit the prosecutor's ability to seek and obtain a death penalty in Illinois, including in many cases to which this factor had previously been applied.

Minority view - Limitation on eligibility factors

Commission members in the minority on this issue generally support the concept that the number of eligibility factors existing under Illinois law should be reduced. The legislature should undertake a serious debate on this issue, with the intention of addressing the problems presented by a proliferation of eligibility factors. Although Commission members unanimously support the concept of reducing the number of eligibility factors, there is a divergence of views about whether the eligibility factors enumerated by the Commission members in the majority represent the most appropriate framework.

Missing from this list is the provision which makes a defendant eligible for the death penalty for committing a murder in the course of a felony (9-1(b)(6)). The existing eligibility factor under Illinois law reads as follows:

> (6) the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual: (i) was actually killed by the defendant, or (ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally

accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act, streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act, or the attempt to commit any of the felonies listed in this subsection (c);

Nearly every state with a death penalty scheme has an eligibility factor based upon a murder occurring in the course of a felony. In Illinois, the eligibility factor has been narrowly crafted to require (i.) personal participation by the defendant in the killing, or (ii.) conduct for which the defendant is legally accountable which results in the death. It also requires that the defendant either have intended the killing, or have the knowledge that the actions create a strong probability of death or great bodily harm. Mere participation in a felony in which someone is inadvertently killed would not result in death eligibility. Eligible felonies under the statute are serious felonies involving the potential for serious bodily injury.

A version of the "course of a felony" eligibility factor was included in the original death penalty scheme passed following *Furman v. Georgia*. See *Rice v. Cunningham*, 61 Ill. 2d 353, 357 (1975). The "course of a felony" factor was included in the subsequent re-enactment of the death penalty scheme, following the Supreme Court's finding that the initial statute was unconstitutional in *Rice*.

It is the view of Commission members in the minority on this issue that there are sound policy reasons for including the "course of a felony" eligibility factor in the statute. This statutory provision permits the application of the death penalty to some murders which are, in fact, quite brutal and heinous. Regardless of whether it acts as a specific deterrent, it places the responsibility for the consequences of violent conduct squarely on the shoulders of those who choose to commit such acts. The Illinois legislature has generally supported the "course of a felony" eligibility factor as a means of seeking to deter violent crime.

As the Commission's research on the eligibility factors shows, the "course of a felony" eligibility factor is one that is frequently relied upon by prosecutors in Illinois to seek the death penalty. The fact that juries have been, and continue to be, willing to impose the death penalty in circumstances described by that eligibility factor displays a societal consensus that such crimes represent instances where death is an appropriate penalty.

Notes - Chapter 4

1. The mandatory application of the death penalty was held unconstitutional in *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001 (1976).

2. The statute provides: (b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: . . ."(the eligibility factors follow).

3. The Commission's analysis identified eight of the twenty existing eligibility factors as having appeared in reported decisions of the Illinois Supreme Court in death penalty cases. Additional information regarding the eligibility factors appearing in reported decisions is contained in the Technical Appendix to this Report, published separately.

4. (b)(3) of the statute, which makes a defendant eligible for the death penalty where he or she has been convicted of two or more intentional murders. *See* 720 ILCS 5/9-1(b)(3).

5. (b)(6) of the statute, which makes a defendant eligible for the death penalty where he or she has committed an intentional murder, or committed acts which he or she knows should result in death or great bodily harm, in the course of one of the fifteen felonies enumerated in the statute. *See* 720 ILCS 5/9-1(b)(6).

6. Information about eligibility factors in reported decisions is contained in the Technical Appendix, published separately.

7. If this is in fact true, then the Illinois statute would run likely run afoul of constitutional requirements; *See*, for example, *Roberts v. Louisiana*, 428 U.S. 325 (1976) invalidating a Louisiana scheme which imposed a mandatory death sentence for murders falling into any one of five categories.

8. The eligibility factors which appear in reported decisions from the Illinois Supreme Court are described in the Technical Appendix, published separately.

9. Murder of a peace officer or fireman, murder of an employee of DOC or someone present at the institution, multiple murder, murder resulting from a hijacking, murder pursuant to a contract, murder in the course of one of five enumerated felonies. *Rice*, 61 Ill. 2d 356-7.

10. See P.A. 80-26.

11. The Appendix found at the end of this Report contains a chart displaying the various public acts which have revised the death penalty statute with respect to eligibility factors.

12. *See* 730 ILCS 5/3-3-(d) "No person serving a term of natural life imprisonment may be paroled or released except through executive clemency."

13. The Commission's analysis reviewed cases in which the death penalty had been imposed and the Illinois Supreme Court had issued an opinion. The Appendix to this report contains summaries of the results of this research. Additional detail with respect to the method used to gather and analyze data, along with tables displaying the cases reviewed, is contained in the Technical Appendix to this Report, published separately.

14. Tables in the Technical Appendix to this Report display the number of cases in which a particular eligibility factor appears. The multiple murder factor appears in just over 46% of reported Illinois opinions, while the "course of a felony" factor appears in 60%. Of the other factors which appear in reported decisions, only one appears in more than 10% of the cases, and the others appear at rates that are substantially below 10%. (Note: figures will not add to 100%, as more than one factor may be present in a given case.)

15. As more than one eligibility factor may appear in a particular case, percentages used in this section will not equal 100 % As a result, statistics have been reported on the basis of the percentage of cases in which that eligibility factor appears, regardless of other eligibility factors which may also be present in the case.

16. At least one prosecutor has suggested that states can avoid problems by narrowing the scope of the eligibility factors in their sentencing schemes. DuPage County Prosecutor Joseph Birkett recommended that the State of Washington could improve its death penalty scheme by limiting the eligibility factors to the "most common reasons for putting someone on death row." *See*, special series on Washington's death penalty, Seattle Post-Intelligencer, August 7, 2001.

17. *See Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983), especially footnote 15.

18. Illinois has one first degree murder statute, but three types of first degree murder which may be proven. The first is an intentional form of murder, where the defendant actually intends to murder the person. The second is often referred to in the case law as "knowing" murder, where the defendant commits acts without the specific intent to kill someone, but in committing those acts the defendant should know that death or great bodily harm would result. The third form of 1st degree murder is "felony" murder, where a death results as a result of the commission of a felony by the defendant. Felony murder does not require an intent to kill. *See e.g.: People v. Brownell*, 79 Ill. 2d 508, 524 (1980) (No distinction in Illinois between capital and non-capital murder); *People v. Caballero*, 102 Ill. 2d 23, 44 (1984).

19. Arkansas, A.C.A.5-4-604 (8)(A).

20. New York Consolidated Penal Laws – 125.27, (x).

21. 720 ILCS 5/9-1(b)(6)(c) provides as follows: the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal

sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act, streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act, or the attempt to commit any of the felonies listed in this subsection (c).

22. These two eligibility factors appear together in roughly 17% of reported cases.

Chapter 5 – Prosecutors' Selection of Cases for Capital Punishment

This Chapter focuses on the responsibility of the prosecutor to select cases in which capital punishment will be sought. Existing Illinois Statutes grant broad discretion to the State's Attorney of an individual county on the question of whether or not to pursue capital punishment. The Commission unanimously recommends that voluntary statewide standards be adopted by prosecutors in Illinois to identify when capital punishment should be sought in a particular case. A majority of Commission members believe that a mandatory, state-wide review of prosecutorial decisions about whether to seek capital punishment should be instituted. Commission members unanimously support the recently adopted Supreme Court rule which requires the prosecutor to give notice to the defendant within 120 days of the State's intention to seek the death penalty.

INTRODUCTION

Under the Illinois death penalty scheme, a sentencing hearing to impose the death penalty is conducted "Where requested by the State," (720 ILCS 5/9-1(d)). This provision has been interpreted to grant broad discretion to an individual state's attorney as to whether or not to seek the death penalty in a particular case. Generally speaking, prior to the adoption of the 1977 Act, the question of sentence was considered to be primarily a judicial function. The 1977 Act specifically delegated the decision whether or not to seek this severe sentence to the prosecution, and the Illinois Supreme Court has held that this legislative grant of discretion is valid. *Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979).

Following *Carey*, the Illinois Supreme Court has continued to hold that the delegation of authority by the legislature to the prosecution valid. While there have been cases challenging this devolution of power to state's attorneys on the ground that the discretion vested in an individual prosecutor is without appropriate standards, the Illinois Supreme Court has found that the statute does not violate constitutional rights.[1]

SPECIFIC RECOMMENDATIONS

The Commission recognized that there is value to the idea of granting discretionary authority to prosecutors to make decisions about whether to seek death in a particular case. Commission members were unanimously of the view that improvements could be made to the process by which those

determinations are made. Commission members had varying opinions as to the best method to make such improvements.

Recommendation 29 :
The Illinois Attorney General and the Illinois State's Attorneys Association should adopt recommendations as to the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court rule or legislation.

One of the criticisms of the operation of the Illinois death penalty scheme has been that the statute granting this discretion to the prosecution contains no standards elucidating the criteria to be considered in determining whether or not to seek the death penalty in a particular case.[2] In some counties, prosecutors have established procedures which define a process they will follow to determine whether or not to seek the death penalty. This process may include meetings with defense counsel and consideration of both aggravation and mitigation evidence at an early stage in the proceedings.

However, there is no *requirement* that the prosecutor in an individual county follow *any* of these processes in reaching his or her decision about whether to seek the death penalty. As a result, the decision making process in each of the 102 counties in Illinois can be, and often is, different. While individualized decision-making can be a desirable goal, there is a strong societal interest in insuring that the criminal laws of the state are applied in a uniform method throughout the state.

The Commission unanimously recommends that written state-wide protocols be adopted voluntarily, based upon input from both the Illinois Attorney General and the Illinois State's Attorneys Association. The recommendation suggests that procedures be developed voluntarily, and not imposed on prosecutors by legislation or the Illinois Supreme Court.

In considering this recommendation, the Commission reviewed state-wide protocols in effect in the state of New Jersey which guide county prosecutors in making death penalty determinations. These written guidelines are developed by the New Jersey Attorney General, who, by virtue of decisional law, has general supervisory authority over County Prosecutors in the state. The preamble to the written New Jersey guidelines provides, in part, as follows:

> Because of the significance of the concerns of the legislature for the victims of these egregious crimes and also as to the penalty involved, the prosecutor must establish guidelines which ensure a rational procedure for the designation of a capital case. Because there are twenty-one county prosecutors, each must screen the homicide cases occurring within his respective jurisdiction and decide whether or not the statutory notice of aggravating factors should be filed in a particular case. It is through this charging process that each prosecutor implements the

> intent of the legislature and ultimately that of the people of the State. Is it neither desirable nor acceptable to have a capital charging standard dependent upon individual attitudes.[3]

The guidelines include a requirement that each county prosecutor establish within his or her office a committee to review homicide cases in which the death penalty may be sought, to assist the prosecutor in making the determination as to whether to seek the death penalty. The prosecutor is required to evaluate whether there is proof beyond a reasonable doubt of at least one aggravating factor in the case, and to consider "all known information tending to establish mitigating factors in the case" in determining whether a case warrants a death penalty prosecution.

State's attorneys in Lake, DuPage and Cook Counties have advised the Commission that they already utilize the concept of a review committee within their respective offices to assist the State's attorney in screening cases which are potentially eligible for the death penalty. It is a good idea to constitute such an internal review committee to provide a thorough analysis of whether a particular case warrants the death penalty. Written state-wide protocols for prosecutors would provide voluntary guidance for all prosecutors in the state with respect to how such an evaluation may best be conducted. For example, in making a decision about whether to pursue the death penalty, an individual prosecutor should consider not only whether the case meets the basic requirements to be death eligible under the statute, but should also consider the degree to which the evidence is sufficient to warrant such a serious penalty. Some prosecutors also consider the character and background of the defendant, including any potential mitigating evidence, as critical to their decision-making process. State-wide protocols would insure that prosecuting attorneys give careful consideration to all aspects of the case in making the ultimate decision about whether to seek the death penalty.

The federal death penalty is administered throughout the United States pursuant to written protocols contained in the U.S. Attorney's Manual.[4] Section 9-10.080, Standards for Determination, provides, in part, as follows:

> In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be provable by admissible evidence beyond a reasonable doubt. Because there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. The analysis employed in weighing the aggravating and mitigating actors that are found to exist should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating

factors. Weak aggravating or mitigating factors may be accorded little or no weight. Finally, there must be substantial admissible and reliable evidence of the aggravating factors.

The written protocols do not substitute for the individualized determination with respect to particular cases, but they do suggest the manner in which evidence should be weighed, and factors in both aggravation and mitigation considered.[5] Such protocols provide important guidance in how to approach an evaluation which potentially involves the difference between life and death.

Recommendation 30 :

The death penalty sentencing statute should be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. In the absence of legislative action to make this a mandatory scheme, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor will commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The state-wide review committee would be composed of five members, four of whom would be prosecutors. The committee would develop standards to implement the legislative intent of the General Assembly with respect to death eligible cases. Membership of the committee, its terms and scope of powers are set forth in the commentary below.

While Commission members unanimously supported the development of voluntary statewide standards by prosecutors, a majority of the members of the Commission expressed the view that this alone was not enough to insure uniform, statewide application of the death penalty and prevent disproportionate application of the death penalty statute. As a result, Commission members supported the creation of a state-wide review committee constituted as follows:

Composition: The state-wide review committee would be composed of 5 members: (1) the elected Attorney General or his or her designee; (2) the elected State's Attorney of Cook County or his or her designee; (3) the current president of the Illinois State's Attorneys Association; (4) a State's Attorney from some County other than Cook chosen by a lottery; and (5) a retired judge, preferably with experience in criminal law and/or appellate level cases, who would be appointed by the Governor.

Terms of members: The Attorney General and the State's Attorney of Cook County would serve on the Committee during their four year terms of office (due to the difference in election schedules, these two terms would actually be staggered). The President of the State's Attorney's Association would serve for a one year term. The State's Attorney chosen by lottery would serve

for a one year term. The Retired Judge would serve for a four year term. In this way, there would be a majority of the members who would serve four year terms (although staggered somewhat) so the Committee would have stability; there would be several members with shorter terms to enable a rotation through the process with some regularity.

Scope of powers: The purpose of the state-wide committee is to review and approve the decision to seek the death penalty in death eligible cases. The Committee would grant approval by majority vote. The review should be confidential, and based upon standards developed by the Committee to carry out the intentions of the legislature with respect to the death penalty statute. Defense counsel should be allowed to present information to the Committee with respect to the defense view of whether the death penalty is appropriate. Information presented to the Committee would be available to both sides (prosecution and defense), except that defense counsel could request confidentiality of information that would not otherwise be subject to discovery. The prosecution could request confidentiality of information necessary to protect the security of any individual.

The state-wide review committee proposed in this recommendation would address more directly the challenge of how to promote uniformity throughout the state with respect to standards for deciding whether or not the death penalty should be sought in a first degree murder case. The recommendation contemplates that the state-wide review committee would have responsibility for approving the decision to seek the death penalty by an individual prosecutor. If the review committee did not approve the decision to seek death in a particular case, the prosecutor would not be authorized to seek the death penalty.

The Commission contemplates that this recommendation would be incorporated into the death penalty statute, and that the review by the committee of the decision to seek the death penalty would be mandatory. The Commission also considered the impact of the new Supreme Court rules, effective March 1, 2001, which now require the State's Attorney to file a written notice within 120 days of his or her intention to seek the death penalty. (*See* Recommendation 31, which follows). The Commission does not believe it is necessary for this mandatory review by the statewide committee to be completed prior to the expiration of the 120 period; however, it should be completed prior to the commencement of trial.

It is important that standards relating to the most serious penalty imposed by law be applied in a uniform and rational manner in all parts of the state in order to avoid the disparate application of the death penalty. The Governor certainly has a strong interest in insuring that criminal penalties are applied in a uniform manner throughout the state. The suggested procedure is not unlike that imposed on U.S. Attorneys across the United States. The death penalty may not be sought in the federal system without the prior written approval of the Attorney General of the United States.[6] U.S. Attorneys are required to submit materials explaining their request for death penalty approval to the Department of Justice,

which turns those materials over to the Capital Case Unit. The Capital Case Unit reviews the materials in the following process:

> Each of the documents provided in support of a recommendation to seek the death penalty and any submissions by defense counsel, shall be reviewed by a Committee appointed by the Attorney General. Counsel for the defendant shall be provided an opportunity to present to the Committee the reasons why the death penalty should not be sought. If the Committee decides to permit an oral presentation, it will ordinarily occur via a video conference. The Committee will consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a Notice of Intention to Seek the Death Penalty. Section 9-10.050, U.S. Attorney's Manual.

The Illinois death penalty statute currently provides:

> (d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c).

This section of the statute was construed by the Illinois Supreme Court in *Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979.) In a 4 to 3 decision, the Illinois Supreme Court found that the statute did not violate the separation of powers doctrine by inappropriately involving the prosecutor in the *judicial function* of sentencing, nor was it violative of the Eighth Amendment since it could not be presumed that a prosecutor would act in a standardless fashion.[7] The Court's opinion did not suggest that the prosecutor's authority under the statute was of constitutional dimension, but recognized that it had been delegated to prosecutors by the legislature.[8]

The recommended statutory review procedure will not give rise to constitutional problems. While the office of State's Attorney is created by the Illinois Constitution, the powers and duties exercised by the State's Attorneys are defined by statute. *See* 55 ILCS 5/3-9. The Illinois Supreme Court recently considered the scope of the State's Attorney's authority under Illinois in a somewhat different setting in *People v. Izzo*, 195 Ill. 2d 109 (2001). The court observed in that case:

> The doctrine [of separation of powers] comes into play when one branch seeks to exert a substantial power belonging to another. [citations omitted] No such encroachment is present here. Even if section 21-6 could be construed as shifting part of the State's Attorney's prosecutorial power to another set of government officials, which it cannot, such a shift is not inherently improper. The powers and duties of State's Attorneys are defined by statute (55

> ILCS 5/3-9005) and can be revised by statute. Although a separation of powers problem would arise if such a revision had the effect of transferring prosecutorial power to the judiciary or to the legislature itself, no possible claim can be made that section 21-6 has such an effect. *Izzo*, 195 Ill. 2d at 117.

In view of the fact that the prosecutor's authority to seek the death penalty in the first instance is derived from the statute creating the entire sentencing scheme, a statutory amendment reducing the breadth of prosecutorial discretion would comport with the Illinois Constitution and decisional law.

Such a state-wide review process will promote better state-wide uniformity in decisions about whether or not to seek the death penalty. Under present law, the elected state's attorney of each of the 102 counties in Illinois has the discretion to decide when and where to seek the death penalty. Each prosecutor is free to adopt any standard or no standards at all in making such a decision, and a prosecutor may decide to seek the death penalty in every case or decline to seek it in all cases. The current Illinois practice provides no safeguards that address this problem, and the lack of well-defined standards has been a frequent criticism of the scheme.[9]

The problem of disparities in the application of the death penalty based upon geography are not limited to Illinois. A recent study completed by the Joint Legislative Audit and Review Commission of the Virginia General Assembly suggests that while there is no clear evidence that race plays a role in the death sentencing process in Virginia, the location of the crime and the relation between the victim and the defendant do appear to be a significant factors in whether or not the defendant is sentenced to death. After controlling statistically for other variables, the location of the prosecution (high density urban areas vs. lower density areas of the state) appears to be the strongest factor influencing whether or not the death penalty is imposed.[10]

Similar findings were articulated this summer in a major examination of Nebraska's death penalty scheme. David Baldus and others reported: [11]

> Our third finding is that the system is characterized by sharp differences in charging and plea bargaining practices in the major urban counties vis a vis the counties of greater Nebraska. In the major urban counties, prosecutors appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death penalty unilaterally or by way of a plea bargain. . . . The data indicate that the differences between charging and plea bargaining practices of prosecutors in the major urban counties and those in greater Nebraska produce a statewide "adverse disparate impact" on racial minorities. . . . the practical effect of the difference in the rates that prosecutors advance cases to penalty trials is that statewide minority defendants face a higher risk that their cases will advance to a penalty trial (with the state seeking a death sentence) than do similarly [situated] white defendants statewide. Baldus, 2001, Vol. I, p. 18-19.

Research initiated by the Commission into sentencing decisions in Illinois also revealed geographic disparities, with defendants outside of Cook County substantially more likely to receive a death penalty than those within Cook County, even after other factors were controlled for statistically.[12] The regional disparities identified in the study were statistically significant, and raise serious concerns about the degree to which the death penalty is being applied fairly throughout the state. The findings also comport with national studies which have found that Cook County is has a proportionately low rate of death sentencing, as judged by comparison with the number of homicides.[13]

Minority view - Statewide review process

While Commission members were unanimous in their view that voluntary state-wide protocols would improve the management of the state's death penalty system, members were not unanimous with respect to the question of whether a mandatory state-wide review concept was a prudent recommendation. Commission members in the minority on this issue expressed the view that a mandatory process would likely raise constitutional concerns and would violate the separation of powers doctrine.

State's Attorney's in Illinois have broad discretion, pursuant to the Illinois Constitution and years of judicial interpretation, to determine whether or not to charge an offense. It was the belief of those who held the minority view that creation of a state-wide review committee of this type would interfere with the grant of the state's attorney's discretionary authority to make such decisions and interfere with the authority of the state's sttorney to manage his or her office.

The Illinois Supreme Court upheld the legislature's grant of discretion to prosecutors to decide whether and when to seek the death penalty in *Carey v. Cousins*, 77 Ill. 2d 531 (1979). The Court noted in *Carey*:

> As the decisions of this court show, the State's Attorney has always enjoyed a wide discretion in both the initiation and the management of criminal litigation. That discretion includes the decision whether to initiate any prosecution at all, as well as to choose which of several charges shall be brought. [citations omitted] *Carey*, 77 Ill. 2d 531, 539.

The Illinois Supreme Court has consistently upheld the construction of the provision granting discretion to the prosecutor to decide when to seek the death penalty since *Carey*. The Court observed most recently that "It has long been recognized by this Court that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all. A prosecutor's discretion extends to decisions about whether or not the death penalty should be sought." *People v. Jamison*, 2001 WL 403325, p. 11 (2001).

Commission members in the minority on this issue believe that creation of a state-wide review committee would seriously undermine the discretionary authority of the state's attorneys and run afoul

of constitutional concerns. The structure of the committee proposed by the Commission members in the majority adds another level of bureaucracy without improving the decision-making capacity of prosecutors in significant ways. Voluntary state-wide standards represent a better approach to addressing the issue of uneven application of the death penalty statute.

Recommendation 31 :

The Commission supports Supreme Court Rule 416(c), requiring that the state announce its intention to seek the death penalty, and the factors to be relied upon, as soon as practicable but in no event later than 120 days after arraignment.

Supreme Court Rule 416(c.), which took effect on March 1, 2001, provides as follows:

> 416 (c.) Notice of Intention to Seek or Decline Death Penalty – The State's Attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in Section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1 (b) which the State intends to introduce during the death penalty sentencing hearing.

The Commission carefully considered the recommendation of the Supreme Court's Special Committee on Capital Cases, and the reasons supporting the proposed time period. The recommendation to support the Supreme Court's new rule was adopted unanimously by the Commission. Early disclosure of the decision to seek the death penalty, and the eligibility factors to be relied on, provide the defense with a reasonable opportunity to formulate a defense.

Recent articles in the Chicago Daily Law Bulletin[14] indicate that, at least in Cook County, prosecutors appeared to be designating nearly every death eligible case as one in which the death penalty would be sought. The intention of the Supreme Court Rule, however, was to provide a time frame within which a reasonable decision could be made with respect to death eligibility. The decision to designate a case as one in which the death penalty will be sought now has important ramifications for the application of the Capital Crimes Litigation Act,[15] as designation as a capital case impacts not only funding under the Act, but also various new procedural safeguards now provided for by Supreme Court rule.

The Commission supports the notion that meaningful evaluation of whether a case is eligible for the death penalty should be completed in a timely fashion, consistent with the new Supreme Court rule.

Notes - Chapter 5

1. *See* for example, *People v. Neal*, 111 Ill. 2d 180, 203 (1985); *People v. Owens* 102 Ill. 2d 145, 160 (1984). The 7th Circuit has also found that these provisions are not violative of a defendant's constitutional rights. *See Silagy v. Peters*, 905 F. 2d 986 (1990).

2. Although the constitutionality of the Illinois death penalty statute has been upheld (*See Silagy v. Peters*, 905 F.2d 986, 991, (1990), holding that the prosecutorial discretion under the scheme does not violate the 8th Amendment as the prosecutor does not *impose* the sentence but rather initiates the proceedings), the statute has been criticized by several courts for its failure to provide legislative guidance in the exercise of the prosecutor's discretion. *See Eddmonds v. Illinois*, 469 U.S. 894, 105 S. Ct. 271 (1984)(Dissents of Justices Marshall and Brennan); *Kubat v. Thieret*, 679 F. Supp. 788, 815-16.

3. The preamble and guidelines from New Jersey are contained in the Appendix found at the end of this report.

4. The U.S. Attorneys Manual is available on the web site maintained by the United States Department of Justice: http://www.usdoj.gov.

5. The standards are part of a process in evaluating capital cases, which includes input from defense counsel and, ultimately, a single decision-maker.

6. See Section 9-10.020, U.S. Attorneys Manual.

7. *Carey*, p. 543: "Unless the State's Attorney believes that there will be testimony which will persuade the jury that the requisite elements for a death sentence exist, he is unlikely to request a hearing."

8. In its discussion on the separation of powers issue, the Court compared the discretion vested in the prosecutor under this section to the powers delegated to the prosecutor under early provisions of the Juvenile Court Act, which permitted the State's Attorney to transfer a delinquency proceeding to a criminal court and thus permit the juvenile to be proceeded against as an adult. This provision essentially gave the State's Attorney the power to increase the severity of the sanction available. The Court found, in a series of decisions, that *the legislature had the power to vest such discretion in the prosecutor*. The Court noted, however, that the Juvenile Court Act had subsequently been amended "*so as to reduce the degree of prosecutorial discretion.*" *Carey*, p. 539, (emphasis supplied).

9. As Justice Ryan noted in his often quoted dissent in *Carey v. Cousins, supra*:

> There can be no doubt that under this statute some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications will be

> spared, not as a result of mercy, but because of the uneven application of the law due to the lack of statutory direction to the prosecutor. . . . There will be no reasonable explanation for the distinction between the two convicted offenders except that, because of the personal belief or office policy of one State's Attorney, one offender was chosen as a candidate for the penalty of death, whereas for similar reasons personal to another prosecutor, an equally culpable offender was spared.. *Carey*, dissent by Justice Ryan, 77 Ill. 2d 557-8.

10. JLARC; Final Report, January 15, 2002, Summary of findings; p. iv-vi. The report may be obtained at the web site maintained by the JLARC: http://jlarc.state.va.us/pubs_rec.htm.

11. Baldus, Woodworth, Young and Christ, "The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis", July 25, 2001. This report may be obtained at the web site maintained by the Nebraska Commission on Law Enforcement and Criminal Justice: http://www.nol.org/home/crimecom/.

12. The Sentencing Study, by Drs. Pierce and Radelet, is discussed in Chapter 14 of this Report, and a complete copy of the report and its findings is contained in the Technical Appendix, published separately.

13. *See*: *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can be Done About It"* , by James S. Liebman (Columbia Law School) and others, Table 10B (Counties with 50 or more death verdicts, 1973-1995, High v. Low Death-Sentencing Counties, p. 291), which shows Cook County among the counties nationwide with a low death sentencing rate measured by death verdicts per 1000 homicides. A copy of the report may be obtained from the Columbia Law School website: http://www.law.columbia.edu/brokensystem2 .

14. *See* "When cases should be tagged for death penalty is subject of dispute," Chicago Daily Law Bulletin, October 24, 2001.

15. A copy of the Capital Crimes Litigation Act is contained in the Technical Appendix to this Report.

Chapter 6 - Trial Judges

Trial judges play an important role in the capital punishment system by insuring the fairness of proceedings for all parties. The Commission unanimously adopted the recommendations in this Chapter, which should result in more effective management of capital cases. Recommendations include supporting improvements to training opportunities for trial judges hearing capital cases, insuring that trial judges have access to the most current information on developing case law with respect to capital punishment, improved research support for trial judges, and a state-wide resource committee for judges hearing capital cases.

Introduction

Efforts to reform the death penalty process in Illinois have focused primarily on the role of prosecutors and defense lawyers, and on the specific evidentiary problems that abound in the area of capital litigation. Aside from the recommendation that trial judges attend training seminars in this area, none of the existing reports have considered the role of the judiciary in the capital process.[1] The trial judge ultimately is responsible for controlling the conduct of the trial, managing the activities of both the prosecution and defense, and making decisions that affect the admission or exclusion of evidence in every criminal trial, not only capital trials. In light of this, the Commission believed that it was important to examine ways in which improvements might be made which could ultimately lead to a better capital trial.

The report of the Special Supreme Court Committee on Capital Cases contains several recommendations which will impose new responsibilities upon judges trying capital cases. The Commission generally supports those recommendations. The Commission has gone further, however, and looked to the experience of other states in order to make additional recommendations designed to improve the quality of justice in capital cases tried in Illinois.

Specific Recommendations

In Illinois, prior to the adoption of the Capital Crimes Litigation Act,[2] funding for defense of a capital case was provided at the county level. The adoption of the Capital Crimes Litigation Act, effective January 1, 2000, provided a new source of state-wide funding for both prosecution and defense of capital cases.

Recommendation 32 :
The Illinois Supreme Court should give consideration to encouraging the Administrative Office of the Illinois Courts (AOIC) to undertake a concerted effort to educate trial judges

throughout the state in the parameters of the Capital Crimes Litigation Act and the funding sources available for defense of capital cases.
The Supreme Court does, already, undertake training efforts for all judges in the state. Recently, new training efforts have commenced with respect to death penalty cases, as recommended in the new provisions of Supreme Court Rule 43.[3] This unanimous recommendation from the Commission, however, calls upon the Supreme Court to undertake specific training for judges to insure that they understand the parameters of the Capital Crimes Litigation Act and the funding sources available for the defense of capital cases.[4]

One of the problems facing counties throughout the state is inadequate funding for the criminal justice system. In addition to bearing part of the overall cost for the county court system[5], counties are required to fund indigent defense services. The Capital Crimes Litigation Act provides a new source of state funding to support capital cases. While trial judges throughout the state will no doubt become acquainted with these provisions over time, it is important that they be fully informed of the existence of this new state funding and its proper parameters. Otherwise, there is the danger that trial judges may hesitate to order adequate compensation for defense counsel or approve trial expenses out of a concern about the source of the funding.

Judicial training in this area is important to insure that capital trials are handled correctly at the trial level from the very start. An analysis of death penalty case reversals indicates that a number of cases are reversed based upon trial court errors that could have been avoided.[6]

Recommendation 33 :
The Commission supports the provisions of new Illinois Supreme Court Rule 43 (which took effect March 1, 2001) as to "Seminars on Capital Cases." The Illinois Supreme Court should be encouraged to undertake more action as outlined in this report to insure the highest quality training and support are provided to any judge trying a capital case.

The Commission also supports the revised Committee Comments to new Supreme Court Rule 43, which contemplate that capital case training will occur prior to the time a judge hears a capital case. The Supreme Court should be encouraged to consider going further and *requiring* that judges be trained before presiding over a capital case.

The Commission unanimously supports these two recommendations with regard to judicial training. In response to changes that were developed as a result of its own examination of the imposition of capital punishment in Illinois, the Supreme Court enacted a new rule addressing the need for specialized training for judges in capital cases and setting a training cycle for judges. Rule 43, which took effect on March 1, 2001, provides as follows:

> In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing, the Judicial Conference shall establish Capital Litigation Regional Seminars for judges that may as part of their designated duties preside over capital litigation. The capital litigation seminars should include, but not be limited to, the judge's role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year and any circuit court judge or associate judge who in his current assignment may be called upon to preside over a capital case shall attend a Capital Litigation Regional Seminar at least once every two years.

The Commission unanimously supports the Supreme Court's efforts to insure that trial judges throughout the state receive training in these important areas. The Supreme Court has already commenced its efforts to train judges, having conducted its first Capital Case Training seminar under the new rules during the fall of 2001.

The Committee Comments to new Supreme Court Rule 43 make the following observation:

> . . . It is contemplated that any judge who presides over a capital case on or after the effective date of paragraph (b) of the rule will have prior thereto attended a Capital Litigation Regional Seminar.

While the Commission supports the application of this rule, it has unanimously recommended that the Supreme Court go one step further and specifically *require* that judges who are going to hear capital cases undertake this training prior to hearing capital cases. Judges hearing cases of this type should be the most qualified and best trained judges. While this problem may be ameliorated over time as more judges attend the Capital Litigation seminars, a stronger statement of training expectations by the Supreme Court would provide an important incentive to accomplish the goal of judicial training in this area in timely fashion.

Other states provide judicial training for judges in capital cases on a somewhat more aggressive basis. New York state operates a training program in capital cases on an annual basis, and judges who hear capital cases are required to attend regularly. This annual judicial training in capital cases is *in addition* to any other judicial training that the judge might attend during the year. Like Illinois, New York is a large state with both a concentrated urban population and a more dispersed rural population. In order to insure that all judges are able to benefit from the training seminars, the New York State judiciary makes a particular effort to use videotaping and other forms of communication to disperse seminar materials to its judiciary. With advances in videoconferencing, and the ubiquitous availability of video tapes, there is no reason why judicial training materials could not be made more widely available to judges throughout Illinois. The Special Supreme Court Committee Comments to Rule 43 note that the Rule is not intended to foreclose the participation of judges in remote locations by other technological means, such as videotapes.

Recommendation 34 :
In light of the changes in Illinois Supreme Court rules governing the discovery process in capital cases, the Supreme Court should give consideration to ways the Court can insure that particularized training is provided to trial judges with respect to implementation of the new rules governing capital litigation, especially with respect to the management of the discovery process.

This recommendation was also supported unanimously by the Commission. New Supreme Court Rule 43 makes specific suggestions about areas where judges could benefit from additional training. The Capital Litigation Regional Seminars will, no doubt, introduce to judges the new rules governing capital litigation. These new rules include the application of new and different discovery rules, particularly the provisions of 416 (e). Under 416 (e), discovery depositions are permitted for good cause shown. The introduction of discovery depositions into the criminal litigation process represents a significant alteration of the state's current discovery rules. Judges who hear primarily criminal cases may have less familiarity with deposition procedures and resolution of disputes. As a result, a particular emphasis on training in this area would insure a smooth implementation of the new rules.

Recommendation 35 :
All judges who are trying capital cases should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

1. The risks of false testimony by in-custody informants ("jailhouse snitches").
2. The risks of false testimony by accomplice witnesses.
3. The dangers of tunnel vision or confirmatory bias.
4. The risks of wrongful convictions in homicide cases.
5. Police investigative and interrogation methods.
6. Police investigating and reporting of exculpatory evidence.
7. Forensic evidence.
8. The risks of false confessions.

The Commission has unanimously recommended that all of those involved in the capital punishment system receive specific training the above subject areas. That recommendation also extends to trial judges. As outlined in Chapter 2 of this report, many of these recommended training subjects cover areas where capital cases can go painfully wrong.

It is particularly important that judges be trained in the problems of this type associated with capital trials. Under existing law, and under new proposals recommended by this Commission, judges are expected to make pre-trial determinations with respect to the credibility of in-custody informants and

rule on the voluntariness of confessions. Insuring that trial judges receive training in the risks associated with these two areas should help to avoid the risk of "tunnel vision" on the part of the judiciary – where, for example, the testimony of police officers may be credited routinely without subjecting it to the rigorous examination that the testimony of other witnesses may receive.

Recommendation 36 :
The Illinois Supreme Court, and the AOIC, should consider development of and provide sufficient funding for state-wide materials to train judges in capital cases, and additional staff to provide research support.

The Illinois Supreme Court has already embarked on an extensive effort to improve judicial training in Illinois, and the efforts of the Court should be applauded. Judges trying capital cases should have access to resources which will enable them to do the job well. Annual training seminars and specialized support will help. However, in order to do an adequate job in complex capital cases, trial judges throughout the state need to have access to resources and tools to support them in a difficult task. The Commission unanimously recommends that the Supreme Court consider the following suggestions from other states:

Development of state-wide bench manual targeted specifically at capital cases. Generally, the Illinois Supreme Court's Committee on Education has certain training materials developed in a bench book format.[7] The New Jersey court system makes use of a state-wide bench manual on Capital Cases developed by the Trial Judges Committee on Capital Causes in conjunction with that state's Administrative Office of the Courts. The manual, over 3 inches thick, covers every aspect of a capital case from the filing of the initial complaint through post-sentencing matters. Topics include pre-trial proceedings and depositions, management of particular trial problems such as pre-trial publicity and jury selection issues, and specific issues related to the guilt-phase charge and the sentencing phase charge. The manual contains extensive cross-references to aggravating/mitigating factors for sentencing phase problems and citation to relevant legal authority. It provides a comprehensive source for addressing specific problems encountered in a typical capital case.[8]

Some materials to guide and support judges in managing capital trials already exist in Illinois. The New Jersey model provides a good example of a state-wide resource that would improve the ability of judges throughout the state in trying capital cases. It is also the best way to insure that judges have access to the same information about how to manage complex capital cases, and to encourage uniform application of the new and specialized capital case rules recently adopted by the Supreme Court.

Increase staffing levels to insure that trial judges have access to assisted legal research. Trial judges across the state need to have the ability to conduct their own research on the complex issues presented in capital cases. In New York State, trial judges in all parts of the state have access to "law clerks" who are actually admitted attorneys. These positions are funded by the State. These staff

attorneys are available to assist judges with legal research issues, and also receive particularized training in capital case legal issues along with trial judges. At present, some judges in Illinois already have access to pool law clerks to help them with research. The availability of research help, however, is directly related to the level of support provided by county government in funding the court system. Increasing access to research staff should significantly improve the ability of judges to manage capital cases effectively.

The Illinois Supreme Court describes some detail regarding the allocation of funding for the court system on its web page. Other states, such as New York, fund a greater proportion of the state court system at the state, rather than the county, level.[9] The issue of allocation of funding for the state court system is currently being re-examined in Illinois by the Illinois State Bar Association.[10]

Improve access to computerized legal research and support training for judges in how to use these research tools. New York state, again, has made a significant effort to insure that all trial judges throughout the state (not just those in New York City) have access to legal research tools. In New York state, a decision was made to go beyond ordinary computerized legal research tools, such as Westlaw, and to create a proprietary computer based research program using off-the shelf software. This research program is available to any judge throughout New York state who is designated to try a capital case.[11] The program database not only contains the relevant New York state statutes, but also contains trial level opinions in other capital cases which are indexed by the particular points covered. It contains capital punishment statutes and court decisions from other states with statutes similar to New York's (including material from Illinois) as well as law review articles and legal treatises. It provides trial judges with a comprehensive body of legal research on capital cases that is easy to access and detailed in nature.

Recommendation 37 :
The Illinois Supreme Court should consider ways in which information regarding relevant case law and other resources can be widely disseminated to those trying capital cases, through development of a digest of applicable law by the Supreme Court and wider publication of the outline of issues developed by the State Appellate Defender or the State Appellate Prosecutor and/or Attorney General.

The Commission unanimously recommended broader dissemination of materials related to capital cases. Capital litigation is a complex area of the law. Since the reinstitution of capital punishment in Illinois, the Supreme Court has issued opinions in cases involving over 250 individuals in which a death penalty has been imposed. These cases often involve the interpretation of the federal or state constitutions, or other important questions of law and procedure. The Illinois Supreme Court is not responsible for insuring that each and every lawyer researches relevant case law in this area, and the new training and qualification guidelines for capital counsel enacted by the Supreme Court should insure better qualified counsel on both sides. However, management of capital litigation can be improved

through development of broadly based outlines of applicable law provided to or made available to counsel in the case.

Several states with death penalty statutes, including Georgia and Nevada, publish such outlines with references to importance cases in the area of capital litigation. Georgia requires by court rule that copies of the Georgia trial checklist be provided to counsel on the record at the first hearing in the case.[12] The Georgia outline is available on the website maintained by the Georgia Supreme Court.[13] In Illinois, the State Appellate Defender already maintains an outline of current issues decided by the Supreme Court on the Appellate Defender website.[14]

Advances in internet technology have made the distribution of information on a broad scale significantly easier. The Illinois Supreme Court's new website,[15] for example, contains not only the Court's published opinions and those of the Illinois Appellate courts, it also provides access to Supreme Court rules, description of the Court's training policies, and special areas where information regarding issues of interest to the public may be examined. Electronic communication enables cost-effective dispersal of information to all parts of the state.

The Supreme Court should consider improving access to relevant precedent in the area of capital litigation through expansion of these efforts. A special section of the Supreme Court's website could be devoted to capital issues, for example. Issues of particular concern, such as the interpretation of eligibility factors or resolution of discovery disputes under the new case management rules applicable to capital cases, could be highlighted.

Recommendation 38 :

The Illinois Supreme Court, or the chief judges of the various judicial districts throughout the state, should consider implementation of a process to certify judges who are qualified to hear capital cases either by virtue of experience or training. Trial court judges should be certified as qualified to hear capital cases based upon completion of specialized training and based upon their experience in hearing criminal cases. *Only such certified judges should hear capital cases.*

Commission members unanimously supported this recommendation to require certification of trial judges. In the same way that trial counsel must have special experience in order to perform competently in a capital proceeding, trial judges must also have a special level of experience in order to perform at their best in these complex cases. In making this unanimous recommendation, the Commission has once again drawn on the experience of other states. In New York state, judges are designated in each judicial district throughout the state as qualified to hear capital cases. This designation is based upon the experience of the trial judge, and judges who are so designated are required to attend special judicial training sessions on capital punishment *before* hearing a capital case.

The adoption of Supreme Court Rule 43, with its specialized training requirements for judges in the area of capital litigation, will certainly improve the knowledge base of the judiciary in this important area. The additional step of certifying judges who are considered qualified to hear capital cases is an extension of the Court's supervisory powers to manage the judiciary. Certification indicates that the judge sitting on the case has, in fact, received the required training and has the requisite experience to handle this type of complex litigation. Only the most experienced judges in a given judicial district should be handling capital cases.

The idea of a formal certification process was suggested to the Special Supreme Court Committee on Capital Cases during its public hearings in 2000.[16] The Special Supreme Court Committee's report did not recommend formal certification of trial judges as a necessary prerequisite to hearing a capital case. The Committee suggested that the revised training provisions, along with the Code of Judicial Conduct, should be sufficient to address concerns about the quality of the judiciary. (P. 88-89.)

It was the unanimous view of the Commission, however, that only the most qualified judges should be hearing capital cases. Many problems typically associated with capital trials can be averted by a trial judge who is particularly familiar with capital cases. The Commission has therefore recommended that the Supreme Court or the chief judges of the various judicial districts throughout the state develop a program to certify trial judges based upon their qualifications in this area.

Recommendation 39 :
The Illinois Supreme Court should consider appointment of a standing committee of trial judges and/or appellate justices familiar with capital case management to provide resources to trial judges throughout the state who are responsible for trying capital cases.

According to the web site maintained by the Illinois Supreme Court, the Court currently has a standing committee responsible for examining sentencing issues in capital cases[17]. The Special Supreme Court Committee on Capital Cases completed a major examination of the capital case process which culminated in an initial report issued in October of 1999 and Supplement Findings and Recommendations in October of 2000. The recommendations of the Special Committee on Capital Cases have already resulted in significant changes in the way that capital cases are handled, and a number of new rules governing the capital case process were adopted by the Supreme Court, effective March 1, 2001.

This recommendation proposes a continuation of the standing committee, and perhaps a reorientation of its role. The Commission unanimously recommended that the Supreme Court consider the appointment of a standing committee responsible for acting as a resource panel for judges throughout the state who are hearing capital cases. New York state maintains such a standing committee, composed of judges with experience in capital litigation who can be called upon by any judge in the state who has received a capital case assignment. The standing committee provides research materials, forms, and advice to the

judge in specific areas. The standing committee also immediately provides training materials in the event the judge has been unable to attend a capital case seminar.

The New Jersey Bench Manual for Capital Causes is developed by the Trial Judges Committee on Capital Causes, in conjunction with the Administrative Office of the Courts. Trial judges often have a different perspective on what would be most helpful to support a trial judge in a capital case.

The purpose of such a standing committee is to make resources available to trial judges presiding over these complex cases. While each trial judge must make decisions about a case based on the materials and evidence in that case, it is helpful to insure that trial judges have the latest information available to them in this area. Trial judges throughout the state should be able to benefit from the accumulated wisdom of other judges who have experienced the same problems. More importantly, such a process will also encourage state-wide communication and a level of state-wide uniformity with respect to management of capital trials. An improved degree of uniformity in the manage of capital sentencing procedures would improve the quality of justice in the state.

Notes - Chapter 6

1. The report by the Chicago Council of Lawyers had three recommendations generally affecting the judiciary. One was that judges should be more open to entering a judgment notwithstanding the verdict where they have some doubt about guilt and that Supreme Court should conduct a *de novo* review in death cases (p. 48, 49); second was that the Post-Conviction Hearing Act should be modified to eliminate the time limitation for capital cases (49); and a third supported the Supreme Court Committee on Capital Cases recommendation for judicial training once every 6 years (49-50). The Senate Task Force report does not contain any recommendations with respect to the judiciary.

2. A complete copy of the Capital Crimes Litigation Act is contained in the Technical Appendix to this Report, published separately.

3. *See* "Judges go to school on death penalty," Chicago Daily Law Bulletin, September 7, 2001, describing "Illinois' first-ever class for judges on 'Conduct of death penalty cases.'"

4. The article from the Chicago Daily Law Bulletin suggests that at least some information was provided during the seminar to judges on the Capital Litigation Act. However, it is clear that continuing effort will be required to insure trial judges are well-acquainted with the Act and expenses that may be appropriately paid from the fund.

5. *See* "State and Local Funding for Illinois Courts," on the Illinois Supreme Court web site, www.state.il.us/court/SupremeCourt/Funding.htm.

6. Information about the analysis of reversed cases is contained in the Technical Appendix to this Report, published separately.

7. The Illinois Supreme Court provides information with respect to some of its training efforts on its website, www.state.il.us/court/SupremeCourt.

8. Indeed, provisions of the New Jersey Bench Book on Capital Causes was cited in a recent opinion from the New Jersey Supreme Court. *People v. Marko Bey*, 161 N.J. 233, 276, 736 A. 2d 469, 492 (1999).

9. *See*: "State Court Organization, 1998," a research report from the Bureau of Justice Statistics, June 2000, NCJ 178932.

10. *See* "Bar leaders eye state as court funds source," Chicago Daily Law Bulletin, April 3, 2001, p. 1; "Legislative session complicated by politics, of all things," Chicago Daily Law Bulletin, January 7, 2001, p. 23.

11. A trial judge who is hearing a capital case is provided with either a laptop computer with the software installed, or access through other computer connections.

12. Georgia's Unified Appeal Rule can be found on the Georgia Supreme Court's website: http://www2.state.ga.us/courts/Supreme. The Unified Appeal Rule applies to all cases in which the state files a notice that it intends to seek death after January 27, 2000. Information about this Rule was also provided to the Illinois Supreme Court during the comment period on its Special Committee on Capital Cases report; *See* letter from Barry I. Mortge, January 6, 2000, Public Written Comments on Proposed Rules.

13. A copy of the Georgia Trial Court Checklist, which is part of the Unified Appeals Rule, is contained in the Technical Appendix to this Report.

14. The outline of issues decided by the Illinois Supreme Court maintained by the State Appellate Defender can be located at http://www.state.il.us/defender/dpenalty.html.

15. The website of the Illinois Supreme Court is located at: http://www.state.il.us/court /SupremeCourt.

16. *See* Testimony of Thomas F. Geraghty, Associate Dean for Clinical Education, Director Northwestern University Legal Clinic, dated January 27, 2000, Public Written Comments on Proposed Rules, Special Committee on Capital Cases.

17. The Supreme Court's web site, *See note 5*, lists its standing committees for the year 2002. Included among them is the Special Committee on Capital Cases, which has, as its responsibility the study of the capital sentencing process.

Chapter 7 - Trial Lawyers

This Chapter concerns recommendations which pertain to trial counsel. Recent changes in the Supreme Court Rules regarding the development of a capital trial bar have changed the qualifications required of capital counsel. The Commission unanimously supports the suggested rule changes establishing these requirements, as well as supporting improved training and funding of counsel trying capital cases.

INTRODUCTION

The issue of trial counsel's capability and qualification is an important one in the capital process. The Commission's own review of the more than 250 cases in which the death penalty has been imposed since 1977 reveals that there are a significant number of cases reversed based on the trial conduct of both the prosecution and defense counsel. About 21%[1] of the cases in which a reversal occurred at some point in the process were reversed based on ineffective assistance of defense counsel as the primary error. Just over 26% of cases in which a reversal occurred at some point in the process were reversed based on some shortcoming with respect to prosecutorial conduct. A significant number of cases which were *not* reversed involved observations by the Supreme Court that something about either the prosecutor's conduct was improper, or that defense counsel's representation was less than adequate, but that in the overall context of the entire trial, the error did not warrant reversal.[2]

A recent nationwide study of the death penalty noted the importance of qualified counsel in capital cases:

> Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation.[3]

Illinois has taken steps to address the problems associated with trial counsel in capital cases. The adoption by the Supreme Court of new rules which set minimum standards for counsel, and the requirement that trial courts enforce those standards, should improve the quality of counsel on both sides in capital cases. This section of the report focuses on many of the new provisions the Illinois Supreme Court has implemented, and also addresses some other areas of concern with respect to trial counsel.

SPECIFIC RECOMMENDATIONS

Recommendation 40 :
The Commission supports new Illinois Supreme Court Rule 416(d) regarding qualifications for counsel in capital cases.

The Commission unanimously supported the proposals contained in Rule 416 (d), which became effective on March 1, 2001.[4] Rule 416 establishes various new procedures to be followed in capital cases, many of which are commented upon elsewhere in these recommendations. Subparagraph (d) provides as follows:

> (d) Representation by Counsel. In all cases wherein the State has given notice of its intention to seek the death penalty, or has failed to provide any notice pursuant to paragraph (c), the trial judge shall appoint an indigent defendant two qualified counsel who have been certified as members of the Capital Litigation Trial Bar pursuant to Rule 714, or appoint the public defender, who shall assign two qualified counsel who have been certified as members of the Capital Litigation Trial Bar. In the event the defendant is represented by private counsel, the trial judge shall likewise insure that counsel is a member of the Capital Litigation Trial Bar.
>
> The trial judge shall likewise insure that counsel for the State, unless said counsel is the Attorney General or the duly elected or appointed State's Attorney of the county of venue, is a member of the Capital Litigation Trial Bar.

The most significant feature of this proposal is that it requires the appointment of two attorneys to represent each indigent defendant in a capital case. A majority of other states with death penalty provisions likewise require the appointment of two attorneys for indigent defendants.[5] In its initial report on the subject,[6] the Special Supreme Court Committee reached the conclusion that the rule should require the appointment of two counsel only in cases involving indigents; the Committee expressed the view that requiring two attorneys in cases involving retained counsel might infringe on the defendant's right to counsel of his or her choice.

The Committee's Supplemental Report[7] specifically addressed the point that the rule and the supporting committee comments would permit a "mixed" representation of public defender and appointed counsel in indigent cases, and suggested appropriate ways for trial courts to address any potential conflicts that could arise.

The Rule also makes clear that the trial court must inquire as to whether counsel is properly certified in accordance with the new rules on the Capital Litigation Trial Bar, and insure that counsel appointed to represent an indigent defendant is properly certified.

The Senate Task Force Report also identified the qualification of defense counsel as a key issue in a capital case.[8] Although the qualification provisions recommended in the Task Force Report vary from the proposals the Supreme Court ultimately adopted, they point to the importance of insuring that a defendant facing a capital charge has experienced, qualified counsel to rely upon.

Recommendation 41 :
The Commission supports new Illinois Supreme Court Rule 701(b) which imposes the requirement that those appearing as lead or co-counsel in a capital case be first admitted to the Capital Litigation Bar under Rule 714.

The Commission unanimously supported this recommendation. The Supreme Court Committee has proposed revisions to Rule 701 (b), effective on March 1, 2001, which require that certain attorneys participating in capital cases be certified as members of the Capital Litigation Trial Bar.[9] The Commission unanimously supports this measure. In its October 2000 Supplemental Report, the Special Supreme Court Committee noted that there is a broader concern about the quality of representation in a capital case:

> The importance of qualified counsel in capital trials goes beyond the defendant's personal interest in competent representation. Society as a whole has an important interest in the fair and just administration of capital punishment. The judiciary has an independent interest in the fair administration of justice, and a special interest in the fairness and accuracy of capital trials. All of these interests are served by a rule that establishes minimum standards for counsel for *all* capital defendants. Sup. Crt. Committee Supplemental Report, October 2000, p.7 (emphasis in original)

The substance of Rule 701 (b)'s amendment is to require that an attorney appearing in a capital case be certified in accordance with the rules contained in new Supreme Court Rule 714 creating the Capital Litigation Trial Bar. The rule provides, in pertinent part:

> Rule 701. General Qualifications
>
> (b) Any person admitted to practice law in this State is privileged to practice in every court in Illinois. No court shall by rule or by practice abridge or deny this privilege by requiring the retaining of local counsel or the maintaining of a local office for the service of notices. <u>However, no person, except the Attorney General or the duly appointed or elected State's Attorney of the county of venue, may appear as lead or co-counsel for either the State or defense in a capital case unless he or she is a member of the Capital Litigation Trial Bar provided for in Rule 714.</u> (Rule amendment is underscored.)

The Special Supreme Court Committee chose to avoid potential separation of powers issues by exempting from this requirement the elected State's Attorney in each county and the elected Attorney General.[10] The Rule is applicable to Assistant State's Attorneys, and to all defense counsel.

The final version of this rule changed the term "trial counsel" to "lead or co-counsel". The Committee Comments suggest that the revised rule is designed to permit assistance at trial of a third-chair who is not a member of the Capital Litigation Trial bar, provided that the attorney is under the direct supervision of qualified lead or co-counsel. This revision should enable attorneys to gain experience in capital trials and still insure that defense counsel is fully qualified.

Recommendation 42 :
The Commission supports new Illinois Supreme Court Rule 714 which imposes requirements on the qualifications of attorneys handling capital cases.

This was also a unanimous recommendation of the Commission. One of the most significant recommendations from the Supreme Court Committee's Report has to do with the development of standards for attorneys qualified to handle capital trials. Supreme Court Rule 714 delineates standards for lead counsel and co-counsel. The Commission unanimously supports the adoption of this Rule. The concept of the Capital Trial Bar was based, in part, on the practice existing in the Federal District for the Northern District of Illinois, which requires that counsel be admitted to the Trial bar before appearing alone in a testimonial proceeding.[11] *See* Committee Comments, Supreme Court Rule 714.

As the Special Supreme Court Committee noted in its Supplemental Report (October 2000), some have argued that the imposition of trial bar standards such as those contained in Rule 714 will not guarantee better advocacy. There are attorneys who have demonstrated very poor advocacy on behalf of death row inmates who would likely qualify under the experience based requirement of the rules for admission to the Capital Litigation Trial Bar. The Committee observed:

> The committee is confident that the proposed minimum standards will make it substantially less likely that capital trials will be marred by error resulting from an attorney's inexperience or lack of familiarity with capital trial procedures. In addition, the required training should help even experienced litigators identify and correct bad habits, avoid mistakes, and remain current on the law. The committee also notes that the positive impact of the capital litigation trial bar goes beyond the effect of admission standards on individual attorneys. System-wide minimum standards for the prosecution and defense will raise the level of professionalism of all attorneys in capital trials. Adopting the capital litigation trial bar proposal *will* guarantee that all capital trials are conducted by attorneys with experience in criminal litigation and training in the substantive and ethical aspects of a death penalty case. Sup. Crt. Committee Supplemental Report, October 2000, p. 5.

The new Rule establishes separate qualification requirements for Lead and Co-counsel. In addition to experience with the general court process, Lead Counsel must have tried eight felony jury trials to completion, at least two of which were murder cases, meet certain training standards, and have experience with experts, forensic and medical evidence. Co-counsel must have tried five felony jury trials to completion, meet certain training standards and also have experience with various areas of expert testimony.

The Rule also provides for a waiver process, in which the Supreme Court can evaluate whether the particular experience of an attorney warrants admission despite lack of compliance with the minimum qualifications as set forth in the rule. It thus provides flexibility for those parts of the state where attorneys may be competent to try a capital case, but may lack the technical qualifications to be admitted to the Capital Litigation Trial bar.

The Committee Comments also make clear that the rule does not bar participation at the trial by a third-chair, who would not be required to meet the qualification requirements for admission to the Capital Litigation Trial Bar. The Committee noted:

> Attorneys who are not members of the Capital Litigation Trial Bar may participate in capital trials in the capacity of "third chair," provided such participation by a third attorney for the prosecution or defense is under the direct supervision of lead or co-counsel. Although participation in a capital trial as third chair will not satisfy the experience requirements of Rule 714, the experience gained may be considered for the purposes of a request for waiver under paragraph (d). (Committee Comments, Supreme Court Rule 714)

Although the Special Supreme Court Committee found that participation by a third chair potentially valuable, it was careful to point out in its Supplemental Report (October 2000, p. 23) that it did not contemplate actual appointment of a "third" chair by the trial court, nor reimbursement from State of county funds for the work accomplished by the "third" attorney.

Recommendation 43 :
The office of the State Appellate Defender should facilitate the dissemination of information with respect to defense counsel qualified under the proposed Supreme Court process.

While the qualification process and decisions relating to this process should be handled by the Supreme Court, as recommended in the new Supreme Court Rules, there are also ways to facilitate the identification of qualified counsel in areas throughout the State. The Commission has unanimously recommended that the State Appellate Defender facilitate the important work of disseminating information about qualified counsel on a state wide basis.

The Special Supreme Court Committee noted in its report[12] that the new certification rules could raise "practical concerns about the availability of qualified local counsel for capital defendants tried in small counties."[13] The Committee spent some time evaluating the potential difficulty, and concluded that, on balance, "the overwhelming majority of capital defendants who seek to retain counsel in downstate counties will be able to find qualified counsel in the county of venue or a neighboring county."[14] The problem remains that, although qualified counsel may be available, it may be difficult for a capital defendant to locate retained counsel easily.

The State Appellate Defender has now been authorized to provide support to trial counsel in capital cases in counties other than Cook County. *See* 725 ILCS 105/10(b)(5). Pursuant to this authority, the State Appellate Defender now has a division which provides assistance to private lawyers who have been appointed to try death penalty cases and to Public Defenders outside of Cook County handling death penalty cases. The Death Penalty Trial Assistance Division provides investigative assistance, mitigation assistance, and in some instances, trial assistance. The Division also provides training associated with trying death penalty cases. The Division has offices in Chicago and Springfield, and will open an office in Belleville in 2002.

The Office of the State Appellate Defender should facilitate the identification of counsel qualified under the new Supreme Court rules by maintaining information in its district offices about counsel who are qualified for lead and co-counsel. This information could provide an enormous benefit for capital defendants seeking to retain counsel or for public defenders in smaller counties who are seeking qualified counsel to assist them in capital representation.

Recommendation 44 :

The Commission supports efforts to have training for prosecutors and defenders in capital litigation, and to have funding provided to insure that training programs continue to be of the highest quality.

The Commission adopted this recommendation unanimously. The new Supreme Court Rules discussed in this section rely heavily on mandatory training to support the development of an improved level of professionalism among counsel trying capital cases. Training seminars are held for both prosecution and defense. Under the provisions of the new rules, qualifying training seminars must be approved by the Supreme Court. *See* Supreme Court Rule 714 (b)(4).

Training will have little effect, however, if it is not of high quality and relevant to the needs of the capital litigation bar. Insuring that training programs are of the highest quality requires a strong commitment to funding for training at all levels. While the Supreme Court may mandate that training programs meet certain quality standards, a secure and stable source of funding for such training programs is the only way to insure that they will address the concerns they are intended to alleviate.

Recommendation 45 :
All prosecutors and defense lawyers who are members of the Capital Trial Bar who are trying capital cases should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

1. The risks of false testimony by in-custody informants ("jailhouse snitches").
2. The risks of false testimony by accomplice witnesses.
3. The dangers of tunnel vision or confirmatory bias.
4. The risks of wrongful convictions in homicide cases.
5. Police investigative and interrogation methods.
6. Police investigating and reporting of exculpatory evidence.
7. Forensic evidence.
8. The risks of false confessions.

The Commission has unanimously recommended that training cover these specific areas; the recommendation for training in these areas is urged not only for counsel but for trial judges and police officers. *See* Chapters 2 and 6 of this Report.

These areas are of critical importance to the capital punishment system, and the reasons for their importance need not be repeated again here. It is not enough to train counsel in the "best" way to do something; it is important that both prosecution and defense be exposed to the potential pitfalls that have occurred in cases where injustices have occurred. Some of these areas will require experts in particular academic fields, while others may be accomplished by reference to anecdotal experience. These training areas may be particularly appropriate for joint training, as suggested by the observations of the Special Supreme Court Committee. As the Committee noted in its report:

> The committee received several comments suggesting that training for prosecutors and defense counsel should be conducted jointly. The committee believes there is a great deal of merit in this idea. The committee agrees that joint training could promote civility among counsel and could also provide those participating with a broader understanding of capital trial issues. . . The committee believes that joint training is consistent with the committee's original proposal, and recommends that training programs include joint sessions for prosecutors and defense counsel when possible. Sup. Crt. Committee Supplemental Report, October 2000, p. 27.

The problem areas described above are not areas which are limited to either prosecution or defense. They represent potential problems endemic to the capital punishment system as a whole, and may provide an appropriate area for the joint training described by the Supreme Court.

Notes - Chapter 7

1. Information with respect to the percentage of case reversals attributable to defense counsel or prosecution is set forth in the summary table on case reversals contained in the Appendix to this Report. The summary table is based upon data contained in Section 2, Table 15 of the Technical Appendix to this Report, published separately. Figures do not add to 100% because in some cases, there was more than one primary reason for the reversal.

2. Concerns were expressed by the Supreme Court about prosecutor behavior, for example, in *People v. Moss*, 2001 WL 1243642 (2001)(special concurrence of Justice McMorrow); *People v. Hooper*, 172 Ill. 2d 64, 82-3 (1996); *People v. Caballero*, 126 Ill. 2d 248, 271-2 (1989) Similarly, concerns have also been expressed about the conduct of defense counsel, *See People v. Blue*, 189 Ill. 2d 99, 141-2 (2000).

3. *See: Mandatory Justice: Eighteen Reforms to the Death Penalty*, Constitution Project, 2001, p. 6.

4. This part of the rule takes effect one year after March 1, 2001 in order to permit the application and certification of attorneys for the trial bar.

5. *See* Sup. Crt. Committee Report, October 1999, p. 32; also information collected at Tab 26 of that report.

6. October, 1999.

7. Sup. Crt. Committee Supplemental Report, October, 2000.

8. Senate Task Force Report, 2000, at pp. 5-6; Recommendation 2.

9. These provisions also take effect one year from March 1, 2001.

10. *See* Sup. Crt. Committee Supplemental Report, October 2000 p. 8-9.

11. *See* LR 83.12 of the Local Rules of the District Court for the Northern District of Illinois, which states that attorneys admitted to the trial bar may appear alone in all matters, while attorneys who are admitted to the general bar, but not the trial bar, may appear *in association* with a member of the trial bar and only appear alone in certain circumstances. *A member of the general bar may only appear as lead counsel in a criminal case if accompanied by a member of the trial bar who is serving as advisor.* LR 83.11 describes the qualifications for admission to the trial bar, which are primarily based upon qualifying trial experience. The local rules for the Northern District can be obtained from the District Court's website: http://www.ilnd.uscourts.gov /LEGAL/NewRules/.

12. Sup. Crt. Committee Supplemental Report, October 2000.

13. P. 13.

14. Sup. Crt. Committee Supplemental Report, October 2000, p. 18.

Chapter 8 - Pretrial Proceedings

This Chapter addresses matters that arise before the trial of the guilt and innocence phase begins. The Illinois Supreme Court has recently adopted new rules governing certain pre-trial proceedings in capital cases. The Commission unanimously supports many of these recommendations, and has also unanimously recommended other changes in pretrial proceedings which should improve the search for truth and the fairness of capital litigation. In addition to its support for these rule changes, the Commission recommends that the Court adopt a definition of "exculpatory evidence," require prosecutors (and others) to disclose to the defense benefits conferred upon or promised to a witness, implement new pre-trial proceedings to assess the credibility of in-custody informants, and closely scrutinize police tactics during interrogation in determining the voluntariness of confessions.

INTRODUCTION

New rules adopted by the Illinois Supreme Court, which took effect on March 1, 2001, have altered many of the existing pretrial practices with respect to capital cases. Commission members had the opportunity to carefully consider not only the Supreme Court Committee's final recommendations, but also much of the public debate which preceded those recommendations. The Commission has elected to express its specific support for a number of ideas developed by the Supreme Court Committee, even though these rules have already been put into practice by the Court, because the Commission found the improvements to the rules represented a sound balance among the various interests. The Governor's Executive order creating the Commission contemplates that the Commission should specifically consider the recommendations.

SPECIFIC RECOMMENDATIONS

Recommendation 46 :
The Commission supports new Illinois Supreme Court Rule 416(e) which permits discovery depositions in capital cases on leave of court for good cause.

This was a unanimous recommendation of the Commission. New Rule 416 (e) provides as follows:

> Rule 416 (e) Discovery Deposition in Capital Cases – in capital cases discovery depositions may be taken in accordance with the following provisions:

(i.) A party may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of court upon a showing of good cause. In determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition. However, under no circumstances, may the defendant be deposed.

(ii) The taking of depositions shall be in accordance with rules providing for the taking of deposition in civil cases, and the order for the taking of a deposition may provide that any designated books, papers, documents or tangible objects not privileged, be produced at the same time and place.

(iii). Attendance of defendant – a defendant shall have no right to be physically present at a discovery deposition.

(iv). Signing and filing depositions – rule 207 shall apply to the signing and filing of depositions taken pursuant to this rule.

(v). Costs – if the defendant is indigent, all costs of taking depositions shall be paid by the county wherein the criminal charge is initiated. If the defendant is not indigent the cost shall be allocated as in civil cases.

Prior to the adoption of Rule 416, discovery depositions were generally not permitted in criminal cases in Illinois. The new Supreme Court Rule introduces the deposition concept to Illinois criminal practice in a limited, and balanced, way. Depositions are permitted only in capital cases, upon leave of court, and the parties subject to deposition are those who are disclosed as potential witnesses. The rule properly puts the question of whether to permit depositions in the hands of the trial judge, and provides the judge with suggestions for balancing the interests of the parties. Providing the trial court with the means to control discovery will enable the court to manage the case and insure that depositions are not being interposed for any improper purpose.

In its general comments on the recommendations contained in the Supplemental report[1] the Supreme Court Committee makes the following observations:

The underlying assumption of public comments objecting to changes in discovery procedures seems to be that the benefits of new discovery procedures do not justify the burdens imposed on prosecutors and the potential for delay in capital trials. The committee submits that taking the extra step to insure a fair trial the first time is justified by moral and practical considerations. One capital case in which a retrial is avoided by better discovery procedures will offset the marginal increase in effort needed to comply with the new Rules in many others. The

committee believes the extra effort is a reasonable price to pay to prevent mistakes that might otherwise force witnesses, victims, and survivors to endure a second trial. The committee also believes the delay in capital trials caused by new procedures, if any, is justified by the importance of an accurate trial result. Nearly 17 years ago, the Court observed that: "In a capital case, the importance of an early disposition of the case weighs less heavily than the paramount goal of ensuring that * * * innocent men are not executed." *People v. Cobb* 97 Ill. 2d 465, 487(1983).

Recommendation 47 :

The Commission supports the provisions of new Illinois Supreme Court Rule 416(f) mandating case management conferences in capital cases.

The Illinois Supreme Court should consider adoption of a rule requiring a final case management conference in capital cases to insure that there has been compliance with the newly mandated rules, that discovery is complete and that the case is fully prepared for trial.

Ultimately, the responsibility for insuring that the trial of a capital case moves along at an appropriate pace and that decisions are fairly made rests with the trial judge. The trial judge is the person responsible for managing the conduct of both the prosecution and the defense before the jury, and supervising the overall conduct of the trial to insure that a fair and just result is obtained. A great many trial problems can be avoided by active and interested judicial management. Preventing extreme or inappropriate conduct by either the prosecution or defense, insuring the proper admission of evidence, and managing the progress of the case in both the guilt and sentencing phase, are all within the purview of the trial judge. As a result, the Commission unanimously supports these recommendations to improve judicial management of capital cases.

Along with other new procedures in capital cases, the Supreme Court has adopted new rule 416(f):

> Supreme Court Rule 416(f): Case Management Conference. No later than 120 days after the defendant has been arraigned or no later than 60 days after the State has disclosed its intention to seek the death penalty, whichever date occurs earlier, the court shall hold a case management conference. Counsel who will conduct the trial personally shall attend such conference.

Under 416 (f), the initial case management conference is the point at which the court must determine whether the attorneys have met certification requirements now imposed on the capital trial bar, confirm that discovery disclosures under the rules have been completed, and insure that the state has filed notice of its intention to seek the death penalty and advised the defense of the eligibility factors which apply, among other things. The Commission unanimously supported this concept, and found it to be a sound strategy for insuring that capital cases are managed in an effective way.

The Commission has unanimously recommended, however, that the Supreme Court expressly require that prior to trial, there be a final case management conference to insure that the case is, in fact, ready for trial. This is particularly important in light of the new provisions of Rule 416 (g) and (h), which require the filing of a certificate by the prosecution that all material that is required to be disclosed under Rule 412 has been disclosed, and a readiness certificate is filed by defense counsel.

The Supreme Court of Georgia has adopted trial procedures which mandate that prior to commencement of the trial, the court will confer with the parties, with the defendant present and with the conference on the record. The conference must include hearing and disposition of all pending motions, a determination as to whether there are any last minute motions by defense or stipulations by the parties, a determination by the trial judge that the parties have reviewed the Georgia Supreme Court trial checklist and are ready to raise issues in a timely manner, and to provide the defendant an opportunity to articulate for the court any objections he or she may have to the conduct of the case by defense counsel.[2]

New Supreme Court Rule 416 leaves the question of future case management conference to the discretion of the trial judge. While many trial judges might elect to have a final case management conference, the supervision of capital cases would be better served by mandating that one be held. The Supreme Court may find that different issues should be covered at such a final case management conference than are provided in the Georgia Rule, and certainly trial courts should have some flexibility in how they approach management of cases. However, many trial errors can likely be avoided by insuring that all counsel are ready to proceed and all required procedures have been complied with prior to trial.

Recommendation 48 :

The Commission supports Illinois Supreme Court Rule 416 (g), which requires that a certificate be filed by the state indicating that a conference has been held with all those persons who participated in the investigation or trial preparation of the case, and that all information required to be disclosed has been disclosed.

The Commission unanimously supported this change to the Supreme Court rules. New Supreme Court Rule 416 (g) reflects a special concern in capital cases. There have been instances where complete information appears to not have been disclosed to the defense.[3] The omission of key information, regardless of whether intentional or accidental, can pose a serious threat to the truth-seeking process. The Commission has unanimously recommended changes to police procedures which would put an affirmative burden upon law enforcement agencies to pursue all reasonable leads, document the evidence collected, make it available to the prosecution, and draw the prosecution's attention to any information which might be considered exculpatory. *See* Chapter 2 of this Report. Those recommendations were prompted, in part, by the provisions of 416 (g).

Rule 416 (g) provides as follows:

> Rule 416 (g) In all capital cases the State shall file with the court, not less than fourteen (14) days before the date set for trial, or at such other time as the court may direct, a certificate stating that the State's Attorney or Attorney General has conferred with the individuals involved in the investigation and trial preparation of the case and represents that all material or information required to be disclosed pursuant to Rule 412 has been tendered to defense counsel. This certificate shall be filed in open court in the defendant's presence.

While the prior Supreme Court rules required the prosecution to insure that flow information was maintained between the various investigatory personnel and the prosecution so that information could be evaluated for disclosure to the defense, new rule 416 (g) goes one step further and will likely encourage increased vigilance by the prosecution to insure that all investigatory materials have been obtained from law enforcement agencies and, where appropriate, provided to the defense. The Commission supports this idea. Together with Commission recommendations on police practices, these provisions should increase the likelihood that all materials have been provided to the prosecution. The prosecution will then be in a position to insure that appropriate disclosures are made to the defense.

Recommendation 49 :

The Illinois Supreme Court should adopt a rule defining "exculpatory evidence" in order to provide guidance to counsel in making appropriate disclosures. The Commission recommends the following definition:

> **Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to:**
> **(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;**
> **(2) Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude;**
> **(3) Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or**
> **(4) Diminish the degree of the defendant's culpability or mitigate the defendant's potential sentence.**

This recommendation was adopted by the Commission unanimously. The Illinois Supreme Court has adopted revisions to Rule 412, which generally cover the disclosure to the accused in a criminal case.

The revisions to the rule are intended to encourage better identification by the prosecution of information which is potentially exculpatory to the defense.[4] The revisions to Rule 412 provide:

> (c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor. The State shall make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense. At trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State's identification of any material or information as tending to negate the guilt of the accused or reduce his punishment. (Rule amendment underscored.)

It was the unanimous view of Commission members that while prosecuting attorneys should certainly be familiar with *Brady v. Maryland*[5] and its progeny, and their resulting responsibilities with respect to disclosure, the disclosure would be facilitated if the Supreme Court adopted a rule that clearly sets forth the definition of "exculpatory evidence." The definition is not intended to be all-encompassing, nor to pose additional burdens on the parties. It is intended to remind counsel of the basic requirements for disclosure of exculpatory evidence by way of example.

The Commission has drawn on a definition of exculpatory evidence found in the Local Criminal Rules for the Federal District Court in Massachusetts[6] in making this recommendation. The Massachusetts District Court Rules not only define exculpatory evidence, but impose clearly defined requirements for disclosure. The Commission has revised the Rule to conform more closely to Illinois law.

Recommendation 50 :
Illinois law should require that any discussions with a witness or the representative of a witness concerning benefits, potential benefits or detriments conferred on a witness by any prosecutor, police official, corrections official or anyone else, should be reduced to writing, and should be disclosed to the defense in advance of trial.

This unanimous recommendation reflects the concern of many Commission members that problematic capital cases often involve situations where accomplices or informers made statements, apparently in exchange for specific benefits not disclosed to the defense, that resulted in a conviction and the imposition of the death penalty. In a number of the cases involving the thirteen men released from death row, the evidence which led to the initial convictions included statements by accomplices or informers.[7] There have also been other death penalty cases reversed by the Illinois Supreme Court where questions remained about whether defense counsel had been fully informed about plea agreements with testifying accomplices or informers.[8]

While a curative instruction will help the jury properly assess the evidence presented by such a witness, defense counsel cannot be expected to be prepared to adequately cross-examine an in-custody informant or accomplice with respect to his or her bias if defense counsel does not have information with respect to the benefits that have been offered to the witness in exchange for his or her testimony. The potential problems with respect to testimony by in-custody informants was examined in some detail in the Morin Inquiry in Toronto, and the Special Commissioner included a similar suggestion among his recommendations.[9]

The Oklahoma Court of Criminal Appeals has also imposed disclosure requirements in cases involving in-custody informants. Those requirements provide that:

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript of copy of such recantation; and (6) any other information relevant to the informer's credibility. *Dodd v. State*, 993 P. 2d 778, 784 (2000)

The disclosure suggested by the Court of Criminal Appeals is more extensive than that recommended by the Commission.[10]

Recommendation 51 :
Whenever the state may introduce the testimony of an in-custody informant who has agreed to testify for the prosecution in a capital case to a statement allegedly made by the defendant, at either the guilt or sentencing phase, the state should promptly inform the defense as to the identification and background of the witness.

Commission members unanimously agreed that disclosure of a testifying in-custody informant's background was important to enable proper cross-examination. Supreme Court Rule 412 already requires disclosure by the prosecution of information about witnesses and their criminal record. This recommendation by the Commission is intended to make clear that it is particularly important that information with respect to the identification and background of in-custody informant witnesses be promptly provided to defense counsel whenever such witnesses are expected to testify.

Recommendation 52 :

(a) Prior to trial, the trial judge shall hold an evidentiary hearing to determine the reliability and admissibility of the in-custody informant's testimony at either the guilt or sentencing phase.

(b) At the pre-trial evidentiary hearing, the trial judge shall use the following standards:

> **The prosecution bears the burden of proving by a preponderance of evidence that the witness' testimony is reliable. The trial judge may consider the following factors, as well as any other factors bearing on the witness' credibility:**
>
> **(1) The specific statements to which the witness will testify.**
> **(2) The time and place, and other circumstances regarding the alleged statements.**
> **(3) Any deal or inducement made by the informant and the police or prosecutors in exchange for the witness' testimony.**
> **(4) The criminal history of the witness.**
> **(5) Whether the witness has ever recanted his/her testimony.**
> **(6) Other cases in which the witness testified to alleged confessions by others.**
> **(7) Any other known evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.**

(c) The state may file an interlocutory appeal from a ruling suppressing the testimony of an in-custody informant, pursuant to Illinois Supreme Court Rule 604.

It was the unanimous view of Commission members that testimony from in-custody informants presented particular problems, which mandated special procedures calculated to insure that such witnesses were reliable. Testimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant.[11]

The subject has received widespread attention in the criminal justice literature.[12] Provisions similar to this were originally proposed in the 1999 opinion in *Dodd v. State*, although they were withdrawn in favor of pretrial disclosure.[13] This topic was also the subject of some debate during the Spring 2001 session of the legislature, with at least one bill on this point considered in the Illinois House.

The Special Commissioner in the Morin inquiry also reached the conclusion that special precautions should be required before a prosecutor makes use of in-custody informant testimony. The Morin inquiry examined in some detail the results of a special grand jury investigation in Los Angeles, California into the misuse of informer testimony.[14] In that investigation, the special grand jury examined in-custody informant use between 1979 and 1990, and found numerous instances where false in-

custody informant testimony had been used. In light of this, the Special Commissioner in the Morin inquiry recommended a number of substantive changes to the Crown policy manual, which emphasized the importance of establishing the credibility of the informer's testimony through corroborative evidence and careful examination of the circumstances under which the informer made his statement.[15]

Recommendation 53 :

In capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession.

It was the unanimous view of the Commission that careful scrutiny should be applied by courts in evaluating the reliability of confessions where the suspect has been misled as to the strength of the evidence. Professor White has detailed the potential problems associated with confessions and methods by which investigators can avoid untrustworthy confessions.[16] He points out that misrepresentation of the evidence against a particular suspect may induce a confession from an innocent person. The conclusive nature of forensic evidence (for example, DNA, fingerprints) poses increased risks that a misrepresentation about such evidence may result in untrustworthy confessions, especially by those who are more easily led.

In Illinois, when a criminal defendant moves to suppress evidence at trial of his or her confession, statute provides that the trial judge should hear and rule on the motion before trial. *See* 725 ILCS 5/114-11.[17] The judge may hold a hearing at which witnesses testify as to the circumstances surrounding the confession by the defendant. This recommendation calls upon trial judges in capital cases to carefully examine police or prosecutor methods during the interrogation process which misstate or overstate the evidence of the suspect's guilt, or the likelihood that he or she will be found guilty, in order to induce him or her to confess.

Police and prosecutors are routinely called upon to confront persons suspected of crime, and to attempt to induce them to admit that they have committed crimes. Illinois courts have held that the police and prosecutors have a great deal of leeway in the methods they may employ in order to secure confessions, including stretching the truth, or even flatly misrepresenting facts to the suspect -- for example, by falsely asserting that another suspect has confessed and implicated the suspect being questioned, or that the suspect's fingerprints were recovered from the scene or weapon. The ultimate question for the trial judge in ruling on a motion to suppress is whether the prosecution has established by a preponderance of the evidence that the confession was voluntary, and is sufficiently trustworthy as to be accepted as evidence against the defendant.

The Commission unanimously believes that the court should carefully scrutinize any such allegations, with the understanding that such misrepresentations by the police can induce untrustworthy confessions which are not voluntary.[18]

Recommendation 54 :
The Commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.

Commission members unanimously agreed to make no recommendation with respect to plea negotiations. There is a continuing concern about whether, and to what degree, individual prosecutors may use the threat of the death penalty in an inappropriate and coercive way during plea negotiations. Several alternatives were discussed with respect to the question of whether State's Attorneys should be permitted to introduce the possibility of seeking the death penalty during plea negotiations, and how conduct by prosecutors could be realistically regulated. The Illinois Supreme Court has reversed at least two cases in which the death penalty was imposed on the ground that the State's Attorney had promised prior to the trial not to seek the death penalty. *People v. Brownell*, 96 Ill. 2d 167 (1983); *People v. Walker*, 84 Ill. 2d 512 (1981). The Commission also considered the potential impact of the new Supreme Court rule requiring the State's Attorney to give notice of his or her intention to seek the death penalty within 120 days of the indictment, and whether it was beneficial or detrimental to have plea negotiations occur or be prohibited during that period.

The Commission's proposal for a mandatory, state-wide review process with respect to the decision to seek the death penalty, if adopted, should significantly narrow the class of cases in which the death penalty is sought, as would the revision of the eligibility factors. As a result, the issue of potentially coercive plea negotiations would likely be significantly reduced if all parts of the new scheme are adopted.

After discussion, the Commission believed that it could not make a recommendation with respect to whether plea negotiations should be prohibited completely until after the state has elected whether or not to pursue the death penalty, nor whether the state should be prohibited from seeking the death penalty if plea negotiations were entered into.

Notes - Chapter 8

1. *See*, Sup. Crt. Committee Supplemental Report, October 2000, p. 42.

2. Unified Appeal Rule, Georgia Supreme Court website, http:// www2.state.ga.us/ courts/Supreme, Section III, Trial Proceedings.

3. The Supreme Court recently reversed a death penalty case due to the failure of the state to provide potentially exculpatory information contained in arson investigation reports. *See People v. Hobley*, 182 Ill. 2d 404 (1998). The Supreme Court reversed and remanded another case where there was some question as to whether complete police reports had been turned over to defense counsel. *See People v. Darryl Simms*, 192 Ill. 2d 368 (2000).

4. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) requires disclosure of such exculpatory material.

5. Id.

6. *See* Local Criminal Rule 116.2; http://www.mad.uscourts.gov/mad.menu.htm.

7. Cases involving Verneal Jimerson and Dennis Williams (the Ford Heights Four), Joseph Burrows, Steven Manning, Rolando Cruz, and Alex Hernandez.

8. *See*, for example, *People v. Olinger*, 176 Ill. 2d 326, 342-351 (1997) (reversing denial of post-conviction of petition without evidentiary hearing and remanding for hearing on Defendant's petition on the ground that the key witness for the state did not testify truthfully as to the plea agreement he had been offered in exchange for his testimony).

9. Recommendation 43, Agreements with informers reduced to writing, provides:

> The Ministry of the Attorney General should amend its Crown Policy manual to impose a positive obligation upon prosecutors to ensure that any agreements made with in-custody informers relating to benefits or consideration for co-operation should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and his or her counsel (if represented). An oral agreement, fully reproduced on videotape, may substitute for such written agreement. As well, in accordance with present Crown policy, any such agreements respecting benefits or consideration for co-operation should be approved by a Director of Crown Operations.

10. Initially, in an earlier opinion in the same case, the Oklahoma Court of Criminal Appeals adopted the view that a pre-trial reliability hearing should be conducted with respect to the credibility of an in-custody informant. That opinion was vacated, in favor of broader pre-trial disclosure. The Commission has instead recommended pre-trial disclosure of relevant information, along with a pre-trial

reliability hearing. *See* Recommendation 52.

11. The case involving Steven Manning was based almost exclusively upon in-custody informant testimony, although in-custody informant testimony played a role in a number of other cases. In the case involving former death row inmate Rolando Cruz, another death row inmate testified as to statements allegedly made by Cruz while on death row. The county prosecutor in the Cruz case then testified during that death row defendant's resentencing hearing.

12. *See* Clifford Zimmerman, "Back from the Courthouse: Corrective Measures to Address the Role of Informants in Wrongful Convictions," in *Wrongly Convicted: Perspectives on Failed Justice*, Ed. Saundra D. Westervelt and John A Humphrey, Rutgers University Press: New Brunswick, 2001.

13. The 1999 opinion in *Dodd v. State* was withdrawn by the Court of Criminal Appeals, and these provisions replaced with the pretrial disclosure requirements described in the 2000 opinion. *See Dodd v. State*, 993 P. 2d 778 at 785 (prior opinion, *Dodd v. State*, 1999 OK CR 29; rehearing granted vacating and withdrawing opinion, 70 OBJ 2952 (Oct. 6, 1999).)

14. Morin Inquiry Report, Chapter 3, pp. 555-579.

15. Morin Recommendation 41 contains 14 different suggestions for areas of inquiry by prosecutors.

16. White, W.S. (1997). *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions.* 32 Harvard Civil Rights- Civil Liberties Law Review 105.

17. 5/114-11 (f): The issue of the admissibility of the confession shall not be submitted to the jury. The circumstances surrounding the making of the confession may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession.

18. The recent series by the Chicago Tribune with respect to confessions obtained in murder cases in Cook County suggests that thorough judicial scrutiny of the circumstances of some confessions would be beneficial. *See* "Coercive and illegal tactics torpedo scores of Cook County murder cases," Chicago Tribune, December 16, 2001.

Chapter 9 - The Guilt-Innocence Phase

The recommendations in this Chapter address evidentiary problems which are of greater concern in capital cases, but which occur in other trials as well. The Commission has unanimously recommended that expert testimony with respect to the problems associated with eyewitness evidence be admitted on a case by case basis, that instructions relating to eyewitness testimony should elucidate the factors for the jury to consider, and caution the jury to consider such testimony carefully in light of other evidence in the case, and that special cautionary instructions be given to the jury for in-custody informant testimony. The Commission also continues to support the exclusion by Illinois courts of polygraph evidence. A majority of Commission members supported revisions to the instructions to the jury relating to evaluation of unrecorded statements by the defendant.

INTRODUCTION

Proceedings during the guilt-innocence phase which increase the possibility of an erroneous jury verdict finding an innocent defendant guilty also potentially expose the innocent to the death sentencing process. While the Commission did not consider every aspect of trial practice in capital cases, it did identify several areas where special problems may arise, and where special care should be taken to insure that the guilt-innocence phase is as fair and accurate as possible.

SPECIFIC RECOMMENDATIONS

Recommendation 55 :
Expert testimony with respect to the problems associated with eyewitness testimony may be helpful in appropriate cases. Determinations as to whether such evidence may be admitted should be resolved by the trial judge on a case by case basis.

The Commission unanimously recommended that the expert evidence on the issue of eyewitness testimony be considered on a case by case basis. There is a growing body of literature which discusses the potential problems associated with eyewitness testimony.[1]

Some jurisdictions take the position that expert testimony on this issue is never appropriate and have adopted a *per se* ban on the admission of such expert testimony.[2] Other states take the view that expert testimony pointing out the fallibility of eyewitness testimony may be of assistance to the jury in an appropriate case. *See Johnson v. State*, 272 Ga. 254, 257, 526 S.E.2d 549, 550 March 2000. The Supreme Court of Georgia noted, in describing its rule as the more "modern trend," :

> . . . we adhere to the position followed by this Court in *Johnson* and *Gardiner*, supra, and hold that the admission of expert testimony regarding eyewitness identification of the defendant is in the discretion of the trial court. Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification. [citations]. However, the admission or exclusion of this evidence "lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion." 272 Ga. 254, 257.

The Illinois Supreme Court has discussed the issue in at least one opinion. *See People v. Enis*, 139 Ill. 2d 264, 285-290 (1990). The Court concluded in that case that the trial court did not err in excluding expert testimony on the problems associated with eyewitness testimony because, in that instance, ". . . expert testimony based on the offers of proof would not have aided the trier of fact in reaching its conclusion." *Enis*, at 288. The Court also observed:

> We caution against the overuse of expert testimony. Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony, and eventually to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. . . We are concerned with the reliability of eyewitness expert testimony [citations omitted] whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to cross-examine eyewitnesses. . . It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable. *Enis*, at 289.

However, the Court also noted:

> A trial judge is given broad discretion when determining the admissibility of an expert witness, and when considering the reliability of the expert testimony, the judge should balance its probative value against its prejudicial effect. In the exercise of his discretion, the trial judge should also carefully consider the necessity and relevance of the expert testimony in light of the facts in the case before him prior to admitting it for the jury's consideration. In this case, we conclude that based on the offer of proof it was proper for the trial judge to exclude the expert testimony. *Enis*, at 290.

The Supreme Court returned to the issue in its consideration of the post-conviction petition of Mr. Enis. In an opinion from November of 2000, the court has left open the question of whether expert testimony with respect to the potential problems associated with eyewitness testimony would be admissible in a particular case.[3]

Whether or not such expert testimony with respect to eyewitness evidence would aid the jury in reaching a determination with respect to the issues in a particular case depends to a very great extent on the facts of the individual case. The Commission recognizes the potential for problems associated with eyewitness testimony and that there may be circumstances where expert testimony with respect to such problems might be helpful to the jury. A blanket rule which always permits the introduction of expert testimony on this issue is likely to produce delay in some cases where this kind of expert testimony may not truly be helpful. Conversely, a blanket prohibition against this type of expert testimony ignores the very real advances in academic literature which have identified potential problems with relying on eyewitness testimony.

As a result, the Commission has unanimously recommended that the admission of expert testimony with respect to problems associated with eyewitness identifications be made on a case by case basis by the trial judge. Such a rule provides flexibility, while permitting the exclusion of evidence that might be inappropriate.

Recommendation 56 :
Jury instructions with respect to eyewitness testimony should enumerate factors for the jury to consider, including the difficulty of making a cross-racial identification. The current version of IPI is a step in the right direction, but should be improved.

IPI 3.15 should also be amended to add a final sentence which states as follows: Eyewitness testimony should be carefully examined in light of other evidence in the case.

The Commission unanimously adopted two related recommendations relating to jury instructions on eyewitness testimony. While eyewitness testimony often provides valuable evidence in a criminal case, the reliability of eyewitness testimony has increasingly been brought into question.[4] In jury trials, making determinations about the credibility of eyewitness testimony is the responsibility of the jury. In Illinois, the jury has historically been instructed that it is the sole judge of the credibility of the witness. The Illinois Pattern Jury Instructions formerly did not enumerate issues for the jury to consider, and the commentary specifically recommended against such an instruction.[5]

Beginning in the early to mid-90's, the Illinois instruction was modified to provide a listing of factors for the jury to consider in assessing eyewitness testimony.[6] IPI 3.15 (2000 edition) currently provides as follows:

> IPI 3.15 Circumstances of Identification. When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following: (1) the opportunity the witness had to view the offender at the time of the offense, or (2) the witness's degree of attention at the time of the offense, (3) the witness's earlier description of the offender, (4) the level of certainty shown by the witness when

> confronting the defendant or (5) the length of time between the offense and the identification confrontation.

Committee notes to the instruction indicate "The Committee now unanimously believes that eyewitness identification is a subject deserving of judicial comment." *See* Committee Notes, IPI 3.15, Circumstances of Identification.

The Commission believes that the current version IPI 3.15 is an improvement over the prior pattern instruction, which recommended advising the jury it was the sole judge of the credibility of eyewitness testimony.[7] The Commission would encourage re-evaluation of this instruction, however, to insure that it reflects important considerations with respect to eyewitness testimony.

Other states have included additional issues in similar pattern instructions on eyewitness testimony.[8] In Kansas, for example, the jury is instructed not only to consider the factors identified above, but also to consider "Whether the witness ever failed to identify the defendant[s] or made any inconsistent identification."[9] In Maryland, the jury is instructed to consider ". . . the witness's certainty or lack of certainty, the accuracy of any prior description. . ."[10] Oklahoma juries are instructed to consider, among other things, " (3) whether the witness's identification is weakened by a prior failure to identify the subject; and (4) whether the witness's testimony remained positive and unqualified after cross-examination."[11]

New Jersey has recently introduced a new concept into the question of eyewitness identification by permitting the judge, in an appropriate case, to instruct the jury that its evaluation of the credibility of the identification of the defendant may include:

> The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.[12]

In approving the use of the instruction, the New Jersey Supreme Court has noted that it should only be given where ". . . Identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." *State v. McKinley Cromedy*, 158 N.J. 112, 132 (1999).

The Commission believes that a decision about how the IPI instruction might be properly amended is best left to the IPI Committee.

The Commission has also unanimously recommended a second revision to the Illinois instruction pertaining to eyewitness testimony, by adding the following sentence to IPI 3.15:

Eyewitness testimony should be carefully examined in light of other evidence in the case. The Commission believes that this modification is justified in light of new concerns that have been articulated with respect to inaccuracies of eyewitness testimony. The instruction encourages the jury to weigh testimony from eyewitnesses along with other evidence in trying to reach its determination as to the guilt or innocence of the defendant. Similar language is also found in the jury instructions of other states.

For example, Maryland pattern jury instructions[13] provide that while the identification of a defendant may be established by a single eyewitness, the jury is advised that they should "examine the identification of the defendant with great care." Oklahoma pattern jury instructions are to the same effect, and begin by advising the jury "Eyewitness identifications are to be scrutinized with extreme care. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing testimony as to identity."[14]

In light of new information regarding the potential for mistaken eyewitness testimony and the drastic consequences if such mistakes are made in a capital case, the Commission believes a re-evaluation of the instructions with respect to eyewitness testimony is prudent.

Recommendation 57 :
The Committee on the Illinois Pattern Jury Instructions-Criminal should consider a jury instruction providing a special caution with respect to the reliability of the testimony of in-custody informants.

The subject of the dangers associated with in-custody informant testimony has already been discussed in some detail in Chapter 8 of this Report, which recommends a pre-trial assessment of the credibility of an in-custody informant's evidence. The Commission members unanimously believed that the problems associated with in-custody informant testimony also warrant a special jury instruction advising the jury of the potential hazards of relying on this testimony.

As the Commission uses the term "in-custody informant," it is not intended to refer merely to testimony by an incarcerated individual about an event. Incarcerated persons may be witnesses to crime in the same way that other citizens are, and the fact of their incarceration does not automatically result in testimony that is unreliable. However, there are a number of death penalty cases where evidence as to particular statements or admissions by a defendant was presented by incarcerated individuals who were perhaps offered some benefit in return for their testimony. These cases require careful scrutiny, since the temptation to an incarcerated person to alleviate the harshness of confinement by any means is obvious.

However, the Commission also recognized that there will be instances when such information is valuable, reliable and truthful. As a result, Commission members did not believe that a wholesale exclusion of this evidence is appropriate or helpful to the truth-seeking process.

Illinois does already provide the jury with a special caution where testimony from an accomplice forms the basis of a conviction. In those instances, IPI 3.17 advises the jury that with respect to an accomplice, ". . . the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

Other states have pattern jury instructions which address this issue. The Commission considered jury instructions relating to in-custody informant testimony from Maryland, Oklahoma and California, and found the Maryland and Oklahoma instructions to provide the best example of how such an instruction could be drawn in Illinois.

In Maryland,[15] the jury is instructed to give careful consideration to any witness promised leniency, not just an accomplice or in-custody informant. The instruction provides:

> You may consider the testimony of a witness who testifies for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit]. However, you should consider such testimony with caution, because the testimony may have been colored by a desire to gain [leniency] [freedom] [a financial benefit] by testifying against the defendant.

The Oklahoma jury instruction is targeted specifically at informers The jury instruction, as modified by recent court decisions[16] provides:

> The testimony of an informer who provides evidence against a defendant for pay/(immunity from punishment)/(personal advantage/vindication) must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or by prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement, (3) whether the informant has ever changed his or her testimony, (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.[17]

In light of the frequency with which such testimony has appeared in the cases of those who were ultimately released from death row, the Commission believes that a special emphasis on this credibility issue is warranted.

Recommendation 58 :

IPI - Criminal -3.06 and 3.07 should be supplemented by adding the italicized sentences, to be given only when the defendant's statement is not recorded:

> **You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.** ***You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.***

A majority of Commission members supported this recommendation. In Chapter 2 of this Report, the Commission made specific recommendations with respect to videotaping and audiotaping of the interrogation of a suspect in a homicide case, and, in certain cases, of significant witnesses. Commission members discussed at several points in the process whether or not exclusion of non-taped statements was prudent, and ultimately elected *not* to recommend exclusion of statements that were not taped.

However, the Commission members unanimously believed that it would be appropriate to give a jury instruction which encouraged the jury to give proper consideration to whether a statement by the defendant was recorded in assessing credibility. Under Illinois law, the voluntariness of a defendant's confession is a matter for the court to determine outside the presence of the jury.[18] Once the court has determined that the statement was voluntarily made, the statement is admissible in the defendant's trial as substantive evidence of his or her guilt. The jury, however, is entitled to consider whether the defendant actually made the statement (to the extent there is any dispute over this fact), and what weight the statement should be given.

The Commission believes that a jury instruction of this type strikes the right balance between the interests of effective law enforcement and the rights of the defendant. By advising the jury to consider recorded statements as having greater reliability, the jury's attention will be drawn to an assessment of the steps that the police took to obtain the statement. The police, for their part, should be encouraged to take greater care to record statements of suspects.

The Commission has also recommended in Chapter 8 of this Report that the court give close scrutiny to interrogation tactics by the police which mislead the suspect/defendant as to the strength of the evidence

against him or her. This scrutiny, at the stage where the voluntariness of the confession is determined, should help to winnow out questionable and untrustworthy statements.

Recommendation 59 :
Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of capital trials.

Illinois courts have long rejected the admission of polygraph examination results as evidence during the guilt/innocence phase of a trial. There have been, however, instances where the Illinois Supreme court has held that information about a polygraph examination may be introduced at trial. *See, for example, People v. Melock*, 149 Ill. 2d 423, 457-465 (1992.)

While situations may arise where information regarding the circumstances surrounding a polygraph examination may be appropriately discussed at trial, the Commission has unanimously recommended continuation of the rule against admission of a polygraph examination to prove the results of the examination.

Notes - Chapter 9

1. *See*, for example, the article by Professor Wells and others discussed in Chapter 2 of this Report, as well as the National Institute of Justice report on Eyewitness Evidence.

2. *See State v. Eddie L. Coley, Jr.*, 32 S.W. 3d 831 at 838, Nov. 2000; "We recognize that we are in the minority of jurisdictions which find such testimony per se inadmissible, rather than leaving the determination of admissibility to the discretion of the trial court. Nevertheless, we are convinced that a per se rule of exclusion is appropriate."

3. *See People v. Enis*, 194 Ill. 2d 361, 393, footnote 1 : "We have assumed, for purposes of evaluating defendant's post-conviction claim, that Dr. Fulero's testimony regarding problems associated with cross-racial identifications would have been properly admitted at trial. We express no opinion, however, as to whether such expert testimony generally aids the trier of fact in reaching its conclusion."

4. For example, in New Jersey, McKinley Cromedy, who is African-American, was serving a 50 year prison sentence for the rape of a white college student. The victim was the only witness to the crime, and identified Cromedy under less than ideal circumstances after. DNA evidence subsequently exonerated him. *See* "Saved by science: New Brunswick man regains liberty after DNA test clears him of rape," New Jersey Star Ledger, December 15, 1999.

5. A copy of IPI 3.15 from the 2nd edition of the pattern jury instructions is included in the Technical Appendix to this Report, published separately.

6. The modification first appears in the 3rd edition of the pattern jury instructions, published in 1992. A copy of the instruction from this edition is also included in the Technical Appendix to this Report.

7. The former version of IPI 3.15 from the 2nd edition is included in the Technical Appendix to this Report.

8. Jury instructions identified in this Chapter are contained in the Technical Appendix to this Report, published separately.

9. Pattern Instructions for Kansas 3d; 52.20 Eyewitness Identification.

10. MPJI-Cr 3:30 Identification of Defendant.

11. OUJI-CR 9-19 Evidence - Eyewitness Identifications.

12. This is a portion of the New Jersey Jury instruction on in-court identification, which may be found on the website of the New Jersey Supreme Court, http://www.judiciary.state.nj.us/criminal/charges/non2C032.htm. A copy of the entire instruction is contained in the Technical Appendix to this Report, published separately.

13. MPJI-Cr 3:30 Identification of Defendant.

14. OUJI-CR 9-19 Evidence - Eyewitness Identifications.

15. MPJI-Cr 3:13 Witness promised leniency.

16. *Dodd v. State*, 993 P. 2d 778, 784 (2000).

17. *Dodd* added the provisions contained in paragraphs (1) through (5) to the instruction. *See* OUJI-CR 9-43A.

18. Illinois law with respect to determinations about the admissibility of a defendant's confession is discussed in Chapter 8 of this Report.

Chapter 10 - The Sentencing Phase

Following the determination as to the guilt of the defendant, a separate sentencing hearing must be held in order to impose capital punishment. This Chapter contains recommendations that specifically apply to this phase of the trial. Different rules apply to this sentencing trial, and different considerations are presented. In the first part of the sentencing phase, the defendant's eligibility for the death penalty must be determined. The Commission's recommendations for limiting the class of cases eligible for the death penalty were presented in Chapter 4 of this Report. The Commission also supports the application of discovery rules to the sentencing phase, additions to the statutory list of mitigating factors to be considered, permitting the defendant to make a statement in allocution at the sentencing phase, and instructing the jury on sentencing alternatives.

INTRODUCTION

Illinois employs a bifurcated sentencing proceeding to determine the imposition of the death penalty. Immediately following the determination as to the defendant's guilt, the Illinois death penalty statute contemplates that a separate sentencing hearing will commence. The defendant is entitled to a sentencing hearing before a jury or, if he or she chooses to waive a jury, the sentencing hearing will be before a judge. A sentencing hearing conducted before a jury will generally be conducted before the same jury which heard the guilt/innocence phase of the trial.

The first stage of the bifurcated sentencing proceeding is often referred to as the eligibility phase. During this phase, the prosecution is obligated to prove, beyond a reasonable doubt, one or more of the eligibility factors listed in the statute. The prosecution is also required to prove that the defendant is 18 years of age or older, as Illinois law does not permit the imposition of the death penalty on persons under 18. The jury will then return a verdict (or the judge will make a finding) that the defendant is or is not eligible for the death penalty based upon the eligibility factors submitted. The eligibility phase is intended to narrow application of the death penalty to the most heinous offenders.

The Commission's proposals for a revised eligibility scheme are discussed in Chapter 4 of this Report. The Commission believes that significantly reducing the scope of the cases in which the death penalty can be applied would return the Illinois death penalty scheme to its intended function of reserving the penalty for those who have committed the most heinous murders.

Once the defendant is found eligible for the death penalty, the aggravation/mitigation phase of the sentencing proceeding begins. During this phase of the proceedings, the prosecution will present information which it believes supports the imposition of the death penalty, referred to generally as

"evidence in aggravation." This information may include the defendant's past criminal record, specific information about the crimes in the instant case which make it particularly heinous or worthy of more severe punishment, and information, such as the defendant's disciplinary record in prison, which establishes his or her likely rehabilitative potential.

The defendant is entitled to present evidence in mitigation during this phase of the proceedings. The death penalty statute sets forth specific types of mitigating factors which the court or the jury may consider where supported by the evidence.[1] The sentencing body is also required to consider any other factors which may mitigate the defendant's punishment. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976). Defendant is therefore entitled to present evidence of any aspect of his or her background or information pertaining to his good behavior to establish some reason why the jury should select a penalty less than death.

At the aggravation/mitigation phase of the proceeding, the normal evidentiary rules which govern the guilt/innocence phase are relaxed. The jury or judge is required to conduct a particularized hearing, bearing in mind the specifics of the crime and the specifics of the defendant, in reaching its determination as to whether or not to impose the death penalty.[2] Any evidence, even "hearsay" evidence which is typically excluded in other circumstances, may be admitted as long as it meets the standard of being "relevant" and "reliable."[3]

The jury, or the judge in a bench sentencing, then reaches a determination as to whether the death penalty should be imposed. The jury's verdict imposing a death sentence must be unanimous.

SPECIFIC RECOMMENDATIONS

In Chapter 8 of this Report, the Commission expressed its support for the rules newly adopted by the Illinois Supreme Court which expand the discovery tools available for use in criminal cases. Under the new Supreme Court Rules, discovery depositions will be available for the first time in capital trials. The Commission believes that an expansion of discovery tools is a good idea.

Recommendation 60 :
The Commission supports the new amendments to Supreme Court Rule 411, which make the rules of discovery applicable to the sentencing phase of capital cases.

The Commission's support for these amendments was unanimous. The Special Supreme Court Committee recommended the following changes to Rule 411, which took effect on March 1, 2001:

Supreme Court Rule 411. Applicability of Discovery Rules

> These rules shall be applied in all criminal cases wherein the accused is charged with an offense for which, upon conviction, he might be imprisoned in the penitentiary. If the accused is charged with an offense for which, upon conviction, he might be sentenced to death, these rules shall be applied to the separate sentencing hearing provided for in Section 9-1(d) of the Criminal Code of 1961 (720 ILCS 5/9-1(d). They shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing. (Rule amendments underscored)

In its Supplemental Report recommending the rule change, the Committee noted:

> In response to these comments, the proposed committee comments to Rule 411 have been revised to clarify that pretrial discovery of defense sentencing information is subject to constitutional and privilege-based limitations. Moreoever, the committee comments have been revised to clarify that disclosure of defense sentencing information is not required when disclosure would provide inculpatory information to the State or otherwise directly or indirectly provide an advantage to the State on the merits of the case. The revised comments also note that the defense should not be required to disclose sentencing information when there is a reasonable possibility of harm to the defense on the merits, even when there is no clear constitutional or privilege-base prohibition on disclosure. Sup. Crt. Committee Supplemental Report, October 2000, p. 44-45.

The Committee Comments to the revised rule state:

> The committee found that the existing discovery rules and associated case law would adequately address constitutional and privilege-based objections to pretrial disclosure of sentencing information by the defense. However, constitutional and privilege-based limitations on discovery do not preclude the possibility that pretrial disclosure of defense sentencing information could directly or indirectly aid the State's case on the merits. The extension of discovery procedures to capital sentencing is not intended to provide such an advantage to the State. Committee Comments, Sup. Crt. R. 411.

Prior to the adoption of revised Supreme Court Rule 411, discovery was not available during the sentencing phase of the trial. See *People v. Lee*, 196 Ill. 2d 368, 381 (2001); *citing People v. Foster*, 119 Ill. 2d 69 (1987). In *Lee*, the Supreme Court reversed the defendant's death sentence and granted a new hearing based on the fact that defendant had been required to submit to a psychiatric exam at the request of the State. The new revisions to Supreme Court Rule 411 took effect following the issuance of the court's original opinion in February of 2001, and in a supplemental opinion on rehearing, the court made the following observations:

> Shortly after this opinion was filed, this court determined that the discovery rules should be extended to death penalty hearings. At a death penalty hearing, the sentencing authority is asked to impose the ultimate penalty upon the defendant. We believe it is important that the sentencing authority possess the fullest information possible with respect to the defendant's life, character, criminal record and the circumstances of the particular offense. [citations omitted] Allowing discovery furthers the goal of presenting complete information regarding the defendant to the sentencing authority. . . We recognize, however that in the context of a death penalty hearing, discovery will not necessarily be reciprocal. Whereas the defendant cannot be compelled to provide discovery unless the State makes reciprocal disclosures, disclosure of information by the prosecution does not automatically entitle the State to disclosure from the defense. [citations omitted] Certain procedural safeguards embodied in our constitution serve to limit discovery by the defendant to the State to the end that a defendant will not be sentenced to death by the use of evidence he unwittingly provides. . . . Pretrial discovery of defense information, whether for use at the guilt phase of trial or at the death penalty hearing, remains subject to constitutional limitations and limitations based on attorney-client or other privilege. The trial courts must do all they can to ensure that each defendant receives a fair trial and a fair sentencing hearing. *Lee*, 196 Ill. 2d 368, 388 (2001)

The Commission considered similar concerns with respect to the application of the revisions to Rule 411. The complexity of managing the discovery of sentencing phase information is acute in Illinois, as in other states, where the sentencing phase follows the guilt phase of the trial immediately, and often before the same jury. There is rarely time for discovery to be conducted following the guilt phase, except in those instances where the sentencing phase will be conducted by a judge sitting without a jury. As a result, much of the discovery of sentencing material will occur prior to the guilt/innocence phase by necessity.

Some types of discovery could implicate a defendant's constitutional right to avoid incriminating himself. During the time prior to trial, and during the trial itself, the rights of the defendant to avoid incriminating himself in any way should supersede the prosecution's right to discover information that might be useful in a sentencing trial. If we are to retain the present system of beginning the sentencing phase immediately following the guilt phase of the trial, trial judges will need to pay close attention to areas where the defendant's rights might be adversely impacted by pre-trial discovery of sentencing information. Where such discovery might have an adverse impact, such as in the deposition of an expert testifying only in the sentencing phase, the better practice would be for the trial judge to deny the deposition at that time, and to provide for a brief interval between the two phases where such discovery could be provided in the event the prosecution believes it necessary. Discovery of the written reports of such expert witnesses could proceed prior to trial, and thus provide the prosecution with the benefit of knowing the areas for this expert testimony.

The Supreme Court should carefully monitor the application of this rule to insure that constitutional rights and other important privileges to which the defendant is entitled have not been impinged upon.

Recommendation 61 :
The mitigating factors considered by the jury in the death penalty sentencing scheme should be expanded to include the defendant's history of extreme emotional or physical abuse, and that the defendant suffers from reduced mental capacity.

The Commission unanimously adopted this recommendation to revise the mitigating factors contained in the Illinois statute. Mitigating factors play an important role in the death sentencing process. While the list of eligibility factors has been expanded over the years from 7 to 20, the statutory list of mitigating factors remains identical to the provisions enacted with the original statute. Juries in Illinois receive a specific instruction on statutory mitigating factors, but are instructed only in general terms with respect to non-statutory mitigation. They are advised, with respect to such non-statutory mitigation, that they may consider any other factor in mitigation that is supported by the evidence. *People v. Hope*, 168 Ill. 2d 1, 43-44 (1995). It was the Commission's view that the capital punishment process would benefit by the explicit inclusion of additional statutory mitigating factors.

The Illinois Death Penalty statute currently provides as follows (720 ILCS 5/9-1(c)):

> Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following: (1) the defendant has no significant history of prior criminal activity; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution; (3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act; (4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm; (5) the defendant was not personally present during commission of the act or acts causing death.

The Commission has unanimously recommended that the list of statutory factors in mitigation should be expanded to include the following two items:

6. Defendant's background includes a history of extreme emotional or physical abuse.
7. Defendant suffers from reduced mental capacity.

Consideration of the defendant's reduced mental capacity and his or her background with respect to emotional and/or physical abuse as factors in mitigation is supported by the U. S.

Supreme Court's recent decision in *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910(2001). In *Penry*, the Supreme Court rejected the jury instructions used in the defendant's resentencing on the ground that they did not adequately permit the jury to consider and give effect to this type of mitigating evidence.

Recommendation 62 :
The defendant should have the right to make a statement on his own behalf at during the aggravation/mitigation phase, without being subject to cross-examination.

The Commission adopted this recommendation unanimously. Statements that are not subject to cross-examination are typically referred to as statements in "allocution."

As the Illinois Supreme Court has noted, allocution at common law referred to an inquiry which the court made of the defendant after the guilty verdict was returned in a capital case, as to ". . . whether the defendant had any reason to offer why judgment should not be entered against him." *People v. Gaines*, 88 Ill. 2d 342, 374 (1985). This right was particularly important at common law, since a defendant was not entitled to be represented by counsel and was not considered competent to testify in his own behalf. The Court observed in *Gaines* that the Unified Code of Corrections[4], which governed criminal sentencing generally, provided a statutory right to make a statement at sentencing. However, those provisions were amended to exclude capital sentencing proceedings with the adoption of the 1977 death penalty Act.[5] As a result, there was no statutory right to make a statement at a capital sentencing hearing, although a defendant could testify at the sentencing proceeding. A defendant who testifies at the sentencing proceeding would be subject to reasonable cross-examination.[6]

The Court has consistently held that a defendant in a capital sentencing proceeding has no right to allocution under Illinois law, *People v. Guest*, 195 Ill. 2d 1, 31-32 (2001), *People v. Anthony Brown*, 185 Ill. 2d 229 (1999), at least where the capital sentencing hearing is conducted before a jury. Trial courts have apparently permitted statements in allocution in capital sentencing hearings conducted before a judge alone.[7] The fact that a non-capital defendant is entitled to make a statement in allocution under the sentencing statute,[8] while a capital defendant may not, does not deny a capital defendant equal protection. *People v. Childress*, 158 Ill. 2d 275, 308 (1994).

This leads to the anomalous situation in which a defendant in a capital case who waives his right to a jury for sentencing may make such a statement in allocution, while a defendant who exercises his or her right to have a jury determine his or her sentence may not make such a statement without testifying on his own behalf, subject to cross-examination.

Several states do permit a defendant the right of allocution in a capital case even where the sentencing hearing is conducted before a jury rather than the judge. In Maryland, the right of a capital defendant to allocution is provided for in Maryland Court Rule 4-343 (f) (". . . Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a

statement, and shall afford the State the opportunity to respond.")[9] *See also Booth v. Maryland*, 306 Md. 172, 198-9 (1986)[10] New Jersey courts have determined that a defendant in New Jersey has a common law right to present a statement in allocution to a jury in a capital case. *State v. Bey*, 161 N.J. 233, 275 (1998) Ohio provides a capital defendant with a right to make a statement to a jury through its capital sentencing provisions, which require that the trial court, and the trial jury, shall hear evidence in aggravation and mitigation, and ". . . shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender." Ohio Revised Code, 2929.03 (D)(1); (*See also* Ohio Crim.R. 32 (A)(1), which requires the court to inquire whether the defendant wishes to make a statement on his or her behalf.) The Oregon Supreme Court has determined that the right of a capital defendant to make an unsworn statement is grounded in the Oregon Constitution, which states that in all criminal prosecutions, the "accused shall have the right . . . to be heard by himself and counsel." *See State v. Rogers*, 330 Or. 282, 297 (2000)[11]

There are also states which, like Illinois, have expressly rejected the notion that allocution is constitutionally required in capital cases. California has consistently rejected the notion that there is a right of allocution at the penalty phase of a capital trial. *People v. Lucero*, 23 Cal. 4th 692, 717 (2001). New York, like Illinois, permits allocution before a sentencing court in a non-capital case, but at least one trial court has found that there is no statutory or constitutional right to allocution in a capital case. *People v. Owens*, 188 Misc. 2d 392, 729 N.Y.S. 2d 285 (2001). The Oklahoma Court of Criminal Appeals recently considered the question and found that neither its statutes nor constitution provided for such an unsworn statement. *Duckett v. State*, 919 P. 2d 7, 21-22 (1996). The Supreme Court of Tennessee has also rejected the idea of allocution in capital sentencing proceedings, concluding that there was no statutory, common-law or constitutional right to allocution in a capital case in Tennessee. *State v. Stephenson*, 878 S.W. 2d 530, 550-552 (1994).

Commission members discussed the potential problems associated with permitting such an unsworn statement, including the difficulty of managing the process to preclude inappropriate displays. On balance, it was the Commission's view that the interests of justice would be better served by permitting the defendant to make a statement in allocution before the jury in a capital sentencing hearing. States which permit allocution have found appropriate ways to control the presentation of this information. For example, in *State v. Rogers* [12], the Supreme Court of Oregon concluded that the trial court had properly exercised its discretionary authority to control proceedings before it by requiring that the defendant make his statement in allocution by reading from a prepared statement, and by requiring that the statement be submitted to the trial court in advance for its review to insure that it did not contain irrelevant or prejudicial comments. These procedural restrictions did not burden the defendant's right to make such a statement. *State v. Rogers*, 4 P. 3d 1273. The New Jersey Supreme Court, exercising its supervisory authority over criminal trials generally, identified general guidelines applicable to statements in allocution in capital cases. These guidelines included requiring that before the defendant speaks, he or she be instructed by the court, outside of the presence of the jury, about the limited scope of the right and that the statement was subject to the court's supervision. The defendant

should also be advised that should the statement go beyond proper bounds it would be subject to correction by the court, which could include comment by the court or prosecutor, or possibly re-opening the case for cross-examination. *See State v. Zola*, 112 N.J. 384, 431-2, 548 A. 2d 1022, 1046 (1988).

The prosecution in a capital sentencing hearing has long been permitted to present evidence and comment upon the defendant's lack of remorse over the crime as a factor for the jury to consider in reaching its determination about whether to impose a death sentence. *People v. Erickson*, 117 Ill. 2d 271, 302 (1987). There may be many circumstances where such comment by the prosecution is relevant and appropriate in a sentencing proceeding. Under existing law, a defendant may not counter this evidence without taking the witness stand to testify in his or her own defense. There may be legitimate reasons why a defendant chooses not to do so. Permitting the defendant to make a statement in allocution will enable the defendant to address this issue.

The Commission recognizes that unsworn allocution statements by a defendant may be self-serving, and that since the defendant will not be testifying, the prosecution will not be able to cross-examine the defendant with respect to the statement. The Commission believes, however, that the jury should be able to discern whether or not such statements are worthy of belief, and what weight they should be accorded in the sentencing process. Courts in other jurisdictions have managed to permit allocution before a jury and control the process appropriately, and trial judges in Illinois should be equally able to manage such statements.

Recommendation 63 :
The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.

This was a unanimous recommendation of the Commission. Most sentencing decisions in criminal cases in Illinois are made by the judge, rather than a jury. The capital sentencing proceeding is unique in that the jury is required to make an actual decision about the defendant's sentence. Prior to 1988, juries in Illinois were instructed that they had to make a determination as to whether or not to sentence the defendant to death, but that they should not concern themselves about what other sentence the defendant might receive in the event that death was not imposed.

While sentencing decisions with respect to death eligible cases are made pursuant to the death penalty statute (720 ILCS 5/9-1 et seq.), the sentence to be imposed for other types of first degree murders is governed by general sentencing statutes contained in the Unified Code of Corrections (730 ILCS 5/5-8-1 et. seq.) Under those provisions, a defendant convicted of first degree murder may be sentenced to a maximum of 60 years imprisonment. Under certain circumstances, that prison term may be extended to a longer period, or the judge may impose a life sentence.[13] For certain types of murders, the court is required to impose a life sentence.[14]

In 1988, the Illinois Supreme Court determined that where a defendant was convicted of multiple murders and was therefore required to be sentenced to natural life as a mandatory alternative to the death penalty, the jury must be informed of that alternative sentence. *See People v. Gacho* , 122 Ill. 2d 221, 262-263 (1988) The Supreme Court elected to apply the decision in *Gacho* prospectively, to sentencing hearings which occurred after the date of the opinion (February 1, 1988). As a result of *Gacho*, Illinois juries receive instructions with respect to an alternative sentence in the case of multiple murder convictions where natural life is the mandatory sentence.

The United States Supreme Court has also considered this issue several times. *See Simmons v. South Carolina* 512 U.S. 154, 114 S. Ct. 2187 (1994), *Shafer v. South Carolina* , 532 U.S.36,121 S.Ct. 1263 (2001). The United States Supreme Court reaffirmed its position in those earlier cases this year in *Kelly v. South Carolina*, __ U.S. __, 122 S. Ct. 726 (2002). As those cases make clear, the trial court *must* instruct the jury on the alternative sentence of life without parole where that sentence is the mandatory alternative.

The Commission has unanimously recommended that the jury in a capital sentencing proceeding be instructed on *all* alternative sentences the defendant might receive. There are several reasons for this. First, as noted in *Gacho* the jury may reasonably be concerned about whether a particularly dangerous defendant may be released from prison, and choose to apply the death penalty not so much because the defendant may be deserving of death, but because there is no way to insure future safety.[15] This a legitimate concern on the part of any sentencing body, and the jury should be adequately informed that there are other ways to insure that society remains safe.

Second, as the court points out in *Shafer*, juries may be misinformed in the other direction with respect to terms of imprisonment. Juries may labor under the false impression that if the defendant is only sentenced to a term of years, he or she will actually serve only a few of those years and be released early on parole. As a result, juries might be inclined to see a particular defendant receive a sentence of 60 years for a murder, if they reasonably believed that the defendant would actually serve 60 years, or something very close to it. Under Illinois law, judges may impose an extended term beyond 60 years where circumstances warrant it. In addition, trial judges are now required to make a statement to inform the public as to the likely sentence a defendant will actually serve if he or she is sentenced to a term of imprisonment. In first degree murder cases where the offense occurred after June 19, 1998, the trial judge must make the following statement during sentencing:

> The purpose of this statement is to inform the public of the actual period of time this defendant is likely to spend in prison as a result of this sentence. The actual period of prison time served is determined by the statutes of Illinois as applied to this sentence by the Illinois Department of Corrections and the Illinois Prisoner Review Board. In this case, the defendant is not entitled to good conduct credit. Therefore, this defendant will serve 100% of his or her sentence. (730 ILCS 5/5-4-1(c-2))

Advising the sentencing jury of the possible alternative sentences that a defendant will receive in a first degree murder may therefore provide important information to the jury with respect to whether or not a sentence of death should be imposed.

It was the Commission's view that this recommendation favored neither the prosecution nor the defense, but that it would serve the truth-seeking function. Members of a jury will invariably ask or wonder what will happen to a defendant if they do not impose a death sentence. It was the Commission's view that despite the complexity of adequately instructing the jury in clear and simple terms about the alternative sentences, this was a more desirable way of conducting the sentencing hearing.

A recent report by the Constitution Project recommended that states with capital punishment should insure that life without parole is available as a sentencing option, and that juries should be given more information with respect to alternative sentences[16]. Illinois already has had, for many years, an alternative sentence of natural life, which means that the defendant will serve out his or her natural life in prison without the opportunity for parole, and has required that the jury be instructed as to its availability in certain circumstances. *See* 730 ILCS 5/3-3-3(d). This recommendation would broaden the circumstances under which an instruction as to alternative sentences would be required.

To the extent that the Commission's recommendations to adopt a severely curtailed death eligibility scheme, with a mandatory alternative of natural life, are adopted, the sentencing jury would only need to be instructed on the sentences of death and the alternative of natural life.

Minority view -- jury not required to impose death

While supporting this concept, a significant minority of the Commission advocated going somewhat further and including among the instructions given to the jury the admonition that they are *never* required to impose the death sentence. There are a number of states with death penalty statutes which do so advise the jury. For example, in Georgia, the jury is advised:

> You may set the penalty to be imposed at life imprisonment.
>
> It is not required, and it is not necessary, that you find any extenuating or mitigating fact or circumstance in order for you to return a verdict setting the penalty to be imposed at life imprisonment. Whether or not you find any extenuating or mitigating facts or circumstances, you are authorized to fix the penalty in this case at life imprisonment.
>
> If you find from the evidence, beyond a reasonable doubt, the existence in this case of one or more statutory aggravating circumstances as given you in charge by the court, then you would be authorized to recommend the imposition of a sentence of life imprisonment without parole, or a sentence of death, but you would not be required to do so.

> If you should find from the evidence in this case, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances as given you in charge by the court, you would also be authorized to sentence the defendant to life imprisonment. You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you, or without any reason.[17]

Juries in Missouri and Oklahoma are similarly instructed that they may elect to impose the penalty of life without parole in lieu of the death sentence.[18]

Residual doubt and jury instructions

Various proposals have been advanced to authorize the defendant to argue the notion of residual doubt, or to instruct the jury on the issue of residual doubt. The Commission generally rejected this notion. As expressed by its proponents, the concept of residual doubt entails instructing (or arguing to the jury) that if, after having convicted the defendant of the crime with which he was charged, some doubt still lingers in the jury's mind with respect to whether or not the defendant is in fact the guilty party, the jury should be authorized to reject a sentence of death on this basis.

The Illinois Supreme Court has considered the notion of residual doubt in a number of cases. The Court has consistently rejected the idea that the issue of residual doubt should be presented at the second stage of a sentencing hearing. *See People v. Emerson*, 189 Ill. 2d 436, 727 N.E. 2d 302, 338-9 (2000). One reason that the Illinois Supreme Court rejected the notion of residual doubt is that questions about such lingering doubt are not relevant to the circumstances of the offense or the defendant's individual background – upon which sentencing decisions are supposed to be based. The United States Supreme Court has specifically rejected the idea that there is a constitutional obligation to consider residual doubt during the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320 (1988) The Illinois Supreme Court has also declined to find that precluding evidence of residual doubt violates the defendant's rights under the Illinois constitution. *People v. McDonald*, 168 Ill. 2d 420, 455-56 (1996).

Tennessee does appear to permit the consideration, in certain circumstances, of residual doubt as a non-statutory mitigating factor in a death penalty hearing. *See State v. Bane*, 57 S.W. 3d 411, 422 (2001); and *State v. Hartman*, 42 S.W. 3d 44, 55-58 (2001). Many other states, like Illinois, reject residual doubt as an appropriate mitigating factor in a death penalty hearing.[19]

The Commission thoroughly discussed residual doubt and its role in the death penalty process. While Commission members were sensitive to the notion that the most severe penalty available should not be meted out in cases where there is some bona fide doubt remaining about whether the defendant committed the underlying crime, a jury instruction on residual doubt appeared to most members of the Commission to be an unwise method of addressing this problem. It seems completely contradictory to

instruct a jury which has just found the defendant guilty of a crime beyond a reasonable doubt that if some "lingering doubt" about the defendant's guilt exists, they should consider that in the sentencing process. Since Illinois does not even define the term "reasonable doubt" for the jury, adding a new concept in jury instructions of "residual doubt" seems all the more unwise.

The Commission has developed a number of recommendations which will address the underlying problem inherent in cases in which the evidence may be sufficient to convict, but where there still remains some underlying concern about the defendant's guilt or culpability. The Commission has recommended, for example, modification of the language of the sentencing statute which directs the jury's discretion, so as to make it clear that the jury can make a decision not to impose the death penalty.[20] More important, the Commission has also recommended the concurrence of the trial judge in the capital sentencing process to address such instances.[21]

Recommendation 64 :
Illinois courts should continue to reject the results of polygraph examinations during the sentencing phase of capital trials.

Just as Illinois has always rejected the idea that polygraph evidence should be admissible in the guilt/innocence phase, Illinois courts similarly reject the idea that polygraph evidence is admissible during the sentencing phase. Other states have chosen a different route with respect to admission of polygraph evidence during the sentencing phase.

Some states permit the introduction of polygraph evidence at the sentencing phase, since normal evidentiary rules are relaxed and it is important to have full information with respect to the defendant's circumstances in reaching a decision.[22] The Illinois Supreme Court has previously rejected the notion of admitting polygraph results even at the aggravation/mitigation phase where the standard for admission of evidence is whether or not it is relevant and reliable. *See People v. Szabo*, 94 Ill. 2d 327 (1983), where the court noted: ". . . the reasons we articulated in rejecting the admission of polygraph evidence at trial are also persuasive in excluding it from the sentencing jury's consideration. No evidence is as likely to divert the jurors attention from a careful, reasoned, consideration of all the aggravating and/or mitigating factors before them." 94 Ill. 2d at 362.

The Commission has unanimously recommended that Illinois courts continue to reject the admission of the results of polygraph examinations even during the sentencing phase of capital trials.

Notes - Chapter 10

1. The statutory mitigation factors are set forth in 720 ILCS 5/9-1(c).

2. *See People v. Hudson*, 157 Ill. 2d 401, 454 (1994).

3. *See People v. Kliner*, 185 Ill. 2d 81, 705 N.E. 2d 850, 895 (1999).

4. Formerly Ch. 38, 1005-4-1(a), now 730 ILCS 5/5-4-1(a).

5. See: *Gaines*, 88 Ill. 2d at 376.

6. *Gaines*, id.

7. See: *People v. Derrick Coleman*, 183 Ill. 2d 366, 374 (1998); *People v. Strickland*, 154 Ill. 2d 489, 503 (1993).

8. 730 ILCS 5/5-4-1(1)(6).

9. The Court rules and jury instructions referred to in this Chapter are contained in the Technical Appendix, published separately.

10. Art. 27, Sec. 413 (c)(2) of the Maryland Code also provides: "The State and the defendant or his counsel may present argument for or against the sentence of death."

11. The Oregon Supreme Court also noted that the trial court had a broad right to control the proceedings before it, and could therefore impose reasonable restrictions on the unsworn statement, noting: "We conclude that, by requiring the defendant to read from a prepared statement and to submit the statement in advance for review, the trial court acted within its discretion to ensure orderly and expeditious proceedings and to avert error." *Rogers*, at 302.

12. 330 Or. 282, 4 P. 3d 1261 (2000).

13. *See* 730 ILCS 5/5-8-1 (b) (authorizing imposition of life sentence in certain circumstances), (c) (requiring the imposition of a life sentence when certain aggravating factors are present), and 5-8-2, authorizing an extended term of up to 100 years for first degree murder in certain circumstances.

14. Generally, the court *may* impose a life sentence where eligibility factors under the death penalty scheme are present, but is required to impose a life sentence for certain of those factors, such as where multiple murders are present, or where there is a murder of a police officer. *See* 730 ILCS 5/5-8-1(c).

15. As the court noted: ". . . The jury here could have reasonably believed, from the instruction given, that the defendant might be given a prison term of a number of years, rather than natural life

imprisonment. That could have persuaded it that the death penalty was the only certain way to protect society from this defendant." *Gacho*, 122 Ill. 2d 261.

16. *Mandatory Justice: Eighteen Reforms to the Death Penalty,* Constitution Project report, 2001, P. 19.

17. Georgia Suggested Pattern Jury Instructions, Vol. II Criminal Cases (2d. Ed., 1991; Revisions through November 1997), Council of Superior Court Judges of Georgia, p.81, Par. 13 "Death Penalty Charge," par. d. The Georgia Pattern Instructions on this point are included in the Technical Appendix to this Report, published separately.

18. *See* See MAI-CR 3d 313.46A (Missouri); OUJI-CR 4-80 (Oklahoma). The Missouri and Oklahoma jury instructions are included in the Technical Appendix to this Report.

19. See: *Melson v. State*, 775 So. 2d 857, 898-99 (1999) (Alabama); *Bogle v. State*, 655 So. 2d 1103, 1107 (1995) (Florida); *State v. Roseboro*, 351 N.C. 536, 549 (2000) (North Carolina); *State v. Southerland*, 312 S.C. 377, 385-6 (1994) (South Carolina).

20. *See* Chapter 11, Imposition of Sentence.

21. *See* Chapter 11, Imposition of Sentence.

22. *See State v. Bartholomew*, 101 Wash. 2d 631, 683 P. 2d 1079 (1984); *State v. Rupe*, 101 Wash. 2d 664, 683 P. 2d 571 (1984).

Chapter 11 – Imposition of Sentence

In Illinois, the statute which describes the method by which the jury must make its decision on whether to impose a death sentence has been criticized as confusing. The Commission unanimously recommends changing the statute to clarify the language and instruct the jury that it must determine unanimously, after considering factors in aggravation and mitigation, whether death is the appropriate sentence. The Commission also recommends unanimously that following the jury verdict on the imposition of capital punishment, the trial judge should indicate on the record whether he or she concurs in the result. If not, a sentence other than death should be imposed. A majority of Commission members believe that in this situation, providing that a new death penalty scheme with only five eligibility factors has been adopted, the trial judge should be required to impose a life sentence. A unanimous recommendation has been made that the death penalty not be imposed on those who are mentally retarded. Finally, the Commission identified several types of cases in which the potential for error was significantly higher, and unanimously recommends that the death penalty be precluded in cases involving uncorroborated testimony from an in-custody informant, an accomplice, and cases based upon a single eyewitness.

INTRODUCTION

This chapter covers a variety of issues pertaining to the imposition of the death penalty, including the standard by which the jury should make its decisions. It also articulates several different types of cases in which the Commission believes the death penalty should not be imposed. The Commission has also proposed a new process for the sentencing determination, which it believes will address concerns articulated in Chapter 10 about the question of residual doubt. The new process entails concurrence by the trial judge in the sentence imposed by the jury. Commission members believe that this is a more effective way to handle questions concerning lingering doubt the defendant's guilt.

SPECIFIC RECOMMENDATIONS

Recommendation 65 :
The statute which establishes the method by which the jury should arrive at its sentence should be amended to include language such as that contained in former SB 1903 to make it clear that the jury should weigh the factors in the case and reach its own independent conclusion about whether the death penalty should be imposed. The statute should be amended to read as follows:

> **If the jury determines unanimously, after weighing the factors in aggravation and mitigation, *that death is the appropriate sentence* . . .**

The Commission has unanimously recommended modifying this statutory language. In Illinois, the sentencing hearing typically follows a two stage process, with the jury or judge first making the determination as to whether or not the defendant is eligible for the death penalty, and then the jury or judge actually makes the determination, based upon information received during the aggravation/mitigation phase, as to the imposition of the death penalty.

The statute which governs the jury's determination as to whether or not to impose the death penalty currently reads as follows:

> . . . *If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence*, the court shall sentence the defendant to death. Unless *the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence* the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. (Emphasis supplied) 720 ILCS 5/9-1(g) (emphasis supplied)

It has been suggested that this language is confusing to the jury, in that it may imply that the jury has no choice about whether or not to impose the death penalty. The jury might reasonably conclude that the imposition of the death penalty is mandatory, unless mitigating factors outweigh the aggravating factors. The jury might not clearly understand that if any one juror finds that a mitigating factor exists, that, and that alone, is sufficient to warrant imposition of a sentence other than death. The language in this recommendation is drawn from SB 1903 (2000 Session), which was reintroduced in the Spring 2001 session as SB 1141 and 1159. While none of these Senate bills passed, the Commission unanimously favored this language over the language contained in the existing statute.

Of the many states with the death penalty, a significant number use a more broadly stated guide for the jury which enables the jury to truly make a choice about whether or not to impose a death sentence in a particular case.

Recommendation 66 :
After the jury renders its judgement with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she concurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming the adoption of a new death penalty scheme limited to five eligibility factors.)

Commission members have suggested the addition of a new feature to the sentencing scheme with this recommendation. Commission members are unanimous in their view that the trial judge should be required to indicate on the record whether he or she concurs in the sentencing result, and impose a sentence other than death where he or she does *not* concur. A majority of Commission members believe that the alternative sentence imposed in this situation should be mandatory natural life, assuming

the new death eligibility scheme with only five eligibility factors is adopted. (See Recommendation 67 which follows.) This proposal is designed to address the situation in which the trial judge has some lingering concern about the defendant's guilt, or when the judge believes the verdict of death may have been influenced by passion and prejudice.

It is important to note what this recommendation does not do. Some states, such as Florida, have death sentencing schemes whereby the jury makes a sentencing recommendation to the judge. The judge may then impose the death penalty or some other sentence either as the jury suggests or on some other basis.[1] These schemes have been criticized, as they permit the judge to override the jury's determination that the defendant's life should be spared.[2]

The recommendation advanced by the Commission leaves the sentencing determination in the first instance in the hands of the jury. Only where the jury has imposed a sentence of death will the judge be required to concur in the result. Commission members anticipate that the instances where judges will routinely overrule the jury's sentencing determination are likely to be few. However, where the proceedings leave the trial judge with doubt about whether death is the appropriate sentence, the Commission majority believe the judge should be provided with the opportunity to correct that error short of ordering a new trial or sentencing proceeding. Any capital punishment scheme should be applied in a rational manner, free from emotion and prejudice. The trial judge is often in the best position to assess whether the verdict is likely the result of some factor other than the culpability and background of the defendant. A capital sentence should be reserved for only the most unequivocal cases.

There are states where the trial judge is required to express a viewpoint on the jury's sentencing determination. Oklahoma, for example, requires the trial judge to complete a trial information form providing the reviewing court with information about the trial. The questions on the form are directed primarily towards assessing the competency of the defendant's counsel, and determining the extent to which race may have played a role in the proceedings.[3]

The form includes a section entitled "Trial Judge's Comments on Appropriateness of Sentence." This section requires the judge to respond to the following two questions:

> 1. Is there anything in the pretrial proceedings, the trial, or the sentencing which would cause you to question the appropriateness of the death sentence being imposed on this case?
> 2. If you question the appropriateness of the death sentence in this case, what would be your recommendation as to sentence?

The answers to these questions are by no means binding on the reviewing court in Oklahoma, but as the court noted recently in *Dodd v. State*, "they are helpful on a close case. . . " (993 P. 2d 778, 783; Okla.Crim.App. 2000).

It was the unanimous view of Commission members that the most appropriate way to address concerns about residual or lingering doubt are through the trial judge's concurrence, in a process similar to that described above, rather than through instructions to the sentencing jury. A recent decision by the Arizona Supreme Court includes an opinion by a member of the court expressing the problems associated with whether or not "residual doubt" is a mitigating factor or a concern for a sentencing judge:

> As a concept, residual doubt is the narrow window of uncertainty that will arise not infrequently in the mind of the judge following a guilty verdict in a criminal prosecution where the prosecutor has satisfied the jury of a defendant's guilt beyond a reasonable doubt but has not established guilt to an absolute certainty. Mitigation evidence, on the other hand, both statutory and non-statutory, is defined by the statute and is concerned with a defendant's human character as it may relate to the offense charged. Residual doubt, normally, will not bear on an aspect of a defendant's character propensities, or past record, and will not, *per se*, be a circumstance of the particular offense. Specifically, residual doubt will arise only with respect to sentencing where the trial judge in fact perceives uncertainty, not as to the verdict of the jury, but as to the absence of absolute evidence of guilt. Such concern will normally stem from the relative strength or weakness in the evidence introduced at trial, the manner in which evidence is presented, the credibility of trial witnesses, the trial strategy utilized by either side, or other circumstances arising at trial. It thus occurs to me that residual doubt, as discussed in the cases, and mitigation evidence, as referenced in Sec. 13-703 (G) are two quite different things. *State v. Harrod*, 26 P. 3d 492, 504 (2001). (Special concurrence of Vice Chief Justice Jones)

While conceding that residual doubt did not exist in the *Harrod* case, another justice took the view that residual doubt could and should be considered as a mitigating factor in the context of the Arizona capital sentencing procedure:

> . . . it is one thing to say that a verdict will not be disturbed just because the judge disagrees with it and quite another to say that a judge should sentence a defendant to death even though the judge believes the jury might have made a mistake. Recent events have shown quite clearly that there have been all too many instances in which juries have found a defendant guilty and the convictions have been affirmed, only to have it later determined that the defendant was actually not the perpetrator [citations omitted.] . . . What harm is done by showing mercy because there is a possibility of a defendant's innocence? Why need we run the risk of executing someone who may actually be innocent? Such a risk does not exist in most cases, but we can hypothecate many instances in which it would. *State v. Harrod*, 26 P. 3d 492, 505-507 (2001)(Special concurrence of Justice Feldman)

Unlike the Illinois statute, the Arizona capital sentencing scheme places the sentencing decision on the court alone. (See Ariz.Rev.Stat. 13-703C). The comments by members of the Arizona Supreme Court therefore address directly the issues presented to trial judges of that state in making determinations

about whether or not the death penalty should be imposed in a given case. Although death penalty schemes, like Arizona's, where the decision to impose the death penalty is made by a judge rather than a jury, are currently under review by the U.S. Supreme Court,[4] the proposal by the Commission entails authorizing the trial judge to extend mercy, rather than impose a more severe penalty. It is therefore not likely to run afoul of constitutional concerns.

The Chicago Council of Lawyers has recommended that judges be more vigilant in exercising their existing authority to grant judgements notwithstanding the verdict in appropriate cases, and should use that power to reduce the sentence of death where there are doubts about the defendant's guilt.[5]

While Commission members unanimously believed that requiring concurrence of the trial judge on sentencing would address the issue of residual doubt and proportionality in a better way, some members of the Commission were reluctant to support the view that the alternative sentence in this situation should be mandatory natural life. The minority viewpoint on this issue is discussed at the end of the next recommendation.

Recommendation 67 :
In any case approved for capital punishment under the new death penalty scheme with five eligibility factors, if the finder of fact determines that death is not the appropriate sentence, the mandatory alternative sentence would be natural life.

As discussed in Chapter 4, a majority of Commission members have proposed to significantly reduce the number of factors that would make a defendant eligible for the death penalty. It is the Commission's hope that the result of this reduction will be that only the most heinous activity will qualify for the imposition of the death sentence. In light of the fact that the breadth of the death penalty scheme would be seriously curtailed, the appropriate alternative sentence for those eligible for the death penalty under such a restricted scheme is mandatory natural life.

The current sentencing statute in Illinois provides that only some of the 20 eligibility factors which may subject a defendant to the death penalty carry the mandatory alternative sentence of natural life. The Commission has reviewed the various eligibility factors, and does not by this recommendation suggest or imply that the alternative sentence under the *current* death penalty scheme of 20 eligibility factors should be mandatory natural life.

Under existing provisions of Illinois, a sentence of "natural life" means that the defendant is never eligible for parole. The governing statute provides that: "No person serving a term of natural life imprisonment may be paroled or released except through executive clemency." See 730 ILCS 5/3-3-3 (d). The Illinois sentencing statute currently in existence, 730 ILCS 5/5-8-1, provides that the court *may* sentence a defendant convicted of first degree murder to natural life if any of the eligibility factors described under the death penalty statute exist. The trial court is *required* to impose a sentence of natural life, however, when certain eligibility factors are present (such as the murder of a police officer

or correctional officer, or a multiple murder). The Commission majority has proposed that natural life be the mandatory alternative sentence under the new restructured death penalty scheme suggested by this Report, where there are only five eligibility factors would would qualify the defendant for the death penalty.[6] As is discussed elsewhere in this Report, the Commission has proposed that if this severely curtailed scheme is *not* adopted, then Illinois juries should be instructed on all sentencing alternatives.

Minority view - rejecting mandatory natural life

Even if the Illinois legislature reduces the eligibility factors to the five recommended, it was the view of Commission members in the minority on this issue that it would be a grave error to require a sentence of mandatory life in every case in which the jury or judge recommends against capital punishment because a mitigating factor exists. Those involved in the system are not prescient and cannot foresee all of the cases that will pass through the system. It is predictable that sooner or later cases will emerge in which the circumstances that make the death penalty inappropriate will also indicate that a sentence of years less than life without parole is appropriate. Instances of unjustly harsh sentences are the inevitable result of mandatory sentencing provisions. As for the need to impose life without parole as the alternative to death, it is important to bear in mind the many past Illinois cases in which, after appellate reversal of a death penalty, the prosecution has agreed that the defendant should be sentenced to a term of years.

Recommendation 68 :

Illinois should adopt a statute which prohibits the imposition of the death penalty for those defendants found to be mentally retarded. The best model to follow in terms of specific language is that found in the Tennessee statute.

The Commission unanimously adopted the recommendation that Illinois should ban the imposition of the death penalty on those who are found to be mentally retarded. As of December 31, 2001, eighteen states (of the 38 with the death penalty) and the federal government have statutory schemes which prohibit the imposition of the death penalty if the court finds the defendant mentally retarded.[7] The process generally involves a separate hearing, usually before the court alone (as opposed to the jury), and various standards are used with respect to how this determination is made.

While such a blanket rule may be less critical if the death penalty eligibility factors are narrowed as suggested by this Commission, there appears to be a trend among the states to ban the imposition of the death penalty on those who are mentally retarded. Five of the eighteen states which now ban the imposition of the death penalty on those found to be mentally retarded enacted their prohibitions during 2001[8] Texas considered similar legislation during 2001. While the bill in Texas passed the legislature, the Governor declined to sign it.

The Commission considered the statutory schemes from a number of states, including Colorado[9], Kansas[10], Nebraska[11], South Dakota[12], and Tennessee[13]. The Commission found that the Tennessee provisions represented a good model, and would recommend that the legislature consider the Tennessee statute as a model in reaching its own determination on this topic.[14] The Tennessee statute defines mental retardation as:

> (1.) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age. Tenn.Code 39-13-203 (a)

The provision requires that the determination as to defendant's mental retardation be made by the court prior to trial, and permits the defendant to raise the issue as a mitigating factor in the event that the court finds that the defendant is not mentally retarded as provided in the statute.

Illinois already has a statutory definition of mental retardation contained in the sentencing statutes which has some similarities. Illinois statute provides:

> Sec. 5-1-13. Mentally Retarded.
> "Mentally retarded and mental retardation" mean sub-average general intellectual functioning generally originating during the developmental period and associated with impairment in adaptive behavior reflected in delayed maturation or reduced learning ability or inadequate social adjustment. (730 ILCS 5/5-1-13)

The definition used in the Tennessee statute is more precise and differentiates more clearly the standards to be used in making the determination about mental retardation. By setting a clear standard, with the additional requirement that the deficits be observable during the developmental period or by age 18, the definition provides protection against attempts to falsify the condition. The Tennessee definition is similar to definitions used in other states which prohibit the imposition of the death penalty on those who are mentally retarded. Illinois should join the group of states prohibiting the imposition of the death penalty on those who are mentally retarded.

The Supreme Court of the United States was poised to consider whether the imposition of the death penalty on mentally retarded defendants violated constitutional standards during its last term. The case, involving Ernest McCarver, originated in North Carolina.[15] While the appeal was pending, the legislature in North Carolina enacted a new scheme to prohibit the imposition of the death penalty on those with mental retardation, and provided in that statutory scheme for retroactive application during a specified period.[16] This legislation effectively mooted the appeal. The U.S. Supreme Court has taken another case involving this issue from Virginia involving Darryl Atkins, however, and it is likely that a decision will be forthcoming on this point in the near future.

In December of 2001, the Supreme Court of Tennessee held that the execution of the mentally retarded violated both the United States Constitution and the Constitution of Tennessee. *Heck Van Tran v. State of Tennessee*; 2001 WL 1538508 (December 4, 2001). Tennessee already precludes the imposition of the death penalty on those who are found to be mentally retarded, but the statute, which took effect in 1990 (*Van Tran*, p. 6) does not provide for retroactive application to murders occurring before its effective date. The decision by the Supreme Court of Tennessee found that the legislature did not intend for the prohibition to be applied retroactively.[17]

The Tennessee Supreme Court determined that executing the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishment. Construction of the Eighth Amendment involves an assessment of whether the particular punishment conforms to contemporary standards of decency. The U.S. Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), rejected the notion that execution of the mentally retarded violated the Eighth Amendment because only two states with the death penalty – Georgia and Maryland – banned such executions. (*Van Tran*, p. 8) The Tennessee Supreme Court noted, however, that

> . . . the legislative landscape following Penry has undergone a dramatic transformation. Since the decision, no fewer than *sixteen* states - Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington – have joined Georgia and Maryland in enacting legislation prohibiting the execution of mentally retarded individuals [citations omitted]. The federal government likewise passed legislation prohibiting such executions. [citations omitted] . . . Five states – Arizona, Connecticut, Florida, Missouri, and North Carolina – enacted the legislation after the United States Supreme Court indicated in *McCarver v. North Carolina* [citations omitted] that it would reconsider *Penry* and the issue of whether a standard of decency marking a mature society has evolved against the execution of the mentally retarded. When these nineteen jurisdictions are considered along with the twelve states that do not have provisions for capital punishment, thirty-one jurisdictions now do not permit the execution of mentally retarded persons. *Van Tran*, p. 9; (emphasis in original)

The Tennessee Supreme Court similarly found that the execution of mentally retarded persons violated both the Eighth Amendment to the U.S. Constitution and the Tennessee Constitution, because it was grossly disproportionate (*Van Tran*, p. 11-12) and failed to achieve legitimate penological objectives (*Van Tran*, p. 12-13.) The Court found that the rule should be retroactively applied under the state's legal standard for retroactivity because it ". . . materially enhances the integrity and the reliability of the fact finding process of the trial. (*Van Tran*, p. 15)

Recommendation 69 :
Illinois should adopt a statute which provides:

A. The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for imposition of a death penalty.

B. Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

Throughout its discussions, the Commission returned with regularity to these three areas – in-custody informants, accomplices and single eyewitnesses – as the most potentially difficult cases in which

reliable determinations can be made about whether to impose the death penalty. Concerns in each of these areas have led to some specific recommendations for change in the criminal justice system. Despite recommendations which should narrow the concerns in these three areas, Commission members still retained reservations about whether imposition of the death penalty on these bases – without strong corroborative evidence – was prudent. As a result, the Commission deemed it appropriate to recommend that despite the other safeguards in the system, the death penalty should not be imposed in cases where the uncorroborated evidence of the defendant's guilt falls into one of these categories.

In-custody informants

The Commission has already recommended several important modifications to trial practice which should significantly reduce the likelihood of questionable testimony by in-custody informants. These include disclosure of the background of such witnesses, disclosure of benefits conferred, a pre-trial credibility hearing to assess the reliability of the testimony, and a special curative instruction.[18] Even with such safeguards, however, the potential for testimony of questionable reliability remains high, and imposing the death penalty in such cases appears ill-advised. A number of the Illinois cases in which inmates were ultimately released from death row involved proffers of testimony from in-custody informants, and much of which was of dubious veracity.

Despite these concerns, the Commission has not recommended the complete exclusion of all in-custody informant testimony, although such a proposal was discussed. A majority of Commission members were of the opinion that there could be cases in which in-custody informant testimony was reliable and truthful, and where it was essentially the only testimony available with which to convict a defendant. As a result, Commission members did not elect to recommend a complete bar of such testimony. The Commission did conclude, however, that no defendant should face the ultimate penalty a state can impose if the conviction is based solely on the testimony of an in-custody informant.

Accomplice testimony

Serious concerns have also been raised about the reliability of accomplice testimony. In at least two of the Illinois cases in which defendants were later released from death row, accomplice testimony played a key role in obtaining a conviction. The cases involving Verneal Jimerson and Dennis Williams (members of the Ford Heights Four) were based largely on the testimony of an alleged accomplice. In the Joseph Burrows case, the accomplice testimony of Gayle Potter was allegedly corroborated by a second accomplice, Ralph Frye. Both Potter and Frye recanted their testimony. An accomplice may have just as much incentive as a jailhouse informant to shade the truth in a manner that is beneficial to the accomplice.

Illinois currently provides for an instruction cautioning the jury with respect to the special problems that accomplice testimony may present. IPI 3.17 provides:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

Although Illinois permits the conviction and death sentence of a defendant based solely on the testimony of an accomplice, a number of death penalty states preclude even a criminal conviction based upon accomplice testimony unless there is independent corroboration.[19] The Commission has not recommended that this change be made in Illinois law. However, there are enough serious concerns about the reliability of accomplice testimony that premising the death penalty solely on such a foundation is extraordinarily unwise.

Single Eyewitness

There is also a legitimate concern about convictions which rest solely on the testimony of one eyewitness. While eyewitness evidence may be credible, there are many instances in which such testimony (even if from more than one eyewitness) may be less than reliable. As a result, while determinations about guilt or innocence based solely on eyewitness testimony may be appropriate, no defendant should ever be determined to be eligible for the death penalty based only upon the testimony of a single eyewitness.

The Commission has already made other substantive recommendations which should reduce the likelihood of erroneous eyewitness testimony. Those recommendations include new methods of conducting police lineups and photospreads, admissibility in appropriate cases of expert testimony regarding the fallibility of eyewitness testimony, and revisions to the jury instructions on eyewitness testimony. Despite these changes, the Commission still believed that basing a sentence of death upon the testimony of a single eyewitness should not be permitted.

Process in such cases

The Commission has not made a specific recommendation with respect to the method by which this recommendation should be implemented, although there were discussions about the most appropriate point in the trial for consideration of these issues. Since a defendant in Illinois can be convicted of a crime based upon the uncorroborated testimony of any of these witnesses, it appears best to leave this question until the conclusion of the guilt/innocence phase.

Following the guilt/innocence phase, trial courts generally conduct a bifurcated sentencing hearing, with the determination first being made as to the defendant's eligibility for the death penalty. This seems the best point in the process for the trial judge to entertain consideration of whether or not the case during the guilt phase fell into one of these three categories, and thus determine whether or not the death penalty phase should continue. Presumably prosecutors will consider in advance of trial whether or not the available proof passes this test before they declare they will seek the death penalty. However, it may not always be possible for a prosecutor to know in advance whether or not corroborating evidence will be available or will hold up at trial. As a result, some flexibility seems called for in the imposition of this standard, based upon the evidence actually adduced at trial.

Notes - Chapter 11

1. F.S.A. 921.141 (2), (3).

2. Indeed, the United States Supreme Court has accepted *certiorari* in a case from Arizona to decide whether or not sentencing proceedings which vest the ultimate decision to impose death solely in the judge are constitutional. *Ring v. Arizona*, ___ U.S. ___, 122 S. Ct. 865 (2002). The U.S. Supreme Court has stayed a Florida execution while it considers *Ring*.

3. *See* Form 13.12, Report of Trial Judge in Capital Felony; a copy of this form is contained in the Technical Appendix to this Report.

4. The United States Supreme Court has agreed to review death penalty schemes where the trial judge, rather than the jury, makes the decision about the imposition of the death penalty. The review concerns a case decided under the Arizona scheme involving Arizona death row inmate Timothy Ring. *See* "Death penalty gets key review: High court to rule whether sentence can be up to judge," Chicago Tribune, January 12, 2002.

5. *See:* "Due Process and the Death Penalty in Illinois," Chicago Council of Lawyers, March 2000, p. 48-49.

6. This recommendation also assumes that other, significant reforms recommended by this report are enacted as well.

7. Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, Washington, and the Federal Government.

8. Arizona, Connecticut, Florida, Missouri, and North Carolina.

9. Colorado Revised Statutes, 16-9-401 et seq.

10. K.S.A. 21-4623.

11. Nebraska Statutes 28-105.01.

12. SDCL 23A-27A-26.2 et seq.

13. Tenn. Code 39-13-203.

14. Tenn. Code 39-13-203 provides, in pertinent part, as follows:
(a) As used in this section, "mental retardation" means: (1.) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.
(c.) The burden of production and persuasion to demonstrate mental retardation by a preponderance of the evidence is upon the defendant. The determination of whether the defendant was mentally retarded at the time of the offense of first degree murder shall be made by the court.
(d.) If the court determines that the defendant was a person with mental retardation at the time of the offense, and if the trier of fact finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in [ ] the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. The provisions of [ ] shall govern such sentencing proceeding.
(e.) If the issue of mental retardation is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to [ ].
(f.) The determination by the trier of fact that the defendant is not mentally retarded shall not be appealable by interlocutory appeal but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

15. *See McCarver v. North Carolina*, ___U.S.___, 121 S. Ct. 1401, March 26, 2001.

16. *See* Senate Bill 173, which added two new sections to Chapter 15A, 2005 and 2006. Section 15A-2006 provides that "Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A, a defendant may seek appropriate relief from the defendant's death sentence upon the ground that the defendant was mentally retarded, as defined in G.S. 15A-2005(a), at the time of the commission of the capital crime. . . A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded, shall be filed: a. On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001 . . .."

17. The Court noted: "With respect to the specific Tennessee mental retardation statute, we also agree with the State that there is no express language indicating that it must be given retroactive application. The General Assembly included only an effective date of July 1, 1990, with no language requiring the statute to be applied to death sentences imposed before that date. Moreover, the statute does not contain a procedure by which mentally retarded persons sentenced to death before July 1, 1990, can raise mental retardation as a bar to execution, nor does it mention post-conviction proceedings as an avenue for challenging a death sentence on the basis of mental retardation." *Van Tran*, p. 6

18. *See* recommendations contained in Chapter 8 of this Report.

19. *See*: Arkansas Jury instructions, AMCI 2d 402; California Jury instructions, CALJIC 3.11; Idaho jury instructions, ICJI 313, 314; Oklahoma jury instructions, OUJI-CR9-25; 9-27; Tennessee jury instructions, 42.09 TPI. The jury instructions are contained in the Technical Appendix to this Report, published separately.

Chapter 12 – Proceedings Following Conviction and Sentence

This Chapter outlines recommendations for changes following the trial and sentencing phase. The Commission has recommended a number of changes to proceedings following trial. A majority of Commission members expressed the view that Illinois should expand the scope of review on direct appeal to embrace consideration of whether or not the imposition of the death sentence was excessive or disproportionate to the penalty imposed in other, similar cases. Members unanimously supported imposing post-trial responsibilities on prosecutors to disclose evidence which might negate the guilt or mitigate the sentence of a defendant. Three proposals to restructure the time limits in post-conviction review have also been recommended unanimously. Finally, the Commission also unanimously recommended earlier filings of clemency petitions to encourage timely disposition.

INTRODUCTION

There are a number of procedural safeguards built into the system following a determination of guilt and imposition of sentence. Under the Illinois Constitution and Supreme Court Rule, any defendant sentenced to death has a right to appeal directly to the Illinois Supreme Court. Ill. Const. of 1970, Art. VI, Sec. 4(b). All other criminal cases are appealed to the Illinois Appellate Court. Sup.Crt.Rule 603. While it has been suggested that efficacy of the Illinois death penalty scheme might be enhanced by providing for an intermediate level of review in death penalty hearings in the Appellate Court, the Illinois Supreme Court rejected a similar proposal as unconstitutional in *Rice v. Cunningham*, 61 Ill. 2d 353, 361-2 (1975).

Following the determination of the case on direct appeal, a defendant in a capital case has the right to bring an action under the Post-Conviction Hearing Act, 725 ILCS 5/122-1. An action under the Post-Conviction Hearing Act is a collateral proceeding, and its purpose is to permit inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been adjudicated on direct appeal. *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). Generally, a defendant is limited to one petition under the Act, unless the proceedings on the prior petition were "deficient in some fundamental way." *People v. Holman*, 191 Ill. 2d 204, 210 (2000). The prohibition against successive post-conviction petitions will only be relaxed when the petitioner establishes good cause for failing to raise claims in a prior proceeding and actual prejudice resulting from the error. *People v. Andre Jones*, 191 Ill. 2d 354, 358 (2000).

A post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right, but must show a substantial violation of constitutional rights. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). The Supreme Court has also held that pursuant to the constitutional provisions which mandate a direct appeal to the Supreme Court in death penalty cases, any appeal of the post-conviction proceedings

involving a sentence of death must be appealed directly to the Supreme Court, rather than the Appellate Court. *People v. Lewis*, 105 Ill. 2d 226, 231-232 (1985).

Following completion of state court appeals, a defendant may also bring a habeas corpus petition in federal court. At the conclusion of the entire judicial process, a defendant in a capital case also has the right to seek executive clemency. The Illinois Constitution grants to the Governor the right to grant reprieves, commutations and pardons on such terms as he or she thinks proper.[1]

SPECIFIC RECOMMENDATIONS

Recommendation 70 :

In capital cases the Illinois Supreme Court should consider on direct appeal (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating circumstances indicates death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.

A majority of Commission members supported the recommendation that the Illinois Supreme Court undertake, as part of the direct appeal, a proportionality review to assess whether the death sentencing scheme in Illinois is being applied in an appropriate and even-handed manner state-wide. A number of states use this procedure in an effort to insure that the imposition of the death penalty is procedurally fair. The following states have some form of proportionality review as part of their death sentencing scheme: Alabama, Delaware, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee and Washington.[2]

This type of review involves a comparison by the court of the death sentence in a particular case with sentences imposed in similar cases to determine whether the sentence is proportionate -- that is, whether other defendants in similar cases were sentenced to death. If not, the implication is that the death sentence in the case on appeal is a disproportionate penalty.[3] As the New Jersey Supreme Court has noted, one important purpose of proportionality review in that state is to monitor and prevent the impermissible discrimination in the imposition of the death penalty, such as that based upon race.[4] Under this type of review, the reviewing court may modify the sentence on appeal to conform to the sentences imposed in other cases.[5]

Illinois did not, as part of its enactment of a death penalty structure, adopt a statute requiring a typical proportionality test. The Illinois Supreme Court has declined to adopt any rules or judicial interpretation requiring one. Proportionality examinations are not constitutionally required[6] and the constitutionality of the Illinois statute has been upheld notwithstanding its absence. *See People v. Neal*, 111 Ill. 2d 180, 203 (1985).

The Illinois Supreme Court does make a limited inquiry in this area, however. Two distinct analyses are conducted by the Court in death penalty hearings. One is to consider whether the sentence itself is excessive in light of the evidence in the case. *See People v. Geraldine Smith*, 177 Ill. 2d 53, 98 (1997); (death sentence excessive in that case based upon mitigation presented; Court notes: ". . . Nevertheless the legislature did not intend that every defendant who qualifies for the death penalty receive the death sentence." at 101.) There have been a number of cases in which the Court has found that the penalty of death was excessive, and either remanded the case for a sentencing hearing on a sentence other than death, or simply imposed such a sentence. *People v. Smith*, supra, (case remanded for new hearing with directions to impose sentence other than death.) The Court has also rejected the claim that the death penalty was excessive in other cases. *People v. Chapman*, 194 Ill. 2d 186, 253-261 (2000); *People v. Coles*, 172 Ill. 2d 85, 110-111 (1996). The inquiry considers the specific facts and circumstances of the crime, as well as the evidence in aggravation and mitigation.

The second distinct analysis conducted by the Illinois Supreme Court in a death penalty case has to do with whether or not the penalty is excessive compared to the sentences meted out to other defendants in the case. *See,* for example, *People v. Easley*, 192 Ill. 2d 307, 345-347 (2000); *People v. Strickland*, 154 Ill. 2d 489, 536-7 (1992). The Supreme Court has prohibited counsel from arguing this limited sort of proportionality to the jury (*See People v. Lear*, 175 Ill. 2d 262, 278 (1997)) but has permitted a defendant to raise this concern on post-conviction petition. *People v. Caballero*, 179 Ill. 2d 205, 214-217 (1997). There have been cases where the Court found that the sentence imposed on one defendant was disproportionate to the sentence imposed upon other defendants in the case. *People v. Gleckler*, 82 Ill. 2d 145, 171 (1980). In those cases, the Supreme Court has not hesitated to make adjustments to the sentence to insure that there is some degree of parity with respect to co-defendants.

The concept of proportionality as proposed here, however, is somewhat different. A proportionality evaluation typically involves comparing the sentence imposed not just to a co-defendant in a particular case, but to a class of offenders who are similarly situated. For example, rather than assessing only the question of whether a particular defendant was treated more or less the same way as his or her co-defendant, the court would assess whether or not the defendant was sentenced more or less with the same level of severity as others who committed crimes of similar brutality or ferocity. The class of comparison cases would generally be those who were convicted of first degree murder, although some states limit the class of comparison cases to only those cases in which a death sentence has been imposed.

Although the Illinois Supreme Court has consistently rejected the notion that the lack of a proportionality review renders the Illinois death penalty scheme invalid, the Commission urges the Court and the legislature to adopt and effectively implement a proportionality evaluation. Commission members remain concerned about whether the Illinois death penalty statute is being applied in a rational and even-handed manner throughout the state. A recent study initiated by the Commission of sentencing decisions reveals that there is a geographic bias in the state with respect to the imposition of the death penalty, and that there may also be race effects.[7] In light of these findings, the Supreme Court

has a responsibility to insure that court processes are managed fairly and effectively throughout the state.

Implementing such a proportionality review usually involves the development of a state-wide database which permits comparison of first degree murder cases. The most extensive effort in this regard has been undertaken by the State of New Jersey. Like Illinois, New Jersey is a state with a diverse population, in both urban and rural areas. The Administrative Office of the Courts in New Jersey collects data on murder cases in the state, and the New Jersey Supreme Court has embarked on an annual review of the sentencing process to insure that the most severe sentence is being applied fairly and evenhandedly throughout the state.

Database information is usually collected at the trial level, and includes information pertaining to the defendant, the victim, the racial and socio-economic characteristics of all those involved, representation by counsel, the aggravating factors the prosecution proposed and those actually found, mitigation evidence, the factual circumstances of the crime, and the impressions of the trial judge.[8] In most states, the collection of data is completed by the trial judge, and supervised by the Supreme Court. In New Jersey, the Administrative Office of the Courts collects the trial level data, and in Nebraska, the prosecutor is responsible for data collection.[9] The Commission has made a separate recommendation[10] that this trial level data should be collected and made available, regardless of whether the Court or the legislature decides to adopt a proportionality evaluation.

Recommendation 71 :

Rule 3.8 of the Illinois Supreme Court Rules of Professional Conduct, Special Responsibilities of a Prosecutor, should be amended in paragraph (c) by the addition of the italicized language:

> **(c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.** ***Following conviction, a public prosecutor or other government lawyer has the continuing obligation to make timely disclosure to the counsel for the defendant or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant or mitigate the defendant's capital sentence. For purposes of this post-conviction disclosure responsibility "timely disclosure" contemplates that the prosecutor or other government lawyer should have the opportunity to investigate matters related to the new evidence.***

This recommendation was adopted unanimously by the Commission. The Special Supreme Court Committee on Capital Cases has already proposed one amendment to Rule 3.8,[11] which adds a general statement of the duty of a prosecutor to seek justice. The Commission has unanimously recommended a separate and distinct amendment to Rule 3.8 which would help to clarify the post-conviction duty of a public prosecutor to disclose information which may have the potential to negate the guilt or reduce the sentence of the defendant.

The prosecution's responsibility to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) during a pending criminal trial is well-settled, and familiar to prosecutors. It is less clear whether, and to what extent, a prosecutor has a duty to disclose exculpatory information subsequent to the completion of the criminal litigation. While the Commission was confident that prosecutors who became aware of material that might completely exonerate a defendant, such as DNA evidence, would disclose that evidence in the interest of justice, it is less clear what would be done with information that may not completely exonerate a defendant, but merely make his or her guilt less likely.

To that end, the Commission sought to clarify the responsibility of the prosecution to disclose evidence of which it becomes aware following the conclusion of proceedings in the underlying criminal case. Members of the Commission were mindful of the fact that in some instances, a prosecutor may not be able to disclose such potentially exculpatory information due to the constrictions placed on disclosure resulting from a pending criminal investigation of someone else. However, the Commission contemplates that in such instances, disclosure would be made at the earliest possible opportunity, consistent with the proper administration of justice, to enable the defendant to evaluate and bring the evidence to the attention of the court.

Recommendation 72 :
The Post-Conviction Hearing Act should be amended to provide that a petition for a post-conviction proceeding in a capital case should be filed within 6 months after the issuance of the mandate by the Supreme Court following affirmance of the direct appeal from the trial.

Commission members unanimously supported this amendment on the time period for filing post-conviction petitions. The Post-Conviction Hearing Act contains a provision limiting the time within which a proceeding under the Act can be filed. The Act provides as follows:

> (c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. (725 ILCS 5/122-1).

Initially, the Post-Conviction Hearing Act provided for a 20 year statute of limitations within which to file the original petition, an amendment which resulted from the 1965 revisions to the Criminal code. The statute was amended to reduce the time period for filing from 20 years to 10 years, effective January 1, 1984.[12] The statute was further amended reduce the filing deadline from 10 years to 3 years following final judgment.[13] The provisions were amended again to state that the filing deadline for a post-conviction proceeding was 6 months from the denial of a petition for leave to appeal or 6 months after the date of the issuance of an opinion from the Illinois Supreme Court, or 3 years from the date of conviction, whichever was *later*.[14] In 1995, the statute was amended once again to change "later" to "sooner." Subsequently, the statute was further amended to provide the time period contained in the present statute, which changed the deadlines yet again to 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court.[15]

These amendments set up a situation where a defendant in a capital case is expected to file his petition for post-conviction relief either 3 years from the date of his conviction (when his direct appeal may not yet be complete) or 45 days after his brief is filed on appeal (a time period which may change with appellate briefing schedules, but which will also be prior to the time that the direct appeal is complete) , whichever is "sooner." While there is a reasonable and rational concern about not unduly extending the time period for post-conviction proceedings, requiring a capital defendant to file a post-conviction petition before his original appeal is complete represents an unwise policy choice.

The Commission reviewed post-conviction statutes from a number of states with regard to when post-conviction proceedings were required to be filed. Arizona, Arkansas, Nevada, North Carolina, Oregon, South Carolina, Tennessee, and Washington all condition the filing of a post-conviction petition upon the completion of proceedings on direct appeal.[16] Commission members agreed that the filing of a post-conviction petition under the Act should be conditioned upon conclusion of the proceedings on direct appeal. The Illinois Supreme Court has a history of prompt disposition of capital cases on direct appeal, so such a change is unlikely to produce any meaningful delay. Amending the Act will merely require continued attention by the Supreme Court to prompt disposition of claims on direct appeal. This clear-cut time period for making the determination about when to file a post-conviction petition will avoid confusion, and permit the defendant to present his or her arguments in a clear and succinct manner. It also provides for the full opportunity to address issues in a more orderly fashion.

The Commission has also recommended that a time limitation for disposition of post-conviction proceedings in the trial court be enacted, and these recommendations together should provide some assurance that the post-conviction period will not be marked by undue delay.

Recommendation 73 :
The Illinois Post-Conviction Hearing Act should be amended to provide that in capital cases, the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.

The Commission unanimously recommends this amendment to the Post-Conviction Hearing Act. The current provisions for hearings under the Post-Conviction Hearing Act require that the trial court must examine the petition and take some action under the statute within 90 days of the filing and docketing of the petition. (725 ILCS 122-2.1). The State is required to answer the petition (unless dismissed) within 30 days. (725 ILCS 122-5). Beyond those basic time limits, there are no provisions in the Illinois Act which place any requirements on the trial court to commence or conclude the post-conviction proceedings within any particular time frame.

There is a legitimate concern that post-conviction proceedings in capital cases could delay the ultimate disposition of the case. While a defendant should be afforded the opportunity to raise appropriate matters by way of such a petition, there should be a reasonable effort at both the trial and appellate level to insure that post-conviction matters are handled in a timely fashion. Some states address the concern about delay related to post-conviction proceedings by placing requirements on the trial court with respect to timely disposition. Maryland statutes provide that the court will enter an order setting a hearing date within 30 days after the petition is filed, and that the hearing must be held within 90 days of the date the petition was filed. The trial court is required to issue a written decision within 90 days of the date of the hearing on the petition. MD. Ann. Code Art. 27, 645A (g). In South Carolina, the trial court must enter an order within 30 days after the State answers the petition scheduling a hearing, and the hearing must be scheduled within 180 days. The judge must issue his opinion within 30 days after receipt of the transcript of the hearing or receipt of the post-trial briefs. Title 17, Ch. 27, Sec. 17-27-160 (C.) and (D) Capital Case post-conviction proceedings. In Tennessee, the hearing must be held within four months of the initial court order, with one extension of 60 days permitted. The extension may not be by agreement of the parties, and may be granted only by order of court based upon unforeseen circumstances. The court must issue a ruling within 60 days following the evidentiary hearing, with one extension by court order for 30 days permitted, and the entire proceeding must be disposed of within one year of the filing of the petition. Tenn. Code Ann. 40-30-209, 40-30-211.

Recommendation 74 :

The Post-Conviction Hearing Act should be amended to provide that in capital cases, a proceeding may be initiated in cases in which there is newly discovered evidence which offers a substantial basis to believe that the defendant is actually innocent, and such proceedings should be available at any time following the defendant's conviction regardless of other provisions of the Act limiting the time within such proceedings can be initiated. In order to prevent frivolous petitions, the Act should provide that in proceedings asserting a claim of actual innocence, the court may make an initial determination with or without a hearing that the claim is frivolous.

This recommendation, which eliminates time limitations in post-conviction proceedings in capital cases where actual innocence is asserted, was supported unanimously by Commission members. The Illinois Supreme Court has decided, in a non-capital murder case, that claims of actual innocence based upon

newly evidence are cognizable under the Illinois constitutional provisions relating to due process. In *People v. Washington*, 171 Ill. 2d 475 (1996) the Supreme Court stated:

> We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence. [citations omitted] Given the limited avenues that our legislature has so far seen fit to provide for raising freestanding claims of innocence, that idea – but for the possibility of executive clemency – would go ignored in cases like this one. We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process. That holding aligns Illinois with other jurisdictions likewise recognizing, primarily as a matter of state *habeas corpus* jurisprudence, a basis to raise such claims under the rubric of due process [citations omitted].
>
> That only means, of course, that there is footing in the Illinois Constitution for asserting freestanding innocence claims based upon newly discovered evidence under the Post-Conviction Hearing Act. Procedurally, such claims should be resolved as any other brought under the Act. Substantively, relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, " ' of such conclusive character'" as would " ' probably change the result on retrial.'" 171 Ill. 2d at 489.

The Senate Task Force Report recommended in 2000 that:

> The Post-Conviction Hearing Act should be amended to allow free-standing claims of innocence based on newly-discovered evidence of innocence to be heard any time after conviction, without regard for other post-conviction matters or timing. Such a change to the Post-Conviction Hearing Act is strongly urged by the Illinois Supreme Court in Washington. [17]

The Commission has unanimously recommended that specific provision should be clearly made in the Post-Conviction Hearing Act to permit the assertion of claims of actual innocence at any time following conviction in capital cases. The bill introduced by Sen. Jones and others during the 2000 legislative session applied to capital cases only and provided that a person could commence proceedings under the Post-Conviction Act where there was newly discovered evidence not available to the person at the time of the proceeding that resulted in the conviction and that evidence established the person's innocence. The bill also provided that a proceeding under that section could be commenced at *any time* after the person's conviction notwithstanding any other provisions of the Act.

A report from the Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (June 27, 2001), proposes two specific recommendations relating to a defendant's ability to introduce exculpatory evidence post-trial. On page 37, the report recommends that federal and state legislation should provide a procedure whereby exculpatory evidence produced by DNA testing post-conviction should be presented at a hearing to determine whether the conviction or sentence was wrongful, regardless of procedural bars or time limitations. In a separate statement, the report

recommends (at p. 41) that state and federal courts should ensure that capital defendants are provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it will more likely than not produce a different outcome at trial or where it would undermine confidence in the reliability of the sentence.

The Post-Conviction Hearing Act should be amended to provide that newly discovered evidence of actual innocence may be the basis for a proceeding under the Act, without regard to procedural time limits contained in the Act. Such evidence should form the basis for attacking the conviction when it offers a substantial basis to believe that the defendant is actually innocent. In order to discourage frivolous and repetitive claims, the Act should provide for a screening of the petition in a manner similar to that currently provided by the Act for non-capital defendants. The current act provides in 725 ILCS 5/122-2.1 (a)(2):

> If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.

The Illinois Supreme Court has strictly construed the provisions of the Post-Conviction Act to prohibit 2nd or subsequent petitions for post-conviction relief. In light of this prohibition, a defendant who discovers new evidence needs some opportunity to make his or her claim before a court of record to insure that a miscarriage of justice has not occurred.

Recommendation 75 :
Illinois law should provide that after all appeals have been exhausted and the Attorney General applies for a final execution date for the defendant, a clemency petition may not be filed later than 30 days after the date that the Illinois Supreme Court enters an order setting an execution date.

This recommendation was adopted unanimously by the Commission. Under the Illinois Constitution, the Governor has the right to issues pardons and commutations of sentences on such terms as he sees fit.[18] Section 12 of the Constitution provides that the manner in which clemency is provided for may be regulated by law. Under Illinois law, the Prisoner Review Board is the entity responsible for hearing proceedings and making recommendations to the Governor with respect to the exercise of executive clemency. (730 ILCS 5/3-3-1(a)(3))[19]

The provisions governing the application for executive clemency state:

> Sec. 3-3-13. Procedure for Executive Clemency.
>
> (a) Petitions seeking pardon, commutation, or reprieve shall be addressed to the Governor and filed with the Prisoner Review Board. The petition shall be in writing and

> signed by the person under conviction or by a person on his behalf. It shall contain a brief history of the case, the reasons for seeking executive clemency, and other relevant information the Board may require.

The application process described in the statute does not suggest a time frame within which the application should be filed, nor the time period within which the Board should commence its work. As a practical matter, this results in applications being filed at what is literally the very last minute in the process, so that the Prisoner Review Board is in the unenviable position of having to review and make confidential recommendations to the Governor with little time for investigation or processing.

In general, it was the view of the Commission that the better practice would be to require that applications be filed within 30 days of the issuance of the mandate after the exhaustion of appeals. Revising the statute in this way would permit a more orderly review process, in which the governor may receive meaningful input from the Prisoner Review Board.

Adding a tier of Appellate review

During its discussions, recommendations were made to the Commission that the death penalty review process might benefit from the addition of an intermediate level of review, rather than the direct appeal to the Supreme Court, which is the current practice. Since the Illinois Supreme Court has already determined that the right to direct appeal to the Illinois Supreme Court in death penalty cases is one of constitutional dimensions under the state Constitution[20], it seemed to Commission members that this proposal was unwise. Commission members also believed, however, that direct appeals to the Supreme Court advanced several goals. First, it promotes uniformity of review in an area where the most serious penalty is being imposed. This helps to insure that standards pertaining to the imposition of the death penalty will be applied in a way that is more likely to be uniform throughout the state, as opposed to variations in practice that will develop as between different appellate districts. It increases the probability that there will be one, coherent body of law with clearly enunciated standards for the death penalty. Second, one layer of appellate review increased the likelihood of prompt disposition of appeals, which is a desirable goal. As a result, Commission members did not support the concept of a two-tier direct appeal.

Notes - Chapter 12

1. Section 12 of the Illinois Constitution of 1970 provides: "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."

2. A table showing the statutory citations from the states which conduct proportionality review is contained in the Technical Appendix to this Report.

3. *See* Bienen, "The Proportionality Review of Capital Cases by State High Courts After *Gregg*: Only 'The Appearance of Justice' ? " 87 *The Journal of Criminal Law and Criminology* 130, 131-2 (1996).

4. *See In Re: Proportionality Review Project*, Opinion by the Supreme Court of New Jersey, August 2000.

5. *See*, for example, *State v. Godsey*, 60 S.W.3d 759, November 29, 2001, Supreme Court of Tennessee, affirming the modification of the death sentence to life without parole.

6. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871 (1984).

7. *See: Race, Region and Death Sentencing in Illinois, 1988-1997* by Drs. Pierce and Radelet. A complete copy of this report is contained in the Technical Appendix to this Report, published separately.

8. Sample forms are contained in the Technical Appendix to this Report.

9. Neb.Stat. 29-2524.01.

10. *See* Chapter 14 of this Report.

11. The Illinois Supreme Court's Rules of Professional Conduct may be found on the Supreme Court's website at http://www.state.il.us/court/SupremeCourt.

12. P.A. 83-693.

13. P.A. 86-1210; provisions regarding the filing date took effect in 1992.

14. P.A. 87-580.

15. See P.A. 88-678 and P.A. 89-284.

16. *See* A.R.S. § 13-4234 D (Arizona) (Clerk files notice of post-conviction relief with trial court upon issuance of mandate affirming defendant's sentence on direct appeal); A.C.A § 16-91-202(a)(1)(A)(i) (Arkansas) (if sentence affirmed on direct appeal, circuit court to hold hearing within 2 weeks of

affirmance to appoint counsel to represent defendant upon issuance of mandate by appellate court); N.R.S. 34.726 (Nevada) (petition filed within 1 year after judgment if no appeal, or within 1 year after supreme court issues remittitur); N.C.G.S.A. § 15A-1415 (North Carolina) (file motion for appropriate relief within 120 days of the latest of: time for appeal expired, mandate issued on direct appeal and time for filing writ of certiorari for further appeals expired, U.S. Supreme Court denies petition for writ or disposes of writ by leaving conviction and sentence undisturbed); O.R.S. § 138.510 (3) (Oregon) (petition filed within two years of the date of judgment if no appeal, or if appeal taken, the date the appeal is final in the appellate courts); Code 1976 § 17-27-45 (A) (South Carolina) (petition filed within one year after entry of a judgment or within one year after sending of remititur to lower court from an appeal or the filing of the final decision upon an appeal, whichever is later); T.C.A. § 40-3-202 (Tennessee) (file petition within 1 year of the final action of the highest state appellate court to which an appeal is taken, or if no appeal within one year of the date on which the judgment becomes final); RCWA 10.78.090 (1), (3) (Washington) (no petition filed more than one year after judgment becomes final; judgment final on date filed with clerk of trial court, date that an appellate court issues mandate disposing of a direct appeal, or date U.S. Supreme Court denies petition for certiorari.)

17. Senate Task Force Report, 2000, Recommendation 7, p. 9.

18. The Commission reviewed clemency provisions from other death penalty states. A summary of the statutory citations is contained in the Technical Appendix to this Report.

19. *See also*: 730 ILCS 5/3-3-2, par (6), which grants to the Prisoner Review Board the authority to hear by at least one member and through a panel of at least 3 members decide, all requests for pardon, reprieve or commutation, and make confidential recommendations to the Governor.

20. *See: Rice v. Cunningham*, 61 Ill. 2d 353 (1975).

Chapter 13 – Funding

Commission members recognized that implementing many of the proposals for reform in this report will require a significant commitment of financial resources. Without that commitment to the criminal justice system, any meaningful implementation of many of these reforms will be curtailed. This Chapter addresses some of the Commission's recommendations which require funding consideration. The Commission unanimously recommended that leaders in both the executive and legislative branches significantly improve resources available to the criminal justice system to insure meaningful implementation of reforms. This chapter identifies a number of important efforts, the substance of which may be discussed in other portions of this report, where funding plays a significant role. These include the reauthorization of the Capital Crimes Litigation Act, statewide trial support of defense counsel by the State Appellate Defender, improved access to research and research staff for judges, improvements to training for all parties, a stronger commitment to funding forensic laboratories with particular emphasis on creation of the comprehensive DNA database, and assistance with student loans for those entering careers in the criminal justice system.

INTRODUCTION

The commitment of resources to the criminal justice system as a whole, and to the capital litigation process in particular, was an issue of importance to the Commission. It became apparent early in the Commission's discussions that some of its recommendations were likely to require new funding commitments. In light of this, Commission members believed it important to highlight several areas in which funding issues would play a significant role with respect to implementation of reforms.

Recommendations do not include specific suggestions with respect to precise funding levels for particular activities. Decisions about specific funding levels are best left to the executive and legislative branches. Leaders in those branches need to give careful consideration, however, to providing funding levels that will enable the criminal justice system to operate in such a way so as to promote the fair, just and accurate administration of justice for all concerned.

SPECIFIC RECOMMENDATIONS

Recommendation 76 :
Leaders in both the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases.

Some of the recommendations proposed by the Commission will require significant effort by the Illinois Supreme Court and by others connected with the criminal justice system. The Commission unanimously supported this recommendation, to carefully evaluate the needs of the criminal justice system. Serious consideration needs to be given to ways in which more resources can be allocated to the criminal justice system as a whole, and to the Supreme Court in particular, in order to insure that reforms are implemented in a meaningful way.

The Illinois State Bar Association has commenced a study to assess whether state levels of funding for the court system should be improved.[1] It is expected that a resolution authorizing a study on the issue of how courts are funded in Illinois will be introduced in the 2002 session of the legislature.[2] Currently, financing the state court system as a whole is the shared responsibility of the state and county government.[3] For the most part, the state funds judicial salaries, while county government provides funds for court buildings, and other court-related staff. Other states, such as New York and New Jersey, provide a much greater level of funding at the trial court level from state sources. *See*, "State Court Organization - 1998," Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, June 2000, NCJ 178932, Table 18.

Capital sentencing proceedings pose a significant impact upon court funding at all levels, but the shock of a capital trial can be felt most seriously at the trial court level. A recent research report by Katherine Baicker indicates that the occurrence of a capital trial can increase county spending by as much as 1.8 per cent, and that the costs often are financed by a decrease in county spending on police and highway expenditures.[4] Some counties may be unprepared for the advent of a capital trial, as Baicker notes that during the period 1983 to 1997, 80 % of the counties she examined nationwide saw no capital convictions.[5] When one occurs, the costs can be unexpected and staggering.[6]

Some of the proposals outlined in this report will add to that cost. Commission members believe that funding to support these reforms is critical to insure that the Illinois capital punishment system operates with a high degree of effectiveness, or, as Governor Ryan put it, in a just, fair and accurate manner. Failure to fund and implement meaningful reform casts doubt upon the reliability of the entire system.

Recommendation 77 :

The Capital Crimes Litigation Act, 725 ILCS 124/1, et. seq., which is the state statute containing the Capital Litigation Trust Fund and other provisions, should be reauthorized by the General Assembly.

The Commission unanimously recommended the reauthorization of the Capital Crimes Litigation Act.[7] This Act represented a major commitment of state resources to both prosecution and defense. While the practical effects of the Act's existence may take some years to be appreciated, members of the Commission strongly supported the continuation of the Act.

The Capital Crimes Litigation Act, 725 ILCS 124/1 et. seq., took effect on January 1, 2000. The Act provides, among other things, for the creation of the Capital Litigation Trust Fund. The Trust Fund provides a source of state funding for capital litigation attorneys fees and expenses. The act has a "sunset" provision that repeals the Act on July 1, 2004 unless re-enacted prior to that date by the General Assembly.

Since enactment, funds have been appropriated throughout the state for matters related to the prosecution and defense of capital cases. While this funding benefits both the prosecution and defense, the provisions which support the full funding of defense costs should significantly improve the quality of defense representation of capital defendants.

Recommendation 78 :

The Commission supports the concept articulated in the statute governing the Capital Litigation Trust Fund, that adequate compensation be provided to trial counsel in capital cases for both time and expense, and encourages regular reconsideration of the hourly rates authorized under the statute to reflect the actual market rates of private attorneys.

The Commission unanimously supported this recommendation, which encourages the regular re-examination of fees paid to defense counsel under the Act to insure that the hourly rates are related to the actual market rates of private attorneys in the geographic area where funding is sought.

Many of the problems facing defense counsel in providing an adequate defense can be eliminated through appropriate funding of trial related expenses and adequate compensation for trial counsel. The Capital Crimes Litigation Act currently authorizes appointed trial counsel to petition the court for "reasonable and necessary capital litigation expenses," including both trial expenses and mitigation expenses. (725 ILCS 124/10 (a)). It authorizes compensation for trial counsel, as long as the State's Attorney has not filed a certificate or stated on the record in open court that the death penalty will not be sought. The provision governing attorneys compensation states:

> (b) Appointed trial counsel shall be compensated upon presentment and certification by the circuit court of a claim for services detailing the date, activity, and time duration for which compensation is sought. Compensation for appointed trial counsel may be paid at a reasonable rate not to exceed $125 per hour. Beginning in 2001, every January 20, the statutory rate prescribed in this subsection shall be automatically increased or decreased, as applicable, by a percentage equal to the percentage change in the consumer price index-u during the preceding 12-month calendar year. "Consumer price index-u" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982-84=100. The new rate resulting from each annual adjustment shall be determined by the State Treasurer and made available to the chief judge of each judicial circuit. (725 ILCS 124/10 (b))

Authorizing compensation for trial attorneys at a rate not to exceed $125 per hour, with an annual adjustment for inflation, should contribute significantly to development of better quality representation. The hourly rate should be reviewed regularly, however, to insure that it reflects current market rates for trial services. There are likely areas in the state where an hourly rate of $125 per hour for this type of legal work would be ample compensation. However, there are a number of areas in the state where $125 per hour would not adequately compensate attorneys at the prevailing market rate for competent legal services. The language of the statute should be amended to enable judges in certain areas to award attorneys fees at an hourly rate in excess of $125 where the prevailing market rate for competent legal services exceeds that amount. If we wish to support the development of a competent private defense bar in capital cases, we should insure that court-awarded compensation will be sufficient to attract highly capable lawyers. Fees which are significantly below market rates are not likely to attract good quality defense counsel.

The importance of insuring that private attorneys undertaking capital representation receive something approaching market rates for the legal services they provide is also highlighted in the Senate Task Force Report. That report recognized that the new, proposed rate level reflected a "much needed improvement." Senate Task Force Report, 2000, p. 6. The Task Force recommended that fees be set by the trial court, based upon "the actual cost of retaining qualified and experienced counsel in the community in which the trial is to be held." Report, Recommendation 4.

The Constitution Project's report recognized the importance of proper funding for defense counsel, calling lack of adequate compensation "A major cause of inadequacy of capital representation . . ."[8]. The report outlined the low fees for appointed counsel in many jurisdictions[9], fees which up until the adoption of the Capital Crimes Litigation Act were not significantly different than fees for court-appointed counsel in Illinois prior to the adoption of the Capital Crimes Litigation Act.[10]

The Act also makes provision for the payment of trial related expenses for appointed trial counsel:

> (c) Appointed trial counsel may also petition the court for certification of expenses for reasonable and necessary capital litigation expenses including, but not limited to, investigatory and other assistance, expert, forensic, and other witnesses, and mitigation specialists. Counsel may not petition for certification of expenses that may have been provided or compensated by the State Appellate Defender under item (c)(5) of Section 10 of the State Appellate Defender Act. 725 ILCS 124/10.

In light of the increased use of DNA evidence in criminal trials, and the importance of mitigation evidence in capital sentencing proceedings[11], the provisions of the Act which authorize reimbursement for expenses should enable better representation by appointed counsel. It represents a substantial improvement over provisions contained in the indigent defense statutes, which limited expert fees to $250. (725 ILCS 5/113-3 (d)).

Recommendation 79 :
The provisions of the Capital Litigation Trust Fund should be construed as broadly as possible to insure that public defenders, particularly those in rural parts of the state, can effectively use its provisions to secure additional counsel and reimbursement of all reasonable trial related expenses in capital cases.

Broad construction of the funding provisions of the Act was supported unanimously by the Commission. A critical issue that the Capital Litigation Trust fund was designed to address has to do with funding for defense counsel. One funding issue of concern to the Commission relates to the ability of an individual public defender in a rural part of the state to adequately prepare for trial. In some counties, funding at the county level may not be adequate to provide the public defender with access to the resources that would really enable proper preparation. The Capital Litigation Trust fund enables even public defenders to apply for trial expenses to support their defense efforts. A proper construction of the Act would also include approval of expenses for the appointment of additional counsel, such as a qualified second chair, supported and paid for by the Capital Litigation Trust Fund, to insure that an adequate defense has been provided in all capital cases.

The Commission has recommended that the Act should be construed so as to provide funding for forensic testing. *See* Chapter 3 of this Report. This is particularly critical in light of the increasing importance of forensic evidence, such as DNA, in the criminal justice system.

Recommendation 80 :
The work of State Appellate Defender's office in providing statewide trial support in capital cases should continue, and funds should be appropriated for this purpose.

The Commission unanimously supported this recommendation. The Capital Crimes Litigation Act provides for a direct appropriation to the office of the State Appellate Defender to support its work in advising and consulting with appointed defense counsel throughout the state and public defenders in counties other than Cook. 725 ILCS 124/15(f) ("Moneys in the Trust Fund shall be appropriated to the State Appellate Defender, ... The State Appellate Defendant shall receive an appropriation from the Trust Fund to enable it to provide assistance to appointed defense counsel throughout the State and to Public Defenders in counties other than Cook.") A separate Act, the State Appellate Defender Act, provides that the office of the State Appellate Defender is authorized to assist trial counsel in cases in which a death sentence is an authorized disposition, but that the State Appellate Defender shall not be appointed to serve as trial counsel in capital cases. 725 ILCS 105/10(c.)(5)[12]

The State Appellate Defender's Office has now created a division which provides assistance to private lawyers who have been appointed to try a death penalty case and to public defenders outside of Cook County who have a death penalty case. The Death Penalty Trial Assistance Division provides investigative assistance, mitigation assistance and, in some instances, trial assistance. The division also

provides training associated with trying a death penalty case. The Division has offices in Chicago and Springfield, and will open an office in Belleville in 2002.

These efforts should provide important support for trial lawyers throughout the state, and will likely help to ameliorate some of the challenges with respect to access to trial support facing lawyers in more rural parts of the state. Financial and training support should continue for these efforts.

Recommendation 81 :
The Commission supports the recommendations in the Report of the Task Force on Professional Practice in the Illinois Justice System to reduce the burden of student loans for those entering criminal justice careers and improve salary levels and pension contributions for those in the system in order to insure retention of qualified counsel.

This recommendation was supported by a significant majority of Commission members. Another important funding issue that must be explored applies to both the public defenders and state's attorneys – whether, based upon information in the Task Force Report on Professional Practice in the Illinois Justice System, public salaries are really adequate to keep pace with market forces that draw experienced counsel out of public service. It is apparent from the Task Force report that there are serious financial pressures that prevent counsel from staying in public service.

Several of the recommendations from the Task Force report were proposed in the General Assembly during its 2001 legislative session, including a provision that would provide for annual stipends to write-down law school loans for eligible State's attorneys and public defenders. These provisions should be supported, as it is extremely important that qualified counsel continue to seek employment in the criminal justice system. In its annual report to the Illinois Legislature, the Illinois Supreme Court noted a continuing concern about the "inadequacy of pay and compensation for assistant state's attorneys and public defenders."[13] The Illinois Supreme Court has expressed its formal support for legislation to address this issue.[14]

Other recommendations with funding implications
Some recommendations in this report may be implemented with existing funding, or only a slight adjustment to current funding levels, while others have significantly greater funding impacts. The Commission deemed it prudent to gather those recommendations together in this chapter, although the substance underlying the recommendations may have been discussed elsewhere in this Report.

Videotaping
The Commission recognized that its recommendation that the entire interrogation process in homicide cases be videotaped would put significant strains on local law enforcement budgets. In light of this, the Commission made a separate recommendation, already discussed in Chapter 2, that the cost of implementing this recommendation be borne by the State:

Recommendation 82 :
Adequate funding should be provided by the State of Illinois to all Illinois police agencies to pay for electronic recording equipment, personnel and facilities needed to conduct electronic recordings in homicide cases.

The Commission unanimously supported the recommendation that funding be provided for electronic recording equipment to record interrogations recommended in this Report. This is an area where some level of state-wide standardization is beneficial, given the potential problems associated with purchasing adequate equipment, maintaining tapes, and training officers in how to accomplish this task. Since state-wide uniformity in this area is a beneficial goal, funding from the State would be a prudent choice.

DNA Funding

An entire chapter of this report has been devoted to the important issue of DNA. The significance of this evidence to the criminal justice system as a whole cannot be overstated. Here, again, the legislature must make a key commitment to funding of salaries for personnel to operate this system. The two most significant recommendations in terms of funding are re-stated below:

Adequate finding should be provided by the State of Illinois to hire and train both entry level and supervisory level forensic scientists to support expansion of DNA testing and evaluation. Support should also be provided for additional up-to-date facilities for DNA testing. The State should be prepared to outsource by sending evidence to private companies for analysis when appropriate. ***Recommendation 21, Chapter 3.***

The Federal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database. ***Recommendation 23, Chapter 3.***

Funding in this area represents a crucial commitment to the long-term functioning of the entire criminal justice system, not merely death penalty cases. Without the staff to evaluate the DNA samples and prepare analyses, a backlog grows which impedes the criminal justice system's ability to process cases. Such a slowdown results in additional costs and, more important, diminishes the quality of justice.

The comprehensive DNA database depends both on personnel to collect the DNA samples from the identified lists of donors, and on forensic scientists to complete the DNA profiles. This program has the potential to provide law enforcement with one of the most powerful tools at its disposal to identify the right suspect.

Recommendations on Staff Support and Training

Elsewhere in this report, the Commission has recommended that additional funding be provided to develop state-wide materials for judges, provide research support for judges, and provide training for judges, prosecutors and defense counsel. The specific recommendations are set forth below.

The Illinois Supreme Court, and the AOIC, should consider development of state-wide materials to train judges in capital cases, providing additional staff to provide research support, and obtaining sufficient finds for this purpose. ***Recommendation 36 , Chapter 6 .***

The Commission supports efforts to have training for prosecutors and defenders in capital litigation. Funding should be provided to insure that training programs continue to be of the highest quality. ***Recommendation 44, Chapter 7 .***

Meaningful training activities and improved state-wide support for judges trying capital cases cannot occur without a sincere funding commitment. This is a necessary part of the commitment that the legislature must make if the capital punishment system is to be retained. Improvements in this area should substantially increase the fairness of trials, provide more just and accurate results, and decrease the number of appellate reversals.

Notes -- Chapter 13

1. *See* "Bar leaders eye state as court funds source," Chicago Daily Law Bulletin, April 3, 2001, p. 1.

2. *See* "Legislative session complicated by politics, of all things," Chicago Daily Law Bulletin, January 7, 2002, p.23.

3. *See* "State and local funding for the Illinois Courts," www.state.il.us/court/SupremeCourt, the website of the Illinois Supreme Court, for information on funding of state courts.

4. *See* Katherine Baicker, "The budgetary repercussions of capital convictions," Working paper 8382, National Bureau of Economic Research, (Cambridge, MA), July 2001, p. 11.

5. Id., at p. 6.

6. *See* "Counties Struggle With High Cost of Prosecuting Death-Penalty Cases," Wall Street Journal, January 9, 2002.

7. A complete copy of the Capital Crimes Litigation Act is contained in the Technical Appendix to this Report.

8. *Mandatory Justice: Eighteen Reforms to the Death Penalty*, Constitution Project, 2001, p. 7-8.

9. Alabama: $20 to $40 per hour, with a maximum of $2,000 per case; Tennessee: hourly rate of $20 to $30 per hour; Mississippi: $1,000 cap per case.

10. 725 ILCS 5/113-3 (c) provided, prior to the adoption of the Capital Crimes Litigation Act, that fees for appointed counsel in Cook County in a felony case were to be $40 per hour for each hour spent in court and $30 per hour four out of court time, with a maximum of $1,250 for each felony case. The statute permitted the court to make payments "in extraordinary circumstances," in excess of the limits provided in the statute if the court certified that such payment was necessary to provide for "protracted" representation. Counsel was also permitted to petition for expenses, not to exceed $250, in capital cases. With the adoption of the Capital Crimes Litigation Act, the statute has been amended to reflect that it does not apply when payment is made pursuant to the Capital Crimes Litigation Act.

11. Many of the cases reversed by the Illinois Supreme Court based upon ineffective assistance of trial counsel had to do with the failure of counsel to adequately investigate and present mitigation evidence. This evidence frequently entails an evaluation of the defendant's psycho-social history, often by experts.

12. Powers and duties of State Appellate Defender. The State Appellate Defender may . . . (c.) (5) in cases in which a death sentence is an authorized disposition, provide trial counsel with the assistance of expert witnesses, investigators, and mitigation specialists from funds appropriated to the State Appellate Defender specifically for that purpose by the General Assembly. The Office of State Appellate Defender shall not be appointed to serve as trial counsel in capital cases.

13. *See*, "2001 Annual Report of the Supreme Court to the General Assembly," 2001 Illinois Judicial Conference, October 2001, www.state.il.us/court/SupremeCourt.

14. Id.

Chapter 14 – General Recommendations

As the Commission discussed many of its proposals for capital cases, it became apparent that some issues also applied with equal force to non-capital cases. It was the view of a majority of Commission members that extension of many of these recommendations to the entire criminal justice system should be seriously considered. The collection of better data with respect to homicide cases in Illinois, irrespective of whether proposals from Chapter 12 on proportionality review are adopted, was unanimously approved by the Commission. Finally, the Commission recommends that judges should be reminded of their responsibility to report instances of trial counsel misconduct to disciplinary authorities.. This chapter also contains a discussion of various research reports in the areas of victim issues, factors which may impact upon the imposition of sentencing, and costs related to the death penalty.

INTRODUCTION

This chapter contains a number of disparate and more general recommendations regarding the Illinois capital punishment system. Recommendations in this chapter address broader policy concerns that relate to the system as a whole, rather than problems that are specific only to capital cases.

In addition to these systemic recommendations, this chapter of the Commission's Report also discusses a number of the research areas of particular concern to Commission members. There are three main research topics covered in this chapter:

- Research describing victims needs and viewpoints with respect to the criminal justice system
- The main findings of the sentencing study completed by Drs. Pierce and Radelet
- Issues pertaining to systemic costs of capital punishment

Although some of these areas are not strictly within the Commission's charge as set forth in the Executive Order, Commission members believe that they are important to a complete understanding of the capital punishment system.

SPECIFIC RECOMMENDATIONS

Recommendation 83 :
The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.

This recommendation was adopted by a majority of Commission members. The Commission's mandate was to review the capital punishment system in Illinois and report to the Governor on ways in which the system can be made more just, fair and accurate. As a result, the recommendations in this Report focus primarily on issues that relate to the capital punishment process. It became readily apparent during many of the discussions on particular points, however, that recommendations that were being made with respect to the capital punishment system could apply with equal force to other cases in the criminal justice system.

During some of its discussions, Commission members were struck by the fact that particular cases received a much higher level of scrutiny because capital punishment was involved. Had those same defendants been sentenced to life imprisonment, or a term of years, their cases might not have been reviewed as carefully and by so many different parties. As a result, some of the injustices with which the public has recently become acquainted might not have been corrected.

Problems with police interrogations have been detailed extensively in recent media accounts.[1] DNA evidence continues to reveal instances of wrongful arrests, and wrongful convictions. It is of critical importance to our state, and fundamental to our system of government, that we have a criminal justice system upon which we can rely to produce a just and fair result. Revelations of wrongful convictions and miscarriages of justice inevitably undermine the confidence of the general public in the reliability of the criminal justice system as a whole.

The members of the Commission urge the Governor and the legislature to give careful consideration to whether recommendations made in this Report with respect to the capital punishment system might not apply with equal force to other areas of the criminal justice system. Death penalty cases represent a relatively small percentage of criminal cases in the state. For example, the study conducted by researchers on behalf of the Commission on sentencing decisions in Illinois revealed that during the study period (1988-1997) there were 5,310 cases in which a defendant was convicted of first degree murder. Only 115 of those cases resulted in the imposition of a death sentence.[2]

A defendant who is sentenced to life in prison without the possibility of parole, or for an extended term of years, does not benefit from the improvements to the criminal justice system brought about by the Capital Crimes Litigation Act or the new Supreme Court Rules governing capital cases. Yet the punishment he or she receives is severe, and the possibility that innocent persons may suffer as a result exists, albeit to a different degree than in a case involving the death penalty. In light of this, recommendations made in this Report with respect to gathering of evidence, avoiding tunnel vision, protection against false confessions, eyewitness evidence, DNA evidence and the caution about problems associated with certain types of cases, such as those involving in-custody informants, apply with equal force to cases where non-death sentences are imposed.

Recommendation 84 :

Information should be collected at the trial level with respect to prosecutions of first degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied. Data should be collected on a form which provides details about the trial, the background of the defendant, and the basis for the sentence imposed. The forms should be collected by the Administrative Office of the Illinois Courts, and the form from an individual case should not be a public record. Data collected from the forms should be public, and should be maintained in a public access database by the Criminal Justice Information Authority.

The Commission has already recommended that consideration be given to adopting a proportionality review on direct appeal. (*See* Chapter 12) That recommendation was supported by a majority of Commission members.

The Commission unanimously recommends, however, that whether or not Illinois adopts a proportionality review as part of its direct appeal process, the Supreme Court should begin to require collection of data with respect to *all* first degree murder cases, regardless of whether a death sentence is imposed. Although this type of data collection is ordinarily done in connection with a proportionality review process, Commission members believed that the recommendation was important enough that it should be undertaken in and of itself.

Throughout the nearly two years that the Commission has studied the capital punishment system in Illinois, Commission members had to contend with an astonishing lack of data about how the capital punishment system works. There is no organized state-wide effort to gather information about cases in which the death penalty is imposed. The efforts undertaken by the Commission to collect data revealed how important factual information about these cases is to a complete understanding of how the system has (or has not) been working.

There are scattered sources of information, kept by different agencies and with varying level of detail. Reported opinions of the Illinois Supreme Court provide important information about death penalty cases, but reviewing opinions in all of the more than 250 cases in which a death penalty has been imposed is an extraordinarily large task. More important, as the Commission efforts to review those cases revealed, those opinions do not always contain uniform information. This Report contains data, for example, about the use of eligibility factors in Illinois, which has been gleaned from the opinions issue by the Court over the past 25 years in more than 250 cases. Unfortunately, not all of those opinions contain clear statements about the eligibility factors relied upon, most likely because it was not a pertinent legal issue in the case. Some opinions may only discuss one eligibility factor, when there may have been other factors that were also relied upon. There is no way to confirm this kind of simple fact without resort to the trial record, which, in many cases, has long ago been sent to storage.

The opinions rarely include information with respect to race of either the defendant or the victim, making systemic statistical analysis about race effects from this data impossible. Some opinions did not include details about the date or facts of the offense, making the opinions of limited use for some

analytical purposes. The opinions of the Supreme Court focus, as they should, on the *legal* principles involved in the cases, and only so much of the facts are necessary to address those legal principles are provided.

In any capital punishment system, it is extraordinarily important not only to make sure that the wrong people have not been convicted, but also to insure that the right people are not being convicted and sentenced to death for the wrong reasons. Extra-legal factors, such as the race of the defendant or the victim, or the geographic location of the crime, should play no role in any capital punishment system. To the extent that the state expects to retain a capital punishment system, evaluation and monitoring of the cases of those who have been sentenced to the most severe penalty should be required.

Proportionality reviews in others states generally rely upon data collected by the trial court on a form that is filled out by the trial judge and forwarded to that state's Supreme Court. With the exception of New Jersey, where data is collected by the state's Administrative Office of the Court following the trial, and Nebraska, where the prosecutor is required to collect the data, states were uniform in imposing this responsibility on the trial judge.[3] The Commission's recommendation reflects that practice.

Unlike many states, however, Illinois also benefits from the existence of a state agency responsible for studying criminal justice issues -- the Illinois Criminal Justice Information Authority. Since it is within the mission of this agency to collect, analyze and make available to the public information on issues relating to criminal justice, the Commission has recommended that once the data is collected at the trial level, the Criminal Justice Information Authority should be the agency responsible for developing and maintaining appropriate information in a public use database. The Authority already maintains other data for use by the public, and maintaining this information fits squarely within the agency's mission.

Finally, the Commission's recommendation would require that data be collected on *all* first degree murder cases, not merely death penalty cases. Collecting information on death penalty cases is useful and important, but in order to understand how the system is working, it is important to be able to compare the data in those cases to cases in which the death penalty was not sought or imposed.

The Special Supreme Court Committee noted that "The absence of a statistical database on death penalty cases and potential death penalty cases makes it difficult to engage in a comprehensive analysis of capital punishment issues."[4] The Supreme Court Committee suggested that further study was appropriate, because it could be difficult to establish significant, uniform categories of information to collect. Despite this, the Supreme Court Committee expressed its belief that such statistical information could be useful in addressing policy questions regarding the death penalty, and recommended further study on this issue.

Trial court report forms from a number of states have been collected and reported in the Technical Appendix to this Report. They provide a clear illustration of the kind of information that would be useful in evaluating the implementation of capital punishment in Illinois. The data collection must be closely supervised, however, in order to insure that trial courts are collecting and reporting relevant

information. Some states which collect this data suffer from incomplete data collection efforts, with a corresponding loss of confidence in reported results.[5]

Recommendation 85 :
Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.

A majority of Commission members supported the idea that instances of misconduct which violate the Rules of Professional Conduct, whether by prosecutors or defense lawyers, should be reported to the Attorney Registration and Disciplinary Commission. One of the consistent problems associated with the capital punishment system has been questionable conduct by both prosecution and defense counsel. Improper conduct by either party should be fully investigated, and sanctioned where appropriate.

Canon 3 of the Code of Judicial Conduct (Ill.Sup.Crt. Rule 63) provides as follows:

> A judge having knowledge of a violation of these canons on the part of a judge or a violation of Rule 8.4 of the rules of Professional Conduct on the part of a lawyer shall take or initiate appropriate disciplinary measures. Ill.Sup.Crt. Rule 63 B (4).

Rule 8.4 of the Rules of Professional Conduct defines misconduct for which a lawyer may be disciplined.[6] Prohibited conduct includes behavior involving dishonesty, fraud, deceit or misrepresentation, as well conduct which is prejudicial to the administration of justice.[7] The Code of Judicial Conduct places upon judges the responsibility to maintain order and decorum in proceedings before the court, and in addition to imposing requirements upon judges to maintain good judicial temperment, the Code also states that the judge "should require similar conduct of lawyers . . .". *See* Ill. Sup. Crt. Rule 63 A (2), (3).

The Commission's analysis of the more than 250 cases in which a death penalty has been imposed in the years since 1977 revealed that some 21% of the reversals were the result of deficiencies in the conduct of defense counsel. Roughly 26% of the cases were reversed based upon conduct by a prosecutor that the Supreme Court found to be improper and reversible. Together, these two types of errors account for a substantial number of the cases reversed on appeal. [8]

Of equal concern, although less well documented in court opinions, are the cases in which the Supreme Court finds that conduct by either the prosecutor or the defense attorney is improper, but in the overall context of the particular case, the conduct does not warrant a reversal because there was no prejudice to the defendant. There are a significant number of cases where the Supreme Court has stated that the conduct of the prosecutor was clearly improper, but was not grounds for reversal.[9] Analysis of the errors occurring on the part of defense counsel is more difficult, since the Court will often curtail its discussion of an ineffective assistance of counsel claim by determining that there has been no prejudice

to the defendant, without specifically addressing the question of whether the counsel's performance fell below the expected professional standard.[10]

The Supreme Court has been critical of the professional conduct of trial counsel for both the prosecution and defense in death penalty cases. The Supreme Court recently affirmed a first degree murder conviction and death penalty, despite its serious reservations about some of the behavior of counsel for the prosecution.[11] The Supreme Court has also reversed cases in which it believed the conduct of both counsel fell below the expected standard, and in one such case, observed that the conduct of all of the legal professionals was less than desirable.[12]

The trial judge ultimately has the responsibility for insuring that the trial is both fair and comports with the requirements of the law. Trial judges should be reminded of their responsibility to manage the conduct of all advocates who appear before them, and, where appropriate, report conduct which violates the Rules of Professional Conduct.

Proposed Limitations on representation based upon disciplinary record

While Commission members appreciated the views expressed by some that it might be prudent to undertake more active efforts to limit the appearance of either prosecution or defense counsel in capital cases where there has been some prior disciplinary experience, Commission members were unanimous that such a proposal was not a good idea. Disciplinary proceedings are highly confidential matters managed by the Attorney Registration and Disciplinary Commission, and it is difficult to see how such a proposal could be implemented on a practical level. The Commission has already expressed its support for the Capital Trial Bar concept in this Report. Paragraph (g) of the new rule provides that the Supreme Court may remove from the roster of eligible attorneys any attorney who, in the court's judgment, has not provided ethical, competent and thorough representation. Sup.Crt.Rule 714 (g). These provisions should provide sufficient safeguards.

OTHER RESEARCH TOPICS

Victim issues

Consideration of the needs of surviving family members of homicide victims was not part of the Commission's original mandate. However, Commission members believed that a complete consideration of the capital punishment system necessitated consideration of ways in which the needs of surviving family members are being met, and suggestions for improvements. In furtherance of that goal, members of the Commission met privately with a representative group of family members of homicide victims. Surviving family members expressed diverse views on the system and on the question of capital punishment itself.

The Illinois Criminal Justice Information Authority (the "Authority") provided important research papers to the Commission in the area of victim issues. The primary conclusions of all three papers are discussed below.[13]

Report on Victim and Survivor Issues in Homicide Cases
This research report covered three principal areas. First, it described national research with respect to the needs of crime victims and evaluations of victim assistance programs. Second, it reported on specific and recent research conducted by the Criminal Justice Information Authority into the problems faced by victims of violent crimes, based upon research on intimate partner homicide in Chicago[14] and an evaluation of the Cook County Victim-Witness program. Finally, the report outlines the Authority's newly adopted Criminal Justice Plan for the State, which identifies some key activities that could be undertaken to minimize the impact of victimization.

National research in the area of crime victims' needs reveals that victims of violent crime, and their family members, face a variety of challenges and multi-faceted needs. These needs include, but are not limited to, the need for emergency services, counseling (both immediate and follow-up), advocacy and support services, assistance with claims, court-related services and systemwide services.[15] Needs may change as victims, or the surviving family members of homicide victims, progress through the criminal justice system[16] and although court-related information was the most frequent victim service used, it was also most frequently described as an unmet need. Of greater concern is the fact that many victims were simply unaware of the existence of victim-assistance programs, and some Illinois crime victims were unaware of existing state victim compensation programs.[17]

The Authority's research points to the broader spectrum of service needs experienced by "collateral" victims, such as children who may witness the violent encounter that results in the homicide, and relatives who may be exposed to the murder scene immediately after the murder.[18] These individuals are also victimized by the crime, although they may not have been physically harmed in the incident. Support services for them are important as well.

The evaluation of the Cook County Victim-Witness program identified an array of stress-related problems experienced by the surviving family members of homicide victims, some still occurring years after the homicide event.[19] Victims of other violent crimes fared better in recovering from the negative effects of the violent encounter than did the families of homicide victims, many of whom still reported serious problems as much as 3 years after the event. These findings point to the need for both a short-term and a long-term approach to victim support services, particularly in the case of surviving family members of homicide victims.

The Criminal Justice Plan adopted by the Authority in June 2001 articulated a number of key objectives with respect to victim services. These included minimizing the impact of victimization by ensuring the provision of basic services to all victims of crime, and developing additional services to minimize the impact of victimization. Accountability in the criminal justice system was also identified as an important principle.

Victim and Survivor Issues in Homicide Cases: Focus Group Report
As a supplement to the research report addressing victims' needs, the Authority also conducted three focus groups with surviving family members of homicide victims. Two of the focus groups were held in Chicago, and one was held in Springfield. The groups were led by a trained facilitator who sought to elicit the views of the family members of homicide victims about their experiences, both good and bad, with criminal justice agencies. Through the group discussions, three main needs were identified: 1.) a need for specific information related to what to do and where to go to handle matters pertaining to the death, 2.) a more generalized need for compassion and sensitivity from those working in the system about the feelings of the surviving family members, and 3.) a need for greater continuity in the criminal justice system with respect those handling the case.

Many family members identified the need for information specific to their case as arising from the moment immediately following the crime through the courtroom process and the ultimate sentencing decision. Most had no previous experience with the criminal justice system and felt frustrated with the lack of information provided. Focus group participants also articulated a concern that the professionals working in the criminal justice system lacked sensitivity and compassion for the plight of the surviving family members. Although some reported positive experiences with criminal justice system professionals, many felt that those working in the system could display more humanity in their dealings with surviving family members.

Finally, it became clear in the groups that many of the participants felt challenged by the turnover in personnel involved in their cases, including caseworkers, attorneys, and even judges. It was the view of some participants that fewer changes in personnel would have reduced their frustrations with the system.

Participants in the process expressed a variety of other needs as well. One troubling observation was the concern raised by some participants that surviving family members (and the cases of their loved ones) were handled differently based upon the race, ethnicity, or sex of the victim, or where the victim lived. Certain assumptions appear to have been made by criminal justice professionals about the conduct of the homicide victim based upon such criteria, which was offensive to the surviving family members who felt that correspondingly fewer resources were applied in their cases. Some participants also expressed the view that there were communities, particularly the Latino and African-American communities, which were underserved with respect to victim assistance programs.

Needs of the Wrongfully Convicted: Report on a Panel Discussion
Often overlooked in the process of assessing the needs of victims are those who have been wrongfully convicted of a crime. These individuals are also victims, although their victimization has a different dimension than that of the surviving family members of homicide victims. The panel discussion which formed the basis for this report included as participants men who have been released from death row in Illinois, as well as men who had been convicted of crimes which did not result in a death sentence and who were subsequently released from prison.

The panel discussion focused on several areas where changes might help the wrongfully convicted reintegrate into society. One clearly articulated need was for some immediate form of financial assistance to enable those released from prison to get back on their feet. Some of the panelists had spent extended periods in prison, and returned to a society that had changed significantly during their incarceration. Challenges were even experienced in mundane personal matters, such as obtaining driver's licenses and opening bank accounts.

Panelists also identified an immediate need for counseling to overcome the stress, depression and anger caused by their wrongful incarceration. A number of participants experienced understandable mental anguish as a result of their incarceration, and have been left with continuing anger and mistrust of the criminal justice system as a result of their wrongful conviction and incarceration. Long after release, they and many of their families continue to suffer from the stigma of having been in prison.

Finally, those who were most successful in making the transition back into society were able to do so because of supportive family and community environments. Others were able to obtain meaningful employment fairly quickly, and return to a stable lifestyle. These factors significantly eased the reintegration back into society.

The three research reports identify problem areas where improvements could be made to support both surviving family members of homicide victims, and those who have themselves been victimized by the criminal justice system through wrongful conviction. Improvements to immediate victim services, access to support and counseling services, and better continuity in the criminal justice system, would lighten the burdens of those who have been victimized.

A study of sentencing decisions in Illinois

Concerned about the impact of extra-legal factors, such as race, on the death sentencing process in Illinois, Commission members concluded that a study of sentencing decisions was important to an understanding of capital punishment in Illinois. Unlike some states with a death penalty, Illinois has a fairly large number of murder cases each year.[20] Relatively few of those cases actually result in the imposition of a death penalty. In order to make comparisons, however, data would have to be collected not only on death penalty cases, but also on first degree murder cases where a death penalty was not imposed.

Chapter 1 of this Report describes the concerns Commission members expressed about whether there might be extra-legal factors that were influencing the decision to impose death sentences in Illinois. The Commission was fortunate to be able to rely on experienced researchers to design and implement a reliable, although limited, study in this important area.

Commencement of the study in Illinois was made more difficult because, unlike many states, Illinois does not collect state-wide data with respect to death sentencing decisions in any organized way.[21] As

a result, the Commission's efforts to understand whether, and to what degree, extra-legal factors play a role in the death sentencing process in the state were circumscribed. The last study to examine any issues related to the Illinois death sentencing process, completed by Gross and Mauro, was based upon data from 1977 through 1980.

The Commission asked Dr. Pierce, of Northeastern University in Boston, and Dr. Radelet, of the University of Colorado, to undertake a study to examine the degree to which factors that were not legally relevant might influence death sentencing in Illinois. Their study examined data about people who were convicted of first degree murder throughout Illinois during a ten year period from 1988 through 1997. The examination was based upon conviction data,[22] which was then linked to demographic data about the victims involved in the homicides.[23] The victim information used in the study did not contain any personally identifying information, and was limited to race, sex and age of the victim, and the number of victims in a single incident.

As the database contained information about convictions, as well as the defendant's history of convictions in Illinois, the researchers were able to approximate two of the most frequently used eligibility factors in Illinois: multiple murder and a murder occurring in the course of a felony. During the study period in question, there were more than 5,000 convictions for first degree murder throughout the state. The data also contained information regarding county of conviction, which enabled the researchers to identify and differentiate trends in various parts of the state.[24]

As is discussed more fully in the final report of Drs. Pierce and Radelet,[25] the study revealed several findings of interest:

- When certain facts in aggravation, such as previous criminal history of the defendant, are controlled for, there is evidence that the *race of the victim* influences who is sentenced to death. In other words, defendants of any race who murder white victims were more likely to receive a death sentence than those who murdered black victims.
- There was a sharp difference in the rate at which defendants were sentenced to death in different regions of the state, even after controlling for facts in aggravation. Among cases with a first degree murder conviction, 8.4% of those from rural counties, 3.4% of those from urban counties, 3.3% of those from collar counties and 1.5% of those from Cook County resulted in a death sentence. These regional differences were statistically significant.
- In the sample studied, there was no statistically significant evidence of disparate treatment based upon the *race of the defendant*, once aggravating factors were held constant. In other words, despite the fact that minorities comprise most of Death Row in Illinois, they are not sentenced to death at greater rates than whites.

These findings should cause concern in a number of areas. First, the fact that there is evidence of some racial disparity in the death sentencing process in that those who kill victims of a certain race are more likely to be sentenced to death should point to the need for a reassessment of how decisions are made with respect to whether or not to pursue the death penalty in a particular case. Statistical information of

this type does not demonstrate that any particular individual has engaged in discrimination based upon race. However, when viewed in the aggregate, the fact that cases involving white victims may more often result in a death sentence than those involving black victims is a serious concern, and anecdotal evidence of this effect was reported in the focus group on the feelings of surviving members of homicide victims.[26]

Second, the significant regional differences in the degree to which the death penalty is imposed demonstrate that there is a wide divergence in the way that prosecutors are exercising their discretion about whether or not to seek the death penalty, resulting in little uniform application of this most severe penalty. While perfect uniformity in sentencing may not be possible, substantial progress toward a more uniform approach to the application of the state's most serious penalty available should be a high priority in the criminal justice system if the state is to retain capital punishment.

Finally, the authors point out that there is no statistically significant evidence in the sample of cases studied that demonstrate that minorities were sentenced to death at greater rates than whites, once the facts in aggravation are held constant. Although this finding may not provide reassurance to some, it at least suggests that overt and wide-spread systemic racial bias based upon the defendant's race was not be present in the capital punishment system during the period studied.[27] The authors also note that Illinois displays some restraint in the application of capital punishment, as the death sentences imposed in the study sample represented less than 2% (statewide) of the first degree murder convictions during the period.[28] In view of the number of cases in which death sentences are ultimately reversed, the actual death sentencing rate is likely somewhat lower.[29]

The authors also observed that a number of the legally relevant factors upon which death should be imposed displayed a statistically significant relationship as predictors of who was sentenced to death. The multiple murder factor, which makes a defendant eligible for the death penalty where he or she has been convicted of two or more murders, was related in a statistically significant way with the imposition of the death penalty, as was the "course of another felony" eligibility factor. A relationship was also demonstrated between murders of victim under 12 and over 59, and multiple murders, with respect to who was sentenced to death. These findings suggest that the capital punishment system in Illinois is not completely arbitrary.

At the conclusion of their study, Drs. Pierce and Radelet make two significant policy recommendations, both of which reflect recommendations put forward by the Commission. The first is that the Illinois Supreme Court should conduct a proportionality review, to guard against arbitrariness in the application of the death penalty. Second, the authors suggest that to engage in a meaningful proportionality review, ". . . officials will need to construct, maintain, and use a database on Illinois homicides."[30] They recommend that data collection begin at the very earliest point in the process, namely, with the commencement of the homicide investigation. The authors also point out that the mere act of data gathering, by itself, may begin to engender more attention to fairness in the system.

Costs related to the death penalty

Commission members had varying opinions with respect to the question of whether the issue of costs should be considered in the context of the Governor's charge to the Commission. Some members of the Commission were of the opinion that if capital punishment was an appropriate remedy, the question of the costs relating to its imposition was not relevant. Other Commission members were of the view that the societal costs of a capital punishment system raised questions about allocation of resources in the criminal justice system, and questioned whether the dedication of so many resources to a relatively small number of cases was prudent. While the Commission made no recommendation with respect to the impact of costs on the capital punishment system, consideration was given to several studies in other jurisdictions on the subject.

There have been a number of efforts to document the costs associated with the imposition of the death penalty. Findings of several of the more reliable studies are detailed below.

North Carolina
A study conducted by Philip J. Cook and Donna B. Slawson[31] compared the cost of adjudicating both capital and non-capital murder cases in North Carolina. The study involved an examination of cases in six prosecutorial districts during the early 1990's, and included an assessment of trial level and appellate costs, as well as costs of incarceration. Their initial conclusion was that the extra cost of prosecuting a capital case was $163,000 per case.[32]

Federal death penalty defense
The Judicial Conference of the United States authorized a study, conducted by its Subcommittee on Federal Death Penalty Cases, which examined the cost of defense representation in federal death penalty cases.[33] The study examined federal death penalty cases between 1990 and 1997. In light of the fact that only a small number of federal death penalty cases had advanced to the appellate stage, the study was limited to an assessment of the costs of defending the case at the trial stage only. The Subcommittee found that the average cost of defense in homicide cases where the death penalty *was not authorized* amounted to $55,772. The average cost for defense in those cases where the death penalty *was authorized* was $218,112.[34]

Indiana
In Indiana, the Criminal Law Study Commission has undertaken an extensive review of that state's death penalty system.[35] One of the questions that has been examined is the relative cost difference between capital cases where the charge and conviction results in a death sentence versus those cases in which the charge and conviction results in a sentence of life without parole.[36] The study took into consideration the costs of trial, appeal, post-conviction, and federal habeas petition, and also considered the differential costs of incarceration for those defendants sentenced to death versus those sentenced to life without parole.[37] Calculations also took into account the impact of reversals and resentencings in reaching conclusions about the costs associated with the death penalty versus life

without parole. Researchers concluded that the present value of the costs associated with the death penalty will exceed the total costs of the life without parole option by more than one-third.[38]

Local impacts

Cost impacts from capital litigation may be felt most immediately at the local level, as many jurisdictions fund court operations at the trial level through expenditures by county government for court staff and buildings. In a nationwide analysis of the financial impact to county governments of capital prosecutions, Baicker (2001) concludes that the presence of a capital trial will increase overall county expenditures by 1.8 percent, and is often financed through increased property taxes. Decreases in county expenditures most often come from police and highway expenditures.[39]

A recent article in the Wall Street Journal reported on the costs of the death penalty prosecution in Jasper, Texas of the three men convicted of the 1998 death of James Byrd.[40] The county spent more than $1.02 million for the prosecution. Two of the defendants were sentenced to death, while a third was sentenced to life in prison. The resulting prosecution forced the County to increase property taxes 6.7% over two years to pay for the trial. According to the report, the Texas Office of Court Administration estimates that the prosecution costs for a capital trial can average $200,000 to $300,000.

Notes -- Chapter 14

1. See, for example, articles from the Chicago Tribune series on confessions such as "Coercive and illegal tactics torpedo scores of Cook County murder cases," Chicago Tribune, December 16, 2001.

2. *See Race, Region and Death Sentencing in Illinois, 1988-1997*, Drs. Pierce and Radelet, p. 9. A complete copy of this report is contained in the Technical Appendix, published in a separate volume. This figure does not take into account whether or not those cases were ultimately reversed and the defendant resentenced, since the reversal may have occurred after the end of the study period (1997).

3. Sample trial court report forms from several states are contained in the Technical Appendix to this report. The Technical Appendix also contains a summary of state statutory citations on proportionality.

4. *See* Sup. Crt. Committee Supplemental Report, October 2000, p. 102-103.

5. In a special series on the Tennessee death penalty, the Daily Tennessean reported that a substantial number of cases are missing from the database that the Tennessee Supreme Court maintains to assess whether or not the death penalty is being applied arbitrarily. According to the article, three of every five first-degree murder convictions are missing from the database, as is one of every five death penalty cases. Cases which are in the database are missing important information. *See* "Missing files raise doubts about death sentences," Daily Tennessean, July 22, 2001. This illustrates the importance of supervising judges to insure that forms are completed and filed with the court.

6. Rule 8.4 provides, in its entirety:

(a) A lawyer shall not:

(1) violate or attempt to violate these Rules;
(2) induce another to engage in conduct, or give assistance to another's conduct, when the lawyer knows that conduct will violate these Rules;
(3) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(5) engage in conduct that is prejudicial to the administration of justice. In relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin. This subsection does not preclude legitimate advocacy when these or similar factors are issues in the proceeding;
(6) state or imply an ability to influence improperly any tribunal, legislative body, government agency or official;
(7) assist a judge or judicial officer in conduct that the lawyer knows is a violation of the Code of Judicial Conduct;
(8) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an educational loan in a bankruptcy proceeding shall not constitute bad faith under this rule, but the discharge shall not preclude a review of the attorney's conduct to determine if it constitutes bad faith; or
(9)(A) violate a Federal, State or local statute or ordinances that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the

lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.
(B) No complaint of professional misconduct based on an unlawfully discriminatory act, pursuant to paragraph (9)(A) of this rule, may be brought until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawfully discriminatory act, and that the determination of the court or administrative agency has become final and enforceable and the right of judicial review of the determination has been exhausted.

(b) A lawyer who holds public office shall not:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;
(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or
(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

(c) A lawyer who holds public office may accept political campaign contributions as permitted by law.

7. *See* Rule 8.4, par. (a)(4) and (a)(5).

8. The Technical Appendix contains tables which display the cases reversed and document the principal cause of the reversal.

9. There have been a number of instances in which conduct of the prosecutor was acknowledged by the court to be improper, but not reversible. *See People v. Moss*, 2001 WL 1243642 (2001)(Special concurrence of Justice McMorrow); *People v. Hooper*, 172 Ill. 2d 64, 82-3 (1996); *People v. Caballero*, 126 Ill. 2d 248, 271-2 (1989).

10. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court uses a two prong test to assess whether defense counsel rendered conduct which is constitutionally deficient. That test involves and assessment as to whether the defense counsel's conduct fell below an object standard of care, and second, whether the conduct resulted in prejudice to the defendant. Claims of ineffective assistance of counsel may be disposed of by giving consideration first to the question of whether there has been prejudice to the defendant, thus never specifically addressing the question of whether, and to what degree, defense counsel's conduct has been below par. *People v. Evans*, 186 Ill. 2d 83, 708 N.E. 2d 1158 (1999).

11. *See People v. Moss*, October 21, 2001 (2001 Wl 1243642). Although a majority of the Court upheld the convictions and sentence, Justice McMorrow was sharply critical of the conduct of the prosecutors in the case and expressed her dissatisfaction with the result although she did vote to affirm. Justice Freeman, who dissented from the decision, expressed in some detail his frustration with conduct by prosecutors in the case, whose behavior he felt inappropriate.

12. *See People v. Blue*, 189 Ill. 2d 99 (2000) . Although the basis for the reversal was the conduct of the prosecutors, the Court did not hesitate to point out the unprofessional behavior of the defense

counsel. 189 Ill. 2d at 141-2.

13. Complete copies of the research reports are contained in the Technical Appendix to this Report.

14. This research report was published by the Illinois Criminal Justice Information Authority in June of 2000. *The Chicago Women's Health Risk Study* is available from the Authority's website (www.icjia.state.il.us).

15. *See: Victim Survivor Issues Report*, December 6, p. 3; p. 7.

16. The report suggests that security related needs may be the most important to victims immediately following the incident, whereas emotional support may be more important several months after the event. *Id.* at p. 4.

17. Id., p. 5, 7 and 13.

18. Id., p. 8-10.

19. Id., p. 15.

20. On average, Illinois has experienced anywhere from 800 to 1000 murders per year, statewide, during the last twenty years.

21. There are efforts to report on death sentences, but information is scattered and incomplete. The Administrative Office of the Illinois Courts reports annually on death sentences imposed in the state, but does not publish additional information about the cases themselves. The Department of Corrections maintains information about defendants who are sentenced to death, but does not collect information relating to homicide victims. Victim data is collected by police agencies, but often is not reported in any reliable way in connection with the ultimate outcome of the case. As a result, attempting to locate clear information which would permit an analysis of death sentencing decisions is problematic.

22. Provided confidentially by the Illinois Department of Corrections.

23. Victim data was obtained through use of the Chicago Homicide Victim's Database, maintained by the Illinois Criminal Justice Information Authority, and through a search of state and local records to collect demographic information about homicide victims from areas in the state outside of Chicago.

24. The research team used a classification system that is in already in use in Illinois, developed by the Illinois Criminal Justice Information Authority. Illinois has 102 counties, and there are vast differences in population makeup and density in the various counties throughout Illinois. The neutral criteria used by the Authority to classify counties defines four categories: *Cook County* (where Chicago is located), which due to its size is its own class; the *Collar counties*, which are more or less urbanized counties contiguous to Cook County; *Urban Counties*, which are counties which lie in a metropolitan statistical area, and *Rural Counties*.

25. A full copy of the final report is contained in the Technical Appendix to this Report.

26. *See Victim and Survivor Issues in Homicide Cases: Focus Group Report*, Illinois Criminal Justice Information Authority, February 19, 2002.

27. Data is not available, nor does the present study attempt to assess, the degree to which minorities may enter the criminal justice system in greater proportions than whites.

28. The authors discuss, at some length, the only other academic study of sentencing outcomes, which was completed by Gross & Mauro. That study covered 1977-1980. Researchers found that approximately 1.4% of homicides in Illinois resulted in a death sentence, as compared to 3.7% in Georgia and Florida. The study by Drs. Pierce and Radelet found that in the subset of data for which all data was complete (some 4,182 cases) there were only 76 death sentences, or something less than 2% statewide. *See: Race, Region and Death Sentencing in Illinois*, p. 1, 9.

29. In Chapter 1 of this Report, the Commission's review of the reversal rate in Illinois death penalty cases is discussed. The Commission's review suggests that more than half of Illinois death penalty cases are reversed at some point in the process. Other studies have suggested a similar reversal rate for Illinois. A Columbia Law University Study released on February 11, 2002 reported a reversal rate for Illinois death penalty cases of 62%. *See: A Broken System, Part III: Why There is So Much Error in Capital Cases, and What Can Be Done About it*, James Liebman (Columbia Law School) and others; February 11, 2002, Appendices, Illinois p. A-14. A complete copy of the report and its appendices can be found at: http://www.law.columbia.edu/
brokensystem2.

30. *Race, Region and Death Sentencing in Illinois*, p. 22-24.

31. Philip J. Cook, Donna B. Slawson "The Costs of Processing Murder Cases in North Carolina," The Terry Sanford Institute of Public Policy, Duke University, May 1993.

32. Id., p. 3, 97.

33. *See* "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, May 1998. A copy of the report is available at www.uscourts.gov/dpenalty.

34. Id., Section I A 2. of the report.

35. The Indiana Study has been ongoing during 2001 and a final report is expected in early 2002.

36. Details regarding the study methodology and measures used to identify costs are contained in the report of the Criminal Law Study Commission, expected to be released early in 2002.

37. This included consideration of the increased health care costs to the Department of Corrections for aging offenders.

38. Details regarding study methodology and calculation of costs are contained in the report of the Criminal Law Study Commission, expected to be released early in 2002.

39. Katherine Baicker, "The Budgetary Repercussions of Capital Convictions," Working Paper 8382, National Bureau of Economic Research, Cambridge MA (July 2001) (available at www.nber.org/papers/w8382 , see p. 18.

40. "Counties Struggle With High Cost of Prosecuting Death-Penalty Cases," Wall Street Journal, January 9, 2002.

Conclusion

Commission members believe that the recommendations presented in this report will significantly improve the fairness and accuracy of the Illinois death penalty system, and substantially improve the quality of justice in Illinois capital cases. After two years of concentrated study and discussion, all Commission members were left with the firm belief that the death penalty process itself is incredibly complex, and that there are few easy answers. The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.

Throughout its process, however, members also discovered that despite the complex and difficult issues presented, the Commission was able to engage fully in discussion of topics that ordinarily engender contentious debate. As a result, Commission members believe that serious and reasoned discussion of this topic is both possible and beneficial. It is the hope of Commission members that leaders throughout government, as well as members of the public, will engage in that serious and reasoned debate over what is one of the most important public policy issues facing our state and our nation.

This Report contains many recommendations for very specific improvements to the capital punishment system in Illinois. While specific improvements are generally discussed in terms that would suggest prospective application only, there may be circumstances in which application of these suggested reforms might be made in more immediate fashion. The Commission has not made any specific recommendation with respect to the retroactive application of its recommendations as it was impossible to predict which proposals or combination of proposals may actually be adopted and when they might take effect. The many possible permutations and the interrelationship of the recommendations made it extraordinarily difficult to address the issue of retroactivity in more than an abstract way. The Commission certainly believes that retroactivity is a question that should be specifically addressed by the legislature when considering the adoption of any of the recommended reforms.

Moreover, recent opinions of the Illinois Supreme Court suggest that the Court itself is struggling with the issue of whether, and to what extent, its own new rules might be applied retroactively. *See People v. Hickey*, 2001 WL 1137273 (September 27, 2001). Retroactive application of reforms is a complex issue in and of itself, and not one that admits of easy resolution. Although the Commission has not made a specific recommendation with respect to the application of its recommendations to pending cases, Commission members believe the Governor should give consideration to the proposed reforms when considering clemency applications in capital cases. If changes in the present system are required to ensure its fairness and accuracy, it is entirely appropriate to consider how those changes might have made a difference to defendants when reaching determinations about whether or not a death sentence should be upheld on the merits or whether mercy should be extended in light of all the circumstances.

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EXECUTIVE ORDER CREATING

THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

NUMBER 4 (2000)

WHEREAS, I am charged with the constitutional responsibility for the faithful execution of the laws of this great State and I have supported laws and programs to assist the police, prosecutors and the courts in fairly enforcing those laws; and

WHEREAS, I have been a strong proponent of strict criminal penalties, victim rights and the protection of all the people of Illinois; and

WHEREAS, the dual aim of our criminal justice system and the rule of law is to ensure that the guilty shall not escape or the innocent suffer; and

WHEREAS, the death penalty is a legal form of punishment supported by the citizenry and I have long supported the imposition of such punishment as a proper societal response for the most vicious and heinous of crimes; and

WHEREAS, since the reestablishment of the death penalty in Illinois in 1977, there have been persistent problems in the administration of the death penalty as illustrated by the thirteen individuals on death row who have had their death sentences and convictions vacated by the courts; and

WHEREAS, the number of death sentences and criminal convictions being vacated or overturned has raised serious concerns with respect to the process by which the death penalty is imposed; and

WHEREAS, based on this experience, we should conduct a thorough review of the death penalty process because the ultimate outcome is irreversible; and

WHEREAS, the people of the State of Illinois must have full and complete confidence that when the death penalty is imposed and final appeals of that sentence are completed, the guilt of the defendant has been justly, fairly, thoroughly and accurately established; and

WHEREAS, in discharging my constitutional obligations with respect to the death penalty, I have the awesome responsibility, and last opportunity, to review a death penalty case before the sentence is carried out to ensure the fairness of the adjudicative process, the factual guilt of the defendant and the appropriateness of the sentence;

THEREFORE, I, George H. Ryan, order the following:

I. CREATION

There shall be established the Governor's Commission on Capital Punishment.

II. PURPOSE

The duties of the Commission shall be:

A. To study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people.

B. To examine ways of providing safeguards and making improvements in the way law enforcement and the criminal justice system carry out their responsibilities in the death penalty process--from investigation through trial, judicial appeal and executive review.

C. To consider, among other things, the ultimate findings and final recommendations of the House Death Penalty Task Force and the Special Supreme Court Committee on Capital Cases and determine the effect these recommendations may have on the capital punishment process.

D. To make any recommendations and proposals designed to further ensure the application and administration of the death penalty in Illinois is just, fair and accurate.

III. MEMBERSHIP

A. The Commission shall consist of a Chairperson, two Co-Chairpersons and 11 additional members, including an Executive Director, all appointed by the Governor.

B. Members shall serve without compensation, but may be reimbursed for expenses.

C. The Commission shall be provided assistance and necessary staff support services by the Office of the Governor and the agencies of state government involved in the issues to be addressed by it.

IV. REPORT

The Commission, upon concluding its examination and analysis of the capital punishment process, shall submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate.

V. EFFECT AND EFFECTIVE DATE

This Executive Order is not intended to, does not, and may not be relied upon to create, expand or abridge any privileges, benefits, remedies, immunities or rights, substantive or procedural, in any matter

administrative, civil or criminal. This Order may not be used as evidence, findings or otherwise in any future or pending matter relating to capital litigation. No limitations are hereby placed on the lawful investigative and prosecutorial prerogatives of any office of government (state, county or local).

This Executive Order Number 4 (2000) shall be effective upon filing with the Secretary of State.

May 4, 2000

PART B. OFFENSES DIRECTED AGAINST THE PERSON
ARTICLE 9. HOMICIDE (720 ILCS 5/9-1)

Sec. 9-1. First degree Murder - Death penalties - Exceptions - Separate Hearings - Proof - Findings - Appellate procedures - Reversals. (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or (3) he is attempting or committing a forcible felony other than second degree murder.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if:
(1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or
(2) the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or
(3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another; or
(4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or
(5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or
(6) the murdered individual was killed in the course of another felony if:
(a) the murdered individual:
(i) was actually killed by the defendant, or (ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons

for whose conduct the defendant is legally accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act, streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act, or the attempt to commit any of the felonies listed in this subsection (c); or

(7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(8) the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another; or

(9) the defendant, while committing an offense punishable under Sections 401, 401.1, 401.2, 405, 405.2, 407 or 407.1 or subsection (b) of Section 404 of the Illinois Controlled Substances Act, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(10) the defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(11) the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom; or

(12) the murdered individual was an emergency medical technician - ambulance, emergency medical technician - intermediate, emergency medical technician - paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was an emergency medical technician - ambulance, emergency medical technician - intermediate, emergency medical technician - paramedic, ambulance driver, or other medical assistance or first aid personnel; or (13) the defendant was a principal administrator, organizer, or leader of a calculated criminal drug conspiracy consisting of a hierarchical position of authority superior to that of all other members of the conspiracy, and the defendant counseled, commanded, induced, procured, or caused the intentional killing of the murdered person; or

(14) the murder was intentional and involved the infliction of torture. For the purpose of this Section torture means the infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the victim; or

(15) the murder was committed as a result of the intentional discharge of a firearm by the defendant from a motor vehicle and the victim was not present within the motor vehicle; or

(16) the murdered individual was 60 years of age or older and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(17) the murdered individual was a disabled person and the defendant knew or should have known that the murdered individual was disabled. For purposes of this paragraph (17), "disabled person" means a person who suffers from a permanent physical or mental impairment resulting from disease, an injury, a functional disorder, or a congenital condition that renders the person incapable of adequately providing for his or her own health or personal care; or

(18) the murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer; or

(19) the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986; or

(20) the murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following: (1) the defendant has no significant history of prior criminal activity; (2) the murder

was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution; (3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act; (4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm; (5) the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c). The proceeding shall be conducted: (1) before the jury that determined the defendant's guilt; or (2) before a jury impanelled for the purpose of the proceeding if: A. the defendant was convicted upon a plea of guilty; or B. the defendant was convicted after a trial before the court sitting without a jury; or C. the court for good cause shown discharges the jury that determined the defendant's guilt; or (3) before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof. The burden of proof of establishing the existence of any of the factors set forth in subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure - Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death. Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure - No Jury. In a proceeding before the court alone, if the court finds

that none of the factors found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If the Court determines that one or more of the factors set forth in subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death. Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(i) Appellate Procedure. The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence. In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of first degree murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections. In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. (Source: P.A. 90-213, eff. 1-1-98; 90-651, eff. 1-1-99; 90-668, eff. 1-1-99; 91-357, eff. 7-29-99; 91-434, eff. 1-1-00.) (720 ILCS 5/9-1.2)

ILLINOIS DEATH PENALTY STATUTE
LEGISLATIVE HISTORY OF ELIGIBILITY FACTORS THROUGH 2001

1	Victim was peace officer or firemen.	*6/21/77 P.A. 80-26*	*Amended 1/1/93 P.A. 87-921*
2	Victim was employee of DOC.	*6/21/77 P.A. 80-26*	*Amended 1/1/93 P.A. 87-921*
3	Defendant murdered 2 or more people.	*6/21/77 P.A. 80-26*	*Amended 1/1/88 P.A. 85-404*
4	Victim was murdered as a result of a hijacking.	*6/21/77 P.A. 80-26*	
5	The defendant was hired by someone to kill the victim.	*6/21/77 P.A. 80-26*	
6	Victim was murdered in the course of another felony.	*6/21/77 P.A. 80-26*	
	Armed Robbery	*6/21/77 P.A. 80-26*	
	Armed Violence	*12/15/94 P.A. 88-677*	
	Robbery	*6/21/77 P.A. 80-26*	
	Rape	6/21/77 P.A. 80-26	*Deleted 7/1/84 P.A. 83-1067*
	Deviate Sexual Assault	6/21/77 P.A. 80-26	*Deleted 7/1/84 P.A. 83-1067*
	Predatory Criminal Sexual Assault of a Child	*12/13/95 P.A. 89-428*	*Amended 5/29/96 P.A. 89-462*
	Aggravated Criminal Sexual Assault	*7/1/84 P.A. 83-1067*	
	Aggravated Kidnapping	*6/21/77 P.A. 80-26*	
	Aggravated Vehicular Hijacking	*7/1/95 P.A. 88-678*	
	Forcible Detention	*6/21/77 P.A. 80-26*	
	Arson	*6/21/77 P.A. 80-26*	
	Aggravated Arson	*12/15/82 P.A. 82-1025*	
	Aggravated Stalking	*7/1/95 P.A. 88-678*	
	Burglary	*6/21/77 P.A. 80-26*	
	Indecent Liberties with a Child	*6/21/77 P.A. 80-26*	*Deleted 7/1/84 P.A. 83-1067*
	Residential Burglary	*7/1/90 P.A. 86-1012*	
	Home Invasion	*12/15/82 P.A. 82-1025*	
	Calculated Criminal Drug Conspiracy	*9/7/89 P.A. 86-834*	
	Streetgang Criminal Drug Conspiracy	*6/27/96 P.A. 89-498*	
	Attempt to commit any of these crimes	*12/15/82 P.A. 82-1025*	
7	Victim was witness in any criminal prosecution.	*6/21/77 P.A. 80-26*	*Amended 12/15/82 P.A. 82-1025*
8	Victim was under 12 years of age.	*7/1/82 P.A. 82-677*	*Amended 12/15/82 P.A. 82-1025*
9	Murder was drug crime related.	*1/1/90 P.A. 86-806*	
10*	Defendant was incarcerated at IDOC and murdered while in the course of another felony.	*1/1/92 P.A. 87-525*	
11*	Murder was premeditated.	*9/7/89 P.A. 86-834*	
12	Victim was an emergency medical technician.	*1/1/93 P.A. 87-921*	*Amended 1/1/94 P.A. 88-433*
13	Defendant was a drug conspiracy	*1/1/94 P.A. 88-176*	

	leader and commanded the murder of victim.		
14	Murder was intentional and tortuous.	*1/1/94 P.A. 88-176*	
15	Murder was a drive by shooting.	*7/1/95 P.A. 88-678*	
16	Victim was 60 years of age or older.	*1/1/98 P.A. 90-213*	
17	Victim was a disabled person and defendant knew of the disability.	*1/1/98 P.A. 90-213*	
18	Victim was a community policing volunteer.	*1/1/99 P.A. 90-651*	
19	Victim was under an order of protection and the defendant was also named in the same order of protection.	*1/1/99 P.A. 90-668*	
20	Victim was known to defendant as a teacher or other school personnel and was upon school grounds at time of murder.	*1/1/00 P.A. 91-434*	

*Although enacted after the eligibility factor for premeditated murder, the factor pertaining to committing a murder while incarcerated in DOC was numbered as eligibility factor 10, and premeditated murder was renumbered as eligibility factor 11. This table conforms to the current numbering system.

STATE STATUTES QUALIFYING CRIMES FOR THE DEATH PENALTY
AGGRAVATING FACTORS/MITIGATING FACTORS

Alabama

Capital offenses: 13A-5-40, Code of Alabama
Aggravating circumstances: 13A-5-49
Mitigating circumstances: 13A-5-51
Also: 13A-5-52

Arizona

Capital offense: first degree murder: A.R.S. §13-1105
Aggravating factors: 13-703 F
Mitigating factors: 13-703 G

Arkansas

Capital Murder: A.C.A § 5-10-101
Aggravating factors: 5-4-604
Mitigating factors: 5-4-605

California

First degree murder: Ann.Cal. Penal Code § 189
Special circumstances: 190.2 and 190.3

Colorado

Capital Offense: first degree murder C.R.S.A. § 18-3-102
Mitigating factors: 16-11-103
Aggravating factors: 16-11-103

Connecticut

Capital felony: C.G.S.A. § 53a-54b
Aggravating factors: 53a-46a
Mitigating factors: 53a-46a

Delaware

Murder in first degree: 11 Del. Code § 636
Aggravating factors: 11 Del.Code § 4209 (e)
Mitigating factors: 11 Del.Code § 4209 (e)

Florida

First degree murder: F.S.A. § 782.04 (1) (a)
Aggravating Circumstances: 921.141 (5)
Mitigating circumstances: 921.141(6)
(separate aggravating and mitigating factors for capital drug trafficking)

Georgia

Murder, felony murder: Code § 16-5-1
Aggravating circumstances: 17-10-30
Mitigating factors: 17-10-30

Idaho

First degree murder: I.C. § 18-4001,03,04 and 19-2515 (d)
Aggravating factors: 19-2515 (h)
Mitigating factors: 19-2515 (h)

Illinois

First degree murder: 720 ILCS 5/9-1
Aggravating factors: 720 ILCS 5/9-1 (b)
Mitigating factors: 720 ILCS 5/9-1 (b)

Indiana

Murder: IC § 35-42-1-1
Aggravating circumstances: 2-9 (b)
Mitigating circumstances: 2-9 (c.)

Kansas

Capital murder: K.S.A. § 21-3439
Aggravating circumstances: 21-4625
Mitigating factors: 21-4626

Kentucky

Murder: KRS § 507.020
Aggravating circumstances: 532-025 (2) (a)
Mitigating circumstances: 532-025 (b)

Louisiana

First degree murder: LSA-RS § 14:30
Aggravating circumstances: La.C.Cr.P. Art. 905.4 1.
Mitigating circumstances: La. C.Cr.P. Art. 905.5 (a)

Maryland

First degree murder: Code 1957, Art. 27 § 407, 408, 409, 412
Aggravating circumstances: (413(d))
Mitigating circumstances: (413(g))

Mississippi

Capital Murder: Miss. Code An. § 97-3-19 and 97-3-21
Aggravating circumstances: 97-3-21 (5)
Mitigating circumstances: 97-3-21 (6)

Missouri

Murder in the first degree: V.A.M.S. § 565.020
Aggravating circumstances: 565.032
Mitigating circumstances: 565.032

Montana

Deliberate homicide: M.C.A. § 45-5-102
Aggravating circumstances: 46-18-303
Mitigating circumstances: 48-18-304

Nebraska

Murder in first degree: Neb.Rev.Stats. § 28-303
Aggravating circumstances: 29-2523
Mitigating circumstances: 29-2523

Nevada

First degree murder: N.R.S. § 200.030
Aggravating circumstances: 200.033
Mitigating circumstances: 200.035

New Hampshire

Capital murder: N.H. Rev. Stat. § 630:1
Aggravating factors: 630:5 VII
Mitigating factors: 630:5 VI

New Jersey

Intentional Murder: N.J.S.A. § 2C11-3(c)
Aggravating factors: 2C:11-3 (c)
Mitigating factors: 2C:11-3 (c)(5)

New Mexico

First degree murder: N.M.S.A. § 30-2-1
Aggravating circumstances: 31-20A-5
Mitigating circumstances: 31-20A-6

New York

First degree murder: New York Penal Law 125.27
Aggravating factors: NY Crim Pro § 400.27 and 400.27, 7
Mitigating factors: 400.27, 9

North Carolina

First degree murder: N.C.G.S.A. § 14-17
Aggravating circumstances: 15A-2000(e)
Mitigating circumstances: 15A-2000(f)

Ohio

Aggravated murder: R.C. § 2903.01
Aggravating circumstances: 2929.04
Mitigating circumstances: 2929.04(b)

Oklahoma

First degree murder: 21 Okl.St.Ann. § 701.7
Aggravating circumstances: 21-701.12
Mitigating circumstances: OUJI-CR-4-78

Oregon

Criminal homicide: ORS 163.115
Aggravated murder: 163.150 (1) (b)
Mitigating circumstances: 163.150 (1)(c)

Pennsylvania

First degree murder: 18 Pa.C.S.A. 1102
Aggravating circumstances: 42 Pa.C.S.A. Sec. 9711
Mitigating circumstances: 42 Pa.C.S.A. Sec. 9711 (e)

South Carolina

Murder: Code 1976 § 16-3-10 and 16-3-20
Aggravating circumstances: 16-3-20 (c)
Mitigating circumstances: 16-3-20 (b)

South Dakota

First degree murder: SDCL § 22-16-4
Aggravating circumstances: 23A-27A-1
Mitigating circumstances: 23A-27A-1

Tennessee

First degree murder: T.C.A. § 39-13-202
Aggravating factors: 39-13-204(i.)
Mitigating factors: 39-13-204(j.)

Texas

Capital murder: V.T.C.A., Penal Code, § 19.03
Mitigating factors: Vernon's Ann. Texas C.C.P. Art. 37.071(d)(1)

Utah

Aggravated Murder: U.C.A. § 76-5-202
Mitigating circumstances: 76-3-207 (3)

Virginia

Capital murder: Va. Code Ann. § 18.2-31
Aggravating factors: 19.2-264.2
Mitigating factors: 19.2-264.4

Washington

Aggravated first degree murder: RCW § 10.95.020
Factors on leniency: RCW 10.95.070

Wyoming

Murder in the first degree: W.S. 1977 § 6-2-101
Aggravating circumstances: 6-2-102 (h)
Mitigating circumstances: 6-2-102 (j)

Summary Table 1.
Reversals in Illinois Death penalty cases

Information in this summary table is drawn from data contained in Table 15 of the Technical Appendix to this report.

Number of reversals: There were 152 cases in which a reversal occurred at some point in the case prior to December 31, 2001.[1] Of those reversals there were 5 cases in which a federal district court granted a petition for relief by a defendant, thus effectively reversing the defendant's sentence, but the order of the district court was reversed by the 7th Circuit. Those five cases have been excluded from this analysis. There were also 3 cases in which a trial court acting on a post-conviction petition ordered a new proceeding which resulted in relief from a death sentence. Those cases have also been excluded from this analysis, since there is no Supreme Court opinion which would identify the basis for the reversal. After these exclusions, a total of **144** cases remain.

		Percentage
Number of reversed cases in which Trial Court errors played a role:	63	44%
Number of reversed cases in which Prosecutor error played a role:	38	26%
Number of reversed cases in which Defense Counsel error played a role:	30	21%
Number of reversed cases in which a legal issue played a role in reversal	25	17%
Number of reversed cases in which the death sentence was found excessive:	5	3%

Note: numbers do not add to 100% because in some cases there was more than one primary reason for reversal.

[1] These calculations exclude the cases involving defendants Bracey, Collins and Madej, whose cases involved reversals occurring after 12/31/02.

Summary Table 2.
Resentencings in Illinois Death penalty cases

Information in this table is drawn from data contained in Table 15 of the Technical Appendix to this report.

Total number of cases reversed: 144

		Percentage
Number of cases in which a defendant was resentenced to life or a term of prison greater than 60 years:	55	38%
Number of cases in which a defendant was resentenced to death:	36	25%

Summary Table 3.
Eligibility factors in Illinois Death penalty cases
with reported decisions from the Illinois Supreme Court

Information in this table is drawn from data contained in Table 8 of the Technical Appendix to this report.

Total number of cases in the sample: 263

Elgibility factor	Number of cases	Percentage
(b)(3) Multiple murder	122	46%
(b)(6) Course of a felony	157	59.6%
(b)(3) and (b)(6) combined	44	17%
(b)(1) Police officer	13	5%
(b)(2) Correctional Officer, inmate	12	4.5%
(b)(5) Contract murder	10	3.8%
(b)(7) Child under 12, brutal & heinous	27	10.6%
(b)(8) Witness	6	2.3%
(b)(11) Premeditated	16	6.1%

Note: numbers do not add to 100% because more than one eligibility factor may appear in a particular case.

Criminal Procedure and Investigations Act 1996

1996 Chapter 25 - *continued*

PART II

CRIMINAL INVESTIGATIONS

Introduction.

22. - (1) For the purposes of this Part a criminal investigation is an investigation conducted by police officers with a view to it being ascertained-

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it.

(2) In this Part references to material are to material of all kinds, and in particular include references to-

(a) information, and

(b) objects of all descriptions.

(3) In this Part references to recording information are to putting it in a durable or retrievable form (such as writing or tape).

Code of practice.

23. - (1) The Secretary of State shall prepare a code of practice containing provisions designed to secure-

(a) that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued;

(b) that information which is obtained in the course of a criminal investigation and may be relevant to the investigation is recorded;

(c) that any record of such information is retained;

(d) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained;

(e) that information falling within paragraph (b) and material falling within paragraph (d) is revealed to a person who is involved in the prosecution of criminal proceedings arising out of or relating to the investigation and who is identified in accordance with prescribed provisions;

(f) that where such a person inspects information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the accused, the accused is allowed to inspect it or is given a copy of it;

(g) that where such a person is given a document indicating the nature of information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the accused, the accused is allowed to inspect it or is given a copy of it;

(h) that the person who is to allow the accused to inspect information or

other material or to give him a copy of it shall decide which of those (inspecting or giving a copy) is appropriate;

(i) that where the accused is allowed to inspect material as mentioned in paragraph (f) or (g) and he requests a copy, he is given one unless the person allowing the inspection is of opinion that it is not practicable or not desirable to give him one;

(j) that a person mentioned in paragraph (e) is given a written statement that prescribed activities which the code requires have been carried out.

(2) The code may include provision-

(a) that a police officer identified in accordance with prescribed provisions must carry out a prescribed activity which the code requires;

(b) that a police officer so identified must take steps to secure the carrying out by a person (whether or not a police officer) of a prescribed activity which the code requires;

(c) that a duty must be discharged by different people in succession in prescribed circumstances (as where a person dies or retires).

(3) The code may include provision about the form in which information is to be recorded.

(4) The code may include provision about the manner in which and the period for which-

(a) a record of information is to be retained, and

(b) any other material is to be retained;

and if a person is charged with an offence the period may extend beyond a conviction or an acquittal.

(5) The code may include provision about the time when, the form in which, the way in which, and the extent to which, information or any other material is to be revealed to the person mentioned in subsection (1)(e).

(6) The code must be so framed that it does not apply to material intercepted in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985.

(7) The code may-

(a) make different provision in relation to different cases or descriptions of case;

(b) contain exceptions as regards prescribed cases or descriptions of case.

(8) In this section "prescribed" means prescribed by the code.

Examples of

24. - (1) This section gives examples of the kinds of provision that may be

disclosure provisions. included in the code by virtue of section 23(5).

(2) The code may provide that if the person required to reveal material has possession of material which he believes is sensitive he must give a document which-

(a) indicates the nature of that material, and

(b) states that he so believes.

(3) The code may provide that if the person required to reveal material has possession of material which is of a description prescribed under this subsection and which he does not believe is sensitive he must give a document which-

(a) indicates the nature of that material, and

(b) states that he does not so believe.

(4) The code may provide that if-

(a) a document is given in pursuance of provision contained in the code by virtue of subsection (2), and

(b) a person identified in accordance with prescribed provisions asks for any of the material,

the person giving the document must give a copy of the material asked for to the person asking for it or (depending on the circumstances) must allow him to inspect it.

(5) The code may provide that if-

(a) a document is given in pursuance of provision contained in the code by virtue of subsection (3),

(b) all or any of the material is of a description prescribed under this subsection, and

(c) a person is identified in accordance with prescribed provisions as entitled to material of that description,

the person giving the document must give a copy of the material of that description to the person so identified or (depending on the circumstances) must allow him to inspect it.

(6) The code may provide that if-

(a) a document is given in pursuance of provision contained in the code by virtue of subsection (3),

(b) all or any of the material is not of a description prescribed under subsection (5), and

(c) a person identified in accordance with prescribed provisions asks for any of the material not of that description,

the person giving the document must give a copy of the material asked for to the person asking for it or (depending on the circumstances) must allow him to inspect it.

(7) The code may provide that if the person required to reveal material has possession of material which he believes is sensitive and of such a nature that provision contained in the code by virtue of subsection (2) should not apply with regard to it-

(a) that provision shall not apply with regard to the material,

(b) he must notify a person identified in accordance with prescribed provisions of the existence of the material, and

(c) he must allow the person so notified to inspect the material.

(8) For the purposes of this section material is sensitive to the extent that its disclosure under Part I would be contrary to the public interest.

(9) In this section "prescribed" means prescribed by the code.

Operation and revision of code.

25. - (1) When the Secretary of State has prepared a code under section 23-

(a) he shall publish it in the form of a draft,

(b) he shall consider any representations made to him about the draft, and

(c) he may modify the draft accordingly.

(2) When the Secretary of State has acted under subsection (1) he shall lay the code before each House of Parliament, and when he has done so he may bring it into operation on such day as he may appoint by order.

(3) A code brought into operation under this section shall apply in relation to suspected or alleged offences into which no criminal investigation has begun before the day so appointed.

(4) The Secretary of State may from time to time revise a code previously brought into operation under this section; and the preceding provisions of this section shall apply to a revised code as they apply to the code as first prepared.

Effect of code.

26. - (1) A person other than a police officer who is charged with the duty of conducting an investigation with a view to it being ascertained-

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it,

shall in discharging that duty have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers.

(2) A failure-

(a) by a police officer to comply with any provision of a code for the time being in operation by virtue of an order under section 25, or

(b) by a person to comply with subsection (1),

shall not in itself render him liable to any criminal or civil proceedings.

(3) In all criminal and civil proceedings a code in operation at any time by virtue of an order under section 25 shall be admissible in evidence.

(4) If it appears to a court or tribunal conducting criminal or civil proceedings that-

(a) any provision of a code in operation at any time by virtue of an order under section 25, or

(b) any failure mentioned in subsection (2)(a) or (b),

is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question.

Common law rules as to criminal investigations.

27. - (1) Where a code prepared under section 23 and brought into operation under section 25 applies in relation to a suspected or alleged offence, the rules of common law which-

(a) were effective immediately before the appointed day, and

(b) relate to the matter mentioned in subsection (2),

shall not apply in relation to the suspected or alleged offence.

(2) The matter is the revealing of material-

(a) by a police officer or other person charged with the duty of conducting an investigation with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it;

(b) to a person involved in the prosecution of criminal proceedings.

(3) In subsection (1) "the appointed day" means the day appointed under section 25 with regard to the code as first prepared.

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THE LEGAL SECRETARIAT TO THE LAW OFFICERS

DRAFT ATTORNEY GENERAL'S GUIDELINES ON DISCLOSURE

A CONSULTATION DOCUMENT

Concerns about the operation of the disclosure provisions in the Criminal Procedure and Investigations Act 1996, and the accompanying Code, have been expressed by many criminal practitioners. At a conference in May last year, the Director of Public Prosecutions outlined his own concerns and indicated that work would commence on developing guidance for prosecutors. Following initial work within the Crown Prosecution Service, the Attorney General established an inter-departmental working group to devise draft Attorney General's Guidelines on disclosure. This work has produced the enclosed set of guidelines which are now being issued for public consultation.

It is hoped that any body or individual with an interest in disclosure issues will feel able to comment on the draft. The guidelines, when published, will be binding on all public prosecutors, but it is expected that they will have a persuasive effect on other participants in the criminal justice process. This period of public consultation is regarded by the Attorney General as an essential step in formulating guidelines which will command public confidence.

The draft guidelines cover the role of investigators, disclosure officers, and lawyers, concentrating particularly on the prosecutor. The opening section puts disclosure issues in context. One of the themes of the guidelines is that there is an inter-relationship between the differing responsibilities of the participants in the trial process. For instance, investigators and disclosure officers may not be able to do their job properly without advice from the prosecutor. Equally, prosecutors cannot do their job properly without satisfactory recording and retention of material, followed by full revelation of the material. Again, prosecutors may not be able to do their jobs properly without adequate defence statements.

In framing the draft guidelines, the Working Group has sought to avoid where possible restating the law, whether that is in statute, or the Code, or the common law subsequent to the implementation of the Criminal Procedure and Investigations Act 1996. The intention is to build upon that material to provide guidance which will ensure that the legislation is operated more effectively. The group considered whether the guidelines should set out lists of the kind of material that should automatically or usually be disclosed. However, it reached the view that the content of any such a list would be highly debatable, and that such a list could not in any event be definitive. Creation of such list would also result in a confusing hierarchy for material which might potentially be disclosed, and might lead to an over-mechanistic approach which ignored the legislative requirements. The group therefore opted against this approach.

In paragraph 30, the Group has attempted to explain the statutory test of "undermine" the

prosecution case. Whether or not it is a good idea to do so is debatable, and views are specifically sought on this issue.

The draft guidelines are an attempt to strike a fair balance between the respective needs of the participants in the investigative and trial process.

The draft guidelines and the covering document can be downloaded (37kb) from this site. You can also e-mail your comments. Alternatively comments on the draft guidelines should be addressed to Stephen Parkinson, Legal Secretariat to the Law Officers, 9 Buckingham Gate, London, SW1E 6JP. They should arrive no later than 15 March.

This document is presented in Portable Document Format (PDF).
To read it you will first need to download the Adobe Acrobat Reader software. For more information regarding PDF documents and how to load the software, please click here

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DISCLOSURE OF INFORMATION IN CRIMINAL PROCEEDINGS

INTRODUCTION

1. Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under Article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.

2. The scheme set out in the Criminal Procedure and Investigations Act 1996 (the Act) is designed to ensure that there is fair disclosure. Disclosure under the Act should assist the accused in the preparation and presentation of their case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place.

3. Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm. The scheme of the Act protects those interests, and should ensure that material is not disclosed which overburdens the court, diverts attention from the relevant issues, leads to delay and is wasteful of resources.

GENERAL PRINCIPLES

Investigators and Disclosure Officers

4. Investigators and disclosure officers must work together with prosecutors to ensure that disclosure obligations are met. A failure to take action leading to proper disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument or an acquittal against the weight of the evidence.

5. In discharging their obligations under the statute, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.

6. Disclosure officers should inspect, view or listen to all material that has been retained, or in very large cases ensure that an investigator has done so, and provide a personal declaration to that effect.

7. Disclosure officers must ensure that the existence of all retained material is revealed to the prosecutor, as is required by the Code, and that descriptions in schedules of material are full, clear and accurate.

8. Disclosure officers should specifically draw material to the attention of the prosecutor for consideration where they have any doubt as to whether it might undermine the prosecution case or might reasonably be expected to assist the defence disclosed by the accused.

9. Disclosure officers should seek the advice and assistance of prosecutors when in doubt as to their responsibility, and must deal expeditiously with requests by the prosecutor for further information on material which may lead to disclosure.

Prosecutors generally

10. Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice. They should not leave it to others to ensure that the obligations concerning disclosure are met.

11. Prosecutors must be alert to the possibility that material may exist which has not been revealed to them and which they are required to disclose.

12. Prosecutors must work together with disclosure officers to ensure that the disclosure obligations are met, and should provide expeditious advice where further information or investigation is required.

13. Prosecutors must not take schedules prepared by disclosure officers at face value but must review them thoroughly. If there are apparent omissions from the schedules, or if documents or other items are insufficiently described or are unclear, the prosecutor must at once return the schedules to the disclosure officer so that they can be completed. If, following this, prosecutors remain dissatisfied with the quality or content of the schedules they must raise the matter with a senior investigation officer (usually the supervising officer), and, if necessary, persist, with a view to resolving the matter satisfactorily.

14. Where prosecutors are not satisfied that material has been inspected, viewed or listened to by the disclosure officer in accordance with paragraph 6 they should at once raise the matter with the disclosure officer and, if that officer has not viewed the material, request that it be done.

15. When it is thought that material might undermine the prosecution case or assist the defence case, prosecutors should always inspect, view or listen to the material and satisfy themselves that the prosecution can properly be continued. Their judgment as to what other material to inspect, view or listen to will depend on the circumstances of each case.

16. Prosecutors should not adduce evidence of the contents of a defence statement other than in the circumstances envisaged by section 11 of the Act or to rebut alibi evidence.

However, there may be occasions when a defence statement points the prosecution to other lines of inquiry. Evidence obtained as a result of this maybe adduced as part of the prosecution case.

17. Prosecutors should ensure that at all times (including during the trial) disclosure officers are informed of any significant changes affecting the case, so that they can review their decisions as to what material may be relevant to the investigation.

18. In deciding what material should be disclosed (at any stage of the proceedings) prosecutors should resolve any doubt they may have in favour of disclosure, unless the material is on the sensitive schedule and will be placed before the court for the issue of disclosure to be determined.

19. If prosecutors are of the view that a fair trial cannot take place because of a failure to disclose which cannot or will not be remedied, they must not continue with the case.

Prosecution counsel and solicitor advocates

20. Prosecution counsel and solicitor advocates ("prosecution advocates") are prosecutors for the purposes of these guidelines and the Criminal Procedure and Investigations Act and are therefore subject to the obligations imposed by them.

21. Upon receipt of instructions, prosecution advocates should consider as a priority the information provided regarding disclosure of material. If as a result the advocate considers that further information or action is required, written advice should be promptly provided setting out the aspects that need clarification or action. Where appropriate a conference should be held to determine what is required. Except in exceptional circumstances, decisions on disclosure should only be taken after consideration of the issues and consultation with those instructing the prosecution advocate.

22. The practice of "counsel to counsel" disclosure should cease: it is inconsistent with the requirement of transparency in the prosecution process.

Defence practitioners

23. A comprehensive defence statement assists the participants in the trial to ensure that it is fair. It provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage. It also helps in the management of the trial by narrowing down and focussing the issues in dispute. It may result in the prosecution discontinuing the case. Defence practitioners should be aware of these considerations in advising their clients.

INVOLVEMENT OF OTHER AGENCIES

24. Where it is appears to an investigator, disclosure officer or prosecutor that a Government department or agency has material that may be relevant to the case, reasonable steps should be taken to identify and consider such material. Although what is reasonable will vary from case to case, prosecutors should inform the department or agency of the nature of its case and of relevant issues in the case in respect of which the other agency might possess material, and ask that agency whether it has any such

material. Further guidance for prosecutors and investigators seeking information (including documents) from Government departments or other Crown bodies may be found in the pamphlet "Giving Evidence or Information about suspected crimes: Guidance for Departments and Investigators".

25. Information coming to the knowledge of investigators or prosecutors of the case as a result of liaison with local authorities, social services departments and similar agencies is to be regarded as already in the possession of the prosecution. This includes information that has not been written down or otherwise recorded. It also includes material that originates from, or has been produced by, third parties (eg. information discussed at, or minutes of, child protection conferences attended by police officers).

26. Where information comes into the possession of the prosecution in the circumstances set out in paragraphs 24 and 25 above, consultation with the other agency ought to take place before disclosure is made: there may be reasons which justify withholding disclosure in the public interest.

DISCLOSURE PRIOR TO PRIMARY DISCLOSURE UNDER THE CPIA 1996

27. Prosecutors must always be alive to the need, if justice requires it, to make disclosure of material after commencement of proceedings but before the prosecutor's duty to make disclosure arises under the Act. For instance, disclosure ought to be made of significant information that might affect a bail decision.

28. Where the need for such disclosure is not apparent to the prosecutor, any disclosure will depend on what the defendant chooses to reveal about the defence. Clearly, such disclosure will not normally exceed that which is obtainable after the duties under the "the Act" arise.

PRIMARY DISCLOSURE

29. Generally, material can be considered to potentially undermine the prosecution case if it has an adverse effect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution.

30. In deciding what material might undermine the prosecution case, the prosecution should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Examples are:

i. Any material casting doubt upon the accuracy of any prosecution evidence.

ii. Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.

iii. Any material which may cast doubt upon the reliability of a confession.

iv. Any material that might go to the credibility of a prosecution witness.

v. Any material that might support a defence that is either raised by the defence or

apparent from the prosecution papers. If the material might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor.

31. The prosecutor should also consider disclosing in the interests of justice any material which is relevant to sentence (eg. information which might mitigate the seriousness of the offence or assist the accused to lay blame in whole or in part upon a co-accused or another person).

SECONDARY DISCLOSURE

32. If the prosecutor considers that the defence statement is lacking in specificity and/or clarity, a letter should be sent to the defence indicating that secondary disclosure will thereby be limited, and inviting the defence to specify and/or clarify the accused's case. The prosecutor should consider raising the issue at a preliminary hearing if the position is not resolved satisfactorily to enable the court to give directions.

CREDIBILITY OF DEFENCE WITNESSES

33. Material in the hands of the prosecution that serves only to undermine the credibility of a defence witness need not be disclosed. When deciding not to disclose such information, prosecutors must take particular care to ensure that the material is solely relevant to the issue of the credibility of the defence witness. If the material might also undermine the prosecution case, or might be reasonably expected to assist the defence case as disclosed by the defence statement, it should be disclosed.

APPLICATIONS FOR NON-DISCLOSURE IN THE PUBLIC INTEREST

34. Before making an application to the court to withhold material which would otherwise fall to be disclosed, on the basis that to disclose would not be in the public interest, a prosecutor should aim to disclose as much of the material as he properly can (by giving the defence redacted or edited copies or summaries).

SUMMARY TRIAL

35. The prosecutor should, in addition to complying with the obligations under the CPIA, provide to the defence all evidence upon which the Crown proposes to rely in a summary trial. Such provision should allow the accused or their legal advisers sufficient time properly to consider the evidence before it is called.

APPLICABILITY OF THESE GUIDELINES

36 The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the prosecuting authorities in receipt of these guidelines. It should also be adopted as regards cases already submitted to which the Act applies, so far is practicable.

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
PO Box 080
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DONALD T. DIFRANCESCO
Acting Governor

JOHN J. FARMER, JR.
Attorney General

April 18, 2001

TO: ALL COUNTY PROSECUTORS
COL. CARSON J. DUNBAR, JR., SUPERINTENDENT, NJSP
ALL POLICE CHIEFS
ALL LAW ENFORCEMENT CHIEF EXECUTIVES

Re: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures

It is axiomatic that eyewitness identification evidence is often crucial in identifying perpetrators and exonerating the innocent. However, recent cases, in which DNA evidence has been utilized to exonerate individuals convicted almost exclusively on the basis of eyewitness identifications, demonstrate that this evidence is not fool-proof. In one 1998 study of DNA exoneration cases, ninety percent of the cases analyzed involved one or more mistaken eyewitness identifications.[1] The attached *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, which incorporate more than 20 years of scientific research on memory and interview techniques, will improve the eyewitness identification process in New Jersey to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence. These Guidelines apply to both adult and juvenile cases. With these Guidelines, New Jersey will become the first state in the Nation to officially adopt the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence Guidelines*.

Components of these Guidelines are already being utilized by many of our law enforcement officers, such as instructing witnesses prior to lineups or photo identifications that a perpetrator may not be among those in a lineup or photo spread and, therefore, the witness should not feel compelled to make an identification. Two procedural recommendations contained in these Guidelines are particularly significant and will represent the primary area of change for most law enforcement agencies. The first advises agencies to utilize, whenever practical, someone other than the primary

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[1]Of 40 cases analyzed, 36 of the subsequent exonerations involved convictions that were based on one or more erroneous eyewitness identifications. Wells, G.L., M.Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." *Law and Human Behavior*, Vol. 22, No. 6. 1998.

investigator assigned to a case to conduct both photo and live lineup identifications. The individual conducting the photo or live lineup identification should not know the identity of the actual suspect. This provision of the Guidelines is not intended to question the expertise, integrity or dedication of primary investigators working their cases. Rather, it acknowledges years of research which concludes that even when utilizing precautions to avoid any inadvertent body signals or cues to witnesses, these gestures do occur when the identity of the actual suspect is known to the individual conducting the identification procedure. This provision of the Guidelines eliminates unintentional verbal and body cues which may adversely impact a witness' ability to make a reliable identification.

I recognize that this is a significant change from current practice that will not be possible or practical in every case. When it is not possible in a given case to conduct a lineup or photo array with an independent investigator, the primary investigator must exercise extreme caution to avoid any inadvertent signaling to a witness of a "correct" response which may provide a witness with a false sense of confidence if they have made an erroneous identification. Studies have established that the confidence level that witnesses demonstrate regarding their identifications is the primary determinant of whether jurors accept identifications as accurate and reliable.[2] Technological tools, such as computer programs that can run photo lineups and record witness identifications independent of the presence of an investigator, as well as departmental training of a broader range of agency personnel to conduct lineups and photo identifications may also assist agencies and departments with staff and budget constraints in implementing this recommendation.

The Guidelines also recommend that, when possible, "sequential lineups" should be utilized for both photo and live lineup identifications. "Sequential lineups" are conducted by displaying one photo or one person at a time to the witness. Scientific studies have also proven that witnesses have a tendency to compare one member of a lineup to another, making relative judgements about which individual looks most like the perpetrator. This relative judgement process explains why witnesses sometimes mistakenly pick someone out of a lineup when the actual perpetrator is not even present. Showing a witness one photo or one person at a time, rather than simultaneously, permits the witness to make an identification based on each person's appearance before viewing another photo or lineup member. Scientific data has illustrated that this method produces a lower rate of mistaken identifications.[3] If use of this method is not possible in a given case or department, the Guidelines also provide recommendations for conducting simultaneous photo and live lineup identifications.

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[2] Cutler, B.L., and S.D. Penrod. "Mistaken Identification: The Eyewitness, Psychology, and the Law," New York: Cambridge University Press, 1995; Wells, G.L. and Bradfield, A.L., "Distortions in Eyewitness Recollections: Can the Post-identification Feedback Effect be Moderated?", *Pyschological Science*, 1999.

[3]Wells, G.L., M.Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." *Law and Human Behavior*, Vol. 22, No. 6. 1998.

Although the Guidelines are fairly self-explanatory, their implementation will require a steep learning curve. To that end, training will be conducted. To accommodate appropriate training, the Guidelines will become effective within 180 days of the date of this letter. However, I would encourage you to implement the Guidelines sooner, if possible. I am requesting that each County Prosecutor designate key law enforcement personnel and police training coordinators to work with the Division of Criminal Justice to train your staff as well as the local law enforcement agencies within your jurisdiction.

While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, the adoption of these Guidelines will enhance the accuracy and reliability of eyewitness identifications and will strengthen prosecutions in cases that rely heavily, or solely, on eyewitness evidence. The issuance of these Guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error. Your cooperation is appreciated as all members of our law enforcement community strive to implement these procedures. Should you have any questions regarding the implementation of these Guidelines, please contact the Division of Criminal Justice, Prosecutors & Police Bureau, at 609-984-2814.

Very truly yours,

John J. Farmer, Jr.
Attorney General

Attachment
cc: Director Kathryn Flicker
Chief of Staff Debra L. Stone
Deputy Director Wayne S. Fisher, Ph.D.
Deputy Director Anthony J. Zarrillo, Jr.
Chief State Investigator John A. Cocklin
SDAG Charles M. Grinnell, Acting Chief,
Prosecutors & Police Bureau

ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES

PREAMBLE

While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, that does not mean that these procedures cannot be improved upon. Both case law and recent studies have called into question the accuracy of some eyewitness identifications. The Attorney General, recognizing that his primary duty is to ensure that justice is done and the criminal justice system is fairly administered, is therefore promulgating these guidelines as "best practices" to ensure that identification procedures in this state minimize the chance of misidentification of a suspect.

I. COMPOSING THE PHOTO OR LIVE LINEUP

The following procedures will result in the composition of a photo or live lineup in which a suspect does not unduly stand out. An identification obtained through a lineup composed in this manner should minimize any risk of misidentification and have stronger evidentiary value than one obtained without these procedures.

A. In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. The Attorney General recognizes that in many departments, depending upon the size and other assignments of personnel, this may be impossible in a given case. In those cases where the primary investigating officer conducts the photo or live lineup identification procedure, he or she should be careful to avoid inadvertent signaling to the witness of the "correct" response.

B. The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification.

C. When possible, photo or live lineup identification procedures should be conducted sequentially, *i.e.*, showing one photo or one person at a time to the witness, rather than simultaneously.

D. In composing a photo or live lineup, the person administering the identification procedure should ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.

E. **Photo Lineup**. In composing a photo lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.

2. Select fillers (nonsuspects) who generally fit the witness' description of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

3. Select a photo that resembles the suspect's description or appearance at the time of the incident if multiple photos of the suspect are reasonably available to the investigator.

4. Include a **minimum** of five fillers (nonsuspects) per identification procedure.

5. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.

6. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.

7. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.

8. View the array, once completed, to ensure that the suspect does not unduly stand out.

9. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

F. **Live Lineups**. In composing a live lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.

2. Select fillers (nonsuspects) who generally fit the witness' description

of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

3. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.

4. Include a **minimum** of four fillers (nonsuspects) per identification procedure.

5. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.

II CONDUCTING THE IDENTIFICATION PROCEDURE

The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or nonidentification decisions.

A. Simultaneous Photo Lineup: When presenting a simultaneous photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

2. Confirm that the witness understands the nature of the lineup procedure.

3. Avoid saying anything to the witness that may influence the witness' selection.

4. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.

5. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

6. Document in writing the lineup procedure, including:

   a. Identification information and sources of all photos used.
   b. Names of all persons present at the photo lineup.
   c. Date and time of the identification procedure.

7. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

B. Sequential Photo Lineup: When presenting a sequential photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

2. Provide the following **additional** viewing instructions to the witness:

   a. Individual photographs will be viewed **one at a time**.
   b. The photos are in random order.
   c. Take as much time as needed in making a decision about each photo before moving to the next one.
   d. All photos will be shown, even if an identification is made prior to viewing all photos; **or** the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).

3. Confirm that the witness understands the nature of the sequential procedure.

4. Present each photo to the witness separately, in a previously determined order, removing those previously shown.

5. Avoid saying anything to the witness that may influence the witness' selection.

6. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.

7. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

8. Document in writing the lineup procedure, including:

   a. Identification information and sources of all photos used.
   b. Names of all persons present at the photo lineup.
   c. Date and time of the identification procedure.

9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

C. Simultaneous Live Lineup: When presenting a simultaneous live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

2. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.

3. Ensure that any identification actions (*e.g.*, speaking, moving, etc.) are performed by all members of the lineup.

4. Avoid saying anything to the witness that may influence the witness' selection.

5. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.

6. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

7. Document in writing the lineup procedure, including:

   a. Identification information of lineup participants.
   b. Names of all persons present at the lineup.
   c. Date and time of the identification procedure.

8. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly.

9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

D. Sequential Live Lineup: When presenting a sequential live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

2. Provide the following **additional** viewing instructions to the witness:

   a. Individuals will be viewed **one at a time**.
   b. The individuals will be presented in random order.
   c. Take as much time as needed in making a decision about each individual before moving to the next one.
   d. If the person who committed the crime is present, identify him or her.
   e. All individuals will be presented, even if an identification is made prior to viewing all the individuals; **or** the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).

3. Begin with all lineup participants out of the view of the witness.

4. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.

5. Present each individual to the witness separately, in a previously determined order, removing those previously shown.

6. Ensure that any identification action (*e.g.*, speaking, moving, etc.) are performed by all members of the lineup.

7. Avoid saying anything to the witness that may influence the witness' selection.

8. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.

9. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

10. Document in writing the lineup procedure, including:

    a. Identification information of lineup participants.
    b. Names of all persons present at the lineup.
    c. Date and time the identification procedure was conducted.

11. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation can either depict the group or each individual.

12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

E. Recording Identification Results

When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings. When conducting an identification procedure, the lineup administrator or investigator should:

1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is.

2. Ensure that the results are signed and dated by the witness.

3. Ensure that no materials indicating previous identification results are visible to the witness.

4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

Dated: April 18, 2001, effective no later than the 180th day from this date.

G.O. 88-18 Chicago Police Department

TITLE: LINEUP PROCEDURES

ISSUE DATE: 23 September 1988

EFFECTIVE DATE: 24 September 1988

DISTRIBUTION: B

RESCINDS: GENERAL ORDER 83-5

I. PURPOSE

This order prescribes procedures to be followed when identification of an arrestee is to be sought by use of a formal lineup.

II. CONDUCT OF THE LINEUP

A. The United States Supreme Court has ruled that the police may require a suspect to participate in a lineup; that the suspect may be required to speak the exact words used in the commission of an offense; and that the suspect may be required to don certain clothing.

B. In Kirby v. Illinois, 92 S. Ct. 1877 (1972), the Court concluded that a suspect is not entitled to counsel during lineup procedures held prior to the initiation of any adversary criminal proceeding, whether by way of formal charge, preliminary hearing, indictment or arraignment. However, if the suspect's attorney is present at the location where the lineup is to be conducted, and in the opinion of the supervisor the attorney would not impede, either tacitly or overtly, the impartial objectives of the lineup, the attorney may be allowed as an observer.

C. In People v. Hinton (1974) 23 Ill. App. 3d 369, 319, N.E.2d 313, the Illinois Appellate Court held that issuance of a complaint, followed by an arrest warrant was the beginning of adversary criminal proceedings which gives rise to the defendant's Sixth Amendment Right to presence of counsel at the lineup (People v. Marshall 47 Ill. App. 3d 784, 365 N.E. 2d 367 (1977)). Therefore a suspect arrested on a warrant does have a right to have counsel present at any lineup conducted after such arrest.

D. As far as physical and time circumstances will permit, the victim and/or witness will view the lineup separately. A waiting victim or witness will be kept separated from those who have viewed the lineup.

E. No suspect will be seen with police officers prior to the lineup unless all subjects to be in the lineup are seen together with the officers. No suspect will be handcuffed during the lineup unless all subjects are handcuffed. Lineups should not be conducted in district lockups unless circumstances exist which preclude the use of another area (uncontrollable arrestee, lack of adequate space elsewhere in the facility).

F. Any previous arrests of any person or the fact that any person in the lineup has been arrested as a suspect will not be mentioned to victims or witnesses. Suspects will not be asked addresses of residence during viewing by victims and/or witnesses.

G. In cases where there is only one suspect in the lineup, the lineup, whenever possible, should consist of a least five persons. When more than one suspect is placed in the lineup, the lineup ideally should consist of at least four non-suspects in addition to the number of suspects in the lineup. Insofar as possible, suspects in a lineup should generally be the same height and weight and should have similar hair and skin color. When more than one suspect is to be viewed, and great disparity is evident between suspects in height, weight and skin color, separate lineups will be conducted and non-suspects in each lineup will have the same general physical characteristics as suspects. Police officers should not be used unless other alternatives have been exhausted.

H. The watch commander of the facility wherein the lineup is conducted or other supervisory officer will require that either an evidence technician or an authorized member of the Detective Division take two photographs of any formal lineup which results in the identification of a suspect. An Evidence Report (CPD-21.949) will be prepared by the photographer whenever photographs are taken.

[Form (CPD-21.949) will replace (CPD-33.103), 1 Jan 1990, Facsimile Message 90-00270].

I. If the investigating detective desires copies of the photographs for use in an on-going investigation, the detective will prepare a Request For Identification Photographs (CPD-33.713) and forward it to the Crime Laboratory Division.

J. When a lineup is held, a Supplementary Report (CPD-11.411-A or B as appropriate) will be completed. A detective will be present during the lineup

proceedings, whenever possible, and will complete the Supplementary Report. If circumstances are such that a detective is not present at the lineup, the Supplementary Report will be prepared by a supervisory officer of the facility wherein the lineup is conducted. **In no case will a lineup be conducted without a Supplementary Report being completed.** The narrative portion of the Supplementary Report will include:

1. the date, time and location of the lineup.

2. the name, rank, star number and unit of assignment of the person(s) conducting the lineup.

3. the name and address of each person viewing the lineup.

4. the name and address of each person present during the lineup (other than those conducting , viewing or participating in the lineup).

5. all available information concerning each person participating in the lineup, e.g., name, sex, race, age, height, weight, Central Booking (C.B.) and/or Identification Record (I.R.) numbers, etc.

6. the name(s) of persons identified in the lineup.

7. the name rank and star of the person photographing in the lineup.

8. any comments made by counsel for the arrestee.

9. any additional information or unusual circumstances occurring during the lineup, e.g., requiring participants to wear certain articles of clothing or to speak certain words or phrases, etc.

LeRoy Martin
Superintendent of Police

87-114 DF(mmd)

FACSIMILE MESSAGE

Issue Date: **1 January 1990**

Message Number: 90-00270

To: All Department Members

From: Joseph P. Beazley Comm Research & Development Division

Message:

Effective immediately use of the evidence report (CPD-33.103) is discontinued the crime scene processing report (CPD-21.949) will be used instead.

Members will annotate applicable department directives (General Orders 84-3, 88-18 and 88-20) to this effect .

PREAMBLE

The legislature has determined that some homicide cases are so egregious that a term of imprisonment is insufficient to properly address societal concerns. These cases have been designated as "Capital" cases.

The decision to file a statutory notice of aggravating factors (s) and thereby commence a capital punishment prosecution is one of the most important charging functions to be performed by a County Prosecutor. It is through this decision making process that a prosecutor commits the entire resources of the criminal justice system.

Because of the significance of the concerns of the legislature for the victims of these egregious crimes and also as to the penalty involved, the prosecutor must establish guidelines which ensure a rational procedure for the designation of a capital case. Because there are twenty-one county prosecutors, each must screen the homicide cases occurring within his respective jurisdiction and decide whether or not the statutory notice of aggravating factors (s) should be filed in a particular case. It is through this charging process that each prosecutor implements the intent of the legislature and ultimately that of the people of the State. It is neither desirable nor acceptable to have a capital charging standard dependent upon individual attitudes.

All homicide cases and all defendants are different. Therefore, no set of guidelines can possibly anticipate every circumstance. The decision as to whether or not a case will be designated a capital prosecution shall be made by each County Prosecutor by applying these guidelines in a realistic and reasonable fashion to each case.

The twenty-one County Prosecutors in the State of New Jersey reaffirm the fact that race, sex, social or economic religion and/or national origin of a defendant or victim has not in the past, nor will in the future be considered in any fashion to determine whether or not a case warrants capital prosecution.

In addition, it has been and continues to be the position of all prosecutors that economic or other resource constraints of their respective offices shall not be a factor in determining whether or not the case warrants capital prosecution nor shall it in any specific case play any role whatsoever in the capital designation decision making process.

These guidelines are not intended to, do not, and may not be relied upon to create any substantive or procedural rights, enforceable at law by any party in any matter, civil or criminal. The guidelines do not place any limitation upon the otherwise lawful prosecutorial prerogatives of the Office of the County Prosecutor.

GUIDELINES FOR THE DESIGNATION FOR CAPITAL PROSECUTIONS

GUIDELINES

GUIDELINE NO. 1

Each county prosecutor shall establish within his office a committee to review every homicide case pursuant to the statute and guidelines, to assist the prosecutor in the prosecutor's determination as to death eligibility.

GUIDELINE NO. 2

The prosecutor, in determining whether or not a case is death eligible, must be satisfied that there is proof beyond a reasonable doubt that the defendant, by his own conduct, actively and directly participated in causing the death of the victim, or procured the commission of the homicide by payment or promise of payment of anything of pecuniary value.

GUIDELINE NO. 3

The prosecutor, in determining whether or not a case is death eligible, must be satisfied that there is proof beyond a reasonable doubt that the defendant acted purposely in that it was his conscious object, or knowingly in that he was aware it was practically certain that his conduct would cause the death of the victim.

GUIDELINE NO. 4

The prosecutor must be satisfied that there is proof beyond a reasonable doubt of the existence of at least one statutory aggravating factor.

GUIDELINE NO. 5

The prosecutor shall consider all known information tending to establish mitigating factors in the case in determining whether or not a case warrants death penalty prosecution.

GUIDELINE NO. 6

If after such review the Prosecutor is satisfied that the State will be able to prove beyond a reasonable doubt that the aggravating factor(s) outweigh the mitigating factor(s) then the case shall be designated a Capital Case.

GUIDELINE NO. 7

After a case has been designated a Capital Case, nothing contained herein shall prevent the prosecutor, prior to conviction, from reconsidering his initial decision to file the statutory notice of aggravating factors based upon a subsequent change in the factual or legal circumstances of the case. If there is a change in factual or legal circumstances of the case, the prosecutor may move to withdraw the Statutory Notice. Any reconsideration by the prosecutor of his initial charging decision shall be made in accordance with these Guidelines.