

ILLINOIS CAPITAL PUNISHMENT
REFORM STUDY COMMITTEE

SIXTH AND FINAL REPORT

October 28, 2010

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REFORM STUDY COMMITTEE

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SIXTH AND FINAL REPORT OF THE CAPITAL PUNISHMENT REFORM STUDY COMMITTEE*

“Rational and informed citizens will continue to disagree on the death penalty, but certainly one point on which all interested citizens can agree is that if we are going to make these life and death decisions, we need to make them as carefully and equitably as possible.”¹

1. Introduction.

This is the sixth and final report of the Capital Punishment Reform Study Committee (the Committee), created by statute in 2003.²

Because this is the Committee’s final report, we have included relevant information about the work and recommendations of the Governor’s Commission on Capital Punishment (the Commission), and of this Committee throughout our entire tenure, including, where appropriate, matters contained in our prior reports.

(a) The Governor’s Commission and this Committee.

Following is a brief history of the events which led to the Committee’s creation, and the work of the Committee from 2003 through 2009.

* Available on the website of the Illinois Criminal Justice Information Authority, <http://www.icjia.state.il.us/public/index.cfm?metasection=dpsrc>.

¹ G. Pierce and M. Radelet, Technical Appendix to the Report of the Governor’s Commission on Capital Punishment, page 25.

² The Capital Punishment Reform Study Committee Act, 20 ILCS 3929/1-2.

On January 31, 2000, Governor George Ryan issued an Executive Order, placing a moratorium on executions of persons who had been sentenced to capital punishment.³ The moratorium remains in effect.

On March 9, 2000, Illinois Governor Ryan issued a second Executive Order in which he created the Commission. Governor Ryan 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.

³ “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.” Report of the Governor’s Commission on Capital Punishment, April 15, 2002, page 1, available at

http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (hereafter “Gov. Comm. Report”).

“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 Commission held meetings during 2000, 2001 and 2002, and issued its Report to the Governor and other interested parties in April 2002. The Report contained 85 recommendations, many of which called for legislative action by the General Assembly, and others were directed to the Supreme Court of Illinois and the Governor.

During the 2002 session of the General Assembly, none of the Commission’s recommendations was acted upon. Just before Governor Ryan left office in January 2003, he granted executive clemency to all persons then on death row in Illinois, almost all of whom he sentenced to terms of life without parole.

During the General Assembly’s 2003 session, a number of the Commission’s recommendations were enacted, as well as a statute creating the Capital Punishment Reform Study Committee. The statute directed the Committee to study the effects of the reforms enacted by the General Assembly in 2003, and other matters relevant to the Illinois capital punishment system, and report to the General Assembly on its findings annually for each of the succeeding five years.⁴ In 2008, the Committee’s original

⁴ 20 ILCS 3929/2. The statute provides for appointment of Committee members by various Illinois office holders.

five-year tenure was extended by one year, to December 31, 2009.⁵

A list of the Committee members is attached as Appendix 2 to this Report.

(b) An overview of the work of this Committee.

A majority of the Committee members concluded that their function under the enabling statute is to evaluate the impact of the reforms to the Illinois capital punishment system enacted by the 93rd General Assembly against the backdrop of the reforms that have been implemented by the judiciary and other government agencies, as well as other reforms proposed by the Governor's Commission which may be necessary or advisable to adopt in order to make fully effective the reforms already adopted.

A minority of the Committee members believes that references to the Governor's Commission should be removed from the final report unless they relate to specific reforms implemented by the General Assembly, and are within the Committee's authority to review.

The Committee's function did not include making a recommendation as to whether or not Illinois should retain or abolish capital punishment.

Committee members have served without compensation. We received funding for the purpose of paying members' out-of-

⁵ P.A. 95-893; 20 ILCS 3929/2(d).

pocket travel and incidental expenses, and retaining outside consultants to assist the Committee in its work.⁶ The Committee's funding has been appropriated to the budget of, and dispensed by, the Illinois Criminal Justice Information Authority (hereinafter CJIA).

In accordance with the Illinois Open Meetings Act,⁷ all Committee and subcommittee meetings were open to the public, and notices of the meetings were posted in advance on the CJIA website.

The Committee divided into four subcommittees, as follows:

1. Police and Investigations.
2. Eligibility for Capital Punishment, and Proportionality.
3. Trial Court Proceedings.
4. Post-Conviction Proceedings, DNA, and General

⁶ Having followed the procedures outlined in the Illinois Procurement Act, 30 ILCS 500/1-5 et seq., the Committee retained the services of two outside experts:

- Peter G. Baroni served as counsel to the Committee from 2006 until 2008.

- David E. Olson and colleagues of Loyola University in Chicago have served as expert consultants to the Committee, and prepared and distributed surveys to various interested parties and organizations, collated the responses, attended Committee meetings, and reported to the Committee.

The CJIA website contains a summary of the funds used to reimburse Committee members, and to pay Messrs. Baroni and Olson. Illinois Criminal Justice Information Authority ("CJIA") www.icjia.state.il.us.

⁷ 5 ILCS 120.

Topics.

Recommendations of the subcommittees were presented to and voted upon by the full Committee.

During the Committee's statutory tenure through December 31, 2009, the Committee held 45 meetings. In order to finalize this Report, the Committee held three additional meetings, on August 24, September 7, and October 13, 2010.⁸

A list of the full Committee's meetings is attached as Appendix 3, and of the subcommittees' meetings as Appendix 4. Minutes of these meetings have been posted on the CJIA website.

In accordance with a provision of the statute establishing the Committee,⁹ four public hearings were held: two in Springfield, on November 13, 2006 and March 2, 2009; and two in Chicago, on February 26, 2007 and January 26, 2009. Advance notices of these hearings were published on the CJIA website, and the Committee wrote to interested parties and organizations inviting them to attend and speak at the hearings. Transcripts of these four hearings are posted on the CJIA website.¹⁰ Appendix 5 contains a listing of the dates and locations of the public hearings,

⁸ As noted below, several recommendations were adopted at the Committee's meetings on August 24 and September 7.

⁹ 20 ILCS 3929/2(c).

¹⁰ CJIA, <http://www.icjia.state.il.us/public/index.cfm?metasection=dpsrc>.

and of the persons who addressed the Committee, and their affiliations.¹¹

The Committee's consultant, Dr. David E. Olson of Loyola University, prepared and mailed four confidential surveys to (1) police and sheriff departments in Illinois, (2) the 102 Illinois State's Attorneys, (3) the appointed Illinois Public Defenders, and (4) Approximately 300 Illinois trial court judges, who received training by the Administrative Office of Illinois Courts, and were eligible and certified to hear capital cases.¹² Responses to the surveys were collated by Dr. Olson and his colleagues, posted on the CJIA website, and attached to the Committee's minutes.

The Committee has filed five previous reports with the General Assembly, with copies provided to the Governor and the Illinois Supreme Court, all posted on the CJIA website, as follows: First Annual Report, dated April 27, 2005; Second Annual Report, dated February 28, 2006; Third Annual Report, dated April 9, 2007; Fourth Annual Report, dated May 12, 2008; and

¹¹ Pursuant to an invitation from the General Assembly House Judiciary Committee, two Committee members were selected to appear at a judiciary committee hearing held in Chicago on September 18, 2008. In accordance with the vote of the Committee (with one dissent), the appointed members recounted the Committee's statutory mandate and work, but declined to take a position on the question whether the moratorium on executions should be left in place or revoked.

¹² The surveys are referred to herein as follows: To police and sheriff departments, "LE survey." To State's Attorneys, "SA survey." To Public Defenders, "PD survey." To trial court Judges, "J survey."

Fifth Annual Report, dated October 8, 2009. In preparing this final report, the Committee members reviewed the recommendations made in the April 2002 Report of the Governor's Commission, the reforms enacted in statutes, rules adopted by the Illinois judiciary and law enforcement agencies, and the Committee's five prior annual reports.

The recommendations made in this final report are contained in the body of the report, and are repeated seriatim in Appendices 1 and 13 to this report.

2. A description of the Illinois capital punishment system.

Following is a description of the process by which first degree murder cases proceed when a Notice of Intent to seek the death penalty has been filed:

- *Cases in which capital punishment is a potential penalty.*

In Illinois, the crimes for which capital punishment is a potential sentence are first degree murders which involve one or more of 21 statutory Aggravating Factors.¹³

- *State's Attorney Notice of Intent to seek capital punishment.* Each of Illinois' 102 counties has a State's Attorney, who is responsible for enforcing the law in the county. Rule

¹³ 720 ILCS 5/9-1, contained in Appendix 7. A person may also be sentenced to death for committing treason against the State of Illinois as defined by statute. 720 ILCS 5/30-1(c). State's Attorneys may proceed by using informations rather than grand jury indictments. 725 ILCS 5/111-1(b) and 111-2(a).

416(c) of the Illinois Supreme Court provides that if the State's Attorney intends to seek capital punishment in a first degree murder case which is "capital eligible" (that is, involves one or more Aggravating Factors), he/she shall file, no later than 120 days after the defendant is indicted and arraigned, a Notice of Intent (Notice) to seek the death penalty. The Notice must list all of the Aggravating Factors which the State intends to introduce during the death penalty sentencing hearing. The trial judge may extend the time for filing the Notice "for good cause shown."¹⁴ The majority of murders in Illinois occur in Cook County, and most capital indictments are brought in Cook County.

- *State's Attorney withdrawal of Notice of Intent.* At any time before a capital sentence is imposed, the prosecutor may withdraw the Notice that the death penalty will be sought,

¹⁴ In *People v. Hill*, No. 1-08-0116, 2010 WL 3063978 (1st Dist. Aug. 4, 2010), the First District Appellate Court held that the 120-day requirement of Rule 416(c) is "directory" rather than "mandatory," so that the trial judge may permit the State's Attorney to file a Notice of Intent after expiration of 120 days from arraignment even though no extension was sought or granted. The court said, "Therefore, although Rule 416(c) imposes a mandatory obligation on the State to file a notice of intent to seek the death penalty within 120 days of a defendant's arraignment, failing to timely file such a notice does not require that the trial court automatically strike the State's notice. Rather, it is one factor to be considered by the court when ruling on a defendant's motion to strike. It is foreseeable that in certain circumstances the State's failure to timely file the notice could preclude it from seeking the death penalty; however, we do not reach that conclusion here."

whereupon the case proceeds as a non-capital case. This is colloquially known as “de-deathing” the indictment.

- *The Capital Litigation Trial Bar.* An Illinois Supreme Court rule requires that in capital cases the lawyers for both sides (except the Attorney General or elected or appointed State’s Attorney) must be certified members of the Capital Litigation Trial Bar (CLTB).¹⁵ A privately retained lawyer must be a member of the CLTB, but is not required to have co-counsel.

- *Defense counsel.* The vast majority of first degree murder cases involve indigent defendants, who are represented either by the county Public Defenders, or by private lawyers who are appointed by the trial court judge.¹⁶ As noted above, most capital cases are brought in Cook County, and are defended by lawyers employed by the Law Office of the Cook County Public Defender.

- *The Capital Litigation Trust Fund.* Many of the expenses of prosecutors and defense lawyers in capital cases are paid from the State-funded Capital Litigation Trust Fund (CLTF).¹⁷ Other expenses are paid with funds of the counties in which the murder occurred, or by State, county and city agencies that provide services to the prosecution and/or defense.

¹⁵ Illinois Supreme Court Rules 416(d) and 714.

¹⁶ The appointment of private lawyers for indigent defendants occurs when the Public Defender has a conflict of interest, and in counties that have no Public Defender.

¹⁷ 725 ILCS 124/15.

- *Investigations.* The filing of a Notice of Intent to seek capital punishment usually triggers action by the defense lawyers to have investigators assigned to interview witnesses and examine records to determine whether it is a capital-eligible case, and whether there are extenuating circumstances that may form the basis for argument that capital punishment is or is not warranted.

- *Discovery depositions.* Under Illinois Supreme Court Rule 416(e), discovery depositions in capital cases are permitted if approved by the trial judge “upon a showing of good cause.”¹⁸ The filing of a capital notice often results in the trial lawyers seeking court approval to take depositions of the other side’s potential witnesses. These depositions may consume substantial amounts of time for lawyers and witnesses alike.

- *Pretrial preparation time.* Capital cases in Illinois often take several years from indictment before they go to trial, and require more investigation, expert witnesses, and preparation time and effort than non-capital first degree murder cases.

- *Case management conferences.* Illinois Supreme Court Rule 416(f) provides that no later than 120 days after the defendant is arraigned, the trial judge must hold a case management conference, attended by the lawyers who will try the case. At the conference, the judge must confirm that the State

¹⁸ Discovery depositions are not commonly allowed in non-capital cases.

has disclosed all Aggravating Factors it intends to introduce into evidence during the sentencing hearing, and that each side has made all other required disclosures to the other.

- *Pretrial certificates.* Pursuant to Supreme Court Rule 416 (g) and (h), not less than 14 days before trial, the State must file a certificate confirming that the prosecutors have conferred with the persons involved in the investigation, and all material or information required to be disclosed has been tendered to defense counsel. The defense lawyers must file a readiness certificate, stating that they have met with the defendant, and fully discussed with the defendant the discovery received from the State, the State's case, possible defenses, and that they have reviewed with the defendant the evidence and defenses which may mitigate the consequences for the defendant at trial and sentencing.

- *The separate phases of capital trials.* In homicide cases in which no death certificate is filed, the case involves one trial, with the judge (if a jury trial is waived by the defendant) or jury determining guilt or innocence; sentencing is left to the discretion of the judge, within the limits set by statute. In contrast, capital cases potentially involve three separate hearings or trials, and thus require a greater expenditure of resources on the part of the lawyers on both sides, as well as the judges, court personnel and jurors. The three hearings are:

(1) *The guilt hearing.* The first trial, known as the “guilt phase,” requires the jury or judge (if the defendant has waived a jury trial) to decide whether the defendant is guilty of the first degree murder (and any other crimes) charged in the indictment. Jury selection is often lengthy, because capital case jurors must be specially qualified to hear capital punishment cases. At this hearing, the State has the burden of proof of the defendant’s guilt beyond a reasonable doubt, and a unanimous verdict of guilty or not guilty is required. If the jury finds the defendant guilty of a crime that does not involve a first degree murder, the jury is dismissed, and the trial judge is required to sentence the defendant to a term of imprisonment consistent with the penalties provided for the crimes of conviction.

- *Trial judge’s removal of capital punishment in certain cases.* In a case in which the defendant has been found guilty of first degree murder by a judge or jury, “on the court’s own motion or the written motion of the defendant, the court may decertify the case as a death penalty case if the court finds that the only evidence supporting the defendant’s conviction is the uncorroborated testimony of an informant witness [see §115-21] concerning the confession or admission of the defendant or that the sole evidence against the defendant is a single eyewitness or a single accomplice without any other corroborating evidence.” The judge must issue a written finding, and the State has a right of appeal to the Appellate Court, 720 ILCS 5/9-1(h-5); Illinois

Supreme Court Rule 603 and 604(a)(1). The trial judge may also decertify the case as a capital case if the judge finds at a pretrial hearing that the defendant is mentally retarded. 725 ILCS 5/114-15.

(2) *The eligibility hearing.* If the defendant has been found guilty of a first degree murder, the trial proceeds to a separate hearing, held before the same jury, or the trial judge if the defendant waives a jury.¹⁹ The jury or judge decides whether the first degree murder for which the defendant was convicted involved one or more of the statutory Aggravating Factors contained in the Notice of Intent, thus rendering the defendant eligible for capital punishment. Both sides may present evidence.²⁰ Whether the eligibility hearing is bench or jury, the prosecution has the burden of proving beyond a reasonable doubt that the murder involved one or more of the Aggravating Factors contained in the Notice of Intent.²¹ If a jury is involved, a unanimous verdict is required; therefore, if any juror concludes that none of the alleged Aggravating Factors was involved in the murder, the jury is dismissed, and the trial judge is required to sentence the defendant to a term of imprisonment consistent with

¹⁹ The defendant may demand a jury trial for the eligibility and/or sentencing hearings even though he/she has waived a jury for the guilt and/or eligibility hearing. See *People v. Sanchez*, 169 Ill.2d 472, 479 (1996).

²⁰ 720 ILCS 5/9-1(e).

²¹ 720 ILCS 5/9-1(f).

the non-capital statutory penalties provided for first degree murder.²²

(3) *The penalty (aggravation/mitigation) hearing.* If it is determined that the defendant is eligible for capital punishment, the case proceeds before the same jury,²³ or before the trial judge if the defendant waives a jury. In this third proceeding, there is no burden of proof specified for either side. Rather, the jury or judge (if a jury has been waived by the defendant) must weigh the evidence, and determine if death is the appropriate sentence.²⁴ Examples of mitigating factors that may preclude a death sentence are listed in the statute.²⁵ If a jury is deciding the issue, and any juror concludes that death is not the appropriate sentence, the trial judge is required to sentence the defendant to a term of imprisonment consistent with the statutory non-capital penalties provided.²⁶

- *Appeals in capital cases.* In the event a death sentence is imposed, and defense post-trial motions are denied, the case is automatically reviewed by the Illinois Supreme Court.²⁷ The

²² 720 ILCS 5/9-1(g).

²³ 720 ILCS 5/9-1(d)(1). For good cause shown, a different jury may be empaneled for the sentencing hearing. 720 ILCS 5/9-1 (d)(2)C.

²⁴ 720 ILCS 5/9-1(g)-(h).

²⁵ 720 ILCS 5/9-1(c).

²⁶ 720 ILCS 5/9-1(g).

²⁷ 720 ILCS 5/9-1(i); Ill. Sup. Ct. R. 603. Convictions in non-capital murder (and other felony) cases are appealed in the first instance to the Illinois

Illinois Supreme Court examines capital cases to determine whether a reversible error occurred. If reversible error is found, the case is remanded to the trial court for a new guilt hearing, or for a new penalty hearing, or for imposition of a non-capital sentence, depending upon the hearing in which the error occurred, and the nature of the error.²⁸ In addition, the Supreme Court may overturn the death sentence and order imposition of imprisonment, if the “[c]ourt finds that the death sentence is fundamentally unjust as applied to the particular case,” and “shall issue a written opinion explaining this finding.”²⁹

- *Trial judge’s removal of capital punishment after remand for resentencing.* On remand to the trial court for resentencing, the trial judge may decertify the case as a death penalty case if the court finds that the only evidence supporting the defendant’s conviction is the uncorroborated testimony of an informant witness [see § 115-21] concerning the confession or admission of

Appellate Court in the Appellate District in which the trial occurred. Review of the Appellate Court’s decision is discretionary with the Illinois Supreme Court.

²⁸ For example, in *People v. Lovejoy*, 235 Ill.2d 97 (2009), the case was remanded for a new trial of the entire case, beginning with the guilt hearing. In *People v. Nelson*, 235 Ill.2d 386 (2009), the error occurred during the penalty hearing; the Supreme Court remanded for imposition of a sentence other than death. Two other cases that resulted in death sentences between 2003 and 2009 were retrials of pre-2003 trials in which death sentences were imposed but the cases reversed for new trials by the Supreme Court of Illinois. *People v. Ramsey*, 192 Ill.2d 154, 735 N.E.2d 154 (2000); *People v. Sutherland*, 194 Ill.2d 289, 742 N.E.2d 289 (2000).

²⁹ 720 ILCS 5/9-1(i).

the defendant or that the sole evidence against the defendant is a single eyewitness or a single accomplice without any other corroborating evidence.” The judge must issue a written finding, and the State has a right of appeal to the Appellate Court, 720 ILCS 5/9-1 (h-5); Illinois Supreme Court Rule 603 and 604(a)(1). The trial judge may also decertify the case as a capital case if the judge finds at a pretrial hearing that the defendant is mentally retarded. 725 ILCS 5/114-15.

- *Court proceedings following affirmance of the death sentence by the Illinois Supreme Court.* In the event the Illinois Supreme Court affirms the trial court and the death penalty remains in effect, there follows in virtually every capital case a series of efforts by defense counsel to obtain further judicial relief, as follows:

- *Petition for review (called a petition for a writ of certiorari) by the United States Supreme Court.* It has become routine for defense counsel in capital cases to seek review by the United States Supreme Court of rulings of the Illinois Supreme Court which uphold imposition of capital punishment.³⁰ Although relatively few of these petitions are granted, this process normally consumes many months.

³⁰ If the Illinois Supreme Court reverses a capital case based upon application of a provision of the United States Constitution, the State may file a petition for review by the United States Supreme Court.

- *Proceedings under the Illinois Post-Conviction Hearing Act.* Following unsuccessful appeals to the Illinois and United States Supreme Courts, defense counsel usually files a petition in the original trial court, seeking relief under the terms of the Illinois Post-Conviction Hearing Act.³¹ That statute provides to any person imprisoned in a penitentiary the opportunity to challenge the proceedings resulting in his conviction if there was a substantial denial of constitutional rights. These petitions are heard by the trial court judge, without a jury.

Some of these petitions have been denied by the trial court judges without hearings, while hearings have been granted in others. In some cases, the hearings have resulted in orders for new trials of the guilt, eligibility or penalty hearings. Even when ultimately dismissed without hearing, these proceedings normally consume many months. If hearings are ordered, additional time is expended by investigators and lawyers for both sides, and the trial judge. In the event the petition is denied, either before or after a hearing is held, the defense routinely appeals the result directly to the Illinois Supreme Court,³² and if unsuccessful there, applies for a *writ of certiorari* in the United States Supreme Court. Similarly, if the trial court grants relief to the defendant (that is, if the judge orders that a new eligibility or penalty hearing be held or a non-death sentence be imposed), the prosecutor often appeals

³¹ 725 ILCS 5/122.

³² IL Supreme Court Rule 651(a).

directly to the Illinois Supreme Court,³³ and, if that fails, petitions for review by the United States Supreme Court. Here again, many months, and sometimes years, are expended in these proceedings.

- *Proceedings in the federal courts under 28 U.S.C. §2254.* If the defendant has failed to obtain relief through the state court remedies described above, the defense lawyers routinely seek relief in the local federal District Court under 28 U.S.C. §2254, which provides that a state court criminal defendant may obtain review of a state court felony conviction if the federal judge determines that he or she is held in custody under a state court judgment that violates the Constitution or laws of the United States.³⁴ These proceedings, which consume additional months and sometimes years, have resulted in a number of rulings requiring Illinois courts to vacate capital convictions and sentences, and either afford the defendant a new trial or release the convicted defendant from custody. Rulings of the federal District Court are subject to appeal and review by either party in the Court of Appeals for the Seventh Circuit, and by discretionary review in the United States Supreme Court through petition for writ of certiorari.

³³ Id.

³⁴ See also Rules Governing Section 2254 Cases in United States District Courts, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2254_2255_Rules.pdf.

- *Petitions for executive clemency.* Under Illinois law, a defendant who has been convicted of a crime may petition the Governor for clemency, either in the form of remission or reduction of his sentence, or a full pardon and release from custody.³⁵ Pursuant to this statute, the Prisoner Review Board reviews, processes and submits confidential recommendations to the Governor on executive clemency petitions that comply with the applicable guidelines. This is the statute under which the capital defendants sought and in January 2003 obtained Governor Ryan's orders vacating their death sentences, and substituting sentences of life without parole. Here again, these proceedings consume months and sometimes years.

The minority view: While appeal, post-conviction and federal court proceedings take months and even years to complete, it must be noted that these same issues would still be litigated and resources would be committed by State and defense bar in non-capital cases.

- *The average lapse of time in Illinois from imposition of death penalties to execution.* During the 13 year period from January 1, 1990 to December 31, 2002, the average time from sentence to execution was approximately 13 years.³⁶

³⁵ 730 ILCS 5/3-3-13.

³⁶ John Patterson, *Illinois Death Penalty Takes Time*, Daily Herald (Oct. 8, 2009) available at <http://www.dailyherald.com/story/?id=327265>.

There have been no executions since Governor Ryan commuted all then-existing death sentences in January 2003. While the moratorium on executions is still in effect, it has not yet been a factor, because the legal proceedings relating to the 17 men sentenced to death between January 2003 and December 2009 are wending their ways through the courts, and petitions for executive clemency on behalf of those that are ultimately unsuccessful in the judicial system have yet to be presented to the Prisoner Review Board and ruled upon by the Governor. Two of the 17 cases were returned by the Illinois Supreme Court to the trial courts, Mr. Lovejoy's for a complete new trial, and Mr. Nelson's for imposition of a sentence other than death. Mr. Nelson and Mr. Sutherland have committed suicide.

- *Civil actions for damages.* Defendants whose convictions have been set aside by court proceedings may, under certain circumstances, file civil actions in the state or federal courts seeking money damages for wrongful conviction and incarceration.³⁷ A number of the Illinois defendants whose capital convictions were overturned have received substantial awards of monetary damages.

³⁷ 42 USC §1983; 28 U.S.C. §2513; see also 705 ILCS 505/8 (providing for compensation to wrongfully convicted persons who have obtained gubernatorial pardons based on actual innocence, or certificates of innocence from the Circuit Court as provided in Section 2-702 of the Code of Civil Procedure).

Several members of the Committee believe that this is not a relevant issue to be addressed by the Committee, because none of these civil actions resulted from convictions after the enactment of the 2003 reforms by the General Assembly, which is the purpose of the Committee.

3. Death sentences imposed 2003 through 2009.

This Committee focused its work on the seven year period January 1, 2003 through December 31, 2009. Following is a summary of the 17 men sentenced to death during the period January 1, 2003 through December 31, 2009:³⁸

2003

1. Mertz, Anthony

Coles County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 218 Ill.2d 1, 842 N.E.2d 618 (2005). Certiorari denied, 127 S.Ct. 47 (2006). Post-conviction petition dismissed by the Coles County Circuit Court without a hearing. Appeal from dismissal pending in IL Supreme Court.

2. Thompson, Curtis

Stark County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 222 Ill.2d 1, 853 N.E.2d 378 (2006). Certiorari denied, 127 S.Ct. 1393 (2007). Post-conviction petition filed in the Stark County Circuit Court in

³⁸ The years shown represent the year in which the death sentences were entered, and the status is as of October 28, 2010.

August 2007. Mr. Thompson committed suicide in June 2008 at Pontiac Correctional Center.

2004

3. Baez, Teodoro

Cook County. Status: Direct appeal pending before the IL Supreme Court (No. 98911). Oral argument heard, awaiting ruling.

4. Harris, Ricardo

Cook County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 225 Ill.2d 1, 866 N.E.2d 162 (2007). Certiorari denied, 128 S.Ct. 292 (2007). Post-conviction petition denied without hearing by the Cook County Circuit Court. Motion to reconsider pending in Circuit Court.

5. Sutherland, Cecil

Jefferson County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 223 Ill.2d 187, 860 N.E.2d 178 (2006). Certiorari denied, 128 S.Ct. 70 (2007). Post-conviction petition pending in the Jefferson County Circuit Court.

6. Urdiales, Andrew

Livingston County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 225 Ill.2d 354, 871 N.E.2d 669 (2007). Certiorari denied, 128 S.Ct. 494 (2007). Post-conviction petition pending in the Livingston County Circuit Court.

2005

7. Bannister, Joseph

Cook County. Status: Capital conviction and sentence affirmed on appeal by the IL Supreme Court, 232 Ill.2d 52, 902 N.E.2d 571 (2008). Certiorari denied, 130 S.Ct. 63 (2009). Post-conviction petition pending in the Cook County Circuit Court.

2006

8. Banks, Dion

Cook County. Status: Capital conviction and sentence affirmed on appeal by the IL Supreme Court, 237 Ill.2d 154 (2010). Petition for writ of certiorari pending in the United States Supreme Court.

9. Nelson, Brian

Will County. Status: Reversed on direct appeal, remanded for sentence other than death, 235 Ill.2d 386, 822 N.E. 2d 1056 (2009). Mr. Nelson committed suicide in April 2010 at the Pontiac Correctional Center.

10. Runge, Paul

Cook County. Status: Capital conviction and sentence affirmed on appeal by the IL Supreme Court, 234 Ill.2d 68, 917 N.E.2d 940 (2009). Certiorari denied, 130 S.Ct. 2402 (2010). Post-conviction petition pending in the Cook County Circuit Court.

2007

11. Adkins, Rodney

Cook County. Status: Capital conviction and sentence affirmed on appeal by the IL Supreme Court, _____ (2010). Petition for rehearing due November 11, 2010.

12. Lovejoy, Lawrence

DuPage County. Status: On direct appeal, reversed for new trial of the entire case, 235 Ill.2d 97, 919 N.E.2d 843 (2009). Awaiting retrial in DuPage County Circuit Court.

13. Ramsey, Daniel

Hancock County. Status: Affirmed on direct appeal by the IL Supreme Court, 2010 WL 3911466 (2010).

2008

14. Hanson, Eric

DuPage County. Status: Capital conviction and sentence affirmed on direct appeal by the IL Supreme Court, 2010 WL 2524140 (2010); petition for rehearing denied. Petition for writ of certiorari due December 27, 2010.

15. Pate, Gary

White County. Status: Direct appeal pending in IL Supreme Court (Docket No. 108157). Mr. Pate's brief filed, State's brief due November 4, 2010.

2009

16. Damm, David

Jo Daviess County. Status: Direct appeal pending in IL Supreme Court (Docket No. 108156). Mr. Damm's brief filed, State's brief due December 16, 2010.

17. Dugan, Brian

DuPage County. Status: Direct appeal pending in IL Supreme Court (Docket No. 109763). Mr. Dugan's brief due November 5, 2010.

**4. Reforms related to police and sheriffs agencies:
electronic recording of suspect interviews.**

(a) The requirement that custodial interviews be electronically recorded.

One of the statutory reforms enacted in 2003, based on a recommendation of the Governor's Commission,³⁹ requires that the results of custodial interviews of homicide suspects are presumed inadmissible in evidence unless the interviews were electronically recorded from the *Miranda* warnings until the end of

³⁹ Governor's Commission Recommendation 4 (hereafter Gov. Comm. Rec. __).

the interview, unless a statutory exception applies.⁴⁰ The statute took effect in July 2005, and since that time, Illinois police and sheriffs have made it a routine practice to record, by audio, video, or both, their interviews of homicide suspects that take place in police facilities.⁴¹

(b) Training for recording.

Members of the Committee met with representatives of the Law Enforcement Training and Standards Board and the Illinois Attorney General's office, regarding training of law enforcement personnel. Representatives of these agencies informed the Committee that a working group of law enforcement personnel and prosecutors was convened to devise and conduct statewide training programs to instruct on compliance with the statutory requirement that custodial interviews of homicide suspects be electronically recorded. Training has been provided by the CPD Training Academy, the Cook County Sheriff, the Suburban Police Academy in DuPage County, the Police Training Institute in Champaign, and the Southwest Academy in Belleville. Training sessions have been attended by approximately 1,000 police and sheriff officers; the sessions were recorded and converted to DVD format, and distributed to an additional 1,200 Illinois officers.

⁴⁰ 725 ILCS 5/103-2.1 (as to adults); 705 ILCS 405/5-401.5 (as to minors); see Gov. Comm. Rec. 4.

⁴¹ LE survey Q.2. In 2005, several Committee members toured the newly constructed, state-of-the-art recording facilities of the Chicago Police Department. See Second Annual Report, at 4.

Mobile training units have also provided interrogation training to more than 1,800 officers. A CPD representative told the Committee that the department provides a two day training course for all new detectives regarding recording custodial interviews.

Based on this information, and interviews with Illinois prosecutors, including several members of the Committee, we concluded that the training of law enforcement personnel has been adequate, and that they are well schooled in conducting custodial interviews of homicide suspects as required by the statute. We have also learned that when officers become familiar with making recordings, they enthusiastically support the practice.

Nevertheless, the responses to surveys sent to police and sheriff's departments indicate a need for ongoing training of officers in the use of recording equipment, and methods of conducting recorded interviews.⁴² As a result, the Committee adopted the following recommendation:

The General Assembly should continue to fund the statutorily mandated recordings of custodial interviews in homicide investigations, for expenses related to ongoing officer training, including refresher training, in the use of recording equipment and proper interviewing techniques.

⁴² LE survey Q.53; Minutes of May 20, 2009, p. 5.

(c) *Law enforcement personnel experiences with recording custodial interviews.*

Most interviews of suspects in homicide cases that occur in police facilities are conducted by detectives and/or their supervisors. Interviews of seasoned law enforcement personnel conducted in person by Committee members, and the testimony of several experienced prosecutors at Committee public hearings, quoted below, disclosed that there was often initial resistance to the statutory requirement that custodial interviews be recorded, but over time and with experience, law enforcement professionals came to realize that these electronic recordings are of great benefit to law enforcement, and have resulted in substantial savings to the criminal justice system.

The Committee's surveys to law enforcement agencies disclosed that the more experience they had with recorded interrogations, the more favorable were their views of this practice.⁴³ In prior annual reports we included a number of the favorable comments regarding mandatory recording of custodial interrogations that we have received from police, prosecutors and judges.⁴⁴

The Chicago Police Department's written submission to the Committee explains that mandatory recording of custodial interviews of murder suspects "has proven invaluable in the

⁴³ LE survey Q.30.

⁴⁴ Third Annual Report at 7-11; Fourth Annual Report at 16-17.

representation of defendants charged in homicide cases....[Recording] provides a record that may resolve many issues which are often in dispute both during pretrial motions and at trial.... This process protects a suspect's rights. Conversely, it also protects the professional integrity of law enforcement officials who question the suspect. Ultimately, [recordings] will result in fewer false confessions and fewer wrongful convictions.”

Results from the surveys sent by the Committee's consultant, David Olson of Loyola University, to police, sheriffs and prosecutors throughout the state corroborated what the Committee had been told. A substantial majority of police and sheriffs responded that they found electronic recordings of custodial interviews of murder suspects to be beneficial, and have specific advantages.⁴⁵ Half responded that recording improves the quality of their interrogations because detectives do not have to take notes.⁴⁶ Most responding prosecutors stated they believe recordings of custodial interviews have been instrumental in obtaining convictions, and have made it easier to obtain convictions; 40% believe recordings have influenced defendants to negotiate for pleas of guilty.⁴⁷

⁴⁵ LE survey Q.26.

⁴⁶ LE survey Q.27.

⁴⁷ SA survey Q.2.5, 2.7, and 2.10, recounted in Fifth Annual Report at 8. Further evidence of support for recording is reflected in law enforcement agencies' responses to the Committee's survey, indicating that, although not statutorily required to do so, almost one-half of the departments make it

We have included a number of other favorable comments the Committee received in previous reports.⁴⁸ As reported in our Third Annual Report (pages 9-10), St. Clair County State's Attorney Robert B. Haida, speaking to the Committee at a public hearing on behalf of the Illinois State's Attorneys Association, explained how at first some detectives and supervisors were wary of recording, but because the use of electronic recordings "has been so overwhelmingly successful . . . , most of the police departments in my jurisdiction now videotape in almost every felony investigation. The police, law enforcement, realize that it's better for them. It protects them from false accusations of physical or mental coercion. It's a better end product."⁴⁹

Kevin Lyons, State's Attorney of Peoria County, told the Committee that recording custodial interviews of murder suspects "has been a healthy addition...to the old saying, a picture says a thousand words, and ... a video is a thousand pictures. I probably am even more agreeable to the expansion of it in other cases."⁵⁰

DuPage County State's Attorney Joseph E. Birkett, speaking at the request of Thomas J. Brown, President of the Illinois State's

a practice to record custodial interviews of suspects in non-first degree murder investigations. LE survey Q.32.

⁴⁸ Third Annual Report at 7-11; Fourth Annual Report at 16-17.

⁴⁹ Public hearing 11/13/06, 74 at 75.

⁵⁰ Public hearing 3/2/09, 41 at 67-68.

Attorneys Association (ISAA), and of the State's Attorney of Livingston County, told the Committee, "You're saving the taxpayers tremendous amounts of money by demanding training, expertise, requiring videotaping, all of those safeguards."⁵¹

Members of the defense bar similarly supported the practice of recording custodial interviews. In response to our survey, approximately 45% of Public Defenders responded that recordings had reduced motions to suppress evidence, and influenced defendants' willingness to plea bargain; and 60% stated recordings made it easier for prosecutors to obtain convictions.⁵²

D. Peter Wise, testifying at a public hearing on behalf of the Illinois Association of Criminal Defense Attorneys, spoke of several capital cases he handled as defense counsel in which recordings proved helpful to the defendant. "[For t]he cases I've tried, it's been an absolute boon for the defense too. So there may be cases where it certainly is helpful to the prosecution, and I can see that. But a couple cases where we were able to establish a false confession in a so-called shaken baby case that led to an

⁵¹ Public hearing, 1/26/09 42 at 65. Mr. Birkett, a past ISAA President, was accompanied by his Assistant B.J. Murray, J.J. Boyd, State's Attorney of Kankakee County, E.C. Weis, State's Attorney of Kendall County (and a member of the Committee), and Mr. Weis' Chief of Criminal Division, M.W. Reidy.

⁵² PD survey Q.2.6, 2.8 and 2.9. 85% of Public Defenders responded that recordings should be expanded to additional felony offenses.

acquittal...it was essential that that was videotaped, ...you could see how it happened. And then most recently, another Decatur first degree murder case, the taping, the videotaping of statements proved very beneficial to the defense.”⁵³

Bernard J. Sarley, a veteran Assistant Cook County Public Defender (CCPD), and the former Capital Case Coordinator (now a Cook County Circuit Court Judge), told the Committee that taping custodial interviews of murder suspects is “definitely a positive reform that has taken place. I believe it’s good for law enforcement. I believe it’s good for the defense. It probably cuts down on frivolous and unnecessary litigation and it probably should result in...some cases being resolved short of trial that wouldn’t have in the past. I also believe that it should result ...in fewer false confessions and fewer wrongful convictions.”⁵⁴

Rob Warden, Executive Director of the Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University School of Law, stated to the Committee “Regarding false confessions, perhaps the most significant reform in the package enacted by the General Assembly was requiring police to electronically record the entire custodial interrogation and make any confession obtained as a result of interrogation that was not electronically recorded presumptively inadmissible.”⁵⁵

⁵³ Public hearing 3/2/09, 78 at 93-94.

⁵⁴ Public hearing 2/26/07, 79 at 81.

⁵⁵ Public hearing 1/26/09, 79 at 86.

In response to our survey, over 20% of judges stated that recordings reduced motions to suppress confessions or admissions, and 45% identified specific benefits that resulted from recordings of custodial interviews.⁵⁶

(d) Funding for equipment, transcribing and storage.

The Committee previously reported that, during our inquiries of detectives and their supervisors about electronic recordings, we were told that additional funding was needed, for example, to pay for up-to-date equipment that is compatible statewide, construction of sound proof rooms, ongoing training of detectives on interviewing techniques, reviewing and transcribing recordings, and storage of electronic files. In large jurisdictions, for example, the costs of storing digitally recorded interviews indefinitely can be very high. The responses to the surveys sent to law enforcement agencies reflect that some departments have a need for additional funding related to the recording requirement.⁵⁷

The Committee discussed this problem, and included recommendations calling for funding for these purposes, in three of our prior reports.⁵⁸ Accordingly, we repeat the reasons made in our most recent (Fifth) Annual Report:

⁵⁶ J survey 2Q.3 and 2Q.6.

⁵⁷ LE survey, Q.39-40, 46, 50-51, and 53.

⁵⁸ See Third Annual Report at 11-12; Fourth Annual Report at 17-18; Fifth Annual Report at 9.

The General Assembly should provide funding related to the statutorily mandated recordings of custodial interviews in homicide investigations, for expenses related to relating to purchase of electronic equipment, assuring equipment compatibility, sound proof rooms, reviewing and transcribing recordings, and storage of tapes and discs.

(e) Pattern jury instructions regarding police tactics during custodial interviews.

In two previous reports, the Committee called attention to a problem identified by a number of law enforcement personnel – including the then General Counsel to the Superintendent of the Chicago Police Department – arising from the recording requirement: the need for pattern jury instructions regarding the tactics that detectives conducting custodial interviews may lawfully use.⁵⁹ In response to our survey to police and sheriff's departments, many responded that they are apprehensive about using certain legal interrogation techniques when being recorded, because of concern over how juries will perceive their methods.⁶⁰

⁵⁹ Third Annual Report at 13-14; Fourth Annual Report at 13-14. The statutes mandating recording include provisions directing the Illinois Law Enforcement Training and Standards Board to provide training in the technical aspects of conducting electronic recordings of custodial interviews, and to develop guidelines for the recording of custodial interviews in homicide investigations. 50 ILCS 705/2-3, and 705/10.3. We have been informed that this statute has not been funded, hence no action has been taken to carry it into effect.

⁶⁰ LE survey Q.28.

The instructions should be balanced, explaining the methods which are and which are not acceptable for use during custodial interrogations.⁶¹

From the prosecution's standpoint, these instructions will help allay police and prosecutors' concerns that jurors may refuse to credit recorded admissions and confessions because the tactics used by law enforcement personnel, although sanctioned by the courts, are considered improper or unpalatable by jurors. From the defense standpoint, the instructions will help prevent jurors adopting an "end justifies the means" approach to tactics the courts have held to be unlawful. In other words, when relevant to the facts, judges ought to advise jurors where the line is drawn between permissible and impermissible interrogation tactics.

⁶¹ An officer seeking to obtain a confession may (1) make false statements to suspects concerning the state of evidence against them, *People v. Martin*, 102 Ill.2d 412, 427 (1984); *People v. Melock*, 149 Ill.2d 423, 437 (1992); or (2) exhort or advise suspects to tell the truth, *People v. Ruegger*, 32 Ill. App. 3d 765, 769 (4th Dist. 1975); *People v. Wipfler*, 68 Ill.2d 158, 173 (1977); *People v. Dozier*, 67 Ill. App. 3d 611, 615 (4th Dist. 1979); *People v. Howard*, 139 Ill. App. 3d 755, 834 (2d Dist. 1985). An interrogating officer may not (1) threaten suspects, *Smith v. Duckworth*, 910 F.2d 1492, 1496-97 (7th Cir. 1990); (2) trick suspects, *People v. Payton*, 122 Ill. App. 3d 1030, 1033 (5th Dist. 1984); or (3) promise leniency to suspects by suggesting specific benefits to follow a confession, *People v. Jones*, 8 Ill. App. 3d 849, 853 (1st Dist. 1972); *People v. Eckles*, 128 Ill. App. 3d 276, 278 (3d Dist. 1984).

Because no action has been taken with respect to this proposal, we repeat the recommendation from our Third and Fourth Annual Reports:

The Illinois Pattern Jury Instruction Committee should draft, and the Illinois Supreme Court should approve, pattern jury instructions explaining which methods may lawfully be used by law enforcement officers during custodial interrogations of suspects, and which may not, in accordance with rulings of the United States and Illinois Supreme Courts.

A number of Committee members believe that directing the Illinois Pattern Jury Instruction Committee as to what instructions should be drafted is not within the scope of this Committee's authority. Further, if the methods used by the police in an interrogation are ruled illegal, the jury will not hear the defendant's statement. In addition, it would be impossible to define every situation and method that would need to be covered in an interrogation situation. Also, an instruction as recommended above would unnecessarily highlight certain types of evidence, which is contrary to existing case law.

5. Reforms related to police and sheriffs' agencies: lineups and photo spreads.

The most common cause of wrongful convictions is mistaken identifications by eyewitnesses.⁶²

⁶² Gross, S.R., et al., Exonerations in the United States 1989 through 2003, 95 J. Crim. L. & Criminology, 523, 542 (2005); D. Michael Risinger,

There were significant disparities in the responses to our surveys about current eyewitness identification procedures in murder investigations. Almost 100% of prosecutors responded that they are satisfied with current procedures used by police departments, whereas 65% of Public Defenders responded they are not satisfied.⁶³

(a) *Photographing lineups, producing photographs used in photo spreads, and pre-viewing instructions to witnesses.*

In 2003, an Illinois statute was enacted relating to lineups and photo spreads, containing provisions requiring that all lineups be photographed or otherwise recorded, and that copies of photographs of lineups, and photographs shown to witnesses in photo spread identifications, be provided to defense lawyers.⁶⁴

Pursuant to recommendations of the Governor's Commission,⁶⁵ the statute also requires that suspects in lineups and photo spreads should not appear substantially different from the "fillers" in the array; and that each eyewitness who views a lineup or photo spread must sign a form which states (1) the suspect may not be in the array, (2) the witness is not required to make an identification, and (3) the witness should not assume the

Innocents convicted: An empirically justified factual wrongful conviction rate, 97 J. Crim. L. & Criminology 761, 773 n. 19 (2007).

⁶³ SA and PD surveys, Q.3.2.

⁶⁴ 725 ILCS 5/107A-5(a).

⁶⁵ Gov. Comm. Rec. 11, 13.

person administering the procedure knows which person is the suspect.⁶⁶

Based upon information provided to the Committee, it appears that law enforcement personnel in Illinois adhere to these provisions.

(b) The current procedures used by Illinois law enforcement in conducting lineups and photo spreads.

Responses to the survey distributed by the Committee's consultant, Professor David Olson, to Illinois law enforcement agencies, disclosed that (1) most departments use administrators of lineups and photo spreads who are aware of the identity of the suspect (that is, they use "non-blind" administration methods); (2) the administrators are able to see which person or persons in the array the witness is viewing, and which person the witness identifies as the perpetrator or non-perpetrator of the crime; and (3) most used simultaneous procedures, in which the witness is shown the persons or pictures in the array (usually 5 or 6), all at the same time; one is the suspect, and the others are fillers.⁶⁷

(c) The Committee's recommendation to use blind methods when using photo spreads for eyewitness identifications.

A majority of the Governor's Commission recommended that, when practicable, administrators should be "blind," that is,

⁶⁶ 725 ILCS 5/107A-5(b)(c).

⁶⁷ LE survey Q.57, 58, and 60.

not aware of which member of the array is the suspect,⁶⁸ and that when a blind administrator is used, the persons in the array should be displayed sequentially, rather than simultaneously.⁶⁹

This Committee's survey yielded agreement among those that expressed an opinion, by a margin of more than three to one for prosecutors, and all Public Defenders, that all lineups and photo spreads should be conducted by a "blind" administrator, that is, by a person who does not know the identity of the suspect, provided that such a person is reasonably available at the time and place the identification procedure takes place.⁷⁰

During his appearance before the Committee, defense attorney Peter C. Wise stated his belief that blind administration of lineups is "a great idea. If for no other reason, you remove any question of officer bias, of witness bias, and I liken it a little bit to a taped statement. ... There's no mystery about what went on there, and I would go one step further, and I think there's no

⁶⁸ Gov. Comm. Rec. 10. A minority voted to require that blind administrators always be mandatory.

⁶⁹ Gov. Comm. Rec. 12. A minority expressed the view that the greater reliability of sequential procedures had not yet been established. A new meta-analysis of 72 experimental tests from 23 different labs involving 13,143 participant-witnesses has been conducted. These tests re-confirm the superiority of sequential over simultaneous procedures. Steblay, N.K., Dysart, J.E. & Wells, G.L. (in press), *Seventy-two tests of the sequential lineup superiority effect: A meta-analysis and policy discussion*, Psychology, Public Policy, and Law.

⁷⁰ SA survey Q.3.2; PD survey Q.3.1.

reason lineups shouldn't be videotaped so we can see that process too.”⁷¹

The Committee meeting held in March 2009 was attended by officials of the Illinois State Police and the Illinois Attorney General's Office, two Chiefs of suburban police departments, and a Deputy from a suburban sheriff's office who represented the Illinois Sheriff's Association. They expressed serious reservations about a mandatory requirement that blind administrators be used, because their experiences indicated that a blind administrator often was not readily available to conduct a lineup or photo spread.

At the Committee's October 26, 2009 meeting, a Captain of the Illinois State Police and the Chief of Investigations of the Illinois Attorney General attended, and presented us with a document submitted “on behalf of police officers throughout the state,” which contains the following statement on page 2:⁷²

“As to a blind method of showing line-up photos, we are not in favor of a mandated double blind administrator, as it places an undue burden on law enforcement and its resources, is not deemed practical, and is directly contrary to the future of law enforcement, in regards to the sharing of information in order to serve the public and solve crimes. We are in favor, however, of a blind method of administering line-ups, and these

⁷¹ Public hearing 3/2/09, Springfield, 78 at 96. References to “lineups” included photo spreads.

⁷² Appendix 2 to minutes of Committee meeting, Oct. 26, 2009.

methods will be extensively covered in the training block of instruction.”

At the Committee’s meeting on December 7, 2009, the following recommendation was approved by vote of 9 to 6 (1 member absent):⁷³

If feasible, in homicide investigations, blind administration should be required of all eyewitness identification procedures. Blind administration may be achieved by use of either of two methods:

(a) Use of a blind administrator. The administrator should not be aware of which person or photograph in the array is the police suspect and which are the fillers. The administrator should assign a number to each person in the array, and use that number when recording the witness’ response.

(b) Use of a blind method.

The use of a live lineup is not suitable for this method, because at some point the administrator will know that the witness is viewing the suspect.

When pictures are used, the administrator may know the identity of the suspect, but should not know which person in the array the witness is viewing. The administrator should assign a number to each picture, which must be placed in folders or displayed on a computer screen. The administrator should then shuffle the folders or computer screen pictures. The administrator should not be aware of the number or position of the suspect, and should not look at the pictures as the witness views them.

⁷³ Minutes of Committee meeting Dec. 7, 2009, pp. 4-5.

*In using either method, the administrator may permit the witness to view the array more than one time, provided that the entire array should be shown to the witness each time.*⁷⁴

Blind methods may be used when it is not feasible to locate a blind administrator. The Committee's recommendation is designed to allay the concern expressed by the law enforcement representatives that a blind administrator often cannot conveniently be located. This is consistent with the views expressed by law enforcement personnel in the memorandum referred to above which was presented on behalf of Illinois law enforcement agencies to the Committee at our meeting on October 26, 2009. It is also consistent with the views of the substantial majority of prosecutors who responded to the Committee's survey.

We have been informed that nowadays most arrays are conducted with photographs, either hard copies or images shown on computer screens. Accordingly, use of the Committee's recommended procedures, if adopted, should bring about a major reform when eyewitness identifications are involved in criminal

⁷⁴ It is important to record the witness' decision and comments for each viewing of the array (a "lap"), because research has shown that most errors occur when a witness reaches the end of the sequential procedure – the first lap – without a tentative identification of the culprit, and then asks for another lap; a selection made in the second lap is more likely to be a mistake than an accurate identification. Steblay, N.K., Swanson, H., Dietrich, Ryan, S.L., Raczynski, J.L., & James, K.A. (in press). *Sequential lineup laps and eyewitness accuracy*, *Law and Human Behavior*.

investigations, and should not place a difficult burden on law enforcement.

At the meeting on December 7, 2009, a related recommendation was adopted by a vote of 9 to 6:

If a blind administrator is not used in a homicide investigation, a contemporaneous written report should be prepared explaining why use of a blind administrator was not feasible.

The minority view is that the use of the word “feasible” lays open the distinct possibility of litigation as to exactly what “feasible” means and further, there has been no showing that the reforms put into place are faulty or in need of additional changes regarding eyewitness identifications.

It remains for the police and sheriffs to adopt the recommended practices, and/or for the General Assembly to incorporate the Committee’s recommendations into a statute for the Governor’s approval.

(d) The Governor’s Commission recommendation regarding the use of sequential rather than simultaneous procedures for eyewitness identifications, and the resulting statutory pilot program.

At a number of meetings throughout its tenure, members of the Committee discussed the recommendation of the Governor’s Commission that in all lineups and photo spreads conducted by a blind administrator, the members of the array be displayed sequentially, that is, one by one, and the witness be required to

indicate his/her reaction to each (for example, “that is - is not - my recollection of the appearance of the perpetrator”) before viewing the next person or photo.⁷⁵ Studies have shown that using a sequential method of displaying persons or photos reduces the risk that witnesses will use a “relative” (rather than an absolute) judgment. In other words, when using a simultaneous procedure witnesses often tend to select the person or photo in the array that most resembles the witness’ recollection of the perpetrator. In contrast, when a sequential procedure is used, the witnesses are required to make an identification based solely on their recollection of the perpetrator compared to the one person shown, without conscious or unconscious comparison to any of the other persons in the array.

Instead of adopting the Governor’s Commission recommendation, a statute was enacted in 2003 that established “a pilot study in the field on the effectiveness of the sequential method for lineup procedures.”⁷⁶ The statute provided, “[t]he Department of the State Police shall select 3 police departments to participate in a one-year pilot study on the effectiveness of the sequential lineup method for photo and live lineup procedures.”⁷⁷ The police departments chosen were Chicago (District 4, Areas

⁷⁵ Gov. Comm. Rec. 12.

⁷⁶ 725 ILCS 5/107A-10(a).

⁷⁷ 725 ILCS 5/107A-10(b).

11, 12 and 13), Evanston and Joliet. The required sequential lineup procedures were as follows:

“The witness shall be requested to state whether the individual shown is the perpetrator of the crime prior to viewing the next lineup participant. . . .The lineup administrator shall be someone who is not aware of which member of the lineup is the suspect in the case. . . .The witness . . . will be requested to state whether the individual shown is the perpetrator of the crime prior to viewing the next lineup participant.”⁷⁸

The statute applied to “selected live lineups that are composed and presented at a police station and to selected photo lineups regardless of where presented.”⁷⁹ The statute also provided:⁸⁰

“Selection of lineups. The participating jurisdictions shall develop a protocol for the selection and administration of lineups which is practical, designed to elicit information for comparative evaluation purposes, and is consistent with objective scientific research methodology.”

The Department of State Police was directed to gather information from the three departments “with respect to the effectiveness of the sequential method for lineup procedures” and file a report of its findings by September 1, 2005.”⁸¹ As it turned

⁷⁸ 725 ILCS 5/107a-10(c).

⁷⁹ 725 ILCS 5/107A-10(d).

⁸⁰ 725 ILCS 5/107A-10(e).

⁸¹ 725 ILCS 5/107A-10(g).

out, the State Police Department relinquished its supervision and control of the pilot program to the General Counsel to the Superintendent of the Chicago Police Department, who appointed two university professors to assist in the design and implementation of the program.⁸²

The report on the pilot program known as the “Mecklenburg Report,” named after the CPD’s General Counsel, was published in March 2006. Soon thereafter it was discovered that the method used to conduct the program contained a difference in the knowledge of the administrators as to the identity of the police suspect: *blind* administrators were used when the procedures were *sequential*, whereas *non-blind* administrators were used to be when *simultaneous* procedures were used.

In the parlance of those who are experts in designing comparative studies, the Illinois pilot program contained a serious methodological flaw, known as “confounded variables.” The flaw was that in the simultaneous procedures, the administrator was aware of the person or photo in the array who the police suspected of committing the crime (called “non-blind”), whereas in the sequential procedures the administrator was not aware of which person in the array was the suspect (called “blind”). For this reason, we reported in our Third Annual Report:

As a consequence [of the design flaw], the members of the Committee believe the study is not a

⁸² See Second Annual Report at 5-6.

sound basis upon which to draw final conclusions about which of the two procedures is preferable.”⁸³

(e) *Professional criticisms of the Illinois pilot program, and information recently revealed about the methodology used in the Evanston Police Department.*

The Illinois pilot program has been the subject of critical analysis by a group of recognized experts in the field of comparative studies. A panel of neutral leading experts in the field of methods in constructing comparative field tests wrote about the Illinois pilot program in *Law & Human Behavior*:⁸⁴

“We have read the materials related to the Mecklenburg study.... The Report indicates, and all commentators seem to agree, that the study does contain a confound: a non-blind simultaneous procedure is compared with a blind sequential

⁸³ Third Annual Report at 14-16. We noted that other pilot studies were under consideration that would use parallel procedures for both sequential and simultaneous procedures, thus avoiding the defect that infected the Illinois pilot study. See also Fourth Annual Report at 20.

⁸⁴ See, for example, Schacter, D.L., Dawes, R., Jacoby, L.L., Kahneman, D. Lempert, R., Roediger, H.L., Rosenthal, R., *Policy forum: Studying Eyewitness Investigations in the Field, Law and Human Behavior* 32 (2008); Wells, G. L., *Field experiments on eyewitness identifications: Towards a better understanding of pitfall and prospects*, 32 *Law & Human Behavior*, 6 (2008); Steblay, N.K., *Studying eyewitness investigations in the field? A look forward*, 32 *Law & Human Behavior* 11 (2008). See also Timothy O'Toole: *What's the Matter with Illinois?* *The Champion* (2006); R. Warden statement, public hearing 1/26/09, 79 at 107-08, and written submission, p. 7. The word “lineup” in the articles referred to in this section is used to describe arrays in which the suspect and fillers appear before the witness in person, and as well as photo spreads, in which the members of the array are presented to the witness by photographs in hard copy or on a computer screen.

procedure. The bottom line issue here, or at least the one that drew our group's attention, concerns the importance of the confound.

* * *

“Our reading of the materials forces us to conclude that the confound has devastating consequences for assessing the real-world implications of this particular study.

“If it is the case that the better outcome from the non-blind/simultaneous procedure is partly or entirely attributable to subtle, unintentional cues provided by the administrator, then the Illinois results may simply underscore that the present procedure produces a biased outcome that may ultimately result in the increased conviction of innocent individuals. Stated slightly differently, it is critical to determine whether the seemingly better result from the simultaneous procedure is attributable to properties of the simultaneous procedure itself, or to the influence of the non-blind administrator.

“... Thus, although the conditions used in the study made some sense from a practical standpoint, the design guaranteed that most outcomes would be difficult or impossible to interpret. The only way to sort this out is by conducting further studies including, at a minimum, a blind/simultaneous condition....

* * *

“If the Illinois study was not designed to address the question of what happens in a blind/simultaneous line-up, given its centrality to the issue, then our assessment is that the Illinois study addressed a question (comparing blind/sequential and non-blind

simultaneous) that is not worth addressing, because the results do not inform everyday practice in a useful manner.

“...A well-designed field study that avoids the flaw built into the Illinois effort, can be an important first step toward learning what we need to know about the best practices in identification procedures.

More recently, additional defects have been discovered when another leading expert in lineup and photo spread methodology, Dr. Nancy K. Steblay, Professor of Psychology at Augsburg College in Minneapolis, Minnesota, was given access to case files from 100 field identification tests conducted by the Evanston Police Department during the pilot program.⁸⁵ From a

⁸⁵ Production of the Evanston files resulted from a Freedom of Information Act lawsuit filed in the Circuit Court of Cook County (07-CH 3622). The Evanston Police Department voluntarily produced its data on the pilot program. The Chicago and Joliet departments refused to do so. In February 2010, the Illinois Appellate Court held that the Chicago and Joliet departments must release their data, appropriately redacted as provided in FOIA. *National Assn. of Criminal Defense Lawyers v. Chicago Police Department* and *NACDL v. Chief of the Joliet Police Department* (consolidated), 399 Ill.App.3d 1, 924 N.E.2d 564 (2010). The Court stated,

“...the public interest at stake in obtaining these documents is significant, both for the people of Illinois and for people across the country who are considering the results of the Illinois study. Wrongful convictions on the basis of mistaken eyewitness identification impose a huge cost on society in addition to the cost imposed on the individual who is wrongfully convicted...if the wrong person is convicted, the actual perpetrator is still at large and continues to pose a danger to society. If an

lengthy analysis of these files conducted by Dr. Steblay and her assistants, she concluded:⁸⁶

In short, “[t]he Evanston files provide empirical evidence that the strategy employed for random assignment to the lineup conditions was not effective, and that this design error, along with the presence of verification and confirmatory lineups, produced a disproportionate inflation of suspect identifications in Evanston’s NB-SIM [non-blind-simultaneous] condition”:⁸⁷

examination of the data used in the study ... discloses flaws in the study methodology or design, reform based on the sequential, double-blind identification procedures is still a possibility in Illinois, as well as in other states that have been considering such reform. . . . The results of this study have garnered nationwide attention on an issue of vital importance to our criminal justice system...the burden on the police agencies of redacting any identifying information is not so excessive that it outweighs the vital public interest in the disclosure of these documents.”

We are informed that the Chicago and Joliet departments are in the process of redacting their files preparatory to producing them pursuant to the Appellate Court’s ruling. See also, N.L. Reimer, *Removing a Roadblock to Reform*, 34 *The Champion* 7 (2010).

⁸⁶ Steblay, N. K., *What we know now: The Evanston Illinois field lineups*, *Law & Human Behavior* (Feb. 20, 2010 published online).

⁸⁷ Dr. Steblay’s analysis excluded 13 procedures which did not involve a full lineup. Of the remaining 87, 46 were double-blind sequential, 36 were non-blind simultaneous, and 5 were non-blind sequential. In this Report, we have rounded the percentages calculated by Dr. Steblay to the nearest whole number.

- A larger marginally significant percentage of the non-blind simultaneous procedures involved verification of the identity of an offender already known to the witness (39% simultaneous vs. 22% sequential).⁸⁸

- In a significantly greater proportion of simultaneous procedures, witnesses were asked to confirm an earlier identification of the suspect (17% simultaneous vs. 2% sequential).⁸⁹

- Significantly more blind-sequential lineups (74%) involved witnesses' first identification attempts for stranger-perpetrators, compared to non-blind lineups (50%). Otherwise stated, simultaneous lineups were significantly more likely to involve an identification of a person previously known to the witness, or a person identified by that same witness in a previous identification procedure (50%), compared to the blind-sequential lineups (26%).

- Bystander witnesses were involved in a statistically significant greater proportion of simultaneous (33%) than sequential (14%) identifications.

⁸⁸ “Not surprisingly, witnesses who knew the offender generated significantly more suspect picks....” Steblay, note 86 above, at 6.

⁸⁹ “The witness’s decision at a second identification task is fraught with serious confounds that challenge the fidelity of the witness’s memory for the culprit.” Steblay, note 86 above, at 8.

- Identification attempts made the day of or the day after the crime were significantly more frequent in the simultaneous (47%) than the sequential (9%) procedures.

- Same-race identifications attempts were more frequent in the simultaneous (51%) than the sequential (35%) procedures.⁹⁰

The research by these neutral experts is of particular importance to the members of the Illinois General Assembly, which enacted legislation and provided funding for the pilot program. For a variety of reasons they have concluded that the program was not, as the statute directed, conducted in a manner “consistent with objective scientific research methodology.” They agree that the results of the program are worthless as a test of the difference between simultaneous and sequential lineup procedures.⁹¹

⁹⁰ Studies have shown that cross-race identifications by strangers are far less reliable than same-race identifications by strangers. See Taslitz, A.E., *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 Ohio St. J. Crim. L. 121, 124-25 (citing studies) (2006); Meissner, C.A. & Brigham, J.C., *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-analytic Review*, 7 Psychol. Pub. Pol’y, & L. 3 (2001); Sporer, S.L., *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 Psychol. Pub. Pol’y, & L. 36 (2001); Wells, G.L. & Olson, E.A., *The Other-Race Effect in Eyewitness Identification: What do we do about it?* 7 Psychol. Pub. Pol’y, & L. 230 (2001).

⁹¹ In due course, the records of the Chicago and Joliet police departments will be produced as ordered by the Appellate Court, and analyzed by neutral experts. In her report, Dr. Steblay warned: “The potential for problems of non-random assignment is also apparent in Chicago and Joliet. In each city, two sites were defined, by detective district and geographical region, respectively. Cases originating in one area were

Circulation of the Mecklenburg Report has had the negative effect of publicizing a report, done at the behest of the Illinois General Assembly and Governor, that purports to establish the superiority of the non-blind simultaneous method over the double-blind sequential, whereas the data do not support that conclusion. Thus, Dr. Steblay states:

“The Evanston data expose a serious failure of experimental control that is the undoing of any comparison *between* the two tested groups - lack of effective random assignment to the two lineup conditions of NB-SIM [non-blind simultaneous] and double-blind sequential lineups.”⁹²

In the concluding summary to her article, Dr. Steblay states:

“The Evanston files provide empirical evidence that the strategy used to assign lineups to the two tested conditions was not effective and that this non-random assignment resulted in a set of a priori circumstances that favored the non-blind simultaneous condition....And, importantly, policy-makers can and should recalibrate their conclusions about the Illinois Program with a more complete recognition of the

tested with non-blind simultaneous lineups and cases from another were tested with double-blind sequential lineups. [Citation omitted.] That is, although assignment to condition was predetermined and fixed (not at the discretion of the detective), the conditions themselves were defined on a non-random basis.” She also noted, “One of the voiced suspicions about the very low filler pick rate (zero) in NB-SIM [non-blind-simultaneous] lineups in Evanston and Chicago was that the lineup administrators did not differentiate witness filler picks from no-choice responses.” Steblay, note 86 above, at 9-10.

⁹² Steblay, note 86 above at 9 (emphasis in the original).

methodological flaws that prevent the Illinois Program from providing valid comparisons between lineup formats or from offering grounded challenges to laboratory findings. Finally, analysis of the FOIA files underscores the absolute necessity that field lineup experiments employ double-blind procedures and true random assignment.”⁹³

Thus, according to all of the independent experts who have studied the Illinois pilot program, it was badly designed, wasteful of time and money, and the reported results untrustworthy and detrimental to the effort to accomplish meaningful reforms in Illinois and elsewhere to criminal justice systems in non-capital as well as capital cases.

(f) The Committee’s recommendation regarding the use of sequential identification procedures.

At the Committee meeting on December 7, 2009, the following recommendation – consistent with a recommendation of the Governor’s Commission⁹⁴ – was approved by vote of 9 to 6:

When a blind administration is used in a homicide investigation, sequential procedures should be used, that is, the persons or pictures should be displayed to the witness one at a time. Using the assigned numbers, the administrator should record in writing or electronically the witness’ response to each person or picture, before showing the witness the next person or picture.

⁹³ Steblay, note 86 above, at 11.

⁹⁴ Gov. Comm. Rec. 12.

The minority view of the Committee is that this issue is not within the scope of the Committee's authority. Further, the reforms that have been enacted have had a positive impact on eyewitness identification. There has been no evidence presented that there have been problems with lineup identifications since the enactment of the reforms.

(g) The Committee's recommendation regarding audio-video recordings of lineup and photo spread procedures.

The Governor's Commission unanimously recommended that, "When practicable, the police should videotape lineup procedures, including the witness' confidence statement."⁹⁵ As noted above, research into cases involving charges brought against innocent persons has shown that one of the most common causes is mistaken identifications by eyewitnesses.⁹⁶ A majority of the Committee members believe that, when feasible, having an audio-video recording of the entire identification procedure - whether lineups or photo spreads - would be a significant reform, for the following reasons:

- The remarks made by the witness, indicating certainty, hesitancy, reasons for selection or non-selection of members of

⁹⁵ Gov. Comm. Rec. 15.

⁹⁶ Above note 62. Ms. C. McMillan told the Committee how her brother was identified as a murderer as a result of policeman in California showing a witness a single photograph of Ms. McMillan's brother. Later discovered DNA led to the actual killer, who confessed and was convicted. Public hearing 2/26/07, 185 at 190.

the array, and the like, will be captured and made available to prosecutors, defense lawyers, judges and juries, so that they may observe and hear the witness' spontaneous reactions at the time of viewing, rather than at the time of trial, when other intervening events or conversations with other witnesses or law enforcement officers may have made the witness more or less certain of his/her selection, and reflect a change in certainty.

- An audio-video will provide evidence as to any hints or suggestions given by the administrator regarding which member of the array is the police suspect, and thus cause law enforcement officers to be careful to avoid consciously or subconsciously from suggesting which member the police believe is the perpetrator.

Accordingly, at the Committee's meeting on December 7, 2009, the following recommendation was approved by a vote of 9 to 6:

In homicide investigations, all eyewitness identification procedures should be electronically recorded by both audio and video equipment, subject to the following qualifications:

First, if an eyewitness identification procedure in a homicide investigation is not electronically recorded, a contemporaneous written report should be prepared explaining why making an electronic recording was not feasible. Second, the Illinois Eavesdropping Act⁹⁷

⁹⁷ 720 ILCS 5/14-3(a)(1).

should be amended to permit electronic recording without the knowledge or consent of the participants.

Third, the requirement of electronic recording of eyewitness identification procedures should take effect only after the Illinois Police Training and Standards Board and the Illinois Attorney General's Office have developed a model procedure for the electronic recordings, and have provided relevant training to local police and sheriff departments, and to the Illinois State Police.

The minority view of the Committee is that this recommendation is beyond the scope of the authority of the Committee. Further, the idea of electronically recording the lineup procedures may have a chilling effect on victims and/or witnesses of crimes. In addition, multiple examples were presented to show how impractical it would be to implement. For example, if an officer goes to a house or location outside the police station to show a lineup to the witness, does he/she have to bring a video camera and attempt to conduct the investigation while recording the procedure? Does all contact with the witness before the identification procedure occurs need to be recorded? Again, the majority recommendation uses the word "feasible". This type of wording will likely increase the litigation regarding witness identification. The bottom line is that there had been no evidence presented that the reform enacted through 725 ILCS 5/107A is ineffective or in need of change.

(h) Training for administrators of lineups and photo spreads.

During two Committee meetings held in 2009, members of the Illinois Attorney General's Office, one of whom serves on the Illinois Law Enforcement Training and Standards Board, told us that there is limited training in place for administering lineups and photo spreads. As noted above, at the Committee meeting on October 26, 2009, we received a memorandum from representatives of Illinois law enforcement agencies, which includes a report from knowledgeable law enforcement personnel who studied the matter of eyewitness identification procedures, and conferred with other Illinois officers. Pertinent to the matter of training, the report they submitted to the Committee states:⁹⁸

“Our first main finding involves Training. Currently there is limited training on the topic of the administration of line-ups by law enforcement personnel. A block of instruction for the training of new recruits, reference the proper way to conduct line-ups in criminal investigations, will be brought to the Illinois Law Enforcement Training and Standards Board and all Illinois Law Enforcement Academies in the state in order to implement this needed training. We have also researched ways to implement the statewide training of existing law enforcement officers through web based and/or roll call training. This training should be mandatory for all Investigators, as they are normally tasked with conducting the majority of the physical and photo line ups.

⁹⁸ Minutes of October 26, 2009, Appendix 2, par. 1.

“This training will include past concerns and issues, suggested best practices and Constitutional and State law that has already been enacted. Our current Illinois law, under 725 ILCS 5/107A, addresses the mandatory warnings that need to be issued prior to the administering of all line ups.”

This is an area in which the use of proper, uniform methods are important, and will become especially significant in the event that the recommendations made above are adopted, regarding the use of blind methods of administering lineups and photo spreads, the use of sequential procedures, and the audio-video taping of eyewitness identifications.

The following recommendation for training, and funding for training, is supported unanimously by the members of this Committee:

The recommendations contained in paragraph 1 of the Law Enforcement memorandum, quoted above, should be fully funded and promptly implemented.

(i) Technology for construction of photo spreads.

The report given to the Committee by law enforcement representatives includes the following regarding plans to expand the sources of photographs for photo spreads:

“Our second main finding involves Technology: In the metro Chicago land area, similar line-up fillers are easy to come by. However, in other parts of the state, either because of population, resources, or lack of technology, fillers are a bit more challenging. Knowing this problem, we are working with the Chicago Police

Department and the Illinois State Police in developing a computer based system for the retrieval of photographic fillers which can be accessed by every police department in Illinois. To this end, we will be pursuing grant money through the Illinois Criminal Justice Authority in order to enhance the interoperability of photos throughout the state.”

This comment requires no action by this Committee.

6. Reforms related to selection of cases for capital punishment.

The statute which established this Committee contains the following directions as to our functions:

(b) The Committee shall study the impact of the various reforms to the capital punishment system enacted by the 93rd General Assembly [P.A. 93-605] and annually report to the General Assembly on the effects of these reforms. Each report shall include:

(1) The impact of the reforms on the issue of uniformity and proportionality in the application of the death penalty including, but not limited to, the tracking of data related to whether the reforms have eliminated the statistically significant differences in sentencing related to the geographic location of the homicide and the race of the victim found by the Governor’s Commission on Capital Punishment in its report issued on April 15, 2002.⁹⁹

Responding to this legislative direction involves consideration of (a) the factors the Illinois statutes identify that make a first degree murder eligible for capital punishment; (b) the

⁹⁹ 20 ILCS 3929/2 (b)(1).

ways in which the 102 Illinois State's Attorneys exercise their discretions in selecting cases in which the death penalty will be sought from among first degree murders committed in their respective counties that involve a capital-eligible factor; (c) proposals for instituting a method of review of State's Attorneys' decisions to seek capital punishment; (d) proposals for allowing the trial judge to review and overturn juries' decisions to impose capital punishment; (e) proposals to expand the scope of direct appeal review by the Illinois Supreme Court to include comparative proportionality review; and (f) proposals to collect data to assist and enable trial and Illinois Supreme Court judges to engage in meaningful comparative proportionality review.

(a) The capital-eligibility factors.

The Governor's Commission unanimously recommended that the Illinois statute should be revised to reduce the list of eligibility factors (then numbering 20) that qualify a defendant for capital punishment.¹⁰⁰ A majority of the Commission members

¹⁰⁰ Gov. Comm. Rec. 27. The Commission explained: "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. 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

recommended that the list be reduced to five, while a minority recommended a reduction to six.

The majority list included the following eligibility factors:¹⁰¹

(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 5/9-1(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.

eligibility factors, as found in the Illinois death penalty statute, was unwise.” (Footnote omitted.) (Gov. Comm. Report at 69).

¹⁰¹ Gov. Comm. Rec. 28; see Gov. Comm. Report at 68-73.

The minority voted to retain a sixth factor – “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)).”¹⁰²

Neither position, majority nor minority, was accepted by the General Assembly. Instead, the statute relating to homicides committed during the course of a felony (felony-murder) was rewritten, and a 21st eligibility factor was added, involving homicides committed in the course of an offense of terrorism. The current list of eligibility factors is contained in Appendix 7.¹⁰³

The persons who appeared at the Committee’s public hearings were unanimous that there are too many factors that render first degree murders eligible for capital punishment. There was no agreement, however, as to which factors should be eliminated and which retained. Here is a summary of the views expressed on this subject:

Joseph E. Birkett, DuPage County State’s Attorney, speaking on behalf of the ISAA, told the Committee:

“The Illinois State’s Attorneys Association in 1999 put forward the first suggested reforms, nine reforms, all of which have been enacted with the exception of one. We were united in our belief that we should reduce a number of aggravated circumstances in Illinois. In fact, we have a bill that we’ve worked on. It’s been drafted. I don’t know if it’s been presented yet in

¹⁰² Gov. Comm. Report at 73-74.

¹⁰³ 720 ILCS 5/9-1(b).

Springfield, but we're working with members of the Judiciary Committee." ¹⁰⁴

In answer to a question as to the factors the ISAA wanted to remove or retain, Mr. Birkett responded:

"I think we've reduced it from 21 to 13, but we haven't - - we got room for more I think. In a lot of capital cases, for example, errors or other factors, you might - - that same person is going to be eligible under felony murder or armed robbery or language that we added and worked on with the General Assembly to add language for inherently dangerous crime which allowed us to eliminate several felonies from murder."¹⁰⁵

A Committee member asked Kevin Lyons, State's Attorney of Peoria County, "What's your opinion on reducing the aggravating factors for the death penalty maybe down from six to ten?" Mr. Lyons replied:

"A very small number of those are really truly used. In fact, several of them have never been used. But some horrific event happens, a massive number of public servants get killed in the course of a bombing, and all of a sudden it becomes a different factor, a greater factor because now if you kill a public servant it becomes a death penalty case. It's a matter of management. And it's hard to do when you're a legislator...But if the purpose is to focus and manage the death penalty, I do believe that the State's Attorneys of Illinois, in fact, I know that the

¹⁰⁴ Public hearing 1/26/09, 42 at 53-54.

¹⁰⁵ Id. at 72-73.

overwhelming majority of them believe that they should probably be reduced. Now, having said that, please don't ask me which ones we should take away.”¹⁰⁶

In contrast to these views, the responses to the Committee's survey to all Illinois State's Attorneys yielded over 80% agreement that the eligibility factors should remain the same, with only 18% favoring reduction.¹⁰⁷ On the defense side, half of the Public Defenders favored reduction of the number of factors.¹⁰⁸

Discussing the fiscal problems that have beset the Cook County Public Defender, then Assistant Public Defender Bernard Sarley said:

“...perhaps more screening or better screening by the prosecution, maybe all of these cases don't need to be capital cases. If capital cases are designed to be for the worst of the worst, then I don't think 150 people charged with murder in Cook County are the worst of the worst. Perhaps few eligibility factors would help. I'm sure that would help much, maybe a combination of both, getting back to the original eligibility factors that we started with way back when.”¹⁰⁹

Julie Harmon, Capital Case Coordinator for the Cook County Public Defender, stated: “There are too many eligibility factors

¹⁰⁶ Public hearing 3/2/09, 41 at 47-49. Committee member Assistant Cook County State's Attorney Walter Hehner said he believed the terrorism factor should be eliminated, because the United State's Attorneys Office would prosecute those cases in federal court.

¹⁰⁷ SA survey Part 5.7.

¹⁰⁸ PD survey Part 5.6.

¹⁰⁹ Public hearing 2/26/07, 79 at 101.

that allow for the imposition of death.”¹¹⁰ Responding to Ms. Harmon’s statement, Committee member Hehner, stated: “I agree with your statement that there’s too many statutory aggravating factors. Can you tell us which factors you think should be repealed?” Her reply, in pertinent part, was:

“I would say the greatest number of eligibility factors that our office believes are overused is felony murder and child homicides when there’s really not a brutal and heinous (sic), because every death of a child is brutal and heinous by its nature, but we do not believe that every child killing should be treated as a death case, and we think that many, many of them are. We also think that every felony murder case should not be treated as a death case. We feel that way too many of those are. So those are the two that I think if they were narrowed or eliminated would have the most positive impact on the number of capital cases that are pending... that usually don’t go all the way to a capital proceeding.”¹¹¹

In light of the foregoing, the Committee adopted the following recommendation:

*The number of statutory eligibility factors for capital punishment remains a serious question that ought to be addressed by the General Assembly.*¹¹²

¹¹⁰ Public hearing 1/26/09, 115 at 118.

¹¹¹ Id. at 128-29. See also the discussion of reducing the eligibility factors by J. Bohman, then Executive Director of the ICADP, Public hearing 2/26/07, 114 at 116-19, 124-25.

¹¹² In 2004, the Massachusetts Governor’s Council on Capital Punishment pointed out the importance of severely limiting eligibility factors; “the

- (b) *The use of the Attorney General-ISAA Guidelines by Illinois State's Attorneys when exercising discretion in selecting cases in which the death penalty will be sought.*

There are no binding restraints on the discretion of the 102 State's Attorneys in their selections of the capital-eligible first degree murder cases in which he or she will, or will not, seek the death penalty.

The Governor's Commission recommended that the Illinois Attorney General and the Illinois State's Attorneys Association adopt recommendations for the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty, but that the recommendations not have the force of law or be imposed by court rule or legislation.¹¹³ The Governor's Commission stated:¹¹⁴

“However, there is no *requirement* that the prosecutor in an individual country follow *any* of these processes in reaching his or her decision about whether

statutory list of ‘aggravating factors’ is the one and only place, in the entire death-penalty system, where substantive limits can be imposed on the death penalty that are not discretionary.” The Council’s recommended list of factors was first degree murders committed by defendants 18 or over through their own conduct, or of another whom they directed or controlled, or contracted with, who acted with deliberate, premeditated malice. The crimes for which death would be a potential penalty were murder as an act of political terrorism; murder to obstruct justice; narrowly defined torture murder; multiple murders; and murder by one under a sentence of life without parole. Report at pp. 10-12.

¹¹³ Gov. Comm. Rec. 28.

¹¹⁴ Gov. Comm. Report, p. 82.

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.” (Emphasis in original.)

The Governor’s Commission’s recommendation was inserted into a statute enacted in 2003 as part of the reform legislation, providing that the Attorney General and State’s Attorneys Association shall promulgate voluntary, non-binding guidelines for procedures governing whether or not to seek the death penalty.¹¹⁵

On February 22, 2006, the Attorney General and the Association adopted “Death Penalty Decision Guidelines” (“Guidelines”), which “do not have the force of law, but they are intended to assist State’s Attorneys in exercising their discretion in conformance with the highest standards of justice.” The Guidelines state:¹¹⁶

“The primary factors in making a decision to seek a death sentence are the need to not only have absolutely no doubt regarding the defendant's guilt but also his/her eligibility for the imposition of death pursuant to the first degree murder statute. The basis of both the charging decision and the decision to seek death must be fundamentally fair and consistent with

¹¹⁵ 720 ILCS 5/9-1(k).

¹¹⁶ Guidelines pp. 2-3, 5.

the law. The decision to seek death should not be automatic simply because the defendant appears to be clearly guilty and clearly eligible. In making this decision, State's Attorneys should be focused on the strength of the case and the background and character of the defendant. [Citations omitted]

“However, State’s Attorneys must resist the temptation or public pressure to seek a death sentence based solely on the brutality of the crime without reference to other relevant factors.”

* * *

“These proposed guidelines are not intended to be a substitute for adopting appropriate policies and procedures at a local level. These guidelines are illustrative of certain basic factors which should be considered in the exercise of discretion.”

The Committee members believe that these guidelines contain an excellent statement of the factors all State’s Attorneys should consider in deciding whether to seek the death penalty in cases which are death eligible, and the steps they should take in formulating their judgments. Consistent adherence to these Guidelines will assist State’s Attorneys in filing Notices of Intent only in the small number of murders where the nature of the crime and the criminal character of the defendant clearly call for application of the death penalty.

Nevertheless, the Guidelines are a statement of policies without an enforcement mechanism; they are not mandatory, and need not be complied with in whole or in part. They articulate admonitions, that is, policies and practices that State’s Attorneys

throughout the state ought to, but are not required to, follow. There is nothing in the Guidelines that provides a remedy for failures to comply.

(c) *Pre-decision meetings between prosecutors and defense lawyers.*

The prosecutors we interviewed, and who appeared before the Committee at the public hearings, assured us that they make it a practice to afford defense lawyers an opportunity to be heard before making a final decision to seek capital punishment. The Guidelines have a separate section entitled “Defense Counsel Input and Mitigation” which sets forth the following operative language:

“Prior to announcing a decision to seek death, the State’s Attorney should provide defense counsel with an opportunity to present matters in writing and/or in person, which might affect the decision to seek or not seek death. This communication should not be used to negotiate a disposition, but give defense counsel a fair opportunity to present valid reasons why the death penalty should not be sought in his/her client’s case. It is important that the offer to the defense be an open offer and that the State’s Attorney be willing to review information presented by the defense at any reasonable time.”¹¹⁷

The Committee received differing reports and opinions on this subject from the persons who appeared before our Committee at the public hearings:

¹¹⁷ Guidelines p. 9.

Robert Haida, State's Attorney of St. Clair County, stated that his office routinely offers pre-decision meetings with defense attorneys:

"If they choose, most of the time they choose not to, but we have had cases where defense counsel has come in and made... a pitch so to speak, off the record about what they think the merits or demerits of our case might be, and we've had very fruitful discussions in certain cases about that."¹¹⁸

Committee member Richard Schwind stated, "I have been in the Attorney General's Office since 1985 doing this, [and] every time we've been involved in a death penalty case, we have approached the defense lawyer and said, 'Give us some reasons [not to serve a Notice of Intent].'"¹¹⁹ Committee member Boyd Ingemunson, a former Assistant State's Attorney in Kendall County, now a defense lawyer, said "I've never met a prosecutor and I've never had a case where a prosecutor was never willing to sit down and talk about the case when requested to do so."¹²⁰

DuPage County State's Attorney Joseph Birkett stated that in his office, defense lawyers are given an opportunity to attempt to persuade the prosecutors to either not certify murder cases for

¹¹⁸ Public hearing 11/13/06, at 78.

¹¹⁹ Public hearing 1/26/09, at 21.

¹²⁰ Id at 26.

capital punishment, or to remove the certification at later stages of the proceedings.¹²¹

The Committee heard from Assistant Cook County Public Defender Crystal Marchigiani, Chief of the Homicide Task Force, who spoke about the excessive number of murder indictments that were noticed as capital cases in Cook County, with the serious impacts on the Public Defender's budget. Regarding opportunities for the Public Defender to speak with the prosecutors before a Notice of Intent is filed, she said, "[s]o this fallacy that you can somehow go to the State's Attorney and have a conversation such that they will not file a notice is a fallacy. That just doesn't happen. And in terms of trying to make a presentation to their committee, as I said, what we've been told is that's never going to happen."¹²²

Defense attorney Andrea Lyon stated that in Cook County the State's Attorney's office does not afford a formal opportunity for defense counsel to make a presentation as to why the death penalty should not be sought. She urged that consideration be given to enacting a rule of court or statute requiring that within a certain time after the indictment is returned, the prosecutor and defense trial lawyers meet to discuss whether or not the case should be treated as a capital case. Committee member, Walter Hehner, who is a supervisor in the Cook County State's Attorneys

¹²¹ Id. at 65.

¹²² Id. at 133.

Office, responded that “In Cook County, whenever we do death review [prior to filing a Notice of Intent], the defense always has the opportunity to present to us written reasons, written mitigation as to why we should not seek the death penalty. In my experience, there’s not one defense attorney that has ever taken us up on that.” Ms. Lyon said, “I’ve never even been told that’s possible.” She went on to reiterate the proposal that a time be set within which the trial lawyers meet to discuss whether or not the case should proceed as a capital case.¹²³

The survey sent by the Committee to Public Defenders asked, “Does the State’s Attorney’s Office in your county confer with your office prior to their decision to file a capital certificate?” Slightly more than half of the responses to this question indicated that State’s Attorneys do not confer with defense before deciding to file a Notice of Intent to seek capital punishment, while about 30% responded “Yes, almost always”, and 17% answered “Yes, sometimes.”¹²⁴

Thus, the Committee received conflicting information regarding whether or not the Guidelines have been followed on this subject by State’s Attorneys throughout the state. Given the evidence accumulated, we are certain that the Guidelines are not adhered to 100 percent of the time, and are not followed

¹²³ Id. at 20; Public hearing 1/26/09, at 22-23.

¹²⁴ PD survey, Q.5.9 (May 13, 2008). The survey sent to prosecutors did not include a question on this subject.

consistently. Accordingly, the Committee adopted the following recommendation:

In first degree murder cases that are capital eligible, before a Notice of Intent is filed, and before expiration of the time for filing a Notice of Intent, representatives of the prosecution should be required to offer to meet in person with the defense lawyers to discuss whether the case should or should not be certified as a capital case, and whether to ask the court to extend the time within which a Notice of Intent may be filed. To make these discussions effective, defense lawyers are encouraged to provide mitigation evidence to the State's Attorney, so an informed decision may be made, after consideration of all of the circumstances of the case, whether to seek capital punishment.

The members present agreed unanimously that this requirement could be accomplished by an addition to Illinois Supreme Court Rule 416, Procedures in Capital Cases.

(d) The formation of a statewide panel to review State's Attorneys' decisions to seek capital punishment - geographic and racial disparities

As noted above, there is at present no enforceable method to assure consistency among the 102 State's Attorneys in their selection of cases for capital punishment. Experts retained by the Governor's Commission reported that "two extra legal factors – the race of first-degree murder victims, and the geographic region where the prosecution occurred – were found to be statistically

related to the imposition of the death sentence in Illinois.”¹²⁵ The more current data obtained by the Committee’s consultants at Loyola University, reflects that geographic disparity in the imposition of the death penalty still exists.¹²⁶

A majority of the Governor’s Commission recommended appointment of a five-person committee to review all decisions to seek to seek capital punishment, with authority to approve or disapprove the State’s Attorneys’ decision.¹²⁷ The Commission’s explanatory comments state:

“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...”

* * *

“The state-wide review committee...would address more directly the challenge of how to promote uniformity throughout the state with respect to

¹²⁵ Gov. Comm., Technical Appendix, p. 22.

¹²⁶ Appendix 6; Fifth Annual Report, p. 12, note 9.

¹²⁷ Gov. Comm. Rec. 30. The proposed review committee would be composed of the Illinois Attorney General or designee, the State’s Attorney of Cook County or designee, a State’s Attorney from another county chosen by lot, the President of the Illinois State’s Attorneys Association, and a retired judge, preferably with experience in criminal law, appointed by the Governor.

standards for deciding whether or not the death penalty should be sought in a first degree murder case....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 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.”¹²⁸

* * *

“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.”

* * *

“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. 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

¹²⁸ The Massachusetts Governor’s Council made a similar recommendation for statewide review of local prosecutors’ selection of capital cases: “because the death penalty is imposed in the name of all of the people of the relevant state, it is essential...to ensure that the ultimate punishment is administered in a manner that is reasonably consistent across the entire state.” The Council recommended that “the Attorney General should review all exercises of local prosecutorial discretion in potentially capital cases.” Report at p. 13.

throughout the state. The findings also comport with national studies which have found that Cook County has a proportionately low rate of death sentencing, as judged by comparison with the number of homicides.”¹²⁹

The Governor’s Commission recommendation was directed in the first instance to the General Assembly, and failing action on its part, to the Governor to “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.” Neither the General Assembly nor the Governor has taken action to implement the Commission’s recommendation.

This proposal was the subject of comment by several witnesses at the Committee’s public hearings. When Rob Warden, Executive Director of Northwestern University’s Center on Wrongful Convictions, appeared before the Committee, he provided a memorandum which refers to the recommendation as

¹²⁹ Gov. Comm. Report, pp. 82, 85, 87-88. The Commission’s comment also stated: “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... 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....”

“essential to the uniform application of the death penalty.”¹³⁰

Kevin Lyons, State’s Attorney of Peoria County, acknowledged the inconsistencies among prosecutors’ selection of cases for capital prosecution:¹³¹

“But I want to tell you that I believe that the State’s Attorneys of Illinois for the most part are people of great conscience and, but you have 102 people, you have 102 thoughts. I will not deny that some places, depending on where you are, think differently, that every murder is the electric chair murder or something.”

Mr. Lyons nevertheless expressed opposition to the plan, because the elected State’s Attorneys “are thought of, in my opinion, by the residents of the county as the person that should reflect the thoughts of those persons in the county.”¹³²

During her statement to the Committee, private defense lawyer Andrea Lyon drew an analogy to the federal Department of Justice, which requires that all of the 94 United States Attorneys must obtain Department approval before seeking capital punishment.¹³³

By vote of 7 to 6 (3 members absent), the Committee adopted the following recommendation:¹³⁴

¹³⁰ Public hearing 1/26/09, at pages 3-4.

¹³¹ Public hearing 3/2/09, 41 at 74-75.

¹³² Id.

¹³³ Public hearing 1/26/09, 6 at 22.

¹³⁴ Committee meeting, August 24, 2010.

*Subject to constitutional limitations, a statewide committee should be established to review all decisions to seek capital punishment, with authority to approve or disapprove the State's Attorney's decision/position.*¹³⁵

7. The financial consequences of the various reforms on the costs of the Illinois capital punishment system.

The statute creating this Committee directed it to study and report on “The impact of the various reforms on the costs associated with the administration of the Illinois capital punishment system.”¹³⁶ This Committee was not able to comply with this directive. We had no funding to conduct a study of that question, nor sufficient information available to us from which to draw firm conclusions.

The Illinois capital punishment system has had the advantage of reforms from November, 2003, when the reforms were enacted by the 93rd General Assembly, until December 31, 2009, when this Committee's tenure ended. During that time, thousands of indictments for first degree murder were returned by grand juries, some death-eligible and some not. Notices of Intent to seek a death penalty were filed in hundreds of cases. Of those, many were “de-deathed” and were disposed of either before trial, by pleas of guilty in which the defendant was sentenced to an agreed term of years of imprisonment, or in a

¹³⁵ Because of their length, the minority comments and majority response are contained in Appendix 15.

¹³⁶ 20 ILCS 3929/2(b)(5).

single, non-capital trial. As noted in Part 3 above, of the cases that went to trial as capital cases between January 1, 2003 and December 31, 2009, 17 resulted in death sentences, two of which were set aside by the Illinois Supreme Court.

As to the reforms enacted in 2003, new costs attributable to the reforms were involved with electronic recording of the custodial interviews of first degree murder suspects; conducting the pilot program regarding sequential lineups and photo spreads; holding pretrial hearings concerning testimony of jailhouse informants; allowing greater access to DNA database searches; and training judges and lawyers for the trial of capital cases. These reforms have and will result in additional costs, but they also will result in savings. For example, if implementation of the reforms causes a “weeding out” of cases that ought not be prosecuted, or prosecuted but not as capital eligible offenses, savings will be experienced.

This is necessarily an inexact endeavor, because whether or not the death penalty is sought, the indictment must be processed, and costs incurred, including many that would be incurred regardless of whether the death penalty was or was not being sought. Also, the common practice of “de-deathing” cases before trial makes the calculation more complicated, because many of the costs of capital cases results are incurred promptly after the notice under Rule 416(c) is filed, in preparation for a potential penalty phase trial. A large portion of this preparation

usually becomes irrelevant when an agreed disposition is reached, approved in advance by the lawyers on both sides, the defendant, and often the trial judge.

In any event, there is insufficient data available to the Committee from which to draw meaningful conclusions as to the cost impact, if any, of the reforms enacted in 2003 on the overall capital punishment system.

At the final meeting of this Committee on December 17, 2009, the following recommendation was approved unanimously by the members present:

The General Assembly should fund SR 297, which passed the Illinois Senate calling for a study into the costs associated with the death penalty in Illinois. We recommend that the Illinois General Assembly fully fund this study into the costs of the death penalty, enabling a needed cost-benefit analysis into the process that will better inform the public policy debate.

8. Incremental, additional costs of the Illinois capital punishment system - the Capital Litigation Trust Fund.

A related question is – what are the *incremental costs* of the Illinois capital punishment system, that is, whether and to what extent the capital punishment system adds costs to the criminal justice system, over and above the cost of processing the cases designated as capital if they had been treated as non-capital cases? Here again the Committee did not have access to data sufficient to gauge precisely the difference in costs of prosecuting capital-eligible first degree murder cases when the death penalty

was sought, compared to the costs of prosecuting the same cases when the death penalty was not sought.¹³⁷

Despite our inability to learn the precise incremental costs of processing capital murder cases, we have concluded that the amount of money spent on murder cases that are designated for capital punishment exceeds the amount that would have been expended had no Notice of Intent been filed and the cases processed through the criminal justice system as non-capital first degree murder cases. From what we have observed, heard and read, capital punishment cases entail a significant additional or incremental cost, compared to treating the same cases without seeking a death sentence. In reaching this conclusion, we considered the facts and circumstances described below.

(a) The Illinois Capital Litigation Trust Fund.

The costs of capital cases are shared by state, county and city agencies that provide assistance to the prosecution and defense, and the State of Illinois through the Capital Litigation Trust Fund (CLTF). The CLTF was established by statute in 2000, to provide funding for the prosecution and defense of capital cases, including post-conviction proceedings.¹³⁸ The Cook

¹³⁷ The data needed is explained in our Fourth Annual Report, pages 26-31. We are aware that the financial situation of the State has changed for the worse since the Governor's Commission Report was filed in 2002, and reforms were enacted in 2003.

¹³⁸ 725 ILCS 124/15. The post-conviction proceedings are those brought in capital cases under Article 122 of the Code of Criminal Procedure of 1963, and Section 2-1401 of the Code of Civil Procedure, and federal law.

County Treasurer administers monies from the CLTF relating to capital cases in Cook County, and the State Treasurer administers the CLTF funds as to capital cases outside Cook County.

The offices which may request payment from the CLTF for expenses incurred related to capital cases are those of the State's Attorneys, the Public Defenders,¹³⁹ the State Appellate Defender, the State's Attorneys Appellate Prosecutor, and the Attorney General. Authorized expenses from the CLTF include salaries of lawyers, investigators, paralegals and other personnel employed by State's Attorneys and Public Defenders when working on capital cases, and fees and expenses of trial attorneys who have been appointed by trial court judges to represent defendants who are charged with capital crimes.¹⁴⁰ Attorneys approved by or contracted with the State Appellate Defender to represent petitioners in post-conviction proceedings in capital cases may also apply for compensation from the CLTF. Costs payable from the CLTF include, but are not limited to, those incurred for DNA

¹³⁹ The Cook County Public Defender does not charge the CLTF for the salaries of Assistant Public Defenders, support staff, or investigators. Those expenses are paid for by Cook County through its budget for the Public Defender's office. The office's other death-case related expenses are billed to and paid by the CLTF, for example, expert witnesses, deposition costs, and the like.

¹⁴⁰ Appointment of private lawyers is required when the county Public Defender has a conflict of interest, and in counties which have no Public Defender office. Maximum hourly rates are specified in the statute.

testing, investigators, expert and forensic witnesses, and mitigation specialists.

The charts attached as Appendix 8 to this report include summaries of amounts expended through the CLTF each year from 2003 through 2009, separated into Cook County and non-Cook County expenditures.

(b) Examples of incremental costs of capital cases.

The expenditures from the CLTF, both for prosecutors and defense lawyers *outside Cook County*, and the related expenses in capital cases, exceeded \$50 million from 2003 through 2009. Compared to the results obtained – 17 capital sentences in seven years¹⁴¹ – these substantial costs (which do not include other State, County and local expenses) highlight one of the most serious problems in the current Illinois system:¹⁴²

- The CLTF expended approximately \$54 million statewide, for the period January 1, 2003 through November 2009.

¹⁴¹ See Appendix 8. As noted above, the Supreme Court of Illinois reversed the capital sentences of two of the defendants who had been sentenced to death: Mr. Nelson (remanded for a non-death sentence), and Mr. Lovejoy (remanded for a complete new trial).

¹⁴² The Committee has been informed the Legislature budgeted funds for the CLTF in fiscal year 2010 (July 1, 2009 - June 30, 2010), but the CLTF did not receive the amount budgeted. In Cook County, the amounts charged to the CLTF for that fiscal year were almost entirely paid from county funds.

- In Cook County, the total amount charged to the CLTF from 2003 through 2009 amounted to approximately \$34 million.

- In counties outside Cook, the CLTF paid approximately \$20 million during the years 2003 to 2009.

As we explain below, a substantial portion of these expenditures would have been unnecessary if the cases were not treated as capital. Indeed, in about half of the cases, the State's Attorneys withdrew the Notice of Intent prior to trial. Indeed, in many of those cases, the State's Attorneys agreed to pleas of guilty and non-capital sentences.

In addition to costs paid from the CLTF, there are costs related to Illinois capital punishment prosecutions which are paid by the State, and the counties and cities in which the crimes were committed and the cases prosecuted. These costs involve salaries of local and State employees who work on capital cases, both prior to and after indictment, for example, State forensic laboratories, mental evaluation facilities, police and sheriff personnel, Illinois State Police employees, Cook County Assistant Public Defenders and their support staff personnel and investigators; salaries, and expenses of members of the State's Attorneys Appellate Prosecutor and Appellate Defender, their Assistants, and their full or part time personnel and investigators, and of the Illinois Attorney General, Assistant Attorneys General, and their full or part time personnel and investigators. The

salaries of those persons are paid from the State, county or city budgets of their respective offices.

When death sentences are imposed, there follow years of costly and lengthy litigation in the state and federal trial and appellate courts, almost always at State expense. Through this process, some convictions have been overturned and the defendants released,¹⁴³ and in other cases the sentences have been reduced to terms of years. Prior to entry of the moratorium on executions in 2000, most executions in Illinois were carried out more than a decade after the death sentences were imposed.¹⁴⁴

(c) A partial analysis of the frequency with which Notices of Intent to seek capital punishment have been withdrawn before trial, or which result in acquittals or convictions of offenses for which capital punishment is not a statutory punishment.

When a Notice of Intent to seek a death sentence is filed, the costs of prosecution escalate. In order to determine the frequency of State's Attorneys filing and then withdrawing Notices of Intent, the Committee has checked the records of capital-noticed cases that were disposed of in the trial courts during 2006 and 2007. As illustrated in the charts attached as Appendix 9, the

¹⁴³ From 1973 to date, 20 persons have been released from Illinois death row as a result of court orders. Death Penalty Information Center Database, <http://www.deathpenaltyinfo.org> .

¹⁴⁴ See note 36 above. As to comparable national statistics, see Bureau of Justice Statistics, Capital Punishment 2000 (Dec. 11, 2001), available at <https://bjs.ojp.usdoj.gov/content/pub/cp00.pdf>.

Committee found that during 2006 and 2007, there were 112 cases in which Notices of Intent to seek capital punishment had been filed by Illinois State's Attorneys in earlier years, resulting in the following dispositions in 2006 and 2007:

2006

- 61 cases in which Notices of Intent to seek capital punishment had been filed in prior years were disposed of in the trial courts.
- 3 defendants received the death penalty, one of which was vacated by the Supreme Court and remanded for imposition of a non-death sentence (Brian Nelson).
- 4 defendants were acquitted of all charges.
- 44 defendants were convicted of first degree murder, sentenced to life or a term of years. In 19 of those cases, the State's Attorney withdrew the capital punishment notices, and agreed to guilty pleas to murder which carried sentences of terms of years rather than death.
- 4 defendants were acquitted of first degree murder, and convicted of lesser, non-capital offenses.
- 6 defendants, the State's Attorney withdrew capital notices, and entered agreed pleas to non-capital offenses.

Thus in 2006:

- 3 defendants out of 61 received the death penalty, one of which was set aside on appeal, which is approximately 3% of the cases disposed of in Illinois trial courts in 2006 in which a capital punishment Notice of Intent had been filed.
- 14 defendants were acquitted or found not guilty of committing capital crimes, which is seven times the number of defendants who were sentenced to death in 2006.

2007

- 51 cases in which Notices of Intent to seek capital punishment had been filed in prior years were disposed of in trial courts.
- 3 defendants received the death penalty, one of which was set aside by the Supreme Court, and remanded for a new trial (Lawrence Lovejoy).
- 42 defendants were convicted of first degree murder, sentenced to life or a term of years. In 27 of those cases, the State's Attorney withdrew the capital punishment notices, and agreed to pleas of guilty to murder which carried sentences of terms of years rather than death in 2006.
- 6 defendants were acquitted of first degree murder.
- 3 defendants were found not eligible for capital punishment.

- 3 defendants, the State's Attorney withdrew capital notices, and entered agreed pleas of guilty to non-capital offenses.

Thus, in 2007:

- 3 defendants out of 51 received the death penalty, one of which was set aside on appeal, which is approximately 4% of the cases disposed of in Illinois trial courts in 2007 in which a capital punishment Notice of Intent had been filed.
- 12 defendants were found not guilty of committing capital crimes, or not eligible for capital punishment, which is six times the number of those who were those sentenced to death in 2007.

To summarize: in the two year period, 2006 and 2007, of the 112 cases disposed of in Illinois trial courts in which a State's Attorney had filed a Notice of Intent to seek the death penalty:

- In 65 cases the State's Attorney withdrew the Notice of Intent, which amounts to approximately 60% of the cases in which a Notice of Intent had been filed.
- In 6 cases the defendants were convicted of first degree murder and sentenced to death, two of which were set aside on appeal, leaving four death sentences, which amounts to less than 4% of the cases in which a Notice of Intent was filed.
- In 26 cases, or almost one-fourth of those who were facing death penalties, the defendants were acquitted, found not guilty of murder, not eligible for capital

punishment, or the State's Attorneys dismissed the murder charges.

- In 83 cases, or almost three-fourths of the capital-noticed cases, the defendants were convicted of murder but not given death penalty.

2009

The Committee also looked at the statistics related to the costs incurred by the CLTF and results in Cook County during the fiscal year ended June 30, 2009. The CLTF disbursed approximately \$5.5 million relating to the operation of the capital punishment system in Cook County, as follows:¹⁴⁵

- \$2 million to the Cook County State's Attorney, chiefly for salaries of personnel assigned to the offices Capital Crime Litigation Unit.
- \$2 million to the Cook County Public Defender, chiefly for fees paid to outside experts, court reporters' time and transcripts, travel, and other related expenses
- \$1.5 million paid to court-appointed private defense lawyers for legal fees, experts, investigators, travel, and other related expenses.

The Committee compared these expenses to the results of 51 first degree murder cases in which a Notice of Intent to seek

¹⁴⁵ See Appendix 8.

the death penalty had been filed that were disposed of in Cook County trial courts in calendar year 2009:¹⁴⁶

- 0 Death sentences
- 4 Acquittals
- 1 Case dismissed by the State's Attorney
- 8 Defendants convicted of non-capital crimes, with sentences ranging from 4½ to 30 years.¹⁴⁷
- 38 Defendants convicted of first degree murder, with sentences ranging from life without parole to terms of years.

The Committee acknowledges this analysis of the disposition numbers from these three years does not consider the total number of first degree murders charged in Illinois for the years in which these cases were indicted. Nor has consideration been given to all of the potential capital cases in Illinois from prior years in which State's Attorneys may have declined to seek the death penalty. These numbers also do not take into account the circumstances of the crimes charged, the amount of evidence of defendant's guilt, the quality of the evidence of defendant's possible defenses at trial, the criminal histories of the defendants, the evidence in aggravation supporting a sentence of death, the

¹⁴⁶ 2010 Annual Report, ICADP, pages 29-31.

¹⁴⁷ Second degree murder (2); manslaughter (2); conspiracy (2); armed robbery (1); aggravated battery (1).

existence of evidence mitigating a sentence of death, and that certain events, such as trial judges' evidentiary rulings, occur during the pendency of any criminal case that require reassessment which in turn may affect plea negotiations.

(d) *Recommendations regarding the selection of cases for capital punishment, and the authority of the trial judge and the Illinois Supreme Court to review capital sentences.*

The members of the Committee believe that the State's Attorneys should scrupulously follow their Guidelines, selecting cases that are really the "worst of the worst."¹⁴⁸ But Committee members also believe that the Guidelines are not being followed in some counties. It appears that far too many Notices of Intent are being filed, causing substantial increases in costs. A related phenomenon is a practice of filing Notices of Intent before thorough investigations have been done – for example, as to the amount and quality of the evidence of the defendants' guilt and of potential defenses, and the evidence in aggravation and mitigation. These investigations may require State's Attorneys to request extensions of time to file Notices of Intent.

In order to insure that Notices of Intent are filed in only the most extreme cases, the so-called "worst of the worst," and only

¹⁴⁸ See, for example, *People v. Szabo*, 94 Ill.2d 327, 352-53 (1983); *People v. Ballard*, 206 Ill.2d 151 at 215-16 (2002), describing the use of aggravating factors to "distinguish and narrow" the group of persons who are death eligible, and 206 Ill.2d at 197, J. McMorrow, specially concurring, discussing alleged over-breadth of death penalty statute.

after thorough examinations have been concluded, thus avoiding the heavy expenditures associated with capital cases, a majority of the Committee believes it is prudent and cost-conscious to put in place the four safety valves recommended by the Governor's Commission, and therefore submit the following recommendations:¹⁴⁹

First, the eligibility factors should be reduced to the five recommended by the Governor's Commission majority, set forth verbatim in Part 6(a) above.

Subject to constitutional limitations, a statewide committee should be established to review all decisions to seek capital punishment, with authority to approve or disapprove the State's Attorney's decision/position.¹⁵⁰

Third, legislation should be enacted that gives trial judges power to overturn jury verdicts of death, and impose instead a sentence to a term of years. If the eligibility factors are reduced to the recommended five, the mandatory sentence should be natural life.

Fourth, steps should be taken to ensure that on appeal from a death sentence, the Illinois Supreme Court follows the prescriptions contained in Governor's Commission Recommendation 70, so that in all capital appeals the Court must engage in what is known as full comparative proportionality review.¹⁵¹

¹⁴⁹ Committee meeting, August 24, 2010 (7 to 6, 3 members absent).

¹⁵⁰ See Part 6(d) above.

¹⁵¹ To enable the Supreme Court to have access to the necessary information to conduct comparative proportionality review, the Capital Crimes Database. Act (720 ILCS 3930/7.6) should be funded. Reliable collection of data affecting capital punishment is necessary before an

In light of the straitened financial condition the State is now facing, these recommendations should be addressed promptly and forcefully by all State's Attorneys, the Illinois General Assembly, the Governor and the Supreme Court.

The minority view of the Committee is that these four recommendations are not within the purpose of the Committee. Additionally, no data or evidence was ever presented nor discussed regarding these four recommendations. These recommendations were not discussed or voted on during the Committee's statutory tenure, which expired on December 31, 2009. These recommendations have nothing to do with studying the reforms enacted in 2003 by the General Assembly.

(e) Other states' studies of incremental, additional costs of capital punishment cases.

In recent years, a number of studies have been conducted to estimate whether and to what extent seeking a death sentence is more costly than seeking a sentence of imprisonment for life without parole or a term of years. The authors of these studies

accurate analysis of capital punishment in Illinois can be undertaken. The Illinois Criminal Justice Information Authority has been authorized "to collect and retain in the Capital Crimes Database all information on the prosecution, pendency, and dispositions of capital and capital eligible cases in Illinois. The Capital Crimes Database shall serve as a repository for all of the foregoing collected information." 720 ILCS 3930/7.6(b). For the past several years, the Committee has recommended that the General Assembly should appropriate funds for the implementation and operation of the Database Act. Fourth Annual Report, pp. 24-25; Fifth Annual Report, pp. 15-19.

have consistently found that seeking a death sentence is more expensive than seeking a sentence of imprisonment.¹⁵²

The additional expense is a result of several factors. Capital trials are longer and more complex than non-capital trials and require more time expended by lawyers, investigators, experts, support personnel, judges and court staff, all paid by the state and/or local governments. The appellate and other post-conviction proceedings in cases that result in death sentences are lengthier and more demanding of lawyer and judicial resources than in non-death cases. The incarceration of death row inmates is more expensive than that of inmates sentenced to life or terms of years.

In Appendix 10, we have provided summaries of studies from the following states: Arizona (2002) - California (2008) - Connecticut (2003) - Indiana (2010) - Kansas (2003) - Maryland (2008) - New Jersey (2007) - New York (1982 and 2005) - North Carolina (1993 and 2009) - South Carolina (2008) - Tennessee (2004) - Washington (2006). Also included are summaries of studies done for the United States Judicial Conference (1998), and the Death Penalty Information Center (2009).

¹⁵² In *Furman v. Georgia*, 408 U.S. 238, 358 (1972), Justice Thurgood Marshall in dissent recounted factors which contribute to greater costs of capital cases, and concluded, "When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."

A number of members of the Committee believe that these studies are not relevant to the purpose of the Committee, that being the studying of the effect of the 2003 reforms enacted by the General Assembly that directly relate to the administration of capital punishment in Illinois.

9. Other consequences of the Illinois capital punishment system.

The Committee's inquiries during the past years have disclosed that the Illinois capital punishment system has other collateral consequences, beyond those discussed above.

(a) The switch of costs from a county to the State when the death penalty is involved.

The filing of a Notice of Intent to seek the death penalty has the immediate effect of switching most of the costs of processing the case from the county of prosecution to the State-funded CLTF.

The Committee was informed by judges and lawyers that in several downstate counties, State's Attorneys have served Notices of Intent to seek capital punishment, and just before trials were to begin, withdrew the notices; and that it appeared (or was suspected) that the notices were filed for the purpose of transferring the costs of investigation and trial preparation from the local county to the CLTF. The motive for doing this was attributed to economic pressure on prosecutors owing to a shortage of funds in county budgets to pay for the cost of

investigation and trial preparation. We wrote about this in our Third (page 25) and Fourth (pages 31-33) Annual Reports.

A trial judge said that, in deciding whether or not to serve a capital punishment notice, there are often strong budgetary and public relations incentives for elected State's Attorneys to take advantage of the availability of funds from the CLTF, rather than using county funds to pay the expenses of first degree murder cases. Another judge said this pressure exists in almost all downstate counties. One of our own knowledgeable Committee members, who is involved in capital trials, said he suspected, although he could not prove, that some State's Attorneys from sparsely populated downstate counties filed Notices of Intent to seek the death penalty in order to avoid having the costs paid with county funds. We were also told, as stated in our Fourth Annual Report (page 33) that when this occurred, and the Notices of Intent were withdrawn on the eve of trial, the appointed defense lawyers immediately lost the ability to obtain fees from the CLTF for trial preparation, expert witnesses, and fees for the trial itself. Instead, they were required to seek funding from county boards, which often were not receptive to their requests, and/or had inadequate funds to meet the requests.

The Cook County State's Attorney's office accounts for the majority of cases noticed for capital treatment, because most murders in Illinois occur in Cook County. Almost 300 Notices of Intent were filed in Cook County from March 2001 to July 2010.

In most of those cases the Notices of Intent were withdrawn, and the cases disposed of through plea agreements to sentences of terms of years, or non-capital trials.

During the period 2003 through 2009, the State's Attorney of Cook County charged the CLTF almost \$16 million, most of which was for salaries and training of Assistant State's Attorneys, investigators, paralegals, and other personnel. Six of the 17 capital sentences imposed during those seven years were Cook County prosecutions, whereas the State's Attorneys in the counties in which the other 11 death sentences were imposed billed the CLTF slightly over \$2 million.¹⁵³

(b) The additional costs incurred by Public Defenders in capital cases, and effects on their budgets and their abilities to properly represent their indigent clients.

When a capital Notice of Intent is filed, the defense lawyers immediately begin to prepare not only for the guilt phase, but also for the penalty phase, which entails hiring mitigation specialists and other experts who will attempt to find justifications for not imposing the death penalty on the defendant in the event he/she is found guilty of a capital eligible murder. Indeed, we have been told that the Cook County Public Defender, knowing the propensity of the State's Attorney to seek capital punishment in a large percent of first degree capital-eligible murder cases (witnesses at our public hearings estimated between 20 and 25%

¹⁵³ See Appendix 8.

of murder cases that were capital-eligible¹⁵⁴), often begins to prepare for the penalty hearing promptly upon indictment, without waiting for the filing of a Notice of Intent.

The testimony we heard was that the number of capital cases being handled by the Cook County Public Defender “hovers around 140.”¹⁵⁵ We were also told that many judges in Cook County permit the State’s Attorney to file Notices of Intent beyond 120 days from indictment, without an order granting an extension of time.¹⁵⁶

The cost of processing capital cases at the trial court level is substantially increased, because of the additional procedures involved (for example, pre-trial discovery depositions), the heightened pressures on both prosecution and defense when a human life is at stake, and the three (rather than one) hearings that occur in capital cases, described in Part 2 above. Even when, as often happens, the State’s Attorney withdraws the request for capital punishment prior to trial, or after the guilt/innocence hearing, a great deal of additional effort and expenses have been incurred that would not have been incurred

¹⁵⁴ Public hearing 2/26/07, 98-101, and 119-130.

¹⁵⁵ Public hearing 1/26/09, J. Harmon, 115 at 117.

¹⁵⁶ Public hearing 1/26/09, J. Harmon 115 at 130-131. *See People v. Hill*, note 14 above.

had the case not been designated for capital treatment in the first instance.¹⁵⁷

In the larger public defender offices, death-noticed cases are assigned to a specialized group of lawyers, who promptly employ investigators, experts and mitigation specialists, who investigate not only guilt-innocence issues, but also - in anticipation that at the guilt phase trial the defendant is found guilty - whether there is a factual basis to trigger a statutory eligibility factor; and in compiling evidence for presentation at the sentencing phase in the event the defendant is found to have committed a death eligible murder. The eligibility and penalty phase trials commence at the end of the guilt phase trial, without time for the defense lawyers to assemble mitigating evidence, so that it must be prepared in advance.

The defense lawyers in the great majority of Illinois capital cases are employed by the Cook County Public Defender. In counties outside Cook, the State's Attorneys Appellate Prosecutor and the Attorney General often assign lawyers to assist in the prosecutions, and the Appellate Defender often assigns lawyers to assist the local defense lawyers; these lawyers' salaries are

¹⁵⁷ These kinds of unnecessary costs also affect the prosecution, because the State's Attorney's office assigns experienced prosecutors and investigators to these cases, and retains experts to testify to Aggravating Factors that justify a death sentence, and to matters that are anticipated to be interposed by the defense during the eligibility hearing as to why the case is not eligible for capital treatment, and during the penalty hearing as to why a death sentence should not be imposed.

paid through their own office budgets. In counties without Public Defenders, and in Cook County when the Public Defender has a conflict of interest or other disabling circumstance, private lawyers are appointed to handle the defense of the cases; these lawyers are paid through the CLTF.¹⁵⁸

In the surveys sent to Public Defenders, 70% responded that there were insufficient resources available to their offices to handle death-eligible murder cases, while 30% responded that the resources were adequate. In contrast, 65% of the prosecutors surveyed responded that the resources were adequate, and 35% answered that resources were inadequate.¹⁵⁹

At our public hearings, the Committee learned of the negative financial impact of death-certified cases on the Cook County Public Defender. As noted above, Cook County has far more murders than the rest of the state, and most of the indicted defendants are indigent; hence the Cook County Public Defender is responsible for defending almost all Cook County murder indictments. The Committee was told that, owing to the large number of death notices filed by the Cook County State's Attorney, the Public Defender's case load of capital cases and related expenses are so great, during the past several years the

¹⁵⁸ From 2003 through 2009, appointed lawyers received almost \$18.5 million from the CLTF for fees and expenses (Appendix 8).

¹⁵⁹ 60% of State's Attorneys responded that cost does not reduce the likelihood of their seeking the death penalty. SA survey, Q.5.8.

Public Defender's office has exhausted its CLTF budget four to five months before the end of the fiscal year. As a result, the office has been unable to pay its outside consultants and experts until long after their bills are due. This has resulted in many of their most valued experts refusing to continue working on the Public Defender's cases, which in turn impairs the Public Defender's ability to properly defend the cases.¹⁶⁰

The Committee heard the following testimony:

- Bernard Sarley (former Assistant Cook County Public Defender, now Associate Judge) told the Committee that the State's Attorney files a Notice of Intent in about one out of every four murder indictments. He commented, "I don't think 150 people charged with murder in Cook County are the worst of the worst." He stated that the high number of murder cases that are noticed for capital punishment has caused the Cook County Public Defender to fall far behind in paying expert witnesses and other essential costs, which resulted in some experts refusing to work on new cases, and thus creating serious problems for the proper handling of the cases.¹⁶¹

- Julie Harmon, the Cook County Public Defender Capital Case Coordinator, also spoke to the Committee about the ability

¹⁶⁰ As noted above, unlike the Cook County State's Attorney, the Cook County Public Defender does not apply for reimbursement from the CLTF for Assistants' or investigators' salaries.

¹⁶¹ Public hearing 2/26/07, 79 at 98-101.

of the Public Defender to provide adequate representation to their indigent clients:¹⁶²

“The vast majority [of the Public Defender’s money from the CLTF] is used to pay for expert witnesses, most commonly mitigators, psychiatrists, psychologists, and forensic examiners. A much smaller portion is used for investigations, training and equipment...It is far too small a sum, however, given the number of pending cases, which consistently hovers at 140.”

Ms. Harmon said that the number of capital cases has for several years depleted the office’s CLTF monies months before the end of the fiscal year, with the result that “Quality experts are becoming discouraged and many have indicated an unwillingness to work on cases with this office due to the long stretches, often four to six months, without being paid.” Ms. Harmon continued:

“... a large percentage of the [CLTF] is wasted working up those cases that are technically death penalty eligible but are not ultimately treated as such at trial, and for which these sums would not have been spent had they been properly designated as non-capital from the start.

* * *

“Capital punishment in Illinois is not reserved for the worst of the worst when 20 to 25 percent of all murder cases are [designated as] capital. The fact of the low percentage of cases in which the State actually seeks death [and] results in a death sentence is not a

¹⁶² Public hearing 1/26/09, 115 at 116-18, 132; see *also* PD written submission, pp. 1-2.

factor of positive reform as much as it is a factor of the State insisting on going forward with ‘capital cases’ that have no business being charged as such... We have many cases that before trial the State will say, If you take 30 years or 40 years, we’ll take death off the table. Well, if the case is worth 30 or 40 years, is it a death case? I think those are troubling situations.”

(c) The relative balance of bargaining positions during plea negotiations in capital cases.

The filing of a death penalty notice also has a potential impact on the bargaining positions of the parties when the time comes – as it does in a majority of felony cases – for the lawyers to meet and discuss a disposition in which the defendant will plead guilty, and the lawyers will agree (with the defendant’s agreement) to recommend that the defendant be sentenced to a penalty other than death. The bargaining positions are skewed, with the State’s Attorney holding the threat of a death sentence over defense counsel, which often has a pronounced negative impact on the ability of the defense lawyer’s negotiating power regarding the agreed term of years.¹⁶³

Regan McCullough, Research Assistant, Illinois Coalition to Abolish the Death Penalty (ICADP), compared the number of cases in which Notices of Intent are filed with the number of those

¹⁶³ In the report entitled Tennessee’s Death Penalty: Cost and Consequences (July 2004), summarized in Appendix 10, the Comptroller of the Treasury Office of Research reported, “[s]urveys and interviews indicate that others [prosecutors] used the death penalty as a ‘bargaining chip’ to secure plea bargains for lesser sentences.”

cases that are resolved by agreement and the notices are withdrawn by the prosecutors. She concluded: “The trend seems to suggest that prosecutors will seek the death penalty as a way to use it as a plea bargain to secure a conviction or a long sentence.”¹⁶⁴ She also submitted written materials that include statistics showing “It seems that the death penalty has been used more often as a plea bargaining tool. The trend seems to suggest that prosecutors will seek the death penalty in order to secure a conviction and long prison sentence.” She submitted an article from a local newspaper which quotes the then State’s Attorney of Kane County as saying “he will continue to seek death penalty sentences as long as the crimes meet the eligibility factors,” and “Why go into a plea bargain without all the bullets in your [the State’s Attorney’s] gun? In a negotiating situation, you can say, ‘You roll the dice on this one and you lose, you get death.’”¹⁶⁵

Ms. McCullough’s written submission also states, “...many of the cases resolved by prosecutors involved crimes of a magnitude equal to or greater than ones in which the defendant received the death penalty,” with three examples cited. “These include the life without the possibility of parole plea of Larry Bright for the murder of eight women in Peoria County, the life without parole sentence for quadruple murderer Kevin Taylor in Cook County and the 40

¹⁶⁴ Public hearing 11/13/06, at 20-21; written submission, p. 2.

¹⁶⁵ Public hearing 11/13/06, ICADP written submission, attached Daily Herald, July 18, 2006, headlined “If you lose, you get death.”

year sentence for triple murderer Dennis Scott in Sangamon County.”¹⁶⁶

Michael A. Kreloff, speaking on behalf of the Chicago Council of Lawyers, told of how, when he was a Cook County Assistant State’s Attorney, he was “aware of the use of qualifying factors as a way to impact the case even if there was no real expectation of a death penalty being imposed.”¹⁶⁷ At the same public hearing, Kevin Lyons, State’s Attorney of Peoria county, said:

“You know, everybody has their role. But there is a value of leverage for the prosecution when the defendant knows that a death penalty case is, can be considered by the prosecutor, and it does, so it does have a leverage tool where the defendant’s attorney, of course, can come and say, look, I have a client that might be interested in pleading to something different if you can take this off the table. So it has its value, but it’s, in the courtroom it’s almost as though we wink about it and go about our life.”¹⁶⁸

Andrea Lyon spoke about her experiences in cases in which she believed Notices of Intent were filed in order to put pressure

¹⁶⁶ *Id.*, ICADP written submission, p. 7. See also discussion of Jane Bohman, ICADP Executive Director, relating to State’s Attorneys seeking the death penalty in cases involving mentally ill defendants, youths under 21 years of age, and mothers suffering from post-partum depression. *Id.* 114 at 117. Also, discussion of Marlene Martin, National Director of the Campaign to End the Death Penalty, *Id.* at 154 at 159-60.

¹⁶⁷ Public hearing 3/2/09, 5 at 12.

¹⁶⁸ *Id.*, 41 at 51.

on the defendant and defense attorney to negotiate for a plea of guilty to a term of years. Ms. Lyon stated that when that happens, “it certainly has an effect on what I might advise a client to do because...your chances of winning anything go down dramatically with a death qualified jury....”¹⁶⁹

Following Ms. Lyon’s statements to the Committee, we heard from Joseph Birkett, DuPage County State’s Attorney, who said, “...this suggestion that prosecutors are overcharging and seeking death to leverage a plea is not true. Not in this current era it’s not. And I think Ms. Lyon is probably mixing what happened pre-reform and post-reform....such conduct, while it may be legal, is questionable in terms of ethical responsibility of the prosecutors. That is not happening.” He concluded, “So every State’s Attorney in the state is following the Guidelines.” As to the source of his knowledge about the practices of each of the 102 Illinois State’s Attorneys Mr. Birkett responded, “I know because I have interaction with State’s Attorneys across the state and have had for several years.”¹⁷⁰

(d) The risk of geographic and racial disparities.

As explained in Part 15(d), the Committee’s expert consultants from Loyola University found, based upon their analysis of relevant data, that there still exists in Illinois a greater likelihood that a person charged in a rural county with first degree

¹⁶⁹ Public hearing 1/26/09, at pp. 33-36.

¹⁷⁰ *Id.* at 47-48; see also pp. 60, 77-78.

murder will be given the death penalty.¹⁷¹ The Committee's experts determined that there is insufficient data to determine whether the racial disparities found by the Governor's Commission experts still exists in Illinois. Their conclusions are illustrated in the charts attached as Appendix 6.

(e) *Damages paid to men wrongfully convicted and sentenced to death, 1989 through 2009.*

The chart attached as Appendix 11 shows that over \$64 million has been paid to men who were released from death row in Illinois, and for the payments made for defending against their cases and claims.¹⁷²

Although settlements with these wrongfully convicted defendants may have been made even if they were not sentenced to death, it is a fair inference that greater compensation was paid because they were held for years facing execution, in isolated death row cells, separated from the general prison population. Accordingly, when the additional cost of the capital punishment system is calculated, part of these amounts should be taken into account.

¹⁷¹ Rural counties are defined as those that are not within a Standard Metropolitan Statistical Area as defined by the U.S. Census Bureau.

¹⁷² None of these convictions occurred after the 2003 reforms were enacted by the General Assembly.

10. Reforms related to the Capital Litigation Trust Fund.

(a) Abuses of the CLTF by appointed defense lawyers.

The Committee was informed about several problems that have arisen with the administration of the CLTF.

First, a few defense lawyers have applied for fees and expenses in excessive amounts. The major offender was a court-appointed defense lawyer in the Cecil Sutherland case, tried in Jefferson County in 2004.¹⁷³ Publicity about this case, and other alleged abuses of the CLTF, resulted in amendments being enacted to the CLTF enabling statute, effective January 2010.¹⁷⁴ Trial judges now must require court appointed defense lawyers to provide a litigation budget under seal; no payment may be made from the CLTF without a properly itemized and detailed bill, examined *ex parte*, and approved by both the trial and presiding judges as reasonable, necessary and appropriate for payment from the CLTF. The Illinois State Treasurer is authorized to conduct an independent review of applications for payments from the Fund, and within 14 days of receipt the Treasurer may return the certification to the trial court explaining why the compensation and expenses are deemed to be unreasonable, unnecessary or

¹⁷³ See discussions, Second Annual Report at 9, and Third Annual Report at 24-25.

¹⁷⁴ After this lawyer's abuse of the CLTF came to light and was publicized, a judge in another county permitted that lawyer to remain as private defense counsel in a different capital case (now pending), and did so despite the same judge having found that lawyer incompetent defense counsel in a non-capital case.

inappropriate. The appointed lawyer has seven days to respond, and the trial court must promptly rule on the Treasurer's objections.¹⁷⁵

The Committee members believe these provisions will provide a major step toward preventing the kinds of abuses that have come to light in the past.

Second, as described above, if a State's Attorney files capital notices in order to transfer costs from local counties to the State, this has a ripple effect that some defense lawyers reported: with capital punishment no longer a potential penalty, and therefore CLTF funds no longer available to appointed defense lawyers, they are required to seek payment for their fees and expenses from local county boards, who may not be receptive to their applications for payment, or may be unable to pay their fees and expenses.¹⁷⁶

The overall reports the Committee received confirm that, despite these problems, the CLTF is being operated properly, and helps to "level the playing field in capital litigation."¹⁷⁷ Nevertheless, as to the future, at the Committee's final meeting in December 2009, the following Comment was approved unanimously:

¹⁷⁵ 725 ILCS 124/10(a)(b).

¹⁷⁶ Fourth Annual Report at 33.

¹⁷⁷ See discussions, Third Annual Report at 24, and Fifth Annual Report at 21.

Since public attention was called to the CLTF's occasional misuses, the General Assembly has passed some reforms giving judges and the State Treasurer more gateway control over CLTF disbursements. We commend the legislature for taking this action. It is our conclusion that these improvements were a needed and helpful reform, but we believe it is too soon to evaluate long term whether those improvements will be adequate to prevent other abuses of the funds.

(b) Use of CLTF funds for forensic testing.

With regard to funding for forensic testing from CLTF, the Governor's Commission recommended, No. 26:

"The provisions governing the Capital Litigation Trust Fund should be construed broadly so as to provide a source of funding for a forensic testing pursuant to 725 ILCS 5/116-3 when the defendant faces the possibility of a capital sentence."

The Committee members are satisfied that the CLTF statute is being applied consistently with this recommendation.

(c) Appropriation of CLTF funds for downstate prosecutors and defense lawyers.

The Committee was informed that funds for the CLTF had not been appropriated to pay prosecutors and defense lawyers for fees and expenses incurred in capital cases. At its meeting on December 17, 2009, the members unanimously adopted the following recommendation:

The General Assembly should fully fund the Capital Litigation Trial Fund for the trial expenses, and where appropriate the appellate expenses, of the

prosecutor and defense of capital prosecutions in all areas of the state.

(d) Availability of CLTF funds for victims' services.

At its final meeting on December 17, 2009, the Committee made a recommendation regarding an amendment to the CLTF statute to pay costs for victims' services:¹⁷⁸

A statutory amendment should be adopted to the Capital Litigation Trust Fund statute 725 ILCS 124/15 to authorize payment for victims' services in capital punishment prosecutions.

Matters relating to compensation for families of homicide victims are discussed in greater detail in Part 18 below.

11. Reforms related to training of prosecutors and defense lawyers - the Capital Litigation Trial Bar.

The statute establishing this Committee provides that we are to study and report on "The implementation of training for police, prosecutors, defense attorneys, and judges as recommended by the Governor's Commission on Capital Punishment," and "The quality of representation provided by defense counsel to defendants in capital prosecutions."¹⁷⁹

In 2001, the Illinois Supreme Court adopted Rule 714, entitled Capital Litigation Trial Bar (CLTB), which requires that all

¹⁷⁸ Approved by vote of 6 to 2, with 2 abstentions. The two dissenters did not oppose the proposal for additional funding for victims, but stated they believe the appropriate source of funds for victims is through the Crimes Victim's Compensation Act, discussed in Part 18(b) below.

¹⁷⁹ 20 ILCS 3929/2(b)(2), (4).

lawyers who participate in capital cases (except the Illinois Attorney General and elected or appointed State's Attorneys) must receive certification as members of the Capital Litigation Trial Bar (CLTB), in order "to insure that counsel who participate in capital cases possess the ability, knowledge and experience to do so in a competent and professional manner." Rule 714(a). Each lawyer who applies must be "an experienced and active trial practitioner with at least five years of criminal litigation experience," and have "prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, two of which were murder prosecutions." Rule 714(b).¹⁸⁰ Provisions are made for continuing education, involving "at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme court within each two-year period following admission to" the CLTB. Rule 714(g).

(a) The quality of representation in capital cases.

A summary of CLTB training for prosecutors and defense lawyers during 2007 through 2010 is attached as Appendix 12.

Approved CLTB training programs for prosecutors are provided, among others, by the Attorney General, the State Appellate Prosecutor, and the Cook County State's Attorney. During 2007, the Cook County State's Attorney conducted a two-

¹⁸⁰ Several past and current members of this Committee are certified CLTB members.

day capital punishment training session in Chicago, with approximately 180 Assistant State's Attorneys in attendance, and a 12-hour training course in Springfield. Assistants have also attended conferences of the Association of Government Attorneys in Capital Litigation, the National College of District Attorneys, and other state and local organizations.

The Cook County Public Defender Office has held training courses for those who wish to become members of the CLTB on the defense side. The State Appellate Defender Office has offered a four-day capital punishment trial education course, and trial education classes for third chair lawyers in capital cases. These courses have been evaluated and approved by the Administrative Office of Illinois Courts. The State Appellate Defender also makes available to defense non-lawyer personnel a volume entitled "Forensic Social Historian," to assist in preparation of mitigation evidence for the penalty phase of capital cases. Assistants have also attended conferences of the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, and other state and local organizations.

Prosecutors, defense lawyers and judges who have participated in capital trials have informed us that the CLTB, and the training courses provided, have been major factors in improving the quality of the representation of both prosecution

and defense in capital cases.¹⁸¹ Responses to our survey to State's Attorneys and Public Defenders reflected satisfaction with training and available resources.¹⁸² Clear majorities of both State's Attorneys and Public Defenders stated that their opponents in the courtroom have sufficient experience and competence to handle capital cases.¹⁸³

Based upon the information available to us, we believe the quality of lawyers on both sides in capital cases meets or exceeds appropriate standards.

(b) The difficulty in obtaining defense lawyers in some downstate counties.

In the Third Annual report, the Committee stated that trial judges in certain downstate areas have encountered problems in locating members of the CLTB who are willing to undertake capital defense by appointment (pages 23-24). As a result, the presiding judge is placed in the position of seeking (or sometimes beseeching) a CLTB qualified attorney to serve, who may be required to travel from an inconvenient distance to defend a

¹⁸¹ See Fourth Annual Report, at. 35-37. Defense attorney Peter Wise told the Committee that it has been his observation that the CLTB training has been excellent, and the CLTB has raised the standards of the lawyers who defend capital as well as non-capital cases. Public hearing 3/2/09, 78 at 107-08.

¹⁸² SA and PD surveys, Q.1.3, 1.6

¹⁸³ SA and PD surveys, Q.6.8. The judicial survey did not include a question relating to competency of the trial lawyers.

capital case; in some instances, CLTB members whose offices are located outside Illinois have been appointed.

Assistant Attorney General Richard D. Schwind, Co-Chair of the Committee, an experienced trial lawyer who has prosecuted a number of capital cases outside of Cook County, observed that he had encountered areas in the state in which it was difficult to find a CLTB qualified defense lawyer. Mr. Schwind asked Robert Haida, State's Attorney of St. Clair County, whether this was a problem in southern Illinois. Mr. Haida responded, "Yes, I think it is a problem. Our circuit, the 20th Judicial Circuit, has five counties, and...in the southernmost county in the Circuit, court is probably 65 miles away....we have St. Clair County defense lawyers that are being called to that county to defend the cases because they don't have anybody in that county to do it. And ...even the attorneys [in St. Clair County] who practice criminal [defense] law, a very small percentage of those are certified."¹⁸⁴

In response to the Committee's judicial survey, over three-quarters of the trial judges stated they believe there are enough defense attorney members of the Capital Litigation Trial Bar to effectively handle death-eligible murder cases in the judges' jurisdictions; slightly over 20 percent responded in the negative.¹⁸⁵ Asked whether there are sufficient resources available to handle

¹⁸⁴ Public hearing 11/13/06, 74 at 83-84.

¹⁸⁵ J survey 1Q.9.

death-eligible cases in their jurisdictions, 72% of the judges answered Yes, and 28% answered No.¹⁸⁶

The survey sent to Public Defenders asked, “Are the *number* of defense attorneys (either private or within the Public Defender’s Office) who are members of the Capital Litigation Trial Bar sufficient to effectively handle death-eligible cases in your jurisdiction?” (Emphasis in original.) Excluding those who answered that they did not know, two-thirds answered Yes, and one-third answered No.¹⁸⁷

This situation suggests a need for action by state and local bar associations, to urge lawyers to consider becoming qualified members of the CLTB, and current members to accept appointments when requested.

12. Reforms related to trial preparation.

(a) Discovery depositions.

In 2001, the Illinois Supreme Court adopted Rule 416(e)(i), authorizing the taking of discovery depositions in capital cases:

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

¹⁸⁶ J survey 1Q.11.

¹⁸⁷ PD survey Q.1.3.

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.

Five trial judges to whom Committee members spoke stated that they believed the depositions were working well; one said depositions aid the judicial process by preventing surprise at trial.¹⁸⁸ Approximately 60% of the trial judges who responded to the Committee's judicial survey stated they believe depositions in capital cases improve processing of the cases.¹⁸⁹

The surveys we sent to State's Attorneys and Public Defenders yielded a wide difference in views toward this rule. In response to the question, "Do you believe that allowing depositions in capital cases improves the processing of these cases?", two-thirds of prosecutors responded No, while over 80% of Public Defenders answered Yes.¹⁹⁰

The matter was discussed during the Committee's public hearings. A Cook County Assistant State's Attorney (then a member of this Committee), speaking on behalf of the Office, stated that "Depositions are an important reform to enable the truth finding process to go forward."¹⁹¹ An experienced private

¹⁸⁸ Fourth Annual Report, p. 38.

¹⁸⁹ J survey, 3Q.4.

¹⁹⁰ SA and PD surveys, Q.5.6.

¹⁹¹ Public hearing 11/13/06, G. Nora at 6; to the same effect, J.E. Birkett, State's Attorney of DuPage County, public hearing 1/26/09, 42 at 61.

defense lawyer explained how he was assisted in preparing for trial by having the opportunity to depose State witnesses, including several prosecution experts and police officers.¹⁹² A veteran Cook County Public Defender described Rule 416(e) as “an outstanding reform.”¹⁹³

Several judges, prosecutors and defense lawyers said they believed the words “good cause” should be defined more precisely, in order to avoid disputes, and disparities among trial judges.¹⁹⁴

In light of the views expressed by lawyers for both sides, the Committee submits the following recommendation:

The Illinois Supreme Court Rules Committee should better define the meaning of the words “good cause” in Rule 416(e).

¹⁹² Public hearing 3/2/09, D. P. Wise, 78 at 85-87, 94, 110-11; see also A. Lyon, public hearing 1/26/09, 6 at 14.

¹⁹³ Public hearing 2/26/07, B. Sarley, Assistant Cook County Public Defender, 79 at 93. Mr. Sarley also pointed (p. 95) out that the Cook County State’s Attorney “almost all the time” opposed his applications for permission to take depositions. See also public hearing 1/26/09, J. Harmon, 115 at 118.

¹⁹⁴ Fourth Annual Report, p. 38; Assistant Cook County State’s Attorney G. Nora, public hearing 11/13/06, at 4; St. Clair County State’s Attorney R. Haida, at 82-83; Assistant State Appellate Defender S. Richards, public hearing 2/26/07, 24 at 25-28; Assistant Cook County State’s Attorney A. Spellberg 74 at 75-77; Assistant Public Defender B. Sarley, 75 at 95-96.

(b) Pretrial hearings regarding informants.

Responsive to a recommendation of the Governor's Commission,¹⁹⁵ a statute was enacted in 2003 relating to capital cases "in which the prosecution attempts to introduce evidence of incriminating statements made by the accused to or overheard by an informant" while they were incarcerated together in a penal institution.¹⁹⁶ The trial judge is required to hold a pretrial hearing "to determine whether the testimony of the informant is reliable." The state has the burden of proof by a preponderance of the evidence that the informant's testimony is reliable; if the state fails to do so, "the court shall not allow the testimony to be heard at the trial." The statute contains a non-exclusive list of factors for the trial judge to consider in determining whether the informant's testimony is reliable.

The information on this subject that the Committee obtained through its surveys indicated that few of these hearings have occurred, but in the few cases in which the statute has been invoked, the system is working well, and has contributed to the efficient handling of informant testimony in several capital cases.¹⁹⁷

¹⁹⁵ Gov. Comm. Rec. 52.

¹⁹⁶ 725 ILCS 5/115-21.

¹⁹⁷ SA and PD surveys, Q.6.6; see also Fourth Annual Report, pp. 37-38; Public hearing 1/26/09, R. Warden 79 at 99-100.

(c) Case management conferences.

In response to our surveys, the value of pretrial case management conferences in processing capital cases was affirmed by 80% of trial court judges, and 70% of States Attorneys and Public Defenders. Approximately 80% of judges, prosecutors and defenders believe the conferences should be held on the record.¹⁹⁸

13. Reforms related to trial judges, and reports of their experiences in capital cases.

(a) Training.

The statute establishing this Committee provides that we are to study and report on “The implementation of training for ... judges as recommended by the Governor’s Commission on Capital Punishment.”¹⁹⁹

In 2001, the Illinois Supreme Court adopted Rule 43:

(a) In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing Capital Litigation Seminars approved by the Supreme Court shall be established 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

¹⁹⁸ J survey 4Q.4 and 5; SA and PD surveys Q.6.4 and 6.5.

¹⁹⁹ 20 ILCS 3929/2(b)(2).

in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year.

(b) 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 Seminar at least once every two years.

From the interviews Committee members have had with trial judges, prosecutors and defense lawyers who have been engaged in capital cases since 2003, including the testimony we heard from various groups during our four public hearings, and responses to the surveys to State's Attorneys and Public Defenders, we are satisfied that the level of competence for judges in capital trials equals or exceeds the requisite standards.²⁰⁰

DuPage County Joseph Birkett made the following recommendation regarding training, to be attended not only by judges, but also by prosecutors and defense lawyers, which we believe merits consideration:²⁰¹

“where there’s an opportunity to discuss issues, an open forum, so to speak....We need to do more of that across the state, not just judicial conferences, defense bar conferences, prosecutor conferences, but do some cross training where, in addition to the formal training,

²⁰⁰ Third Annual Report, pp. 21-22; Fourth Annual Report, p. 37; SA and PD surveys, Q.6.7.

²⁰¹ Public hearing 1/26/09, 42 at 71.

you have an opportunity to share ideas and to talk. Maybe we could break down some walls.”

As we explain in the following sections, we believe that the judicial training should include discussions about the standards for ruling on applications under Rule 416(e) to take discovery depositions.

Based on information provided to us, we made the following recommendation in our Third Annual Report (p. 23), which we repeat here:

The Administrative Office of the Illinois Courts should create a publicly accessible electronic list of trial court judges who have received capital case training, and the training each judge received.

(b) Control of prosecution and defense budgets.

The Committee heard comments from several trial court judges, prosecutors and defense lawyers about the potential for abuse of the CLTF by defense lawyers, in particular a case tried in Jefferson County. This subject is discussed in greater detail in Part 10(a) above.

(c) The quality of evidence used during capital prosecutions.

The statute which created this Committee provides that we are to study and report on “the impact of the various reforms on the quality of evidence used during capital prosecutions.”²⁰²

²⁰² 20 ILCS 3929/2(b)(3).

The Governor's Commission recommendation relating to testimony of jailhouse informants is discussed above. Other recommendations of the Commission regarding the quality of evidence have not been acted upon either by the General Assembly or the Illinois Supreme Court, namely: (1) Illinois Supreme Court rule defining "exculpatory evidence"; (2) a requirement that any discussions with a witness or witness' representative concerning benefits or detriments conferred on a witness by any prosecutor, police official, correction official, or anyone else, should be reduced to writing and disclosed to the defense in advance of trial; (3) that when determining motions to suppress confessions, trial judges should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him, or the likelihood of his guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession; and (4) experts may be helpful in appropriate cases, and should be determined by trial judges on a case-by-case basis.²⁰³

These matters remain to be addressed by the General Assembly and the Supreme Court.

14. Reforms related to jury instructions and jury questionnaires.

Both the Governor's Commission and this Committee have recommended that three jury instructions be adopted by the

²⁰³ Gov. Comm. Recs. 49, 50, 53, 55.

Illinois Supreme Court Committee on Pattern Jury Instructions - Criminal.²⁰⁴ At a meeting in December 2009, a majority of the Committee members adopted the recommendations set forth in subparagraphs (a), (b) and (c) below, embodying the instructions to be given if supported by the evidence.²⁰⁵

(a) *Jury instructions regarding testimony of jailhouse informants.*

The Committee adopted the following recommendation for jury instruction regarding informant testimony by vote of 8 to 5:

The State has introduced the testimony of an in-custody informant as to a statement allegedly made by the defendant. This testimony is to be examined and weighed by you with care. Whether the in-custody informant's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making this determination, you should consider: (1) whether the in-custody informant has received anything, or expects to receive anything, in exchange for his/her testimony; (2) any other case in which the in-custody informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the in-custody informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the in-custody informant has ever changed his/her testimony; (4) the criminal history

²⁰⁴ Gov. Comm. Recs. 56, 57 and 58.

²⁰⁵ A majority of the Committee members present (7 to 6) voted that this Committee is authorized by its enabling statute to make these recommendations relating to jury instructions.

of the in-custody informant; and (5) any other evidence relevant to the in-custody informant's credibility.

The minority view is that this recommendation goes beyond the scope of the Committee's authority. Further, no evidence or data was reviewed that indicated that a jury instruction change was needed.

(b) Jury instructions regarding unrecorded testimony as to what defendant said about the crime.

The Committee recommended by vote of 8 to 5 that the following instruction be given when testimony (other than the testimony of the defendant) is introduced as to what the defendant said concerning the crime:

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. An electronic recording that contains the defendant's actual voice or a statement written by the defendant may be more reliable than a non-recorded summary.

The minority view of the Committee is that this recommendation is beyond the scope of the Committee's authority. Further, this type of instruction highlights certain evidence, which is improper under Illinois law. The instruction

informs the jury what weight to give a particular piece of evidence. In addition, there was no evidence presented to the Committee that the current jury instruction is faulty or in need of change.

(c) Jury instruction regarding testimony of eyewitnesses.

The Committee recommended by vote of 7 to 5 that Illinois Pattern Jury Instruction IPI 3:15 should be amended to add a final sentence which states:

Eyewitness testimony should be carefully examined in light of other evidence in the case.

The minority view of the Committee is that this recommendation exceeds the authority of the Committee. In addition, there has been no evidence presented to the Committee that the current jury instruction is faulty or ineffective and in need of change. No evidence was presented to the Committee that the reforms enacted in 2003 regarding this issue have not been effective. This again highlights certain evidence to the jury, contrary to Illinois law.

No action has been taken with respect to any of these recommendations by the Illinois Supreme Court or its IPI-Criminal Committee. The Chair of the IPI Committee explained the lack of action on the basis that the IPI Committee's authority is limited to preparing instructions that embody existing statutory or case law. Some members of the Committee believe that this position is inconsistent with the IPI Committee's historical function and practices, as illustrated by several instructions the IPI Committee

and the Supreme Court have approved and published²⁰⁶ and that these instructions are consistent with current studies, existing law common sense and improving the fair administration of justice.²⁰⁷

(d) Jury instructions related to the penalty hearing.

The Committee considered jury instructions that should be given to the jury during the penalty hearings in capital trials.

Recommendations for jury instructions during the penalty phase

²⁰⁶ See, e.g., IPI 1.01 (2000) “The Functions of the Court and the Jury”; IPI 1.03 “Arguments of Counsel”; IPI 2.02 “Information—Indictment—Complaint Not Evidence”; IPI 2.03 “Presumption of Innocence—Reasonable Doubt—Burden of Proof Generally”; IPI 3.11 “Prior Inconsistent Statements”; IPI 4.19 “Definition of Clear and Convincing Evidence”; IPI 8.12 “Definition of Putative Father-Child Abduction.” The Committee notes to IPI 1.03 and IPI 2.02 explain that those instructions are appropriate reinforcements of concepts already expressed to the jury. The Committee note to IPI 2.03 states that the instruction concerning the presumption of innocence and the State’s burden to prove guilt is a “touchstone of American criminal jurisprudence.” The Committee note to IPI 4.19 explains, “Because the Committee found no Illinois case or statute directly on point, the Committee derived this instruction from *State v. King*, 158 Ariz. 419, 763 P.2d 239 (1988).” The Committee note to IPI 8.12 defines the term “putative father” with the definition drawn from Black’s Law Dictionary, and from usage in other cases, because the Illinois statute does not define the term. Jury instructions in the three areas discussed above were recommended by the Massachusetts Governor’s Council on Capital Punishment, Report at pp.19-20.

²⁰⁷ See, for example, *Bucyrus-Erie Co. v. Gen. Prods. Co.*, 643 F.2d 413, 418 (6th Cir. 1981): “The purpose of jury instructions is to inform the jury on the law and to provide proper guidance and assistance in reaching its verdict.”; *Ray v. Am. Nat’l Red Cross*, 696 A.2d 399, 405 (D.C. Cir. 1997); “The purpose of all instructions to the jury is to ‘guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth.’” quoting 9A Charles A. Wright & Arthur R. Miller, *Fed’l Practice & Procedure* §2556, at 438 (2d ed. 1995).

were adopted by a majority vote. Because of the length of the instructions, we have included them in Appendix 13.

The minority view of the Committee is that the recommended instructions contained in Appendix 13 exceed the authority of the Committee. In addition there has been no evidence presented to the Committee that the current jury instructions are faulty or in need of change.

(e) Jury questionnaires.

Surveys distributed to State's Attorneys, Public Defenders and Judges asked about their experiences with the use of juror questionnaires developed specifically for screening potential jurors for service on death-eligible cases. Results from the survey were generally consistent across all three groups. Among those that had experience with jury selection in death-eligible cases, more indicated that they did use juror questionnaires than did not. For example, among State's Attorneys responding to the survey, just over one-half indicated the use of juror questionnaires. Among public defenders, roughly 70% indicated the use of juror questionnaires, as did almost 60% of the judges. Most respondents who commented on this question stated jury questionnaires were useful, and ensured that, through the joint development by the prosecution and defense, with judicial approval, specific questions were asked during jury selection.

15. Racial and geographic disparities in the application of the death penalty in Illinois, 2003 through 2009.

(a) The General Assembly's direction to this Committee respecting discrimination in the application of the death penalty.

The statute creating this Committee contains a specific reference to the Governor's Commission experts' findings of geographic and racial discrimination, and a direction to the Committee to study and report to the General Assembly as to:

The impact of the reforms on the issue of uniformity and proportionality in the application of the death penalty including, but not limited to, the tracking of data related to whether the reforms have eliminated the statistically significant differences in sentencing related to the geographic location of the homicide and the race of the victim found by the Governor's Commission on Capital Punishment in its report issued on April 15, 2002.²⁰⁸

We have reproduced in Appendix 14 the Summary of Major Conclusions and Recommendations made by the Governor's Commission experts on this subject.

(b) The Governor's Commission experts' findings of geographic and racial discrimination in application of the death penalty in Illinois.

Experts retained by the Governor's Commission examined data regarding all defendants who were convicted of first degree murder and sentenced between January 1, 1988 and December 31, 1997. From their examination of the data, they concluded that

²⁰⁸ 20 ILCS 3929/2(b)(1).

there was a statistically significant greater risk of imposition of the death penalty when the homicide was committed in a rural rather than an urban or collar county area, and when the victim was white rather than non-white (offenders convicted of murdering whites are more likely to receive the death penalty, and blacks who kill whites are more likely to receive the death penalty compared to blacks who kill blacks).²⁰⁹ The experts found no significant difference in the race of the offender.

(c) *The recommendations of the Governor's Commission experts regarding geographic and racial disparities in the application of the death penalty.*

In light of their finding that there was a “lack of high-quality data that is needed to measure additional factors that may affect death penalty decision making,” the Governor's Commission's experts submitted two recommendations:²¹⁰

First, there is a “necessity for the Illinois Supreme Court, as the body responsible for reviewing death penalty cases, to pay special attention to issues of proportionality. They suggested that the Court undertake what is known as Proportionality Review (or Comparative Proportionality Review), in which the Supreme Court would “consider a comparison between cases in which the death

²⁰⁹ See Technical Appendix to Governor's Commission Report (March 20, 2002), at pages iii and 18-19, and 22, also published in *Race, Region, and Death Sentencing in Illinois, 1988-1997*, G. L. Pierce & M. L. Radelet, 81 *Oregon Law Review* 39 (2002).

²¹⁰ Gov. Comm. Report, Technical Appendix, pages 22-24, attached as Appendix 14.

penalty was imposed and other death-eligible cases with equal levels of aggravation and mitigation in which the defendant was sentenced to a prison term.”

Second, the experts stated:

To conduct a meaningful proportionality review, officials will need to construct, maintain, and use a database on Illinois homicides....A monitoring system built on a foundation of comprehensive high-quality data can be used to help ensure that race and other inappropriate factors are not involved in death sentencing decisions, and to help ensure that pure arbitrariness...does not permeate sentencing.

(d) This Committee’s findings regarding geographic and racial discrimination.

Geographic disparities. The research done by this Committee’s expert consultants, summarized in the chart attached as Appendix 8, indicates that geographic disparity has been reduced but not eliminated following enactment of reforms in 2003.²¹¹ Based upon an analysis that went through calendar year 2009, the data illustrate that a defendant indicted of a capital-eligible first degree murder was three times more likely to receive

²¹¹ A downstate trial judge told Committee members that there are pressures on prosecutors in small counties in his circuit to seek the death penalty for every defendant in the few capital-eligible homicides indictments, because murder is especially abhorrent to members of the community. Fourth Annual Report, p. 32, note 12. See also testimony of Peoria County State’s Attorney K. Lyons, public hearing 3/2/09, 41 at 70-72.

a death sentence if he was indicted and convicted in a county outside Cook County.

Racial disparities. As to racial discrimination, the Committee's experts concluded that there is insufficient reliable data to determine whether there still exists in Illinois a significant racial disparity in capital sentences, that is, whether it is more likely that a murder of a white person will result in a death sentence than a murder of a non-white person.²¹²

As noted in Part 16(d) below, the Committee members unanimously recommend that the Capital Crime Database Act be funded, and that the data collected include the race of the defendants and victims.

16. Reforms related to judicial review of capital sentences.

(a) *The Governor's Commission proposal regarding the power of trial judges to overturn capital sentences imposed by juries.*

The Governor's Commission recommended that after a jury renders a capital sentence, the trial judge should be required to indicate whether he/she concurs in the result. If he/she does not

²¹² Witnesses at the Committee's public hearings expressed frustration at their inability to obtain accurate statewide information about the number of first degree murder indictments that are capital eligible, the number of Notices of Intent filed, and the results of those cases. Public hearings 11/13/06, R. McCullough, 19 at 23-24; P. McAnany 15 at 25, 30; ICADP written submission at pp.7-8; public hearing 1/26/09, R. Warden, 79 at 111-12, and J. Ryan 154 at 178-79.

concur, the judge shall sentence the defendant to a sentence other than death.²¹³

The General Assembly did not adopt the Commission's recommendation. Instead, a statute was enacted that gave the trial judge authority, in the event he/she did not concur in a jury's determination that death is the appropriate sentence, to set forth the reasons in a writing as a part of the record for appellate review.²¹⁴

The minority observes that the Committee has found no evidence that the reform enacted is ineffective.

(b) The Governor's Commission proposal to expand the powers of the Illinois Supreme Court when reviewing capital cases.

In light of its experts' findings, a majority of the Governor's Commission made the following three-part recommendation, regarding the Illinois Supreme Court's consideration of appeals in capital cases:²¹⁵

In capital cases, the Illinois Supreme Court should consider (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating

²¹³ A majority of the Governor's Commission also recommended that if the number of eligibility factors was reduced to the recommended five factors recommended by a majority of the Committee, the mandatory alternative sentence should be natural life. Gov. Comm. Report, 152-53.

²¹⁴ 720 ILCS 5/9-1(g).

²¹⁵ Gov. Comm. Rec. 70.

circumstances indicates that death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty issued in similar cases.”

Factor (3) is directly related to the findings of geographic and racial discrimination found by the Governor’s Commission experts. This recommended review power envisions that the Illinois Supreme Court, when considering appeals from cases involving capital sentences, will engage in what is known as proportionality (or comparative proportionality) review. In this process, the Court would compare the facts of each capital case that comes before it to all other similar death-eligible homicide cases indicted in Illinois during a chosen number of past years (for example, the past three, four or five years); these other cases would comprise the universe.²¹⁶ The comparison is done for the purpose of identifying those cases that are most similar to the case before the Court. Having selected from the universe the cases having “equal levels of aggravation and mitigation,” the Supreme Court would compare the outcomes in those cases to

²¹⁶ The universe would include all capital-eligible first degree murder cases (that is, cases in which the facts included one or more Aggravating Factors) indicted during a chosen period of years, *including* cases in which (1) no Notice of Intent was filed, and (2) in the penalty hearing it was determined that the defendant should not receive the death penalty, but *excluding* cases in which (1) in the guilt hearing the defendant was acquitted of first degree murder, and (2) in the eligibility hearing the defendant was found not eligible for capital punishment.

the sentence of death imposed on the defendant in the case before the Court:

- If the Court found that death was the sentence imposed in the comparable cases, the Court would reject an argument based upon comparative proportionate review, and uphold the death sentence.

- If the Court found that death was not imposed in the comparable cases, the Court would consider reducing the sentence to a term of years of imprisonment consistent with the statutory non-capital penalties provided.²¹⁷

Instead of enacting the concepts embodied in Recommendation 70, a statute was enacted in 2003 providing that the Illinois Supreme Court may overturn a death sentence and order imprisonment “if the court finds that the death sentence is fundamentally unjust as applied to the particular case.”²¹⁸ The Illinois Supreme Court has discussed this statute in a number of

²¹⁷ See, for example, *People v. Szabo*, Ill.2d 327, 351-52 (1983): “...this court has a duty to ensure that cases in which the death penalty is imposed are rationally distinguished from those in which it is not imposed. (*People v. Gleckler*, (1980), 82 Ill.2d 145, 166.) Rationality, consistency, and evenhandedness in the imposition of the death penalty are constitutionally indispensable. [Citing United States Supreme Court cases.]”; see also *People v. Ballard*, 206 Ill.2d 151, 179, and 215-17, (Justice McMorrow concurring) (200).

²¹⁸ 720 ILCS 5/9-1(i).

cases since 2003, but has not overturned a death sentence on the basis of a “fundamentally unjust” finding.²¹⁹

The Supreme Court has power to determine the scope of its review in both criminal and civil cases,²²⁰ but has taken no steps designed to implement the Commission’s Recommendation 70. Instead, both before and after the reforms were enacted in 2003, the Court has expressly declined to undertake comparative proportionality review.²²¹ The Court has not compared the facts of any of the capital cases it has reviewed since January 1, 2003 to any of the other post-2002 capital cases it has reviewed, or to any other post-2002 capital-eligible cases, including those in which Notices of Intent were filed by the State’s Attorneys. Nor has the General Assembly funded the Capital Crimes Database Act, discussed in part (d) below.

²¹⁹ *People v. Mertz*, 218 Ill.2d, 54 and 91 (2005); *People v. Thompson*, 222 Ill.2d 1, 36 and 52 (2006); *People v. Urdiales*, 225 Ill.2d 354, 452 (2007); *People v. Ramsey*, Docket No. 105942, pp. 84-85 (2010).

²²⁰ See, e.g., *Grollemond v. Indus. Comm’n*, 5 Ill.2d 541, 542 (1955).

²²¹ *People v. Richardson*, 123 Ill.2d 322, 363 (1988); *People v. Mertz*, 218 Ill.2d 1, 94-95 (2005); *People v. Thompson*, 222 Ill.2d 1, 47-48 (2006). The Committee has discussed this matter in its Third (Pages 19-21), Fourth (pages 21-25), and Fifth (pages 10-19) Annual Reports. In a few pre-2003 cases, the Illinois Supreme Court overturned capital sentences on the basis that they were not warranted by the facts, but these cases are few and far between, the last decided in 1997. See, e.g., *People v. Crews*, 42 Ill.2d 60, 65-66 (1969); *People v. Walcher*, 42 Ill.2d 159, 166 (1969); *People v. Carlson*, 79 Ill.2d 564, 587-91 (1980); *People v. Gleckler*, 82 Ill.2d 145, 161-71 (1980); *People v. Buggs*, 112 Ill.2d 284, 293-95 (1986); *People v. Johnson*, 128 Ill.2d 253, 277-82 (1989); *People v. Leger*, 149 Ill.2d 355, 408-14 (1992); *People v. Smith*, 177 Ill.2d 53, 97-101 (1997).

That is where the matter rests today, precisely as it was before the Governor's Commission made Recommendation 70.

The minority observes that the Committee has found no evidence that the reform enacted has been ineffective.

(c) This Committee's recommendations concerning collection of data needed for the Supreme Court to conduct comparative proportionality review.

Owing to the absence of a readily available source of information by which to judge to what extent, if any, racial disparities still exist in the Illinois capital punishment system, and to what extent, if any, State's Attorneys are filing notices seeking the death penalty in cases that do not involve the "worst of the worst" crimes and criminals, this Committee has recommended that data be gathered from official sources which will enable objective analyses on those critical subjects. The Committee's Third Annual Report, published in April 2007, contains the following recommendation:

The General Assembly should enact legislation, or the Illinois Supreme Court should enact a rule, mandating the creation of a statewide capital crimes database, and a repository and monitoring system for the data collected.

As explained by the Governor's Commission experts, this database is an essential source of information for the Illinois Supreme Court to conduct comparative proportionality review, and thus attempt to insure that the Illinois capital punishment

system is not infected by discrimination – geographic, racial, or otherwise – and that the imposition of capital punishment is applied on an equal basis throughout the State; and is reserved strictly to those whose crimes fall at the very end of the spectrum. We have set forth in Appendix 14 (page 22), the admonition of the Governor’s Commission experts: “A monitoring system built on a foundation of comprehensive high-quality data can be used both to ensure that race and other inappropriate factors are not involved in death sentencing decisions, and to help insure that pure arbitrariness (inequities not attributable to either legal or non-legal factors) does not permeate sentencing.”

(d) The Capital Crimes Database Act.

Responsive to this Committee’s recommendation, in 2007 the General Assembly enacted the Capital Crimes Database Act (20 ILCS 3930/7.6), which directs the Illinois Criminal Justice Information Authority (ICJIA) to “collect and retain in the Capital Crimes Database information on the prosecution, pendency, and disposition of capital and capital eligible cases in Illinois.”

Agencies that are “required to provide information on capital cases to the ICJIA as the ICJIA may request” for the Database, are the Attorney General, Department of Corrections, State Police, all county State’s Attorneys and Public Defenders, and Appellate Prosecutor and Appellate Defender. The Administrative Office of Illinois Courts and all county circuit court clerks may be

“requested to provide information on capital cases to the ICJIA for the Database.”²²²

In previous reports, we have called attention to the estimate of the former Executive Director of the ICJIA that consolidating and analyzing the data will cost approximately \$100,000 annually, not including costs the ICJIA will incur to carry out the statutory mandate to “develop rules to provide for the coordination and collection of information in the Capital Crimes Database,” and “procedures and protocols for the submission of information relating to capital and capital eligible cases to the data base in conjunction with the agencies submitting the information.”²²³ We have explained in detail why this database of information is essential to the proper, equitable operation of a criminal justice system which includes capital punishment.²²⁴

To date, no funds have been appropriated for the implementation of this provision, or for the creation or maintenance of the database called for in the Act. Our Committee did not have the resources to compile a complete data base for proportionality review. Accordingly, we have twice recommended that the General Assembly and the Governor take

²²² 20 ILCS 3930/7.6, §§7.6(d)(e).

²²³ §§7.6(c)(f).

²²⁴ Fourth Annual Report, pages 22-25; Fifth Annual Report, pages 15-19.

the necessary steps to provide adequate funding for the database.²²⁵ We repeat that recommendation in this Report:

The General Assembly and the Governor should take the steps necessary to provide the funding necessary to implement the collection, recording, coding, arrangement, comparison and analysis of the data in a professional manner, as called for in the statute mandating creation of a 'Capital Crimes Database,' 20 ILCS 3930/7.6.

The Committee also submits the following additional recommendation:

Information collected for the Capital Crimes Database should include data regarding the races of the defendants and victims.

Unless these recommendations are implemented, and an accurate database established, the Illinois Supreme Court will be unable to conduct the comparative proportionality review that is essential to ensure that capital sentences are imposed only upon those who are found guilty of the most extremely heinous offenses.

17. Reforms related to Illinois forensic laboratories.

This Committee spent considerable time dealing with issues concerning Illinois forensic laboratories, chiefly those owned and operated by the State. Committee members met with officials of the State labs a number of times, and laboratory officials attended

²²⁵ Fourth Annual Report, page 25; Fifth Annual Report, page 19.

a number of our full Committee meetings, both in person and by telephone. Our members also attended meetings of the statutorily created Illinois Laboratory Advisory Committee (ILAC).²²⁶

(a) A description of the Illinois forensic laboratory system.

Forensic laboratories in Illinois are both publicly and privately owned and operated. The Illinois laboratories are operated by personnel of the Illinois State Police. Although some management personnel have been given military-type titles (for example, Commander), they are trained, accredited scientists, not strictly law enforcement personnel.²²⁷ There are also a number of laboratories operated by individual counties (for example, DuPage Sheriff's Laboratory), and laboratories operated by a combination of local law enforcement agencies (for example, the Northern Illinois Crime Laboratory), as well as several privately owned laboratories.

In the Committee's Third Annual Report (pp. 26-27), we described the State labs and the ILAC:

“The Illinois State Police (ISP) provides crime scene and forensic services to many criminal justice agencies. The ISP forensic science laboratory system

²²⁶ Note: See Second Annual Report, pp. 8, 12; Third Annual Report, pp. 26-30; Fourth Annual Report, pp. 41-48; Fifth Annual Report, pp. 20-27; minutes of Committee meeting July 7, 2009, pp. 7-9; minutes of Committee meeting September 22, 2009, p. 8; minutes of Committee meeting December 17, 2009, p. 18.

²²⁷ Gov. Comm. Report, p. 53.

is the third largest crime laboratory system in the world. All ISP labs are certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD). In 2005, the ISP forensic science lab system became accredited by the International Organization for Standardization (ISO). The State Police Department is required by statute to report to the Governor and the General Assembly 'the extent of the backlog of cases awaiting testing or awaiting DNA analysis.' 730 ILCS 5/5-4-3a.

"In 2004, the Illinois General Assembly established the Illinois Laboratory Advisory Committee (ILAC). 20 ILCS 3981/5. The statute mandates that the responsibilities of the ILAC, among others, are to examine ways to make more efficient use of State laboratories, including facilities, personnel and equipment; to examine ways to reduce laboratory backlogs; to make recommendations regarding staffing and funding needs to ensure resources that allow for accurate, timely and complete analysis of all samples submitted for testing; and to make recommendations regarding accreditation and quality assurance as it applies to laboratory testing that will be in compliance with recognized International Organization for Standardization and applicable professional standards."²²⁸

In the Fifth Annual Report, the Committee detailed a number of continuing problems experienced in the State laboratory system,²²⁹ which we summarize below. The Committee made a

²²⁸ See also Fourth Annual Report, pp. 41-42.

²²⁹ Fifth Annual Report, pp. 20-27.

number of recommendations to the Illinois General Assembly regarding the State labs, also discussed below.

(b) The Governor's Commission's recommendations, and action taken to implement them.

The Governor's Commission made a series of recommendations regarding the role of forensic laboratories in capital cases. Following is a summary of those recommendations, and the action taken to carry them into effect.

(1) An independent State laboratory.

The Governor's Commission recommended:

"An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision."²³⁰

The Commission explained.²³¹

"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. 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."

²³⁰ Gov. Comm. Rec. 20.

²³¹ Gov. Comm. Report, p. 52. The Report also contains an explanation of the dissenting members' views at pp. 53-54.

The General Assembly has taken no action to implement this recommendation.

(2) The need for funding to reduce the backlog in processing DNA samples, and to correct salary discrepancies and other serious problems besetting the State laboratory system.

The Governor's Commission made several recommendations on this subject:

- No. 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."

- No. 23: The Federal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database."

The Committee's comments on the adequacy of funding for State labs appear in the following sections.

(3) Statutory authorization for a defendant in a capital case to apply for an order to obtain a search of the DNA database to identify others who may be guilty of the crime.

The Governor's Commission made the following recommendation, No. 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."

In 2003, pursuant to this recommendation, a statute was enacted authorizing trial judges to order that the defendant's DNA be compared to others' DNA in the Illinois State Police database, and if appropriate criteria are met, to order the State Police Department to request a comparison to the National DNA index system.²³²

The statute which established this Committee requires it to study and report on the effect of this reform (among others), including the impact on the quality of evidence used during capital trials.²³³ Members of this Committee are informed that this statute is being applied properly by members of the Illinois judiciary.

(c) This Committee's recommendations regarding funding for State labs.

The Committee summarized its findings and concerns on the matter of DNA testing in prior reports.²³⁴ During meetings and conversations the Committee held with officials of the State forensic laboratory, the Committee was told repeatedly of funding problems that have impaired the labs from processing requests for DNA testing in an effective and timely fashion. Several years ago, several hundred DNA samples were outsourced to a private lab for testing; errors requiring re-testing were disclosed, resulting

²³² 725 ILCS 5/116-5.

²³³ 20 ILCS 3929/2(b)(3).

²³⁴ Third Annual Report, pp. 27-29; Fourth Annual Report, pp. 46-47; Fifth Annual Report, pp. 25-27.

in retesting all of the samples, causing further loss of time and efficiency. During the Committee's July 7, 2009 Committee meeting, it was told that representatives of the Illinois State Police Crime Laboratory informed members of Subcommittee 4 that there were 829 untested DNA samples in the ISP system awaiting analysis, and that 359 samples have been outsourced for testing to Cellmark, Inc., a private laboratory.

Two-thirds of the trial judges responded to the Committee's survey that murder trials have been delayed due to delays in receiving results from forensic laboratories.²³⁵

Many of the problems experienced by the State labs, including the DNA backlog, are related to the lack of adequate funding for appropriate salaries of supervisors and for additional competent scientists. Rather than repeating the complexities of the problem — and the ripple effect on timely DNA testing, hiring and promotions, pensions, overcrowding in existing facilities, repair and replacement of existing scientific equipment, and purchasing of new scientific equipment, and physical condition of the facilities and equipment — we call readers' attention to the discussions contained in previous Committee annual reports: Third at pages 26 to 30; Fourth at pages 42 to 48, and Fifth at pages 20 to 27. In addition, responses to our surveys repeat the problem: More than half of the reporting law enforcement departments and prosecutors, and 70% of Public Defenders, have

²³⁵ J survey 3Q.5.

experienced delays in receiving evidence and forensic results from the state crime labs in murder investigations and trials.²³⁶

The officials of the State laboratories expressed frustration at their inability to obtain the attention, a hearing or a meeting, with members of the Illinois General Assembly. For this reason, this Committee twice made the following recommendations in its Fourth and Fifth Annual Reports:

*Salaries and pensions of scientists in the Illinois forensic science laboratories should be raised to a level compatible with those in other states and the private sector, and steps should be taken to eliminate the unnatural salary discrepancies that have developed in Illinois forensic science laboratories, as explained in the 2006 and 2007 reports of the Illinois Laboratory Advisory Committee.*²³⁷

*Representatives of the General Assembly Judiciary Committees and the Chair of the ILAC should discuss and attempt to resolve the concerns expressed by the ILAC Chair.*²³⁸

At the Committee's final meeting on December 17, 2009, the Committee approved the following recommendation unanimously:

The Committee repeats the recommendation it made at page 27 of its Fifth Annual Report: Representatives of the General Assembly Judiciary Committee and the Chair of the ILAC should discuss

²³⁶ LE survey Q.72; SA and PD surveys, Q.4.3.

²³⁷ Fourth Annual Report, p. 45.

²³⁸ Fourth Annual Report, p. 48, and Fifth Annual Report, p. 27.

*and attempt to resolve the concerns expressed by the ILAC Chair.*²³⁹

18. Reforms related to the families of Illinois homicide victims.

(a) Introduction.

In its report, the Governor's Commission addressed the matter of providing assistance to surviving family members of homicide victims, as well as to 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." The Commission explained (footnotes omitted):²⁴⁰

"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."

* * *

"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

²³⁹ Minutes of Dec. 17, 2009, p. 18.

²⁴⁰ Gov. Comm. Report, pp. 192-93.

services, assistance with claims, court-related services and system wide services. Needs may change as victims, or the surviving family members of homicide victims, progress through the criminal justice system 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.”

Although this Committee’s enabling statute does not refer to reforms relating to those affected by homicides, Committee members agreed unanimously that we should include several recommendations in our final report on this important subject.

(b) Existing resources and programs for victims.

The existing provisions of Illinois law relating to assistance and compensation for crime victims are contained in the Illinois Crime Victim’s Compensation Act (CVCA).²⁴¹

The CVCA provides for compensation to be paid to spouses and relatives of persons who are killed or injured during commission of crimes. The Act requires claimants to notify law enforcement officials, depending on the crime committed, within either 72 hours or seven days after the crime, and to file application for compensation in the Illinois Court of Claims within two years. The Court of Claims may hold hearings, and enter

²⁴¹ 740 ILCS 45/17.

order fixing the amount of compensation, which is limited to a total of \$27,000, minus amounts received by the claimants for government medical or health insurance, public aid, workers compensation, Social Security or VA burial benefits, life, accident or liability insurance, civil damage awards, or any other source. Emergency compensation awards of \$2,000 may be made by the Attorney General.

The Act provides that law enforcement agencies that investigate crimes shall inform victims or dependants of the availability of compensation under the CVCA.

There are a number of existing programs and official organizations designed to assist victims of crime, including victims of homicides. They include (1) the Illinois Automated Victim Notification System (AVN), (2) the Illinois Attorney General Crime Victim Services Division, (3) the Attorney General's Crime Victim Assistance Line, (4) the Attorney General's Crime Victim Compensation Program, (5) the Illinois Victims Assistance Academy, (6) the Cook County State's Attorneys Office Victim Witness Assistance Unit, and (7) various other county victims assistance programs and victims advocates.²⁴²

During our public hearings, a number of persons provided us with insight into the needs of families and loved ones of murder

²⁴² For example, Parents of Murdered Children, Bereaved Parents of the USA and The Compassionate Friends. IllinoisVictims.Org is a resource referral and advocacy organization for homicide victims' families.

victims, and of those who witness murders (peripheral or collateral victims). In the following portion of this report, when the terms “victim” or “victims” are used, we refer to all of those persons.

(c) *Witnesses’ statements regarding the shortcomings of the present method of paying for the needs of victims.*

The Committee has been told by a number of knowledgeable persons that the monies available for victims through the CVCA are often insufficient to meet their needs, especially when the deceased provided the chief financial support for family.²⁴³ A member of IllinoisVictims.Org and the National Coalition of Victims in Action stated that victims’ services in Illinois are tied directly to court proceedings against an accused murderer, so that if a perpetrator is never caught and prosecuted, or if the prosecution is delayed, victims do not receive the services of a victim advocate. They often do not know that they are eligible for funds from the CVCA, or from the few other victim services that may be available in their communities, such as counseling. Also, when the trial court proceedings end, few if any of the funds or services are made available for victims’ ongoing needs.²⁴⁴ The Committee was told that the CVCA allows a maximum of \$1,000 per month for lost wages, and \$1,000 for burial expenses, with an overall maximum of \$27,000 per victim

²⁴³ Many of these same concerns were discussed in the Governor’s Commission Report, pages 193-194.

²⁴⁴ Public hearing 2/26/07, J. Bishop-Jenkins, 59 at 60-62.

per crime. These amounts have proven to be inadequate when serious injuries are suffered by the victims.²⁴⁵ Another member of Illinois Victims.org echoed many of these concerns. She told the Committee of the needs many victims have for money travel to and from court and the Prisoner Review Board, child care, and a room apart from where the defendant's family meets. She proposed that victims receive funding from the CLTF.²⁴⁶

The Committee was addressed by a representative of the Murder Victims Families for Human Rights, an organization of family members of murder victims. She stated that victims should be reimbursed adequately for burial expenses, travel to court proceedings, hotels, caregivers, child care, and counseling for the emotional trauma suffered by victims, especially those who witnessed killings. Also many victims require support to replace the lost earnings of the deceased, tuition payments for children, medicines, food, lodging, and the like.²⁴⁷ She said there is no state funding for ongoing counseling for victims.²⁴⁸

²⁴⁵ 740 ILCS 45/1 et seq.

²⁴⁶ Public hearing 3/2/09, D. Larson, 18 at 28.

²⁴⁷ Public hearing 11/13/06, J. Bishop-Jenkins, 32 at 34-35, 40-41; public hearing 2/26/07, Chicago, J. Bishop, 9 at 12-14.

²⁴⁸ Public hearing 2/26/07, J. Bishop, 9 at 17; see also pp. 18-23. Ms. Bishop told us of bullets being sprayed through a window into a room at which a birthday party was in progress, attended by thirty 11 year-old girls. One of the girls was shot in the head and died; the others fell to the floor and survived. None of the survivors - the peripheral victims - received any services from the State, although many were deeply traumatized, and required counseling. Id. at 62-63.

At a public hearing in January 2007, we were told that in Cook County there is a victims' services staff of about 60, but their function is "primarily only to navigate [victims] through the legal system, call them up and tell them, 'Look, you have to go to a hearing, you have got a trial, you have got to be there. I will help you get there, I will sit with you during the trial.' There is no counseling Individual counseling is nonexistent."²⁴⁹

It was suggested to us that every county should have victims' services offered from the time of the crime, not dependent upon the existence of legal proceedings, which is extended as well to peripheral as well as direct victims.²⁵⁰

²⁴⁹ Public hearing 2/26/07, J. Bishop-Jenkins, 59 at 70. Ms. Bishop-Jenkins acknowledged that there are services available to victims through other county and state agencies, but "there is no organized outreach. There is nobody that has even informed [the victims] that those services might be available even if they did X, Y and Z, and tracked down those services, and if they fill out the appropriate paperwork to qualify for some low cost program. It's incredibly unvictim friendly, and right now the impetus is completely on the victims to initiate anything that happens to them, and what's worse is that is that with regards to this issue of parole in the Prisoner Review Board, the impetus is entirely placed on the victim to initiate the seeking of information about their cases..." (Id. at 78. See also public hearing 3/2/09, T. Sigwerth (mother of murdered son), 119 at 124-26, 134.

²⁵⁰ Public hearing 2/27/07, J. Bishop-Jenkins, 59 at 66. The Gov. Comm. Report states p. 193 (footnote omitted):

"The [Illinois Criminal Justice Information] 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. These individuals are also victimized

The information received by the Committee regarding the continuing needs of homicide victims mirrors the discussion in the Governor's Commission Report:²⁵¹

“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.”

(d) This Committee's recommendation for victims' funding from the Capital Litigation Trust Fund.

In Part 10(d) above, we set forth the Committee's recommendation, adopted at the Committee's final meeting in December 2009, for an amendment to the CLTF statute to authorize payment for victims' services in capital prosecutions. This will require a change to the CLTF statute, and consideration as to what amounts of money will be allocated to victims' services, and how the funds will be applied for, accounted for, and disbursed.

by the crime, although they may not have been physically harmed in the incident. Support services for them are important as well.”

²⁵¹ Gov. Comm. Report, p. 193.

- (e) *Witness statements regarding reforms that will ensure continuous, current advice to victims regarding the status of investigations, and judicial and post-judicial proceedings; for improvements in training for Victims Advocates; and for a statewide Victims Advocate department.*

Many of the persons who appeared at the Committee's public hearings to speak on behalf of victims told us of the pressing need for improvements in the ways in which services are rendered to victims, and the importance of improvements to the role of Victims Advocates. We were told that many counties have no position equivalent to a victims advocate, or the positions are part time, and that in other instances several counties share a single person for the task. The Committee was also told that there are frequent breakdowns in communications between victims and those responsible for contacting them. They emphasized the need to keep victims currently and continuously advised of the investigations and prosecutions related to homicides, and to inform victims of post-conviction proceedings, for example, appeals, dates and places of oral arguments, decisions rendered by reviewing courts, and hearings before the Prisoner Review Board after convictions have been finally confirmed by the courts.²⁵²

²⁵² Public hearing 11/13/06, J. Bishop-Jenkins, 32 at 39; public hearing 1/26/09, D. Larson 220 at 229-30; public hearing 3/2/09, D. Larson, 18 at 21-25, 28-29, 32, 36; T. Sigwerth, 119 at 124-26, 134.

We were told of shortcomings in many of the programs which provide the services of victims' advocates, whether through lack of training, lack of empathy or understanding of homicide victims' emotional trauma and needs, overwork, and the like. We received a recommendation that there be a statewide Victims Advocate office, separate from prosecutors' offices, to act as statewide ombudsmen, providing central control, and ensuring that victims of crimes have access to the kinds of services and information they ought to receive.²⁵³ We have been told by Committee member Ms. Bishop-Jenkins that the federal government and about half of the states have a victim ombudsman available to mediate complaints of violations of victims' rights.

A recommendation was also made to the Committee that the law require a seat on the Prison Review Board for a representative of victims.²⁵⁴

²⁵³Public hearing 11/13/06, J. Bishop-Jenkins 32 at 39. Testifying before she was appointed to the Committee, Ms. Bishop -Jenkins stated, "...the victims can sometimes, if they are emotionally tied to the prosecutor, as they are, the victims can be bound up in this win-lose scenario, like if the prosecutor doesn't win, I don't win. This is a very dangerous situation for victims emotionally." Ms. Bishop-Jenkins also said: "We should make sure that there is absolutely, in every single county, victim services that are offered from the point of crime that are not necessarily tied just to the prosecution of the case, that are also available for peripheral victims as well, and that can be ongoing for emotional support after the trial...to make sure that victims interests are represented no matter what the particular disposition of the case."]

²⁵⁴ Public hearing 2/26/07, J. Bishop-Jenkins, 59 at 66-67.

The Illinois Crime Victim's Compensation Act contains time limitations within which victims are required to notify law enforcement officials of the perpetration of the crime (7 days), and file an application for compensation with the Court of Claims (2 years).²⁵⁵ As a result, the Committee unanimously adopted the following recommendation:

*Training should be implemented throughout the state to all law enforcement and public officials that are first responders to murder scenes to insure that victims' families are told of their rights, as required by law.*²⁵⁶

(f) Victims' input into State's Attorneys' decisions regarding penalties to be sought, including proposed Notices of Intent to seek capital punishment, and proposed negotiated pleas of guilty.

The victim advocates who spoke at our public hearings did not directly address prosecutors conferring with victims and/or their representatives concerning whether to seek the death penalty, or what position to take regarding penalties when negotiating pleas of guilty with defense lawyers. Some, however, approached the subject indirectly, by pointing out that part of the

²⁵⁵ 740 ILCS 45/6.1. Compensation under the Act is a secondary source. The applicant must first exhaust all other sources reasonably available, including, but not limited to, any governmental, medical or health insurance programs.

²⁵⁶ Minutes of Committee meeting 12/17/09, page 20. This notification is required by the terms of the CVCA, 740 ILCS Sec.45/5.1(b), but training of law enforcement personnel is not required.

additional money necessary to prosecute capital cases could and should instead be used to assist victims.²⁵⁷

The State's Attorney of St. Clair County told the Committee that his policy is to obtain input from victims before making a decision about whether to seek the death penalty: "we get significant input from the victims."²⁵⁸

²⁵⁷ Public hearing 2/26/07, J. Bishop, 9 at 18, 22. Ms. Bishop told the Committee of a woman who was murdered by an abusive husband; the mother of the deceased woman was raising her three young grandchildren. The State's Attorney sought the death penalty. The grandmother told Ms. Bishop, "I need a new house. I need counseling for my kids. I need some help with this developmentally delayed child. How come the State has millions of dollars to give me something I don't need or want, which is the death penalty, and they can't help me with any of these things that I really do need." Ms. Bishop proposed that lawmakers "take the cost savings of abolishing the death penalty system and applying it not only for crime prevention but also toward services for victims" (Id. at 14-15). See also J. Bishop-Jenkins, 64 at 76; J. Bohman, 114 at 121: "The question really is whether what we are spending to pursue the death penalty over other options to protect public safety to the extent that they have a permanent or a very long prison sentence." Public hearing 1/26/09, J. Ryan, 154 at 167: "And I think that if the death penalty was not in play in our state, we would have more resources to devote all across the judicial system o make sure that the playing field was more level, and that the appropriate resources were sunk in finding out the truth."

²⁵⁸ Public hearing 11/13/06, R. Haida, 74 at 77. Mr. Haida went on to say: "We have certified in cases where the victim survivors asked us not to, ... what I always get from the victims is, most of the time, they are so appreciative of the opportunity just to talk to somebody about what they are going through... we've had people tell us we'll support whatever you do, our preference would be no, and we've balanced that with everything else, and sought it, and we've gone the other way. We've had victim survivors ... literally pound on the table demanding that we seek the death penalty, and we have, after considering all the facts and circumstances, including

The Death Penalty Decision Guidelines prepared by the Attorney General and the Illinois State's Attorneys Association provide:

“The State’s Attorney or his/her representative should consider the views expressed by the victim’s family in making the decision to seek or not seek the death penalty. The family should be advised that the decision regarding what penalty to seek is the State’s Attorney’s and although the family’s views are important, their views are only one factor in making the decision.”²⁵⁹

Members of the Committee are unanimously in accord with the policy stated in the Guidelines, but again observe that they are not legally binding recommendations.

(g) Amendment to the Illinois Constitution regarding rights of victims.

At our final meeting, the Committee discussed House Joint Resolution CA 19, which contains a proposal to amend the Illinois Constitution Bill of Rights, by creating an enforcement mechanism for the rights of crime victims, for example, to receive advance notification of court proceedings and postponements; to be

what they’ve had to say, and we’ve decided to decline to certify.” (Id. at 77-78.)

²⁵⁹ Guidelines, pages 8-9, citing *People v. Mack*, 105 Ill.2d 103, 473 N.E.2d 880, 85 Ill. Dec. 281 (1985).

present at hearings and trials; and to present written statements to the court about the impact a violent crime has had on them.²⁶⁰

The members voted to approve the following comment (5 to 2, with 3 abstentions):²⁶¹

We urge the General Assembly to give favorable consideration to an amendment to the Illinois Constitution Bill of Rights providing an enforcement mechanism for the rights of crime victims.

19. Conclusion.

The current and former members have been privileged to serve on this Committee.

²⁶⁰ The federal government and 33 other states have similar constitutional or statutory provisions acknowledging victims' rights and making them legally enforceable.

<http://www.victimlaw.info/victimlaw/pages/victimsRight.jsp>.

²⁶¹ Minutes of Committee meeting Dec. 17, 2009, pp. 22-23.

Respectfully submitted,


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cc: Illinois General Assembly:

Senate President and Minority Leader

House Speaker and Minority Leader

Governor, State of Illinois

Chief Justice, Supreme Court of Illinois

Past and current Committee members

October 28, 2010

Tab 1

Appendix 1

Recommendations

FUNDING FOR ELECTRONIC RECORDINGS

The General Assembly should continue to fund the statutorily mandated recordings of custodial interviews in homicide investigations, for expenses related to ongoing officer training, including refresher training, in the use of recording equipment and proper interviewing techniques. (p. 28)

The General Assembly should provide funding related to the statutorily mandated recordings of custodial interviews in homicide investigations, for expenses related to relating to purchase of electronic equipment, assuring equipment compatibility, sound proof rooms, reviewing and transcribing recordings, and storage of tapes and discs. (p. 35)

JURY INSTRUCTION REGARDING METHODS OF QUESTIONING

The Illinois Pattern Jury Instruction Committee should draft, and the Illinois Supreme Court should approve, pattern jury instructions explaining which methods may lawfully be used by law enforcement officers during custodial interrogations of suspects, and which may not, in accordance with rulings of the United States and Illinois Supreme Courts. (p. 37)

BLIND ADMINISTRATION OF EYEWITNESS IDENTIFICATIONS

If feasible, in homicide investigations, blind administration should be required of all eyewitness identification procedures. Blind administration may be achieved by use of either of two methods:

- (a) Use of a blind administrator. The administrator should not be aware of which person or photograph in the array is the police suspect and which are the fillers. The administrator should assign a number to each person in the array, and use that number when recording the witness' response.
- (b) Use of a blind method.

The use of a live lineup is not suitable for this method, because at some point the administrator will know that the witness is viewing the suspect.

When pictures are used, the administrator may know the identity of the suspect, but should not know which person in the array the witness is viewing. The administrator should assign a number to each picture, which must be placed in folders or displayed on a computer screen. The administrator should then shuffle the folders or computer screen pictures. The administrator should not be aware of the number or position of the suspect, and should not look at the pictures as the witness views them.

In using either method, the administrator may permit the witness to view the array more than one time, provided that the entire array should be shown to the witness each time. (pp. 42-43)

REPORT WHEN BLIND ADMINISTRATION NOT USED

If a blind administrator is not used in a homicide investigation, a contemporaneous written report should be prepared explaining why use of a blind administrator was not feasible. (p. 44)

USE OF SEQUENTIAL PROCEDURES

When a blind administration is used in a homicide investigation, sequential procedures should be used, that is, the persons or pictures should be displayed to the witness one at a time. Using the assigned numbers, the administrator should record in writing or electronically the witness' response to each person or picture, before showing the witness the next person or picture. (p. 55)

ELECTRONIC RECORDING OF EYEWITNESS IDENTIFICATION PROCEDURES

In homicide investigations, all eyewitness identification procedures should be electronically recorded by both audio and video equipment, subject to the following qualifications:

First, if an eyewitness identification procedure in a homicide investigation is not electronically recorded, a contemporaneous written report should be prepared explaining why making an electronic recording was not feasible. Second, the Illinois Eavesdropping Act¹ should be amended to permit electronic recording without the knowledge or consent of the participants.

¹ 720 ILCS 5/14-3(a)(1).

Third, the requirement of electronic recording of eyewitness identification procedures should take effect only after the Illinois Police Training and Standards Board and the Illinois Attorney General's Office have developed a model procedure for the electronic recordings, and have provided relevant training to local police and sheriff departments, and to the Illinois State Police. (pp. 57-58)

TRAINING FOR ADMINISTRATION OF EYEWITNESS IDENTIFICATIONS

The recommendations contained in paragraph 1 of the Law Enforcement memorandum, quoted on pages 59 and 60 of this Report, should be fully funded and promptly implemented. (p. 60)

REDUCTION OF ELIGIBILITY FACTORS

The number of statutory eligibility factors for capital punishment remains a serious question that ought to be addressed by the General Assembly. The eligibility factors should be reduced to the five recommended by the Governor's Commission majority, set forth in Part 6(a) of this Report. (pp. 67 and 94)

MEETINGS BETWEEN PROSECUTORS AND DEFENSE LAWYERS BEFORE NOTICE OF INTENT IS FILED

In first degree murder cases that are capital eligible, before a Notice of Intent is filed, and before expiration of the time for filing a Notice of Intent, representatives of the prosecution should be required to offer to meet in person with the defense lawyers to discuss whether the case should or should not be certified as a capital case, and whether to ask the court to extend the time within which a Notice of Intent may be filed. To make these discussions effective, defense lawyers are encouraged to provide mitigation evidence to the State's Attorney, so an informed decision may be made, after consideration of all of the circumstances of the case, whether to seek capital punishment. (p. 75)

STATEWIDE REVIEW COMMITTEE

Subject to constitutional limitations, a statewide committee should be established to review all decisions to seek capital punishment, with authority to approve or disapprove the State's Attorney's decision/position. (pp. 80 and 94)

FUNDING OF COST STUDY

The General Assembly should fund SR 297, which passed the Illinois Senate calling for a study into the costs associated with the death penalty in Illinois. We recommend that the Illinois General Assembly fully fund this study into the costs of the death penalty, enabling a needed cost-benefit analysis into the process that will better inform the public policy debate. (p. 82)

POWER OF TRIAL JUDGES TO OVERTURN JURY DEATH SENTENCES

Legislation should be enacted that gives trial judges power to overturn jury verdicts of death, and impose instead a sentence to a term of years. If the eligibility factors are reduced to the recommended five, the mandatory sentence should be natural life. (p. 94)

SUPREME COURT COMPARATIVE PROPORTIONALITY REVIEW

Steps should be taken to ensure that on appeal from a death sentence, the Illinois Supreme Court follows the prescriptions contained in Governor's Commission Recommendation 70, so that in all capital appeals the Court must engage in what is known as full comparative proportionality review. (p. 94)

FUNDING OF CLTF

The General Assembly should fully fund the Capital Litigation Trial Fund for the trial expenses, and where appropriate the appellate expenses, of the prosecutor and defense of capital prosecutions in all areas of the state. (p. 112-13)

DEFINE "GOOD CAUSE" IN RULE 416(e)

The Illinois Supreme Court Rules Committee should better define the meaning of the words "good cause" in Rule 416(e). (p. 120)

AOIC CREATE LIST OF JUDGES TRAINED FOR CAPITAL CASES

The Administrative Office of the Illinois Courts should create a publicly accessible electronic list of trial court judges who have received capital case training, and the training each judge received. (p. 124)

JURY INSTRUCTION REGARDING INFORMANT TESTIMONY

The State has introduced the testimony of an in-custody informant as to a statement allegedly made by the defendant. This testimony is to be examined and weighed by you with care. Whether the in-custody informant's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making this determination, you should consider: (1) whether the in-custody informant has received anything, or expects to receive anything, in exchange for his/her testimony; (2) any other case in which the in-custody informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the in-custody informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the in-custody informant has ever changed his/her testimony; (4) the criminal history of the in-custody informant; and (5) any other evidence relevant to the in-custody informant's credibility. (pp. 126-7)

JURY INSTRUCTION REGARDING DEFENDANTS' STATEMENTS

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. An electronic recording that contains the defendant's actual voice or a statement written by the defendant may be more reliable than a non-recorded summary. (p. 127)

JURY INSTRUCTION REGARDING EYEWITNESS TESTIMONY

Eyewitness testimony should be carefully examined in light of other evidence in the case. (p. 128)

JURY INSTRUCTIONS IN PENALTY HEARING

See Appendix 13

FUNDING OF CAPITAL CRIMES DATABASE

The General Assembly and the Governor should take the steps necessary to provide the funding necessary to implement the collection, recording, coding, arrangement, comparison and analysis of the data in a

professional manner, as called for in the statute mandating creation of a 'Capital Crimes Database,' 20 ILCS 3930/7.6. (p. 142)

DATABASE REGARDING RACE

Information collected for the Capital Crimes Database should include data regarding the races of the defendants and victims. (p. 142)

GENERAL ASSEMBLY REGARDING ILAC CONCERNS

Representatives of the General Assembly Judiciary Committee and the Chair of the ILAC should discuss and attempt to resolve the concerns expressed by the ILAC Chair. (pp. 149-150)

TRAINING REGARDING FIRST RESPONDERS ADVICE TO VICTIMS

Training should be implemented throughout the state to all law enforcement and public officials that are first responders to murder scenes to insure that victims' families are told of their rights, as required by law. (p. 159)

CLTF FUNDING FOR VICTIMS' SERVICES

A statutory amendment should be adopted to the Capital Litigation Trust Fund statute 725 ILCS 124/15 to authorize payment for victims' services in capital punishment prosecutions. (p. 113)

AMENDMENT TO CONSTITUTION REGARDING ENFORCEMENT OF VICTIMS' RIGHTS

We urge the General Assembly to give favorable consideration to an amendment to the Illinois Constitution Bill of Rights providing an enforcement mechanism for the rights of crime victims. (p. 163)

Tab 2

Appendix 2

Committee members

Leigh B. Bienen
Jennifer A. Bishop-Jenkins
James R. Coldren, Jr.
Kirk W. Dillard
James B. Durkin (7/12/07)*
Theodore A. Gottfried (9/19/07)*
Walter Hehner
Jeffrey M. Howard
T. Clinton Hull (4/14/09)*
Boyd J. Ingemunson
Thomas P. Needham (5/8/06)*
Gerald E. Nora (11/12/08)*
Edwin R. Parkinson
Charles M. Schiedel
Richard D. Schwind, Vice Chair
Geoffrey R. Stone
Randolph N. Stone
Thomas P. Sullivan, Chair
Jeffrey J. Tomczak (6/30/05)*
Arthur L. Turner
Michael J. Waller
Eric C. Weis

* Date resigned

Tab 3

Appendix 3

Full Committee meetings

2005

February 14
March 28
April 25
June 13
August 8
September 26
November 14
December 12

2006

January 23
February 27
March 22
April 10
June 19
September 7
October 23

2007

January 23
February 13
March 26
April 30
June 4
July 6
August 6
September 17
November 8
December 11

2008

January 28
March 4
April 8
May 14
June 12
July 22
September 17
October 22
December 4

2009

January 23
March 9
April 6
May 20
July 7
September 22
October 26
November 23
December 7
December 17

2010

August 24
September 7
October 13

Tab 4

Appendix 4

Subcommittee meetings

2005:

<u>Subcommittee 1</u>	<u>Subcommittee 2</u>	<u>Subcommittee 3</u>	<u>Subcommittee 4</u>
February 6	May 19	May 27	May 16
May 23	June 6	June 24 (joint	June 24 (joint
August 1	September 26	meeting with	meeting with
November 7	October 5	Subcomm. 3)	Subcomm. 3)
	November 8		October 14

2006:

<u>Subcommittee 1</u>	<u>Subcommittee 2</u>	<u>Subcommittee 3</u>	<u>Subcommittee 4</u>
May 5	February 22	February 4	March 29
June 5	March 15	May 10	May 11
June 21	April 13	June 19	June 19
October 20	June 13	October 16	October 23
December 4	August 14	December 12	December 13
December 11	October 17		
	December 11		

2007:

Subcommittee 1

February 7
May 30
June 29
September 17
(joint meeting
with Subc. 4)

Subcommittee 2

January 16
February 8
April 16
June 4
July 6
August 6
September 17

Subcommittee 3

January 30
March 28
June 11
July 23
August 7
October 31

Subcommittee 4

January 23
February 13
April 19
May 22
September 17
(joint meeting
with Subc. 1)

2008:

Subcommittee 1

February 22
March 21
November 14

Subcommittee 2

August 27

Subcommittee 3

January 28
April 7
June 12
September 10

2009:

Subcommittee 3

January 9

Tab 5

Appendix 5

Public hearings

November 13, 2006, Springfield, IL:

The following persons testified at the hearing:

Gerald E. Nora, Assistant Cook County State's Attorney.

Patrick McAnany, President, and Regan McCullough, Research Assistant, Illinois Coalition to Abolish the Death Penalty.

Jennifer Bishop Jenkins, Illinois Victims Organization.

Gail Rice, victim's family member.

Larry Golden, Downstate Illinois Innocence Project.

Linda Virgil, Chair, Illinois Legislation, National Alliance on Mental Illness.

Robert B. Haida, State's Attorney, St. Clair County, and Illinois State's Attorneys Association.

February 26, 2007, Chicago, IL:

The following persons testified at the hearing:

Jean Bishop, Murder Victims Families for Human Rights.

Jane Bohman, Executive Director, Illinois Coalition to Abolish the Death Penalty.

Marva Jackson.

Jennifer A. Bishop-Jenkins, Organization of Illinois Victims.

Mary L. Johnson, Chicago Black United Community Families of the Wrongfully Convicted.

Janet Kittliues, Death Penalty Issue Specialist, Illinois League of Women Voters.

Marlene Martin, National Director, Campaign to End the Death Penalty.

Catherine McMillan and Carrie Summers, Executive Director, Illinois Coalition to Abolish the Death Penalty.

Steven L. Richards, Office of Illinois Appellate Defender.

Alan J. Spellberg, Assistant Cook County State's Attorney.

Bernard J. Sarley, Assistant Cook County Public Defender.

Darby Tillis, former Illinois death row inmate.

Guidi Weiss, Illinois Liaison for the Grey Panthers.

William Wendt.

January 26, 2009, Chicago, IL:

The following persons testified at the hearing:

Andrea D. Lyon, Clinical Professor of Law, DePaul University College of Law.

Thomas Callahan, DePaul University, DePaul Students Against the Death Penalty, and Campaign to End the Death Penalty.

Joseph E. Birkett, DuPage County State's Attorney, and Assistant State's Attorney Bernard J. Murray.

John J. Boyd, Kankakee County State's Attorney.

Eric C. Weis, Kendall County State's Attorney, and First Assistant Michael W. Reidy.

Rob Warden, Executive Director, Center on Wrongful Convictions, Northwestern University School of Law.

Julie M. Harmon, Capital Case Coordinator, Crystal H. Marchigiani, Chief of Homicide Task Force, and

Stephanie L. Hirschboeck, Supervisor with Homicide Task Force, Law Office of the Cook County Public Defender.

Elliot Slosar, law student.

JoAnna Ryan, Jeremy Schroeder, Executive Director, and Garnet Fay, President, Illinois Coalition to Abolish the Death Penalty.

Delbert Tibbs, former death row inmate.

Darby Tillis, former death row inmate.

Julien Ball, Marlene Martin and Robin Kaufman, Campaign to End the Death Penalty.

Dora Larson, Illinois Victims.org.

Judith Erickson, Oak Park Friends Meeting.

Patricia McMillen, Abolition in Illinois Movement.

March 2, 2009, Springfield, IL:

The following persons testified at the hearing:

Michael A. Kreloff, Chicago Council of Lawyers.

Donna Larson, Illinois Victims.org.

Kevin W. Lyons, Peoria County State's Attorney.

Thomas J. Brown, Livingston County State's Attorney, on behalf of Illinois State's Attorneys Association.

D. Peter Wise, past President, Illinois Association of Criminal Defense Lawyers.

Tammera Sigwerth.

Jeremy Schroeder, Executive Director, Illinois Coalition to Abolish the Death Penalty.

Tab 6

Appendix 6

**Trends in the Number & Characteristic of
Prison Sentences Imposed on Those
Convicted of First Degree Murder in Illinois**

**Presented to the
Illinois Capital Punishment Reform Study
Committee**

**Presented by
David E. Olson, Ph.D.
Loyola University Chicago**



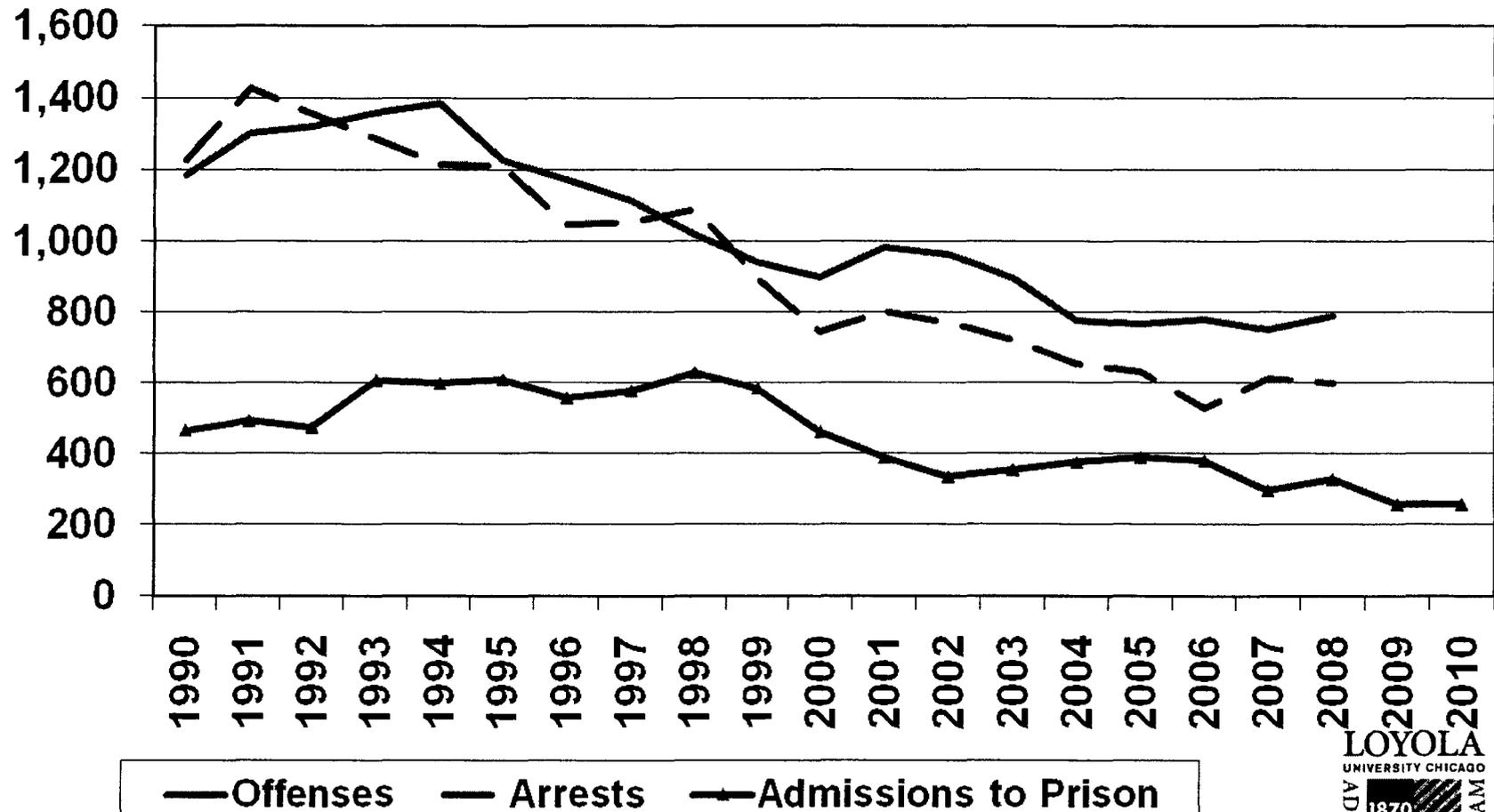
Preparing people to lead extraordinary lives

Background

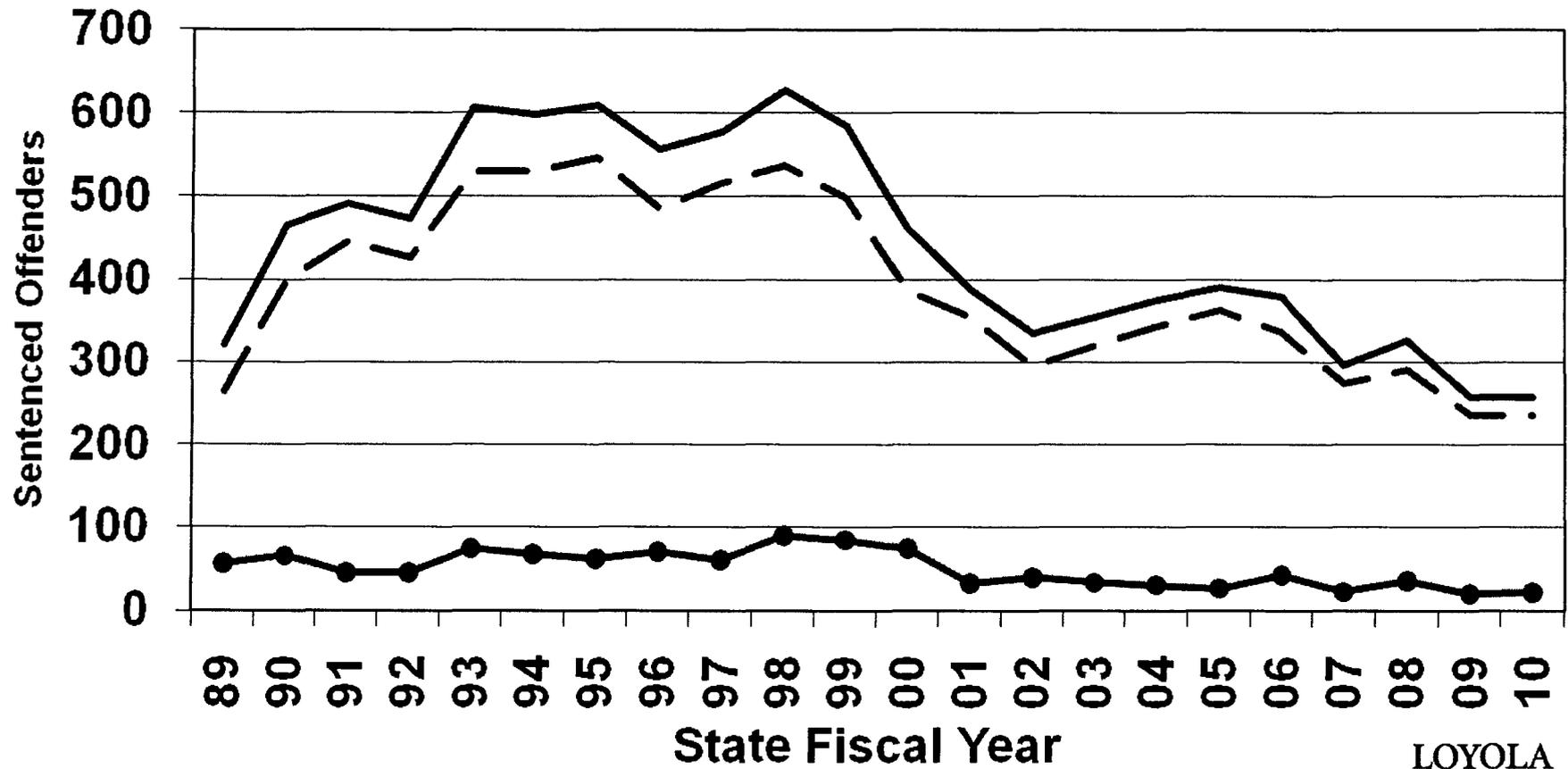
- All sentencing data provided by the Illinois Department of Corrections' Planning & Research Unit. State fiscal years cover July 1 through June 30 (i.e., SFY 2007 covers July 1, 2008 through June 30, 2009).
- Offense & arrest data provided by the Illinois State Police.
- Unit of analysis in the offender (i.e., each of those convicted of murder is counted once);
- Analyses of determinate, life sentences and death sentences;
- Analyses by region of Illinois & by time period



Illinois Murder Offenses, Arrests & Admissions to Prison



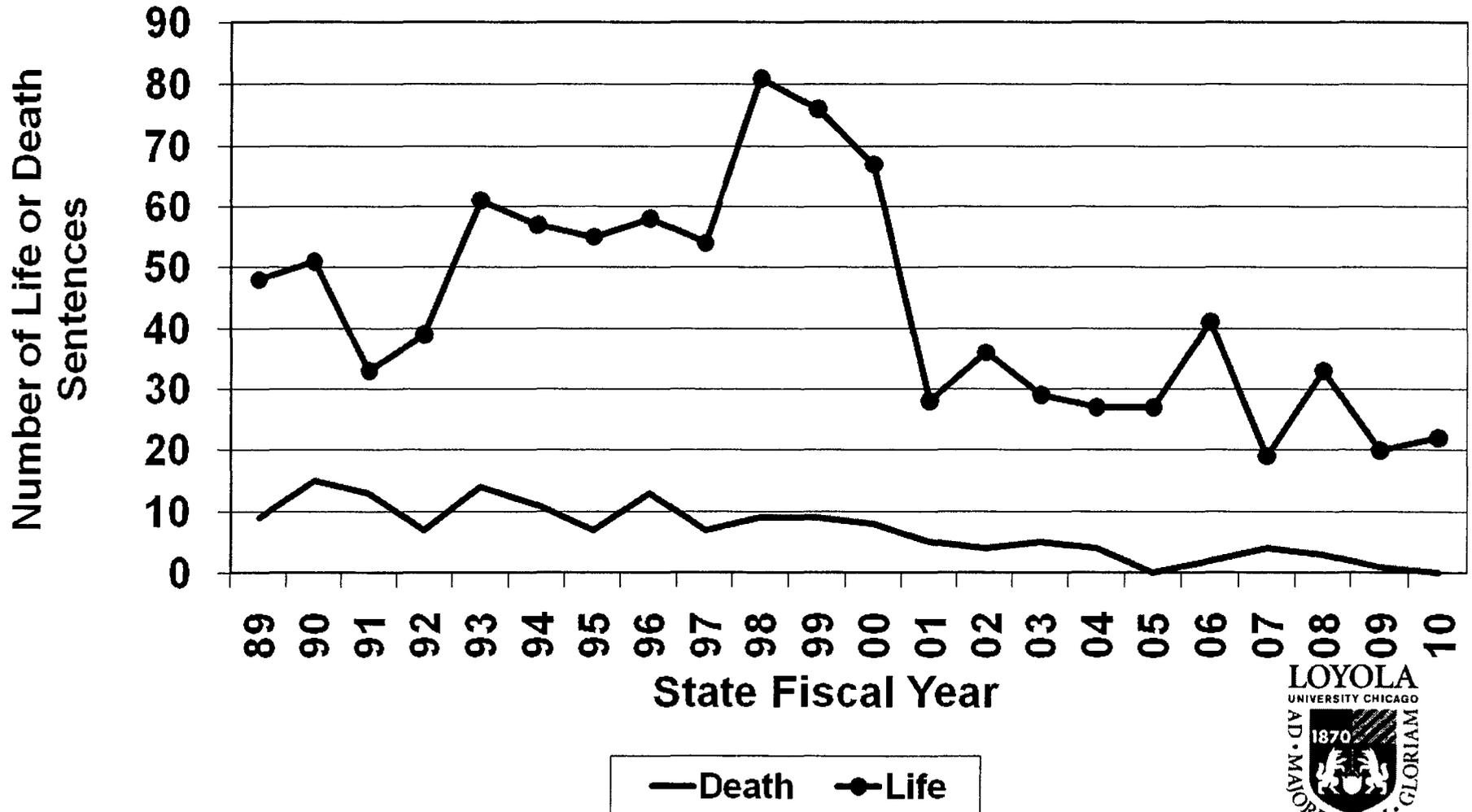
Sentences Imposed on Those Convicted of 1st Degree Murder



Life + Death Sentences
 Determinate
 Total



Number of Life & Death Sentences Imposed on Those Convicted of 1st Degree Murder

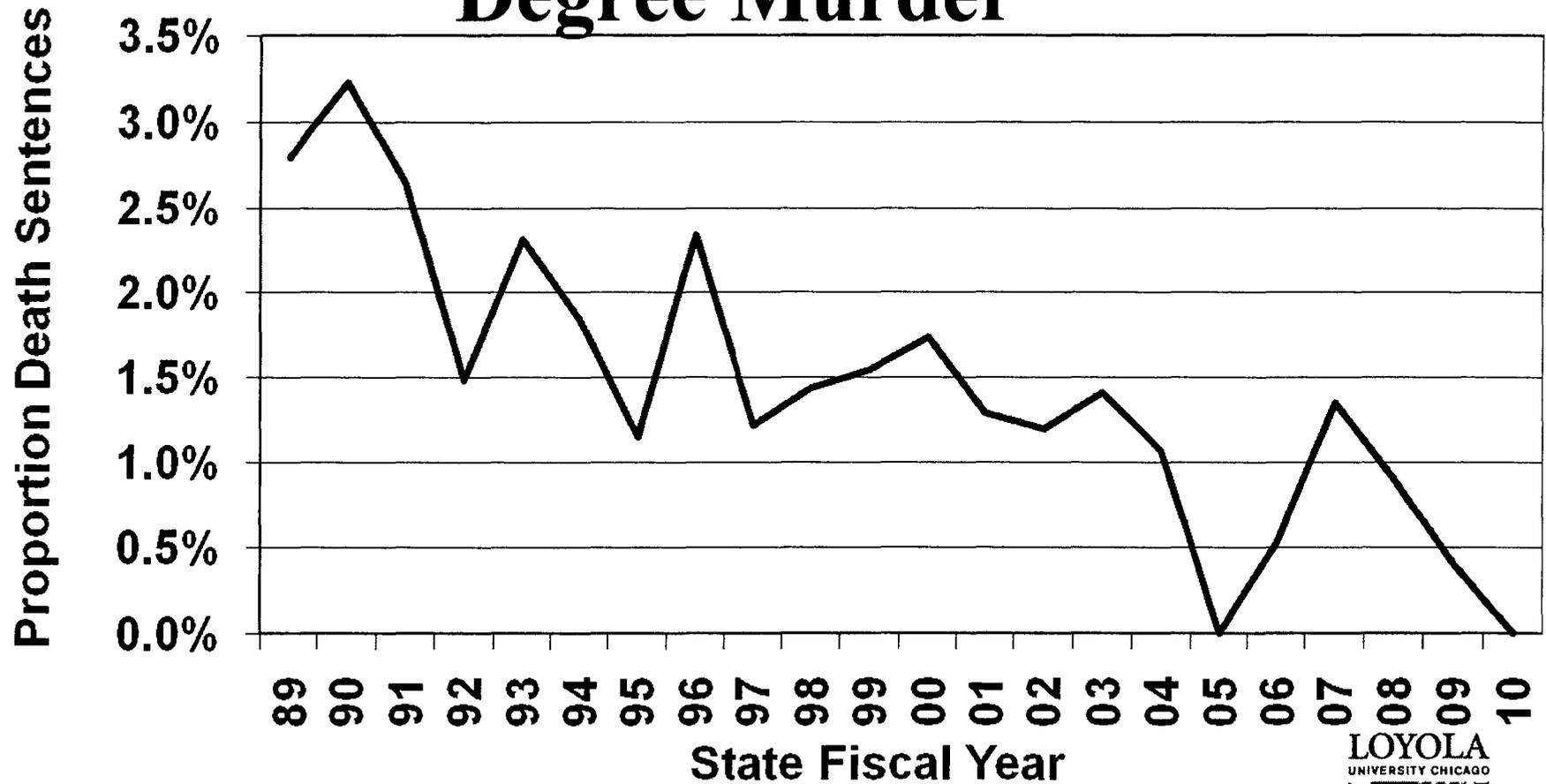


Preparing people to lead extraordinary lives

Death & Total Sentences Imposed on Those Convicted of 1st Degree Murder



Death Sentences as a Proportion of Total Sentences Imposed on Those Convicted of 1st Degree Murder



Life Sentences as a Proportion of Total Sentences Imposed on Those Convicted of 1st Degree Murder



**Tables Summarizing the Sentencing of First Degree Murderers in Illinois,
State Fiscal Years 1989 through 2010**

Prepared for

The Illinois Capital Punishment Reform Study Committee

Prepared by

David E. Olson, Ph.D.

Donald Stemen, Ph.D.

&

Jordan Boulger

**Loyola University Chicago
Department of Criminal Justice
802 North Michigan Avenue
Chicago, Illinois 60611
312-915-7563**

September 2010

General Overview

In an effort to examine the patterns of death penalty imposition across Illinois, researchers from Loyola University obtained detailed, offender-level data from the Illinois Department of Corrections (IDOC) that included information pertaining to the 9,592 offenders convicted of first degree murder and admitted to prison in Illinois from July 1988 through June 2010, or state fiscal year (SFY) 1989 (which covers the period from July 1, 1988 to June 30, 1989) to SFY 2010. During this 22-year period, a total of 150 individuals were convicted and sentenced to death.

The tables on the following pages summarize the total number of offenders convicted of first degree murder in Illinois and the number and proportion of these offenders who received a death sentence across different regions of Illinois and across different time periods. The time periods used in the analyses were the “Pre-Moratorium” (July 1988 to December 1999), the “Moratorium & Governor’s Capital Punishment Commission” period (January 2000 to June 2005) and the “Post-Reform passage” period (July 2005 to June 2010).

Over the time periods examined, the proportion of first-degree murderers sentenced to death statewide fell from 1.9 percent in the pre-moratorium period to 0.6 percent in the post-reform passage period (Table 1). In purely statistical terms, this decrease from 1.9 percent to 0.6 percent translates to roughly a 66 percent reduction in the likelihood of the death penalty being imposed over these time periods. Across all separate geographic regions of Illinois examined (Tables 2 through 6), the proportion of first degree murderers sentenced to death fell between the pre-moratorium and post-reform passage periods.

Separate tables are included that summarize the sentences imposed on convicted murders across different regions of Illinois, including Cook County (Chicago), the suburban Collar Counties (Lake, McHenry, Kane, DuPage, and Will counties), other urban areas outside of Cook and the Collar Counties (counties that fall within a metropolitan statistical area based on U.S. Bureau of the Census classifications) and the remaining rural counties in Illinois.

Table 1
Statewide Sentences Imposed on Convicted Murderers in Illinois

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	6,106 (98.1%)	118 (1.9%)	6,224 (100.0%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	1,961 (98.9%)	22 (1.1%)	1,983 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	1,515 (99.4%)	10 (0.6 %)	1,525 (100.0%)
Total	9,582 (98.4%)	150 (1.6%)	9,592 (100.0%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Table 2
Sentences Imposed on Convicted Murderers in Cook County, Illinois

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	4,655 (98.8%)	58 (1.2%)	4,713 (100.0%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	1,405 (99.3%)	10 (0.7%)	1,415 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	1,057 (99.6%)	4 (0.4%)	1,062 (100.0%)
Total	7,117 (99.0%)	72 (1.0%)	7,189 (100.0%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Table 3
Sentences Imposed on Convicted Murderers in Illinois Outside of Cook County

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	1,451 (96.0%)	60 (4.0%)	1,511 (100.0%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	556 (97.9%)	12 (2.1%)	568 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	458 (98.7%)	6 (1.3%)	464 (100.0%)
Total	2,465 (96.9%)	78 (3.1%)	2,543 (100.0%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Table 4
Sentences Imposed on Convicted Murderers in *Illinois' "Collar Counties"* (Lake, McHenry, Kane, DuPage and Will Counties Combined)

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	405 (95.3%)	20 (4.7%)	425 (100%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	133 (98.5%)	2 (1.5%)	135 (100%)
Post-Reform Passage (July 2005 through June 2010)	129 (97.8%)	3 (2.2%)	132 (100%)
Total	667 (96.4%)	25 (3.6%)	692 (100%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Table 5
Sentences Imposed on Convicted Murderers in *Illinois' Urban Counties, Excluding the Cook and "Collar" County Region*

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	725 (97.1%)	22 (2.9%)	747 (100%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	276 (97.9%)	6 (2.1%)	282 (100%)
Post-Reform Passage (July 2005 through June 2010)	247 (100%)	0 (0%)	247 (100%)
Total	1,248 (97.8%)	28 (2.2%)	1,278 (100%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Table 6
Sentences Imposed on Convicted Murderers in *Illinois' Rural Counties*

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	319 (94.7%)	18 (5.3%)	337 (100%)
Moratorium (January 2000 through Passage of Reforms (June 2005))	154 (97.5%)	4 (2.5%)	158 (100%)
Post-Reform Passage (July 2005 through June 2010)	79 (96.4%)	3 (3.6%)	82 (100%)
Total	552 (95.6%)	25 (4.4%)	577 (100%)

Source: Analyses of IDOC data by Olson, Stemen & Boulger.

Tab 7

APPENDIX 7

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 an inherently violent crime or the attempt to commit an inherently violent crime. In this subparagraph (c), "inherently violent crime" includes, but is not limited to, armed robbery, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, aggravated arson, aggravated stalking, residential burglary, and home invasion; 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 or participating in any criminal investigation or 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; for purposes of this paragraph (8), "participating in any criminal investigation or prosecution" is intended to include those appearing in the proceedings in any capacity such as trial judges, prosecutors, defense attorneys, investigators, witnesses, or jurors; 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; or

(21) the murder was committed by the defendant in connection with or as a result of the offense of terrorism as defined in Section 29D-14.9 of this Code.

Tab 8

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Appendix 8

Captital Litigation Trust Fund Expenses by Year and Agency

Year	Cook County PD	Cook County SA	Cook County Court	Non-Cook PD	Non-Cook SA	Non-Cook Court Apptd	Total
2003*	\$402,152.67	\$347,379.30	\$35,495.87	\$112,828.29	\$229,558.70	\$2,896,949.21	\$4,024,364.04
2004	\$1,419,383.24	\$2,335,881.87	\$873,380.43	\$38,285.50	\$577,775.74	\$3,002,705.07	\$8,249,415.85
2005	\$1,552,366.39	\$2,619,567.70	\$786,003.95	\$92,245.00	\$149,281.85	\$2,140,338.62	\$7,341,808.51
2006	\$2,064,194.49	\$2,757,825.95	\$2,156,313.30	\$228,365.89	\$259,103.91	\$2,682,465.70	\$10,150,275.24
2007	\$1,665,891.92	\$2,785,799.26	\$1,112,715.85	\$192,628.42	\$278,166.89	\$1,997,289.46	\$8,034,498.80
2008	\$1,689,313.69	\$2,956,401.70	\$939,663.97	\$194,469.31	\$193,057.46	\$2,651,551.90	\$8,626,466.03
2009†	\$2,069,141.04	\$2,069,141.04	\$1,506,405.82	\$89,920.66	\$459,500.00	\$1,693,807.79	\$7,887,916.35
Total	\$10,871,443.44	\$15,871,996.82	\$7,409,979.19	\$948,743.07	\$2,146,444.55	\$17,064,907.75	\$54,314,744.82

* Cook County 2003 figures include only the months of November and December

† Cook County 2009 figures do not include the month of December

Source: Cook County figures were obtained from the Cook County Treasurer's Office.

Non-Cook County figures were obtained from the Illinois State Treasurer's Office.

Tab 9

Appendix 9

SUMMARY OF INDICTMENTS FOR MURDER IN ILLINOIS IN WHICH A NOTICE OF INTENT TO SEEK CAPITAL PUNISHMENT WAS FILED,¹ AND THE CASE WAS DISPOSED OF IN THE TRIAL COURT DURING 2006

NO.	DEFENDANT, CASE NO. & COUNTY ²	EXPLANATION	SENTENCE FOR MURDER ³	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
1	Abrams, E. 02 CR 21884	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	60 years	African-American	African- American	1
2	Ashby, J. 03 CR 2693	Bench: guilty of murder; eligible; sentence.	Life	African-American	African- American	3

¹ In each of these cases, the State's Attorney filed a notice of intent to seek capital punishment pursuant to Illinois Supreme Court Rule 416(c):

"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."

² Cook County unless otherwise noted.

³ This column shows the sentences received by the defendants for murder, but not additional sentences for terms of years received for non-murder offenses as explained in note 1 on page 7.

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
3	Ausby, E. Will County 01 CF 1047	Bench: not eligible (mental retardation). Plea agreement to murder. Bench: sentence.	Life	African-American	Asian	1
4	Banks, D. 01 CR 10553	Jury: guilty of murder; eligible; sentence.	Death	African-American	African- American	1
5	Battle, R. 03 CR 13668	Notice withdrawn by state. Bench: guilty of murder; sentence.	75 years	African-American	Caucasian	1
6	Bright, L. Peoria County 05 CF 83	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	Caucasian	African- American	8
7	Castillo, J. 03 CR 4835	Notice withdrawn and murder count dismissed by State. Plea agreement to armed robbery.	—	Hispanic	Indian	1
8	Cole, R. 02 CR 27021	Bench: guilty of murder; eligible; sentence.	Life	African-American	African- American	1
9	Davis, J. 98 CR 29279	Jury: guilty of murder. Bench: eligible; sentence.	Life	African-American	Caucasian	2
10	Davis, M. Madison Cty. 04 CF 585	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	Caucasian	Caucasian	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
11	Donelson, A. 00 CR 15501	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	45 years	African-American	African- American	1
12	Durr, F. 99 CR 10030	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	African-American	African- American	1
13	Flemister, R. 04 CR 29631	Notice withdrawn by state. Jury: not guilty of murder.	—	African-American	African- American	1
14	Gibbs, J. Gallatin Cty. 03 CF 53	Jury: not guilty of murder, guilty of burglary.	—	Caucasian	Caucasian	2
15	Gibbs, S. Gallatin Cty. 03 CF 52	Notice withdrawn and murder count dismissed by State. Plea agreement to burglary. Bench: sentence.	—	Caucasian	Caucasian	2
16	Gonzalez, J. 02 CR 14656	Jury: guilty of murder. Bench: eligible; sentence.	Life	Hispanic	Hispanic	1
17	Grady, W. 03 CR 20799	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	30 years	African-American	African- American	1
18	Grayson, D. 03 CR 16933	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	26 years	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
19	Griffin, G. 01 CR 30149	Notice withdrawn by state. Bench: directed verdict, not guilty of murder.	—	African-American	African- American	1
20	Groleau, J. 00 CR 18344	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	30 years	Caucasian	Arab- American	1
21	Guyton, R. Kane County 05CF827	Bench: guilty of murder. Notice withdrawn by state. Bench: sentence.	45 years	African-American	Caucasian/A sian	1
22	Hamm, A. DeWitt County 03 CF 102	Notice withdrawn by state. Jury: not guilty of murder, guilty of child endangerment.	—	Caucasian	Caucasian	3
23	Holeman, H. 04 CR 22049	Blind plea to murder. Bench: eligible; sentence.	49 years	African-American	African- American	1
24	Hoover, A. 03 CR 0931	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	34 years	African-American	Caucasian	1
25	Hudson, V. 05 CR 4789	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	African-American	African- American	1
26	Hudson, V. 05 CR 4790	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
27	Johnson, M. 03 CR 26786	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	60 years	African-American	African- American	1
28	Jones, G. 02 CR 27812	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	29 years	African-American	Arab	1
29	LaGrone, M. DeWitt County 03 CF 101	Jury: guilty of murder; not eligible. Bench: sentence.	LWOP	African-American	Caucasian	3
30	Lipscomb, K. 01 CR 4450	Blind plea to murder. Bench: eligible; sentence.	LWOP	African-American	African- American	1
31	Morris, B. 02 CR 2487	Bench: guilty of murder; not eligible; sentence.	50 years	African-American	African- American	1
32	Mosley, E. 03 CR 15223	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	50 years	African-American	African- American	1
33	Murchison, R. 01 CR 11457	Jury: guilty of murder; eligible. Bench: sentence.	60 years	African-American	African- American	1
34	Murray, J. 02 CR 22445	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	60 years	African-American	African- American	1
35	Nelson, B. Will County 02 CF 925	Jury: guilty of murder; eligible; sentence.	Death	Caucasian	Caucasian	4

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
36	O'Brien, D. 03 CR 11710	Bench: guilty of murder; eligible; sentence.	Life	Caucasian	Caucasin	1
37	Phillips, H. 02 CR 10176	Jury: guilty of murder. Bench: eligible; sentence.	LWOP	Caucasian	Hispanic	3
38	Pugh, E. 01 CR 26807	Notice withdrawn by state. Jury: not guilty of murder, guilty of involuntary manslaughter.	—	African-American	African- American	1
39	Reeves, T. 02 CF 1617	Jury: guilty of murder. Bench: eligible; sentence.	LWOP	African-American	African- American	1
40	Runge, P. 01 CR 17929	Jury: guilty of murder; eligible; sentence.	Death	Caucasian	Hispanic	2
41	Rutledge, G. 02 CR 27625	Notice withdrawn by state. Bench: not guilty of murder.	—	Hispanic	Hispanic	1
42	Schroth, E. 05 CR 8460	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	Life	Caucasian	Hispanic	1
43	Scott, D. Sangamon County 01 CF 992	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	40 years	African-American	Caucasian	3
44	Shines, S. 02 CR 25129	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	25 years	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
45	Smith, T. 02 CR 20249	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	50 years	African-American	African-American	1
46	Stewart, F. 01 CR 07927	Notice withdrawn by state. Bench: not guilty of murder, guilty of involuntary manslaughter.	—	African-American	African-American	1
47	Taylor, C. Vermillion Cty. 04 CF 741	Notice withdrawn and murder count dismissed by State. Plea agreement to second degree murder. Bench: eligible; sentence.	—	African-American	African-American	1
48	Taylor, K. 01 CR 22674	Blind plea to murder. Bench: eligible; sentence.	LWOP	African-American	African-American	1
49	Taylor, K. 01 CR 22678	Blind plea to murder. Bench: eligible; sentence.	LWOP	African-American	African-American	1
50	Taylor, K. 01 CR 22679	Blind plea to murder. Bench: eligible; sentence.	LWOP	African-American	African-American	1
51	Washington, C. 01 CR 9864	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	30 years	African-American	African-American	1
52	Weems, G. 01 CR 26145	Jury: guilty of murder; eligible. Bench: sentence.	Life	African-American	African-American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
53	White, C. 02 CR 25129	Notice withdrawn and murder count dismissed by State. Plea agreement to burglary.	—	African-American	African- American	1
54	Williams, A. 04 CR 4074	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	40 years	African-American	African- American	1
55	Williams, C. Kane County 97 CF 415	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	48 years	Caucasian	Caucasian	1
56	Williams, E. 03 CR 14310	Bench: guilty of murder; eligible; sentence.	48 years	African-American	African- American	1
57	Williams, M. 04 CR 0451	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	55 years	African-American	African- American	1
58	Zeledon, D. 02 CR 28257	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	32 years	Caucasian	African- American	1

Not shown on this chart are:

1. Sentences received by four defendants who entered into plea agreements under which the murder charges were dismissed, and the defendants were convicted of and sentences were imposed on lesser felonies (J. Castillo, 20 years; S. Gibbs, 15 years; C. Taylor, 10 years; C. White, 15 years), and sentences imposed on four defendants who were found not guilty of murder but guilty of lesser felonies (J. Gibbs, 15 years; A. Hamm, 10 years; E. Pugh, 12 years; F. Stewart, 10 years).
2. Murder indictments against C. and L. Slack (01 CR 25129 and 01 CR 30199), because the capital punishment notices were stricken by the trial court judge because the notices were filed more than 120 days after arraignment. C. Slack entered into a plea agreement to murder and a sentence of 25 years. A jury found L. Slack guilty of murder, and he was sentenced by the trial judge to life imprisonment.
3. The first indictment on which K. Taylor went to trial (01 CR 22676), because he was not then eligible for capital punishment. A jury found him guilty, thus making him eligible for capital punishment on the three remaining murder indictments listed in the chart. He was sentenced in 01 CR 22676 to two concurrent 50 year sentences, consecutive to the sentences imposed in the three cases listed in the chart.
4. Two murder indictments against A. Hawkins (01 CR 6821 and 6822) in which the State filed capital notices, which stated that Mr. Hawkins was “currently not eligible for the death penalty, however if [he] is convicted of murder” in the first case to go to trial the State “shall be seeking the death penalty.” In April 2006, a jury acquitted Mr. Hawkins in 01 CR 6822, hence he was not eligible for capital punishment in 01 CR 6821, which was resolved in December 2006 by a plea agreement to second degree murder, and a sentence of 15 years.

Appendix 9

SUMMARY OF INDICTMENTS FOR MURDER IN ILLINOIS IN WHICH A NOTICE OF INTENT TO SEEK CAPITAL PUNISHMENT WAS FILED,¹ AND THE CASE WAS DISPOSED OF IN THE TRIAL COURT DURING 2007

NO.	DEFENDANT, CASE NO. & COUNTY ²	EXPLANATION	SENTENCE FOR MURDER ³	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
1	Adkins, R. 03 CR 22832	Jury: guilty of murder. Bench: eligible, sentence.	Death	African-American	Caucasian	1
2	Alfonso, M. DuPage County 01 CF 1864	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	LWOP	African-American	Hispanic	1

¹ In each of these cases, the State's Attorney filed a notice of intent to seek capital punishment pursuant to Illinois Supreme Court Rule 416(c):

"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."

² Cook County unless otherwise noted.

³ This column shows the sentences received by the defendants for murder, but not additional sentences for terms of years received for non-murder offenses as explained in note 1 on page 7.

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
3	Alfonso, M. DuPage County 01 CF 266	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	LWOP	African-American	Asian	2
4	Alvarez-Garcia, J. ⁴ 02 CR 27621	Bench: guilty of murder, eligible, sentence.	LWOP	Hispanic	Hispanic	2
5	Anderson, A. 06 CR 24444	Bench: not guilty of murder.	—	African-American	African- American	1
6	Armour, C. 02 CR 211186	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	20 years	African-American	Caucasian	1
7	Bennett, D. 05 CR 00362	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	26 years	African-American	African- American	1
8	Bolden, D. 05 CR 08886	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	28 years	African-American	African- American	1

⁴ Defendant Alvarez-Garcia was initially sentenced to death by the bench on 03/30/2005. However, on 06/30/2005, the presiding judge granted a Motion to Reconsider and Present Additional Mitigation, and on 03/09/2007, the sentence was vacated. Alvarez-Garcia was subsequently given life for counts 7, 8, 15, 16 and 17-- all first degree murder charges.

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
9	Brown, J. 05 CR 18295	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	50 years	African-American	African- American	1
10	Butler, C. 05 CR 12440	Notice withdrawn by state. Plea agreement to second degree murder. Bench: sentence.	15 years	African-American	African- American	1
11	Campuzano, G. 04 CR 29482	Jury: guilty of murder. Bench: not eligible, sentence.	LWOP	Hispanic	Hispanic	2
12	Carlson, B. 04 CR 16264	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	50 years	Caucasian	African- American	1
13	Drapes, C. 05 CR 06665	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	60 years	African-American	African- American	1
14	Earnest, D. 04 CR 27431	Jury: not guilty of murder.	—	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
15	Ellis, D. 05 CR 25351	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	49 years	African-American	African- American	1
16	Ester, C. 06 CR 05267	Bench: guilty of murder, eligible, sentence.	40 years	African-American	African- American	1
17	Foreman, R. 01 CR 9864	Jury: guilty of murder. Bench: not eligible, sentence.	LWOP	African-American	African- American	1
18	Gutierrez, N. 04 CR 06151	Jury: guilty of murder. Bench: not eligible, sentence.	LWOP	Hispanic	Caucasian	1
19	Harris, J. 05 CR 21285	Notice withdrawn by state. Plea agreement to second degree murder. Bench: sentence.	20 years	African-American	African- American	2
20	Hernandez, J. 05 CR 20768	Bench: guilty of murder, eligible, sentence.	75 years	Hispanic	Hispanic	1
21	Hill, J. 01 CR 30109	Jury: guilty of murder, eligible. Bench: sentence.	60 years	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
22	Holmes, C. 06 CR 09511	Bench: guilty of murder, eligible, sentence.	LWOP	African-American	African- American	2
23	Ingram, B. 04 CR 17334	Jury: guilty of murder. Bench: eligible, sentence.	45 years	African-American	African- American	1
24	Jefferson, L. 00 CR 18344	Bench: guilty of murder, not eligible, sentence.	60 years	African-American	Arab	1
25	Jones, W. 00 CR 13445	Jury: guilty of murder, eligible. Bench: sentence.	LWOP	African-American	African- American	1
26	Lawrence, P. 01 CR 30741	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	LWOP	African-American	African- American	1
27	Leach, C. 04 CR 13211	Bench: guilty of murder, sentence.	28 years	African-American	African- American	1
28	Leak Jr., E. 05 CR 18294	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	75 years	African-American	African- American	1
29	Lloyd, C. 03 CR 06536	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	LWOP	African-American	African- American	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
30	Lopez, J. 04 CR 27083	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	47 years	Hispanic	Caucasian	1
31	Lovejoy, L. DuPage County 04 CF 2319	Jury: guilty of murder, eligible, sentence.	Death	African-American	African- American	1
32	Luna, J. 02 CR 15430	Jury: guilty of murder, not eligible. Bench: sentence.	LWOP	Hispanic	Caucasian, Hispanic, Asian	7
33	Maldonado, M. 99 CR 23858	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	60 years	Hispanic	Hispanic	1
34	Martinez, E. 00 CR 06449	Bench: not guilty of murder.	—	Hispanic	African- American	1
35	Massey, A. DeWitt County 06 CF 59	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	LWOP	Caucasian	Caucasian	3
36	McCray, N. 06 CR 09038	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	75 years	African-American	Caucasian	1

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
37	McGowan, T. 02 CR 16806	Notice withdrawn by state. Plea agreement to murder. Bench: sentence.	LWOP	African-American	Caucasian	1
38	Middleton, B. 03 CR 11167	Notice withdrawn by state. Bench: not guilty of murder.	—	African-American	African- American	1
39	Miller, J. Madison County 03 CF 1363	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	LWOP	African-American	African- American	2
40	Noble, S. 05 CR 18887	Notice withdrawn by state. Bench: not guilty of murder.	—	African-American	African- American	1
41	Outlaw, D. 03 CR 02084	Bench: guilty of murder, eligible, sentence.	LWOP	African-American	African- American	2
42	Phillips, C. 02 CR 05365	Bench: not guilty of murder.	—	African-American	African- American	1
43	Ramirez, M. 01 CR 19273	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	LWOP	Hispanic	Hispanic	2
44	Ramos, A. 01 CR 19273	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	LWOP	Hispanic	Hispanic	2

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
45	Ramsey, D. Hancock County 96 CF 46	Blind plea to murder. Jury: eligible, sentence.	Death	Caucasian	Caucasian	2
46	Reese, W. 02 CR 20394	Jury: guilty of murder. Bench: sentence.	LWOP	African-American	African- American	1
47	Richardson, C. 02 CR 20394	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	60 years	African-American	African- American	1
48	Smith, M. 04 CR 14107	Notice withdrawn by state. Jury: guilty of murder. Bench: sentence.	40 years	African-American	African- American	1
49	Taylor, C. 05 CR 20595	Notice withdrawn by state. Plea agreement to involuntary manslaughter of a family member. Bench: sentence.	10 years	African-American	African- American	1
50	Trevino, L. 01 CR 15065	Notice withdrawn by state. Bench: guilty of murder, sentence.	LWOP	Hispanic	Hispanic	2

NO.	DEFENDANT, CASE NO. & COUNTY	EXPLANATION	SENTENCE FOR MURDER	DEFENDANT'S RACE	VICTIM'S RACE	NO. OF VICTIMS
51	Tucker, A. Lawrence County 05 CF 19	Jury: guilty of murder, eligible. Bench: sentence.	LWOP	Caucasian	Caucasian	1

Tab 10

Appendix 10

DEATH PENALTY COST STUDIES

1. Arizona

Date: 2002

Source: Office of the Attorney General, Capital Case Commission Final Report Attachment D, "Case Study on State and County Costs Associated with Capital Adjudication in Arizona: Data Set III Research Report to Arizona Capital Case Commission"

The Data/Research Subcommittee of the Attorney General's Capital Case Commission ("Subcommittee") was established to compare the cost of adjudicating capital cases to non-cases. "Capital cases," for the purposes of this study were defined as cases in which the death penalty was sought through the guilt phase of the trial. The data set used in the study consisted of estimated state and county resource allocations in 30 capital and non-capital cases, including expenditures on pretrial motions, trial-related psychiatric medical evaluations and exams, expert testimony, trial-related special investigators, jury trial, jury selection, aggravation and mitigation hearings, attorney trial preparation, and inmate incarceration. Incarceration costs included housing defendants from indictment to sentencing. Prosecution costs associated with post-conviction habeas proceedings were not included.

The Subcommittee found significant cost disparities between all phases of capital and non-capital cases:

The median costs to maintain an inmate in county jail from indictment through sentencing were:

- \$27,097.07 for capital cases
- \$16,909.05 for non-capital cases

The median costs of jury trials were:

- \$11,188.48 for capital cases
- \$6,291.53 for non-capital cases

The median costs relating to county prosecutors were:

- \$24,527.20 for capital cases
- \$20,376.50 for non-capital cases

The median costs relating to county public defenders were:

- \$23,946.76 for capital cases
- \$10,093.45 for non-capital cases

The median costs relating to appellate defense counsel were:

- \$16,077.9 for capital cases
- \$4,233.60 for non-capital cases

The median costs relating to the Attorney General's representation of the State in prisoners' direct appeals and post-conviction petitions were:

- \$19,092.58 for capital cases
- \$5,470.01 for non-capital cases.

There were also additional costs associated with aggravation and mitigation hearings, and special experts used in capital cases but not in non-capital cases.

Overall, the Subcommittee found that for the initial trial, the State spent on average:

- \$98,859.57 on cases in which the death penalty was sought and ultimately imposed
- \$103,942.60 on cases in which the death penalty was sought through the guilt phase of trial, but ultimately not imposed
- \$93,654.19 on capital cases that resulted in a sentence of 25 years to life
- \$57,563.96 on non-capital cases.

On appeal, the State spent on average:

- \$163,897.26 on capital cases resulting in a death sentence
- \$128,454.35 on capital cases that resulted in a sentence of 35 years to life
- \$118,165.94 on capital cases that resulted in a sentence of 25 years to life
- \$70,231.34 on non-capital cases.

Because of concerns about the small sample size and the lack of concrete data in many areas, the Subcommittee recommended that the State implement mechanisms for more accurately capturing cost data using a larger sample size.

2. California

Date: 2008

Source: California Commission for the Administration of Justice, Final Report

In 2008, the California Commission for the Administration of Justice (“Commission”) released a report on the State’s capital punishment system, concluding that the system was “dysfunctional” and “broken.” The Commission proposed three alternatives to the State’s death penalty system, one of which was a wholesale replacement of the death penalty system with a “Maximum of Lifetime Incarceration” system. In support of that recommendation, the Commission analyzed the costs associated with “death cases,” defined as cases in which the death penalty was sought through the guilt phase of trial. The Commission concluded that the State could achieve significant savings with an alternative maximum life imprisonment system:

Annual additional cost of first degree murder trials:

- Death penalty sought and obtained: \$ 20 million

- Trial with maximum sentence of lifetime incarceration: \$5 million

Annual Additional cost of direct and indirect appeals in first degree murder cases:

- Capital sentence imposed: \$54.4 million
- Maximum sentence of lifetime incarceration imposed: \$3 million

Annual additional cost of incarceration of persons convicted of first degree murder:

- Capital sentence imposed: \$137.7 million
- Maximum sentence of lifetime incarceration imposed: \$11.5 million

3. Connecticut

Date: 2003

Source: State of Connecticut Commission on the Death Penalty, Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut, Submitted to the Connecticut General Assembly

The Connecticut Commission on the Death Penalty studied the defense costs of capital cases between 1973 and 2003. Given the limited resources available to the Commission, and the limited record-keeping of many State agencies, the Commission could not precisely identify the differences in defense costs between capital cases and non-capital murder cases. For example, with the exception of the Division of the Public Defender Services, most State agencies did not track expenditures allocated solely to capital felony cases.

Based on Public Defender Services' reports, the Commission estimated that in cases in which the State sought the death penalty, defense costs for were 88% higher than defense costs incurred for cases in

which the death penalty was not sought. The additional costs were attributed to investigating aggravating and mitigating factors, and post-conviction costs associated with appeals.

The Commission recommended that the State conduct a comprehensive analysis of the additional costs associated with the death penalty, and implement an improved system of documenting costs from state and local agencies.

4. Indiana

Date: 2010

Source: Legislative Services Agency, Office of Fiscal and Management Analysis, Fiscal Impact Statement

As part of Senate Bill 43, which was aimed at expanding the list of aggravating factors which would make a defendant eligible for the death penalty or life without parole, the Indiana Legislative Services Agency prepared a cost study evaluating the added costs expected to be incurred if the bill was enacted. The Agency examined costs of 92 murder trials between 2000 and 2007. The total cost for murder trials, for cases in which the death penalty was sought, was \$229,769, and \$102,297 for cases in which the life without parole was sought. The Agency determined that the combined costs (costs of attorneys, expert witnesses, other costs, appeals, and the discounted cost of incarceration) for murder cases noticed for death in which a death sentence was imposed was \$505,773, compared to \$151,547 in murder cases where the prosecution sought and the defendant received a sentence of life without parole.

In its analysis, the Agency stated, "the death penalty is generally the most expensive for trial courts to conduct because two attorneys are required to represent the accused, and a bifurcated trial is conducted to determine guilt or innocence and whether a sentence of death is warranted."

5. Kansas

Date: 2003

Source: Performance Audit Report, Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, A Report to the Legislative Post Audit Committee

In a 2003 report by the Kansas Legislative Division of Post Audit prepared for the Legislative Post Audit Committee, the additional cost of trying capital cases was estimated, based on reported time and money expenditures received from judges, lawyers, and law enforcement officials who participated in 22 death-eligible first degree murder cases between 1994 and 2003. In seven of the cases, the death penalty was sought and imposed; in seven cases the death penalty was sought but not imposed; and in eight cases the death penalty was not sought.

At the time the 22 cases were tried, Kansas law did not provide for a sentence of life without parole. Punishment for those convicted of capital murder was either death or prison with eligibility of parole, set at either 25 or 50 years.

The Post Auditor concluded that the estimated median cost of a case in which the death penalty was sought and imposed was \$1.2 million, whereas in a case in which the death penalty was sought but not imposed the estimated median cost was \$900,000, and a case in which the death penalty was not sought the estimated cost was \$740,000.

The Auditor concluded that death penalty cases tend to be more expensive at both the trial and appellate level. The median trial costs for murder cases in which the death penalty was sought was nearly 16 times greater than the trial costs for murder cases in which the death penalty was not sought. Increased costs were attributed among other factors, to the increased number of attorneys involved, jury selection costs, length of trials, expert witnesses, separate sentencing trials, contracting with mitigation specialists, and defense psychiatric costs. Estimated appeal related costs were 21 times greater for cases in which the death penalty was imposed, compared to those in which the death penalty was not imposed.

The annual costs associated with incarcerating inmates sentenced to death and inmates sentenced to life in prison were the same, because Kansas does not have a death row; inmates under death sentences are housed with other maximum security inmates.

6. Maryland

Date: 2008

Source: Urban Institute Justice Policy Center, The Cost of the Death Penalty in Maryland

The Urban Institute conducted a study based on the examination of the costs of 509 capital-eligible cases that resulted in guilty verdicts between 1978 and 1999. The focus of this study was to determine how the death penalty affects costs related to the adjudication of death-noticed cases, and the costs of incarceration for defendants sentenced to death. Adjudication costs include guilt trial, penalty trial, post-conviction, and appellate costs. The results were then weighted across a set of 1,136 cases that were identified as capital-eligible.

Between 1978 and 1999, death sentences were imposed in 56 of the cases. In 106 cases, the death penalty was sought but not imposed. The combined expense of these 162 cases, including funding of the Maryland Capital Defender's Division, was \$186 million.

In order to estimate the cost of each stage of processing, researchers relied on administrative databases containing official records on each case, and time estimates from attorneys, judges, and support staff. They concluded that both the filing of a death notice and the imposition of a death sentence added significantly to the cost of a homicide case. On average, costs were as follows:

- \$1.1 million for capital-eligible cases in which prosecutors did not seek the death penalty
 - \$870,000 in prison costs
 - \$250,000 in adjudication costs

- \$1.8 million for capital-eligible cases in which the death penalty was sought but not imposed
 - \$950,000 in prison costs
 - \$850,000 in adjudication costs
- \$3 million for capital-eligible cases in which the death penalty was sought and imposed.
 - \$1.3 million in prison costs
 - \$1.7 million in adjudication costs

Thus, the Institute concluded that it cost an average of \$1.9 million more to have a defendant sentenced to death, than not to seek the death penalty.

Seventy percent of the additional costs were incurred during the trial phase. These additional costs were due to a longer pretrial period; longer and more intensive voir dire; longer trials with more time and resources spent by attorneys prosecuting cases; and an expensive penalty phase.

Notable cost differences between death sentence cases and capital-eligible cases which were not death-noticed are as follows:

- Trial costs (guilty phase) higher by \$616,000 for death sentence cases
- Sentencing costs (penalty phase) higher by \$326,000 for death sentence cases
- Appellate costs an additional \$467,000 for death sentence cases
- Incarceration costs for defendants sentenced to death an additional \$316,000.

7. New Jersey

Date: 2007

Source: New Jersey Death Penalty Study Commission Report

The New Jersey Death Penalty Study Commission was created by the New Jersey legislature to study all aspects of the death penalty, including whether there was a significant difference between the cost of the death penalty from indictment to execution, compared to the cost of life in prison without parole. The Commission's findings were based on estimated costs provided by the Office of the Public Defender and the Department of Corrections.

Although it was difficult to measure with any level of precision, the Commission concluded that the costs associated with cases in which the defendant was sentenced to death were greater than cases in which the defendant was sentenced to life without parole.

The Office of the Public Defender estimated that eliminating the death penalty would save its office \$1.46 million a year in costs associated with pretrial investigation and preparation, pretrial motions, jury selection, additional staff attorneys, the penalty phase trial, and longer appeals.

The Department of Corrections estimated that eliminating the death penalty, and thereby eliminating the need for a death row, would save the State \$974,430 to \$1,299,340 per inmate over the inmate's lifetime.

The Administrative Office of the Courts was unable to provide a cost comparison of a death penalty trial with a non-death penalty murder trial. The Office of the Attorney General indicated that there would be little cost savings for its office, because the defendants would face the possibility of life without parole, necessitating a protracted trial.

8. New York

Date: 1982

Source: New York State Defenders Association, Capital Losses: The Price of the Death Penalty for New York State

Date: 2005

Source: New York State Assembly, The Death Penalty in New York: A Report on 5 Public Hearings on the Death Penalty in New York Conducted by the Assembly Standing Committee on Codes

In 2005, the Standing Committee on Codes of the New York State Assembly prepared a report summarizing the testimony presented at public hearings the Committee conducted, together with the Judiciary and Correction Committees, between December 2004 and February 2005, for purposes of reviewing the death penalty statute. One of the issues discussed was the cost of the death penalty. In its report, the Assembly pointed out that over the prior ten years, the state and local governments had spent over \$170 million administering the death penalty statute; that seven persons had been sentenced to death; that four of the sentences had been set aside on appeal; and that no executions had taken place.

The Schenectady County District Attorney testified that since 1995, total statewide expenditures for death penalty prosecution and defense were approximately \$200 million. A representative of the New York State Defenders Association testified that, based on conservative estimates, in the previous decade the State spent \$170 million on death penalty prosecutions and defense, resulting in an average of approximately \$24 million per death sentence obtained. (This calculation did not take into account the costs associated with handling the cases as non-capital.)

In 1982, the New York State Defenders Association published a report on the costs associated with the death penalty.¹ The Association described costs related to the guilt phase, penalty phase, and appeals stages of death penalty cases, based upon survey data, benchmarks and estimates, where available, to estimate defense, prosecution, court, and other costs. The Association applied these approximated costs to a

¹ The report does not analyze costs associated with murder cases in which the death penalty was not sought.

hypothetical case.² The Association estimated that the cost of capital litigation associated with the guilt and penalty phases of trial, state court and U.S. Supreme Court review of each death penalty case, would cost at least \$1.8 million in which a death sentence was imposed.

9. North Carolina

Date: 1993

Source: Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina*

Date: 2009

Source: Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, *American Law and Economics Review*

In 2009, a Duke University economist conducted an analysis of the cost of the death penalty in North Carolina, focusing on fiscal years 2005 and 2006. He compared actual costs the State incurred in capital cases with the likely costs the State would have incurred if the State had not sought the death penalty in those cases.³ He concluded that if the cases had been treated as non-capital, there would have been a reduction of State expenditures of \$10.8 million per year. His breakdown of the additional costs were:

² The hypothetical case assumptions included the following: a four-week trial of 120 trial hours, two trial lawyers, one investigator, expert costs, 125 hours of motion work, 344 hours or lawyer time for preparation and investigation, a uniform formula to estimate prosecution costs, and 800--900 billable hours related to direct review to the Court of Appeals, among other estimates set forth in the report.

³ Mr. Cook analyzed information compiled on all cases in which the defendant was indicted and arraigned for murder and which were disposed of during fiscal years 2005 and 2006. He reviewed estimates of potential savings as provided by the Office of Indigent Defense Services, the Administrative Office of the Courts, the Center for Death Penalty Litigation, and data obtained from the NC Department of Corrections annual reports.

• Extra defense costs in trial phase	\$13,180,385
• Extra payments to jurors	224,640
• Appeals and post-conviction pleadings	7,473,556
• Resentencing hearings	594,216
• Prison costs	<u>169,617</u>
• Total estimated additional costs of the death penalty, FY2005 and 2006	\$21,642,414

In his 1993 study, the economist concluded that North Carolina capital trials resulted in average additional costs of \$4 million per year for 1991 and 1992.

10. South Carolina

Date: 2008

Source: Douglas, James W. and Stockstill, Helen K., "Starving the Death Penalty: Do Financial Constraints Limit Its Use?" 29 Justice System Journal 326 (2008)

The authors conducted a study to explore their hypothesis that within South Carolina counties, cost considerations play a part in the decision of whether to seek capital punishment, with the number of capital charges filed in a county positively related to the county's median household income. Their analysis compared the number of death penalty cases filed in each county between 2005 and 2007, with the wealth of each county measured by median household income. The authors interviewed nine of the State's sixteen circuit solicitors (equivalent to Illinois' State's Attorneys). Six of the nine said they did not consider costs in their decisions concerning the death penalty; three said they consider costs, but additional costs would not preclude their seeking the death penalty if they believed that was warranted. The majority of the additional expenses in capital cases related to the defense and the court system, rather than the prosecution; that the factors that increase costs included the requirement that capital defendants be represented by two lawyers, increased use of investigators and expert witnesses, overtime pay for court staff, increased

length of trial for capital cases compared with a non-capital case, appeals, and increased costs associated with juries.

The authors concluded that, contrary to what the solicitors stated, the data suggested that state solicitors do take costs into account, albeit indirectly, in making decisions as to whether or not to seek the death penalty. They based their conclusion on a statistically significant relationship between median household income and the number of capital charges filed in each county, which showed that solicitors in wealthier counties sought the death penalty in more cases than those in less-wealthy counties.

11. Tennessee

Date: 2004

Source: Comptroller of the Treasury Office of Research, Tennessee's Death Penalty: Costs and Consequences

At the request of the Tennessee House Judiciary Committee, the State's Comptroller conducted a study comparing the costs of first-degree murder cases in Tennessee in which notices to seek the death penalty were filed, to the costs of non-capital first degree murder trials. Using 240 randomly selected capital eligible cases, prosecuted between 1993 and 2003, the Comptroller obtained data from the Administrative Office of the Court, the Department of Correction, and time and expense estimates from responses to surveys received from court clerks, judges, and attorneys.

Based upon an analysis of costs related to various phases of the proceedings, the Comptroller concluded that first degree murder cases in which the prosecution filed a notice to seek the death penalty cost more than first degree murder cases in which prosecutors sought either life with or without parole. Thus, the survey data revealed the following average trial costs in which the prosecutor sought:

Death penalty	\$46,791
Life without parole	31,494
Life with possibility of parole	31,622

The differences were owing to capital trials involving longer trials with more pretrial investigative procedures, including mental health evaluations

motions; more issues raised; additional attorneys, with higher hourly rates; two separate jury hearings; and more frequent sequestering of juries.

As to the appeals phase, the Comptroller determined that there were greater expenses on direct appeals to the Court of Criminal Appeals in cases in which a death penalty had been imposed, compared to cases in which the defendant was sentenced to life with or without parole. The additional costs were due to increased time defense counsel spent on capital case appeals, and the increased time and cost involving the Court of Criminal Appeals' staff, compared to non-capital appeals. Additional costs were also incurred owing to statutory provisions for automatic appeals to the Tennessee Supreme Court in capital cases which were affirmed by the Court of Criminal Appeals.

The Comptroller also noted that from 1977 to 1995, approximately 30% of capital sentences were reversed based on trial errors, and remanded for new trials.

The Comptroller found that prosecution and defense expenses for proceedings following affirmance by the Tennessee courts (in state and federal courts, and gubernatorial clemency hearings) were higher in capital than non-capital cases.

The Comptroller concluded that the annual cost of incarceration was the same for Tennessee death row inmates as for other maximum security-inmates with life sentences. Although almost all defendants under death sentences were housed separately, the prisons calculated daily incarceration costs based on the entire prison population. After the death row inmates are executed, there is an annual savings, but at the time the study was done, the only defendant executed in Tennessee between reinstatement of the death penalty in Tennessee in 1977 and 2004 (of 97 sentenced to death) spent 19 years in jail after conviction.

The Comptroller concluded that overall, first degree murder cases in which a notice to seek the death penalty was filed cost more than cases in which the State did not seek the death penalty.

12. Washington

Date: 2006

Source: Washington State Bar Association, Final Report of the Death Penalty Subcommittee of the Committee on Public Defense

A Subcommittee of the Washington State Bar Association conducted a study of additional trial and appeal costs in cases prosecuted in Washington in which the prosecution sought the death penalty. The Subcommittee based its study on surveys sent to elected prosecutors and directors of public defender programs, asking their best estimates of cost differences between trying capital cases in which the prosecution sought the death penalty and non-capital cases; information from the Administrative Office of the Courts; research on the costs incurred by state and federal agencies in appellate review of cases in which the death penalty was imposed; and interviews with members of the prosecution and defense teams in the *State v. Ridgway* case, one of the State's most complex and expensive serial murder cases, which resulted in a guilty plea and consecutive life sentences for at least 48 murders.

The members of the Subcommittee concluded that cases in which the death penalty was sought were more costly because they involve additional work and expenses related to presentation of the evidence and the procedural and substantive requirements for capital cases. For example, capital cases involve the appointment of two attorneys, complex pretrial motions and legal issues, more detailed and lengthy jury selection, presentation of the evidence, extensive mitigation investigations, and the penalty phase trial.

Based on the average of the estimates provided by prosecutors and public defenders, the Subcommittee concluded that, at the trial level, prosecuting a murder case in which the death penalty was sought cost an additional \$217,000, and defending cost an additional \$246,000. When other costs unique to capital cases are included, the Subcommittee concluded that, compared to trial level costs in non-capital murder cases, the total additional costs of trying capital cases was in the range of \$467,000 per trial, and that the trial of a capital case cost an additional \$47,000 to \$70,000 in court costs.

As to appeals in murder cases in which a death sentence was imposed, compared to non-death penalty first degree murder appeals, the average defense lawyers' fees and costs were approximately \$100,000 more in capital cases (\$117,799) than for non-capital cases (\$16,971).

National studies

1. United States Judicial Conference

Date: 1998

Source: 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

In 1998, the Committee on Defender Services of the United States Judicial Conference conducted a budget analyses of a sample of cases tried in federal courts between 1990 and 1997 in which the defendant was charged with an offense punishable by death. The analysis compared the cases in which the death penalty was sought, to those in which the death penalty was not sought. The Committee examined the amount of time prosecutors and defense lawyers billed for time spent on client conferences, research, hearings and trials. They determined that, on average, lawyers in cases in which the death penalty was sought billed more than ten times the number of hours of lawyers in non-capital cases; the average total cost of capital trials was \$218,112, compared to an average total cost of \$55,772 for trials in which the death penalty was not sought.

2. Death Penalty Information Center

Date: 2009

Source: Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis, A Report from the Death Penalty Information Center

The Death Penalty Information Center (DPIC) reported that there is no national figure for the additional costs incurred in murder cases in which the death penalty was sought, compared to those in which the death

penalty could be but was not sought. Costs vary from state to state, depending on state statutes and court rules and pay scales, and the frequency with which state prosecutors seek the death penalty. In states that have conducted an estimate, the methodologies used are so different that compiling a national average is challenging. However, all of the studies conclude that the death penalty system is more expensive than an alternative system in which the maximum sentence is life without parole.

Between 1976 when the Supreme Court “reinstated” the death penalty, approximately 7,500 death sentences were imposed in the United States. Based on North Carolina’s 1993 estimate that it cost approximately \$300,000 more to seek the death penalty than to seek a lesser sentence of life in prison, the DPIC concluded that there was a countrywide expenditure of \$2.25 billion more than what would have been spent if the death penalty had not been sought in those cases.

Tab 11

Appendix 11

**CIVIL DAMAGE AWARDS TO DEFENDANTS SENTENCED TO DEATH IN ILLINOIS, AND
COSTS TO DEFEND AGAINST THE CLAIMS, 1997-2010**

<u>Claimant</u>	<u>County</u>	<u>Court of Claims</u>	<u>Settlements</u>	<u>Fees Paid to Defend</u>	<u>Totals</u>
Burrows, Joseph	Iroquois		\$100,000		\$100,000
Cobb, Perry	Cook	\$120,300			120,300
Cruz, Rolando	DuPage	120,300	2,892,564	\$1,960,743	4,973,608
Fields, Nathson	Cook	199,150			199,150
Gauger, Gary	McHenry	60,150		2,197,391	2,257,541
Hernandez, Alexandro	DuPage		1,366,085	377,864	1,743,949
Hobley, Madison	Cook	161,005	7,500,000	3,119,228	10,780,233
Howard, Stanley	Cook	161,005	800,000	767,466	1,728,471
Jimerson, Verneal	Cook	120,300	8,800,000	1,054,061	9,974,361
Jones, Ronald	Cook	125,036	2,200,000	11,126	2,336,162
Kitchen, Ronald	Cook	199,150		23,118	222,268
Lawson, Carl	St. Clair	120,300			120,300
Orange, Leroy	Cook	161,005	5,500,000	994,257	6,655,262
Patterson, Aaron	Cook	161,005	5,000,000	2,663,761	7,824,766
Porter, Anthony	Cook	145,875		661,027	806,902
Smith, Steven	Cook	125,036		288,328	413,364
Tillis, Darby	Cook	120,300			120,300
Williams, Dennis	Cook	<u>140,350</u>	<u>12,800,000</u>	<u>1,054,061</u>	<u>13,994,411</u>
TOTALS		\$2,240,268	\$46,958,650	\$15,172,431	\$64,371,349

Tab 12

Appendix 12

CAPITAL LITIGATION TRIAL BAR APPROVED ATTORNEY TRAINING PROGRAMS (Supreme Court Rules 714(b) and 714(g))

The following training programs have been approved for the purposes of Supreme Court Rule 714(b) qualifying training for applications filed within two years of the date of the program and Supreme Court Rule 714(g) Continuing Legal Education.

Please Contact the Sponsor for Course Information

The approved programs offered in 2010 can be used as a qualifying program or as Continued Legal Education.

<u>Program</u>	<u>Sponsor</u>	<u>Dates/Location</u>	<u>Hours</u>
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender Illinois Institute of Continuing Legal Education	October 14-15, 2010 Collinsville, IL	12
Advanced Trial Advocacy	State's Attorneys Appellate Prosecutor	September 20-24, 2010 Springfield, IL	12
Defending Illinois Death Penalty Cases in 2010.	West Suburban Bar Association	September 16-17, 2010 Chicago, IL	12
Latest Developments to Improve Trial Practice	Office of the Cook County Public Defender	September 2-3, 2010 Oak Brook, IL	12
Professional Advocacy in Capital Cases	Office of the Cook County State's Attorney	September 1-2, 2010 Chicago, IL	12
5 th Annual AGACL Conference	Association of Government Attorneys In Capital Litigation	August 31-September 3, 2010 San Diego, CA	12
2010 Clarence Darrow Death Penalty Defense College	DePaul University School of Law	May 24-28, 2010 Chicago, IL	12
Advanced Trial Advocacy	State's Attorneys Appellate Prosecutor	March 22-26, 2010 Springfield, IL	12
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender Illinois Institute of Continuing Legal Education	March 22-23, 2010 Chicago, IL	12
Defending Illinois Death Penalty Cases in 2010	West Suburban Bar Association	March 18-19, 2010 Chicago, IL	12
2010 Forensic Seminar for Capital Defense Attorneys * for Recertification and Rule 714(g) Compliance Only	DePaul University School of Law	February 18-19, 2010 Chicago, IL	12
Capital Litigation Training	Lake County Bar Association	January 28-29, 2010 Gurnee, IL	12

The approved programs offered in 2009 can be used as a qualifying program or as Continued Legal Education.

<u>Program</u>	<u>Sponsor</u>	<u>Dates/Location</u>	<u>Hours</u>
Capital Litigation Training: Prosecutors and Professionalism	State's Attorneys Appellate Prosecutor	November 19-20, 2009 Springfield, IL	12

Prosecuting Homicide Cases	National College of District Attorneys	November 8-12, 2009 San Francisco, CA	12
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender Illinois Institute of Continuing Legal Education	October 29-30, 2009 Springfield, IL	12
Advanced Trial Advocacy	State Appellate Prosecutor's Office	September 20-24, 2009 Springfield, IL	12
30 th Annual AGACL Conference	Association of Government Attorneys In Capital Litigation	July 29-August 1, 2009 Miami, FL	12
Clarence Darrow Death Penalty Defense College Seminar	DePaul University College of Law Center for Justice in Capital Cases	June 1- June 5, 2009 Chicago, IL	12
Professional Advocacy in Capital Cases	Office of the Cook County State's Attorney Office of the DuPage County State's Attorney Office of the State Appellate Prosecutor	May 14-15, 2009 Chicago, IL	12
Prosecuting Homicide Cases	National College of District Attorneys	April 26-30, 2009 San Francisco, CA	12
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender and Illinois Institute of Continuing Legal Education	March 26-27, 2009 Chicago, IL	12
Advanced Trial Advocacy	State's Attorneys Appellate Prosecutor	March 8-12, 2009 Springfield, IL	12

The approved programs offered in 2008 can be used as a qualifying program or as Continued Legal Education.

<u>Program</u>	<u>Sponsor</u>	<u>Dates/Location</u>	<u>Hours</u>
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender and Illinois Institute of Continuing Legal Education	November 17-18, 2008 Springfield, IL	12
Jury Persuasion For Life	Office of the Cook County Public Defender	October 29-30, 2008 Chicago, IL	12
2008 Capital Litigation Training	Illinois State Appellate Prosecutor's Office	October 15-16, 2008 Springfield, IL	12
2008 Annual Death Penalty Seminar	DePaul University College of Law Center for Justice in Capital Cases	October 10-11, 2008 Chicago, IL	12
Advanced Trial Advocacy	State's Attorneys Appellate Prosecutor	September 7-11, 2008 Springfield	12
29 th Annual AGACL Conference	Association of Government Attorneys In Capital Litigation	August 27-30, 2008 San Francisco, CA	12
Clarence Darrow Death Penalty College Seminar	DePaul University College of Law Center for Justice in Capital Cases	May 27-31, 2008 Chicago, IL	12
2008 Capital Litigation Seminar	Lake County Bar Association	April 30-May 1, 2008 Gurnee, IL	12
Advanced Trial Advocacy	State's Attorneys Appellate Prosecutor	March 9-13, 2008 Springfield, IL	12
Life in the Balance 2008 Defending Death Penalty Cases	National Legal Aid and Defender Association	March 8-11, 2008 Atlanta, GA	12

Defending Illinois Death Penalty Cases	Office of the State Appellate Defender and Illinois Institute of Continuing Legal Education	March 4-5, 2008 Chicago, IL	12
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The approved programs offered in 2007 can be used as a qualifying program or as Continued Legal Education.

<u>Program</u>	<u>Sponsor</u>	<u>Dates/Location</u>	<u>Hours</u>
Forensic Evidence Course	National College of District Attorneys	November 25-29, 2007 San Diego, California	12
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender and Illinois Institute of Continuing Legal Education	November 8 - 9, 2007 Fairview Heights, IL	12
Capital Litigation Training - The Need for Effective Advocacy & Professionalism	State Appellate Prosecutor's Office	October 11 - 12, 2007 Springfield, IL	12
Making the Case for Life X	National Association of Criminal Defense Lawyers	September 21 - 23, 2007 Las Vegas, NV	12
Advanced Trial Advocacy	State Appellate Prosecutor's Office	September 9 - 13, 2007 Springfield, IL	12
2007 Annual Death Penalty Seminar	Office of the State Appellate Defender	September 6 - 7, 2007 Chicago, IL	12
28 th Annual Conference	Association of Government Attorneys in Capital Litigation (AGACL)	July 25 - 28, 2007 Lake Buena Vista, FL	12
Capital Litigation Training - Effective Advocacy & Professionalism"	Office of the Cook County State's Attorney	June 21 - 22, 2007 Chicago, IL	12
Clarence Darrow Death Penalty Defense College Course	DePaul University College of Law Center for Justice in Capital Cases	May 29 - June 2, 2007 Chicago, IL	12
Defending Illinois Death Penalty Cases	Office of the State Appellate Defender and Illinois Institute for Continuing Legal Education	March 19 - 20, 2007 Chicago, IL	12
Advanced Trial Advocacy	State Appellate Prosecutor's Office	March 11 - 15, 2007 Springfield, IL	12
Life in the Balance 2007 Defending Death Penalty Cases	The National Legal Aid and Defender Assoc. (NLADA)	March 10 - 13, 2007 Dallas, TX	12
Prosecuting Homicide Cases	National College of District Attorneys	Feb. 25 - Mar. 1, 2007 San Francisco, CA	12

PLEASE CHECK BACK FREQUENTLY FOR UPDATES TO THIS FORM.
CAPITAL LITIGATION TRIAL BAR
APPROVED ATTORNEY TRAINING PROGRAMS
(Supreme Court Rule 714(b)(g))

The following agencies or organizations have provided approved training programs.
Please contact these providers to inquiry about future programs.

Association of Government Attorneys in Capital Litigation
Contact: Paul J. McMurdie, Secretary

Center for Justice in Capital Cases
Contact: Professor Andrea Lyon, Director /or
Emily Hughes, Associate Director
DePaul University
College for Justice in Capital Cases
College of Law
312-362-5837
alyon1@depaul.edu
ehughes2@depaul.edu

Chicago Bar Association
Contact: Veronica Chaney

Cook County Public Defender
Contact: Jeff Howard
312-869-6149, ext. 3059

Cook County State's Attorney
Contact: Paula Hudson Holderman/or
Randy Roberts, Director of CLE

Illinois Institute for Continuing Legal Education
Contact: Karen S. Darby, Executive Director
Steven C. Rahn, Director of Courses

National College of District Attorneys
Contact: Mary Ellen Nodelman

Office of the State Appellate Defender
Contact: Cheryl Bormann
cheryl.bormann@osad.state.il.us

State's Attorneys Appellate Prosecutor
Contact: Matthew Jones
mjones@ilsaap.org

Revised:
September 21, 2010

Tab 13

Appendix 13

RECOMMENDATIONS FOR JURY INSTRUCTIONS IN PENALTY HEARING¹

If any one of you finds that a mitigating factor listed in these instructions is supported by the evidence, you must treat that mitigating factor as a reason why the defendant should not be sentenced to death. You may not treat that listed mitigating factor as a reason why the defendant should be sentenced to death.²

Under the law, the defendant shall be sentenced to death if you unanimously find after considering the factors in aggravation and mitigation that death is the appropriate sentence.

If after considering the factors in aggravation and mitigation one or more jurors determines that death is not the appropriate sentence, the court shall impose a sentence [(other than death) (of natural life imprisonment, and no person serving a sentence of natural life imprisonment can be paroled or released, except through an order by the Governor for executive clemency)].³

In deciding whether the defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence.

Aggravating factors are reasons why the defendant should be sentenced to death. Mitigating factors are reasons why the defendant should not be sentenced to death. Aggravating factors include:

First: (Insert any statutory aggravating factor or factors found by the jury at the first stage of the death penalty hearing)

¹ Adopted by a majority of Committee members at a Committee meeting on December 17, 2009.

² Adopted by vote of 7 to 6. See *People v. Kuntu*, 196 Ill.2d 105, 142 (2001).

³ Adopted by vote of 6 to 5, 1 abstention. Compare current IPI instruction 7-C-06.

Second: Any other reason supported by the evidence why the defendant should be sentenced to death.

Where there is evidence of an aggravating factor, the fact that that aggravating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.

Mitigating factors include:

First: [(Any or all of the following) (The following)] if supported by the evidence:

The defendant has no significant history of prior criminal activity.

The murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution.

The murdered person was a participant in the defendant's homicidal conduct or consented to the homicidal act.

The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.

The defendant was not personally present during the commission of the act or acts causing death.

The defendant's background includes a history of extreme emotional or physical abuse.

The defendant suffers from a reduced mental capacity.

Second: Any other reason supported by the evidence why the defendant should not be sentenced to death.

Where there is evidence of a mitigating factor, the fact that the mitigating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.

If you unanimously determine from your consideration of all the evidence after considering the factors in aggravation and mitigation that death is the appropriate sentence, then you should sign the verdict requiring the court to sentence the defendant to death.

If after considering the factors in aggravation and mitigation one or more jurors determine that death is not the appropriate sentence, then you should sign the verdict requiring the court to impose a sentence [(other than death) (of natural life imprisonment)].⁴

After considering the factors in aggravation and mitigation, we the jury unanimously determine that death is the appropriate sentence.

The court shall sentence the defendant _____ to death.

[Signature lines]⁴

After considering the factors in aggravation and mitigation, one or more of the jurors determines that death is not the appropriate sentence.

The court shall sentence the defendant to a sentence other than death.”⁴

[Signature lines]

⁴ Adopted by vote of 7 to 5, 1 abstention. Compare current IPI instruction 7-C-06, note 3 above.

Tab 14

Appendix 14



REPORT
OF THE
GOVERNOR'S
COMMISSION ON CAPITAL PUNISHMENT

GEORGE H. RYAN
GOVERNOR

APRIL 2002
TECHNICAL APPENDIX

Technical Appendix

Material contained in this Technical Appendix supplements the separate Report of the Governor's Commission on Capital Punishment. Included in this document are research reports requested by the Commission, tables presenting data gathered through the Commission's analysis of death penalty cases, supplementary materials on Illinois law and supplementary materials on the laws of other states.

Information contained in data tables in this Technical Appendix was correct through **December 31, 2001**. Information collected about the laws and jury instructions from other states was also current through that date. Case data may change as new opinions are issued by either state or federal courts. Statutory material and jury instructions may also change from time to time.

Table of contents

SECTION 1 – RESEARCH REPORTS

A. *Race, Region and Death Sentencing in Illinois 1988-1997*, Dr. Glenn Pierce and Dr. Michael Radelet, March 20, 2002.

B. *Report on Victim and Survivor Issues in Homicide Cases*, Research report of the Illinois Criminal Justice Information Authority, December 6, 2001.

C. *Victim and Survivor Issues in Homicide Cases: Focus Group Report*, Research report of the Illinois Criminal Justice Information Authority, February 19, 2002.

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

SECTION 2 – REVIEW OF ILLINOIS DEATH PENALTY CASES, 1977-2001

A. Overview

B. Case citation tables

Table 1 Illinois death penalty cases in which an opinion has been issued by the Illinois Supreme Court, 1977-2001 (26 pages).

Table 2 Illinois death penalty cases – citations for cases in which a defendant was released from death row, 1977-2001.

Table 3 Illinois death penalty cases – citations for the cases involving the “Death Row Ten.”

Table 4 Illinois death penalty cases – citations for cases involving defendants with more than one death sentence, 1977-2001.

Table 5 Illinois death penalty cases – citations for cases in which the defendants have been executed, 1977-2001.

C. Eligibility factors

Table 6 Eligibility factors – Statutory eligibility factors under Illinois law as of December 31, 2001 (720 ILCS 5/9-1(b)).

Table 7 Eligibility factors – Factors appearing in reported decisions of the Illinois Supreme Court between 1977 and 2001.

Table 8 Eligibility factors – Summation table showing eligibility factors appearing in reported decisions of the Illinois Supreme Court.

Table 9 Eligibility factors – List of cases where three or more eligibility factors were reported.

Table 10 Eligibility factors – List of cases where the multiple murder (b3) and course of a felony (b6) eligibility factors appeared together.

Race, Region, and Death Sentencing in
Illinois, 1988-1997

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March 20, 2002

Race, Region, and Death Sentencing in Illinois, 1988-1997

Outline

- I. Summary of Findings
- II. Introduction and Statement of Research Questions
- III. Prior Research on Post-Furman Death Sentencing in Illinois
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 - B. Chicago Tribune
- IV. Methodology
 - A. The Data
 - 1. Department of Corrections
 - 2. Chicago Homicide Data
 - 3. Victim Data from Selected State and Local Records
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 - B. The Variables
 - C. Statistical Approach
- V. Findings
- VI. Conclusions and Policy Recommendations
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- B. Florida
- C. Indiana
- D. Kentucky
- E. Maryland
- F. Nebraska
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- H. North Carolina
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- K. The Federal System

Appendix II: Indicators of Death Sentence Eligibility Documentation

Appendix III. Tables 3 – 31 of the Findings

Appendix IV: Acknowledgements

Turning to the question of geographic region, Table 31a indicates that the odds of receiving a death sentence for killing a victim(s) in Cook County decrease by a factor of .164 (i.e., the Exp(B) value for Cook County in Table 31a). Likewise, the odds of receiving a death sentence in for killing a victim(s) in Cook County are on average 83.6 percent lower than for killing a victim(s) in the rural county region of Illinois controlling for the other 26 variables in the analysis.

Readers of this report will disagree among themselves about the policy implications suggested by our finding of geographic disparities. Some will say that the finding that first-degree murder offenders in Cook County are less likely to receive the death sentence than offenders in other counties may mean that the Cook County criminal justice system is not pursuing potential death sentence cases with sufficient rigor. Others will argue that rural counties are imposing the death sentence too liberally and/or without sufficient oversight. However, one consequence to carefully consider in proposing that Cook County is not rigorously and/or properly pursuing death sentences, is that a more rigorous application the death sentence by Cook County, on the order of the rural county region or even the other urban county region, would result in dramatically higher numbers of offenders sentenced to death in Illinois.

Overall, the statistical analysis reveals some surprises about what factors correlate with death sentences in Illinois. Some of the predictor variables that would be expected to affect death sentencing do not show statistically significant relationships with sentence outcomes.. For example, of the 12 indicators of statutorily-defined death eligibility included in the analysis, only seven were significantly related to death sentencing, even though each one of the twelve are legally relevant in identifying which first-degree murder cases are eligible for a death sentence. These 12 indicators represent two (i.e., the multiple murder factor and the in the course of another felony factor) of the twenty death eligibility factors identified in Illinois statutes. Nonetheless, these two factors are the most commonly used factors in death sentence cases, and thus account for a high proportion of death eligible cases.

VI. Conclusions and Policy Recommendations

A. Limits to this Study

The results of this study are limited by both scope and data. First, the goal of this study was to examine only those cases that involved a conviction for first-degree murder, comparing cases that resulted in a death sentence with those that did not. Our study examines only sentencing decisions, not charging decisions or a wide array of other decisions involved in sending a defendant to death row. It is quite possible that disparities correlated with extra-legal factors (e.g., race, social class, region, or gender) also exist, either at a greater or lesser strength, in decisions in the criminal justice system that are not examined in this research.

Critics of this study who point to its limited scope and limited number of variables should realize that the addition of more data could very well increase the power of non-legal explanatory variables. Baldus et al., for example, point to nine states where both well-controlled and less-well-controlled studies of death sentencing have been conducted. In two-thirds of these states, the racial

disparities were stronger in the well-controlled studies than in the less complex work.²⁷ Certainly the data we have gathered for this research is strong enough to raise serious concerns in the minds of both those who support and oppose the death penalty about whether it is being equitably applied in Illinois.

A second limitation of this research is missing victim data on cases included in our analysis. As noted, we were able to match 4,252 cases with race of victim information (80.1 percent) to form the final sample for our analysis. However, missing data is only a problem if the cases excluded are somehow different than the cases for which we do have complete data. We see nothing to indicate that the cases with missing data in this study are significantly different the cases for which there are data.

B. Summary of Major Conclusions

Indicators of two extra legal factors, the race of first-degree murder victims and geographic region, were found to be statistically related to the imposition of the death sentence in Illinois controlling on the other variables in this study. Although there are limitations to the present study, these findings on race and geography are consistent with those reported in many other studies. This pattern of findings raises important concerns about how the death sentence is imposed in Illinois.

A major limitation of this study is the lack of high-quality data that is needed to measure additional factors that may affect death penalty decision making. A great deal of time and effort was expended to acquire data necessary for the present study, and despite these efforts, the present study's data is limited in both scope and completeness. The data problems encountered in this study are not the responsibility of the Illinois state and local agencies that participated in this study. They provided extensive support and consultation (at no cost) to the project. The problem arises because present criminal justice information systems were designed to primarily to support administrative functions of the agencies they assist. These systems were not designed to support research activities and, equally important, judicial monitoring activities. Thus the limitations of data and information encountered by this study directly mirror the limitations that any death sentencing monitoring system would encounter in Illinois. Indeed, properly conducted assessments of death sentences in Illinois would resemble smaller scale projects of the type conducted for this project. Critically, today's criminal justice information systems are entirely inadequate to collect, manage and integrate the range and quality of information on criminal cases necessary to support a reliable criminal justice monitoring system. As a result, the quality of available criminal data will greatly limit the integrity of any death sentencing monitoring system for the foreseeable future.

C. Recommendations

The results of our analysis lead us to suggest two policy recommendations.

²⁷ Baldus et al., *supra* note 7 (Cornell), at 1661-62.

1. Proportionality Review. The data suggest the necessity for the Illinois Supreme Court, as the body responsible for reviewing death penalty cases, to pay special attention to issues of proportionality.²⁸ Like New Jersey, they might consider a comparison between cases in which the death penalty was imposed and other death-eligible cases with equal levels of aggravation and mitigation in which the defendant was sentenced to a prison term.²⁹ This type of review, however, will be very limited if only cases that end with a death sentence are examined and information and cases from prior stages of the criminal justice system decision-making process are not available.

2. Monitoring. To conduct a meaningful proportionality review, officials will need to construct, maintain, and use a database on Illinois homicides. As criminologists, one of the most important lessons we have learned from this research is that data on Illinois homicides is fragmented, difficult to obtain, and often of poor quality. It has been gathered not for purposes of ensuring even-handedness in sentencing, but rather for unique needs of individual state agencies (e.g., local police departments, Department of Corrections). If the death penalty is to be continued, comprehensive high-quality data needs to be gathered and made available to a diverse group of researchers so that issues of equity can be monitored.

A monitoring system built on a foundation of comprehensive high-quality data can be used both to help ensure that race and other inappropriate factors are not involved in death sentencing decisions, and to help ensure that pure arbitrariness (inequities not attributable to either legal or not-legal factors) does not permeate sentencing. While it is beyond the mandate given to the current authors to design a comprehensive monitoring system, it is clear that there must be an intensive effort by all parties involved in capital cases in Illinois to gather detailed data on all aspects of homicide cases. Here we are not suggesting data collection on decisions made from charging through sentencing, but, rather, going back to the day of the homicide and beginning with measures of the quality of the investigation by the police. If the police devote more resources to the investigation of the murders of prominent white victims than to other cases, even if all other decision-makers (e.g., prosecutors, judges, jurors, and governors) are fair, racial bias will still permeate the system. In addition, a database needs to be constructed to follow all cases from the time a death sentence is imposed to the time the person exits death row (via court or gubernatorial action, natural death, suicide, or execution). All links in the “continuous chain” of decision makers need to be involved in gathering data, which they can use to monitor their own performance.³⁰

²⁸ For an elaboration on this and on other ideas to improve the administration of the death penalty, see THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 27 (2001).

²⁹ This proportionality review has the added advantage of alerting prosecutors and trial courts to the importance of issues of proportionality, which in turn may affect decisions on when to seek a death sentence. The New Jersey Supreme Court, for example, has struck down only one death sentence because of issues of proportionality. *State v. Papasavvas*, 2002 N.J. LEXIS 51 (Feb. 14, 2002).

³⁰ The racial and ethnic backgrounds of these decision-makers are one example of data needed (as well as continued efforts to bring more diversity into the decision-making circle).

In some cases, data gathering itself may add an element of fairness in the system. For example, a study that examines charging decisions would most certainly remind prosecutors of their duty to be even-handed. But even if they were, decisions made at earlier points (e.g., by police) would remain invisible. Gathering data at all decision-points on the chain of decisions makes the decisions more transparent, more accountable, and reminds everyone that their work is no longer invisible.

Those designing such a database would need input from prosecutors, defense attorneys, judges, law enforcement investigators, forensic experts and other criminal justice personnel, as well as scholars and other more disinterested parties. To be sure, there will undoubtedly be differences in informed opinion between various parties in the debate, but if all cooperate in data gathering, the system will be made much more transparent.

Recent research has also shown the importance of gathering data on the racial characteristics of potential jurors in capital cases, and on how (and why) jurors are excused through peremptory challenges. The most thorough research to address this issue focused on 317 capital prosecutions in Philadelphia, 1981-1997. The authors found that “discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread.”³¹ They found that prosecutors are more successful than defense attorneys in controlling jury composition, and that these biases tend to increase the number of death sentences and the degree of racial discrimination in death sentencing decisions. The opportunity for prosecutors and defense attorneys to interview jurors after they have completed their service and rendered their verdicts might reveal occasional acts of overt racism that may have infected their work.

D. A Final Note

In conclusion, the unique character of homicide in general and the death penalty in particular raises the distinct possibility of powerful political and psychological factors intruding on and interfering with the criminal justice and judicial decision process and with the goal of equity in administration of the death penalty. Hence the importance of vigilant monitoring. When a murder occurs, all who hear about it -- citizens, prosecutors, jurors -- feel a threat and a need to confront, to varying degrees, personal fears of death. One way to deal with the threat is to retreat to the comfort of people who are familiar to us. When the murder victim is among those communities with which we are most familiar (and race and social class are part of the victim's social or human capital that can make them part of that familiar community) and the killer is more of an outsider (in both in social and geographic sense), the fear and outrage grow.

³¹ David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Brotloff, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. OF PENN. J. OF CONSTITUTIONAL LAW 3 (2001); *see also* William J. Bowers, Benjamin D. Steiner, and Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. OF PENN. J. OF CONSTITUTIONAL LAW 171 (2001).

And in the past thirty years, the potential for death penalty decisions to become more political has grown like never before. One reason for this is media pressure -- the media can sensationalize homicides and prioritize them in terms of outrage and threat (not all murders are given equal media coverage), and it can put pressure on decision-makers to accept those priorities. In addition, all of the reforms in the death penalty in the past three decades have made it extremely costly and time-consuming to pursue. Especially in these days where state budgets are constrained, prosecutors must make priority decisions. There may be pressure from one source to pursue death (e.g., from the media), but also pressure from the office accountant not to do so.

Rational and informed citizens will continue to disagree on the death penalty, but certainly one point on which all interested parties can agree is that if we are going to make these life and death decisions, we need to make them as carefully and equitably as possible.

Tab 15

Appendix 15
Minority Comments

In the hopes of achieving “uniformity” across Illinois, the majority recommends a “statewide committee” to review all decisions by the individual State’s Attorney to seek capital punishment. However, the creation of such a committee would clearly violate the separation of powers doctrine. The 102 State’s Attorneys are independently elected constitutional officers, each 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*, 197 Ill.2d 135, 161-62 756 N.E.2d 788 (2001) (emphasis added). See also *People ex rel. Carey v. Cousins*, 77 Ill.2d 531, 539, 397 N.E.2d 809 (1979) (“[T]he 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.”); *People v. Richardson*, 123 Ill.2d 322, 362, 528 N.E.2d 612 (1988) (the “sole power to seek the death penalty” belongs to the prosecution); *People v. Williams*, 147 Ill.2d 173, 256, 588 N.E.2d 983 (1991) (“The State’s Attorney has the responsibility of evaluating evidence and other pertinent factors and determining what, if any, offense may be charged.”). As such, the legislative creation of a separate panel or body review to a State’s Attorney’s decision to seek (or not seek) the death penalty in a particular case would clearly violate the separation of powers doctrine enshrined in Article II, section 1 of our

constitution. See *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill.2d 466, 475, 831 N.E.2d 563 (2005) (“the State’s Attorney is a constitutional officer whose powers may not be stripped or transferred to others by a legislative body”); *People ex rel. Kunstman v. Shinsaku Nagano*, 389 Ill. 231, 249 (1945) (holding that because the State’s Attorney is a “constitutional officer with rights and duties analogous to or largely coincident with the Attorney General, though not identical, and the one to represent the county or People in matters affected with a public interest,” the legislature could not transfer some of that authority to another attorney). Moreover, for such a legislatively-created body to report such findings to the Illinois Supreme Court will serve only to exacerbate this constitutional infringement.

The majority further laments that the guidelines for seeking the death penalty are not binding and that there is no remedy for failing to adhere to them. However, because each case is unique, and because each individual State’s Attorney is empowered by the constitution to decide whether or not to seek the death penalty, neither the courts nor the legislature can mandate how a State’s Attorney exercises that exclusive discretion. Thus, creation of more bureaucracy is not a solution. Such additional state bureaucracy created by the General Assembly will usurp the exercise of independent prosecutorial discretion.

Nevertheless, current Illinois law provides numerous procedures for the effective review of a prosecutor’s decision to seek the death penalty. First, a trial judge may decertify a capital case for any of the numerous reasons specified in 720 ILCS 5/9-1(h-5). Also, a trial judge may decertify

a capital case after finding that defendant is mentally retarded. 725 ILCS 114-15. Moreover, once a jury has determined that death is the appropriate sentence, the trial judge has the right to file a written opinion of non-concurrence with the jury's sentence. 720 ILCS 5/9-1(g). Finally, all death sentences are subject to automatic review by the Illinois Supreme Court, and that Court is empowered to reverse any death sentence it deems "fundamentally unjust." 720 ILCS 5/9-1(i). Clearly these procedures ensure that only those truly deserving are actually sentenced to death.

Majority Response

1. The of separation of powers question.

The minority comment asserts that the proposed statewide review committee "would clearly violate the separation of powers doctrine." The majority members do not agree. They believe that the cases cited by the minority do not support their position, and that a statewide review committee is entirely consistent with Illinois law and the doctrine of separation of powers.¹

This same contention was made by a minority of the Governor's Commission. A brief explanation as to why this proposal does not implicate

¹ This same contention was made by a minority of the Governor's Commission. A brief explanation as to why this proposal does not implicate or violate separation of powers is contained in the Report of the Governor's Commission at pages 86 and 87: "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. [Citing and quoting from *People v. Izzo*, 195 Ill.2d 109 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."

or violate separation of powers is contained in the Report of the Governor's Commission at pages 86 and 87.

The doctrine of separation of powers is embodied in Article II, Section 1 of the Illinois Constitution of 1970:

“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”

The office of State's Attorney is provided for in Article VI, Section 19 of the Illinois Constitution, which relates to the Judicial Branch. There is no description of State's Attorneys' powers, merely a statement that “A State's Attorney shall be elected in each county in 1972 and every fourth year thereafter for a four year term....” The duties of State's Attorneys' are statutory. They are contained in the Counties Code, 55 ILCS 5/3-9005, which provides that the State's Attorney in each county has a duty to commence and prosecute all indictments and prosecutions in his/her county. In *People v. Izzo*, 195 Ill.2d 109, 117 (2001), the Illinois Supreme Court said, “The powers and duties of State's Attorneys are defined by statute (55 ILCS 5/3-9005 (West 1998) and can be revised by statute.”

The provisions of the Illinois Constitution relating to the General Assembly are contained in Article IV. The General Assembly has the sole power to determine what conduct constitutes a crime, and the punishment that may be imposed upon those convicted of crimes. In *People v. Williams*, 66 Ill.2d 179, 186 (1977), the Illinois Supreme Court said: “It is well settled in this State that the legislature has the power to prohibit particular acts as crimes, fix the punishment for the commission of such crimes and determine the manner of executing such punishment. [citing

cases].” Further, the Illinois Supreme Court, as the chief body in the Judicial Branch (Article VI, Section 1), has adopted rules with respect to procedures that must be followed when the State’s Attorney wishes to seek the death penalty. Thus, State’s Attorneys have no constitutional or statutory power to define criminal conduct, provide punishments for those convicted of crimes, or determine the process that must be adhered to in order to qualify a convicted defendant for capital punishment. Those are powers that belong to the General Assembly and the Illinois Supreme Court.

The General Assembly has enacted a statute that defines the crime of first degree murder. 720 ILCS 5/9-1(a). That statute provides that a defendant who has been convicted of first degree murder may be sentenced to death if an “Aggravating Factor” was involved in the crime. At present, there are 21 Aggravating Factors listed in 720 ILCS 5/9-1((b)(1)-(21). The State’s Attorney is bound by this law, and may not seek the death penalty unless a statutory Aggravating Factor is present in the case and proven beyond a reasonable doubt during the eligibility hearing.²

Related to these provisions is the requirement of Illinois Supreme Court Rule 216(c) that within 120 days after the defendant is indicted for first degree murder and arraigned, the State’s Attorney “shall provide notice of the State’s intention to seek or reject imposition of the death penalty,” and in the notice the State “shall also include all of the statutory

² The statute provides that when a defendant has been convicted of first degree murder, the State’s Attorney may request the trial judge to conduct a separate sentencing hearing “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 provision contains the statutory authority for the trial court holding the eligibility (subsection b) and penalty (subsection c) hearings.

aggravating factors enumerated in section 9-1(b) of the Criminal code which the state intends to introduce during the death penalty sentencing hearing.”

The General Assembly has further constricted State’s Attorneys’ discretion with respect to the death penalty. After a defendant has been found guilty of first degree murder, the trial judge may “decertify the case as a death penalty case” if the defendant is found to be mentally retarded, and when the sole evidence of guilt is the unsupported testimony of an accomplice, a jailhouse informant, or an eyewitness. 720 ILCS 5/9-1(h-5); 725 ILCS 5/114-15(d).

There is no provision in the Illinois Constitution or statutes, or the Rules of the Illinois Supreme Court, that limit the General Assembly’s power to completely abolish the death penalty as a punishment for first degree murder; that is purely a statutory matter. Nor is there any constraint on the General Assembly’s power to define the factors that qualify defendants convicted of first degree murder for capital punishment. Nor is there any constitutional or statutory provision that prohibits enactment of a statute designed to obtain statewide consistency in the application of capital punishment, requiring State’s Attorneys to obtain permission to seek the death penalty from a review board.

The cases cited by the minority contain propositions of law and holdings with which we have no quarrel. Several of those cases hold that it is not a violation of the doctrine of separation of powers for the General Assembly to vest the sole discretion to seek the death penalty in State’s Attorneys. *People ex rel. Carey v. Cousins*, 77 Ill.2d 531, 539-40 (1979).

Similarly, we acknowledge that State's Attorneys are responsible for determining what, if any, criminal offenses may be charged, and are vested with wide discretion in *enforcing* the criminal laws contained in Illinois statutes. *People v. Williams*, 147 Ill.2d 173, 256 (1991); *see also County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc.*, 215 Ill.2d 466, 475 (2005) (dicta). But all of these cases recognize, either expressly or by implication, that the power to define criminal conduct and fix criminal penalties resides with the General Assembly, and can be changed or restricted by the statutes passed by the General Assembly and approved by the Governor. These statutes may include provisions that limit the discretion of State's Attorneys by adding to or subtracting from the definitions of criminal conduct, and the applicable penalties, and the steps State's Attorneys must take in carrying out their duties of enforcing the criminal laws. State's Attorneys are the only office holders who are authorized to enforce the laws, but they are the laws as written by the General Assembly, as well as by rules of the Illinois Supreme Court, the highest authority in the Judicial Branch, of which the State's Attorneys are a part.

A typical example was the subject of *People v. Taylor*, 76 Ill.2d 289 (1979), a case cited by the Illinois Supreme Court in the *Carey* case on which the minority relies (*see* 77 Ill.2d 531 at 530). In *Taylor*, the Supreme Court upheld an amendment to the Illinois Juvenile Court Act (37 ILCS par. 702-7(3)) that *reduced* the degree of prosecutorial discretion of State's Attorneys in juvenile criminal proceedings (76 Ill.2d at 299).

Although it is to some extent repetitious, we submit the following examples of the application of these principles to capital punishment, in both Illinois statutes and rules of the Illinois Supreme Court:

Statutes

- The provisions establishing eligibility factors, which restrict the first degree murder cases in which State’s Attorneys may seek capital punishment to those in which one or more of the factors is present. They may not seek a death penalty in a first degree murder case that does not involve an Aggravating Factor. These factors have been changed from time to time by the General Assembly, with the concurrence of the Governor.

Representatives of the Illinois State’s Attorneys Association, the Illinois Attorneys General Association, and individual State’s Attorneys (including several members of the Committee), have acknowledged the power of the General Assembly, with the Governor’s concurrence, to limit State’s Attorneys’ discretion in designating first degree murder cases for capital punishment treatment. Joseph E. Birkett, State’s Attorney of DuPage County, speaking to the Committee at the request of the President of the Illinois State’s Attorneys Association, stated:³

“The Illinois State’s Attorneys Association in 1999 put forward the first suggested reforms, nine reforms, all of which have been enacted with the exception of one. We were united in our belief that we should reduce a number of aggravated circumstances in Illinois.”

³ Public Hearing 1/26/09, 42 at 53-54.

Peoria County State's Attorney Kevin Lyons told the Committee that the overwhelming majority of Illinois State's Attorneys believe the eligibility factors probably should be reduced.⁴ Justice McMorrow, concurring in *People v. Ballard*, 206 Ill.2d 151 at 215 (2002), stated that the Illinois Attorneys General Association expressed agreement that our death penalty statute is overly broad, and recommended that the number of aggravating factors be cut in half.

- The authority vested in trial court judges to overrule State's Attorneys' decisions to seek capital punishment, and decertify the case as capital, if the judge finds that the defendant is mentally retarded, or the sole evidence against the defendant is the testimony of a jailhouse informant, or a single eyewitness or accomplice.

- The statutory provisions requiring that capital cases be tried in three separate hearings, and specifying the State's burden of proof in the hearings.

- The statutory provisions requiring capital convictions to be appealed directly to the Illinois Supreme Court, and providing that capital sentences may be set aside by the Supreme Court if the death sentence is found to be fundamentally unjust.

- The statutory provision that appeals in post-conviction hearing in capital cases are heard by direct appeal to the Illinois Supreme Court.

⁴ Public Hearing 3/2/09, 41 at 48.

Illinois Supreme Court Rules

- Rule 416(c) of the Illinois Supreme Court, requiring the State's Attorney to file a Notice of Intent to seek capital punishment within 120 days after indictment.
- Illinois Supreme Court Rule 416((f), (g) and (h), requiring the State's Attorney to participate in case management conferences in capital cases, and file certificates of compliance with the requirements of the rules.

These precedents provide authority to the General Assembly and the Governor to enact a statute, or the Illinois Supreme Court to adopt a rule, designed to achieve statewide uniformity in the capital punishment system, by imposing a requirement that State's Attorneys may not seek the death penalty without first obtaining approval of a body established by statute.⁵ Were it not for the statute authorizing the State's Attorneys to seek the death penalty, capital punishment would not exist in Illinois. The proposed review would simply impose an additional step that must be taken before the death penalty may be sought.

The legislative purpose behind the proposed reviewing body is to achieve consistent, statewide uniformity in the capital punishment process, involving only the most heinous cases; to dispel the racial and geographic bias that infects the present system; to preclude State's Attorneys making threats of death sentences to achieve bargaining power over the defense;

⁵ The Governor's Commission Recommendation 30 included the following: "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."

to stop the filing of Notices of Intent in order to shift the cost of first degree murder cases from the local county to the State; and to prevent prosecutors from using capital prosecutions for political advantage, or any other inappropriate reason.

2. The policy issues.

The remainder of the minority comments are intended to demonstrate that certain existing statutory provisions “will ensure that only those truly deserving are actually sentenced to death.” In the words of the Bard of Avon, “tis a consummation devoutly to be wished” (Hamlet, Act III, Scene 1). There is no evidence that only the worst of the worst are selected for and/or receive death sentences, and there will not be a solid factual basis for a conclusion on that subject unless and until the Capital Crimes Database Act is funded, or the Illinois Supreme Court exercises its supervisory power over the lower courts,⁶ so that the necessary statistics are obtained and collated. Based upon our review of the facts of the 17 cases in which death sentences have been imposed during the Committee’s tenure (January 1, 2003 through December 31, 2009), we believe there are many cases involving far more egregious conduct in which the State’s Attorneys have agreed to pleas to imprisonment, and others in which judges and juries have declined to impose capital punishment.

The minority cites the power of trial judges to decertify cases as capital upon finding that the defendant is mentally ill. They could have added, as noted above, that the same power applies if the judge finds that

⁶ Illinois Constitution, Art. 6, §16.

the sole evidence against the defendant is a single eyewitness, a single accomplice, or the uncorroborated testimony of an informant. These are examples of the General Assembly's exercise of its power to place conditions on State's Attorneys' decisions to seek capital punishment. However, as a practical matter, these provisions apply in but a few cases, and will have little effect on the capital punishment system as a whole.

The minority also cites the trial judge's right to file a written opinion of non-concurrence with a jury's death sentence. In none of the cases in which capital sentences have been returned by juries since this authority was granted in 2003 has a trial judge filed a written non-concurrence. And even if made, the statement would have no binding effect on the Illinois Supreme Court when reviewing the case.

The minority's final policy submission is the provision, enacted in 2003, empowering the Supreme Court's to set aside death sentences deemed fundamentally unjust. In the capital case opinions rendered since the statute was enacted, it has not been relied on in any case by the Supreme Court to set aside a death sentence; no death sentence has been found to be fundamentally unjust. Here is a summary of the nine relevant opinions (citations contained in Part 3 of this Report):⁷

- The opinions in the *Mertz*, *Thompson* and *Adkins* cases contain factual analyses as to why the Supreme Court determined the death

⁷ In three of the decided cases, the Supreme Court was not called upon to analyze the question whether a death sentence was warranted. Mr. *Sutherland* agreed to a death sentence. Mr. *Nelson's* case was remanded for imposition of a sentence other than death based upon the trial judge during the penalty phase having dismissed a holdout juror opposed to a death sentence. Mr. *Lovejoy's* case was reversed and remanded for an entire new trial based upon trial errors; the Supreme Court did not have to reach and did not discuss the question whether the facts warranted capital punishment.

penalty was justified and/or not fundamentally unjust. The opinions in *Thompson* and *Adkins* discuss several pre-2003 cases in which the Supreme Court vacated death sentences because they were not warranted by the facts.⁸ But in none of these three cases is there a discussion of or comparison to any of the many post-2002 capital-eligible cases in which Notices of Intent were filed by the State's Attorneys in which, at the conclusion, death sentences were not imposed.

- The opinions in the *Urdiales*, *Runge* and *Ramsey* cases contain terse, conclusory language, stating that the death penalty was “the appropriate penalty” or “not fundamentally unjust,” or words to that effect. The Court did not explain how these conclusions were reached, or what analysis was involved in reaching the conclusions. There is only the Court's *ipse dixit*.

- The opinions in the *Bannister*, *Banks* and *Hanson* cases contain no discussion whatever of either the statutory “fundamentally unjust” standard, or the more general question whether the facts justify a capital sentence.

⁸ See cases cited in Final Report, page 140, footnote 225.