



REPORT
OF THE
GOVERNOR'S
COMMISSION ON CAPITAL PUNISHMENT

GEORGE H. RYAN
GOVERNOR

APRIL 2002
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Preamble

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

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

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

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

A. Investigation:

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

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

B. Eligibility for the Death Penalty

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

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

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

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

D. Trial of Capital Cases:

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

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

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

E. Review

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

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

Because capital punishment is presently lawful in Illinois and because it appears to have the support of a majority of Illinois citizens, our deliberations have concentrated primarily on these reforms

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

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

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

April, 2002

MEMBERS OF THE COMMISSION ON CAPITAL PUNISHMENT

Chairman, Judge Frank McGarr

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

Co-Chair, Senator Paul Simon

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

Co-Chair, Thomas P. Sullivan

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

Deputy Governor Matthew R. Bettenhausen, Member and Executive Director

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

Kathryn Dobrinic, Member

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

Rita Fry, Member

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

Theodore Gottfried, Member

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

Donald Hubert, Member

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

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

William J. Martin, Member

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

Thomas Needham, Member

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

Roberto Ramirez, Member

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

Scott Turow, Member

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

Mike Waller, Member

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

Andrea Zopp, Member

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

Judge William H. Webster, Special Advisor to the Commission

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

COMMISSION STAFF

Matthew R. Bettenhausen, Deputy Governor, State of Illinois

Mr. Bettenhausen served as both a member of the Commission and its Executive Director.

Jean M. Templeton, Research Director

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

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

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

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

Richard Guzman, Office of the Governor

Michelle Hanneken, Office of the Governor

Patricia Sheerin, Office of the Governor

Acknowledgements

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

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

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

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

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Chapter 1 -- Introduction and Background

CREATION OF THE GOVERNOR'S COMMISSION

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

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

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

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

The Governor's moratorium on the imposition of the death penalty in Illinois continued in effect during the pendency of the Commission's deliberations, and is still in effect. This Report summarizes the Commission's recommendations and findings following its examination of capital punishment in Illinois.

ORGANIZATION OF THE COMMISSION'S WORK

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

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

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

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

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

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

THE ILLINOIS DEATH PENALTY STATUTE AND ITS HISTORY

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

Illinois revised its death penalty scheme, contained in Ch.38, par. 1005-8-1A, in 1973.⁵ The original scheme contained six eligibility factors⁶, and provided that the decision about whether to impose a death sentence would be handled by a three-judge court. The original scheme also provided for an appellate process which began, as with other criminal appeals, with the appellate court.⁷ This death penalty scheme was found unconstitutional by the Illinois Supreme Court in *Rice v. Cunningham*, (61 Ill. 2d 353, 336 N.E. 2d 1 (1975)) both for its requirement of a three judge panel, which the Court held would divest the individual judges of their constitutional authority to decide cases, and for its appeal process imposing an intermediate level of review, which the Court held would violate those provisions of the 1970 Constitution which required a direct appeal to the Supreme Court in death penalty cases.

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

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

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

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

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

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

RECENT CHANGES TO THE DEATH PENALTY PROCESS IN ILLINOIS

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

Special Supreme Court Committee

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

in 1999, conducted public hearings in Chicago and Springfield in 1999, and issued a report containing its Supplemental Findings and Recommendations in October of 2000. The recommendations from the Committee covered a wide range of issues, including the qualification of counsel for capital cases, new discovery rules, new capital case procedures, and new standards for discovery of DNA evidence. Most of these recommendations were enacted into Rules by the Supreme Court, effective March 1, 2001.¹⁵ The Commission considered many of the observations made by the Committee, and has made a number of recommendations based upon those findings in this Report.

Senate Minority Leader's Task Force on the Criminal Justice System

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

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

RESEARCH INITIATED BY THE COMMISSION

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

Cases involving the thirteen men released from Death Row

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

Review of cases in which a death sentence was imposed.

Since Illinois reinstated its death penalty in 1977, more than 275 individuals have been sentenced to death. Of that number, approximately 160¹⁶ are currently on death row. Twelve inmates have been

executed under the current statute, and thirteen released from death row. Of those individuals who have been sentenced to death in Illinois, there are over 250 proceedings in which there has been at least one reported Illinois Supreme Court decision.¹⁷

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

Examination of laws of other states with the death penalty

Presently, 37 states and the federal government have a death penalty. At the outset, it was apparent that the Commission could benefit from understanding the procedures in other states. To that end, statutory provisions were collected¹⁸ from most states in the following areas:

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

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

Sentencing Study

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

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

decisions by prosecutors. Even with new Supreme Court rules which require the filing of a notice of intent to seek the death penalty, information is still not collected in any regularized fashion to document decisions that are made in the process. More important, to be truly valuable, information needs to be collected not only on death penalty cases, but also on all murder cases in which the death penalty is not sought or imposed in order to comparatively examine and review death penalty decisions and the process itself.

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

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

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

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

RESULTS OF THE RESEARCH

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

Thirteen released death row inmates

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

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

There were a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain. In some cases, this was an accomplice²⁰, while in other cases it was an in-custody informant. The "Ford Heights Four" case involved the conviction of four men in south suburban Cook County for the 1978 double murder of a man and a woman. Two of the men, Verneal Jimerson and Dennis Williams, were sentenced to death, while the other two were sentenced to extended prison terms. The primary testimony against the men was provided by their alleged accomplice, Paula Gray, who was then 17.²¹ All four men were ultimately released in 1996, after new DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime.

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

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

There were also several cases where there was a question about the viability or reliability of eyewitness evidence. Former death row inmate Steven Smith was convicted and sentenced to death based upon the questionable testimony of one eyewitness, testimony which the Illinois Supreme Court later found unreliable. Anthony Porter's convictions and death sentence rested primarily upon the testimony of two

eyewitnesses, both of whom were acquainted with Mr. Porter. Those witnesses later recanted, and another man subsequently confessed to the crime for which Mr. Porter was convicted. He entered a plea of guilty and is currently serving a prison term for that crime.²³ These cases seemed to reaffirm recent academic findings about the potential fallacies of eyewitness testimony.

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

Other Death Penalty cases

The broader review of the more than 250 cases in which a death penalty has been imposed²⁴ revealed some areas for concern. Overall, more than half of all of these cases were reversed at some point in the process.²⁵ Most of the reversals occurred on direct appeal, with roughly 69% of the reversed cases falling into this category. Of the cases reversed on direct appeal, almost 58% of those were reversed on sentence only, and not on the underlying murder conviction.

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

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

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

Outside of the cases involving the 13 men released from death row, cases in which a death sentence is imposed based upon a single eyewitness, an accomplice or an in-custody informant without some kind of corroboration are more rare. In many of the cases where a defendant has been sentenced to death, there is some kind of forensic evidence -- such as fingerprint evidence, DNA evidence and so forth-- which links the defendant to the crime.

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

Victim issues

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

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

In addition to hearing views from a number of surviving family members of homicide victims, the Commission also requested several studies to assess different facets of this issue. These studies were completed at the Commission's request by the Illinois Criminal Justice Information Authority (the Authority)²⁸ during the fall and winter of 2001-2002. Results from all of these studies are discussed in detail in Chapter 14 of this Report. The initial study²⁹ summarized national research evaluating the needs of crime victims and assessing the effectiveness of victim assistance programs. It also reported on specific research that the Authority had recently completed with respect to intimate partner homicides in Chicago, and the Authority's evaluation of the Cook County Victim Witness Program. Finally, it commented upon the Authority's process to define a plan for investigating the sufficiency of services delivered to crime victims.

As a follow up to this research, the Authority convened a special series of focus groups of the family members of homicide victims in order to elicit views about their experiences with the criminal justice

system. Focus groups were conducted in both Chicago and Springfield, and participants' views were elicited through the assistance of a trained facilitator. The Authority's report³⁰ provided helpful insights into the challenges facing surviving family members of homicide victims as the criminal case progresses through the system.

In its third and final report³¹, the Authority provided a summation of a panel discussion involving individuals who had been wrongfully convicted, including a number of individuals who had been released from death row in Illinois. The wrongfully convicted are also victims, and while some of the cases involving the wrongfully convicted have generated media attention, less effort has gone into identifying the specific needs that should be addressed to assist their re-entry into society following their release from prison.

Sentencing Study

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

Costs related to the imposition of the death penalty

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

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

and non-capital murder prosecutions. A discussion of those studies is presented in Chapter 14 of this Report.

ORGANIZATION OF THIS REPORT

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

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

Frequently cited materials

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

Supreme Court Reports

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

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

The *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases, October 1999* will be referred to throughout this Report as “the Sup. Ct. Committee Report, October 1999.” The *Special Supreme Court Committee on Capital Cases Supplemental Findings and Recommendations, October 2000* will be referred to throughout this Report as “the Sup. Ct. Committee Supplemental Report, October 2000.”

Senate Minority Leader’s Report

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

The Canadian Inquiries.

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

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

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

The second Canadian inquiry involved an investigation into the wrongful conviction of Thomas Sophonow in Manitoba. Mr. Sophonow was accused of strangling 16 year-old Barbara Stoppel in a donut shop in Winnipeg on the 23rd of December, 1981. The first criminal trial resulted in a mistrial, and Mr. Sophonow was retried and convicted. His conviction was overturned, and he was tried a third

time and convicted. The Manitoba Court of Appeals acquitted him of all charges in 1985. Mr. Sophonow maintained his innocence throughout the proceedings. In 1998, some 13 years after he was acquitted, the Winnipeg police reinvestigated the murder. In June of 2000, an announcement was made that Mr. Sophonow was not responsible for the murder, and that another suspect had been identified. The Attorney General of Manitoba apologized to Mr. Sophonow on the same day for his wrongful conviction. A commission of inquiry was appointed to determine whether there were errors made in the investigation and court proceedings and to determine compensation.

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

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

Appendices to this Report.

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

Notes - Chapter 1

1. States undertaking an examination of their own death penalty systems included Arizona, Indiana, Nebraska and North Carolina. Texas and Maryland considered, but did not pass, a moratorium. *See, e.g.* “Death penalty debate slowly shifts,” Chicago Tribune, January 31, 2001.
2. The transcripts from the public hearings are presented in full on the Commission’s website, www.idoc.state.il.us/ccp.
3. This report provided an analysis of salary disparities in the criminal justice system, which have the practical effect of discouraging many attorneys from pursuing careers in this area.
4. The names of the thirteen men released from Illinois death row are: Joseph Burrows, Perry Cobb, Rolando Cruz, Gary Gauger, Alejandro Hernandez, Verneal Jimerson, Ronald Jones, Carl Lawson, Steven Manning, Anthony Porter, Steven Smith, Darby Tillis, and Dennis Williams. Citations to the Illinois Supreme Court opinions involving these former inmates may be found in the Technical Appendix.
5. The complete text of P.A. 78-921 is set forth in the Supreme Court decision which subsequently invalidated the scheme.
6. Murder of a police officer or firefighter, murder of employee or person present in a Department of Corrections facility, multiple murders, murder in the course of hijacking, contract murder, murder in the course of a felony.
7. P.A. 78-921 added a new par. 1005-8-1A to chapter 38, which provided, in part: “If the 3 judge court sentences the defendant to death and an appeal is taken by the defendant, the appellate court shall consider the appeal in two separate stages. In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there were errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court finds there were no errors justifying modification or reversal of the findings of the trial court, the appellate court shall conduct an evidentiary hearing to determine whether the sentence of death by the 3 judge court was the result of discrimination. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment.”
8. 720 ILCS 5/9-1(d).
9. A copy of the complete statutory provision governing the death sentencing process as it currently exists is contained in the Appendix.
10. *See* P.A. 82-677.

11. *See* P.A. 82-1025. The original eligibility factor was limited to the murder to prevent the testimony of a witness against the defendant; the subsequent amendment broadened the eligibility factor to include the murder to prevent the testimony of witness in any criminal prosecution or investigation, whether against that defendant or another.
12. A table containing the amendments to the eligibility factors contained in the death penalty statute, showing the public act number and effective date, is contained in the Appendix.
13. On August 17, 2001, Governor Ryan vetoed House Bill 1812, which sought to add a new provision to the State's death penalty sentencing statute making a defendant eligible for the death penalty where the murder was committed in furtherance of the activities of an organized gang. The Governor noted in his veto message that the almost annual effort to add eligibility factors to the statute introduced more arbitrariness and discretion, raising potential constitutional concerns. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.
14. On February 8, 2002, Governor Ryan returned House Bill 2299 to the legislature with significant amendments to its anti-terrorism provisions and deletion of the new death eligibility factor. The bill is currently pending in the legislature. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.
15. The Illinois Supreme Court Rules, with Commentary, can be found on the Supreme Court's website, www.state.il.us/court/SupremeCourt.
16. The number of inmates on death row varies as cases are reversed or are resentenced, or as inmates die from other causes.
17. In some cases, although a death sentence has been imposed by the trial court, no opinion on direct review has yet been issued by the Supreme Court. Trial courts continue to impose death sentences in Illinois, although the Governor's moratorium prevents any executions from occurring.
18. This Report contains citations to various authorities from other states. Some of the materials from other states are included in the Technical Appendix to this Report.
19. A complete copy of the report by Drs. Pierce and Radelet is contained in the Technical Appendix to this report, published separately.
20. The cases of former death row inmates Perry Cobb and Darby Tillis also illustrate the problem of relying upon a witness with something to gain. Their convictions were based upon the testimony of Phyllis Santini, who claimed that Cobb and Tillis had committed the robbery and murder of two men on the north side. Her testimony was later impeached in a subsequent trial by Lake County prosecutor who testified that he knew Santini and she had made statements to him that Santini and her boyfriend had committed a robbery. There was one other witness who claimed in one of the trials to have seen men who looked like Cobb and Tillis in the vicinity of the robbery, but this witness had failed to

positively identify the men in earlier trials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 2 – Police and Pretrial Investigations

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

Recommendation 1 :

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

Recommendation 2 :

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

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

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

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

Recommendation 3 :

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

Recommendation 4 :

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

Recommendation 5 :

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

Recommendation 6 :

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

Recommendation 7 :

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

Recommendation 8 :

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

Recommendation 9 :

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

Recommendation 10 :

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

Recommendation 11 :

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

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

Recommendation 12 :

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

Recommendation 13 :

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

Recommendation 14 :

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

Recommendation 15 :

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

Recommendation 16 :

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

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

Recommendation 17 :

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

Recommendation 18 :

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

Recommendation 19 :

The statute relating to the Illinois Law Enforcement Training and Standards Board, 50 ILCS 705/6.1a, should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

Chapter 3 - DNA and Forensic Testing

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

Recommendation 20 :

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

Recommendation 21 :

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

Recommendation 22 :

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

Recommendation 23 :

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

Recommendation 24 :

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

Recommendation 25 :

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

Recommendation 26 :

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

Chapter 4 – Eligibility for Capital Punishment

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

Recommendation 27 :

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

Recommendation 28 :

There should be only five eligibility factors:

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

(2) The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.

(3) The murder of two or more persons as set forth in 720 ILCS 5/9-1(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.

Chapter 5 – Prosecutors’ Selection of Cases for Capital Punishment

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

Recommendation 29 :

The Illinois Attorney General and the Illinois State's Attorneys Association should adopt recommendations as to the procedures State's Attorneys should follow in deciding whether

or not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court rule or legislation.

Recommendation 30 :

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

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

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

Terms of members: The Attorney General and the State's Attorney of Cook County would serve on the Committee during their four year term of office (due to the difference in election schedules, these two terms would actually be staggered). The President of the State's Attorney's Association would serve for a one year term. The State's Attorney chosen by lottery would serve for a one year term. The Retired Judge would serve for a four year term. In this way, there would be a majority of the members who would serve four year terms (although staggered somewhat) so the Committee would have stability; there would be several members with shorter terms to enable a rotation through the process with some regularity.

Scope of powers: The purpose of the statewide committee is to review and approve the decision to seek the death penalty in death eligible cases. The committee would grant approval by majority vote. The review should be confidential, and based upon standards developed by the Committee to carry out the intentions of the legislature with respect to the death penalty statute. Defense counsel should be allowed to present information to the committee with respect to the defense view of whether the death penalty is appropriate. Information presented to the committee would be available to both sides (prosecution and defense), except that Defense counsel could request confidentiality of

information that would not otherwise be subject to discovery. The prosecution could request confidentiality of information necessary to protect the security of any individual.

Recommendation 31 :

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

Chapter 6 - Trial Judges

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

Recommendation 32 :

The Illinois Supreme Court should give consideration to encouraging the Administrative Office of the Illinois Courts (AOIC) to undertake a concerted effort to educate trial judges throughout the state in the parameters of the Capital Crimes Litigation Act and the funding sources available for defense of capital cases.

Recommendation 33 :

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

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

Recommendation 34 :

In light of the changes in Illinois Supreme Court rules governing the discovery process in capital cases, the Supreme Court should give consideration to ways the Court can insure that

particularized training is provided to trial judges with respect to implementation of the new rules governing capital litigation, especially with respect to the management of the discovery process.

Recommendation 35 :

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

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

Recommendation 36 :

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

Recommendation 37 :

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

Recommendation 38 :

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

Recommendation 39 :

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

Chapter 7 - Trial Lawyers

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

Recommendation 40 :

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

Recommendation 41 :

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

Recommendation 42 :

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

Recommendation 43 :

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

Recommendation 44 :

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

Recommendation 45 :

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

- 1. The risks of false testimony by in-custody informants (“jailhouse snitches”).**
- 2. The risks of false testimony by accomplice witnesses.**
- 3. The dangers of tunnel vision or confirmatory bias.**
- 4. The risks of wrongful convictions in homicide cases.**

5. Police investigative and interrogation methods.
6. Police investigating and reporting of exculpatory evidence.
7. Forensic evidence.
8. The risks of false confessions.

Chapter 8 - Pretrial proceedings

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

Recommendation 46 :

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

Recommendation 47 :

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

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

Recommendation 48 :

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

Recommendation 49 :

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

Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to:

- (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
- (2) Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude;
- (3) Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or
- (4) Diminish the degree of the defendant's culpability or mitigate the defendant's potential sentence.

Recommendation 50 :

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

Recommendation 51 :

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

Recommendation 52 :

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

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

The prosecution bears the burden of proving by a preponderance of evidence that the witness' testimony is reliable. The trial judge may consider the following factors, as well as any other factors bearing on the witness' credibility:

- (1) The specific statements to which the witness will testify.

- (2) The time and place, and other circumstances regarding the alleged statements.
- (3) Any deal or inducement made by the informant and the police or prosecutors in exchange for the witness' testimony.
- (4) The criminal history of the witness.
- (5) Whether the witness has ever recanted his/her testimony.
- (6) Other cases in which the witness testified to alleged confessions by others.
- (7) Any other known evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.

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

Recommendation 53 :

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

Recommendation 54 :

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

Chapter 9 - The Guilt-Innocence Phase

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

Recommendation 55 :

Expert testimony with respect to the problems associated with eyewitness testimony may be helpful in appropriate cases. Determinations as to whether such evidence may be admitted should be resolved by the trial judge on a case by case basis.

Recommendation 56 :

Jury instructions with respect to eyewitness testimony should enumerate factors for the jury to consider, including the difficulty of making a cross-racial identification. The current version of IPI is a step in the right direction, but should be improved.

IPI 3.15 should also be amended to add a final sentence which states as follows: Eyewitness testimony should be carefully examined in light of other evidence in the case.

Recommendation 57 :

The Committee on the Illinois Pattern Jury Instructions-Criminal should consider a jury instruction providing a special caution with respect to the reliability of the testimony of in-custody informants.

Recommendation 58 :

IPI - Criminal -3.06 and 3.07 should be supplemented by adding the italicized sentences, to be given only when the defendant's statement is not recorded:

You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made. You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.

Recommendation 59 :

Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of capital trials.

Chapter 10 - The Sentencing Phase

Following the determination as to the guilt of the defendant, a separate sentencing hearing must be held in order to impose capital punishment. This Chapter contains recommendations that specifically apply to this phase of the trial. Different rules apply to this sentencing trial, and different considerations are presented. In the first part of the sentencing phase, the defendant's eligibility for the death penalty must be determined. The Commission's recommendations for limiting the class of cases eligible for the death penalty were presented in Chapter 4 of this report. The Commission also supports the application of discovery rules to the sentencing phase, additions to the statutory list of mitigating factors to be considered, permitting the defendant to make a statement in allocution at the sentencing phase, and instructing the jury on sentencing alternatives.

Recommendation 60 :

The Commission supports the new amendments to Supreme Court Rule 411, which make the rules of discovery applicable to the sentencing phase of capital cases.

Recommendation 61 :

The mitigating factors considered by the jury in the death penalty sentencing scheme should be expanded to include the defendant's history of extreme emotional or physical abuse, and that the defendant suffers from reduced mental capacity.

Recommendation 62 :

The defendant should have the right to make a statement on his own behalf at during the aggravation/mitigation phase, without being subject to cross-examination.

Recommendation 63 :

The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.

Recommendation 64 :

Illinois courts should continue to reject the results of polygraph examinations during the sentencing phase of capital trials.

Chapter 11 – Imposition of sentence

In Illinois, the statute which describes the method by which the jury must make its decision on whether to impose a death sentence has been criticized as confusing. The Commission unanimously recommends changing the statute to clarify the language and instruct the jury that it must determine unanimously, after considering factors in aggravation and mitigation, whether death is the appropriate sentence. The Commission also recommends, by majority vote, that following the jury verdict on the imposition of capital punishment, the trial judge should indicate

on the record whether he or she concurs in the result. If not, a sentence other than death should be imposed. A unanimous recommendation has been made that the death penalty not be imposed on those who are mentally retarded. Finally, the Commission identified several types of cases in which the potential for error was significantly higher, and unanimously recommends that the death penalty be precluded in cases involving uncorroborated testimony from an in-custody informant, an accomplice, and cases based upon a single eyewitness.

Recommendation 65 :

The statute which establishes the method by which the jury should arrive at its sentence should be amended to include language such as that contained in former SB 1903 to make it clear that the jury should weigh the factors in the case and reach its own independent conclusion about whether the death penalty should be imposed. The statute should be amended to read as follows:

If the jury determines unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence . . .

Recommendation 66 :

After the jury renders its judgement with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she concurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming adoption of new death penalty scheme limited to five eligibility factors.)

Recommendation 67 :

In any case approved for capital punishment under the new death penalty scheme with five eligibility factors, if the finder of fact determines that death is not the appropriate sentence, the mandatory alternative sentence would be natural life.

Recommendation 68 :

Illinois should adopt a statute which prohibits the imposition of the death penalty for those defendants found to be mentally retarded. The best model to follow in terms of specific language is that found in the Tennessee statute.

Recommendation 69 :

Illinois should adopt a statute which provides:

A. The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for imposition of a death penalty.

B. Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

Chapter 12 – Proceedings following conviction and sentence

This Chapter outlines recommendations for changes following the trial and sentencing phase. The Commission has recommended a number of changes to proceedings following trial. A majority of Commission members expressed the view that Illinois should expand the scope of review on direct appeal to embrace consideration of whether or not the imposition of the death sentence was excessive or disproportionate to the penalty imposed in other, similar cases. Members unanimously supported imposing post-trial disclosure responsibilities on prosecutors to disclose evidence which might negate the guilt or mitigate the sentence of a defendant. Three proposals to restructure the time limits in post-conviction review have also been recommended unanimously. Finally, the Commission also unanimously recommended earlier filings of clemency petitions to encourage timely disposition.

Recommendation 70 :

In capital cases the Illinois Supreme Court should consider on direct appeal (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating circumstances indicates death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.

Recommendation 71 :

Illinois Supreme Court Rule 3.8., Special Responsibilities of a Prosecutor, should be amended in paragraph (c) by the addition of the language italicized:

(c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense. *Following conviction, a public prosecutor or other government lawyer has the continuing obligation to make timely disclosure to the counsel for the defendant or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant or mitigate the defendant's capital sentence. For purposes of this post-conviction disclosure responsibility "timely*

disclosure” contemplates that the prosecutor or other government lawyer should have the opportunity to investigate matters related to the new evidence.

Recommendation 72 :

The Post-Conviction Hearing Act should be amended to provide that a petition for a post-conviction proceeding in a capital case should be filed within 6 months after the issuance of the mandate by the Supreme Court on affirmance of the direct appeal from the trial.

Recommendation 73 :

The Illinois Post-Conviction Hearing Act should be amended to provide that the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.

Recommendation 74 :

The Post-Conviction Hearing Act should be amended to provide that in capital cases, a proceeding may be initiated in cases in which there is newly discovered evidence which offers a substantial basis to believe that the defendant is actually innocent, and such proceedings should be available at any time following the defendant's conviction regardless of other provisions of the Act limiting the time within such proceedings can be initiated. In order to prevent frivolous petitions, the Act should provide that in proceedings asserting a claim of actual innocence, the court may make an initial determination with or without a hearing that the claim is frivolous.

Recommendation 75 :

Illinois law should provide that after all appeals have been exhausted and the Attorney General applies for a final execution date for the defendant, a clemency petition may not be filed later than 30 days after the date that the Illinois Supreme Court enters an order setting an execution date.

Chapter 13 – Funding

Commission members recognized that implementing many of the proposals for reform in this report will require a significant commitment of financial resources. Without that commitment to the criminal justice system, any meaningful implementation of many of these reforms will be curtailed. This Chapter addresses some of the Commission’s recommendations which require funding consideration. The Commission unanimously recommended that leaders in both the executive and legislative branch significantly improve resources available to the criminal justice system to insure meaningful implementation of reforms. This chapter identifies a number of important efforts, the substance of which may be discussed in other portions of this report,

where funding plays a significant role. These include the reauthorization of the Capital Crimes Litigation Act, statewide trial support of defense counsel by the State Appellate Defender, improved access to research and research staff for judges, improvements to training for all parties, a stronger commitment to funding forensic laboratories with particular emphasis on creation of the comprehensive DNA database, and assistance with student loans for those entering careers in the criminal justice system.

Recommendation 76 :

Leaders in both the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases.

Recommendation 77 :

The Capital Crimes Litigation Act, 725 ILCS 124/1, et. seq., which is the state statute containing the Capital Litigation Trust Fund and other provisions, should be reauthorized by the General Assembly.

Recommendation 78 :

The Commission supports the concept articulated in the statute governing the Capital Litigation Trust Fund, that adequate compensation be provided to trial counsel in capital cases for both time and expense, and encourages regular reconsideration of the hourly rates authorized under the statute to reflect the actual market rates of private attorneys.

Recommendation 79 :

The provisions of the Capital Litigation Trust Fund should be construed as broadly as possible to insure that public defenders, particularly those in rural parts of the state, can effectively use its provisions to secure additional counsel and reimbursement of all reasonable trial related expenses in capital cases.

Recommendation 80 :

The work of State Appellate Defender's office in providing statewide trial support in Capital Cases should continue, and funds should be appropriated for this purpose.

Recommendation 81 :

The Commission supports the recommendations in the Report of the Task Force on Professional Practice in the Illinois Justice System to reduce the burden of student loans for those entering criminal justice careers and improve salary levels and pension contributions for those in the system in order to insure retention of qualified counsel.

Recommendation 82 :

Adequate funding should be provided by the State of Illinois to all Illinois police agencies to pay for electronic recording equipment, personnel and facilities needed to conduct electronic recordings in homicide cases.

Chapter 14 – General Recommendations

As the Commission discussed many of its proposals for capital cases, it became apparent that some issues also applied with equal force to non-capital cases. It was the view of a majority of Commission members that extension of many of these recommendations to the entire criminal justice system should be seriously considered. The collection of better data with respect to homicide cases in Illinois, irrespective of whether proposals from Chapter 12 on proportionality review are adopted, was unanimously approved by the Commission. Finally, the Commission recommends that judges should be reminded of their responsibility to report instances of trial counsel misconduct to disciplinary authorities.. This chapter also contains a discussion of various research reports in the areas of victim issues, factors which may impact upon the imposition of sentencing, and costs related to the death penalty.

Recommendation 83 :

The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.

Recommendation 84 :

Information should be collected at the trial level with respect to prosecutions of first degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied. Data should be collected on a form which provides details about the trial, the background of the defendant, and the basis for the sentence imposed. The forms should be collected by the Administrative Office of the Illinois Courts, and the form from an individual case should not be a public record. Data collected from the forms should be public, and should be maintained in a public access database by the Criminal Justice Information Authority.

Recommendation 85 :

Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional conduct by prosecutors and defense lawyers.

Conclusion

Commission members believe that the recommendations presented in this report will significantly improve the fairness and accuracy of the Illinois death penalty system, and substantially improve the quality of justice in Illinois capital cases. After two years of concentrated study and discussion, all Commission members were left with the firm belief that the death penalty process itself is incredibly complex, and that there are few easy answers. The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.

Throughout its process, however, members also discovered that despite the complex and difficult issues presented, the Commission was able to engage fully in discussion of topics that ordinarily engender contentious debate. As a result, Commission members believe that serious and reasoned discussion of this topic is both possible and beneficial. It is the hope of Commission members that leaders throughout government, as well as members of the public, will engage in that serious and reasoned debate over what is one of the most important public policy issues facing our state and our nation.

This Report contains many recommendations for very specific improvements to the capital punishment system in Illinois. While specific improvements are generally discussed in terms that would suggest prospective application only, there may be circumstances in which application of these suggested reforms might be made in more immediate fashion. The Commission has not made any specific recommendation with respect to the retroactive application of its recommendations as it was impossible to predict which proposals or combination of proposals may actually be adopted and when they might take effect. The many possible permutations and the interrelationship of the recommendations made it extraordinarily difficult to address the issue of retroactivity in more than an abstract way. The Commission certainly believes that retroactivity is a question that should be specifically addressed by the legislature when considering the adoption of any of the recommended reforms.

Moreover, recent opinions of the Illinois Supreme Court suggest that the Court itself is struggling with the issue of whether, and to what extent, its own new rules might be applied retroactively. *See People v. Hickey*, 2001 WL 1137273 (September 27, 2001). Retroactive application of reforms is a complex issue in and of itself, and not one that admits of easy resolution. Although the Commission has not made a specific recommendation with respect to the application of its recommendations to pending cases, Commission members believe Governors should give consideration to the proposed reforms when considering clemency applications in capital cases. If changes in the present system are required to ensure its fairness and accuracy, it is entirely appropriate to consider how those changes might have made a difference to defendants when reaching determinations about whether or not a death sentence should be upheld on the merits or whether mercy should be extended in light of all the circumstances.