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REDUCING THE RISK OF EXECUTING THE INNOCENT: THE REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

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WEDNESDAY, JUNE 12, 2002

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:04 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, chairman of the subcommittee, presiding.

Present: Senators Feingold and Durbin.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. This hearing will come to order, and good morning.

Welcome to this hearing of the Senate Judiciary Committee, Subcommittee on the Constitution, and I want to thank everyone for coming here so early this morning. We are starting an hour earlier than usual, Senate time, in order to complete this hearing by 11:00 a.m., when there is a Joint Session of Congress that will be convened to hear an address from the Prime Minister of Australia.

This hearing today will explore the bold, unique, yet entirely reasonable response by Governor George Ryan and the people of Illinois to flaws in the current administration of the death penalty, most notably, the risk of executing innocent people.

Earlier this year, our Nation hit what I would have to regard and I think most people would regard as a very troubling milestone: the 100th innocent person in the modern death penalty era was exonerated and released from death row. A few weeks later, we hit 101. During this same period, there have been close to 800 executions at the State and Federal levels. This means that the system is so fraught with error that, for every eight executions, there has been one person on death row later found innocent in the modern death penalty era. Of course, for every innocent person wrongfully convicted, a guilty person has likely gone free and may still be able to commit more crimes.

The 100th death row inmate to be exonerated is Ray Krone. Mr. Krone was wrongfully convicted and served 10 years in the Arizona prisons for a murder he did not commit, before he finally walked out a free man. Faulty forensic analysis and circumstantial evi-

dence led to Mr. Krone's conviction. But a DNA test set him free and points to another man as the killer. Mr. Krone is in the audience today, and, Mr. Krone, thank you for joining us today. Where is Mr. Krone? Thank you very much.

Two other men who share the same dubious distinction are also with us today: Kirk Bloodsworth and Juan Melendez. Mr. Bloodsworth served 9 years in the Maryland prisons, including some time on death row, for a rape and murder he did not commit. Mr. Bloodsworth was convicted primarily on the basis of faulty eyewitness testimony. Like Mr. Krone, a DNA test was the key to his freedom. It is good to see you here, sir.

Mr. Melendez sat on death row in Florida for almost two decades before a court finally overturned his murder conviction. The court cited the prosecution's failure to provide the defense with critical evidence and the lack of physical evidence linking him to the crime. After the court's decision, State prosecutors announced that they would drop the charges against him. Mr. Melendez was released earlier this year. Mr. Melendez, thank you for joining us. Where is Mr. Melendez? Thank you for being here.

These men—Mr. Krone, Mr. Bloodsworth, Mr. Melendez—and the other 98 innocent former death row inmates are the reason we are having today's hearing. These are not abstractions. They are real people, innocent men who suffered for years under the very real possibility of being put to death for crimes that they did not commit.

There is no question that those who perpetrate heinous crimes should be punished and punished severely. And there is no question that the family and friends of murder victims bear an awful, painful burden for the rest of their lives. Society owes them our most steadfast effort to bring the perpetrators to justice and sentence them severely. But society also has a responsibility to ensure that only the guilty are convicted and punished.

This hearing will explore the steps that one State—Illinois—has taken to address this difficult dilemma. In Illinois, after 13 death row inmates were exonerated and released, as compared with the 12 executions carried out after the death penalty was reinstated in 1977, a consensus emerged among both death penalty opponents and proponents that the State's death penalty system was broken. Two years ago, on January 31, 2000, Governor Ryan took the courageous step of placing a moratorium on executions in Illinois.

Governor Ryan then created an independent, blue-ribbon commission of present and former prosecutors, public defenders, a former Federal judge, and various distinguished Illinois citizens, including one of our former colleagues and my dear friend, Senator Paul Simon. Governor Ryan instructed this Commission to review the State's death penalty system and to advise him on how to reduce the risk of executing the innocent and ensure fairness in the system. Governor Ryan's decision to suspend executions and create a commission sparked a national debate on the fairness of the current administration of the death penalty.

After 2 years of work, the Illinois Governor's Commission on Capital Punishment completed its task and released its report in April of this year. The Commission set forth 85 recommendations for the reform of the Illinois death penalty system. These rec-

ommendations address difficult issues like inadequate defense counsel, execution of the mentally retarded, coerced confessions, and the problem of wrongful convictions based solely on the testimony of a jailhouse snitch or a single eyewitness. The Commission's work is the first comprehensive review of a death penalty system undertaken by a State or Federal government in the modern death penalty era. We will hear more about the Commission's work and its recommendations in this hearing.

The risk of executing the innocent and other flaws in the administration of the death penalty are not unique to Illinois. The 101 innocent people who were sent to death row and later exonerated come from 24 different States. In addition to Illinois, exonerations of people sentenced to death have occurred in Alabama, Arizona, California, Florida, Georgia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, and Washington.

Just last month, Governor Parris Glendening of Maryland placed a moratorium on executions in his State to allow a study of racial disparities he ordered 2 years ago to be completed. And I commend Governor Glendening for his leadership, and I hope that other Governors follow the lead of Governor Ryan and Governor Glendening.

But I also believe that Congress has an important responsibility to ensure that innocent people are not executed and that constitutional protections are respected in the administration of capital punishment across the country.

I have introduced a bill that would apply essentially the Illinois model to the rest of the Nation. The National Death Penalty Moratorium Act, Senate bill 233, would enact a moratorium on Federal executions and urge the States to do the same, while a National Commission on the Death Penalty examines the fairness of the administration of the death penalty at the Federal and State levels.

I do not expect our witnesses today to discuss or debate the provisions of my bill. Rather, this hearing is intended to educate Congress and the American people about the Illinois experience with a moratorium and review of the death penalty system.

This morning we will have two panels of witnesses. Illinois Governor George Ryan is the sole witness on panel one. On panel two, we will have three members of the Illinois Commission as well as outside experts and prosecutors from Illinois and South Carolina. To accommodate Governor Ryan's schedule, who will be appearing over video, however, we will proceed first with panel two. At approximately 10:00 a.m., we will take a brief break from panel two and turn to Governor Ryan. Following Governor Ryan's statement and any questions for the Governor, we will return to panel two, and I want to thank my colleagues and the panel two witnesses for their flexibility.

Senator Thurmond, the ranking member of the subcommittee, has submitted a statement for the record which will be entered into the record without objection.

[The prepared statement of Senator Thurmond appears as a submission for the record.]

Chairman FEINGOLD. And as I understand it, there will be no live opening statement from the Republican side. Is that correct?

And, therefore, I believe we can move forward to the panel that is already assembled in front of us.

Our first witness, also appearing through video, is Matt Bettenhausen. He is the Illinois Deputy Governor for Criminal Justice. Mr. Bettenhausen is a former attorney with the United States Attorney's Office for the Northern District of Illinois. He served as Executive Director of the Illinois Governor's Commission on Capital Punishment. I want to thank you, Mr. Bettenhausen, for taking the time to testify before the committee today during what I know is a very important time for the Illinois Legislature, and you may proceed.

STATEMENT OF MATTHEW R. BETTENHAUSEN, DEPUTY GOVERNOR FOR CRIMINAL JUSTICE AND PUBLIC SAFETY, STATE OF ILLINOIS, AND EXECUTIVE DIRECTOR, ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

Mr. BETTENHAUSEN. Thank you, Chairperson Feingold and distinguished members of the United States Senate. First of all, let me thank you for accommodating the Governor's and my schedule. As you know, the Governor had to call the General Assembly into special session because of the budget problems that we are having here in Illinois. And given those problems, I certainly would much more prefer to be there in Washington, D.C., with you. But I am honored and privileged to be before you this morning to talk about the work of the Governor's Commission on Capital Punishment, and I think it is very appropriate that we are before this committee as you have demonstrated that you have been champions of fairness and have helped to ensure that justice is in our justice system.

Senator Feingold, as you know, it was approximately a year and a half ago that I was working with your staff along with staff of Congressman LaHood, Illinois' very own Congressman LaHood, in drafting the Innocence Protection Act that you have introduced and Congressman LaHood has sponsored. As you know, some of those provisions were modeled after the reforms that we have already made here in Illinois. And one of those important provisions, as Senator Feingold pointed out, is DNA testing. An important provision that we have had here in Illinois—and it is in the Innocence Protection Act—is to provide for post-conviction DNA testing.

As you know, Illinois' track record since reinstating capital punishment in 1977 speaks for itself. It does not speak well for itself. In that time, we have had 12 individuals executed; 13 other individuals have been released and exonerated. Five of those 13 were released based on post-conviction DNA testing. It is an important tool for not only bringing the wrongfully convicted but also accurately convicting the guilty.

I am happy to be here to discuss the work of the Governor's Commission, which conducted extensive research and analysis of Illinois' capital punishment system from the initial police investigation to trial, appeal, and post-conviction review.

As Senator Feingold has noted, there are some 85 recommendations in our report for reform, in addition to the significant reforms that we have already made in Illinois, such as providing for post-conviction DNA testing, providing compensation for those who have been wrongfully convicted, providing a capital litigation trust fund

to provide moneys to defense attorneys and prosecutors so that cases are investigated thoroughly and accurately from the beginning and to make sure that they are tried properly in the first instance. We actually give a framework and highlight some of the important recommendations of the Commission.

Obviously, with the 85 recommendations and the 2 years of work that the panel put together, I can only briefly hit some of the more important recommendations that the Commission is making.

As you know, one of the things that we studied is the disparities and potential discrimination that you see in the capital punishment system. Here in Illinois, we have 102 counties. That means there are 102 different decision makers who decide whether a defendant will get the death penalty. That results in disparity in treatment. You can have an individual, the same crime, like facts, who could get a 40-year sentence in southern Illinois and could get the death penalty in northern Illinois. We did that study, and we found that there was disparity in sentencing in our capital punishment system here in Illinois based both on geography as well as the race of the victim.

Based on that as well as the Governor's concern, while not trying to impinge or impugn any of the State's attorneys and their prerogatives, the Governor—this is one State, and he has to look at one State, and when he looks at these individuals who have been sentenced to death, we must have a uniform system. An important recommendation of the Commission is that we have a statewide panel that reviews any prosecutor's decision to seek the death penalty, and that panel must sign off on each of the decisions that are made. It is very similar to the Federal system where the United States Attorney General must sign off on each of the—on any decision in which the death penalty is sought.

As you noted, we have also recommended that Illinois ban the imposition of the death penalty on those who are mentally retarded. We hope that that will be enacted soon, and perhaps it may not be enacted, as you know, because the Supreme Court has several cases before it currently considering whether, in fact, we have become a more enlightened society that cannot tolerate the execution of the mentally retarded.

We have also recommended that we significantly reduce the current list of death eligibility factors. When the Supreme Court allowed capital punishment to be reinstated after having found it unconstitutional because too many death cases, too many murder cases qualified, we have found here in Illinois that basically we have expanded in that 25-year time period the eligibility factors so that almost any murder could qualify for the death penalty, could put it not only in constitutional jeopardy but also the concerns of both prosecutors, defense attorneys, everyone uniformly that the Commission heard from, everybody said there were too many death eligibility factors and that we should reserve, if we are going to have capital punishment, for those cases that involve the most heinous of crimes.

We also said and recommended that no person be sentenced to death based solely on the uncorroborated testimony of a single eyewitness or accomplish or jailhouse snitch.

We also found in our study of the 200-some death cases since the death penalty was reinstated here in Illinois that jailhouse informants, snitches, played an important role in some of the wrongful convictions. Therefore, we made a number of recommendations, such as a reliability hearing that should be had before the testimony is heard, very similar to the kind of hearing that courts go through before allowing expert testimony.

We also believe that juries must be instructed about the dangers of this testimony and that there must be full disclosure of the benefits conferred on those individuals for their testimony.

While we have a number of jurisdictions that have agreed to voluntary videotaping of statements and also some who tape the entire interrogation process, the Commission has recommended that that be the rule rather than the exception here in Illinois.

We also believe and recommend that trial judges should be required to concur or reverse a jury's death sentence verdict. That allows the court to consider in making pre-trial rulings that the court has not heard all of the evidence, does not understand how all—gives them the chance to review and revisit those issues to make sure that the death sentence is an appropriate sentence and signing off on it.

In addition, Illinois does not allow for proportionality review and does not provide for it by the Illinois Supreme Court. Again, we believe and recommend that the Illinois Supreme Court should conduct proportionality reviews and make sure that the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

We also found in our study of the investigation of cases of wrongful convictions that eyewitness testimony, the unreliability of eyewitness testimony could be rectified by changing eyewitness identification procedures. We have adopted some of the recommendations created by the Department of Justice in researching on how to do line-up procedures and photo spread procedures to make sure that we are not trying—but to assure the accuracy of eyewitness testimony.

We have also had a number of confusing jury instructions in the State, and the juries are not instructed about all potential sentences. We believe and we have recommended on this Commission that the jury be told that information so that there isn't improper speculation and that we really improve the truth-seeking process.

I have just touched on a number of the important recommendations that we have made, and I hope that that gives a framework of the kinds of issues that we are looking at and the kinds of recommendations that we have made.

I thank you for the opportunity to be here today.

[The prepared statement of Mr. Bettenhausen appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Bettenhausen. I appreciate your discussion of what has been done in Illinois, and I am told this may be the first time that the committee has used this video approach for listening to a witness, and I think it worked out well, and I want to thank the recording studio and the technical people for making it possible to hear you and, later on, Gov-

ernor Ryan. And we will have some questions for you later. Thank you very much.

Now we will move on to John Kinsella, who is the First Assistant State's Attorney in DuPage County, Illinois, and he has served as an Illinois prosecutor for 21 years. Mr. Kinsella is currently the first vice president of the Illinois Prosecutors Bar Association, and he has taught and lectured for the National College of District Attorneys, the Illinois State's Attorneys Association, and the Illinois Appellate Prosecutor's Office. We welcome you to the panel today, and you may proceed.

STATEMENT OF JOHN J. KINSELLA, FIRST ASSISTANT STATE'S ATTORNEY, DUPAGE COUNTY, ILLINOIS

Mr. KINSELLA. Thank you, Senator. First of all, it is an honor and a privilege, certainly, to be here, and it is a rather daunting task to represent all the men and women of the prosecution profession in Illinois, but I will do my very best to do that.

As you have indicated, I have been a prosecutor for approximately 21 years and have handled personally several death penalty cases at trial level as well as procedurally. In fact, the last person executed in Illinois was a case I handled at the end of those proceedings, Andrew Kokoraleis, who was convicted of being involved in the mutilation and murder of 16 women, and he was the last person executed in Illinois on March 17, 1999.

First of all, I want to make the point that the death penalty in Illinois is still the law. There are still juries hearing death penalty cases. Death sentences are being handed out, and the Illinois Supreme Court is currently affirming death sentence cases. So the moratorium—and I should probably address that first. I think you suggested that it was welcomed by many. In fact, I think I can speak on behalf of prosecutors who, I think for the most part, objected to the concept. And the basis is this, Senator: that there have been about approximately 300 persons since 1977 sentenced to death. There are approximately 170 on death row currently. And while 12 have been executed, there are 10 cases from which 13 individuals who at one time were sentenced to death were later either acquitted or, in fact, the cases were dismissed. We do not believe generally as prosecutors that this reflects that the system is broken. Those cases, some of them, are very troubling and they certainly should be examined and reviewed. But we believe that the overwhelming majority of police officers and prosecutors in Illinois do an outstanding job seeking justice and sought appropriate sentences in these cases.

In essence, the moratorium has put a hold on the progress of all these cases that are currently in the system. The moratorium, the Illinois Supreme Court has already ruled the new rules that have been put in place before the Commission report or any resulting changes do not apply to these other cases. So, in essence, the cases have progressed to the point, they have gone through all of the myriad levels of review, have been on hold since the time of this moratorium, we believe, prosecutors believe that each and every one of these cases are unique, different, and should be examined on their own merits and that the system that we are talking about being broken is our Anglo–American system of justice, our method

of finding truth. This is not about the death penalty per se in Illinois or the Illinois statute. The cases that have been cited as wrongful convictions or innocent persons are cases which were tried under the rules that apply certainly in Illinois and, for the most part, are uniformly the same across this country.

And to the extent that a case was tried which someone concludes resulted in an erroneous verdict, that is troublesome, should be looked at, and our system of justice should be constantly under review, constantly being examined, constantly being changed. And that is our history. This is not a stagnant process.

In fact, the law in Illinois has changed dramatically since this debate started in 1999, and I would suggest that the changes imposed by rules of the Supreme Court address the most glaring problems that were talked about when this debate began, which was a grossly underfunded defense, incompetent attorneys, judges who were not properly trained, and prosecutors who, frankly, in some instances created their own problems by also being improperly trained.

So these issues—this is not a stagnant question. We took a serious look at the death penalty in Illinois over the last several years. The system has changed dramatically. We do not believe that as a result of these 13 cases that all death penalty judgments handed down in Illinois are somehow flawed. In fact, many of these people, Senator, pled guilty to those crimes. There is not a serious question in many of these cases of a claim of actual innocence. And yet they are all thrown into the same hopper with cases which were—where there are claims of actual innocence.

Frankly, the question that troubles me as well is that we decide to say that any person ever having been convicted and sentenced to death and later acquitted was, in fact, innocent. In fact, one of the cases that is cited, one of the 13, the Illinois Supreme Court specifically said it wasn't saying that. And yet it is quoted as being a case in which the defendant was found innocent. The Supreme Court, and I quote, said, "While a not-guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous." Courts do not find people guilty or innocent.

Now, I am not suggesting that some of these people aren't, in fact, innocent. Some of them clearly are, and we can debate which ones. And, frankly, if it is one or 13, it doesn't matter. It certainly raises questions and issues that we need to address, and we welcome that debate.

But I also believe in the rhetoric of the emotions of the death penalty, which is certainly an emotional issue, we sometimes get beyond a true objective examination of the facts, and that troubles prosecutors in Illinois.

We believe the system should be examined, should be reviewed, welcome the Commission's report. Without taking too much more time, we believe the Commission's report was underrepresented from prosecutors. There was only one active prosecutor on the Commission. As well, there was not a single police officer, and many of these proposals which we find troublesome deal with police procedure and police practice. And to have no one from that profession on the Commission we believe is a problem.

Having said that, the Illinois State's Attorneys Association has issued a response indicating disagreement with only 18 of the proposals. So the reality is that the overwhelming majority of the proposals are supported by prosecutors, and the debate on the death penalty in the system is one which we should all—we should not just do this as a result of a newspaper story and a highlighting of driving public policy by the media. We should do this constantly. And I think if we do, the system will be in reality and in perception what we believe it to be, which is fair, just, and supportive of the overall majority view of the death penalty, that it is appropriate in some of the most brutal cases.

Thank you.

[The prepared statement of Mr. Kinsella appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Kinsella. Although I don't agree with the direction of your remarks, I appreciate the tone, and I want to say that I agree that these problems with the criminal justice system are not confined to the death penalty, and I am concerned about those aspects of it. But I think any reasonable person would agree, given the end of the story in the death penalty, that it is particularly important that these things be resolved, first and foremost, in that area. And that is why I admire what Governor Ryan did.

I also appreciate your candor with regard to the issue of whether everybody on this list of 101 was actually innocent. I think we could debate that, but I am pleased that you concede that surely many of these people were obviously and demonstrably innocent—in fact, several of them are in this room—and that that is not acceptable. And I appreciate that as well.

I should have said that there is a 5-minute limit on testimony. I didn't apply it to the first two, but any help you can give me in this regard would be appreciated because we have an absolute limit on time today.

Without objection, at this time I enter into the record statements and supporting materials from the ACLU, Amnesty International, the National Association of Criminal Defense Lawyers, and the Presbyterian Church Washington Office.

Chairman FEINGOLD. Our next witness is Scott Turow, probably best known as an author of best-selling legal novels, is a member of the Illinois Governor's Commission on Capital Punishment. Mr. Turow served as an Assistant United States Attorney in the Northern District of Illinois for several years before joining the law firm of Sonnenschein, Nath and Rosenthal, where he is currently a partner.

And I should confess, Mr. Turow, you were an upperclassman at the law school we both attended when I came there, and when I read your book, I almost turned around in terror that it would really be like that. And it was pretty accurate.

Great book, great start to your writing career, and we are honored to have you here, Mr. Turow. You may proceed.

STATEMENT OF SCOTT TUROW, SONNENSCHEIN, NATH AND ROSENTHAL, CHICAGO, ILLINOIS, AND MEMBER, ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

Mr. TUROW. Thank you, Mr. Chairman. I am deeply honored to be here to testify before you today, and I am especially honored to be representing Governor Ryan's Commission on Capital Punishment.

I want to start in my role as a representative of that Commission by responding to some of the remarks made by Mr. Kinsella and which I see repeated in some of the statements, particularly those which regard our Commission as biased.

There was a statement made by Mr. Kinsella that only one active prosecutor was among the 14 people on the Commission. That, in fact, is not true. Kathy Dobrinie was the State's Attorney for Montgomery County when she was appointed. In addition, Michael Waller, of course, was not only the State's Attorney of Lake County but also the president of the State's Attorneys Association. In addition, my colleague Andrea Zopp, who is now in-house at a large corporate entity, was formerly the First Assistant State's Attorney for Cook County. William Martin was the prosecutor of perhaps one of the most if not the most famous serial murder case in Illinois, that of Richard Speck. And, in fact, nine of the 14 of us had prosecutorial experience.

Included in that group, although Mr. Kinsella says there was not a single police official or representative on the Commission in his written statement was Mr. Thomas Needham, who, in fact, was the general counsel of the Chicago Police Department. Matt Bettenhausen, who has testified today, was and is the Director of Homeland Security for the State of Illinois, and even I sit on the Illinois State Police Merit Board. So I reject the characterizations of the membership of the Commission as unbalanced.

Similarly, I am more troubled than Mr. Kinsella by a system which has exonerated more people than it has executed. There have been 12 executions in the State of Illinois since the death penalty was re-established and 13 exonerations of people on death row. And I have always regarded debates about whether somebody is factually or legally innocent as extremely inappropriate for lawyers. We exist in a system which places the burden on the State to prove guilt beyond a reasonable doubt, and when the State fails in that regard, all persons are entitled to be clothed with the enduring presumption of innocence. And it is not appropriate to get into the kinds of debates that I think are being raised by some of the comments made here.

Mr. Kinsella also comments that the observations of the Commission would apply generally to everything in the criminal justice system and perhaps bring all the results into question. Certainly we emphasize that some of the reforms that we were recommending should have been applied—should be examined for possible general application. But the fact, Mr. Chairman, is that, as the Supreme Court has often commented, death is different, and I make reference in my full written statement to a case that was handled by Mr. Kinsella's office. I represented a young man named Alex Hernandez who was twice convicted—once convicted and sentenced to death; subsequently, after the case was reversed due to

a finding of deliberate prosecutorial misuse of Bruton-protected statements, Mr. Hernandez and his co-defendant, Rolando Cruz, who was represented by Professor Marshall, Cruz was resentenced to death after a second trial, Hernandez to 80 years. And I am sure the members of the Commission know that both men were ultimately freed.

Among the most compelling reasons for freeing them, of course, was that a man named Brian Dugan had confessed to the murder for which Cruz and Hernandez had both been sentenced to death. The corroboration of Dugan's statement is well documented in the record, and despite that, the office that Mr. Kinsella now sits as first assistant in persisted in the prosecution of these two men for 10 years after another man who ultimately proved to be a DNA match, after that man had given a well-corroborated confession to the crime which, in fact, was supported by the investigation of the Illinois State Police.

And the lesson I draw from that, in contrast to what Mr. Kinsella has said, and perhaps other representatives on the panel today, is this—and I think it is the most important message I have for the subcommittee. I have been struck in the years that I have spent pondering the problem of capital punishment—to which, by the way, I might add, I am not morally opposed. I have been struck by the paradox. Capital punishment is reserved for the worst of the worst, and it is those murders which, by their character, most outrage the conscience of the community. And that fact, therefore, makes for the greatest challenge to our capital punishment system, because capital punishment is invoked in cases where emotion is most likely to hold sway and where rational deliberation is most problematic for everyone—for investigators, for prosecutors, for judges, for juries. We place an enormous burden on police officers and prosecutors when we take hideous crimes and say to them you must find the killer, you must protect all of us.

And because this is a system which in rare instances tempts bad faith, it is a system that I believe merits the enhanced safeguards that our Commission has proposed.

Deputy Governor Bettenhausen has illuminated some of those, and I need not go on about that at length. But I think that we have to recognize the inflammatory nature of capital crimes and say at the threshold that death and capital punishment is very different and requires far more thorough safeguards.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Turow appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Turow. I appreciate your comments, especially in light of the fact that, as you indicated, you are not necessarily an opponent of the death penalty per se. And this distinction that you made in terms of the use of the word "innocent," every single one of these 101 people are, by definition, according to our legal system, innocent.

Mr. TUROW. Yes, sir.

Chairman FEINGOLD. Period.

Mr. TUROW. Yes, sir.

Chairman FEINGOLD. That is our system.

I would add that we also know that a great percentage of them didn't do it. So if somebody doesn't like the legal technicalities, we know for sure that in quite a number of these cases, they didn't do it. And I think it is very important to constantly keep those two things in mind, and I appreciate your testimony.

Without objection, I will enter into the record at Senator Thurmond's request a letter from the Federal Law Enforcement Officers Association.

Chairman FEINGOLD. And now we are pleased to turn to Kent Scheidegger, who is Legal Director of the Criminal Justice Legal Foundation in Sacramento, California. Thank you for being here, sir, and you may proceed.

STATEMENT OF KENT SCHEIDEGGER, LEGAL DIRECTOR, CRIMINAL JUSTICE LEGAL FOUNDATION, SACRAMENTO, CALIFORNIA

Mr. SCHEIDEGGER. Thank you very much, Mr. Chairman. I appreciate the opportunity to speak today.

The correct identification and the sufficient punishment of murderers is, of course, a matter of great importance. There is no more important function of the State governments than the protection of its citizens from murder. The performance of this function, while protecting the actually innocent, deserves the greatest attention and care. Regrettably, there has been a great deal of misleading information circulating on the subject of capital punishment, so I welcome the opportunity to at least make a start today.

I very strongly disagree with Mr. Turow that, in the context of this proceeding, it is inappropriate for us to consider whether a person is factually innocent or not. In the legislative branch, it is entirely appropriate, considering matters of policy, to consider whether these 101 cases are innocent people who at one point were wrongly convicted or guilty people who have now been wrongly freed, because there are many falling in that category.

You mentioned California, Senator. There are no cases in California of persons proven innocent. One of the most notorious cases, the case of Jerry Bigelow, the jury on the second trial found him guilty of the robbery in which the victim was killed, which by itself is sufficient to make him guilty of murder. It also found it true that he intended to kill the victim, and yet it wrongly and inexplicably acquitted him of murder. Our system of justice does give the defendant the benefit of the acquittal in that situation, but that does not make him an innocent man wrongly convicted.

So the 101 number is wrong if it is asserted as people actually innocent, and that is the policy basis, as opposed to the legal basis, on which it is so often asserted, and it ought not be considered for that purpose.

The focus of today's hearing is on the actual guilt or innocence. This change of focus is welcome and long overdue. For three decades, the American people have suffered inordinate delay, exorbitant expense, and extended litigation over issues having nothing to do with guilt, which are not in the Constitution as originally enacted, and which involve sentencing policy decisions of dubious merit.

Congress should certainly be concerned with further reducing the already small possibility of conviction of the innocent regardless of whether the sentence is death or life in prison. At the same time, it should take care not to exacerbate and, if possible, reduce the interminable delays and erroneous reversals which are presently the norm in the vast majority of capital cases that involve no question whatever of the identity of the perpetrator.

The report of the Commission unfortunately is lacking in the balance needed for this important question. With regard to the balance by former prosecutors being on the panel, it reminds me of the words of former Democrat Ronald Reagan, "There you go again."

I am particularly disturbed by the way in which they brush off deterrence as a policy basis. There are a flurry of recent studies confirming or at least supporting the deterrent effect of capital punishment and, in particular, one from the University of Houston which indicated a loss of 200 lives as a result of a temporary halt in executions in the State of Texas. There are, of course, studies to the contrary. Even so, any public official considering a halt to or severe restriction of capital punishment must consider the very substantial possibility that such an action will result in the deaths of a great many innocent people.

One of the recommendations is to narrow the scope of offenses eligible for capital punishment. I agree that some narrowing is in order. But the drastic reduction proposed by the Commission is not warranted by any concerns of actual innocence. In particular, the recommendation that the murder of a rape victim by the rapist not be a capital offense is repugnant and ought to be rejected out of hand. This is the kind of case where deterrence is most needed because a rapist facing a long prison sentence otherwise has very little incentive not to kill the victim. It is also the kind of case where DNA evidence is most likely to eliminate any doubt of identity.

On a positive note, I note that the report does acknowledge that many of the reversed judgments in capital cases are based on things that have nothing to do with the trial and are the result of new rules created by the State and Federal Supreme Courts. This is a very important consideration for the Congress to consider when it is confronted with data of the so-called error rate in capital cases. The recent studies out of Columbia define "serious error" as any ground on which a conviction is reversed. That would include *Booth* v. *Maryland* for the so-called error of introducing victim impact statements, which we now know is not error. It includes cases where a trial judge gave an instruction that had been expressly approved by the United States Supreme Court at the time of the trial and was later disapproved. So the rate of so-called error should not cause us to lack confidence in our trial system. Instead, these cases represent the cost of the fallibility of the review process and of retroactive rulemaking by judicial decision rather than by legislation.

I am going to be nearly out of time. I would like to say, though, that I also think we should change the process of review so that the inevitable claim of ineffective assistance of counsel is always reviewed immediately after the trial. At that point everybody is still involved, still knows what they did, the defense lawyer has not moved on to a later stage of his career and may have more incen-

tive to defend himself rather than fall on his sword, which is a problem.

As a matter of federalism, if Congress wants to change State procedures, there is a question as to whether it can and whether it should. I suggest that an incentive arrangement be adopted for whatever reforms Congress deems necessary to reduce litigation in those areas having nothing to do with guilt in exchange for whatever improvements Congress believes is necessary in the guilt determination.

I also believe if Congress sets up a commission, one of the goals stated in the commission should be to reduce the median time from sentence to execution to 4 years rather than the 15 that is typical today. That is sufficient time to identify those few cases involving real questions of innocence and to resolve any major issues in the case, but also give us an effective death penalty with the benefits that would flow from that.

I will have a corrected written statement which I will send to the committee staff. Thank you very much for your attention.

[The prepared statement of Mr. Scheidegger appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Scheidegger.

The next witness is Donald Hubert, a member of the Illinois Governor's Commission on Capital Punishment. He is currently in private practice and is a fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers. 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.

Mr. Hubert also served as a State prosecutor in the Special Prosecutions Unit of the Illinois State Attorney General's Office. We welcome you to the panel, and thank you, and you may proceed.

STATEMENT OF DONALD HUBERT, HUBERT, FOWLER AND QUINN, CHICAGO, ILLINOIS, AND MEMBER, ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

Mr. HUBERT. Thank you, Mr. Chairman. I echo the remarks so far made that this is indeed a tremendous honor. And may I say as an aside how heartened I am to see so many young people sitting behind you who really do represent the future of the country. It is a sight to behold.

I am here only to share with you my experiences with the Governor's Commission, all towards the end of helping you to see why he appointed us in light of the problems that we were having with exonerations in Illinois.

Let me start by saying that I would like to officially and publicly say thank you to Governor Ryan. This is the report that was issued, and we in Illinois owe him a tremendous debt of gratitude for his courageous stand, first, in imposing the moratorium and then, secondly, in coming up with the Governor's Commission.

My message today is a very simple one: that a moratorium and a commission is a win-win situation for those who oppose and those who support the death penalty, given that there are situations in other jurisdictions that are similar to those in the State of Illinois.

Certainly Illinoisans would say that they in a great majority have supported the Governor's moratorium. I believe indeed that the legacy that will flow from his efforts in this area, that any future Governor that would seek to reinstitute the death penalty will have the burden by clear and convincing evidence to show Illinoisans that indeed a system would undoubtedly and truly is broken has been fixed.

I agree with the simple words that were spoken by Tom Sullivan, co–Chair of this Commission. He was a former U.S. Attorney for the Northern District of Illinois, and in the simple words that he said, "Repair or repeal." You will hear those words reverberate out of Illinois over the next several months.

And let me stop just a moment. The notion that my distinguished co-presenter has indicated that a rape victim who then murders would not be subject to the death penalty under our provisions. Let me say I have an 8-year-old daughter, and I believe without any hesitation that under the provision that said torture followed by murder, that a rape is torture—a rape is torture.

The Commission members, I share with you that our backgrounds were many and varied. There were those who were well-known and those who were not. My own background, as you have indicated, a former bar president, but I started my career after the University of Michigan Law School as a prosecutor. My first assignment was to write a brief to the Illinois Supreme Court in a murder case. My first trial was a habeas corpus petition where I as a prosecutor supported the murder conviction. My very first trial as a lawyer—who can ever forget their first trial?—before the venerable Judge Hubert Will, a great man, who I think spent many a day vacationing in the great State of Wisconsin.

Chairman FEINGOLD. And we always appreciate that from Illinois.

Mr. HUBERT. I have also had experience as a defense lawyer. I have worked with some of the great ones in Illinois, and let me, if you may allow me, to put their names into the record, individuals like George Harwood and Chester Slaughter, Adam Bourgoies, Jim Montgomery, R. Eugene Pincham. Justice Tom Fitzgerald started a pro bono program that Scott Turow and I both participated in. I handled for free out of my own pocket five murder cases. So I have been both prosecutor and defense lawyer, for fee and for free.

But I stand here before you today and say that I join with Scott Turow, I have anguished over the issue of the death penalty, and I believe in a democratically determined country where highly motivated and educated and reasonable and honest and sincere individuals have been in support of it, that I am not morally opposed to it.

However, I state categorically that I do not support the death penalty in Illinois unless it has been repaired. We have a major breakdown. It is embarrassing. It is unacceptable. And we must do something about it.

That having been said, what are some of the profile matters that other jurisdictions might want——

Chairman FEINGOLD. I have to ask you to keep it brief, because we are over the time.

Mr. HUBERT. I have one minute, I believe.

Chairman FEINGOLD. Actually, you are one over, but I am going to give you a little more time.

Mr. HUBERT. All right. Oh, I am one over. Okay.

Chairman FEINGOLD. I will give you 30 more seconds.

Mr. HUBERT. And that is, again, prosecutors who engage in misconduct, defense lawyers who are incompetent, judges who don't enforce the rules and allow lawyers to run amuck, and an appellate process that didn't catch the issue.

In conclusion, thank you again for allowing me to appear here and to be one of the presenters, and I believe that your holding this hearing is a great step forward for the entire country.

[The prepared statement of Mr. Hubert appears as a submission for the record.]

Chairman FEINGOLD. I appreciate your eloquent comments, and I think it is very useful when you point out that the moratorium is really a win-win and something that you have to think about. You come from the perspective of somebody who generally has supported the idea of the death penalty. I am completely opposed to the death penalty. So I had to hesitate before supporting the idea of a moratorium because of my concern that it might get fixed; in other words, you might get rid of the defects. I think that is almost impossible, but I decided, even though there is a concern about that, that I can't stand by from a moral point of view knowing that innocent people might be executed, even if I believe no one should be executed.

So this really is a compromise for both people who are for the death penalty and against the death penalty, as I am sure you experienced in the Commission, to say, look, we all can agree that you can't have a system where it is too likely that an innocent person may be executed. I really appreciate your comments, and now we will turn to Druanne White. She served as assistant solicitor for 12 years before being elected Solicitor for South Carolina's Tenth Judicial Circuit in November 2000. She served in the U.S. Marine Judge Advocate Corps and has delivered several lectures on South Carolina crime and prosecution. We welcome you, Ms. White, and thank you, and you may proceed.

STATEMENT OF DRUANNE WHITE, SOLICITOR, TENTH JUDICIAL CIRCUIT, STATE OF SOUTH CAROLINA

Ms. WHITE. Thank you, Senator. It is a prosecutor's job to seek justice. That is what we call our system, the "criminal justice system." And in order to seek justice, the State must balance the rights of the victim with the law-abiding community and with the defendant.

I agree with the Illinois report, many of their proposals, and, in fact, the majority of them. However, in my opinion, some of the proposals would be dangerous because they do not adequately balance the rights of victims and law-abiding citizens with those of the defendants. This doesn't surprise me. There were 17 members on this Commission, only one active prosecutor, no active law enforcement officers, yet they made all of these recommendations.

Would anyone claim it was a bipartisan, fair committee if we put 16 Republicans and one Democrat on it and said, But it is fair be-

cause some of the Republicans used to be Democrats? But that is what we have got.

If there is any doubt about the bias, look on page iii where the Commission in its own report says the majority wishes to abolish the death penalty. So this report on suggestions on how to cure the woes was written by people who were anti-death penalty.

Now, I find this ironic that a South Carolina case was mentioned, exoneration. The South Carolina case was just like the California case. The person was convicted of armed robbery and murder. He was sentenced to death. A new jury—he was a given a new trial on a technicality. The new jury found him guilty of the armed robbery and inexplicably not guilt of the murder. That is hardly an exoneration.

I think innocent persons will pay the price if some of these proposals are adopted because there isn't any balance. And I would like to illustrate that with the last death penalty case that I prosecuted.

Denisona Crisp stabbed an individual multiple times from behind, and then he ran him down with a car. The individual lived, and the defendant, Denisona Crisp, came to my jurisdiction when he got out on bond. And that is when he began hunting black males. The defendant, Denisona Crisp, first preyed upon Jealoni Blackwell. He shot him and then he beat him until every bone in his face was broken. But the hunt wasn't over because the next victim was Clarence Watson. The defendant, Denisona Crisp, taped two knives in his right hand and two in his left, and he began slashing and stabbing and gutting Clarence Watson. The last thing Clarence Watson saw was the defendant kneeling over him and cutting out his throat. I didn't say "cutting it." I said "cut it out."

But the defendant wasn't done. The hunt continued. The new black male prey was Thomas Gambrell. This time the defendant decided he needed a little more action, so he let Thomas Gambrell run through the woods as he shot him and tracked him through the woods.

The neighbor that lived near the woods told me that she had never heard anything like it when she woke up that night to screams and pounding on her door. And when she looked out, Thomas Gambrell's bloody fingers were going down her door as he tried to claw his way through because he was so afraid of Denisona Crisp pursuing him.

We must balance the rights of these victims with the rights of the defendant. This defendant had a long prior record. He had escaped before. He was diagnosed anti-social personality disorder—in other words, a psychopath. When he got into jail, the first thing he did was construct a shank and tried to cut a guard's throat.

Anti-death penalty people will tell you that we have no mercy. I have mercy, but I don't have it for the killers. I have mercy for the innocent victims. Should we have mercy for Denisona Crisp or for the poor, innocent people that will come in contact with him should he escape again? Should we have mercy for Denisona Crisp, or should we have mercy for the poor person who will be his cell mate? Should we have mercy for Denisona Crisp or for the guards? You know, they are parents, too. They are sons and daughters and brothers and sisters. I am just as merciful as an anti-death penalty

person. I just choose to have my mercy for the people who are not ruthless killers.

I would urge you——

Chairman FEINGOLD. Let me ask you a question. Is the person you were just describing one of the 101 persons exonerated?

Ms. WHITE. The one from South Carolina was not——

Chairman FEINGOLD. The one that you have just described, the heinous crimes you have just described——

Ms. WHITE. No, sir. I just prosecuted him in October.

Chairman FEINGOLD. Is he one of the 101 people that have been exonerated?

Ms. WHITE. No. The one that——

Chairman FEINGOLD. Thank you.

Ms. WHITE.—was exonerated——

Chairman FEINGOLD. Make that clear for the record——

Ms. WHITE.—so-called from South——

Chairman FEINGOLD.—so nobody thinks that that is the case.

Ms. WHITE. The one that was so-called exonerated from South Carolina was actually found guilty by the second jury of the armed robbery.

I would ask that you balance the rights of the victims and the innocent community with those of the defendant. I would urge you to implement the fair and balanced proposals that are in this. There are many of them. But I would implore you to reject the ones that would allow the likes of Denisona Crisp to kill again.

[The prepared statement of Ms. White appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much.

We will now note that Senator Durbin has arrived. What I am going to try to do is—ah, there is Governor Ryan. All right. We are going to take a break here, and first I am going to turn to Senator—you are going to defer to the Governor of Illinois? Senator Durbin is a great guy, and he knows Illinois politics.

[Laughter.]

Chairman FEINGOLD. Well, then, we will turn to Governor Ryan and go back to panel two later. I understand that Governor Ryan is now prepared to participate in the hearing, and as I mentioned earlier, we will now turn to him for his opening remarks. Following his opening remarks, we will allow members to ask questions of Governor Ryan, and then after we complete that, we will complete the testimony of Professor Marshall and ask questions of the second panel.

Seeing no members of the minority here to make a statement, I will now say it is a great pleasure and honor to welcome Governor George Ryan of Illinois. Governor Ryan's courageous decision in January 2000 is the main reason we are holding this hearing today.

Governor Ryan, I wish you could join us in person, but I am very pleased that you are, nonetheless, able to participate via the wonders of modern technology during a busy legislative session in Illinois. And, Governor, if you figure out Illinois' budget problems, please come up to Wisconsin and help us. We are having serious ones, too.

Governor George Ryan was elected to the Illinois House in 1972 and re-elected four times. During that tenure, he served two terms as House Republican leader and one term as Speaker of the House. Governor Ryan went on to serve as Lieutenant Governor from 1983 to 1991, at which time he became Secretary of State.

Seven years later, he was elected the 39th Governor of Illinois, and, again, Governor, as you know, I have strong feelings about your courage in this regard. I want to thank you for your time this morning, and I commend you for your leadership and courage on this important issue. You may proceed, Governor Ryan.

STATEMENT OF HON. GEORGE RYAN, GOVERNOR, STATE OF ILLINOIS

Governor RYAN. Senator Feingold, thank you very much for your kind words. And you are right, we did attempt to solve our budget problems and finished up late last night, so I am delighted to have the opportunity to be here, and good morning to my friend, Senator Durbin, and I thank him for the hard work that he puts in.

I am absent today, as you pointed out, Senator, because we are in the middle of our special session that I called to balance our budget. And because of the importance of this issue and your leadership on this issue, I am delighted that we were able to connect through technology from our office here in Springfield.

By the way, you may know that this is the home of your colleague, Senator Dick Durbin, Springfield is his home, where he is well thought of and does a great job representing us.

I would like to thank all the members of this committee. I have had an opportunity to meet and work with a couple of them. Certainly Senator Leahy has been a part of our program that I have worked with in the past, and you have with you this morning Scott Turow and Don Hubert, who just testified, and Larry Marshall, who heads up the—is the Chair of the Northwestern Center on Wrongful Conviction. So I do want to thank you for inviting me to testify on the death penalty moratorium.

You know, throughout my career, I believed that only the guilty could be sent to death row, being from a little town in Illinois called Kankakee, where the death penalty and death row were kind of in the abstract for those who didn't really have a lot to do with it. So I never really questioned the system. Bad guys went to death row, and they were executed.

You may have heard me tell this story in the past, Mr. Chairman, but it was some 25 years ago, and I vividly remember voting to put the death penalty back on the Illinois books.

As a member of the Illinois General Assembly, I was voting yes to put the law back on the books, and during the debate of that bill, an opponent of the death penalty asked if any of us that were voting yes or supporting the bill would be willing to "throw the switch."

It was a pretty sobering question, and it gave me a lot of reason for thought. But it wasn't my responsibility, and for that I was relieved. It was still kind of in the abstract for me, and I still believed that the death penalty was the right answer. Administration of the death penalty was something that was left up to the criminal

justice system and certainly that system would never make a mistake.

So I voted for the death penalty. The fact is now, as Governor, I learned the responsibility is mine, and I do "throw the switch." It is an awesome responsibility, and it is probably the toughest job that any Governor has, who should live or who should die.

Since those days as a legislator, a lot has happened to shake my faith in the death penalty system. And the more I have learned, the more troubled I have become.

The State executing an innocent man or woman is the ultimate nightmare. The fact is we have come very close to that prospect 13 times in Illinois.

Anthony Porter's case is a shocking example of just that. Back in the fall of 1998, when I was still campaigning for Governor, Anthony Porter was scheduled to be executed on September 23rd of that year. He had ordered his last meal and he had been fitted for his burial clothes.

He had been convicted in the 1982 of shooting a man and a woman to death in a South Side park of Chicago.

Two days—two days—before he was to die, his lawyers won a last-minute reprieve, a temporary reprieve that was based on his IQ which they believed to be about 51.

With that delay, some of the great journalism students from Northwestern University and their professor, David Protess, who is also a very powerful champion for justice, had some time to start their own investigation into the then 16-year-old case. Anthony Porter had been on death row for 16 years.

With the help of a private detective, the students picked up in one aspect of the case, and they found that they could help Anthony Porter.

Key witnesses, like one who claimed that he saw Porter at the crime scene, an eyewitness who absolutely saw Porter shoot these people, recanted that testimony and said that Porter was framed.

The students then followed their leads into your home State, Senator, into Milwaukee, where the private detective obtained a video confession from a man named Alstory Simon.

Simon told the private detective that he shot the two victims in an argument over some drug money. With that new evidence, charges were dropped and the innocent Mr. Porter was freed in February of 1999. An innocent man spent nearly 17 years on death row, with an IQ of 51, barely able to defend himself or know what the charges were. The charges against him were wrong, and they nearly sent him to death, after spending nearly 17 years on death row.

I had the opportunity to meet with Mr. Porter just last week, and he told me how he was kept in his dark cell for 23 hours a day. His eyes can't tolerate the sun today because they are so sensitive. And that is tough punishment for a guilty man, let alone an innocent one. If you can imagine enduring that much pain, all the while knowing that you are innocent.

I was caught off guard by Mr. Porter's case because I had just taken office. I didn't know how bad our system really was. Shortly after Anthony Porter's case, while I was still trying to recover from

what had happened to him, the Andrew Kokoraleis case came to my desk.

Andrew Kokoraleis was a serial killer, and he had been charged with the brutal murder, rape, and mutilation of a young 21-year-old woman. After the mistakes the system made in the Porter case, I agonized. I had to decide whether Kokoraleis was going to live or whether he was going to die. I reviewed the case. I consulted with staff. I called in veteran prosecutors and defense attorneys. I requested additional information from the Prisoner Pardon Board. I checked and double-checked and triple-checked because I wanted to be absolutely sure that this man who was sentenced to death was going to be guilty. And in the end, I was sure without any doubt that Andrew Kokoraleis was guilty of a monstrous, unspeakable crime. I allowed his execution to proceed.

But it was an emotional, exhausting experience, and one that I would not wish on anybody. It all came down to me. I am a pharmacist, Senator, from Kankakee, Illinois, who had the good fortune to be elected Governor of the State of Illinois. But now, in fact, I had to throw the switch. Quite frankly, I think that might be too much to ask of one person to decide.

That experience was really not the end of my journey. Journalists Steve Mills and Ken Armstrong of the Chicago Tribune conducted an in-depth investigation of the death penalty cases in Illinois in 1999 that was absolutely startling. Half—half, if you could imagine—of the nearly 300 capital cases in Illinois had been reversed for a new trial or sentencing hearing. Thirty-three of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from practicing law. Thirty-five African American death row inmates had been convicted or condemned by an all-white jury. In fact, two out of three of our approximately 160 Illinois death row inmates are African American.

Prosecutors used jailhouse informants to convict or condemn 46 death row inmates. So it was clear that there were major questions about the system—questions that I alone could not answer.

In January of 2000, the 13th death row inmate was found wrongfully convicted of the murder for which he had been sentenced to die. At that point, I was looking at a very shameful scorecard: since the death penalty had been reinstated in 1977, 12 inmates had been executed and 13 were exonerated. To put it simply, we had a better than a 50–50 chance of executing an innocent person in Illinois.

The odds of justice being done were as arbitrary as the flip of a coin.

Up until then, I had resisted calls by some to declare a moratorium on executions. But then I had to ask myself how could I go forward with so many unanswerable questions about the fairness of the administration of the death penalty in Illinois. And how on Earth could we have come so close, again and again—to putting fatal doses of poison into the bodies of innocent people strapped to a gurney in our State's death chamber?

It was clear to me that when it came to the death penalty in Illinois, there was just no justice in the justice system. I declared the moratorium on January 31, 2000, because it was the only thing I

could do. I had to put a stop to the possibility of killing an innocent person.

That was the easy part. The hard part was to find out why our system was so bad and what had gone so terribly wrong with it. The hard part was to try and find out answers to how our system of justice became so fraught with errors, especially when it came to imposing the ultimate, irreversible penalty.

So I appointed some of the smartest, most dedicated citizens that I could find to a commission to study what had gone so terribly wrong. It was chaired by former Federal Judge Frank McGarr and was co-chaired by a former colleague of yours, Senator Paul Simon, and the former U.S. Attorney from the Northern District of Illinois, a fellow by the name of Thomas Sullivan.

They led a panel which included former prosecutors, defense lawyers, and non-lawyers. Accomplished attorney Scott Turow, whom you have heard from earlier today, a best-selling author and Commission member, along with Commissioner Don Hubert, whom you just heard from, and Matt Bettenhausen. My Commission put together a tremendous document. They developed 85 recommendations to improve the caliber of the justice system of our State. It does not single out anyone, but it calls for reforms in the way police and prosecutors and defense attorneys and judges and elected officials do their business.

I have taken the entire report and introduced it to the Illinois General Assembly. It will require legislation, and hopefully the General Assembly will take the bill and have hearings around the State and shape it into a good piece of legislation that will pass.

My bill proposes barring the execution of the mentally retarded, mandating that natural life is given as a sentencing option to juries, and reducing the death penalty eligibility factors from 20 to 5, and barring the death penalty when a conviction is based solely on a jailhouse snitch.

This summer, the General Assembly, as I said, will hold hearings, and I hope that they will hear from all of the key parties throughout the State—prosecutors, defense attorneys, victims, and the wrongfully convicted.

My Commission reviewed at least at some level every capital case that we have ever had in Illinois, but it took a closer look at the 13 inmates that were freed from death row and exonerated.

Most did not have solid evidence. We had cases where jailhouse snitches were the only key witnesses, another case where a drug-addicted witness sent a man to death row, and DNA freed several inmates. Some were convicted because of overzealous police and prosecutors. Some had inadequate representation at trial.

The Commission concluded that its recommendations will significantly improve the fairness and accuracy of the Illinois death penalty system. But it also concluded, and I also quote, "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." I think that is a pretty powerful statement, and it is one that I will ponder.

In the meantime, we do know this: I said 2 years ago, and I can say now, until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with a moral certainty

that no innocent person is facing a lethal injection, nobody will meet that fate as long as I'm Governor.

We all want to punish the guilty. There isn't any question about it. But in doing so, we must never punish the innocent. And we almost did that in many cases here. And with our mistake-prone system in Illinois, that is just what we were about to do.

So, Chairman Feingold, I know that you are proposing a Federal moratorium on the death penalty. We have had the pleasure, as I said earlier, of discussing our mutual concerns about capital punishment a number of times in the past couple years. And I want to commend you for your passion for truth and justice.

I have not studied the Federal system, but I do know, especially after September 11th, that the United States of America must be a model for the rest of the world. And that means our justice system should be the glowing example for the pursuit of truth and justice. And it certainly must be fair and it must be compassionate.

So we must safeguard our individual liberties while keeping our communities safe. And we must protect the innocent. I believe it is a fundamental part of the American system of justice.

Once again I appreciate the opportunity to be here with you today and to present what we have done in Illinois with our moratorium on the death penalty.

Chairman FEINGOLD. Thank you so much, Governor. I am very honored that you would take the time to do this today, and I will turn to Senator Durbin in a moment after I have asked you a couple of questions. But let me first say that there is no question in my mind that there are going to be significant changes in the death penalty system in this country, whether it would lead to abolition or whether it would lead to fixing the problems in the system.

I am also confident that when the history of those changes are written, the most important name will be the name Governor George Ryan. And I admire your courage in this regard tremendously.

In fact, there has been much made this morning at the hearing of the composition of the Commission you selected, and some have suggested because former prosecutors were used that that is not a valid representation of prosecutors, in fact, making the claim that certain people switched political parties. Well, I want it clear that this advocate of the moratorium and the Commission, Governor Ryan, is still a Republican and is still saying these very things.

In that regard, Governor Ryan, some critics, including the Wall Street Journal editorial page, have charged that, in choosing the members of your Commission, you stacked the deck with death penalty opponents. How do you respond to these claims?

Governor RYAN. Well, you know, I try not to respond a lot of times to the newspaper's errors, but let me say that some of the critics haven't been happy with this report for the reasons you have said, that I have stacked the Commission. I would like to point out that 9 of the 14 members on this Commission are current or former prosecutors. When I appointed them, those opposed to capital punishment accused me then of stacking the Commission with death penalty supporters.

It is kind of a no-win situation, I think, Mr. Chairman. This was a fair Commission, and the Commission is made up of some of the

most conscientious and dedicated people to enter public service. And I think they did a good job with this report. If they had a personal bias, it certainly didn't show. They spent 2 years studying this, many hours every week, and they did a great job. And I am grateful for and proud of the work that they have done.

Chairman FEINGOLD. Thank you, Governor. Some, even those who recognize that there are problems in the current death penalty system, argue that there is no need for a moratorium. They argue that we can enact reforms without suspending executions. I disagree with that position. I believe that it doesn't make sense to go forward with executions at the same time that efforts are underway to review and repair the system. And you, of course, realize that these two things should be joined.

Can you explain why you decided that suspending executions was necessary rather than merely appointing the Commission to study the issue and then make recommendations?

Governor RYAN. Well, because we never executed 13 innocent people. In the case that I like to go back to, this fellow Anthony Porter, who was absolutely innocent without question and was 48 hours away from death, and if we hadn't had a moratorium on the death penalty, he would have been executed.

I don't know how many more of those 13 others or 12 would have been executed, but they were all innocent, and I think that if we had gone on with this for the last 2 years, there probably would have been several innocent people executed. And I think that is what I was concerned about, whether we had a fair system that worked for everybody. The witness that you had on earlier, Ms. White, talked about being fair and just and to have a balance. I would like to point out that I—I am not sure what the death penalty is supposed to mean. Is it a deterrent to crime or just revenge for a crime? I think that is a question that has to be asked.

When you look at some of the problems, we look at the prosecution and the defense of these people, is it fair and just that poor and indigent people who can't afford the best attorneys should be the ones that go to death row more often than others? We need to have a system that is fair and is balanced and is just. And so that is what we tried to do with the moratorium and the study that we put into it.

Chairman FEINGOLD. Thank you, Governor.

Finally, do you have any regrets about the decision you made now that the Commission has completed its work?

Governor RYAN. No, not at all, and I have several things left to do with that Commission and that report, and hopefully we will fine-tune it a little bit throughout the summer and pass it into legislation in the fall.

Chairman FEINGOLD. Well, obviously, I wish you well in that regard, and thank you.

I now turn to my friend and colleague from Illinois, Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman. And let me also thank Governor Ryan and the panel for joining us today.

And let me say that there couldn't be two more different political figures before us today than Senator Feingold of Wisconsin and Governor Ryan of Illinois, not only in terms of their party affiliation but their political philosophy, and yet they have both come to remarkably similar conclusions about one of, I think, the most challenging moral issues of our day.

I commend Governor Ryan for the decision he made to establish a moratorium on the death penalty in Illinois. Like Governor Ryan, I support the death penalty. I have voted for the death penalty. But I believe the only morally coherent position you can take with the evidence that Governor Ryan had before him was to establish a moratorium until there was clearly established a line of evidence and established a clear record that the men and women on death row were there because they had committed the crimes they were charged with.

I don't think any of us want to see an innocent person killed by the State, and Governor Ryan, faced with the reality of 13 individuals facing death on death row who were released, did what I think is the absolutely right thing.

And I also commend you, Governor, for going beyond that and establishing this Commission. I know most of the people on that Commission. I have known them most of my life. I respect them. They are people, I think, who are balanced and objective in the approach that they take. I don't believe that that Commission was biased. I think it was honest. And I think it really challenges all of us to take a look at the Commission's conclusions and to determine each and every one of them as to whether or not they are honest, whether they need to be followed through, whether they establish standards which we should pursue as a Nation.

Governor Ryan, I can tell you, despite our political differences in the past, you have not only done the right thing for our State, you have created a national debate which was long overdue, and the public sentiment in reaction to your decision and the decision by others, such as Governor Glendening in Maryland, has resulted in many Americans stepping back and finally facing a very, very tough issue of the death penalty and deciding for themselves what is the right thing in a good and just Nation to do.

I thank you, Governor Ryan, for your testimony and for your service and, particularly on this issue, your leadership.

Thank you, Mr. Chairman.

Governor RYAN. Thank you.

Chairman FEINGOLD. Thank you, Senator Durbin, for your excellent comments, and, again, Governor Ryan, we are grateful to you for your appearance here today, but especially for your leadership on this, and I look forward to working with you on this issue for many years to come. Thank you, Governor Ryan.

Governor RYAN. Thank you very much.

[The prepared statement of Governor Ryan appears as a submission for the record.]

Chairman FEINGOLD. We will now return to the second panel. We have one more witness, Professor Larry Marshall. He is a law professor at Northwestern University School of Law and the Legal Director of the Center on Wrongful Convictions.

Professor Marshall currently represents criminal defendants as a part of his work with the Northwestern University Legal Clinic and has succeeded in winning the release of several innocent defendants who were sentenced to death or life imprisonment. Professor Marshall once served as a law clerk for Supreme Court Justice John Paul Stevens.

We certainly welcome you to the panel this morning, Professor Marshall. It's a pleasure to see you again, and you may proceed.

STATEMENT OF LAWRENCE C. MARSHALL, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, AND LEGAL DIRECTOR, CENTER ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIVERSITY

Mr. MARSHALL. Thank you, Senator, Senator Durbin. I think the issue here today is really one of values, not the question of whether we value the death penalty or not value the death penalty in the abstract, because that is an issue upon which reasonable do and can differ; but, rather, the question is how much we value the life of the absolutely innocent person who is caught up in this nightmare of being sentenced to death.

Each of the witnesses who testified against, so to speak, the idea of a moratorium, against some of the proposals that the Governor made and the Commission made, accepted the idea that we have a system in need of reform. One of them said she accepted 67 of those reforms. The others said they accepted the majority of them. The Illinois Prosecutors Association, Mr. Kinsella said, accepted the grand majority of them. But yet, they say, that we nonetheless ought to proceed and continue to kill people at the very time that we have not yet implemented those procedures, at the very time that we haven't studied the impact that those reforms would have on those cases.

To paraphrase the adage that we all are schools in, which is it is better that 10 guilty people go free than one innocent person be convicted, much less executed, I am hearing here that it is better that numerous innocent people be executed than other guilty people's executions be deferred or perhaps not go forward.

So the question is: How much do we value that innocent person? I am hearing over and over, well, yes, there are some guilty people, Mr. Scheidegger says, there are some guilty people on death row. Stop the presses. Of course, there are guilty people on death row. But what do we do about the fact that there are scores and scores of innocent people—innocent people, some of whom may be cleared by DNA, but in most cases involving the death penalty, DNA is simply not there. DNA is not available. Don't we have a moral duty to learn the lessons from these cases?

When I was driving up here today, I saw the sign in front of the Archives: "What Is Past Is Prologue." Don't we have a duty to look at the past and to figure out what it teaches us before we take the ultimate step of killing?

Now, Mr. Kinsella says, well, look, this is really an indictment of the entire Anglo–American system. And the answer is, of course, the system is faulty and the system needs improvement. But death is different. When we kill someone, we absolutely take away that person's chance to prove their exoneration.

I am shocked to hear Mr. Scheidegger say that one of our goals ought to be to limit the time between sentence and execution to 4 years. Mr. Scheidegger knows that the mean time that it has taken people like Kirk Bloodsworth and the hundred others to exonerate themselves has been over 7 years. What is he saying when he says, But we should be killing them within 4 years? He is saying to Mr. Bloodsworth, you know what, I don't care about the fact that you would have been killed, even though we now know you are innocent. He is saying that to those other hundred people. And the question is why.

Well, we are told the answer is, as Ms. White tells us, because there are awful crimes going on out there. And she described with passion that would bring tears to any of our eyes what happened in that case that she prosecuted.

But let me point out that happened in a State which has an active death penalty and that the execution of that man is not going to reverse any of those harms. So we have to balance costs and benefits here.

We may be able to go back to a death penalty someday that is new and improved, that actually has safeguards that protect against the execution of the innocent, that protect against racism, that protect against arbitrariness. But let me say, Senators, that if we have a system right now which is as bad as this one is, and even figuring out if somebody did it or didn't do it, which is the easy objective fact, then how much worse is that system at figuring out whether that person deserves to live or deserves to die, the ultimate imponderable.

Mr. Scheidegger says, well, you know, a lot of the Columbia study is really based on other kinds of procedural issues, and he says glibly it is a tribute to the fallibility of judicial review. And that is what we are up against here. What we are up against is, whenever there is exoneration, well, that is a wrongful exoneration. Whenever there is an acquittal and a jury does something and says someone is not guilty of murder, that is inexplicable.

But, of course, if someone is convicted, that is the law; the jury has spoken; there is no questioning that jury's verdict.

When we have a commission that comes in, as the Illinois Commission did, objectively studying an issue and looks at the facts and, as Governor Ryan learned, we are shocked to learn how fallible the system is. And that Commission now says that on balance, having read and learned and studied, having looked in the faces of those who are on death row and were ready to die but are now known to be innocent, that they no longer support the death penalty, we are told that is a bias. We are told that people becoming educated and learning about the realities and practicalities of the implementation of the death penalty become biased.

Twelve years ago, when I first got involved in this field, I actually believed that the death penalty had problems, but I believed one thing about it: that whatever other problems it had, we could be sure that someone who was on death row was, in fact, guilty; that all of the safeguards of the post-Furman era absolutely proved that.

The facts have absolutely shattered that belief for me. I have represented nine people who were absolutely innocent and who

were sentenced to death, who were freed because of fortuities, because of the hand of God, or whatever else you want to call it, but not because the system has worked. And if we truly care about the value of life, we have to say let's take a time-out. Let's take a time-out. It is not going to kill anyone for us to wait and study this subject. It may well kill innocent people if we don't.

Thank you.

[The prepared statement of Mr. Marshall appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Professor, for that powerful explanation of this issue, and I appreciate your leadership on this issue.

We will now turn to the questions. We will start with 7-minute rounds, and I am going to go first to Deputy Governor Bettenhausen, who is with us by video.

One of the most frequently criticized recommendations in the Commission's report is the recommendation to eliminate the felony murder death eligibility provision and the general reduction of death eligibility factors from the current sum of 20 to 5. The argument is that these recommendations are simply an effort by opponents of the death penalty to reduce its use.

Can you explain how the Commission arrived at its list of five eligibility factors and the rationale behind recommending the elimination of many of the eligibility factors, including the felony murder provision?

Mr. BETTENHAUSEN. Well, Senator, one of the things—and I think I mentioned this in my opening statement—is we heard from prosecutors, from judge, from police officers as well as defense attorneys, and uniformly we heard that there were too many eligibility factors in Illinois. If you are going to have the death penalty, you need to have it for the most heinous of crimes. Every murder is horrendous. Every murder is terrible. But as we know, constitutionally you cannot have the death penalty for every murder. There are victims in every murder case. But if you are going to have capital punishment, it has to be reserved for those cases. It is a significant investment of those prosecuting these cases as capital crimes.

We looked at what was originally enacted here in Illinois. We looked at all of the cases that have happened, 300-some death penalty cases that have happened throughout Illinois's history with capital punishment. A number of those factors have never been used. But we looked at where with our sentencing study this very prosecutorial abuse could happen, and we saw that was in the felony murder cases, because you would have lifetime, life cases treated differently so that you have disparity and misapplication potentially of the capital punishment law.

So it was based on that, and looking at what are—it is, to some extent, a tough judgment to make. It would have been easier just to say, like the prosecutors who are here today, well, we agree that you reduce the eligibility factors, but the difficulty always is you can find any example for any case because all murders are terrible.

But we didn't take the easy way out. We looked at what would pass as the worst of the worst. If you are going to have capital punishment, this does it, and it preserves it for the worst of the worst

cases so that you can apply your criminal justice system and do the costs that are associated with capital punishment fairly.

One of the other things when we talk about victims—we also heard from victims. Our committees and subcommittees met with police officers practically weekly when we were working on these recommendations. But one of the things victims should know, for example, when we talk about the capital punishment being there, most of the time most murders are not going to qualify for capital punishment. Most of the thousands of murders that happen in Illinois, less than 2 percent would be treated as a capital case. And of those 2 percent, 70 percent of those are going to be reversed, and those victims then have to go through the whole process again. And of those reversals, only 25 percent of them ultimately resulted in the imposition of capital punishment. And it is unfair to victims to hold that out there, for them to think that every murder is going to result in capital punishment, and it treats victims differently.

Chairman FEINGOLD. Thank you very much. I am now going to turn to Professor Marshall.

Some argue that the fact that there have been exonerations is proof that the system is working, but we also know that oftentimes there are people very much outside the system, in part because of your good efforts, like reporters or journalism students, who do the work to uncover evidence of innocence.

I know you have worked with students on many cases of death row inmates who are later exonerated. Do you agree that the 101 exonerations is proof that the system is working?

Mr. MARSHALL. Absolutely not, Senator. If you look at the circumstances of these exonerations, you see extraneous forces working. Let me give you the best example I can to show you how clear it is the system doesn't work. And, again, I will point—I could point to many people, but I will point to Kirk Bloodsworth because he is in the room.

Kirk Bloodsworth was convicted of raping and murdering a young girl. He was convicted based on eyewitness testimony. Ultimately, he was exonerated 9 years afterwards, after spending time on death row, because DNA testing was available.

Now, DNA was available in that case because the victim was also raped. Had she not been raped, then DNA wouldn't have been there, and the eyewitness testimony saying that Kirk Bloodsworth was the murdered would have stood. Kirk Bloodsworth would have been executed or would have spent the rest of his life in prison.

The bottom line is, to put it glibly, he was lucky in this perverse way that the victim was raped, because had she not been raped, he would have been equally innocent, but he would have had no method of exoneration.

DNA is available in around 20 percent of death penalty cases. Those are the cases for which there is biological evidence susceptible to forensic testing. In the other 80 percent of the cases, they don't have that method. So, again, we see these kind of fortuities.

We had another case. Scott Turow talked about the Cruz–Hernandez case. Part of the evidence in there was DNA evidence that happened to be lingering on the inside of a test tube. Everyone thought the DNA had been destroyed. There happened to be a little bit left. Or the arrest of a true killer, these kinds of complete

fortuities. The Anthony Porter case, 2 days before, we got a stay from the Illinois Supreme Court based on evidence of retardation, nothing to do with innocence.

That is not the system working. That is, in some cases, our ability to prove innocence. But how many people have been executed already without those fortuities, without those miracles, and how many people on death row will be executed? Countless numbers.

Chairman FEINGOLD. I think that is an important point as well about the DNA, because there are some who believe that this is just a question of making sure everybody gets a DNA test. And that doesn't even represent anywhere near a majority. In fact, I think you said more like 20 percent of even these exoneration cases. It is a wonderful thing that we are able to do that, but it certainly does not address the whole problem.

I would like to turn to Mr. Turow and Mr. Hubert, because they are both part of this Commission, but they both have indicated that they support the death penalty, capital punishment. Your position illustrates something remarkable here that I don't think you can really underscore enough: that there is common ground between death penalty proponents and opponents, and this is not an area of public debate where there has been a whole lot of common ground in the past. But the people of Illinois certainly came together to say that enough is enough, it is time to take a time-out because the system is broken.

How did each of you arrive at the decision to support a moratorium and Commission? And I would ask Mr. Turow first to answer that.

Mr. TUROW. Well, Senator, my experiences—I do spend most of my time writing, but I do spend quite a bit of time also practicing law. And in the decade of the 1990s, I spent most of the time that I give to lawyering involved in the post-trial phases of capital cases. And what moved me was not only the experience of the Cruz and Hernandez cases, but also an instance that we have not talked about today of another young man whom I represented who simply, in my opinion, was on death row for the crime of having bad lawyers. The lawyers who had represented him had been under contract to the localities, public defender's office. They were supposed to do 103 cases a year for the total of $30,000, which meant that when they got down to the capital case that they were supposed to be working on, each of them was being paid an average of $300.

And, not surprisingly, when we applied the resources of a large law firm to a case in which there had been $600 worth of representation, the result changed. We were able to prove, I think, that there had been significant legal errors, so found the judge who entertained our post-conviction petition. And we were also able to persuade the very fine State's attorney in Lake County, Michael Waller, that an improper assessment had been made of the defendant's character based on the failure to present appropriate mitigation information.

So not only had I seen the palpably innocent like my client, Alex Hernandez, convicted wrongfully, I had also seen instances where someone who was not innocent and who ultimately admitted he was not innocent, but he had had inadequate representation, bring him to death row.

And looking at all of that, I saw a system which is simply fraught with error, where the imposition of the death penalty seems to be haphazard and where distinctions are made on bases that I found almost impossible to understand.

So for those reasons, I very much support the moratorium, and my doubts about reinstituting the death penalty, as I say, do not have any basis on moral affront but simply my question as to whether this can ever be done in a way that is rational and that justifies the enormous consumption of social resources.

Chairman FEINGOLD. Thank you very much, Mr. Turow.

Mr. Hubert?

Mr. HUBERT. Thank you. I think the number of exonerations was so overwhelmingly great that it made Illinois become potentially the poster child for government that kills the innocent.

Secondly, there have been points made of a disproportionate number of those who receive the death penalty who are black males, and so we always in a situation like that have to wonder whether or not, particularly in light of the fact that overwhelmingly prosecutors are white, the judges are overwhelmingly white, the jurors are overwhelmingly white—we have to go through the *Batson* situation to try to begin to rectify that—that we have to be concerned with whether there is fairness when you have those kinds of statistics. We are talking about two statistics. One is the number is just—it defies logic and reason, and it is embarrassing. I am embarrassed to sit here before the rest of the Nation and say Illinois has that. And then the other number is the disproportionate number of black males who are receiving the death penalty, and that needs to be studied to see whether or not that is a fair process.

Thank you.

Chairman FEINGOLD. Let me just say, even though there is some competition between Wisconsin and Illinois, you shouldn't be embarrassed. You are just the State that had the courage to say, wait a minute, something is going on here. I think that is a great tribute to the State of Illinois, and I admire it greatly. Thank you for your comments.

Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman.

Mr. Scheidegger, let's go to this point where you are saying in your testimony that 4 years is the end of it——

Mr. SCHEIDEGGER. No, Senator, I did not say that.

Senator DURBIN. Well, let me read what you say: Four years is more than sufficient to weed out the very few cases of real doubt of identity, but short enough that the American people would finally have the benefits of an effective death penalty system.

Why did you say 4 years?

Mr. SCHEIDEGGER. Thank you for giving me the opportunity to respond because I think Mr. Marshall seriously distorted my proposal, and I think he needs an emergency course in remedial statistics.

I propose that we set as a goal a 4-year median, not a 4-year limit. That is a very different thing. And I think what I am saying is that in a typical case, that is sufficient to confirm that it is a

case involving no question of identity of the perpetrator, which is the norm.

Certainly some cases will take longer than that, and——

Senator DURBIN. How would Congress enact a law calling for a 4-year median?

Mr. SCHEIDEGGER. What I said was that we should state that as a goal, and we should continually look at proposals to work toward that goal. I did not propose a cutoff.

Senator DURBIN. All right. Then——

Mr. SCHEIDEGGER. That is a gross distortion of my statement by Mr. Marshall.

Senator DURBIN. I am troubled. I don't believe Congress can enact a law that says on average we will only allow 4 years. I don't see how you can do that. I have seen a lot of laws——

Mr. SCHEIDEGGER. I did not propose that, Senator.

Senator DURBIN.—in a long period of time so——

Mr. SCHEIDEGGER. I did not propose that.

Senator DURBIN. I think we should try to have speedy review, and I think all of us agree on that.

Let me see if there are things that we could all agree on, and obviously there are lot of differences here. Ms. White, let me ask you about this: Do you question the premise that when there is a courtroom considering a capital case, a serious case—and you have described one that is as graphic as I have ever heard—where we are asking for the death penalty, that you should have on both sides of the table, both the State and the defense, competent counsel?

Ms. WHITE. That makes my job so much easier if I have competent counsel on the other side and a competent judge.

Senator DURBIN. Great.

Ms. WHITE. Because then I don't have to worry about protecting the record for myself and for the defendant and for the judge. I much prefer very competent counsel on the other side and a competent judge, and I have always said we ought to have specialization in the judiciary as well as in the defense and prosecution——

Senator DURBIN. I agree completely.

Ms. WHITE.—because you have got to have specialization. This is too big an area to have people that don't know what they are doing.

Senator DURBIN. And I assume—and I don't want to assume too much, but I assume from that answer that you would also concede that if you had counsel on either side representing the people or representing the defendant who did not have a sufficient level of expertise, that the system of justice is not going to be served?

Ms. WHITE. Senator, when I teach law enforcement and prosecutors, I specifically tell them—and I have got it in my policy manual in my office—our job is not to arrest people and it is not to prosecute people. It is to arrest guilty people and to prosecute guilty people.

And I take it very seriously. I go back and talk to every witness in the investigation. The police actually laugh about my "to do" list because before I will send it in to the grand jury, I send them back to talk to additional witnesses and so forth. But I don't plan on ever prosecuting anybody that I have any doubt about their guilt.

Senator DURBIN. Well, let me tell you why I think, I hope that everyone here at the table would come to that same conclusion, and I am going to invite those who might disagree to say so. But let me just put a footnote to this, Mr. Chairman. I have started looking at the whole question of how we attract the very best lawyers as prosecutors and as defense attorneys, and one of the biggest single obstacles are student loans. Now we have the prosecutors of our State, Mr. Kinsella, we had a group that came in—you may have been part of the group.

Mr. KINSELLA. Yes, about 2 weeks ago.

Senator DURBIN. About 2 weeks ago, saying we need some help here. We cannot attract and keep the prosecutors that we need—and the same is being said on the defense side—unless we find some way for student loan forgiveness, because the payments of new law students at some Chicago firms that Mr. Turow knows very well are over $100,000 a year just out of law school. And you just can't get close to matching that.

Currently, our only student loan forgiveness is extremely limited, and it only is for prosecutors.

So I would hope that perhaps as we draw the conclusion we need competent counsel on both sides, we could also draw a conclusion that whatever your position on the death penalty, for goodness sakes, let's have the very best men and women sitting at those tables who are going to be prosecuting and defending. I hope we can concede that.

Is there anyone who would question that conclusion? If there is anyone here who says that competent counsel is not an issue, please tell me now.

Mr. KINSELLA. No, and, Senator, you are right, we did meet from the—we were here from the National District Attorneys Association and representatives of the Illinois State's Attorneys Association, and I think we talked about this general issue of prosecutors being under scrutiny and questioning of competency and all the rest, as well as defense counsel. And I think you were very supportive of the concept that this is an issue that needs to be addressed. And as a prosecutor and as someone who has to hire lawyers to come into court and prosecute and then try and keep them beyond 2 or 3 years, it is difficult.

Senator DURBIN. The second point I would like to make is on DNA testing. We had a horrendous massacre at a Brown's chicken restaurant in the suburbs of Chicago about 9 years ago, and it went unsolved for the longest period of time. And then ultimately there was a break in the case, and a girl friend started talking, and the next thing you knew there were two suspects. And, fortuitously, 9 years ago, someone at a crime lab saved an unfinished chicken dinner that was in the restaurant that night and found enough DNA from the saliva on that unfinished chicken dinner to match with one of the alleged suspects. Incredible. Who would have dreamed that that unfinished chicken dinner 9 years later would be the key piece of evidence, or at least appear to be one of the key pieces of evidence?

Now let me ask you about DNA testing. We didn't know 9 or 10 years ago this was even an issue. Now we know it can clearly exonerate a person. I have a bill with Senator Leahy as well as Senator

Specter which basically says this is now a fact. It is like fingerprints. It is like the reality of tests today. Is there anyone here who disputes the belief that at least those on death row should have an opportunity where it is clearly relevant to the case and there is a chain of custody of evidence that can be drawn into the case that the person on death row should have the benefit of DNA testing before there is a final decision on their execution? Mr. Kinsella?

Mr. KINSELLA. Senator, I think, in fact, Illinois was among the very first States that enacted a post-conviction DNA testing bill, and it was supported by prosecutors. If there is a person on death row—and keep in mind, there is a continuum going on here. DNA really kind of hit in the late 1980s, early 1990s, and a lot of the cases we are talking about either occurred right before that or right at that time. And the testing is far more sophisticated now than it was initially.

And so I think it important. No prosecutor wants to see an innocent person executed. I don't have horns in my head. I don't stand before a jury and ask them to sentence someone to death lightly. I think it is a very, very serious thing. But, unfortunately, I strongly believe there are cases where that is appropriate.

Senator DURBIN. The point I am getting to is this: We may disagree on the ultimate question are you for or against the death penalty, but it appears that reasonable people on both sides of that issue can agree that the system needs to be improved. And I think that is what the Commission said. The Illinois Commission didn't call to abolish the death penalty. It had a long list of recommendations. And these two were included, among others. We didn't have time or won't have time to get to videotaping confessions and the like.

But I would just say that it really, I think, creates the burden on those of us who support the death penalty to look honestly at things which everyone agrees on, for and against the death penalty, and say these are changes which should be made if we are going to continue this system. Good prosecutors, good defense attorneys, and the average American is going to require us to take this hard look at it.

The last point I will make—and then I will yield to the chairman—is keep this in mind, too: we are focusing on a small, small percentage of people accused of murder who end up on death row. Think of the much larger percentage of individuals who got the break of serving a life term in prison who will be there the rest of their lives. They are not part of this debate, and they are not part of this discussion. But you have to believe that the same hard questions we are asking about death row should be asked as well about other elements of the criminal justice system. Painful as it is to consider, the fact is that a lot of these people are not even being represented in this hearing, and they should be. Our system of justice really demands that we take this hard look, if not for justice, certainly to make sure that the wrongful are actually convicted and punished.

Thank you.

Chairman FEINGOLD. I thank Senator Durbin for his tremendous contribution to this hearing and to this issue. I appreciate it very much.

I ask unanimous consent that the statement of our chairman, Senator Leahy, be introduced at this time. Without objection.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman FEINGOLD. I guess we have time for a few more questions before 11 o'clock. I am going to ask Mr. Turow and Mr. Hubert and Mr. Bettenhausen to answer the same question.

In her statement, Ms. White says that the Commission was unbalanced and skewed in favor of defendants and against victims and community interests, and Mr. Scheidegger suggests that one way to address victims' needs is to reduce the death penalty appeals process. He suggests that the time from sentence to execution be no longer than 4 years.

Could each of you comment on this criticism that victims' rights were not adequately considered by the Commission and that the way to address victims' rights is to mandate a time certain maximum period from sentence to execution? Mr. Turow?

Mr. TUROW. Thank you, Mr. Chairman.

We met extensively with the surviving family members of murder victims. We had a number of public hearings. It became clear, when it was the time for public discussion, that it was difficult for victim families to appear. And as a result, we had a number of private sessions with the—at the urging of all of the Commission members. We wanted to hear from victims. And we considered their points of view very carefully, and I, speaking personally, learned a great deal, because although I have been a defense lawyer, I was not, while I was a Federal prosecutor, directly involved in capital prosecutions, although I did have a very dear friend in the office who did do a capital case.

And, you know, one of the things that I learned was that it is a unique loss to lose someone to a murder, and certainly victims have a right to a system that takes away any temptation for self-help and that relieves them of the ultimate indignity of thinking that that murderer might murder again.

One of the things that is very important is that no one who is sitting here today is proposing that murderers be set free. The issue always in the capital punishment debate is whether life without parole or capital punishment is sufficient to meet the policy goals of our system.

Chairman FEINGOLD. Thank you, Mr. Turow.

Mr. Hubert?

Mr. HUBERT. Yes, first of all, one of the members of the Commission, when he was a boy, his dad was brutally murdered. He spoke eloquently, very persuasively on the issue. He sensitized us to it.

I refer you also to page 192 through 195 of the report. One subject that we identified clearly was victim issues, and in that report we indicated that, "The Commission met privately with a representative group of family members of homicide victims." And we did. We took an entire day, and they gave us graphic and detailed and startling testimony.

The Illinois Criminal Justice Information Authority provided important research papers that we included in our analysis, and, finally, we held focus groups with surviving members.

It is hard to talk about a time limitation. It reminds me, when I was in law school, that there are very few per se rules in this country. Our jurisprudence does not lend itself to per se rules, because it ultimately excludes the exception, it ultimately leads to inhumane results. And, indeed, I believe that a time limit on the issue of reviewing whether someone has been—someone who is innocent has been given the death penalty is another example of that.

So I would say that we did very clearly look at the victims' issue, and I believe also that a time limit on this issue would be un–American.

Chairman FEINGOLD. Thank you.

Mr. Bettenhausen?

Mr. BETTENHAUSEN. A couple things, Senator. Thank you.

First of all, the Commission asked for three studies on victims' issues. While we talk about 85 recommendations, there are a lot more recommendations for change when you start looking at the appendix, and in that appendix are those three studies about victims' issues and a number of things that prosecutors, defense attorneys, and just the criminal justice system needs to do in order to treat victims better, more fairly, and to assist them to go through this process.

We also have to keep in mind that not all victims think alike on this issue. The Governor and I have met on a number of occasions with Bud Welch, who lost a daughter in Oklahoma when Timothy McVeigh bombed that building. The Governor has a friend from Kankakee who lost her sister, her brother-in-law, and an unborn child who is against capital punishment and doesn't believe in it.

But not all victims speak with the same voice on this particular issue, so we have looked at those issues. And I would also note, in terms of the time limits, the Commission also looked at the kinds of delays that you have in the system. The cases are not being investigated. They are not moving on. We proposed reforms that don't allow the courts to continue to sit on these cases, but that they need to look at them and progress the cases through the criminal justice system so that we get final resolution, not only capital cases but also in our criminal justice system in general.

So I would like to follow up, which goes to Senator Durbin's question, the Governor has also been very concerned about the fact that we are making these kinds of mistakes in capital cases where we invest the most resources that we have. There have got to be many, many more innocent people who are sitting in our prisons, and that is one of the reasons why he commissioned another group to look at the criminal code and propose reforms to our entire criminal justice system.

I would also add for Senator Durbin, a good friend of his from Springfield here, Bill Roberts, put together a report about the need to adequately fund the criminal justice system, and one of the things is loan forgiveness, and we had incorporated those recommendations as well in our report. And I would be remiss if I didn't hit this because I have also talked with your staff and Senator Durbin's staff. As you know, you have passed the Coverdell DNA Backlog Act to provide Federal funding for it. This is a serious issue for the criminal justice system, the backlogs that exist in

DNA laboratories throughout the United States. Crimes could be solved, victims could be protected. We need—this is a Federal issue because the national database, in order to make it really work, needs to be manageable. And we need the help and we need the dollars. We are not seeing enough Federal funds coming to the States to make sure that we can truly use DNA in our criminal justice system.

Chairman FEINGOLD. Thank you, Mr. Bettenhausen.

I have one final question for Ms. White. You say in your statement that you disagree with recommendation 4 of the report, which would require all custodial interrogations of a suspect in a capital case to be videotaped. Is that accurate?

Ms. WHITE. I think it is a good idea to do, and, in fact, what we do—because my office alone—I work in a jurisdiction of slightly less than a quarter of a million, and I got cut $200,000 this year in one year, and so my objection is just that it be mandated. What we like to do is do the interrogation, have the written statement made, and then for time sake, because we don't have the personnel to transcribe and do all of these other things, then turn on a tape recorder or video, have the individual Mirandized, have him read his statement and say, yes, there are no further changes, there are no additions that I would like, and that is just from—we just don't have the number of tapes and the money to——

Chairman FEINGOLD. So it is sometimes done in South Carolina but is not required?

Ms. WHITE. The whole thing is not taped. What I like is—because sometimes, you know, in an—for one thing you don't even know who the suspect is sometimes when you are starting. For instance, a domestic abuse case, I have got one pending right now where the guy calls in and says she committed suicide. Well, at first you think he had found a suicide. You start getting your tests back, your blood spatter and so forth, and you realize it is not, it is a murder. So the entire interrogation of him the first day, you didn't even know he was a suspect.

So at the point you know he is a suspect and he or she is giving a statement, instead of taping hours of various interviews as the system evolves——

Chairman FEINGOLD. Your concern is about resources.

Ms. WHITE. Right.

Chairman FEINGOLD. You don't have any concern about the effect that the act of recording will have.

Ms. WHITE. No, I actually——

Chairman FEINGOLD. You don't know of any cases where suspects have been reluctant to talk on tape or that suspects give false confessions.

Ms. WHITE. That would be one of my concerns, of course, is that they might be reluctant. But I think at that point, once they have given their statement and it is reduced to writing, then turning on a tape, that just prevents them from being able to come into court and say, "I didn't know what I was doing." So I actually prefer that they do tape the reading of the final statement so that that can't be done and everybody knows that is really and truly the final statement. But that is just a little more economic.

Chairman FEINGOLD. All right. Thank you very much. I want to thank everyone on the panel as we hit 11 o'clock. The record of this hearing will remain open for a week for Senators or interested parties to submit statements or other material. Within that time, Senators may submit questions for our witnesses.

Let me just say finally that I think this was an excellent discussion. We got a lot of different viewpoints out. But I am absolutely convinced, based on the statistics that we all know, that not only were 101 people exonerated, although I cannot state the names, I am certain that there are innocent people on death row now and that innocent people have been executed, because it is not possible when you have one versus eight in terms of executions versus exonerations that that has not happened. And this country, with the principle of equal justice under law, has got to address this issue whether you are for or against the death penalty. And you have taken a great step today in moving us in that direction.

I thank you and I conclude the hearing.

[Whereupon, at 11:00 a.m., the subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Questions for Don Hubert from Senator Jeff Sessions

The report of the Governor's Commission Capital Punishment recommends, among other changes, that there should be only 5 factors for a defendant to be eligible to received the death penalty. One of these 5 factors is "The intentional murder of a person involving the infliction of torture." During your testimony, you stated that "rape" would certainly qualify as "torture" under this new, limited eligibility scheme.

Under Illinois state law, criminal sexual assault is defined as:

§ 12-13. Criminal Sexual Assault.

(a) The accused commits crminal sexual assault if he or she:

(1.) commits an act of sexual penetration by the use of force or threat of force; or
(2.) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent;
(3.) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
(4.) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

720 Il. Comp. Stat. 5/12-13

Can you direct this Committee to a single legally-controlling precedent under Illinois or federal law which holds that rape, without other aggravating factors, constitutes "torture" under a capital punishment statute?

If so, do you believe the Commission should have made explicitly clear that rape is to be considered an eligibility factor under the "torture" standard and not removed by the "course of a felon" exclusion adopted by the majority of the Commission?

Do you believe that rape should be an eligibility factor?

If not, why not?

As a general matter, let me just say in response to your question that the question itself points out the challenges that arise in any discussion of the appropriate death eligibility

factors. Any murder that occurs is a tragedy with potentially serious and devastating results for the remaining family members. While there may be those who believe that every murder should expose the murderer to the possibility of the death penalty, Commission members recognized that under well-established United States Supreme Court precedent, **not every murder can or should be death eligible.** As uncomfortable as it may be, we are put to the task of having to draw a line somewhere and say that some murders are death-eligible, and some are not. No matter where the line is drawn, someone will object or describe another terrible crime that should be death eligible. This is precisely why some members of the Commission favored eliminating the death penalty altogether. You have chosen to focus your question on a type of murder, that involving rape, which you believe will cause outrage among those who support the death penalty. For every case you identify where the death penalty should be imposed under such a standard, others could probably identify cases where the death penalty would be unwise.

In any event, you should understand that a rape occurring under the statute you describe above, even if it resulted in murder, **would not** be death eligible even under the current statute. The Illinois Statute which describes the basis for death eligibility is found at 720 ILCS 5/9-1. Paragraph (b)(6) describes the qualifying felonies which may result in death eligibility, and a sexual assault occurring under the statute described above **would not** qualify because it is not among those named in the statute. The statute does include **aggravated criminal sexual assault** as one of the qualifying felonies; that crime is described under § 12-14, not 12-13. As a result, Illinois law already limits the types of sexual assault which may make a defendant death eligible to those that involve more serious, aggravated conduct with the threat of bodily injury.

In addition, even under the aggravated criminal sexual assault statute, not every murder committed in the course of an aggravated criminal sexual assault results in the death penalty. The Commission requested a study which examined 10 years of sentencing dispositions in first degree murder cases in Illinois. That study revealed that of the first degree murders with a contemporaneous conviction for aggravated sexual assault, only about 15% resulted in the imposition of the death penalty.

The Commission's recommendation to eliminate the "course of a felony" eligibility factor just draws that net a little tighter. There are situations where an aggravated sexual assault may constitute torture, where there has been brutality or prolonged abusive conduct. Not every sexual assault, not even every aggravated sexual assault, would constitute torture. This reflects the views of a majority of Commission members that the death penalty should be reserved for the worst murders. We chose to focus on the most brutal of murders, rather than seeking to make defendants death eligible for every murder.

In your second question, you ask me my opinion on whether the commission should have made it explicitly clear that rape is to be considered an eligibility factor under the "torture" standard. I do not feel that my individual votes or feelings with respect to the commission report should be expressed and, in fact, this was necessarily agreed upon as part of the process.

Your final question asks whether I believe that rape should be an eligibility factor. Yes, I believe consistent with Illinois law that rape should be an eligibility factor. For example, I also believe that rape of a child constitutes torture.

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Questions for Don Hubert from Strom Thurmond

1. Mr. Hubert, did you support the Commission's recommendation that would eliminate felony murder as a capital-eligible offense? If so, why?

[Up to you if you want to confess how you voted.]

The Commission recommended retaining five eligibility factors which reflect categories of serious murder. The Commission recognized that deleting the "course of a felony" eligibility factor would be opposed by some. It was our view, however, that this eligibility factor, more than any other, carried with it the potential for disparate treatment. The current "course of a felony" eligibility factor includes 15 separate felonies, and it was suggested more than once to the Commission that under these broad eligibility factors, nearly any first degree murder could wind up being death eligible. This is certainly not the intent of the death penalty statute, nor does it follow the established precedents of the United State Supreme Court.

Every murder is serious and tragic. This factor, however, includes such a broad spectrum of crime that a murder becomes death eligible without regard to the severity or brutality of the crime. Thus, a person who commits the armed robbery of a convenience store, and without any forethought or planning, shoots one of the employees, is going to be eligible for the death penalty in the same way that mass murderers like John Wayne Gacy (with 33 victims) are eligible for the death penalty. I don't think this reflects what a majority of our citizens expect, even those who support the death penalty.

Mistakes do happen in our criminal justice system. In Illinois, there have been a number of examples of wrongful conviction, some involving the death penalty and some where the death penalty was not involved. For example, in Illinois the case involving the 1986 murder of a nursing student (Laurie Roscetti) has been the news again. Ms. Roscetti was brutally raped and murdered. Four young African-American men were tried for her murder. Since the murder involved a rape, they could have been eligible for, but did not receive, the death penalty. The evidence against them was not overwhelming, and basically consisted of a confession from one of the alleged participants. They were convicted and sentenced to long prison terms, although they maintained their innocence. Last year, new and improved DNA testing revealed that none of the four men could have been responsible for the rape. They were eventually released from prison in December of 2001. Following their release, the State's Attorney of Cook County commenced proceedings against 2 new defendants in the case - and at least one of those men has been linked by DNA evidence to the rape/murder of Laurie Roscetti. The Chicago Tribune has run an extensive series on the Roscetti murder, and I would commend those articles to you for review.

No matter where the line is drawn with respect to the kind of murder eligible for the death penalty, there will be cases about which opinions may differ. Eliminating the "course of a felony" eligibility factor will increase the reliability of the death penalty system

by reducing the possibility of disparate treatment. There will be less discretion available to individual prosecutors, and the death penalty will be reserved for the most serious murders.

2. Mr. Hubert, you stated in your testimony that under the Commission's recommendations, a defendant would be eligible for the death penalty if he raped and murdered one victim, despite the proposal that would remove felony murder as a capital offense. You based this argument on the premise that rape is torture. Is rape considered torture under Illinois law?

The Commission's proposal on eligibility factors removes this broad, "course of a felony" eligibility factor in favor of retaining 5 more narrowly crafted eligibility factors. The intention was to limit the use of the death penalty to those cases where the most brutal and heinous murders occur. The elimination of the "course of a felony" factor will further limit the number of cases eligible for death, but some brutal felony murders will continue to be death eligible.

A large number of the cases prosecuted under the "course of a felony" eligibility factor (around 20%) also involve the multiple murder factor - which means that even if this eligibility factor were eliminated, a significant number of defendants would still be eligible for the death penalty. Some cases under this factor would also fall into one of the other eligibility factors that the Commission recommended retaining.

The reality in Illinois is that the death penalty is used with more restraint than in other states - in a study completed at the request of the Commission, only 2 % of first degree murder convictions during a 10 year period (out of a total of 5,000 cases) resulted in a death sentence. Of the first degree murder convictions during that period where a contemporaneous felony of aggravated sexual assault was involved, only about 15% of the cases with murder/sexual assault resulted in the death penalty. [See Pierce and Radelet, Technical Appendix, Section A, Table 6, page 44.]

Under current Illinois law, only aggravated sexual assault (not ordinary sexual assault) results in death eligibility. As a result, not every murder involving a sexual assault is death eligible. The Commission's recommendation would limit that group somewhat further by restricting eligibility to cases where torture was involved -- torture in the sense of some prolonged abusive conduct - not just simple rape.

Sadly, there are cases in Illinois where a rape involves brutal conduct that would still be death eligible under the Commission's revised eligibility factors. See, for example, the case in involving Andrew Kokoraleis, who was executed in 1999 (132 Ill. 2d 235; while prosecuted for murder and aggravated kidnapping, Mr. Kokoraleis gave statements to police that also suggested involvement in the rape/torture of at least one victim.)

3. Mr. Hubert, you have indicated that you support the Illinois moratorium based

on the particular circumstances in that state. Do you have any indication that people are being wrongfully sentenced to death by Federal courts? If not, would you nevertheless support a national moratorium on executions?

If there are facts that show a situation in federal death penalty prosecutions that is similar to what has occurred in Illinois, then a federal death penalty moratorium is certainly appropriate. I am not as familiar with the facts relating to federal death penalty prosecutions, but certainly we should engage in careful scrutiny of the system.

4. Mr. Hubert, the Commission made a number of recommendations regarding law enforcement practices. Given the fact that no active law enforcement officials were members of the Commission, do you feel that the law enforcement community was represented adequately?

Yes, I do feel that the law enforcement community was adequately represented. The Commission benefited from the presence of Tom Needham, who worked directly for the Chicago Superintendent of Police during his time on the Commission. Commission members also consulted with law enforcement officials as needed, and gathered a variety of information about police practices.

In addition, the Commission had available national studies and academic studies addressing various areas of police practices that helped Commission members make recommendations, and were provided with transcripts of legislative hearings in Illinois before our own General Assembly on many of the issues pertaining to police practices that the Commission considered.

While there were areas where the Commission's report criticized certain law enforcement practices, the Commission's report also criticized prosecutors, defense attorneys, and the judiciary. The purpose of our comments was to suggest better alternatives, and ways that the system could be improved. We did that, and it is unfortunate if some choose to criticize the Commission instead of discussing the substance of the recommendations.

Questions by Senator Strom Thurmond for Lawrence Marshall, regarding his testimony before the Constitution Subcommittee, June 12, 2002.

1. Mr. Marshall, in your testimony, you assert that 101 innocent men and women have been released from death rows in the United States since 1973. Isn't it misleading to assert that all of these released people are innocent? Haven't many of these people been exonerated for reasons other than factual innocence?

2. Mr. Marshall, can you point to the case of an innocent person executed in the United States post-Furman?

3. Mr. Marshall, death penalty opponents refer to reversals of capital verdicts as an indication that the entire system is broken. How can it be argued that the system is broken when questionable verdicts are overturned by appellate courts? Doesn't this mean that our elaborate system of review is working?

4. Mr. Marshall, do you support the Commission's recommendation to maintain capital punishment in Illinois with changes in its administration, or would you rather see the death penalty abolished?

Responses of Lawrence C. Marshall to Written Questions Posed by Senator Strom Thurmond Regarding Mr. Marshall's Testimony Before the Constitution Subcommittee, June 12, 2002.

1. One of the bedrock principles of American jurisprudence is the presumption of innocence. Unless that presumption is altered by a valid verdict, every person is treated as innocent. All 101 people that I discussed must, therefore, be treated as innocent, just as you and I are treated as innocent. None of these people were convicted in proceedings that have survived scrutiny. Many of them were later freed when newly discovered evidence emerged proving their innocence. Others were freed when prosecutors recognized that there was insufficient evidence with which to proceed. Yet others were acquitted in retrials. These are not people that were freed on technicalities. Rather, they were freed because the evidence could not sustain any finding of guilt. This is what "innocent" means in our law and culture.

It is, of course, true that in some cases the evidence of factual innocence is particularly compelling because of DNA results or because the true culprit has been identified. We must not fall into the trap, though, of concluding that unless a person can be exonerated in one of those manners, then they cannot be treated as innocent. The suggestion that some of these people are anything but "innocent" is a suggestion that it is legitimate to credit a conviction that was deemed invalid. This would be a profound error.

2. In identifying "innocent" persons I have never relied on my own subjective opinion. Rather, I have relied on the official action of the courts, juries, prosecutors and governors. Only when one of these official entities has freed an inmate have I treated the case as an example of a wrongly convicted person released from death row. Because there is no official exoneration of people who have already been executed, there is no way for me to identify a case where someone who has been executed since 1973 has then been officially exonerated. When such efforts have been made, they have been rebuffed. For example, after Virginia executed Roger Coleman without providing the DNA tests that he said would exonerate him, requests for access to the evidence were made by his family and others so that posthumous DNA tests could be conducted. The Commonwealth of Virginia refused to provide the evidence, and the Virginia courts allowed the prosecution to burn the evidence. So, no, I cannot prove to you whether Roger Coleman was guilty or innocent. This is just one example of the barriers that have been put in the way of posthumous exonerations.

If you are asking for my subjective opinion, I have no doubt that innocent defendants have been executed in the United States since 1973. The Quixote Center documented sixteen cases in seven states in which persons had been executed despite compelling evidence of innocence. Professors Bedeau and Radelet have likewise described many such cases. Examining these case studies, and recognizing the fortuities that have saved the lives of those who have been spared, leads to the inescapable conclusion that innocent people have been executed.

Indeed, consider all of the DNA exonerations that have occurred in the past decade. These results have upset cases in which executions would have otherwise moved forward. Prior to the early 1990s, however, this kind of testing was not available. Surely, one would have to

wear blinders to avoid the conclusion that some of those who were executed from the late 1970s to the mid-1990s would have been exonerated had DNA testing been available.

3. The fact that 101 persons sentenced to death since *Furman* have been legally exonerated should in no way be construed as evidence that the system works. With few exceptions, the cases in question were overturned as a result of interventions by volunteer lawyers, journalists, or activists. And even in the cases where the system corrected itself, it was not as a result of built-in safeguards. As I explained in my oral testimony, many of the exonerated are alive today only because there happened to be some DNA that was testable, or the true killer happened to have been apprehended for some other crime. Yet for most people on death row, there is no possibility of DNA testing because there is no biological evidence, and we cannot count on the serendipity of the true killer being identified in time. We have not yet begun to fix the system; until we do, it should be unthinkable for us to kill anyone.

4. The Governor's Commission on Capital Punishment found the current capital punishment system flawed beyond repair. It stated that, as long as a death penalty is on the books, no matter what reforms are implemented, there will be a serious danger of executing innocent persons. If that is the case, as my own experience has taught me, I see no conscionable alternative to abolition of the death penalty.

I recognize, however, that not everyone agrees with me on this point. I would hope, though, that we can all agree that we must take every step humanly possible to limit the risk of executing the innocent. I would also hope that we can all agree that until such steps are taken, we should not continue to administer the flawed and untrustworthy death penalty that is with us today.

Answers to Questions From Senator Thurmond
Following Housing of the Senate Judiciary Committee
Subcommittee on the Constitution
June 12, 2002
Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor's Commission on Capital Punishment

Kent Scheidegger
Criminal Justice Legal Foundation
July 3, 2002

1. "Mr. Scheidegger, please explain your recommendation that four years should be the median time between sentencing and execution."

The delays of ten to fifteen years between sentence and execution that are typical in capital cases are a national disgrace. If the Congress decides to establish a national commission to examine capital punishment, one of the tasks assigned to that commission should be to propose specific reforms to reduce the delay to a reasonable time.

I propose that the goal be set at a *median* time of four years. Lest I be misunderstood again, let me emphasize that this is a statistical measure of performance of the system as a whole. I do not propose a cut-off on any individual case. A standing body should periodically measure the delay, and if the median continues to exceed four years, analyze the reasons for it and propose further reforms.

The median time is the time in which half of the total is completed. If 1000 sentences are rendered in the year 2002, 500 of them should have their review completed by 2006. Half will take longer. A few will take much longer. In particular, any case involving doubt as to identity of the perpetrator should receive as much review as necessary to resolve that doubt, and the sentence should be commuted if it cannot be resolved. My proposal uses the median rather than the mean so that these very few cases of extended review do not distort the measure.

The typical case involves no question of identity. If the steps involved in reviewing a case proceed expeditiously, and if those that can be performed concurrently are, then most cases can receive all the review needed within the four years. Those few that require longer review can be identified as such, and nothing in my proposal precludes such extended review when warranted.

Reducing delay requires changes in both the state and federal systems. One of the tasks of a commission would be to identify and evaluate specific changes which would reduce delays while maintaining or improving the quality of review. One such change, I suggest, would be to appoint counsel to investigate and present any claim of ineffective assistance or nondisclosure of exculpatory evidence immediately after sentencing, rather than waiting for the direct appeal. This change would simultaneously reduce delay and improve quality, as the evidence would still be fresh.

2. "Mr. Scheidegger, please comment on Mr. Kinsella's observation that the Illinois Commission report is 'suspect' friendly."

Regarding the makeup of the Illinois Commission, I will rest on my oral and written statements at the hearing.

3. "Mr. Scheidegger, does the situation in Illinois have any relevance on the Federal death penalty system? Does it follow that problems in that state of Illinois necessitate a Federal moratorium on executions?"

The situation in Illinois has no relevance to the federal death penalty. The point of concern in Illinois was a few cases of persons convicted at trial and subsequently found to be actually innocent. The number who are actually innocent is smaller than that touted by the opposition, but still a matter of concern. For the federal system, the number is zero. No one sentenced to death in federal court has been found innocent. The problems of poorly paid trial counsel and lack of collateral counsel, which have been the focus of criticism of some states, do not exist in the federal system. There is no basis whatsoever for a moratorium on the federal death penalty.

4. "Mr. Scheidegger, if our true goal is to save innocent lives, shouldn't the deterrent effect of capital punishment be a crucial part of the death penalty debate?"

If all innocent lives are of equal value, as I believe they are, deterrence and incapacitation are just as important as protecting the wrongly accused. There are strong reasons to believe that an effective death penalty will save a great many innocent lives. Those who would risk the innocent to save the guilty have the burden of proving the absence of a deterrent effect, and they have not carried it.

5. "Mr. Scheidegger, would you agree that our death penalty system has more safeguards and is more accurate than ever before? If so, please explain."

With regard to the accuracy of the determination of guilt, there are two important improvements in recent years which Congress should consider when evaluating the reliability of the system. One is improvements that have been made and continue to be made in forensic science.

The other important consideration is the improvements in state collateral review. The cases raising the greatest concern are those which survive collateral review without a claim of actual innocence being sufficiently investigated. Congress acted six years ago to fix the problem of collateral counsel in the Antiterrorism and Effective Death Penalty Act of 1996. Congress provided an incentive system for states to establish a right to collateral counsel, appointment mechanism, and standards. See 28 U. S. C. § 2261. Many states have responded with legislation and rules for this purpose. See, *e.g.*, Ariz. Rev. Stat. § 13-4041; Ariz. R. Crim. Proc. 6.8. What is needed most at this point is for the federal courts to keep their part of the bargain and implement the reforms of this Act, so that the remaining states will see an incentive to improve their systems. Regrettably, not a single federal court has yet extended the benefits intended by Congress to a state.

This is not to say that further improvements cannot be made, however. A reasonable level of compensation for counsel and a basic requirement of criminal trial experience would be positive developments. Congress should consider offering the states positive incentives, as it did in the AEDPA, for adopting such measures. Congress most definitely should not, however, require the states to turn over appointment counsel to an agency likely to be controlled by persons whose objective is to grind the system to a halt. That would be repeating the mistake made in the creation of the "resource centers," which Congress wisely defunded.

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July 2, 2002

VIA FEDERAL EXPRESS, FACSIMILE AND E-MAIL

Patrick Wheeler
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington DC 20510

Re: Response to Questions by Senator Strom Thurmond Re: 6/12/2002 Testimony

Dear Mr. Wheeler:

Below are my responses to the written questions posed to me by Senator Strom Thurmond. My thanks again to Chairman Feingold as well as the other members of the Sub-committee on the Constitution for the extraordinary privilege of appearing there.

1. *Mr. Turow, a majority of the Commission members favor abolishing the death penalty in Illinois. There was one active prosecutor and no active law enforcement officials on the Commission. Do you feel that the Commission was fair and balanced? If so, why?*

Senator Thurmond, many on the Commission understood that our proposals would be controversial and, as a result, we expected healthy debate on their merits. However, we did not anticipate an effort to avoid that debate by attacking the make-up of the Commission, especially on a basis that is highly misleading.

The information which you received that, "There was one active prosecutor and no active law enforcement officials on the Commission," is, in a word, untrue. When Governor Ryan selected the members of the Commission, he appointed two sitting public defenders and two sitting prosecutors. Each of the prosecutors had served multiple terms and had sought and won capital sentences on a number of occasions. One of the prosecutors was Michael Waller, the

elected State's Attorney for Lake County (the third most populous county in Illinois), who subsequently became President of the Illinois State's Attorneys Association (ISAA). The other was Kathryn Dobrinic, elected three times as the State's Attorney for Montgomery County and who, at the time, was the President-elect of the ISAA.

In addition, the Governor also appointed Thomas Needham, a former Cook County State's Attorney, who served as Chief of Staff to the Superintendent of the Chicago Police Department. The Commission's work went on for over two years. By the time we concluded, Mr. Needham had very recently left the Chicago Police Department; Ms. Dobrinic, too, had finished her term, after twelve years in office.

Besides Mr. Needham, Matthew Bettenhausen, the Deputy Governor of Illinois for Criminal Justice and Public Safety, was the Executive Director of the Commission and a member. Matt Bettenhausen came to the job of Deputy Governor directly after serving many years as an Assistant United States Attorney and Associate Chief of that office's Criminal Division. As Deputy Governor, Mr. Bettenhausen has oversight of the Illinois State Police, the Department of Corrections, and the Law Enforcement Training and Standards Board, among other agencies. He is also the Homeland Security Director for Illinois. Clearly, he too, is an "active law enforcement official." Given all these facts, you can see that someone gave you misleading information about the make-up of the Commission.

Furthermore, besides these four individuals, six other members of the Commission had extensive prior prosecutorial experience. Thomas P. Sullivan, one of our co-chairs, was the former United States Attorney for the Northern District of Illinois. Andrea Zopp is the former

First Assistant State's Attorney for Cook County, as well as a former Assistant United States Attorney where she was Chief of the Organized Crime and Drug Enforcement Task Force. Judge Frank McGarr, our Chair and former Chief Judge of the United States District Court for the Northern District of Illinois, was formerly first Assistant Attorney General of Illinois and First Assistant United States Attorney. William Martin is a former Cook County State's Attorney who prosecuted the case in which mass murderer Richard Speck was sentenced to death. Donald Hubert is a former Assistant Attorney General. And I was an Assistant United States Attorney for eight years, where I was Deputy Chief of the Criminal Receiving and Appellate Division. (I also serve presently as a member of Illinois State Police Merit Board, and previously represented the Illinois Fraternal Order of Police Labor Council.)

In sum, ten of the fourteen members of the Commission were or had been prosecutors. Finally, William Webster, another former United States Attorney, as well as former Director of the Federal Bureau of Investigation and the Central Intelligence Agency was a Special Advisor to the Commission.

Accordingly, I believe that the membership of the Commission was fair and balanced and certainly attuned to the perspectives of the law-enforcement community. Indeed, it was death-penalty abolitionists who expressed concerns when the Commission was appointed, feeling it was preponderantly weighted toward prosecutorial viewpoints.

In our initial meeting with the press, when reporters asked how many of those appointed opposed the death penalty, my memory is that only three members indicated that they did. For several of us--including me--our two-year study of capital punishment led to the unanticipated

conclusion that Illinois would be better off without a death penalty because we will never construct a system that will fully meet the requirements of fairness and accuracy that so severe a sanction requires. But speaking for myself, I do not find capital punishment morally repugnant and I am comfortable with the right of the people to choose this option in our penal structure. Furthermore, I believe that in that regard, my views mirror those of a substantial majority of the Commission.

2. *Mr. Turow, you have stated in the past that the Commission did not recommend a repeal of the death penalty because a majority of the people in Illinois support capital punishment. Did this Commission, in lieu of calling for an unpopular repeal of the death penalty, attempt to restrict the use of capital punishment so that it would be unavailable in most cases?*

No. We attempted to respond to the mandate given us by Governor Ryan to propose reforms that would make the capital punishment system in Illinois more fair, just and accurate. Under the reforms we recommended to the death-penalty eligibility requirements, for example, the vast majority of those currently on Illinois's death row would still be there. Moreover, most of the Commission's recommendations have been supported by the Illinois State's Attorneys Association and the Illinois State Bar Association

3. *Mr. Turow, isn't it inaccurate to refer to every individual who has been exonerated as "innocent"? Isn't it true that overturned verdicts have nothing to do with factual innocence.*

The correct term for a person who has been charged with a crime and not convicted is "not guilty," and that person is entitled in such circumstances to be clothed with the presumption of innocence which stays with all citizens until they are convicted. It is never a defendant's obligation to prove his innocence.

Nonetheless, the Illinois 13 have garnered attention because in many of these cases there is abundant evidence that the defendants are in fact innocent. In a number of instances others persons have confessed to the crime and/or been convicted (Burrows, Cruz, Gauger, Hernandez, Jimerson, Porter, Williams) while others such as Cruz, Hernandez and Ronald Jones have had their innocence further corroborated by DNA analysis.

4. *Mr. Turow, in your Wall Street Journal piece of April 24, 2002, you stated that reversal rates of capital sentences indicate "commendable scrutiny by reviewing court." Isn't it inconsistent to argue that there is commendable scrutiny on one hand, and then, on the other hand, use the same reversal percentages to argue that the system is broken?*

A system which condemns those who are not guilty, which imprisons them for years, and which prolongs the agony of victims by providing a false assurance that justice has been done is not functioning properly, even if its errors are eventually recognized by a reviewing court. In doing so, it wastes resources that could have been employed elsewhere and delivers injustice for years before justice is ultimately done. Nor is the system functioning properly when it condemns to death those whom reviewing courts ultimately determine were not fairly sentenced. A properly functioning capital system would get it right at trial—not a decade or more later on post-conviction review or in *habeas corpus* proceedings.

5. *Mr. Turow, the Commission recommended that the death penalty should not be sought against a defendant when based on the uncorroborated testimony of a single eyewitness or jailhouse informant. Doesn't this recommendation interfere with the jury's role as finder of fact? Couldn't the concern about unreliable witnesses be addressed by a jury instruction that cautions jurors about the use of this information.*

The Commission's proposal, which would bar the death penalty when a conviction is based ***solely*** on the testimony of a single eyewitness, accomplice or a jailhouse informant in no way interferes with the jury's role as finder of fact, any more so than the United States Supreme Court's recent decision barring imposition of the death penalty on the mentally retarded. In both instances, the jury retains its traditional role in determining whether or not the defendant is guilty of murder. In each case, however, for reasons of policy, capital punishment is not among the sentencing alternatives.

The history in Illinois has revealed several unwarranted capital convictions based, at least in part, on the testimony of in-custody informants or of accomplices whose testimony was later shown to be unreliable. (E.g., Burrows, Cruz, Hernandez, Jimerson, Williams.) Similarly, recent psychological research has raised many new questions about the reliability of eyewitness testimony; errant testimony from two eyewitnesses was the critical factor in the wrongful conviction of Anthony Porter. It was our judgment, recognizing the highly inflammatory nature of crimes that merit capital punishment, that the inherent risks of inaccuracy in single eyewitness or jailhouse informant cases are significant enough that even while we ought to accept the jury's verdict, we should not authorize a capital sentence, with its irrevocable effects,

when experience has taught us that subsequent events often call the verity of these single-witness cases into question.

Finally, in capital cases where jailhouse informants, accomplices and a lone eyewitness are corroborated somehow, the Commission did recommend a jury instruction such as you suggest. [See Recommendation 56]

6. *Mr. Turow, why did the Commission recommend eliminating felony murder as a capital offense.*

Illinois does not define "capital offenses" in quite the same way as many other states. In Illinois, there is only one offense of murder -- with three ways to establish guilt (intentional, knowing, and felony-murder). The Commission did not suggest eliminating the crime of felony-murder. It suggested eliminating the "course of a felony" eligibility factor from our death penalty scheme. Within this "course of a felony" eligibility factor, there are fifteen separate qualifying felonies. Not only does the statute make the commission of a murder during the course of such a felony death eligible, it also includes the attempt to commit any of those felonies. Many observers have suggested that due to this long list, nearly any first-degree murder in Illinois could qualify for the death penalty.

That situation raises concerns of constitutional magnitude. In Zant v. Stephens, 462 U.S. 872, 879 (1983), the United States Supreme Court made clear that the class of persons subject to capital punishment must be far narrower than all those convicted of first degree murder, and that distinctions must be made according to pre-existing criteria in "an objective, even-handed and

substantively rational way." In practice, what Zant means is that capital punishment is reserved for the "worst of the worst," the most heinous crimes that skirt to the furthest boundary of abhorrent human conduct, and that eligibility criteria must attempt to define those circumstances.

Certainly reading through the opinions in the cases of many on Illinois's death row one finds the worst of the worst. But there are also cases whose gravity seems indistinguishable from other first-degree murders that commonly result in a lesser sentence. Far too often, felony-murder has been the avenue by which those less aggravated cases have ended up with a death sentence imposed.

A felony-murder eligibility factor comprehends very grave and very aggravated offenses. But it also sweeps into eligibility for capital punishment impulsive murders that take place in the midst of a crime with little reflection by the defendant. A defendant who means to commit an armed robbery and in a split second ends up murdering a store clerk has committed an odious offense requiring severe punishment, but it is not a homicide that distinguishes itself from, say, murders based on racial hatred, which are not eligible in themselves for capital punishment in Illinois, or many other first-degree homicides.

Furthermore, examination of our capital jurisprudence shows that often felony-murder has been the pathway by which the wrong cases have proceeded through the system. Ronald Jones, for example, was convicted of a rape-murder, for which the evidence of rape was scant. Jones's confession, which he always maintained was false and had been extracted by a police beating, stated that he had killed the victim, a supposed prostitute, while struggling with her over a knife after he'd had sex with her for which he'd refused to pay. DNA ultimately proved that

Jones was not the woman's sexual assailant and he was freed. The horror of Jones's case is that a man who was not guilty was sentenced to death. But the evidence on its face does not portray a dramatically aggravated offense, and as such raises questions about how this became a capital case in the first instance.

Even when a defendant is guilty, felony-murder has been the vehicle for placing on death row those who, on reflection, all agree do not belong there. For many years, I represented a young man named Christopher Thomas who was sentenced to death for shooting a man when he struggled with Thomas during the course of an armed robbery. When the legal errors made by Thomas's original lawyers allowed his conviction to be overturned, the prosecutor in the case agreed that a reevaluation of the crime, as well as the evidence turned up by a new mitigation investigation, showed this was not properly treated as a capital case.

Both the Jones and Thomas cases highlight the problem of what happens when overly broad eligibility criteria exist. Cases which do not merit capital punishment when compared to other first-degree murders become capital cases anyway, and even the innocent, like Jones, can be convicted as the resulting momentum builds.

Finally, as a lesser concern, it was not clear to many of us as a matter of policy why a murder was inherently more grave simply because it was committed in the course of another felony. Illinois does not otherwise makes murderers death-eligible either because they have a lengthy prior felony record, or even because they commit a felony contemporaneously with the murder, albeit not in the course of it. For example, a defendant who engages in a crime spree, who robs a store, then commits a rape, and finally murders a passerby for sport is not death-

eligible, while the defendant who becomes frightened and impulsively shoots someone in the course of an armed robbery is.

It was our conclusion that *Zant*'s command is more meaningfully fulfilled by creating a capital punishment scheme that looks to the character of the murder, rather than the happenstance of whether it took place in the course of a felony. Toward that end, we recommended, five eligibility factors including, for example, murders accompanied by "torture" or which were intended to hinder the justice process be death-eligible. In so doing, we defined these terms more broadly than current Illinois law. Thus, for example, a brutal rape and murder becomes death eligible not because it took place in the course of a felony, but because of the unusually cruel nature of the crime itself.

7. *Mr. Turow, wouldn't the Commission's recommendation of videotaping interrogations be a burdensome and expensive mandate? If an investigation is in the early stages and there is no suspect, must every interview be videotaped? If an officer were inclined to improperly secure a confession, wouldn't the use of videotaping be open to abuse as well?*

Although they preferred no mandate, the Illinois State's Attorney's Association agreed that video recorded interrogations should be "strongly encouraged." Apparently, they found neither undue burden nor expense in this practice as a general matter. Accepting that there will be increased costs, the Commission recommended that the State provide funding for all police agencies in the state to accomplish this goal. See Recommendation 82, at p. 183 of the report.

Furthermore, the objection that "every interview" must be recorded in the early stages of an investigation misunderstands the recommendation which applies only to "custodial

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interviews" at "a police facility." Thus, the requirement would not be triggered unless the police have probable cause to place a suspect in custody and bring him to the station. When *Miranda* applies, so does the videotaping requirement. That bright line should make the videotaping requirement easy for police officers to administer.

It is certainly true that bad faith knows no boundaries and a police officer intent on securing an unlawful confession might be able to do so notwithstanding this requirement. Yet there can be no question that this rule would make such unlawful conduct more difficult. On the other hand, it will provide even clearer evidence of guilt in the vast majority of cases, which we know are investigated in good faith. In fact, a videotape of the entire interrogation will obviate many claims of coerced or involuntary confessions and thereby reduce a familiar obstacle to conviction.

Respectfully submitted,

Scott F. Turow

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cc: Senator Russell D. Feingold, Wisconsin
Senator Richard J. Durbin, Illinois
Illinois Deputy Governor Matthew R. Bettenhausen
Donald Hubert, Esq.
Professor Lawrence Marshall

Answers to Questions by Senator Strom Thurmond for Druanne White, regarding her testimony before the Constitution Subcommittee, June 12, 2002.

1. Mrs. White, in South Carolina, how may individuals sentenced to death have requested post-conviction DNA testing?

I talked with Don Zelenka in the South Carolina Attorney General's Office. That office handles all appeals in capital cases in South Carolina. He indicated that approximately four out of the seventy-two defendants on death row have requested post-conviction DNA tests.

2. Mrs. White, out of those, how many have been exonerated?

According to Mr. Zelenka, none.

3. Mrs. White, death penalty critics point to the 101 exonerated people who had been on death rows across the country. One of those cases was in South Carolina. Would you please describe this South Carolina case? In particular, please address the notion that this exonerated person was proven innocent?

I have not been notified of the exact names on this list of 101 people. I assume the South Carolina case is the one involving Jesse Keith Brown. Mr. Zelenka tried the case. Mr. Zelenka informed me that Defendant Brown was tried for breaking into the victim's home. He used a shotgun to rob and kill the victim. The defendant was acting alone. In his first two trials, the defendant was sentenced to death. In the third trial the jury convicted the defendant of the robbery and other related charges. It inexplicably found the Defendant not guilty of murder. The Defendant is currently incarcerated for the robbery.

Mr. Zelenka informs me that there may have been other cases on the list of 101 where a defendant was found guilty by one or more juries and then found not guilty by a later jury. This does not mean that the defendant did not commit the crime. This means that although one or more juries was convinced beyond a reasonable doubt that the defendant was guilty, a later jury did not feel the State proved the case beyond a reasonable doubt.

To my knowledge, there have been no Post-Furman cases in South Carolina where it has been shown that a defendant on death row is actually innocent.

4. Mrs. White, does this sound like a system that is forcing innocent people to the death chamber?

We must always strive to improve our criminal justice system. If we err on the side of allowing vicious killers to go free, many more of our innocent citizens will be killed. Make no mistake about it; most of the individual's on death row are not basically

good people who had a bad moment. They are cold-blooded, remorseless murderers who will not hesitate to kill again and again.

Our priority should be to protect innocent lives. This includes not only the lives of innocent defendants, but also the lives of innocent potential victims. Recently, a defendant in Greenville, South Carolina killed another inmate while the defendant was awaiting sentencing in his death penalty case. The murdered inmate was imprisoned for driving under suspension. A defendant in my last death penalty case tried to cut a prison guard's throat. These cases show that innocent people will be harmed even if death row inmates are given life sentences. A moratorium on the death penalty will insure that more innocent victims are murdered. Therefore, we must continue to balance the rights of victims, society, and defendants in our criminal justice system. To my knowledge, no innocent person has actually been executed in the Post-Furman era.

SUBMISSIONS FOR THE RECORD

AMERICAN BAR ASSOCIATION

Death Penalty Moratorium
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June 12, 2002

The Honorable Russ Feingold
Chairman
Subcommittee on the Constitution, Federalism, and Property Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for holding a subcommittee hearing on "Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor's Commission on Capital Punishment" on June 12, 2002. We respectfully request that this letter and the enclosed publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, be included in the record of that hearings.

The ABA produced the *Guide*, or "protocols," in an effort to encourage states to undertake detailed examinations of their death penalty systems. These "protocols" are designed to help capital jurisdictions conduct fair and comprehensive reviews of the laws, processes, and procedures relevant to the administration of the death penalty in their jurisdictions.

As you are aware, concern that innocent persons might be executed was one of the factors that prompted the American Bar Association call for a nationwide moratorium on executions. Although the ABA has taken no position on the death penalty *per se*, except to oppose the execution of mentally retarded offenders and offenders who were under 18 at the time they committed capital offenses, the Association has numerous longstanding policies addressing weaknesses in death penalty administration, including the risk of wrongful executions.

The ABA's moratorium resolution brings together many of those positions. Among other matters, it calls for competent, adequately funded counsel at all stages of the proceedings; full, independent state and federal review of *habeas corpus* claims; and the elimination of racial discrimination–all potentially

resolvable concerns given adequate resources. The ABA resolution urges that no state or federal executions go forward until jurisdictions have carefully evaluated their respective death penalty processes and made the changes necessary to ensure fundamental fairness and due process and minimize the risk of executing innocent individuals.

As it now stands, death penalty administration is a haphazard maze of inconsistent and unfair practices that actively increase the risk that innocent people will be executed. No person should be at risk of a death sentence because of incompetent representation, prosecutorial abuse, racial bias, or other factors that produce unjust results in trials and sentencing. The disturbing number of wrongful convictions that have been uncovered around the nation underscores the importance of invoking a moratorium now, before irreversible error occurs.

Sincerely,

Jim Coleman

James E. Coleman, Jr., Chair
Death Penalty Moratorium Implementation Project

cc: Senator Patrick J. Leahy
Senator Edward M. Kennedy
Senator Charles E. Schumer
Senator Richard J. Durbin
Senator Strom Thurmond
Senator Orrin G. Hatch
Senator Jon Kyl
Senator Mitch McConnell

June 12, 2002

Dear Senator Feingold:

We are writing to thank you for holding the hearing on the Illinois Governor's Commission on Capital Punishment and to urge support for your bill S. 233 "The National Death Penalty Moratorium Act of 2001, which would establish a two-year commission to study the use of the death penalty in both the federal and state systems and impose a moratorium on the federal death penalty during the life of the Commission. There is a compelling need for a Federal Commission, as the attached documents established.

More than 101 persons, from 24 different states, have been released with claims of innocence during the modern death penalty era. Unlike Illinois, most states will not take the initiative to establish a Commission to examine problems with their death penalty systems and make necessary changes. Congress must act to prevent the continuing grave injustices that are occurring on death rows across the country.

Please include for the record of your hearing the following documents

- Fact sheet on all exonerated persons during modern death penalty era;
- An open letter from three exonerated persons: Ray Krone, Kirk Bloodsworth and Juan Melendez;
- A fact sheet on the three exonerated persons listed above;
- Myths and Realities about the Death Penalty;
- Press release by the ACLU.

Thank you for all the work you for holding this hearing and for all the important work that you do on this important issue.

Sincerely,

Rachel King
Legislative Counsel

American Civil Liberties Union

"101 ALMOST DEAD MEN WALK"
The Facts About America's Nationwide Death Penalty Crisis:
A System Poised to Execute the Innocent

Innocence on Death Row – By the Numbers

- Total number of death row prisoners released with evidence of their innocence* who were convicted and sentenced to die = 101 since 1973.
- Number of death row inmates released with evidence of their innocence over the last 10 years (50), showing a sustained danger for executing innocent people:

Year	*Innocent Inmates Released*
2002	3 (and counting)
2001	5
2000	8
1999	8
1998	2
1997	4
1996	6
1995	5
1994	2
1993	6
1992	1

- Number of death row inmates released with evidence of their innocence, by race:

African American	*White*	*Latino*	*Native American*	*Other*
43	43	12	1	1

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* Numerous death row inmates are in the process of challenging their sentences and awaiting testing, appeals, etc. which could prove their innocence. It is also likely that prisoners unable to gain adequate representation and proceedings may have already been executed.

* Sentences for at least 14 additional death row inmates across the country were commuted to life in prison due to serious doubts about their guilt.

* Other defendants, though not exonerated completely, were released from death row with substantial evidence of their innocence. Generally, the defendant's conviction was overturned and then he or she reluctantly entered a guilty plea to a lesser charge because of the threat of possibly receiving another death sentence. Nevertheless, unlike those enumerated below, they are technically guilty of some degree of murder.

- Number of death row inmates released with evidence of their innocence, by state:

State	*Number*	*State*	*Number*
Florida	22	Illinois	13
Oklahoma	7	Texas	7
Georgia	6	Louisiana	5
Arizona	6	New Mexico	4
California	3	N. Carolina	3
Pennsylvania	4	S. Carolina	3
Alabama 3		Indiana 2	
Massachusetts	2	Missouri	2
Ohio	2	Idaho	1
Maryland	1	Mississippi	1
Nebraska	1	Nevada	1
Washington	1	Virginia	1

- Average number of years spent on death row for the 101 prisoners released with evidence of their innocence = 8. Many of these prisoners spent more than 8 years sitting on death row.

* * * * * * * *

Systemic Errors Which Sent 101 Innocent Persons to Death Row

- **Testimony**

  Error potential exists in several forms regarding witnesses who testify during a trial. Perjured testimony occurs when a witness gives false testimony and thus actually lies on the stand. Mistaken testimony happens when witnesses make legitimate mistakes as to identity, recollection of events, etc. during their testimony. Recanted testimony happens when a witness later, after the trial, changes his or her testimony and, in essence takes back his or her original statement. Coerced testimony occurs when the police or prosecutor threaten a witness with prosecution or bodily harm if they do not testify a certain way.

- **Prosecutorial Misconduct**

  Those prosecuting a case (the District Attorney, Assistant District Attorneys) are required to share all evidence that might be helpful to a defendant's case. If the prosecutors do not do so, they have engaged in prosecutorial misconduct. Prosecutorial misconduct also occurs when the prosecutor puts a witness on the stand knowing, or having reason to believe, that the witness will lie. Prosecutorial misconduct also occurs when the prosecutor makes a deal with a witness to reduce a sentence or forgo seeking a criminal charge without disclosing the deal to the defendant or the Court.

- **Ineffective Counsel**

  The job of a defense attorney, especially for capital cases, is to defend his/her client competently and vigorously. Often, capital case defendants are at the mercy of attorneys

who (for a variety of reasons) do not perform their duties fully. Ineffective counsel takes many forms ~~including~~ lack of preparation, failure to object to unreliable evidence, failure to present key evidence to the jury, and conflict of interest. By simply not taking the time to read the case material and to go over the evidence, defense attorneys run the risk of missing key points and details which could help their clients. Further, if a defense attorney fails to interrogate witnesses, or fails to seek out witnesses to interrogate, key pieces of evidence and testimony, which could exonerate the defendant, will be missed. Defense attorneys, especially in death penalty cases, are sometimes inexperienced, overworked and underpaid. Some lawyers have failed to do their jobs because of lack of resources, serious health problems, alcohol, drug abuse or addiction or serious mental illness.

- **DNA Evidence**

  It is becoming increasingly common for those wrongfully convicted of capital and other crimes to be released when DNA evidence proves beyond a doubt that the person jailed for a murder, rape, etc. could not have committed the crime. Additionally, potentially exculpatory evidence that could be tested for DNA is sometimes lost or destroyed. In a number of states it is still difficult to get access to DNA evidence and testing.

- **Police Misconduct**

  Coerced confessions are the most common form of police misconduct. A coerced confession occurs when a police officer forces a defendant to sign a statement admitting that he/she committed the crime. Additionally, police officers may withhold evidence (which could point to another suspect), from the prosecutor, other officers and/or the court systems, or plant evidence at the scene that implicates the defendant. Additionally, testimony from witnesses is sometimes coerced.

- **Jailhouse Informants/Snitches**

  Jailhouse informants are inmates serving sentences who often get a reduction in their own sentences for testifying against defendants. These informants may falsely testify to having heard the defendant confess to a crime while the informant and the defendant were held in the same jail facility. Jailhouse informant testimony can be tremendously unreliable, especially if the informant is rewarded for the testimony.

- **Expert Testimony**

  Often the prosecution relies on scientific or forensic "experts" to prove a defendant's guilt. These experts are called upon to examine and testify to polygraph tests, hair samples, blood, semen, and DNA tests from such sources to tell the jury whether the defendant committed the crime. Because the jury is told that these witnesses are "experts" in their field, juries often give their testimony considerable weight. If these experts are wrong, or if the scientific approach they rely upon is faulty, wrongful convictions of innocent people can occur. In Oklahoma alone, over one thousand cases are currently being reviewed because some of the state's forensic experts gave inaccurate (and even false), testimony, which likely contributed significantly to many – if not most – of these people being wrongly convicted at their trials.

- **Other Factors**

  A variety of other factors can lead to errors in capital cases including newly discovered evidence (including a post-trial murder confession given by someone else), previously unknown witnesses, and reversal on appeals. Between the original trial and the appellate trial, previous evidence or witness testimony may be tossed from a case (for any of the

reasons listed above), thus resulting in the defendant being exonerated due to insufficient evidence. Judicial errors are responsible for some wrong death sentences. In more than a few cases people were sentenced to death because a judge gave the jury wrong or confusing instructions.

American Civil Liberties Union

"101 ALMOST DEAD MEN WALK"
The Facts About America's Nationwide Death Penalty Crisis:
A System Poised to Execute the Innocent

101 Innocents Sentenced To Die – A Quick Glance

No.	Name of Innocent	Year Sent to DR	Year Released	State	Error Factor	Race
101	Thomas H. Kimbell, Jr.	1998	2002	PA	Evidence of innocence improperly excluded at trial	W
100	Ray Krone	1992	2002	AZ	No DNA evidence submitted in original trial, freed by DNA evidence which is tied to an already imprisoned inmate	W
99	Juan Roberto Melendez	1994	2002	FL	Prosecutorial misconduct; false testimony; another man confessed to the crime	L
98	Charles Fain	1983	2001	ID	Exonerated by DNA evidence; false testimony (jailhouse informants)	W
97	Jeremy Sheets	1997	2001	NE	Improper testimony of alleged accomplice	W
96	Joaquin Jose Martinez	1997	2001	FL	Police and official misconduct; false testimony; retried and acquitted	L
95	Gary Drinkard	1995	2001	AL	Ineffective counsel (did not bring forward evidence of alibi); retried and acquitted	W
94	Peter Limone	1968	2001	MA	New evidence, false testimony and official misconduct	W
93	Albert Burrell	1987	2000	LA	Prosecutorial misconduct, insufficient evidence and exonerated by DNA evidence.	W
92	Michael Graham	1987	2000	LA	Prosecutorial misconduct, insufficient evidence and exonerated by DNA evidence.	W
91	Frank Lee Smith	1986	2000	FL	False eyewitness testimony. Exonerated by DNA evidence and died prior to exoneration on death row.	B
90	William Nieves	1994	2000	PA	Ineffective assistance of counsel, false testimony, evidence withheld by prosecution	L
89	Earl Washington	1984	2000	VA	Mental retardation, false confession and exonerated by DNA evidence	B
88	Joseph Nahume Green	1993	2000	FL	Insufficient evidence and faulty eye-witness testimony	B
87	Eric Clemmons	1987	2000	MO	Exculpatory evidence withheld by state; retried and acquitted	B
86	Steve Manning	1993	2000	IL	False jail house snitch testimony	W
85	Alfred Rivera	1997	1999	NC	Jury did not hear key evidence, false testimony by co-defendant; retried and found not guilty	L
84	Warren D. Manning	1989	1999	SC	Circumstantial evidence; ineffective counsel	B
83	Clarence Dexter, Jr.	1991	1999	MO	Ineffective assistance of counsel prosecutorial misconduct and expert testimony overstated	W
82	Ronald Jones	1989	1999	IL	Police misconduct; exonerated by DNA evidence	B
81	Ronald K. Williamson	1988	1999	OK	Exonerated by DNA evidence	W
80	Steven Smith	1985	1999	IL	DNA evidence excluded him, questionable testimony	B
79	Anthony Porter	1983	1999	IL	Police misconduct (forced confession), mental retardation	B
78	Shareef Cousin	1996	1999	LA	Improperly held evidence and prosecutorial misconduct	B
77	Curtis Kyles	1984	1998	LA	Prosecutorial misconduct, withheld evidence	B
76	Robert Lee Miller, Jr.	1988	1998	OK	Exonerated by new DNA evidence, which pointed to someone else	B

American Civil Liberties Union

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No.	Name of Exonerated Innocent	Year Sentenced to DR	Year Released	State	Error Factor	Race
75	Randall Padgett	1992	1997	AL	Exculpatory DNA evidence suppressed by prosecutors; acquitted at retrial	W
74	Robert Hayes	1991	1997	FL	Faulty identification of semen DNA evidence; hair found on victim was not Hayes'.	B
73	Benjamin Harris	1985	1997	WA	Incompetent counsel, mental illness	B
72	Ricardo Aldape Guerra	1982	1997	TX	Prosecutorial misconduct and police misconduct, ethnic discrimination	L
71	Carl Lawson	1990	1996	IL	Inadequate counsel (conflict of interest); retried and acquitted	B
70	Troy Lee Jones	1982	1996	CA	Ineffective assistance of counsel	B
69	Gary Gauger	1993	1996	IL	Police misconduct (questionable "confession") and insufficient evidence	W
68	Roberto Miranda	1982	1996	NV	Incompetent counsel	L
67	Dennis Williams	1979	1996	IL	Prosecutorial misconduct, police misconduct, perjured testimony, new evidence and exonerated by DNA.	B
66	Verneal Jimerson	1985	1996	IL	Prosecutorial misconduct, police misconduct, perjured testimony, new evidence and exonerated by DNA	B
65	Sabrina Butler	1990	1995	MS	Prosecutorial misconduct; trial irregularities	B
64	Alejandro Hernandez	1985	1995	IL	Prosecutorial misconduct, exculpatory DNA evidence	L
63	Rolando Cruz	1985	1995	IL	Prosecutorial misconduct, exculpatory DNA evidence	L
62	Robert Charles Cruz	1981	1995	AZ	False testimony by convicted burglar and drug dealer	L
61	Adolph Munson	1985	1995	OK	Prosecutorial misconduct (suppression of exculpatory evidence) and false expert witness testimony; acquitted at retrial	B
60	Joseph Burrows	1989	1994	IL	Prosecutorial misconduct, police misconduct and false testimony (police coercion)	W
59	Andrew Golden	1991	1994	FL	Insufficient evidence	W
58	Muneer Deeb	1985	1993	TX	Ineffective assistance of counsel and improper evidence, false jailhouse informant testimony	O
57	James Robison	1977	1993	AZ	Improper testimony of alleged accomplice; retried and found not guilty	W
56	Gregory R. Wilhoit	1987	1993	OK	Ineffective assistance of counsel (alcoholism)	W
55	Walter McMillian	1988	1993	AL	Racial discrimination, prosecutorial misconduct and perjured testimony	B
54	Federico Macias	1984	1993	TX	Ineffective counsel; jailhouse snitch testimony	L
53	Kirk Bloodsworth	1984	1993	MD	Prosecutorial misconduct; exonerated by DNA	W
52	Jay C. Smith	1986	1992	PA	Prosecutorial misconduct: false testimony, withheld evidence	W
51	Charles Smith	1983	1991	IN	Ineffective counsel, questionable testimony	B
50	Bradley P. Scott	1988	1991	FL	Inconsistent witness testimony	W
49	Gary Nelson	1980	1991	GA	Prosecutorial misconduct, inadequate representation, exculpatory evidence	B
48	Jimmy Lee Mathers	1987	1990	AZ	State Supreme Court reversed due to insufficient evidence	W
47	Dale Johnston	1984	1990	OH	Prosecutorial misconduct	W
46	John Skelton	1983	1990	TX	Insufficient evidence linking him to the crime	W

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"101 ALMOST DEAD MEN WALK"
The Facts About America's Nationwide Death Penalty Crisis:
A System Poised to Execute the Innocent

No.	Name of Innocent	Year Sent to DR	Year Released	State	Error Factor	Race
45	Patrick Croy	1979	1990	CA	Improper jury instructions; retried and acquitted	N
44	Clarence Brandley	1981	1990	TX	Prosecutorial misconduct, false testimony, racial discrimination	B
43	James Richardson	1968	1989	FL	False testimony, jailhouse snitches, judicial misconduct	B
42	Timothy Hennis	1986	1989	NC	Prosecutorial misconduct and false testimony; retried and found not guilty	W
41	Robert Cox	1988	1989	FL	Insufficient evidence	W
40	Jesse Keith Brown	1983	1989	SC	Questionable testimony, inadequate assistance of counsel; acquitted at retrial	W
39	Randall Dale Adams	1977	1989	TX	Ineffective assistance of counsel, inappropriate expert testimony	W
38	Earnest Miller	1980	1988	FL	Prosecutorial misconduct, false witness testimony	W
37	William Jent	1980	1988	FL	Prosecutorial misconduct, false witness testimony	W
36	Larry Troy	1983	1988	FL	Perjured testimony (jailhouse informant)	B
35	Willie Brown	1983	1988	FL	Perjured testimony (jailhouse informant)	B
34	Jerry Bigelow	1980	1988	CA	False confession and witness testimony; ineffective counsel; retried and found not guilty	W
33	Richard Neil Jones	1983	1987	OK	Prosecutorial misconduct	W
32	Robert Wallace	1980	1987	GA	Not competent to stand trial and cause of death accidental	B
31	Juan Ramos	1983	1987	FL	Prosecutorial misconduct	L
30	Anthony Ray Peek	1978	1987	FL	False testimony, inappropriate evidence; acquitted at retrial	B
29	Vernon McManus	1977	1987	TX	Retrial ordered because of jury selection irregularities. Charges dropped because key witness refused to testify at new trial	W
28	John Henry Knapp	1974	1987	AZ	New evidence	W
27	Henry Drake	1977	1987	GA	Insufficient evidence and new evidence	W
26	Darby (Williams) Tillis	1979	1987	IL	New evidence; retried and acquitted	B
25	Perry Cobb	1979	1987	IL	New evidence; retried and acquitted	B
24	Joseph Green Brown	1974	1987	FL	Prosecutorial misconduct, false testimony	B
23	Clifford Henry Bowen	1981	1986	OK	Prosecutorial misconduct	W
22	Neil Ferber	1982	1986	PA	Perjured testimony and prosecutorial misconduct	W
21	Anthony Brown	1983	1986	FL	Perjured testimony; acquitted at retrial	B
20	Lawyer Johnson	1971	1982	MA	New evidence	B
19	Anibal Jarramillo	1981	1982	FL	Insufficient evidence	L
18	Johnny Ross	1975	1981	LA	Prosecutorial misconduct	B
17	Michael Linder	1979	1981	SC	Prosecutorial misconduct	W
16	Charles Ray Giddens	1978	1981	OK	False testimony; insufficient evidence	B
15	Larry Hicks	1978	1980	IN	Perjured eye witness testimony	B
14	Jerry Banks	1975	1980	GA	Prosecutorial misconduct (concealing exculpatory witnesses, possibly planting evidence)	B
13	Gary Beeman	1976	1979	OH	False testimony; acquitted on retrial	W
12	Jonathan Treadway	1975	1978	AZ	Insufficient evidence.	W
11	Earl Charles	1975	1978	GA	Official misconduct	B

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No.	Name of Innocent	Year Sentenced to Die	Year Released	State	Error Factors	Race
10	Delbert Tibbs	1974	1977	FL	Racial bias and false testimony	B
9	Clarence Smith	1974	1976	NM	False testimony and police misconduct	W
8	Ronald Keine	1974	1976	NM	False testimony and police misconduct	W
7	Richard Greer	1974	1976	NM	False testimony and police misconduct	W
6	Thomas Gladish	1974	1976	NM	False testimony and police misconduct	W
5	James Creamer	1973	1975	GA	Prosecutorial misconduct and false testimony	W
4	Freddie Pitts	1963	1975	FL	Incompetent counsel, false testimony and prosecutorial misconduct	B
3	Wilbert Lee	1963	1975	FL	Incompetent counsel, false testimony and prosecutorial misconduct	B
2	Samuel Poole	1973	1974	NC	Incompetent counsel, prosecutorial misconduct	B
1	David Keaton	1971	1973	FL	Police misconduct (coerced confession); mistaken identification	B

Note: *Many of those released from death row will have multiple factors contributing to their release. Error factors compiled by ACLU Capital Punishment Project, based upon Death Penalty Information Center (DPIC) data.*

Source: *Death Penalty Information Center (DPIC). DPIC used a number of resources when first developing the above list. The earlier cases are based heavily on the work of Hugo Adam Bedau and Michael L. Radelet. (See also, Radelet, Michael et al., "Prisoners released from death rows since 1970 because of doubts about their guilt"; 13 Thomas M. Cooley Law Review 907 (1996)).*

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"101 ALMOST DEAD MEN WALK"
The Facts About America's Nationwide Death Penalty Crisis:
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At Issue

- **Compensation**

  Very few of these innocent people who spent considerable time on death row received any type of compensation after their release. What compensation is fair to give to innocent persons wrongfully sentenced to death? Should state court systems have to pay for their errors? Should state legislatures be mandated to set up a compensatory fund to pay to such innocent persons?

- **Official Malfeasance**

  In several of these cases, defense attorneys, prosecutors, expert witnesses, police officers, judges and others have either not performed their duties adequately, or they engaged in official misconduct or worse. What type of punishment, if any, was assigned in such cases? Should court officials be held accountable for work product – or lack thereof – which sent an innocent person to death row? And, in such cases, who would provide the oversight?

- **Moratorium**

  Clearly there is no one easy-fix solution to properly address the volume of problems, which exist in our country's death penalty system(s). Ninety-nine innocent men and one innocent woman were set to be executed in our country, but because of the work of some eager students, journalists, or dedicated lawyers, were saved. Who knows how many innocent men and women on our country's death rows were not so fortunate? The only courageous solution to prevent (additional) innocent people from being executed is for state leaders to call for moratoriums on all executions within their states while the error factor issues are addressed.

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NEWS RELEASE NEWS RELEASE NEWS RELEASE NEWS

Innocents Saved from Death Row Join Lawmakers to Promote Study into Reducing the Risk of Death Penalty Mistakes

FOR IMMEDIATE RELEASE
Wednesday, June 12, 2002

Contact: Gabe Rottman
(202) 675-2312

WASHINGTON – Three innocent men, recently exonerated and released from death row, today joined with lawmakers here to promote an independent federal study into potentially widespread incidences of innocent men and women being put to death by a faulty capital punishment system in America.

"Were it not for the persistence of my family, I would never see the outside of a prison. I know first-hand that the system doesn't work," said Ray Krone, who became the 100th exoneree in March. "Congress needs to act now to prevent other innocent Americans from facing the injustice that I have witnessed."

Floridian Juan Melendez who spent seventeen years on death row before finally being exonerated and Kurt Bloodsworth, a Maryland man who was sentenced to die based solely on circumstantial evidence, both joined Krone at the hearings.

The exonerees timed their trip to Washington to coincide and draw attention to a hearing in the Constitution Subcommittee of the Senate Judiciary Committee examining ways to reduce the risk of innocent persons being executed in America. Sen. Russell Feingold (D-WI), who chairs the subcommittee, has introduced legislation that would impose a moratorium on the federal death penalty and empanel a national, independent commission to investigate flaws in the system that allow innocent persons to be sentenced to death.

Sen. Feingold's bill, called the "National Death Penalty Moratorium Act of 2001" (S. 233) will be discussed at the hearing along with the recommendations of a Governor's Commission in Illinois. The Illinois commission was formed by Republican Gov. George Ryan after 13 inmates were found to be innocent and released from death row in quick succession. Gov. Ryan also declared a moratorium on executions in his state. The commission recommended 85 sweeping changes to the state's use of the death penalty, including reducing the number of capital crimes and beefing up competent counsel protections.

Democratic Gov. Parris Glendening of Maryland followed suit in May, declaring a moratorium and appointing a panel to study the fairness of his state's death penalty. Supporters of the federal legislation, including the American Civil Liberties Union, also upped the intensity of their advocacy last month after Pennsylvania inmate Thomas Kimbell became the 101 person to be saved from death row since the death sentence was reintroduced in 1976. The ACLU sponsored the exoneree trip to Capitol Hill.

"The government is losing in the ultimate zero-sum game," said Rachel King, an ACLU Legislative Counsel. "In the life and death questions posed by the death penalty, the state does not get another chance to make right when they kill the wrong person. Legislation is needed to prevent further tragedy."

Krone, Melendez and Bloodsworth will be available for media interviews on June 12

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Brief Case Histories on Krone, Melendez and Bloodsworth

Ray Krone

Ray Krone was convicted and sentenced to death in 1992 based solely on mistaken expert testimony that claimed his teeth matched bite marks on the victim's body. The rest of the evidence against him was circumstantial at best, utterly inconclusive at worst.

He was only exonerated after a DNA test showed the other piece of physical evidence -- saliva left at the crime scene by the real killer – could not have been from Krone. Had he lived in a jurisdiction that did not allow death row inmates access to DNA evidence, Krone would most likely have been executed for a crime he did not commit.

Juan Melendez

Juan Melendez was convicted solely on the testimony of two felons, one of whom was actually a co-defendant who received a dramatic reduction in his sentence for his cooperation and then offered dubious testimony on the witness stand. No physical evidence connected Melendez to the murder; 10 witnesses repudiated under oath the evidence of the two felons and another man repeatedly confessed to the murder.

Despite the obvious holes in Melendez's prosecution, he spent 17 years on death row before repeated appeals and new exculpatory evidence finally forced his exoneration and release.

Kirk Bloodsworth

Kirk Bloodsworth was sentenced to death based on deceptive circumstantial evidence that, when the facts came to light, turned out to be innocuous. Bloodsworth was accused of the violent murder of a young girl. An anonymous caller told police that he had been seen with the girl on the day of the crime. Bloodsworth was then identified from a police sketch, acquaintances told investigators that he said he had done something "terrible" that day that would affect his marriage, he identified the murder weapon during interrogation even though nothing had been publicized and a footprint near the body vaguely matched Bloodworth's shoe size.

In the end, hard-won DNA evidence conclusively showed that Bloodsworth could not be the murderer and he was exonerated. As for the evidence at the trial, his identification of the murder weapon arose out of the fact that it was sitting on the table next to him during the interrogation – and the "terrible" thing that was to affect his marriage was him neglecting to buy his wife the taco salad he had promised her earlier in the day.

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Myths About the Death Penalty in America

Myth: Access to DNA testing would solve the problem of executing innocent people.

While access to DNA testing is critical, DNA is not relevant to every capital case and is only responsible for 12 of the 101 death row exonerations since 1973. In many cases freedom came with the *lucky* exposure of prosecutorial misconduct, incorrect testimony by "expert" witnesses, false eyewitness testimony, false testimony by jailhouse informants or false confessions coerced by the police.

Myth: The release of innocent people from death row shows that the system is working.

Many exonerees only survived death row because of the work of advocates outside of the system, including reporters, movie producers and college students. If the system had been left to its own devices these innocent people would have been executed.

For example, Anthony Porter was one of several death row inmates freed by journalism students at Northwestern University. Porter was scheduled to die before the class that eventually proved his innocence even began its work. He was granted an eleventh-hour stay of execution after questions about his mental ability were raised; Porter had an IQ of 51. It was only this stay that allowed the students at Northwestern to prove his innocence in time to prevent his execution.

The system must not depend on outsiders to correct its errors. We ought to enact a moratorium on executions while we find out how to keep the system from executing innocent people.

Myth: The death penalty system is only flawed at the state level; the federal death penalty is imposed without error.

In reality, it is more than likely that the death penalty is flawed on both the state and federal level. Three and a half percent of the people the Attorney General has attempted to execute have been innocent. And, in but one example of state-level problems, Illinois -- where a moratorium was imposed after it was found that more people on death row

were innocent than had been executed -- has an error rate of at least 4.5 percent.

The reasons behind mistaken death sentences apply equally in both state and federal courts. Inaccuracies inherent in eyewitness testimony remain whether that testimony is given in federal or state court, "expert" witnesses can be as incorrect in federal court as in state court, jailhouse informants are just as likely to lie to save themselves in federal court as they have been in state courts.

Indeed, the very first person sentenced to death in a federal case since the reinstatement of the federal death penalty in 1988 has a compelling claim to innocence. David Ronald Chandler was convicted on the testimony of Charles Ray Jarrell, a prime suspect in the same crime with whom the government made a deal in exchange for testimony against Chandler. Jarrell has since *recanted* the testimony that sent Chandler to federal death row even though doing so has exposed him to the risk of execution.

Matthew R. Bettenhausen
Deputy Governor for Criminal Justice and Public Safety and
Executive Director of Governor Ryan's Commission on Capital Punishment
U.S. Senate Constitution Subcommittee
Testimony
"Reducing the Risk of Executing the Innocent:
The Report of the Illinois Governor's Commission on Capital Punishment"
Wednesday, June 12, 2002

Chairperson Feingold, distinguished members of the United States Senate:

It is an honor to be here before you this morning to discuss the work of Governor Ryan's Commission on Capital Punishment. As you know, the Commission engaged in extensive research and analysis of Illinois' capital punishment system from initial police investigation through trial, appeal and post-conviction review. My name is Matt Bettenhausen. I am the Deputy Governor for Criminal Justice and Public Safety and I served both as a member and as Executive Director of Governor Ryan's Commission on Capital Punishment.

The Governor's Commission on Capital Punishment's report contains 14 chapters that order the recommendations from police and pretrial investigations all the way through the post-conviction and more general and funding recommendations. The report also 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. The report includes the following introduction and background information concerning the commission's work:

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

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

Under the 1977 Act, a death penalty hearing only occurs "where requested by the State."[8] The death penalty hearing, often referred to as the "sentencing phase" of the trial, occurs following the defendant's conviction for first degree murder. The sentencing phase of the trial usually occurs in two distinct phases: the eligibility phase and the aggravation/mitigation phase. During the eligibility phase, the prosecution must establish either before the jury or the judge proof beyond a reasonable doubt that one of the eligibility factors is present. The prosecution must also establish that the defendant is eighteen years of age, as Illinois prohibits the imposition of the death penalty on those under eighteen. When the jury (or the judge in a bench sentencing) determines that the defendant is eligible for the death penalty, the aggravation/mitigation phase commences. During the aggravation/mitigation phase, the prosecution presents information to the jury or the judge which it believes warrants the imposition of the death penalty in a particular case. The defendant presents information in mitigation, or which he or she believes establishes reasons for not imposing the death penalty in a particular case.[9]

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

Amendments to the 1977 Act followed shortly. In 1982, the General Assembly added a new eligibility factor, which provided that death could be imposed if the victim of the murder was under 16 years of age and the murder was committed in a brutal and heinous manner.[10] The legislature subsequently amended this provision to lower the threshold age for the victim from 16 to 12, 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 160[16] are currently on death row. Twelve inmates have been executed under the current statute, and thirteen released from death row. Of those individuals who have been sentenced to death in Illinois, there are over 250 proceedings in which there has been at least one reported Illinois Supreme Court decision.[17]

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

Examination of laws of other states with the death penalty
Presently, 37 states and the federal government have a death penalty. At the outset, it was apparent that the Commission could benefit from understanding the procedures in

other states. To that end, statutory provisions were collected[18] from most states in the following areas:

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

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

Sentencing Study

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

Unfortunately, Illinois does not systematically gather this type of data. Commission members found their efforts to come to grips with the complexities of the death penalty system circumscribed by a lack of reliable information that would provide insight into the range of issues occurring in death penalty cases. There is no state-wide database which would enable an examination, for example, of charging decisions by prosecutors. Even with new Supreme Court rules which require the filing of a notice of intent to seek the death penalty, information is still not collected in any regularized fashion to document decisions that are made in the process. More important, to be truly valuable, information needs to be collected not only on death penalty cases, but also on all murder cases in which the death penalty is not sought or imposed in order to comparatively examine and review death penalty decisions and the process itself.

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

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

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

A complete discussion of the methodology of the study and its results is contained in the separate report by Drs. Pierce and Radelet.[19]

Results of the research

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

Thirteen released death row inmates

Commission members found a number of common themes in these cases, which provided a framework for analyzing the remaining cases in which the death penalty has been imposed. All 13 cases were characterized by relatively little solid evidence connecting the charged defendants to the crimes. In some cases, the evidence was so minimal that there was some question not only as to why the prosecutor sought the death penalty, but why the prosecution was even pursued against the particular defendant. The murder conviction of former death row inmate Steven Manning was based almost completely upon uncorroborated testimony of an in-custody informer. No physical evidence linked Manning to the murder he was said to have committed, nor was there any solid corroboration of the alleged statements he made admitting to the murder. Gary Gauger was convicted in McHenry County of the double murder of his parents even though no physical evidence at the scene linked Gauger to either murder, nor was there any satisfactory explanation of a possible motive. The primary evidence against Mr. Gauger were statements, allegedly made by Gauger, that the police claimed were indicative of guilt, made during an interrogation that was not memorialized. Gauger denied the statements. Following a federal investigation, two other persons were subsequently convicted in Wisconsin of murdering Mr. Gauger's parents. Despite scant evidence, each of these cases resulted in a conviction, and a death penalty.

There were a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain. In some cases, this was an accomplice[20], while in other cases it was an in-custody informant. The "Ford Heights Four" case involved the conviction of four men in south suburban Cook County for the 1978 double murder of a man and a woman. Two of the men, Verneal Jimerson and Dennis Williams, were sentenced to death, while the other two were sentenced to

extended prison terms. The primary testimony against the men was provided by their alleged accomplice, Paula Gray, who was then 17.[21] All four men were ultimately released in 1996, after new DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime.

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

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

There were also several cases where there was a question about the viability or reliability of eyewitness evidence. Former death row inmate Steven Smith was convicted and sentenced to death based upon the questionable testimony of one eyewitness, testimony which the Illinois Supreme Court later found unreliable. Anthony Porter's convictions and death sentence rested primarily upon the testimony of two eyewitnesses, both of whom were acquainted with Mr. Porter. Those witnesses later recanted, and another man subsequently confessed to the crime for which Mr. Porter was convicted. 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 imposed[24] revealed some areas for concern. Overall, more than half of all of these cases

were reversed at some point in the process.[25] Most of the reversals occurred on direct appeal, with roughly 69% of the reversed cases falling into this category. Of the cases reversed on direct appeal, almost 58% of those were reversed on sentence only, and not on the underlying murder conviction.

Reasons for case reversals varied widely. A significant number of cases were reversed based upon legal issues that had little to do with the conduct of the trial itself. Both the United States Supreme Court and the Illinois Supreme Court have, from time to time, announced new rules of law that resulted in reversal of a number of cases that had been pending on appeal. In a number of cases, the Illinois Supreme Court decided that under the facts of that particular case, the death penalty was excessive. In a similar number of cases, the Court found that the prosecution had failed, for one reason or another, to establish that the defendant was eligible for the death penalty under the statute, and reversed the sentence. There were also a number of cases reversed on issues pertaining to the defendant's fitness for trial, based upon the claim that the defendant had been administered small quantities of medication during his pre-trial incarceration. When other 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 study[29] summarized national research evaluating the needs of crime victims and assessing the effectiveness of victim assistance programs. It also reported on specific research that the Authority had recently completed with respect to intimate partner homicides in Chicago, and the Authority's evaluation of the Cook County Victim Witness Program. Finally, it commented upon the Authority's process to define a plan for investigating the sufficiency of services delivered to crime victims.

As a follow up to this research, the Authority convened a special series of focus groups of the family members of homicide victims in order to elicit views about their experiences with the criminal justice system. Focus groups were conducted in both Chicago and Springfield, and participants' views were elicited through the assistance of a trained facilitator. The Authority's report[30] provided helpful insights into the challenges facing surviving family members of homicide victims as the criminal case progresses through the system.

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

Sentencing Study

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

Costs related to the imposition of the death penalty

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

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

In a moment I will give a review of some of the Commission's 85 recommendations that include the creation of a statewide panel to review prosecutors' request for the death penalty; banning death sentences on the mentally retarded; significantly reducing the number of death eligibility factors; videotaping all interrogations in homicide cases; and controlling the use of testimony by jail house informants and accomplices.

Illinois' track record since it reinstated capital punishment in 1977, speaks for itself—though it does not speak well for itself. In the past 25 years, thirteen men have been exonerated and set free from Illinois' death row, that number is one *more* than the number of those executed in that same time period. While much has been mentioned of the Governor's Commission, it is also important to recognize that in the interim, the State

of Illinois and Governor Ryan have worked to improve the present capital punishment system while the moratorium has been in place. For example, in August of 1999, Illinois created the Capital Litigation Trust Fund to provide funds for capital defense. Thus far this fund has made over $35 million available exclusively for capital cases in order to help ensure that we thoroughly investigate and try our capital cases correctly in the first instance. In addition, Illinois was also one of the first states to provide for post-conviction DNA testing. We have passed several pieces of legislation requiring the preservation of DNA evidence and we provide statutory compensation for the wrongfully convicted. In 2000, after declaring the moratorium, Governor Ryan traveled to Washington D.C. to testify in support of the Innocence Protection Act and appeared with Senators Leahy and Feingold along with Illinois Congressman Ray LaHood and Congressman William Delahunt to discuss this legislation. This important Act contains a number of criminal justice reforms aimed at reducing the risk that innocent people are executed by affording greater access to DNA testing and ensuring better quality legal defense for capital defendants. As you know, many of its provisions were modeled after some of the reforms enacted in Illinois.

While we have had some successes in improving our capital punishment system, there is still much that must be done. The Governor's Commission proposes 85 recommendations for improving Illinois' capital punishment system to better ensure that it is fair, just and accurate. Despite many of the significant advancements Illinois has already recently made, we still have a long way to go.

Some of the recommendations include:

- Creating a statewide review panel to conduct a pre-trial review of prosecutorial decisions to seek capital punishment. The panel would be comprised of four prosecutors and a retired judge. Having 102 separate decision makers in capital cases is an invitation for inconsistency. Public pressure to pursue the death penalty in smaller or more rural counties can often times cause an elected prosecutor to seek the death penalty in a case that would never receive consideration for the ultimate punishment in Chicago or Cook County. In fact, a sentencing study that was commissioned by the Governor's Commission and conducted by Professors Glenn Pierce and Michael Radelet did show that defendants in murder trials were *over 7 times more likely* to receive the death penalty than those in Cook county.

- Significantly reducing the current list of death eligibility factors from twenty to five including: murder of a peace officer or firefighter; murder in a correctional facility; the murder of two or more persons; the intentional murder of a person involving torture; and any murder committed by a suspected felon in order to obstruct the justice system.

- Banning the imposition of the death penalty for defendants found to be mentally retarded.

- No person may be sentenced to death based solely on uncorroborated single eyewitness or accomplice testimony or the uncorroborated testimony of jail house informants.

- Recommending other reforms concerning the use of jail house informants who purport to have information about the case or statements allegedly made by the defendant, including requiring a preliminary hearing to be conducted by the court as to the reliability of such witnesses and their proposed testimony, full-disclosure of benefits conferred for such testimony, early disclosure to the defense about the background of such witnesses and special cautionary instructions to the jury.

- Videotaping the statements of defendants and the entire interrogation process in homicide cases.

- Allowing trial judges to concur or reverse a jury's death sentence verdict. This will allow the trial judge to take into account potential improper influences such as passion and prejudice that may have influenced a jury's verdict, consider potential residual doubt about the defendant's absolute guilt, consider trial strategies of counsel, credibility of witnesses and the actual presentation of evidence, which may differ from what was anticipated in making pre-trial rulings in either admitting or excluding evidence.

- The Illinois Supreme Court should review all death sentences to determine if the sentence is excessive or disproportionate to the penalty imposed in similar cases, if death was the appropriate sentence given aggravating and mitigating factors and whether the sentence was imposed due to some arbitrary factor.

- The report contains several recommendations relating to eyewitness identification for procedures that should be required when police conduct a "lineup" or "photospread." These recommendations include:

  - Having someone who is unaware of the suspect's identity conduct the lineup.

  - Having police tell the eyewitness that the suspected perpetrator may not be in the lineup or photospread.

  - Taking a clear written statement of any statements made by eyewitnesses as to the level of confidence they have in identifying a suspect, and

  - When possible, videotaping both the lineup procedures and the witnesses confidence statement.

- Adequate funding to eliminate backlogs and expand DNA testing and evaluation, including continued support for a more comprehensive DNA database.

- Revise Illinois' complicated and confusing statute so that juries can understand simply that they must determine, in light of all the evidence and the mitigating and aggravating circumstances, whether the death penalty is the appropriate sentence.

- To eliminate confusion and improper speculation, juries should be instructed as to all the possible sentencing alternatives before they consider the appropriateness of imposing a death sentence.

- Like defendants in any other criminal case, capital defendants should be afforded the opportunity to make a statement to those who will be deciding whether to impose the ultimate punishment allowed by the state, a sentence of death.

With these and many other suggested reforms, the Commission believes that Illinois' capital punishment system would be more just and better equipped to ensure fair and accurate results. However, the report recognizes and the commission members unanimously agreed 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." This report represents the Commission's best efforts to ensure, that we strive for perfection and a more just, fair and accurate criminal justice system.

Finally, I wish to address the issue of cost. The full implementation of the Commission's 85 recommendations would undoubtedly result in millions of dollars in increased annual costs to the already extraordinary costs of seeking and imposing the death penalty in Illinois. If the ultimate penalty is to be sought or imposed, justice demands that when life and death are at stake that money not be an issue. On the Federal level, passage and full funding of Acts such as the Innocence Protection Act and the Paul Coverdell Forensic Science Improvement Act represent an indispensable first step in providing some of the necessary resources to ensure fairness and accuracy in capital case proceedings. On the state level, the Commission has recommended that leaders in both the executive and legislative branches must significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms.

Given the increasing number of innocent people being discovered in prisons and death rows across the nation, supporters of capital punishment must step-up and provide the necessary funds to repair our nation's broken system of capital punishment. In the words of former U.S. Attorney and fellow Commissioner Thomas P. Sullivan who, unfortunately could not be with us this morning: "The message of the [Governor's] Commission on Capital Punishment's report is clear: repair or repeal. There is no other principled course."

Thank you again Chairperson Feingold and the honorable members of the Constitution Subcommittee for the incredible honor of appearing before you this morning.

APPENDIX

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.

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STEVE YOUNG
PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

19 June 2002

The Honorable Strom Thurmond
Ranking Member, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond,

I am writing on behalf of the membership of the Fraternal Order of Police to address the very troubling recommendations contained in the "Report of the Governor's Commission on Capital Punishment," and which was the subject of a hearing in the Subcommittee last week.

Just one year ago, the Federal government executed its first death row prisoner in almost forty years--Timothy McVeigh. The F.O.P. has no doubt that the sentence was just--and we further believe that the death sentences for the other twenty-seven inmates on Federal death row, and the more than three thousand awaiting execution at the State level, are equally just and should be carried out with alacrity. We reject any suggestions or legislation that would end, curtail or delay the use of the death penalty, because to do so would prevent, curtail or delay justice for the victims of the most heinous crimes and rob the criminal justice system of its most effective deterrent.

The F.O.P. supports capital punishment at the State and Federal level and does not support the concept of "moratoriums" on this or any other just sentence proscribed by law. To the F.O.P. and the victims of violent crimes, a moratorium on the death penalty is a moratorium on justice. There is no evidence that any innocent person has been executed since the death penalty was reinstated in 1973. Our system of justice works--as evidenced by the thirteen defendants in Illinois released from death row after their convictions were invalidated. While no system is perfect, Americans have the highest confidence in our system of justice. Schemes to end capital punishment by placing "moratoriums" on executions thwart the aim of justice, the will of the people and their legislatures that enacted the death sentence for our most heinous criminals.

The administration of justice cannot be allowed to become a political football, but it is clear to us that the suggestions contained in the Commission's report are not designed to "ensure that the Illinois capital punishment system is fair, just and accurate." Quite the opposite, the Commission's recommendations seek to undermine the use of capital punishment, which is part and parcel of the American justice system and that of the State of Illinois.

I would ask that you and the Subcommittee bear in mind that the Commission itself states that the majority of its members favor abolishing the death penalty. Faced with the fact that a large majority of the people in Illinois and the rest of the nation support capital punishment--and that Illinois and Federal law proscribe the penalty for certain offenses--the Commission chose to make suggestions, not to improve the fairness or accuracy of the death penalty as they were instructed to do, but to actively undermine its use and effectiveness as a deterrent. To add insult to injury, the Commission had the temerity to recommend that the Governor and his successors should consider clemency in all capital cases until all their recommendations are adopted into law. This is preposterous. I do not know how Governor Ryan views the work of his Commission, but I would say that they abandoned his directive to "ensure that the Illinois capital punishment system is fair, just and accurate" in an effort to advance their own political goal of abolishing capital punishment in the State.

In order to better illustrate my point, let me address some of the commission's recommendations beginning with their most troubling: reducing from twenty (20) to five (5) the aggravating circumstances under which a defendant is eligible for the death penalty in the State of Illinois. If their proposals are adopted, the murder of a child under the age of twelve would no longer be a capital offense, nor would murder for hire, or a murder committed during the course of, or in furtherance of, another felony. Additionally, stalkers who have protective orders issued against them will no longer be eligible for the death penalty if they kill their victims. Clearly, these suggestions do nothing to address the fairness, justice or accuracy of capital punishment.

In addition to greatly limiting the aggravating circumstances which define a capital murder, the Commission attacks prosecutorial discretion in a number of other ways. First, a prosecutor's decision to seek the death penalty would have to be ratified by a statewide commission. This restriction damages the ability of a prosecutor to use the death penalty to the people's advantage as many criminal defendants will plead guilty if the option to seek such a penalty is taken off the table. But, if we arm criminals with the knowledge that prosecutors cannot even seek capital punishment without the decision being ratified by a statewide review board, they lose more than their own discretion--they lose a weapon in the fight to keep our most dangerous criminals off the streets.

The Commission also recommends that trial judges be permitted to reverse a jury's decision to impose the death penalty, substituting the jury's sentence with imprisonment for the "natural life" of the defendant. Taken together with the recommendation immediately above, should a prosecutor's decision to seek the death penalty be approved by the statewide review board, and should the prosecutor prove to a jury that the defendant is guilty beyond a reasonable doubt and then, in the sentencing phase of the trial, successfully make the case that the crime was so heinous as to warrant the ultimate punishment, all of the work and effort put forth by the State and its law enforcement officers could be set aside by the trial judge if he does not "concur" with the verdict of the jury. This seems to subvert, not advance, the cause of justice.

One aspect of the Commission's many suggestions that also ought to be considered is the cost to the taxpayer of implementing their anti-capital punishment agenda, which is all the more objectionable when you consider that a majority of the taxpayers in Illinois support the death

penalty. The cost goes beyond the increased funding to train criminal defense lawyers how to help their clients avoid the death penalty. The Commission itself admits that the imposition of their suggestions "will require a significant increase in public funding at virtually every level, ranging from investigation through trial and its aftermath." I fail to see what value there is in making the administration more expensive by being more lenient on the very worst sort of violent criminals.

I have here addressed only a few of the Commission's more objectionable proposals. It is my hope that the Subcommittee, and the Governor of Illinois, will reject this report and its recommendations. Taken as a whole, it is clear that the Commission failed in its task, choosing to put ideology above the pursuit of justice. As a nation, we cannot afford to do so.

I want to thank you for giving us the opportunity to make our views known and would ask that you include this letter as part of the record. If I can be of any further help on this or any other issue, please feel free to contact me or Executive Director Jim Pasco at my Washington office.

Sincerely,

Steve Young
National President

cc: Jerry Wright, President South Carolina State Lodge
Mark Donahue, President, Illinois State Lodge

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Food & Drug Administration & OIG
HOUSING & URBAN DEVELOPMENT - OIG
INTERIOR
Bureau of Indian Affairs
Bureau of Land Management
Fish & Wildlife Service
National Park Service
OIG
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JUSTICE
Drug Enforcement Administration
Federal Bureau of Investigation
Immigration & Naturalization Service
INS Border Patrol
Marshals Service
OIG
U.S. Attorneys Office
LABOR
OIG & Labor Racketeering
NATIONAL ARONAUTICS & SPACE ADMIN. - OIG
NUCLEAR REGULATORY COMMISSION - OIG
POSTAL SERVICE
Inspection Service & OIG
RAILROAD RETIREMENT BOARD - OIG
SECURITIES & EXCHANGE COMMISSION - OIG
SMALL BUSINESS ADMINISTRATION - OIG
SOCIAL SECURITY ADMINISTRATION - OIG
STATE DEPARTMENT
Bureau of Diplomatic Security & OIG
TRANSPORTATION
Coast Guard Investigative Service
Federal Aviation Administration
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TREASURY
Bureau of Alcohol, Tobacco & Firearms
Customs Service
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June 12, 2002

Honorable Russ Feingold
Chairman
Subcommittee on The Constitution
United States Senate
Washington, DC 20510

Honorable Strom Thurmond
Ranking Member
Subcommittee on The Constitution
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Ranking Member;

On behalf of the Federal Law Enforcement Officers Association (FLEOA), I wish to express our general support for the death penalty under current law. FLEOA opposes any death penalty moratorium, much less abolishment of the death penalty for federal crimes. We come to this position as first line field participants in the system and fully aware of our mission which is to gather and report the facts as fairly and accurately as humanly possible.

FLEOA believes there is a need for the "super due process" currently afforded any person facing federal charges that expose them to the death penalty, and we welcome any oversight of the field application of this process. We believe any non-partisan review of the cases that fall under this area would indicate a level of fairness that is the envy of any system – worldwide. Our elected officials and administrative appointees have insured that there are many levels of review in the prosecutorial process and as indicated by these hearings, our elected officials continue their just oversight of this subject. With these levels of review and the oversight of the application of the death penalty, FLEOA believes there is no need for a moratorium of the death penalty on the federal level.

FLEOA is a non-partisan, non-profit, professional association exclusively representing federal agents from the agencies listed on our left masthead. If you have any questions or need further information please feel free to contact us. Thank you for your attention to this matter.

Richard Gallo

P.O. Box 740, Washington DC 20044
Administrative Services (717) 938-2300 • 1811 Newsletter (607) 277-4899

Written remarks of
Attorney Don Hubert,
Member,
Governor George H. Ryan's Commission on Capital Punishment
Before the Subcommittee on the Constitution
Judiciary Committee
United States Senate

Wednesday, June 12, 2002

Mr. Chairman and distinguished Senator members of this Committee:

I am honored to be invited to participate in this hearing, sharing the very positive experiences Illinois has achieved through Governor Ryan's moratorium on the death penalty in hopes that it may assist your deliberations on a federal moratorium.

Governor Ryan is owed great thanks from the People of Illinois for taking such a bold, courageous and innovative stand in the face of startling facts that Illinois was on the doorstep of executing men who were absolutely and without any doubt not guilty of murder.

I am thankful that you have heard about and listened to our anguished efforts to right the death penalty process through the Governor's Commission on the Death Penalty. This discussion at the federal level alone will reverberate throughout the country to create communication, understanding and knowledge in all 50 states. Few fair-minded people contest that the time is ripe to decide whether we need a national moratorium to give us breathing room to deliberate dispassionately whether the death penalty only executes the guilty under standards that apply equally to all.

My message to you is this: a moratorium can be supported by all, whether you favor the death penalty or seek its abolition, where facts similar to those in Illinois exist. I am here to assist in identifying those Illinois facts all to the end that a profile be constructed to measure the fairness of the federal and state death penalty systems.

Executing one innocent person is contrary to the fundamental principles that are the guiding light for our system of justice. How embarrassing it is that Illinois has become the poster child and primary example of government on the brink of executing the innocent. You have heard over and over the fact that we have exonerated 13 men in 12 cases who were sentenced to die, in many instances for a murder they absolutely did not commit or participate in committing. How chilling it is that Anthony Porter was about 2 days away from dying when his innocence stunned the judiciary into action.

Public support for the moratorium has been great in Illinois. Although polls were not the

guiding light causing Governor Ryan to impose the moratorium and to establish the Commission, there is overwhelming support in Illinois for the moratorium. Equally true, there will be significant pressure on any Governor to prove, clearly and convincingly, that Illinois' death penalty system has been repaired. Anything less, in the words of former United States Attorney for the Northern District of Illinois and Commission co-chair, Tom Sullivan, should cause a public outcry for repeal. I agree with Tom that in Illinois we must "repair or repeal." This simple but great motto arose from the moratorium and from the Commission.

I now share with you some of my own background and Commission experiences. There were only 14 Commission members. Some were immensely well known; others were unknown. My own background included stints as only the second African-American to serve as President of the 127 year old Chicago Bar Association and my membership in the Cook County Bar Association, the country's oldest African-American bar association. I served as a state prosecutor in the Special Prosecutions Unit of the Illinois State Attorney General's office handling federal habeas corpus murder appeals on behalf of the State. My first trial as a lawyer was a federal habeas corpus trial in a murder case presided over by the late and great Federal Judge Hubert Will.

I worked in private practice under the mentor ship of great criminal defense lawyers such as George C. Howard, Chester Slaughter, James D. Montgomery, Adam Bourgoies, Sr. and R. Eugene Pincham. I have handled five murder cases as part of a pro bono program initiated by Illinois Supreme Court Justice Thomas Fitzgerald when he was presiding judge of the Cook County Criminal Court system. In other words, I have participated in both the prosecution and defense of murder cases, for fee and for free.

Last week, I was honored to be appointed Special Assistant State's Attorney under the leadership of Special Prosecutor Ed Egan to investigate former Chicago Police Detective John Burge who has been accused, with other detectives, of torturing suspects into giving confessions in murder investigations, including death penalty murder cases.

I support the death penalty as a democratically approved sentence. I have not found determinative, though they are powerful, the arguments by death penalty opponents for abolition. It is not that I am personally for the death penalty. It is that I will not work against the will of the majority of people who favor it. Some murders are so cruel and inhumane that I accept that in a democracy the majority of the people have the right to seek the sanction of death.

I do not support the death penalty in its present form in Illinois. Our death penalty system is broken. It must be corrected for me to support it again. If it is not repaired, then I favor its repeal. The 12 cases of exoneration in Illinois were outrageous and unacceptable as a standard of justice in a democracy.

The shining lights in the Illinois criminal justice system have been the moratorium and

the Commission. We needed time to think, gather facts, reflect and recommend. Throughout the Commission process the Governor was our unflinching supporter. We were led by people who already had legacies of greatness, Former Federal Chief Judge Frank McGarr, Former Senator Paul Simon and Former United States Attorney Tom Sullivan. Our process never included hostility, animosity or meanness. All 14 members treated one another with respect and deference. We were divided into subcommittees to consider different subjects and then each subcommittee came together as a committee of the whole for further deliberations. Our process was guided by a project manager, Matt Bettenhausen, and a project researcher and writer, Jean Templeton. We met regularly for two years. I can honestly say that it was the most enjoyable committee on which I have ever served, and I have served on many.

Members were for and against the death penalty. One member had a dad who was viciously murdered when he was only a boy. Another member was States' Attorney for one of Illinois' larger counties. Another was a legal adviser to a police superintendent. One was a Public Defender. Another was a former United States Attorney for the Northern District of Illinois. Yet another was a former U.S. Senator, and another a Chief Judge of the Northern District of Illinois. One was a specialist in murder appeals. Yet another was former First Assistant States' Attorney. Another was an internationally famous author. All brought their best thinking to the process; all left their egos at the door. There were blacks, whites and a Hispanic. Men and woman participated in equal numbers.

Throughout our process the criminal justice system never suffered. Murder cases continued to be prosecuted. The death sentence continued to be handed down. The moratorium and the work of the Commission did not interfere with that process.

Others should consider a moratorium if their process resembles our findings in Illinois. Illinois has a distinguished criminal justice system with cases such as People v. Witherspoon coming from our state. Our laws are similar to those in most states. No better, but no worse. We have 102 counties and therefore the same number of State's Attorneys who decide whether to seek the death penalty. Our state is blessed with many ethnic and racial groups. The City of Chicago is home to nearly equal numbers of whites, African-Americans and Latinos. The Asian-American population is one of our fastest growing constituencies. Our state is rich in resources, but regularly struggles to balance the budget.

Yet, innocent men were sentenced to death. Black men are disproportionately receiving the death sentence. Prosecutorial misconduct was abundant. Criminal defense lawyers, some court-appointed, were incompetent. Defendants were poor and unable to hire a lawyer. Elected judges did not prevent lawyers – some prosecutors, some defense -- from running amuck. The appellate process sent no warning signals. Funding for indigent defense, crime labs, appropriate testing, even basic police work, was low priority. Laws were stacked on top of more laws to expand the number of defendants subject to the death

penalty. The crimes were so heinous that the public – in large numbers -- did not care what happened as long as someone was found guilty. Notwithstanding a state full of great judges, police, prosecutors and defense lawyers, it was some journalism students at Northwestern University who set off the first alarm by uncovering a police report that identified a murderer – who was free -- while an innocent man had been sentenced to die.

Please note that not only did we ruin the lives of the innocent men who were wrongly convicted and wrongly sentenced to death, we also ignored the actual murderers and thus broke faith with society at large, the survivors, and the families of the murder victims, the majority of whom are African-American. We met, as a Commission, with victims' rights groups and we concluded Illinois should do more to assist victims, survivors and families of survivors of these horrendous crimes, starting with convicting the actual perpetrator or perpetrators.

We also made a recommendation, number 83, that many of the new methods and procedures we recommend should be applied to the criminal justice system as a whole. This might be our least-noted recommendation, but it also may be our most far-ranging. Here's why.

In a democracy, people must believe in the administration of justice. There must be faith in the legal system, or one must prepare for social upheaval. Illinois' death penalty system does not inspire confidence among the people in their legal system. It shouldn't. What is worse, its errors serve – in all communities – to denigrate our values, our practices, our laws and even the Constitution that each one of us at some point has pledged to uphold. The ill-repute of so solemn a public function as determining guilt for murder and carrying out a sentence of death eats at the social fabric which is supposed to bind us together as one people. The people of Illinois deserve better than that. They deserve a criminal justice system in which they can have confidence. They deserve one of which they can be proud.

We think Recommendation #83 will help us get there. We think increasing the standards by which society treats suspects, by which police investigate, by which the bar prosecutes and defends the accused, and by which the bench tries and sentences, will make Illinois' criminal justice system stronger, more worthy of public respect and support. That will make Illinois' society stronger in every neighborhood.

Yes, a federal moratorium is appropriate if the federal system resembles our Illinois experience. I do not claim to be an expert on the federal system or those of other states. Yet, Maryland's moratorium suggests that Illinois does not stand alone in having a broken death penalty system.

Again, I thank you for this opportunity to submit a written position paper, to appear and to speak and answer your questions. The country owes you a debt of gratitude for this hearing process.

ILLINOIS STATE'S ATTORNEYS ASSOCIATION

RESPONSE TO THE REPORT OF GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT

MAY 16, 2002

RESPONSE OF THE ILLINOIS STATE'S ATTORNEYS ASSOCIATION TO THE REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT

The Governor's Commission on Capital Punishment released its report on April 15, 2002. The report contains numerous recommendations to improve the administration of justice in Illinois. Prosecutors have a strong interest in improving the criminal justice system, and the Illinois State's Attorneys Association has a long history of promoting reform, particularly in the death penalty process. The ISAA eagerly supports the vast majority of the Commission's "recommendations," many of which are already enacted into law or restate reforms the Association members are presently promoting.

The Commission's recommendations are good for the most part because most are designed to promote the truth-finding function of our trial system. Especially good are those recommendations for training, certification and other measures to promote the expertise of trial judges and practitioners. Also valuable are the recommendations which promote additional forensic science resources for the truth-finding process.

The ISAA is concerned about the remainder of the Commission's proposals, however, which reflect an inconsistent and fundamental distrust of the fairness of Illinois' criminal justice system and the integrity of its participants, particularly sworn police officers. In several areas, the Commission's report departs from reforming the death penalty system to micro-managing law enforcement. Several recommendations were apparently made with no consideration of the profound impact they would have upon the investigative functions of the police, especially the peace officer's duty to protect public safety and exonerate the innocent with timely work on leads. Other recommendations fail to consider the needs of other citizens in the station house, witnesses and victims. Further consultation with non-lawyers, especially experts from the law enforcement and victim communities, is needed in these areas.

Death penalty reform will work if we consistently honor three principles. First, reform will work when it improves the fact-finding function of our trial system. It will fail when it attempts to circumvent or replace the system. Second, reform will work if it is designed to achieve justice. It will fail when reforms are designed to create a "suspect friendly" or "lawyer friendly" system, as opposed to a "justice friendly" system. Third, reforms will only work if there is full consultation with all communities of expertise, including police and victims. As Oliver Wendell Holmes noted, "The life of the law is experience, not logic." A logical theory does not become a good law without the benefit of experience and experiment. Reform must be based upon informed debate which consults the entire spectrum of experience and expertise.

Recommendation 1: A formal statewide policy should be adopted which provides that "After a suspect has been identified, the police should pursue all reasonable lines of inquiry, whether these point toward or away from the suspect."

The ISAA agrees that good police work requires that all leads are investigated and all potential evidence is gathered as soon as possible. However, because the Commission has failed to identify what remedial measures, if any, would be taken for the failure to satisfy this guideline in a particular case, the ISAA believes further clarification is necessary.

Recommendation 2: The police must maintain detailed schedules of all relevant evidence, including exculpatory evidence, and provide copies of those schedules to prosecutors as well as certify to the prosecutor that all record-keeping obligations have been complied with.

The ISAA supports this proposal which is contained in a pending legislative initiative of the Dupage County State's Attorney's Office (Senate Bill 2023) and which would assist prosecutors in complying with their disclosure obligations under the Constitution and Supreme Court Rules.

Recommendation 3: Illinois law should be modified so that public defenders may represent suspects during custodial interrogations in potentially death eligible cases if the suspect requests the advice of counsel.

Current constitutional law protects the defendant's right to counsel and provides a remedy should this right be disrespected by law enforcement. Creating additional rights to immediate representation by public defenders for suspects whenever they are taken into custody is unnecessary. This recommendation should be opposed until it is determined how this expansion of the Public Defender's Office will promote the truth finding process, how it will impact the ability of police to conduct investigations in the station house, and how it can be administered without disqualifying the public defender in a conflict of interest every time a second suspect is taken into custody. This lawyer-friendly proposal is not necessarily suspect-friendly, never mind justice-friendly.

Recommendation 4: Custodial interrogations in homicide cases which occur at a police facility should be videotaped in their entirety.

The ISAA agrees with the Commission minority report which said that video recorded interrogations should be "strongly encouraged." In fact, many members of the Association have previously called for the creation of pilot programs to determine the feasibility of recording interrogations in their entirety. However, any attempt to mandate such a system would be impractical because in the early stages of the investigation, the police do not always have a clear idea as to what occurred and do not know whether particular individuals are witnesses or suspects. To comply with a mandatory requirement, law enforcement personnel will be required to videotape nearly every interview because the investigation may ultimately lead to a murder charge, thereby dramatically slowing down the investigation with potentially dangerous consequences. This is one of many practical difficulties which can only be addressed with additional experience. The Commission implicitly recognizes the good sense of the minority report, by qualifying its mandate to situations where it is "practicable." This qualification begs the question (or starts a courtroom argument) concerning what is practicable. We will not learn how to promote the best practices without the vigorous experimentation and development the ISAA has been encouraging.

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.

The trial system enables judges and juries to determine if police officers testify truthfully regarding a defendant's oral statement, and there is no need to require the police to have the suspect repeat or confirm a statement twice, three times or more, although such a practice should not be discouraged. The Commission also ignores the fact that there are constitutional limitations on whether an officer can resume questioning and this practice would be prohibited where defendants reconsider their decision to talk or where they request counsel.

Recommendation 6: Because videotaping is not always practical, police officers should carry tape recorders to use when interviewing suspects in homicide cases outside the police station.

Because it is necessary to safeguard the police ability to solve crime and protect the public from criminal behavior, the ISAA disagrees with this proposal because it may delay investigation and hinder crime solving. Again, the question of best practices is distinct from the issue of what minimal practice should always be required. The practicality of this proposal cannot be assessed without the experience and consultation of police professionals.

Recommendation 7: The Illinois Eavesdropping Act should be amended to permit non-consensual recording of statements in homicide cases where the suspect is aware that the person asking questions is a police officer.

The ISAA agrees with this proposal because non-consensual recording is compatible with the call for the creation of pilot programs. However, because police investigations do not always start out as murder investigations, the Association suggests that the exception be expanded to include other serious crimes, possibly even all felonies. Also, because prosecutors in various counties also interview suspects, any exemption should also include situations where the suspect is aware that the person conducting the interview is a prosecutor.

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

Because police are not in a position to determine which witnesses are "significant" or if their testimony is likely to be challenged at trial, and because witnesses may refrain from speaking to the police if they are to be recorded, the ISAA is concerned that this recommendation will interfere with the police ability to investigate serious crime. However, because the Commission seems to recognize these concerns and states that its recommendation is "purposefully stated in general terms" and that "[i]ts implementation will require further study and consultation with prosecutors and police officials," the Association supports this recommendation as a theory to be tested and a goal to implemented if practicable.

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 prohibited from asking leading questions or implying that they believe the suspect is guilty.

The ISAA disagrees with this proposal because police officers are not qualified to determine a person's mental capacity. Also, constitutional law already requires the suppression of any statement where the defendant was incapable of understanding what his rights encompassed and what their waiver entailed.

Recommendation 10: When practicable, police departments should insure that the person conducting the lineup or photospread in a homicide case is not aware of which individual is the suspect.

Although police and prosecutors are always looking to improve identification procedures, the ISAA believes that any attempt to impose a particular method represents an unprecedented, unnecessary and uninformed intrusion into the police process. Constitutional law currently provides that if an identification procedure is improperly suggestive, that identification may not be utilized at trial. Moreover, requiring that police officers unfamiliar with the investigation conduct the identification process will unnecessarily delay the time until the defendant can be formally charged or released if he is not identified, thereby posing an increased risk to the public as the actual offender is still at large. Finally, because many smaller communities across the State may not have the requisite number of photographs or live individuals similar in appearance to the suspect in order to comply with the requirements, those police agencies will be unable to conduct the identification procedures in a timely fashion, potentially interfering with the suspect's constitutional rights to be brought before a judge within 48 hours of his arrest.

Recommendation 11: Eyewitnesses should be explicitly informed that the suspected perpetrator may not be in the lineup or photospread and that they should not feel compelled to make an identification. Eyewitnesses should also be told that they should not assume the person conducting the identification procedure knows which person is the suspect.

This recommendation restates current police practice, and the ISAA supports continuation of the practice.

Recommendation 12: Provided the officer conducting the identification procedure does not know who the suspect is, a sequential lineup or photospread procedure should be utilized in all homicide cases.

The ISAA agrees with the minority that it is inappropriate to mandate a particular procedure which has not yet been tested or approved by the courts. However, the Association supports the ability of individual police departments to experiment with different procedures to determine if sequential procedures are more effective.

Recommendation 13: Suspects in homicide cases should be similar in appearance to, and not stand out from, the other individuals in a lineup or photo array.

This recommendation restates current practice which the ISAA supports.

Recommendation 14: All statements made by witnesses at the time of identification in homicide cases should be documented in writing to indicate the witness' degree of confidence that the identified person is or is not the offender. Documentation should occur prior to any feedback from law enforcement personnel.

The ISAA agrees that police should record any statement made by a witness indicating his or her confidence in an identification. However, it must be pointed out that police are not barometers of witness confidence and should not be expected to make their own evaluations. Also, the Association is concerned that some witnesses may refuse to take part in an identification procedure if they are required to sign and date a police report indicating their confidence in the identification.

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

The ISAA disagrees with this proposal because it is extremely impractical since it would require three separate cameras, one on the participants in the lineup, one on the witness and one on the officer conducting the procedure. More importantly, however, such a requirement could have a chilling effect on law enforcement because witnesses refuse to be videotaped out of a fear of reprisal. Also, this proposal fails to recognize the particular sensitivities of crime victims, especially rape victims. Nevertheless, the Association supports the ability of individual police departments to experiment with different procedures.

Recommendation 16: All police officers who work on homicide cases should receive additional training by experts on the risks of false testimony by in-custody informants and accomplice witnesses, the dangers of "tunnel visions" or confirmatory bias, the risks of wrongful convictions, police investigative and interrogation methods, police investigating and exculpatory evidence, forensic evidence, and the risks of false confessions.

The ISAA agrees with this proposal as it has long believed that additional training improves the criminal justice system and helps make the exclusion of evidence unnecessary.

Recommendation 17: Police academies, agencies and the Illinois Department of Corrections should provide training on consular rights and notification under the Vienna Convention.

The ISAA agrees with this proposal since it would help eliminate future problems in cases where foreign nationals are prosecuted.

Recommendation 18: The Illinois Attorney General should publish a guide for all law enforcement agencies to remind them of their duties under the Vienna Convention and regularly review their compliance.

The ISAA agrees with this proposal since it would help eliminate future problems in cases where foreign nationals are prosecuted.

Recommendation 19: The Illinois Law Enforcement Training and Standards Board should be authorized to revoke a police officer's certification as a peace officer due to perjury regardless of whether there is a criminal conviction.

The ISAA believes that this proposal reflects a misunderstanding of the Illinois Law Enforcement Training and Standards Board's function and points out that the proposal is unnecessary since a conviction for perjury will automatically result in decertification.

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.

The ISAA agrees with the minority view that an independent lab would be an unnecessary expense and that a better proposal than creating yet another state agency would be the creation of a permanent and adequately funded "defense scientific services center" whereby defendants and defense counsel would have access to truly independent forensic scientists for consultation and review without requiring the intervention of courts or the agreement of prosecutors.

Recommendation 21: In order to reduce the backlog of DNA testing requests, adequate funding should be provided for additional forensic scientists and facilities to expand DNA testing and evaluation. The State should also be prepared to out source DNA analysis when appropriate.

The ISAA agrees with this proposal since it will reduce the time for DNA testing.

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

This recommendation restates current law which the ISAA supports.

Recommendation 23: The Federal and State governments should provide adequate funding to develop a comprehensive DNA database.

The ISAA agrees with this proposal.

Recommendation 24: Illinois law should be amended so that in capital cases, defendants may seek a court order to search the DNA database to identify others who may have committed the crime.

The ISAA agrees with this proposal.

Recommendation 25: In a capital case, forensic testing should be permitted upon defense motion whenever it has the opportunity to produce, new non-cumulative evidence relevant to the defendant's claim of actual innocence even though the results may not completely exonerate the defendant.

This recommendation restates current law (People v. Savory, 197 Ill. 2d 203, 756 N.E.2d 804 (2001)), which the ISAA supports.

Recommendation 26: Indigent defendants facing the possibility of a capital sentence should be permitted to draw funds from the Capital Litigation Trust Fund to pay for forensic testing which would significantly advance their claims of actual innocence. Funding for non-capital defendants should come from other sources.

The ISAA agrees with this proposal.

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

While many observers believe that the current list of factors is too long and redundant in certain instances, this is a legislative decision. The amendment to the statute must be based upon a deliberate and informed review of the issues by the legislature.

Recommendation 28: There should be only five eligibility factors: (1) murder of a peace officer or fireman; (2) murder of any person in any correctional facility; (3) multiple murder; (4) murder accompanied by the intentional infliction of torture; and (5) murder of a witness, prosecutor, defense attorney, juror, judge or investigator.

The Commission's proposal to eliminate fifteen of the statute's twenty eligibility factors demonstrates need for a full and informed consideration of these issues by the legislature. A full debate may cause many to reconsider the wisdom of the Commission's recommendation to exempt some of the most dangerous, heinous killers from the death penalty, including killers of the elderly, disabled and children, felony murderers and contract killers for hire.

Recommendation 29: The Attorney General and the State's Attorney's Association should adopt voluntary guidelines regarding the procedures for deciding whether or not to seek the death penalty.

The ISAA agrees with this proposal and has already begun preparing a statewide protocol for use by all of its members.

Recommendation 30: The death penalty statute should be amended to require the approval of a statewide review committee before any State 's Attorney may seek death.

This recommendation overturns the constitutional role of the State's Attorney as the chief prosecutor for each county in Illinois. This reform would turn over the prosecutor's role to a commission which would include one non-prosecutor not bound by the ethical rules governing prosecutors. This recommendation would add a procedural roadblock in the death penalty system, but interposing a state commission of political appointees does nothing to promote justice in individual cases. This would also reverse the entire direction of reform which has been urged by the defense bar, the speedy determination whether to seek death in a case. This recommendation could not be implemented with current Supreme Court rules requiring speedy screening decisions. This recommendation is also incompatible with the great body of responsible Commission recommendations which otherwise promote the best practices of prosecutors and defense attorneys instead of bypassing the trial system. The Association finds it singularly telling that the Commission, which included 13 lawyers and one lawmaker, provided no commentary on the need to amend the Illinois Constitution to achieve this recommendation.

Recommendation 31: The Commission supports Supreme Court Rule 416(c) requiring the prosecution to announce its intention to seek the death penalty as soon as practicable.

This recommendation restates current law which the ISAA supports.

Recommendation 32: The Administrative Office of Illinois Courts should educate trial judges across the state regarding the parameters of the Capital Crimes Litigation Act and available funding sources for the defense of capital cases.

The ISAA supports this proposal. The ISAA has long promoted the principle that additional training improves the criminal justice system.

Recommendation 33: The Commission supports Supreme Court Rule 43 calling for seminars on capital cases but suggests that it be amended to require trial judges to take part in such training prior to presiding over a capital case.

The ISAA agrees with this proposal in principle, but points out that in counties with only one or two judges, it may interfere with the parties' ability to bring the matter to trial in a timely fashion.

Recommendation 34: The Illinois Supreme Court should insure that trial judges receive particularized training regarding the new rules for capital cases especially with respect to the discovery process.

The ISAA supports this proposal.

Recommendation 35: All judges who preside over capital cases should receive additional training by experts on the risks of false testimony by in-custody informants and accomplice witnesses, the dangers of "tunnel visions" or confirmatory bias, the risks of wrongful convictions, police investigative and interrogation methods, police investigating and exculpatory evidence, forensic evidence, and the risks of false confessions.

The ISAA agrees with this proposal, but points out that care must be taken to ensure that the curriculum is balanced and not promote bias against any particular categories of competent evidence.

Recommendation 36: The Illinois Supreme Court should provide sufficient funding and staff for the development of a state-wide bench manual for capital cases as well as ongoing research support.

The ISAA supports this proposal.

Recommendation 37: The Illinois Supreme Court should develop better means of disseminating relevant case law and court rules applicable to capital cases, such as devoting a section of the court web site to capital cases.

The ISAA supports this proposal.

Recommendation 38: The Illinois Supreme Court should adopt a system where only those judges who have received specialized training in capital cases are certified to preside over such cases.

The ISAA agrees in principle with this recommendation, but notes the need to avoid administrative problems in smaller counties with fewer judges available for certification.

Recommendation 39: The Illinois Supreme Court should create a standing committee of experienced judges familiar with capital case management to provide assistance to trial judges across the state.

The ISAA supports this proposal.

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

This recommendation restates current law which the ISAA supports. The Association also notes that Illinois is the only state which requires particular qualifications for prosecutors in capital cases in addition to defense attorneys. This reform should promote much greater confidence in our trial system.

Recommendation 41: The Commission supports Supreme Court Rule 701(b) restricting counsel in capital cases to members of the Capital Litigation Bar.

This recommendation restates current law which the ISAA supports.

Recommendation 42: The Commission supports Supreme Court Rule 714 regarding qualifications for counsel in capital cases.

This recommendation restates current law which the ISAA supports.

Recommendation 43: The State Appellate Defender should assist in the identification of competent defense counsel by maintaining lists of defense attorneys who have qualified for lead and co-counsel representation in capital trials.

The ISAA supports this proposal.

Recommendation 44: Adequate funding should be provided so that prosecutors and defense attorneys can continue to receive high quality training in capital litigation.

The ISAA supports this proposal.

Recommendation 45: All members of the Capital Trial bar (prosecutors and defense attorneys) should receive additional training on the risks of false testimony by in-custody informants and accomplice witnesses, the dangers of "tunnel visions" or confirmatory bias, the risks of wrongful convictions, police investigative and interrogation methods, police investigating and exculpatory evidence, forensic evidence, and the risks of false confessions.

The ISAA agrees with this proposal as it has long believed that additional training improves the overall ability of the criminal justice system to determine truth and avoids promoting any ideological bias against any professions or competent evidence.

Recommendation 46: The Commission supports Supreme Court Rule 416(e) which permits discovery depositions in capital cases upon a showing of good cause.

This recommendation restates current law which the ISAA supports.

Recommendation 47: The Commission supports Supreme Court Rule 416(f) mandating case management conferences in capital cases and recommends that the rule be amended to require that a final case management conference be held to insure that the case is ready for trial.

This recommendation restates current law which the ISAA supports. Also, the Association points out that although Rule 416(f) currently leaves the availability of a final case management conference to the discretion of the judge, many trial judges already require them as a matter of course.

Recommendation 48: The Commission supports Supreme Court Rule 416(g) which requires the prosecution to file a certificate that all parties involved with the investigation of the case have been conferred with and all information required to be disclosed has been disclosed.

This recommendation restates current law which the ISAA supports.

Recommendation 49: The Illinois Supreme Court should adopt a definition of "exculpatory evidence" in order to provide guidance to prosecutors in making appropriate disclosures.

This proposal is unnecessary because Supreme Court Rule 412(c) currently includes the classic definition of exculpatory evidence, "any material or information . . . which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor." The Rule also requires the disclosure of such evidence.

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 disclosed prior to trial.

The ISAA agrees in principle with this proposal, but points out that current law already requires the disclosure of any benefit expected by the witness in exchange for his testimony.

Recommendation 51: Whenever the prosecution may seek to introduce testimony of an in-custody informant at either the guilt or sentencing phase, it must disclose to the defense the witness' identification and background.

This recommendation restates current law which the ISAA supports.

Recommendation 52: Trial judges should hold pre-trial evidentiary hearings to determine the reliability and admissibility of an in-custody informant's testimony at either guilt or sentencing.

The ISAA disagrees with this proposal because it intrudes into the jury's role in discerning witness credibility. Instead, the Association has long stated that a jury instruction similar to the accomplice witness instruction would be more effective in addressing this concern without interfering with the jury's function.

Recommendation 53: Courts should carefully scrutinize any tactic that misleads a suspects as to the strength of the evidence in order to determine if it improperly induced him into confessing.

This recommendation restates current law which the ISAA supports.

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

Recommendation 55: Expert testimony regarding eyewitness testimony should be admitted where appropriate.

This recommendation restates current law which the ISAA supports.

Recommendation 56: Illinois Pattern Jury Instructions should be amended to include a reference to the difficulty of making a cross-racial identification as well as a statement that "eye witness testimony should be carefully examined in light of the other evidence in the case."

The ISAA disagrees with these proposals. The current IPI instructions adequately state the law instructing jurors to consider all the legally relevant factors relating to the sufficiency of an identification, including the witness' opportunity to view the offender at the time of the offense, his degree of attention and the length of time between the offense and the identification. It would be inaccurate, highly offensive, and a throwback to the worst legal classifications in our history, to categorically impeach a witness' ability to recognize a human being on the sole basis of the witness's race.

Moreover, the Association does not believe it is appropriate to highlight a particular type of evidence such as eyewitness testimony because juries are already told to "consider all the facts and circumstances in evidence" when weighing the identification testimony of a witness.

Recommendation 57: The IPI instructions should include an instruction calling for "special caution" with respect to the reliability of the testimony by in-custody informants.

The ISAA supports this proposal as the appropriate method for curing the special problems with testimony from in-custody informants. This proposal promotes a more informed trial system and makes Recommendation 52 (which excludes information from the fact-finder) unnecessary.

Recommendation 58: When a defendant's statement was not electronically recorded, the jury should be instructed that a recording or a statement actually written by the defendant is more reliable than a non-recorded summary.

The ISAA disagrees with this proposal as it calls for the jury to be instructed that certain statements are inherently unreliable even though those same statements were found by the trial judge to have been voluntarily made.

Recommendation 59: Illinois courts should continue to reject the results of polygraph examination during the guilt phase of capital trials.

This recommendation restates current law which the ISAA supports.

Recommendation 60: The Commission supports Amended Supreme Court Rule 411, making the rules of discovery applicable to the sentencing phase of capital cases.

This recommendation restates current law which the ISAA supports.

Recommendation 61: The statutory mitigating factors should be expanded to include the defendant's history of extreme emotional abuse and that the defendant suffers from reduced mental capacity.

The ISAA agrees with this proposal, but points out that such mitigating evidence is always presented by the defense in a capital case if such evidence is available. In fact, any failure to present this type of mitigation evidence would be ineffective assistance of counsel and would cause reversal of the death sentence. This recommendation would put a statutory gloss on current law and practice which are both supported by the ISAA.

Recommendation 62: The defendant should have the right to make an unsworn statement in allocution to the jury without being subject to cross-examination.

The ISAA disagrees with this proposal because the Illinois Supreme Court has consistently held that capital defendants are not entitled to make an unsworn statement in allocution, particularly since the defendant may attempt to address disputed factual matters in his plea for mercy.

Recommendation 63: The jury should be instructed as to alternative sentences that may be imposed if the death penalty is not imposed.

The ISAA disagrees with the proposal that the jury be instructed as to all possible sentencing possibilities, except in cases where the only alternative is mandatory natural life, because such an instruction could actually prejudice the defendant by making a death sentence more likely. If a jury is told that the defendant could be sentenced to as little as 20 years (even though such a sentence would be highly unlikely), the jury might determine that the death penalty is necessary to ensure that he is never released into society.

Recommendation 64: Illinois courts should continue to reject the results of polygraph examination during the sentencing phase of capital trials.

This recommendation restates current law which the ISAA supports.

Recommendation 65: Illinois' Death Penalty Statute should be amended to replace the "no mitigating factors sufficient to preclude" language with "that death is the appropriate sentence."

Although the Illinois Supreme Court and the Federal Courts have consistently rejected any claim that the current statutory language is confusing and might lead a jury to believe that the death penalty is mandatory, the ISAA does not oppose such an amendment because every judge or jury must ultimately determine whether death is the "appropriate" sentence.

Recommendation 66: No sentence of death may be imposed unless the trial judge concurs in the jury's verdict to impose the death penalty.

The ISAA disagrees with this proposal because it is an extreme recommendation, unlike any other statutory scheme in the country, and would effectively eliminate bench trials in capital cases. Also Illinois trial judges currently have the authority to grant a new trial or sentencing hearing (or even enter a judgment notwithstanding the verdict). Nevertheless, the Association is willing to study whether less extreme options are feasible.

Recommendation 67: Assuming the eligibility factors are limited to the five proposed by the Commission, the only alternative sentence for death eligible crimes should be natural life.

Although the ISAA disagrees with the proposed reduction to five eligibility factors, the Association could support a statutory requirement that whenever a defendant is found death eligible, the only other available sentence is mandatory natural life.

Recommendation 68: The imposition of the death penalty should be prohibited for defendants who are determined to be mentally retarded.

The ISAA supports this goal but stresses that the goal must be achieved with an objective standard for mental retardation which has been established before the defendant's crime. The Commission's commentary makes a strong case that any definition of mental retardation must include a combination of significant deficits in general intellectual functioning and adaptive behavior as well as manifestation of mental retardation prior to age 18.

Recommendation 69: The death penalty should not be sought if the sole evidence of guilt was the uncorroborated testimony of an in-custody informant, accomplice or single eyewitness.

Although the ISAA recognizes that most prosecutors would not seek death in such a case, the Association disagrees that it is appropriate to systematically preclude the death penalty based on certain types of evidence. The Association knows of no completely uncorroborated single witness murder case. Without knowing the Commission's definition of "uncorroborated," it is possible that the Commission would disqualify a single witness case like the one against Richard Speck.

Recommendation 70: The Illinois Supreme Court should automatically examine as part of every direct appeal whether the sentence was imposed based on a arbitrary factor, whether the evidence supported the death sentence, or whether the sentence was disproportionate to the sentences imposed in other cases.

Even though such review is not required by the federal constitution or the Illinois death penalty statute, current Illinois law provides that the Illinois Supreme Court will address these precise issues whenever they are raised by defendants in capital cases. Therefore, the ISAA believes this proposal is unnecessary since it is already addressed by Illinois law.

Recommendation 71: Rule 3.8(c) of the Rules of Professional Conduct which refers to the Special Responsibilities of Prosecutors should be amended to provide that the duty to disclose exculpatory evidence continues even after conviction.

Although prosecutors already consider their obligation to disclose exculpatory evidence as ongoing thereby rendering this proposal unnecessary, the ISAA would not oppose this proposal as a further codification of existing law.

Recommendation 72: The time for filing an initial post-conviction petition in capital cases should be extended to 6 months following the affirmance of the conviction and sentence on direct appeal.

The ISAA is opposed to any additional delays in the system as being unfair to the victims.

Recommendation 73: The Post-Conviction Act should be amended to require that any evidentiary hearing is convened within one year of the filing of the petition.

The ISAA supports this proposal.

Recommendation 74: The Post-Conviction Act should be amended to permit the filing of a petition based on newly discovered evidence of actual innocence regardless of otherwise applicable procedural bars.

The ISAA agrees in principle but believes that a better approach may be found in current legislation (Senate Bill 2023) sponsored by the Dupage County State's Attorney's Office.

Recommendation 75: Illinois law should provide that clemency petitions in capital cases may not be filed any later than 30 days after the Illinois Supreme Court sets a final execution date.

The ISAA supports this proposal.

Recommendation 76: Leaders in both the executive and legislative branches of state government should ensure that more resources are available to the criminal justice system in order to bring about meaningful reform in capital cases.

The ISAA supports this proposal.

Recommendation 77: The Capital Crimes Litigation Act should be reauthorized.

The ISAA supports this proposal.

Recommendation 78: Adequate compensation must be provided to counsel from the Capital

Litigation Trust Fund and the statute should be amended to allow trial judges to award a higher rate of fees based on the prevailing market rate in that area.

The ISAA supports this proposal.

Recommendation 79: The provisions of the Capital Litigation Trust fund should be construed broadly so that public defenders, especially in rural areas, can use its provisions to secure additional counsel and seek reimbursement for reasonable expenses in capital trials.

The ISAA supports this proposal.

Recommendation 80: The State Appellate Defender should continue providing statewide trial support in capital cases and the necessary funds should be appropriated.

The ISAA supports this proposal.

Recommendation 81: Funds should be made available for increased salaries, pension contributions and student loan repayment for prosecutors and public defenders.

The ISAA supports this proposal.

Recommendation 82: Adequate funding must be provided by the State to all Illinois police agencies in order to implement electronic recordings of interrogations in homicide cases.

The ISAA supports this proposal.

Recommendation 83: The recommendations of this report should be used to improve the entire criminal justice system, and not be restricted to capital cases.

The ISAA agrees with this proposal to the extent that it supports the specific recommendations which improve the overall truth-seeking function of our trial system and the improved expertise of its practitioners and judges.

Recommendation 84: The Administrative Office of Illinois Courts should develop data collection forms which would be filled out by trial judges after sentencing defendants for first degree murder in order to provide information which will help determine that the capital punishment system works fairly.

Data collection is good, but there are two problems with this proposal. First, trial judges should not be saddled with the ministerial burden of collecting data for statisticians. Second, while statistics can measure many things, statistics will not measure the fairness and justice of a criminal justice system which assesses truth and justice in the unique facts and circumstances in each case.

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.

This recommendation restates current law which the ISAA supports.

Submitted May 16, 2002

THE ILLINOIS STATE'S ATTORNEYS ASSOCIATION WORKING GROUP ON CAPITAL LITIGATION

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The myth of executing 'children'

By Jeff Jacoby, 6/2/2002

First of two parts

THERE WERE tears and sighs aplenty when Napoleon Beazley was put to death last week, eight years after he pumped two .45-caliber bullets into the head of a defenseless 63-year-old, rifled the dead man's pockets to get his keys, and then stole his car for a one-block joyride. But the tears and sighs weren't for Beazley's victim, John Luttig, or for Luttig's widow, who was nearly killed herself, or for their children and grandchildren, whose lives sustained a wound that night that will never fully heal.

The tears and sighs were for Beazley. And why? Because at the time he committed what even he later called a "heinous" and "senseless" murder, his 18th birthday was still three months off. That was enough to send the anti-death penalty spin machine into overdrive.

"I am astounded," wrote Bishop Desmond Tutu, "that Texas [and other states] take *children* from their families and execute them."

"Texas must recognize," thundered Sue Gunawardena-Vaught of Amnesty International, "that the brutal practice of executing *children* is in complete and utter defiance of international law."

"Of those nations executing *children,"* an aghast Jeannine Scott wrote in The New Abolitionist, "the United States is far in the lead."

It's hard to say which is more offensive - the pretense that giving a lethal injection to a 25-year-old convicted murderer amounts to "executing children," or the spectacle of people who never shed a tear for the innocent John Luttig weeping so noisily for his killer.

In any case, the age issue is a red herring. No state allows the death sentence for anyone younger than 16, and no one younger than 23 has been executed in modern times. Antiexecution activists seized on Beazley's age for the same reason they seized on Karla Faye Tucker's death row conversion to

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Christianity and Ricky McGinn's last-minute plea for DNA testing: They'll seize on *any* excuse to keep a murderer alive, no matter how lame the excuse or how obvious the murderer's guilt.

That is their right, of course - in a way, it is even part of the super-due process the US criminal justice system affords capital defendants - but it would be nice if they sometimes acknowledged the truth: They aren't opposed to unjust or tainted executions, they are opposed to all executions, period. The Beazley brouhaha was simply one more skirmish in their ongoing (and very well-funded) campaign to wipe out capital punishment for good.

So is their call for a death-penalty moratorium.

Opponents of capital punishment loudly insist that death sentences are meted out unfairly and incompetently, that the criminal justice system is broken, and - worst of all - that scores of innocent defendants are being sent to death row. These are grotesque exaggerations, based mostly on a handful of anecdotes (didja hear the one about the lawyer who fell asleep?) or highly tortured statistics, like the phony claim that there is a 68 percent error rate in capital cases.

The truth is that capital punishment in America is the most accurate and carefully administered criminal sanction in the world, and the public has good reason to support it. The latest Gallup poll shows that 72 percent of Americans favor the death penalty for murderers, while only 25 percent oppose it. Indeed, nearly half of the public (47 percent) says that the death penalty isn't imposed often enough, more than double the 22 percent who think it is imposed too often.

Hence the call for a moratorium. Americans are being urged not to abolish executions but merely to suspend them long enough to identify and fix any problems. "Whether you support or oppose capital punishment," goes the ACLU's pitch, "we need a moratorium on executions to give us time to figure out why the system is not working."

It's a clever appeal, and there are signs it is having an impact. Illinois and Maryland have adopted moratoriums. The idea is under consideration in other states. Writing in The New Republic, Peter Beinart suggests that endorsing a national death-penalty moratorium could be a winning issue for a Democratic presidential candidate. With a largely anti-death penalty media cheering in the background, perhaps it could.

Of course, some moratorium proponents are death penalty supporters who sincerely believe that there are correctable problems with the way it is currently administered. That was the thinking behind the moratorium in Illinois, a state where judges and policemen have been convicted of corruption and where a number of capital defendants were wrongly convicted.

But most of those calling for a national moratorium see it as a prelude to

ending executions for good. As usual, they are not being straightforward about their motives - or about what we could expect if they got their way.

Next: The cost of a moratorium.

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Capital punishment saves lives

By Jeff Jacoby, 6/6/2002

*Second of two parts*DEATH PENALTY abolitionists don't usually mention it, but in promoting a moratorium on executions, they are urging us down a road we have taken before.

In the mid-1960s, as a number of legal challenges to capital punishment began working their way through the courts, executions in the United States came to a halt. From 56 in 1960, the number of killers put to death dropped to seven in 1965, to one in 1966, and to zero in 1967. There it stayed for the next 10 years, until the State of Utah executed Gary Gilmore in 1977. That was the only execution in 1977, and there were only two more during the next three years.

In sum, between 1965 and 1980, there was practically no death penalty in the United States, and for 10 of those 16 years - 1967-76 - there was *literally* no death penalty: a national moratorium.

What was the effect of making capital punishment unavailable for a decade and a half? Did a moratorium on executions save innocent lives - or cost them?

The data are brutal. Between 1965 and 1980, annual murders in the United States skyrocketed, rising from 9,960 to 23,040. The murder rate - homicides per 100,000 persons - doubled from 5.1 to 10.2.

Was it just a fluke that the steepest increase in murder in US history coincided with the years when the death penalty was not available to punish it? Perhaps. Or perhaps murder becomes more attractive when potential killers know that prison is the worst outcome they can face.

By contrast, common sense suggests that there are at least some people who will *not* commit murder if they think it might cost them their lives. Sure enough, as executions have become more numerous, murder has declined. "From 1995 to 2000," notes Dudley Sharp of the victims rights group Justice For All, "executions averaged 71 per year, a 21,000 percent increase over the

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1966-1980 period. The murder rate dropped from a high of 10.2 (per 100,000) in 1980 to 5.7 in 1999 - a 44 percent reduction. The murder rate is now at its lowest level since 1966."

What is true nationally has been observed locally as well. There were 12,652 homicides in New York during the 25 years from 1940 to 1965, when New York regularly executed murderers. By contrast, during the 25 years from 1966 to 1991 there were no executions at all - and murders quadrupled to 51,638.

To be sure, murder rates fell in almost every state in the 1990s. But they fell the most in states that use capital punishment. The most striking protection of innocent life has been in Texas, which executes more murderers than any other state. In 1991, the Texas murder rate was 15.3 per 100,000. By 1999, it had fallen to 6.1 - a drop of 60 percent. Within Texas, the most aggressive death penalty prosecutions are in Harris County (the Houston area). Since the resumption of executions in 1982, the annual number of Harris County murders has plummeted from 701 to 241 - a 72 percent decrease.

Obviously, murder and the rate at which it occurs are affected by more than just the presence or absence of the death penalty. But even after taking that caveat into account, it seems irrefutably clear that when murderers are executed, innocent lives are saved. And when executions are stopped, innocent lives are lost.

Death penalty abolitionists (and a few death penalty supporters) claim that a moratorium on executions is warranted because the criminal justice system is "broken" and the death penalty is unfairly applied. But if that's true when the punishment is death, how much more so is it true when the punishment isn't death! Death penalty prosecutions typically undergo years of appeals, often attracting intense scrutiny and media attention. So painstaking is the super-due process of capital murder cases that for all the recent hype about innocent prisoners on death row, there is not a single proven case in modern times of an innocent person being executed in the United States.

But the due process in non-death penalty cases is not nearly as scrupulous. Everyone knows that there are innocent people behind bars today. If the legal system's flaws justify a moratorium on capital punishment, *a fortiori* they justify a moratorium on imprisonment. Those who call for a moratorium on executions should be calling just as vehemently for a moratorium on prison terms. Why don't they?

Because they know how ridiculous it would sound. If there are problems with the system, the system should be fixed, but refusing to punish criminals would succeed only in making society far less safe than it is today.

The same would be true of a moratorium on executions. If due process in capital murder cases can be made even more watertight, by all means let us do so. But not by keeping the worst of our murderers alive until perfection is achieved. We've been down the moratorium road before. We know how that

experiment turns out. The results are written in wrenching detail on gravestones across the land.

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An Illinois Prosecutor's Perspective on the Moratorium and the Governor's Commission on Capital Punishment Report

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I have been a prosecutor in Illinois for 21 years. I am currently the First Assistant State's Attorney of DuPage County. DuPage County is the second largest County in Illinois, with a population of nearly one million residents. I have tried over 100 felony cases to verdict, including many murder cases. I have tried six capital cases and have had two defendants sentenced to death. I am currently the First Vice President of the Illinois Prosecutors Bar Association. I have taught and lectured for the National College of District Attorneys, National Louis University, the Suburban Law Enforcement Academy (Illinois), the Illinois State's Attorney's Association and the Illinois Appellate Prosecutor's Office. I am a member of the Association of Government Attorneys in Capital Litigation and have recently been certified by the Illinois Supreme Court for membership in the Capital Litigation Trial Bar. I have been an active participant in the on going debate in Illinois over the death penalty and many of the proposed reforms that have been discussed over the past several years.

While I am appearing here today as an Illinois prosecutor and as an Assistant State's Attorney from DuPage County, Illinois, I am speaking on my own behalf and not as a representative of any of the organizations of which I am a member. I will be expressing my own views and not those of any other individual or organization.

I was asked to appear here today to express the views of an Illinois prosecutor on the issues of the Governor's moratorium and the Governor's Commission on Capital Punishment. I do so with a sense of gratitude for the tremendous honor of appearing before this committee. I am truly humbled by this opportunity and hope I am able to provide a worthwhile perspective on the Illinois experience. The State's prosecutors obviously do not speak with a single voice. However, I am confident that our views are consistently bi-partisan, victim sensitive, and formed with a keen sense for protecting our communities. We are the voice of the victims of crime and the last line of defense to those who may become victims in the future.

The Moratorium Issue

The moratorium in place in Illinois is the result of the Governor's decision to halt executions and is not the product of any change in legislation or judicial action. The last person executed in Illinois was Andrew Kokoraleis who was executed on March 17, 1999. He was sentenced to death in connection with the mutilation murders of 16 young women. In January of 2000, Governor Ryan announced a moratorium. It was imposed without notice to any prosecutor or victim's family member and without regard to the individual circumstances of their cases. He stated that he would not permit another execution in the State until he had a commission examine the State's system of capital punishment. Notwithstanding the Governor's moratorium, it should be pointed out that the death penalty remains the law in Illinois. Prosecutors continue to seek death sentences, courts continue to impose death sentences, and the Illinois Supreme Court continues to uphold death sentences. The only direct impact has been that the Illinois Supreme Court has not issued any execution dates because the Illinois Attorney General, in deference to the Governor, has not sought the entry of such an order. However, many have commented that the Governor does not have the Constitutional authority to nullify, even temporarily, the Illinois death penalty law. Ultimately, this is largely an academic question in light of the acquiescence to his Governor's position.

The Illinois Supreme Court has consistently found the Illinois death penalty law to be constitutional, as have the various federal courts that have been asked to review the statute. In fact, since the moratorium was put in place, the Illinois General Assembly has passed two bills that created two new grounds for seeking the death penalty. The Governor has vetoed each of these bills. Recent reported polling shows that about 50% of people accept the Governor's position and support the current review, but the fact remains, that the death penalty is still supported by a majority of the general public and their elected representatives.

No one would dispute that the Governor's actions were prompted by a series in the Chicago Tribune on capital punishment entitled "The Failure of the Death Penalty in Illinois." This series had been preceded by a story in the Tribune entitled "The Verdict: Dishonor" in which the paper attempted to make the case that prosecutorial misconduct in murder cases was a nation-wide systemic problem dating back some forty years. Prosecutors around the country uniformly criticized the article and questioned the reliability of the research.

The Tribune's compilation of case names and numbers detailing 13 "exonerated" death cases formed the basis for the claim of "wrongful convictions" by the Governor. The Governor's Commission also examined these same 13 cases. It is worth noting that these 13 cases represent all the cases since reinstatement of capital punishment in Illinois in 1977 wherein a defendant having at least once been sentenced to death was later either acquitted or against whom the charges were later dropped. Therefore, by definition, any person having once been convicted and sentenced to death and the charges having ultimately been dismissed or the defendant acquitted are included in the category of "wrongfully convicted" and eventually labeled as "innocent." While all 13 were sentenced to death at some point while their case was pending, it is worth noting not all the

defendants were facing a death sentence when their case was ultimately resolved. For example in the Gauger case, the defendant's death sentence was vacated immediately following his trial. The prosecutor later dismissed his case after the Appellate Court ruled that he was arrested without probable cause and therefore his confession was deemed inadmissible. In the Hernandez, case the defendant was initially sentenced to death in 1985. He was re-tried in 1990 and 1991, however following his second conviction he was sentenced to a term of years and did not receive a second death sentence. The second conviction was overturned and the case was dismissed in 1996.

By making these observations I am in no way suggesting that even one man being convicted for a crime he did not commit is somehow acceptable or insignificant. Clearly, from what has been learned in at least some of these cases the defendants were in fact shown to be innocent. These cases are very disturbing and merit the closest scrutiny. By the same token it is important to understand that not all these defendants have been shown to be "innocent." For example in the Smith case (one of the 13 cases in question), the Illinois Supreme Court in overturning his second conviction and second death sentence went to great lengths to clarify that their opinion should not be read as a declaration of his innocence. Their decision was based upon their determination that the evidence was legally insufficient to support his conviction. However, in spite of the Court's admonitions, many death penalty opponents will make the unequivocal claim that all 13 defendants, including Smith were shown to be innocent. Such claims are in most instances simply expressions of opinion and not a legal conclusion. Ultimately, we should all be concerned about any miscarriage of justice, whether it is in one case or a dozen. The remaining question is what do we do about it and how should that experience impact the handling of other unrelated prosecutions.

From the beginning of the current death penalty debate in Illinois, various concerned entities, beyond the Governor, have reacted. The Illinois Supreme Court has instituted substantial changes in how capital cases are handled in Illinois. These include new rules on the qualifications of those who can prosecute, defend, or preside over a death case. The court has ordered that capital defendants are entitled to extensively greater discovery, including depositions of State witnesses. The court ordered mandatory training for everyone involved in such litigation. The new rules are designed to afford greater protections to the accused and to assure a far greater degree of confidence in the judgments of the courts. The legislature, in recognizing that among the most common complaints about capital cases in Illinois was the adequacy of defense counsel and the lack of funding for the defense, has established a capital litigation trust fund that is now available to finance the defense in capital litigation.

In addition to the actions of the Supreme Court and the creation of the capital litigation trust fund, many substantial reforms have been instituted or proposed. For instance, in legislation supported by prosecutors across Illinois we became among the first states to establish the right of a convicted offender to obtain post-conviction DNA testing in order to pursue a claim of actual innocence. Further, prosecutors have advocated many of the reforms put into place by the Supreme Court and have proposed legislation that will assist convicted defendants in post-conviction challenges to their convictions.

Among the most uniform objections that prosecutors have had about the Governor's imposing a moratorium is the fact that none of these changes or proposed reforms will have any legal impact on the cases of the approximately 170 men and women currently on death row in Illinois. Thus, the moratorium has only served to put on hold all the cases that have proceeded through the myriad levels of review to a point at which an execution date should be ordered. The Illinois Supreme Court has already ruled that no new rule can have a retroactive application, nor do the new rules provide a basis for finding that a case tried 20 years ago is to be measured by any newly enacted rules. This has lead to the demand by prosecutors that the Governor, on a case-by-case basis, examine each case individually. No one questions the Constitutional right of the Governor to exercise his Constitutional power of clemency in vacating a death sentence for any reason he chooses. With all due respect to the Governor, if he believes that any death row inmate is innocent, he not only can, but also should, act accordingly. But, the effect of his moratorium is such that cases have been halted on the theory that some new procedural law or rule will somehow affect the ultimate disposition. This delay in the resolution of cases already tried, sentenced, and reviewed by the courts was imposed without notice to any prosecutor or victim's family member and without regard to the individual circumstances of the case. These cases include prosecutions where the defendant pleaded guilty to the murder or where no legitimate claim of actual innocence has ever been articulated by the defense.

Prosecutors generally believe that each case is unique and that the judgment rendered in that case must rise or fall on it's own merits. The facts and types of issues raised in each of the 13 cases, which actually stem from 10 separate crimes (several are co-defendants) are different and unique. Similarly, the facts and issues in every death case are different and unique, each deserving it's own individual examination. If a defendant has received a fair trial, had full access to all the levels of review, and there is no credible claim of residual doubt justice demands that the lawful sentence of the court be carried out.

Having expressed these concerns I do want to state that prosecutors throughout Illinois sincerely believe that any process that critically examines what we do and how we do is welcomed. Our laws must always be examined and re-examined in an unending effort to assure that we are always striving to improve our system of justice. The refinement of our Anglo-American system of truth seeking should never be viewed as complete. We must continue to vigorously pursue improvement and meaningful reform.

At the root of the current debate is essentially an attack on the how we arrive at justice through our truth seeking process. There are those who believe that these 13 cases reveal a fundamental flaw in the Anglo-American legal tradition such that the system simply cannot reliably find the truth. If accepted, this contention would not be logically limited to capital cases but place into question the reliability of every judgment arrived at in any court of law. Uniformly, prosecutors, and one could argue the public as well, are unwilling to accept such a fatalistic view of justice in America. We are confident that if everyone involved in the process does there job ethically and competently, justice will be obtained. When there is a breakdown in that process, safeguards are in place to guarantee that all reasonable doubt goes to the accused and no innocent person ever suffers

the ultimate punishment. No prosecutor, just as no person, ever wants to see an innocent person convicted, let alone executed.

Response to the Commission's Report

Preliminarily, I want to express my opinion that the Commission members did a commendable job and obviously worked very hard in tackling a very complex issue. While Illinois prosecutors have strong objections to some of the recommendations, Illinois prosecutors, nonetheless support the overwhelming majority of the Commission's work.

Before address some of the Commission's specific recommendations, there are several general observations that I would like to make. There was only one active prosecutor among the 14 people on the Commission. Among the thirteen others were some of the most vocal opponents of the death penalty regardless of the jurisdiction. Of even greater concern is the fact that many of the most controversial recommendations reflect a very negative opinion of the integrity of policeman, and in many instances directs how the police are to do their job and manage their investigations. However, there was not a single police official or representative on the Commission. Of perhaps equal significance, was the absence of representatives from any victim rights groups or representatives of the victims perspective.

The report overall is very "suspect friendly" and seems to advocate an approach to law enforcement that could impede the ability of the police to investigate the most serious crimes. This would not serve the larger public interest in protecting its citizens. The report seems designed to limit the application of the death sentence to only serial killers and cop killers and to place more and more obstacles to seeking a death sentence rather than reforms that are designed to remedy the perceived systemic shortcomings observed in their examination of capital cases in Illinois.

The following are some of the specific criticisms that have been made by Illinois prosecutors:

1. The expansion of the Fifth Amendment right to appointed counsel to any suspect who requests representation even when not being questioned is very troublesome. This practice could seriously undermine the ability of police to solve crime, while expanding suspect's rights far beyond those contemplated by the Miranda decision.

2. Mandating the use of videotaping of all interrogations of suspects and witnesses is of concern to prosecutors. Videotaping of suspect's statements is always advisable when possible. However, mandating that every statement heard by a police officer be recorded on the premise that they cannot be trusted to tell the truth is disturbing. The use of videotaping should be strongly encouraged. Yet, the Commission's report bespeaks an unjustified distrust of police.

3. Many of the recommendations of the Commission constitute an attempt to micro-manage police procedures. These include the areas of how to question suspects and witnesses and how to conduct identification procedures. While some of the suggestions are appropriate, it should not be the subject of legislation that suggests that any other approach is inherently unreliable.

4. Most prosecutors agree that many of the death penalty eligibility factors could be eliminated, but they believe the Commission's recommendation goes too far. While the elimination of felony-murder, murder of a child, or a contract killing will dramatically reduce the number of death eligible murders, it would do so at the cost of justice in many cases. The abduction, rape and murder of a young child are crimes for which the death penalty should at least be a sentencing option.

5. The responsibility of making the decision should not be left to a state mandated committee. There is no correlation between the charging decision and improving the truth seeking process in capital cases. A person singularly responsible to the public he or she serves should make this critical decision.

6. The concept of a pre-trial reliability hearing for any category of witness runs against the historical role of the jury in the truth seeking process. There are other more appropriate means of addressing the legitimate concerns associated with the use of a true jailhouse informant.

7. Specially categorizing the testimony of eyewitnesses is unnecessary and highlighting racial considerations in evaluating the testimony of a witness is inappropriate.

8. Allowing a defendant to testify before a jury without being subject to cross-examination is a dramatic departure from the most traditional method of truth seeking known to our Anglo-American legal tradition. This could permit factual testimony being presented without facing the rigors of cross-examination, which often reveals serious questions of the reliability of such testimony.

Conclusion

Prosecutors throughout Illinois embrace reform and are open to any meaningful change that enhances the reliability of the truth seeking process. The majority of the recommendations of the Governor's Commission are supported by prosecutors in Illinois (attached please find a copy of the response of the Illinois State's Attorney's Association). However, several of the more substantive recommendations will not enhance the ability of police or prosecutors to appropriately investigate or prosecute a murder case. To the contrary it will create hurdles designed to assist the accused

beyond any level previously recognized under the Constitution. Some have opined that the resulting statutory scheme intended by these recommendations so limits the availability of the death penalty and creates so many obstacles that it would have the practical effect of ending capital punishment in Illinois. In fact, the majority of the Commission voted in favor of abolishing the death penalty in Illinois.

The debate over whether Illinois needs to reform it's criminal justice system or whether Illinois should continue to have capital punishment is a debate well worth having. Those of us in law enforcement welcome the debate, provided it is open, honest and allows all voices to be heard. If the result of such a debate is a more reliable capital justice system wherein the public's confidence is enhanced, we will all be the better for it. If the result is the elimination of capital punishment, we will accept the will of the people.

In addressing the Governor's moratorium, prosecutors in Illinois have consistently maintained that it was not appropriate or necessary. Opinions include a strong argument that the Governor exceeded his Constitutional authority in announcing the moratorium. The only actual consequence to date has been that many capital cases have been procedurally put on hold for three years, still leaving the remaining issues in those cases unresolved. Ultimately, the question of having capital punishment in Illinois is a matter for the legislature. Unless and until the Illinois General Assembly re-visits the issue and abandons the death penalty as a sentencing option, every participant in the criminal justice system has an obligation under the law to enforce the law and play their role, including the Governor. In response to the moratorium, prosecutors have consistently sought to have each case follow the proper course, which ultimately ends with the Governor's obligation to exercise his executive authority to use his discretion in considering every claim of actual innocence, or any other basis for commuting the sentence. Justice delayed in these cases serves no one's interests, least of all the family of the victims in a capital case.

STATEMENT OF SENATOR PATRICK LEAHY
SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON THE CONSTITUTION
HEARING ON
"REDUCING THE RISK OF EXECUTING THE INNOCENT: THE REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT"
JUNE 12, 2002

I want to congratulate Senator Feingold, who chairs the Subcommittee on the Constitution, for holding this hearing to discuss the important lessons learned from the Ryan Commission in Illinois. Many of us have waited for the results of this report with great anticipation, and we are gratified to have the opportunity to hear from Governor Ryan, members of the Ryan Commission and other witnesses who have thoroughly studied these issues.

Governor Ryan showed great courage two years ago by ordering a moratorium on executions in the State of Illinois until failures in the system could be identified and corrected. I commend Governor Ryan for undertaking this detailed review of the Illinois system, which includes 85 specific recommendations for reform. The results of the Ryan Commission Report should serve as a resource – and, frankly, as wake up call – to other states that are considering reform of their systems of capital punishment. The evidence by now clearly shows that this is not just an Illinois problem; this is a national problem that requires a national solution. Senator Feingold has proposed a national moratorium through legislation he has introduced.

For the past few years, I have been working hard to pass a bill called the Innocence Protection Act. I introduced this bipartisan bill in February 2000. Senator Gordon Smith is the leading Republican cosponsor. A few months later, Congressman Ray LaHood of Illinois and Congressman Bill Delahunt of Massachusetts introduced the Innocence Protection Act in the House of Representatives. Today, we have 25 cosponsors in the Senate and 233 in the House, including a wide array of Democrats and Republicans, supporters and opponents of the death penalty. Reflecting the strong and growing interest in these reforms, House Judiciary Committee Chairman Sensenbrenner and Crime Subcommittee Chairman Smith have scheduled a hearing on the bill, which will take place next week. Following up on today's hearing, this committee will hold its next hearing on this issue next week as well, on June 18.

Over the past few months we have crossed several important milestones in the debate over the problems in how the death penalty is used today. We saw the 100th and 101st death row inmates released. Ray Krone, the 100th capital prisoner to be exonerated is here today, as are Kirk Bloodsworth and Juan Melendez, both of whom were wrongfully convicted and sentenced to death. Soon after the Ryan Commission Report was released, the State of Maryland announced a moratorium on executions to investigate concerns about racial and geographic disparities in that state's capital punishment system. And just last week, the Supreme Court let stand the Fifth Circuit Court of Appeals' decision in the "sleeping lawyer" case. The Fifth Circuit correctly held that "unconscious counsel equates to no counsel at all."

These events reflect a rising awareness by courts and state governments that the current system is broken. The Ryan Commission Report recommends crucial steps toward fixing the systemic failures that produce wrongful convictions. There is much for the states and for the Congress to do in fixing these flaws, and the Ryan Commission's report will help lawmakers at all levels of government summon the resolve to confront and address them.

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The Dallas Morning News

September 27, 2000, Wednesday THIRD EDITION

SECTION: NEWS; Pg. 21A

LENGTH: 1004 words

HEADLINE: McGinn set for execution this evening;
DNA tests had failed to clear man in girl's '93 rape, murder

SOURCE: Austin Bureau of The Dallas Morning News

BYLINE: Christopher Lee

DATELINE: AUSTIN

BODY:

AUSTIN - The only death-row inmate ever granted a reprieve by Gov. George W. Bush is scheduled to be executed Wednesday after DNA tests failed to exonerate him in the rape and murder of his 12-year-old stepdaughter.

Ricky McGinn, 43, whose case helped spark a national controversy over the use of the death penalty in Texas, is scheduled to die by lethal injection after 6 p.m. Wednesday at the Walls unit in Huntsville.

Mr. Bush granted Mr. McGinn a temporary stay on June 1, only minutes before his execution was to be carried out.

The governor, who at the time was campaigning for president in California, was always convinced that Mr. McGinn was guilty of the killing. But he said technical advances in DNA testing might show that Mr. McGinn did not rape Stephanie Flanary immediately before she was slain with an ax in 1993.

Had he not committed the rape, Mr. McGinn never would have been eligible for the death penalty.

The new tests, done at the FBI lab in Washington, concluded that a hair found inside the victim's body came from Mr. McGinn or one of his maternal relatives. None of his relatives was ever a suspect in the case.

Steve Flanary, Stephanie's father, said the new tests did nothing except delay justice and cause his family more pain.

"It helped rehash everything just almost like it was at the beginning again," said Mr. Flanary, a pipe fitter and boilermaker who lives in Angleton, Texas. "I knew it [the new test] was going to say it was him. I was convinced before."

Defense attorney Richard Alley of Fort Worth could not be reached for comment. Mr. McGinn maintained that he was innocent in an interview with The Associated Press this month.

"I still want the world to know I'm not guilty," Mr. McGinn said. "I don't care what the tests show."

A Brown County jury found Mr. McGinn guilty of capital murder in 1995 and sentenced him to death by injection. The conviction was based on strong circumstantial evidence: The victim's blood was found in his car and on an ax in his truck.

State District Judge Stephen Ellis ruled Aug. 15 that the new tests failed to exonerate Mr. McGinn and set Wednesday as the new execution date.

Conducting the tests was the right thing to do even though they simply affirmed the jury's decision, said Richard Dieter, executive director of the Death Penalty Information Center in Washington. The nonprofit group does research on death-penalty issues but is neither for nor against capital punishment.

"One would expect that most of these tests will show the defendant was guilty," Mr. Dieter said. "But there are going to be exceptions. It's not acceptable to execute a few innocent people in the process. So you need to do the testing not because most of the people are innocent but because some of them may be. It remains important despite this case."

Five states have laws allowing for post-trial DNA testing for death-row inmates, including Washington, Illinois, New York, Arizona and Oklahoma. A similar measure recently passed in the California Legislature and awaits consideration by Democratic Gov. Gray Davis.

State Sens. Rodney Ellis, D-Houston, and David Sibley, R-Waco, say they will jointly sponsor a bill in the 2001 Texas Legislature to provide convicts with DNA testing and other protections, with some restrictions.

Dianne Clements, president of Justice for All, a Houston-based victims' rights group, said any measure would have to be carefully defined in order to do something other than postpone justice for victims' families.

"When you are a death-row inmate, every delay is a success," Ms. Clements said. "Without a doubt, Ricky McGinn knew what the results would be, and he continued to lie. ... It [testing] does nothing to help anybody. What it does is uses resources on clearly guilty capital killers."

Mr. Flanary, who plans to witness the execution, said Mr. Bush's decision to grant Mr. McGinn a temporary reprieve had more to do with presidential politics than justice. Mr. Bush has drawn fire from critics who say Texas, which executes more inmates than any other state, has ignored poor work by defense attorneys and unfairly limited inmates' ability to introduce new evidence that might clear them.

"Look at it this way," Mr. Flanary said of Mr. Bush's decision. "You make a comment to the news media saying, 'We never executed anyone that's innocent in the state of Texas.' So in order to gain votes from both sides - the people who are against the execution and the people who are for the execution - in order to balance it out, why not pick one out there you know is already convicted? You can use that to your own personal gain."

Bush spokesman Mike Jones said Mr. Bush's decision was based solely on the legal case.

"The governor took the right action for the right reasons," Mr. Jones said. "And it's further proof that the Texas justice system has extensive safeguards to ensure that only the guilty are executed in Texas."

Texas has executed 144 inmates since Mr. Bush took office in January 1995. Mr. McGinn will be the 33rd Texas inmate executed this year and the 232nd since the state reinstated capital punishment in 1982.

Mr. McGinn's case drew national attention earlier this summer after his defense attorneys raised questions about how police investigators took DNA samples after the slaying and about the results of those tests. Those tests, on a pubic hair found inside Stephanie and on a semen stain on her shorts, were inconclusive.

Throughout the case, defense attorneys have suggested that law officers might have planted the first semen sample on the body to bolster their case against Mr. McGinn, but they have produced no evidence to substantiate such a claim.

Although Mr. McGinn had never been in prison before the Flanary killing, his criminal history included a murder acquittal and accusations that he sexually assaulted two women in the 1980s. During the penalty phase of his trial, a daughter accused him of sexually assaulting her.

TESTIMONY OF LAWRENCE C. MARSHALL

BEFORE THE SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION

HEARINGS ON

"REDUCING THE RISK OF EXECUTING THE INNOCENT:

THE REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION

ON CAPITAL PUNISHMENT."

JUNE 12, 2002

Good morning. My name is Lawrence Marshall, and I am a Professor of Law at Northwestern University School of Law in Chicago, where I serve as Legal Director of Northwestern University's Center on Wrongful Convictions. In that capacity, I have had the privilege of working on many of the cases you have been discussing here this morning. In fact, the staff of the Center on Wrongful Convictions has been involved in nine of the cases in which innocent men have been exonerated off of Illinois' death row. In addition, we have worked with lawyers throughout the country on cases of wrongful convictions in other jurisdictions and we have intensely studied the causes and possible remedies for this grave problem. Studies that our Center has done on three of the leading causes of wrongful convictions–eyewitness error, false confessions, and informant testimony–are attached as an appendix to this testimony.

Today's hearing is an important step in America's continuing education about the realities of how the death penalty system is administered. There is no substitute for facts in this regard. When the debate is about the ethics and morality of capital punishment in the abstract, one can argue based on one's personal view and philosophy. But when the discussion focuses on the pragmatic issue of the system's propensity for error, there can be no meaningful discourse in the absence of data. My personal experience with the death penalty serves as an example of this point.

Twelve years ago, when I was asked to represent my first capital client, I had certain perceptions about the capital punishment system. I believed that the system was plagued by racism and arbitrariness, and that whether a defendant lives or dies often had more to do with skin color and net worth, than with the defendant's particular culpability. But despite these flaws, I assumed that there was one matter about which we could all be sure: that those who were convicted of capital crimes and sentenced to die were unmistakably guilty of the crimes for which they stood convicted. I believed that despite any other flaws, our capital justice system had so many safeguards in place that it was virtually unimaginable that a truly innocent person would be convicted and sentenced to death. Most of America shared this assumption in 1990.

Over the past decade, the facts have shattered this belief. As you have heard, these facts have led the Governor of Illinois–a long time supporter of the death penalty–to declare a moratorium on executions. And these facts have led the Governor's bipartisan commission to declare that the death penalty system in Illinois is in need of broad, systemic reforms and that, even if these reforms are adopted, there is still no failsafe way to protect against wrongful executions. Because of these facts, the people of Illinois are now immersed in a serious debate about whether the death penalty can be fixed, and whether it is worth trying to fix, given the tremendous costs associated with fixes that would only reduce–not eliminate–the risk of error.

This discussion must not be limited to Illinois because the problem is not at all unique to Illinois. Illinois does not convict more innocent people than other states do; Illinois has simply done a better job of exposing its errors. The high rate of wrongful convictions that has been exposed in Illinois is a reflection of some serendipitous events and a tribute to the diligent work of journalists, investigators, academicians and public interest lawyers. Through the efforts of these groups, and some fortuities involving confessions of real killers, several wrongful convictions were exposed in the mid 1990s. Once this happened, many of the key players in the criminal justice system–defense lawyers, prosecutors, judges, legislators, the Governor–started paying more attention to other inmates' claims of actual innocence. Pleas that might have been summarily dismissed years earlier now were taken more seriously. And, lo and behold, this scrutiny led to reversal after reversal after reversal–not based on some procedural technicality, but based on evidence of actual innocence.

In a few of these cases, the evidence of innocence has come about through DNA testing, but that is the exception, not the norm. Most homicide cases do not yield biological samples capable of identifying the perpetrator or excluding a wrongfully charged suspect. We must avoid taking false comfort, then, in the current availability of DNA testing. In those cases in which DNA testing is possible it is, of course, imperative to make such testing available. But we must recognize that for every person whose innocence can be established through DNA testing, there

are many equally innocent defendants whose lives depend on the fortuities of the right witness emerging at the right time. Several Illinois inmates were freed through such strokes of good fortune. Thankfully, though, Governor Ryan did not glibly assume that we had already detected all of the errors that had been committed. Thus, he created a model for what every jurisdiction must do–he has put in place a top-to-bottom examination of the way in which the death penalty is implemented. And he has refused to allow executions to proceed while that examination is underway.

No other State has examined its system yet with this sort of microscope; nor has the federal system undertaken such of scrutiny of its own death penalty. Consequently, as we sit here today, the only one jurisdiction that had subjected its death penalty system to intense examination has found that system deeply flawed. It is now time for all other jurisdictions to subject their systems to similar scrutiny.

Predictably, there are some who have tried to dismiss the Illinois experience as an isolated cluster, that has no bearing on the fairness and accuracy of the death penalty system in their states. The facts belie this claim. Nationally, according to the Death Penalty Information Center, 101 innocent men and women have been released from death rows in the United States since 1973. Eighty-eight of these cases have been in 23 jurisdictions other than Illinois. This problem is hardly isolated to any one state.

In November 1998, the Center on Wrongful Convictions hosted the National Conference on Wrongful Convictions and the Death Penalty. At that conference, 29 innocent men and women who had once been sentenced to die sat on one stage–a living testament to the fallibility of the capital punishment system. The next day, the Governor of Virginia was quoted in the newspapers boasting that none of the wrongly convicted came from Virginia, and that his jurisdiction was obviously running its system without error. This claim was senseless to its core. In 1998, Virginia had the strictest rules in the land regarding an inmates right to raise a claim of actual innocence after trial. Even if an inmate could present compelling evidence of actual

innocence, the courts would not hear his claim if it was brought more than 21 days after trial. Other inmates were executed as they begged on the gurney for a DNA test that might establish their innocence. It was no surprise, then that a system that precluded inmates from trying to establish innocence was a jurisdiction in which no death row inmate had been exonerated. Some of these draconian rules finally were relaxed, and very predictably, a Virginia death row inmate was cleared through DNA testing after having spent 16 years in prison for a crime he did not commit.

In addition to those who suggest that the problem of wrongful convictions is limited to Illinois, there are others who claim that all of the evidence about exonerations simply proves that the system works well at avoiding the execution of the innocent. The tragic error of this assertion is that it assumes–with no justification–that we are catching all of the errors before execution. The evidence belies this belief. For example, Kirk Bloodsworth of Maryland was convicted of the heinous rape and murder of a young girl and was sentenced to death. Bloodsworth was exonerated nine years after conviction when DNA testing proved that he could not possible have been the person responsible for the crime. But Bloodsworth's case could easily have come out differently. Had the victim in that case not been raped, there would have been no DNA evidence to test and Bloodsworth would never have been exonerated. He would have been just as innocent, but he would not have been able to prove it. There are many Kirk Bloodsworths on death rows today–just as innocent, but without the potential for exculpatory DNA testing.

Each of the 101 wrongful conviction cases yields lessons to be learned, and we must come to terms with those cases and lessons before we proceed to execute a class of people that undoubtedly includes many innocent men and women. As I said earlier, what we need here are facts, and until those facts are developed in every jurisdiction it ought to be unthinkable to kill anyone. Over the past decade, I have spoken about the death penalty to thousands of individuals. On hundreds of occasions people have told me that they used to support the death penalty, but as they learned more about the practicalities of its administration–its racism, its

arbitrariness, its focus on the poor, and its propensity to condemn the innocent–their support for imposing the punishment has diminished. Not once has anyone ever told me that they used to have doubts about capital punishment, but as they have learned more about the fairness with which it is applied, they have now come to support the penalty more strongly.

The importance of shining light on this subject is clear. If a system's death penalty cannot survive the kind of robust scrutiny that the Illinois death penalty has come under, then it simply should not survive. When executions are carried out, they are done in the name of the people. The people have an absolute right to know the truth about how well that system is working–or not working.

WASHINGTON OFFICE
NATIONAL MINISTRIES DIVISION

PRESBYTERIAN CHURCH (USA)

Statement by the Presbyterian Church (U.S.A.) Washington Office, for the Senate Committee on the Judiciary, Subcommittee on the Constitution.

Regarding the June 12, 2002 hearing, "Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor's Commission on Capital Punishment."

The General Assembly of the Presbyterian Church (U.S.A.), representing the majority voice of 2.5 million Presbyterians from 11,500 congregations in the United States and Puerto Rico, has repeatedly spoken out against the use of capital punishment. As early as 1959, the General Assembly of the United Presbyterian Church in the United States of America called for abolition of the death penalty and proclaimed that "capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ, [and] that as Christians we must seek the redemption of evil doers and not their death." In 2000, the 212th General Assembly of the Presbyterian Church (U.S.A.) reaffirmed its opposition to the death penalty, as previously recorded in statements from 1959, 1965, 1966, 1977, 1978, and 1985, and issued a call for an immediate moratorium. The Presbyterian Church (U.S.A.) continues to stand in opposition to the death penalty because of its racist, classist, and inconsistent applications, because it is statistically ineffective as a deterrent, and because it violates biblical principles of forgiveness, reconciliation, and rehabilitation.

There are many people of faith who feel that retention of capital punishment serves a moral purpose. However, the Presbyterian Church has adopted the position that while it is true that in the Old Testament there are laws that require capital punishment for certain crimes and that Christ came not to destroy but to fulfill the law, the advent of Christ now offers a different approach to sin and punishment. Now, it is the love of Christ, not law, that constrains us, and such love does not advocate deliberate execution of human life for sin, no matter how heinous. The retention of capital punishment implies a limitation on the reach of the divine grace for the reclamation even of the worst criminal; hence the more tenable position for Christians is a recommendation for abolition. In deep humility, Christians may well recall Christ's admonition, "Let him who is without sin cast the first stone."

The Presbyterian Church has historically stated its belief that in a representative democracy, the use of death as an instrument of justice places all citizens in the role of executioner and places the state in the role of God, who alone is sovereign. It is presumptuous for individuals to appoint themselves executioners of God's justice. This goes for the state as well, which is but a collection of persons. We have confused divine justice with personal vengeance—and it isn't any less vengeful to use the state as a means of retaliation.

The fact that this form of punishment is falling into disuse globally and within this country does not lessen but emphasizes the duty of people of faith to think earnestly of this matter in the light of Christian responsibility. In June of 1997, nineteen diverse religious

organizations united to call for a nationwide moratorium on executions. To date, over seven hundred religious and secular organizations are sounding a clear and visible public call for a moratorium on executions now.

In 1966 the General Assembly of the Presbyterian Church in the United States adopted a statement proclaiming, "The best means of teaching respect for human life consists in refusing to take a life in the name of the law." The Presbyterian Church (U.S.A.) will continue to proclaim this message and to tirelessly advocate for total abolition of capital punishment.

". . . and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?" (Micah 6:8)

Sincerely,

Rev. Elenora Giddings Ivory

Rev. Elenora Giddings Ivory
Director
Presbyterian Church (U.S.A.) Washington Office

The Atlanta Journal-Constitution: 3/13/02
http://www.accessatlanta.com/ajc/opinion/0302/0314death.html

Study: Death penalty deters scores of killings

By PAUL H. RUBIN

Executions are always controversial, and there are always debates about whether states should use the death penalty. But this debate cannot proceed rationally unless we fully understand the advantages and disadvantages of execution.

The conventional wisdom among criminologists had been that executions do not provide any deterrence. This was challenged by the economist Isaac Ehrlich in two papers in the 1970s. These studies have themselves subsequently been challenged.

Two colleagues and I have recently re-examined this issue. We used statistical techniques and data that were unavailable when Ehrlich and his critics performed their analyses. In particular, we used "panel data" techniques, a form of statistical regression analysis that is more powerful than others. We have also used much more comprehensive and complete data. We have used data on all 3,054 counties in the United States for the 1977-96 period. Others had used state data or national data, but such data is more subject to error.

Use of this data enables us to statistically "control" for the effects of most factors that influence homicide rates. That is, we adjust for the effects of age, race and other demographic characteristics of the population, unemployment, population density, other crime rates, general sentencing "toughness," NRA membership, and police- and prison-related variables. The use of panel techniques also enables us to adjust for factors idiosyncratic to each county and for any national time trends in homicide rates.

We essentially predict for each county for each year the number of homicides, and show the effect of executions on the actual number. Our analysis is thus the most comprehensive in the literature and addresses virtually all of the criticisms aimed at Ehrlich's work.

One important factor in measuring the deterrent effect is the perception by the criminal of the probability of execution. Because there are ambiguities in measuring this variable, and because there are remaining statistical questions, we examine 48 separate variants of our general hypothesis. In 45 of these, we find a statistically significant and important deterrent effect.

One conservative version of our model finds that each execution deters an average of 18 homicides, with a range of between 8 and 28 murders deterred by each execution. Other variants find even larger numbers of prevented murders.

One criticism of capital punishment is that it is applied in a racially biased manner. We do not examine this issue. But it is important to note that, while African-Americans are disproportionately involved in homicides as perpetrators, they are also disproportionately involved as victims. Department of Justice figures show that African-Americans are victims in about one-half of the murders, and in 1999, for example, homicide victimization rates per 100,000 persons were 3.5 for whites and 20.6 for blacks.

Thus, any deterrent effect of capital punishment is likely to provide substantial benefits to members of the African-American community.

We as a society might decide that we want to eliminate capital punishment. But this should be an informed decision, and should consider both the costs and benefits of executions. Our evidence is that there are substantial benefits from executions and, thus, substantial costs of changing this policy.

Paul H. Rubin is professor of economics and law at Emory University. Hashem Dezhbakhsh and Joanna Mehlhop Shepherd were co-authors of the research on which this is based.

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Gov. Ryan
U.S. Senate Constitution Subcommittee
Testimony
Illinois Death Penalty Moratorium
Wednesday, June 12, 2002

Chairman Feingold, it's a pleasure to be speaking to you.

Please excuse my absence, we're in the middle of a special session at our state capitol, and I could not get away. Because of the importance of this issue and your leadership, I am delighted that we were able to connect through technology from Springfield, Illinois.

Springfield, by the way, is the home of your colleague, Illinois' senior senator and my friend Senator Dick Durbin.

I want to thank the distinguished members of this committee for indulging me.

Thank you for inviting me to testify on the Illinois death penalty moratorium.

Throughout my career, I believed only the guilty could be sent to Death Row.

I never questioned the system.

Mr. Chairman, you may have heard me tell this story before.

Though it was 25 years ago, I vividly remember voting to put the death penalty back on the Illinois books.

During the debate, an opponent of the death penalty asked if any of us who supported it would be willing to "throw the switch."

It was a sobering question.

It wasn't my responsibility and for that I was relieved. Administering the death penalty was up to the criminal justice system, and surely the system would never make a mistake.

So, I voted for the death penalty.

The fact is now, as governor, I learned the responsibility is mine, I do "throw the switch."

That's the toughest part of being Governor.

Since those days as a legislator, a lot has happened to shake my faith in the death penalty system-- and the more I learn, the more troubled I've become.

The state executing an innocent man or woman is the ultimate nightmare.

The fact is, we've come too close to that prospect 13 times in Illinois.

Anthony Porter's case is a shocking example of that.

Back in the fall of 1998, when I was still campaigning for Governor, Anthony Porter was scheduled to be executed on September 23 of that year.

He had ordered his last meal and been fitted for his burial clothes.

Mr. Porter had been convicted in the 1982 shooting death of a man and woman in a South Side Chicago park.

Two days before he was to die, his lawyers won a last minute, temporary reprieve based on his IQ which was, they believed, about 51.

With that delay, some of the great journalism students from Northwestern University, and their professor, David Protess, a powerful champion for justice, had the time to start their own investigation into the then 16-year-old case.

With the help of a private detective, the students picked apart the prosecution of Anthony Porter.

Key witnesses, like one who claimed he saw Porter at the crime scene, recanted their testimony – they now said Porter was framed.

The students then followed their leads to Milwaukee, where the private detective obtained a videotaped confession from a man named Alstory Simon.

Simon told the private detective that he shot the two victims in an argument over drug

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money.

With that new evidence, charges were dropped and the innocent Mr. Porter was freed in February 1999.

The charges against him were wrong, and he nearly went to his death for them – after spending nearly 17 years on death row!

I met with Mr. Porter last week. He told me how he was kept in his dark cell for 23 hours a day. His eyes don't tolerate the sunlight well anymore. That's tough punishment for a guilty man, let alone an innocent one. Imagine enduring that pain, all the while knowing you are innocent.

I was caught off guard by Mr. Porter's case. I had just taken office.

I didn't know how bad our system was.

And shortly after Anthony Porter's case, while I was still reeling, the Andrew Kokoraleis case came to my desk.

Andrew Kokoraleis was a serial killer and had been charged with the brutal rape and mutilation murder of a 21-year-old woman.

After the mistakes the system made in the Porter case, I agonized.

I thoroughly reviewed the case files, consulted with staff, and with veteran prosecutors and defense attorneys.

I requested additional information from the Prisoner Review Board.

I double-checked and then I triple-checked.

I wanted to be absolutely sure.

And in the end, I was -- sure beyond any doubt that Kokoraleis was guilty of a monstrous unspeakable crime. I allowed his execution to proceed.

But it was an emotional, exhausting experience – one I would not wish on anybody.

It all came down to me: a pharmacist from Kankakee, Illinois, who had the good fortune to be elected by the people of Illinois to be their Governor.

I now had to "throw the switch."

Quite frankly, that might be too much to ask of one person to decide.

But, that experience was not the end of the journey.

Journalists Steve Mills and Ken Armstrong of the Chicago Tribune conducted an in-depth investigation of the death penalty cases in Illinois in 1999 that was startling.

Half of the nearly 300 capital cases in Illinois had been reversed for a new trial or sentencing hearing.

33 of the death row inmates were represented, at trial, by an attorney who had later been disbarred or at some point suspended from practicing law.

35 African-American death row inmates had been convicted or condemned by an all-white jury.

In fact, two out of three of our approximately 160 Illinois death row inmates are African-American.

Prosecutors used jailhouse informants to convict or condemn 46 death row inmates.

It was clear there were major questions about the system – questions that I alone could not answer.

In January of 2000, the 13th death row inmate was found wrongfully convicted of the murder for which he had been sentenced to die.

At that point, I was looking at our shameful scorecard: since the death penalty had been reinstated in 1977, 12 inmates had been executed and13 were exonerated.

To put it simply, we had a better than a fifty-fifty chance of executing an innocent person in Illinois.

The odds of justice being done were as arbitrary as the flip of a coin.

Up until then, I had resisted calls by some to declare a moratorium on executions.

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But then I had to ask myself, how could I go forward with so many unanswerable questions about the fairness of the administration of the death penalty in Illinois.

How on earth could we have come so close --- again, and again, and again – to putting fatal doses of poison into the bodies of innocent people strapped to gurneys in our state's death chamber?

It was clear to me that when it came to the death penalty in Illinois, there was no justice in the justice system.

I declared the moratorium on January 31, 2000 because it was the only thing I could do.

That was the easy part. The hard part was to find out what had gone so terribly wrong.

The hard part was to try to answer how our system of justice became so fraught with error, especially when it came to imposing the ultimate, irreversible penalty.

So I appointed some of the smartest, most dedicated citizens I could find to a commission to study what had gone so terribly wrong.

It was chaired by former Federal Judge Frank McGarr and co-chaired by former Senator Paul Simon and former U.S. Attorney for the Northern District of Illinois Thomas Sullivan.

They led a panel which included former prosecutors, defense lawyers, and non-lawyers. Accomplished attorney Scott Turow, a best-selling author and commission member, will also testify before you today.

My commission put together a tremendous document.

They developed 85 recommendations to improve the caliber of justice in our state system. It does not single anyone out, but it calls for reforms in the way police, prosecutors, defense attorneys, judges and elected officials do business.

I have taken that entire report and introduced everything that requires legislation to the Illinois General Assembly.

My bill proposes barring the execution of the mentally retarded; mandating that natural life is given as a sentencing option to juries; reducing death penalty eligibility factors from 20 to 5; and barring the death penalty when a conviction is based solely on a jailhouse "snitch."

This summer, the Illinois General Assembly will hold hearings. I hope they'll hear from all of the key parties – the prosecutors, defense attorneys, victims, and the wrongfully convicted.

My commission reviewed, at some level, every capital case that we have ever had in Illinois, but it took a closer look at the 13 inmates freed from Death Row and exonerated.

Most did not have solid evidence. We had cases where jailhouse snitches were the key witnesses. Another case where a drug addicted witness sent a man to death row. DNA freed several inmates. Some were convicted because of overzealous police and prosecutors. Some had inadequate representation at trial.

My commission concluded that its recommendations will significantly improve the fairness and accuracy of the Illinois death penalty system.

But it also concluded, and I quote:

"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."

That's a powerful statement.

It is one that I will ponder.

In the meantime, I do know this:

I said two years ago, and I say now, until I can be sure that everyone sentenced to death in Illinois is truly guilty until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate.

We all want to punish the guilty.

But in so doing, we must never punish the innocent.

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And with our mistake prone system in Illinois, we were doing just that.

Chairman Feingold, I know you are proposing a federal moratorium. We've had the pleasure of discussing our mutual concerns about capital punishment a number of times in the past couple of years. I want to commend you for your passion for truth and justice.

I have not studied the federal system, but I do know, especially after September 11th, that the United States of America must be a model for the rest of the world. And that means our justice system should be the glowing example for the pursuit of truth and justice. It must be fair and compassionate.

We must safeguard individual liberties while keeping our communities safe.

And we must protect the innocent. It is fundamental to the American system of justice.

Thank you.

Statement of Kent Scheidegger
Legal Director, Criminal Justice Legal Foundation
Before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution
Hearing on the Report of the Illinois Commission on Capital Punishment
June 12, 2002

I thank the subcommittee for the opportunity to testify today. The correct identification and sufficient punishment of murderers is a matter of the greatest importance. Indeed, there is no more important function of the state governments than the protection of their citizens from murder. The performance of this function while also protecting the wrongly accused deserves the closest attention and greatest care. Regrettably, there has been a great deal of misleading information circulating on the subject of capital punishment, so I welcome the opportunity to make at least a start at getting the truth out today.

The focus of today's hearing is on the actual guilt or innocence of the defendant. This change of focus is most welcome and long overdue. For three decades, the American people have suffered inordinate delays and exorbitant expense in extended litigation over issues which have nothing to do with guilt, which are not in the Constitution as originally enacted and understood, and which often involve sentencing policy decisions of dubious merit. Congress should certainly be concerned with further reducing the already small possibility of conviction of the innocent, whether the penalty be death or life in prison. At the same time, it should take care not to exacerbate, and if possible to reduce, the interminable delays and erroneous reversals that are presently the norm in that vast majority of capital cases that involve no question whatever of the identity of the perpetrator. I suggest that the Congress set a national goal of reducing to four years the median time from sentence to execution and establish a standing commission to periodically review the system and recommend changes to achieve that goal. Four years is more than sufficient to weed out the very few cases of real doubt of identity, but short enough that the American people would finally have the benefits of effective death penalty system: justice for the worst murders, certainty the murderer will not kill again, and the life-saving deterrent effect of such a system.

The specific topic of today's hearing is the Report of the [Illinois] Governor's Commission on Capital Punishment.[1] Regrettably, that report shows little of the balance needed for this important topic. Particularly disturbing is the summary manner in which the report dismisses deterrence.[2] While the subject has long been controversial and will likely remain so, the flurry of recent studies finding a deterrent effect cannot be brushed off. A sophisticated

1. Cited below as "Commission Report."

2. Commission Report at 69.

econometric analysis at Emory University estimated that each execution saves 18 innocent lives.[3] Another study at the University of Colorado estimated a lower but still very substantial 5 to 6 fewer homicides for each execution.[4] Even using the lowest of these figures, a national moratorium would kill hundreds of innocent people each year. Indeed, a study at the University of Houston estimated that a temporary halt in executions in Texas to resolve a legal question cost over 200 lives in a single state.[5] There are, of course, other studies to the contrary. Even so, any public official considering a halt to or severe restriction of capital punishment must consider the very substantial possibility that such an action will result in the deaths of a great many innocent people.

One of the commission's recommendations is to narrow the scope of offenses eligible for capital punishment. Some amount of narrowing is indeed in order, but the drastic limitations in the report are not justified by any concerns with actual innocence. In particular, the recommendation that murder of the rape victim by a rapist no longer be a capital offense should be rejected out of hand. This is the kind of case where the deterrent effect is most needed, since without capital punishment the rapist is looking at a long prison sentence whether he kills the victim or not. It is also the kind of case where DNA is most likely to eliminate any doubt of identity.

On a positive note, the report does acknowledge that many of the reversed judgment in capital cases are "based on legal issues that had little to do with the trial itself," and are often the result of new rules created by the state and federal supreme courts after the trial.[6] This is an important fact for the Congress to consider when it is confronted with misleading statistics of the so-called "error rate" in capital cases. A pair of heavily publicized reports by a well-known opponent of capital punishment, Professor James Liebman, and others, defined as "serious error" every case where a judgment was reversed for a reason other than a nullification of the death penalty statute.[7] By this definition, the case of *Booth* v. *Maryland*[8] was infected by the "serious

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3. Dezhbakhsh, Rubin, and Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data, Emory University Dept. of Economics Working Paper 01-01 (Jan. 2001), http://userwww.service.emory.edu/~cozden/dezhbakhsh_01_01_cover.html; see also Rubin, Study: Death penalty deters scores of killings, Atlanta Journal-Constitution (Mar. 13, 2002) (copy attached).

4. Mocan and Gittings, Pardons, Executions, and Homicide, NBER Working Paper 8639 (December 2001), http://econ.cudenver.edu/mocan/papers/deathpenalty1007.pdf.

5. Cloninger and Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 Applied Economics 569, 575 (2001).

6. Commission Report at 9.

7. J. Liebman, et al., A Broken System, Part II, p. 22 (2002).

8. 482 U.S. 496 (1987).

error" of permitting a victim impact statement, which we now know was not error at all. The report also cites as "serious error" the case of *Francis* v. *Franklin*,[9] in which the trial judge gave an instruction on malice which, at the time of the trial, had been expressly approved in a Supreme Court precedent as a correct statement of the law,[10] but was disapproved after the trial.

Reversals such as these should not lower our confidence in the trial process in the slightest. They represent the cost to society of the fallibility of the review process and of the process of shaping the law by retroactive judicial decision rather than by prospective legislation. In the field of capital punishment, both of these costs have been enormous, and any legislation in the field should consider ways to reduce them.

Another disappointing aspect of the commission report was that it passed on some reforms that would have benefitted both sides. Recommendation 72, to postpone postconviction review until after the direct appeal,[11] is a step in the wrong direction.

The capital appeals bar has apparently decided that an attack on the trial lawyer is mandatory in every capital case, regardless of the actual quality of representation. Given that this challenge is inevitable, the discovery and hearing should begin in the trial court immediately after sentence, while everyone involved is still available and still remembers what was done and why. Furthermore, defense lawyers who have not yet moved on to another stage of their careers will still have an interest in defending their reputations, and are more likely to do so rather than falling on their professional swords, which is a problem in this area. The few who actually do fail to provide adequate representation can be identified, not assigned new cases, and possibly be required to refund the fee that they did not earn.

The commission's report is addressed to reforms to be made at the state level. Indeed, much of the report is simply cheerleading for reforms that have already been made.[12] The question arises, as a matter of federalism, what changes the Congress should make in state criminal law and procedure, and whether it has the constitutional authority to make them. Certainly any attempt by Congress to dictate the eligibility criteria for state capital punishment laws would raise serious constitutional doubts.

This suggests an incentive arrangement for states to enact whatever reforms Congress decides are necessary to further improve the accuracy of the guilt determination. Consistent with the new focus on actual innocence, I suggest that the incentive be reduced litigation on issues which have nothing whatever to do with that accuracy. In 1995, Senator Kyl proposed a limit on

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9. 471 U.S. 307 (1985).

10. Agnew v. United States, 165 U.S. 36, 52 (1897).

11. Commission Report at 169-170.

12. See, e.g., Recommendation 60, Commission Report at 138-139 ("supporting" a change made a year ago).

federal habeas review along the lines of that in effect in the District of Columbia. The Senate decided not to adopt that limit for habeas generally, but a similar limit on claims affecting solely the penalty phase and not the guilt determination should be considered. In states which adopt the guilt-phase reforms that Congress decides are necessary and which provide a full and fair review of claims affecting only the penalty phase, the latter issues would not be second-guessed on federal habeas. Given our experience with federal court obstruction of the incentive arrangement in the Antiterrorism and Effective Death Penalty Act of 1996,[13] I also suggest that the authority to decide whether a state qualifies for the incentive be vested in the United States Attorney General, and not in the courts.

Thank you for your attention. I will be glad to answer any questions at this time and to work with the committee on any specific proposals for legislation.

13. See 28 U.S.C., Title 254.

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, REGARDING CAPITAL PUNISHMENT, WEDNESDAY, JUNE 12, 2002, SD-226, 9:00 AM.

Mr. Chairman:

Thank you for holding this important hearing regarding the Illinois Commission on Capital Punishment. Today, we will discuss the capital punishment system in Illinois, which has come under considerable scrutiny after the exoneration of 13 people who had been sentenced to death. In March of 2000, following highly critical media reports, Illinois Governor George Ryan declared a moratorium on all executions. The Governor also directed the formation of the Commission on Capital Punishment and charged it with suggesting reforms that would ensure fairness and accuracy in the administration of the death penalty. In April of this year, the Commission issued a report that recommended a number of changes to the capital punishment system in Illinois.

Opponents of the death penalty have pointed to the state of Illinois as a sign of a criminal justice system gone bad. However, a close look at the facts reveals that while there were indeed problems in some Illinois capital cases, the system is far from broken. Despite reports to

the contrary, many of the exonerated individuals have not been shown to be actually innocent and several of them were released due to procedural missteps.

Nevertheless, the prospect of the execution of an innocent person is unacceptable, and I am committed to preventing it. I want to assure my colleagues that I support due process and fundamental fairness for those facing capital charges. The finality of the death sentence requires extraordinary diligence, so that mistakes do not occur.

In addition to a discussion of the situation in Illinois, our hearing today provides the opportunity for a debate on the overarching question of whether the death penalty continues to be an appropriate punishment in the American system of justice. I believe that it is. Some crimes are so depraved and heinous that the imposition of a death sentence is warranted and necessary. Not only do I and other members of this committee support capital punishment, but most Americans do as well. According to a May 9, 2002, Gallup Poll, 72% of Americans favor the death penalty for persons convicted of murder.

During the 107th Congress, Chairman Feingold has

introduced S. 233, the National Death Penalty Moratorium Act of 2001, that would place a moratorium on executions by the Federal government and urge states to do the same, while a National Committee reviews the administration of the death penalty. I do not support these efforts to place a moratorium on the death penalty, and I do not believe that the circumstances in Illinois have any relevance on a Federal moratorium. There is absolutely no evidence to indicate that there is one innocent person awaiting execution for a Federal offense. The few cases in Illinois state courts, while troubling, do not bear on the Federal system.

The fact remains that the administration of the death penalty at both the Federal and state levels is more accurate than ever. There is not one documented case of the execution of an innocent person since the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), resulted in the reform of state death penalty statutes. In addition, DNA testing is now widely available to ensure the highest degree of accuracy. I have supported legislation in the past that would provide for post-conviction DNA testing in cases where a DNA test has the potential to exonerate the

defendant. Furthermore, funding for appointed defense counsel has increased in recent years, and reports by both Attorneys General Reno and Ashcroft found that there is no racial bias in Federal death penalty cases.

Both the Reno and Ashcroft reports detail the close scrutiny that capital cases receive at the Federal level. It is a system designed to ensure that those who receive the ultimate punishment are truly deserving. In 1995, the Department of Justice developed the death penalty protocol. This protocol requires United States Attorneys to submit for review all cases in which a defendant is charged with a capital offense, even if the U.S. Attorney does not recommend seeking the death penalty. These submissions are then reviewed by the Capital Case Unit in the Criminal Division, followed by another review by the Attorney General's capital case review committee. Recommendations are then made to the Attorney General, and he makes the final determination.

To prevent any bias, the review is performed without revealing the race or ethnicity of the defendant to anyone reviewing the case in Washington, including the Attorney General. By all accounts, this process is working and

minorities are not being targeted unfairly. At each stage of the review process, the death penalty is recommended for a higher percentage of whites than for blacks or Hispanics.

Death penalty critics often argue that despite this thorough process, there is an inherent racial bias because the percentage of minorities being charged for capital offenses is higher than that of the general population. However, as former Attorney General Reno noted, this argument holds for the entire criminal justice system. Unless we are willing to accuse both the Federal and state criminal justice systems of racial bias, it simply does not follow that the capital punishment system is discriminatory. In this context, it is important to note that the Reno report found that 70% of the victims of defendants charged with Federal capital crimes were minorities.

A Columbia University report known as the Leibman study is often cited as proof that capital punishment in this country is deeply flawed. This study, published in 2000, alleged that from 1973 to 1995, 70% of death penalty convictions were reversed on appeal. The implication is that 70% of the time, innocent people were sentenced to death. This study should be viewed carefully because during

the time period addressed by this study, the Supreme Court issued a series of retroactive rules that nullified a number of verdicts. These reversals were not based on the actual innocence of defendants, but rather were based on procedural rules.

I would also like to stress the difference between the terms "exoneration" and "actual innocence." Media reports often confuse the two. If a defendant is exonerated based on a procedural misstep, that person has not been proven innocent. Even if one were to accept the assertion that some of the exonerated individuals were actually innocent, this does not prove that innocent people have been executed. On the contrary, it would only prove that the system is working and that in cases where the evidence of guilt is insufficient, executions do not take place.

I would now like to address the report of the Illinois Commission on Capital Punishment. The Commission did not advocate abolishing the death penalty in Illinois but did make 85 recommendations concerning the imposition of the death penalty. Many of these recommendations are acceptable, and I would welcome their implementation at both the state and Federal levels. For example, the report calls

for increased training and support for trial judges that hear capital cases. Another recommendation would provide for the dissemination of case law updates to trial judges. The Commission also calls for further training of both prosecutors and defense lawyers and supports minimum qualification standards for defense counsel. Many states require defense attorneys to meet a certain level of qualification, and this is a positive development.

Unfortunately, many recommendations made by the Commission are problematic, and I would not support them at the Federal level or encourage their adoption at the state level. In fact, some of the recommendations severely restrict the use of the death penalty. Due to the fact that a majority of the Commission's members favor abolishing capital punishment, I cannot help but wonder if these recommendations are back-door ways to discourage the use of the death penalty.

For example, the Commission recommends the videotaping of all interrogations of potential capital defendants at police facilities. The underlying rationale is that the entire interview will be on record, and this will discourage police officers from engaging in inappropriate activities to

secure confessions. This recommendation would be very costly, would be impractical, and would not necessarily guard against abuse. Unless funding were provided, this requirement would be a high-priced mandate. Furthermore, it is often difficult for officers to know, at the early stages of an investigation, who might be a capital suspect. If investigators are still in the act of piecing the story together, they would have to videotape everyone they interview as a precaution. Additionally, the use of a videotape is open to abuse as well. If an officer were inclined to coerce a confession, there is nothing to prevent that officer from forcing the suspect to confess when the tape starts rolling.

The Commission also recommends that a statement of a homicide suspect that was not recorded should be repeated back to him on tape, so that his comments can be recorded. This recommendation is unwise. If a suspect unintentionally blurts out an incriminating statement on the way to the station, it is entirely possible that he will deny having made the statement when it is repeated back to him. At trial, a good defense attorney will no doubt use the one existing recording that disputes, rather than confirms, what

the officer heard.

Another recommendation that I cannot support would significantly reduce the offenses for which the death penalty is available. The Commission would limit capital eligibility to the murder of two or more persons, the murder of a police officer or firefighter, the murder of an officer or inmate of a correctional institution, murder involving the use of torture, and murder committed to obstruct the justice system. While I agree that the death penalty should apply in all of these cases, the Commission has excluded other crimes that deserve capital status. For example, the Commission has failed to include felony murder as a capital-eligible offense. Therefore, the death penalty would not be available even if the defendant murdered someone in the course of another felony, such as rape. Also, in many circumstances, the death penalty would not be available for the murder of one person. This recommendation inexplicably and unwisely restricts the use of death penalty, and it should be rejected.

Yet another of the Commission's recommendations would prohibit the use of the death penalty in cases where conviction is based upon the testimony of a single

eyewitness, without any corroboration. This suggestion is undoubtedly well-intentioned, but it should not be adopted because it interferes with the traditional role of the jury as the finder of fact. If the jury doubts the veracity of the statement and there is no other evidence to back up the claim, the jury may refuse to believe the testimony of the eyewitness. A similar recommendation would prohibit the use of the death penalty based on the uncorroborated testimony of an in-custody informant. Similarly, this recommendation would also interfere with the jury's role of determining the facts.

However, I understand the concern about in-custody informants and other witnesses whose trustworthiness is questionable. It would be perfectly reasonable to require a trial judge to issue a jury instruction that cautions jurors about reliance on the testimony of these witnesses. The instruction should not require witnesses to disregard the testimony. Rather, the instruction should make it clear that the decision to accept or reject the statement is entirely the jury's, but that this testimony should be viewed very carefully.

Mr. Chairman, I would like to make one last point about

capital punishment. It saves lives. A January, 2002, Emory University study examined murder rates in the United States since 1977, when executions resumed after a period of nine years. The study found that each execution prevents an average of 18 murders. This finding demonstrates that if we are really interested in preventing the death of innocent people, capital punishment should be part of our criminal justice system.

To be sure, we should implement appropriate safeguards and closely monitor the administration of the death penalty at both the Federal and state levels. We should ensure that innocent people are not convicted and certainly not executed. But we should not overreact at the Federal level to problems that are unique to the state of Illinois. It is important to keep in mind that the very formation of this Commission demonstrates that the people of Illinois are committed to the improvement of their capital punishment system. Furthermore, not one innocent person has been executed.

The death penalty is simply too important a tool to be abandoned. Capital punishment provides prosecutors with a crucial negotiating tool and also exacts punishment for the

most vile and heinous of crimes.

I welcome all of our witnesses today, and look forward to a spirited debate on this important matter.

Statement of Scott Turow
Before
The United States Senate Committee on the Judiciary's
Subcommittee on the Constitution

For the Hearing Entitled
"Reducing the Risk of Executing the Innocent: the
Report of the Illinois Governor's Commission on Capital
Punishment"
June 12, 2002

Summary
The witness, an author who has continued to practice law, illustrates some of his conclusions as a member of Governor George Ryan's Commission on Capital Punishment by reference to his experiences representing defendants in the post-trial phases of two different capital prosecutions in the 1990's. The witness asserts that because capital punishment is constitutionally limited to "the worst of the worst," capital cases by their nature are highly inflammatory, occasionally making reasoned deliberation by law-enforcement officers, prosecutors, judges and juries more difficult. Thus not only the finality of the penalty, but the highly-charged nature of the crime and the response it inevitably provokes counsel in favor of measures such as those proposed by the Illinois Commission designed to enhance evidentiary safeguards and to provide pre-trial review of the death penalty election. Finally, the witness calls attention to the Illinois Commission's unanimous conclusion that a higher degree of confidence in the outcomes in capital cases requires a significant increase in public funding, especially to insure that capital defendants are represented by qualified counsel with effective support.

Chairman Feingold and Members of the Subcommittee:

My name is Scott Turow. I am an author and an attorney.

Thank you for the extraordinary privilege of appearing before you to share my reflections related to my experience as a member of Governor Ryan's Commission on Capital Punishment. I am especially honored to testify in the same hearing with Governor Ryan, who has been a courageous and visionary Chief Executive for our state, and with my colleagues from the Governor's Commission, Matt Bettenhausen and Don Hubert. Membership on the Commission is one of the highpoints of my career at the bar. I am very proud of the work of the Commission, due not only to the thoroughness of our research and

deliberations, but also because of the extraordinary openness and patience with which the members reasoned with one another, notwithstanding many enduring differences, thus allowing us to reach consensus on the need for many reforms. It is a signal honor to appear here as one of the representatives of that distinguished group, whose individual biographies are attached as an Appendix to my statement.

I am also delighted to appear with Professor Lawrence Marshall of Northwestern University. Like Matt and Don, Larry is a cherished friend and a professional colleague with whom I worked for years as co-counsel in an extraordinary case.

I am sure that when I was appointed to the Commission some Illinoisans were startled to see someone whom they think of principally as a storyteller chosen to help deliberate about what is probably the gravest real-life problem in the law. Although I spend the majority of my time these days as a writer, I have always continued to practice. I have been a partner in the Chicago Office of Sonnenschein Nath & Rosenthal since 1986, when I left my first job as a lawyer as an Assistant United States Attorney in Chicago (a position to which I had been appointed by one of the Co-Chairs of our Commission, Thomas P. Sullivan, yet another dear friend.) When literary success freed me from some of the constraints other lawyers face, I began to devote a substantial portion of the limited time I spend in practice to *pro bono* matters. Thus, I spent the bulk of my hours as practicing lawyer in 1990's representing two defendants in the post-trial phases of two very different capital prosecutions. These activities do not make me a death-penalty expert by any stretch; many of my colleagues on the Commission had capital litigation experience far more extensive than mine. Nonetheless both cases were prolonged and intense and did a great deal to inform my views about what confronts us in creating the fair, just and accurate capital punishment system that Governor Ryan requested when he declared a moratorium on executions in Illinois and appointed the Commission. For purposes of today's discussion, these two cases provide convenient illustrations in helping me explain why I supported certain reforms our Commission recommended. I do so without attempting to speak for my colleagues who may have had very different reasons for reaching the same conclusions.

The Case of Cruz and Hernandez

1. Background

Because I was an Assistant United States Attorney from 1978 to 1986, before the re-enactment of the federal death penalty became effective, I had very little prosecutorial experience with capital cases. Notwithstanding that, in the fall of 1991 I agreed to take on the appeal of Alejandro Hernandez, the less-celebrated co-defendant of Professor Marshall's client, Rolando Cruz. Dubbed by the press "The Case That Broke Chicago's Heart," the murder of 10 year-old Jeanine Nicarico was a *causa belli* from the moment the crime was discovered on February 25, 1982. The outraged suburban community of Naperville, Illinois

rallied around Jeanine's parents who had endured the ultimate parental nightmare, returning from work to discover their daughter kidnapped and then two days later confronting the hideous news that her body had been discovered in a nearby nature preserve. Jeanine had died as result of repeated blows to the head, administered only after she had been blindfolded with adhesive tape and subjected to a variety of sexual assaults.

More than forty law enforcement officers joined a multi-jurisdictional task force organized to find Jeanine's killer and a $10,000 reward was offered. When those efforts, as well as a Special Grand Jury's investigation failed to yield results, the Nicarico case became a pivotal issue in the primary election for DuPage County State's Attorney conducted early in 1984. Although the sitting State's Attorney had declared six weeks before that there was "insufficient evidence" to return any indictments, Hernandez, Cruz and a third man Stephen Buckley were indicted on March 6, 1984, with the primary only days away.

The primary winner and eventually-elected State's Attorney, James Ryan (now the Attorney General of Illinois) proceeded to trial in January, 1985. Hernandez and Cruz were both convicted and sentenced to death. There was no physical evidence against either man—no blood, semen, fingerprint or other forensic proof tied either to the crime. Instead, the state's case had consisted solely of each defendant's statements, a contradictory maze of mutual accusations, whose verity and motives were in doubt from the start, given both the incentive of the reward money and the fact that Alex's IQ is about 75. By the time the case reached me in late 1991, Cruz's and Hernandez's original convictions and death sentences had been reversed by the Illinois Supreme Court due to "a deliberate and constitutionally unacceptable attempt by the prosecution to circumvent the strictures of *Bruton* and the confrontation clause," *People v. Cruz*, 121 Ill.2d 293, 333, *cert. denied*, 488 U.S. 869 (1988), but the men had been convicted yet again in separate capital trials, with Cruz re-sentenced to death, and Hernandez to 80 years.

The facts of these vexed cases resist convenient summary. Furthermore, any efforts I might make would inevitably reflect the ire of a still-impassioned advocate. Instead, I attach as a further Appendix a copy of the Illinois Appellate Court's opinion in Alex's case, *People v. Hernandez*, No. 2-91-0940, at 20 (1/30/95 unpublished)(hereinafter *Hernandez II)* in the hope that it will provide a more dispassionate version of the contentions of each side. To make a very long story much shorter, after heroic efforts by Professor Marshall, the Illinois Supreme Court again reversed Cruz's conviction on July 14, 1994. I argued Alex's appeal in December of that year before the Illinois Appellate Court, which reversed the case a month later on separate grounds. Cruz was retried in a bench trial in November, 1995 and acquitted, after a police officer admitted having given false testimony in earlier proceedings in the case in order to corroborate other officers. The case against Hernandez was dismissed shortly afterwards.

Accepting that my view of things is far from objective, let me nonetheless state what I regard

as the operative facts for purposes of the present discussion. My client was tried for his life three times and twice convicted of a crime of which he was clearly innocent. In 1985, after Hernandez and Cruz were first convicted, another little girl, Melissa Ackerman, was abducted and murdered about twenty miles away in a fashion so similar to the crime committed against Jeanine Nicarico that the Illinois Supreme Court ultimately determined in Cruz's second appeal that the Ackerman murder could be deemed evidence of *modus operandi*. Brian Dugan was apprehended for the Ackerman murder. In the course of plea-bargaining he confessed, in an attorney proffer, not only to the Ackerman killing, but to the Nicarico murder as well. As stated by the Illinois Appellate Court, "Dugan's statements were significantly corroborated by the evidence," *Hernandez II* at 20, including eyewitness testimony, physical evidence such as tire tracks where the body was found that matched Dugan's car, and the fact that Dugan knew a number of details of the crime never publicly revealed. The Illinois State Police investigated Dugan's confession and concluded he was the lone murderer of Jeanine Nicarico, and DNA tests in 1995 ultimately showed that Dugan—and Dugan alone—matched the DNA profile of Jeanine's sexual assailant.

Despite Dugan's confession, the DuPage County State's Attorney's Office persisted with these prosecutions for another ten years. I can again only be blunt in stating my personal view: those prosecutions were not conducted in good faith. After Cruz and Hernandez were freed, four police officers and three prosecutors were indicted for conspiracy to obstruct justice in the Cruz case, charges of which they were ultimately acquitted in a jury trial. In my view, all three of Alex's trials were characterized by police testimony that flouted reason, sometimes bolstered by prosecutorial misconduct. As but one of a catalog of possible examples, let me point to Alex's second trial, in which the state sought to overcome the lack of physical evidence by linking Alex to certain shoeprints discovered outside the Nicarico home. Ten different witnesses testified about the prints and a number of demonstrative exhibits were admitted. Testimony was then introduced that Alex, who stands 5'3", wore shoes about size seven. Finally, the state's police expert testified the prints in issue were "about a size 6." In truth, both the expert and the prosecutor who elicited his testimony knew and did not disclose to the defense that the shoeprints had been identified by the manufacturer as coming from girl's shoes and that the "size 6" testified to was the much smaller female, as opposed to a male, size. Explaining this astonishing due process violation in a capital case, the prosecutor (one of the men later indicted) offered varying explanations, the last of which was that disclosing these facts had "slipped my mind." See *Hernandez II* at 27-8.

2. The Lessons I Took

As the Chairman and the Members of the Subcommittee are undoubtedly aware, Cruz and Hernandez are but two of thirteen men in Illinois who were exonerated after being placed on death row. Studying those cases and bearing my experience in *Hernandez* in mind, I have taken certain lessons, although they may well be better regarded as the observations of a

writer, rather than a lawyer. In *Zant v. Stephens*, 462 U.S. 872, 878 (1983), the U.S. Supreme Court made clear that the class of persons subject to capital punishment must be far narrower than those merely convicted of first-degree murder. In practice, capital punishment is reserved for "the worst of the worst," those crimes which most outrage the conscience of the community. Paradoxically, that fact makes for the system's undoing, because by its nature, capital punishment is invoked in cases where emotion is most likely to hold sway and where rational deliberation is most often problematic for investigators, prosecutors, judges and juries. Thus, not only the finality of the penalty, but the inflammatory nature of the crimes requires that special strictures be in place to ensure the accuracy of the judgments arrived at.

Bearing the experience of many cases in mind, our Commission made a number of recommendations aimed at safeguarding against the most volatile or dubious elements of our evidentiary system:

We recommended 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.
In light a growing body of scientific research relating to eyewitness identification, we proposed a number of reforms regarding such testimony, including significant revisions in the procedures for conducting line-ups.
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.

We 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.
We recommended a number of measures expanding a capital defendant's access to DNA testing, both before and after trial.

The highly emotional nature of these cases can also occasionally become the by-way to over-reaching by prosecutors or police. Such overreaching occurred in many of the thirteen exonerated cases, but those cases remain a small subset of capital prosecutions. In my experience, the overwhelming majority of prosecutors and law-enforcement officers seek to be fair. But special challenges are presented by highly visible cases, especially ones where an outraged community demands results and where the thought of someone perceived as a vicious criminal going free is nigh on to intolerance to those whose job it is to safeguard the public. The high rate of reversals in capital prosecutions—about 65% in Illinois, which is in line with national figures derived in a recent study—is due to a number of factors, but one I venture to say, after reading hundreds of such opinions, is the frequency with which prosecutors and law-enforcement officers feel obliged to push the envelope. One of the most serious issues of political theory surrounding the death penalty is whether we are wise to

place the machinery of death in the hands of any human being, when the inherent nature of the crimes so tempts bad impulse.

Our Commission proposed that a state-wide body, composed of the state Attorney General, three prosecutors and a retired judge, be created in Illinois; that panel's concurrence would be required before any of Illinois 102 State's Attorneys could seek capital punishment. The principal purpose of this proposal was to ensure that the law is applied uniformly throughout the state so that a capital sentence is not determined solely by the venue in which a murder occurred. Yet a review mechanism also provides further assurance that the extraordinary power to seek death is being employed in a dispassionate manner.

As a final thought about the highly-charged nature of capital cases, I want to address the role of victims. When I was appointed to the Commission, I was very conscious of the fact that because I never prosecuted a capital case, I did not have a ground-level understanding of the anguish and perspectives of a murder victim's surviving family and loved ones. Along with many of my colleagues, I was eager to hear testimony from those persons. Survivors of course do not have uniform points of view anymore than Senators do. But certain things struck me in the hours we spent with victims' families. First, losing a loved one to a murder is unlike any other loss—that is because the death is the result not of something as fickle and unfathomable as disease, or as random as a destructive act of nature. Instead it is the product of the conscious choice of another human being and is particularly intolerable for that reason. Second, although there is much talk of "closure" in connection with the death penalty, victims' families seemed to be driven by other emotions to call for execution of the killer. One particularly strong impulse is the victim's family's need to feel certain that other families will not suffer as they have; were the murderer to kill again it would render even more meaningless their loved one's death. A second desire is for a sense of equivalence. Again and again victims' families expressed frustration and outrage over the fact that they can never again share birthdays or holidays with the person they've lost, while a murderer, even if confined for life, will enjoy those opportunities.

Speaking solely for myself and in no way representing the views of others on the Commission, I believe our approach to the surviving loved ones of a murdered victim needs more careful reflection. I came of age as a prosecutor in a different era, when crime victims were not at the forefront of the criminal process. As late as 1987, the United States Supreme Court held in *Booth v. Maryland*, 482 U.S. 496 (1987) that it violated the Eighth Amendment to offer evidence in a capital sentencing of the impact of a murder on the survivors, deeming such information an invitation to arbitrariness and irrelevant to the only proper issues, the character and blameworthiness of the defendant and the nature of the offense. By now, the national Victim Rights movement has reversed that result. Survivors now have the right in many jurisdictions to appear before the sentencer, and to a great extent survivors even claim a form of "ownership" over the process. In the *Hernandez* case I was repeatedly struck by the irony that Brian Dugan was sentenced to natural life for his killing of Melissa Ackerman,

while the sentence visited on Cruz and Hernandez for the nearly-identical Nicarico murder was death. Dugan received natural life because the Ackerman family preferred a certain result and quick resolution, while one of the powerful motives for seeking death for Jeanine's killers was the staunch views of the Nicarico family, who rallied public support. A system in which persons live or die because of the character of the survivors is not a rational one. Nor does it aid reasoned deliberation to have the angriest people at center-stage of the process of delivering justice. Victims deserve a system that recognizes their legitimate needs and treats them with respect, that provides meaningful punishment that eliminates any temptation for victims to resort to self-help and which does not depreciate the death of their loved ones, especially by allowing a convicted murderer to kill again. But I am dubious that the justice system ought to be charged with assuaging victims' sense of irretrievable loss. We were fortunate on our Commission to have as a member Roberto Ramirez, who had lost his father to a murder which his grandfather in turn avenged. He was very much in tune with the needs of the surviving loved ones and helped turn our attention in that direction. We made no formal recommendations about meeting the victim's loved-ones' needs, but the Illinois Criminal Justice Information Authority contributed important research papers to the Commission, emphasizing that victims often suffer from a lack of both compassionate services and reliable communication about developments in the case as it proceeds through the justice system. Meeting those needs, rather than a providing a determinative role in the death penalty process, may be better answers to their needs to come to emotional terms with the murder.

The Case of Christopher Thomas

1. Background

Following the conclusion of the Hernandez case, several younger lawyers at Sonnenschein and I assumed the *pro bono* representation Christopher Thomas in 1996, accepting the case from the Capital Litigation Division of the Illinois Appellate Defender's Office. Chris had been convicted of the first-degree murder of Rafael Gasgonia on October 25, 1994. The murder took place behind Mr. Gasgonia's place of employment during the course of an attempted armed robbery, which had resulted first in a struggle between Chris, his two accomplices and the victim, and ultimately in the shooting of Mr. Gasgonia. After a sentencing hearing in which Chris adamantly proclaimed his innocence, despite three prior confessions, he was sentenced to death on June 27, 1995. The Illinois Supreme Court affirmed his conviction and sentence on September 18, 1997. *People v. Thomas*, 178 Ill.2d 215, 687 N.E.2d 892 (1997), *cert.denied*, 118 S.Ct. 2375 (1998)

The *Thomas* case was poles apart from *Hernandez* in virtually every critical aspect. For one thing, Chris's numerous confessions and the well-corroborated statements of his co-defendants left me with few concerns about my client's innocence, notwithstanding his

protests at sentencing. Secondly, I was privileged throughout to deal with prosecutors who conducted themselves with the highest degree of professionalism. Lake County State's Attorney Michael Waller, who ultimately became my colleague on the Commission, and his Felony Chief, Michael Mermel, defended the Thomas conviction vigorously; but they also endured my advocacy with patience and attention, and remained open throughout to reconsidering the legal and factual bases of the case.

Again being blunt, Chris was essentially on death row for the crime of having bad lawyers. Chris had been defended by two local private attorneys who were under contract to the Lake County Public Defender's Office. They were each paid $30,000 per year to defend 103 cases, an average of less than $300 per matter. By terms of the contract, two cases had to be first-degree murders, and another one a capital case. One lawyer had no experience in capital trials; the other had been stand-by counsel one time for a *pro se* capital defendant.

Chris got all the defense you would expect for $600. His lawyers clearly regarded the case a clear loser at trial and, given its relatively unaggravated nature, virtually certain to result in a sentence other than death. When state witnesses omitted mention that the shooting had taken place in the course of a struggle, the defense lawyers failed to impeach them with their prior signed statements to that effect. Inexperienced in mitigation investigations, the lawyers had uncovered only a sliver of the background information ultimately developed by the Capital Litigation Division and our office, and the lawyers' limited efforts had been hobbled by the fact that one of them had previously prosecuted the chief mitigation witness, Chris's aunt, who, not surprisingly, ultimately refused to cooperate with her former antagonist. (Neither lawyer thought that antagonism merited withdrawal, which would have obliged the lawyer to take on another capital case.) And finally, despite the clear mandate of Estelle v. Smith, 451 U.S. 454 (1980) and Illinois law protecting the confidentiality of mental health records, Chris's lawyers had failed to object when the state introduced Chris's prior court-ordered psychological examinations, which became the cornerstone of the state's case in aggravation.

This latter legal defect ultimately became the basis for overturning Chris's sentence when Judge Barbara Gilleran-Johnson conducted a hearing on the lengthy post-conviction petition we had filed on Chris's behalf. After negotiations with State's Attorney Waller, in which he admitted being struck by the new mitigation evidence showing that Chris had endured an exceptionally deprived and abusive childhood, an agreement was reached that rather than execution, Chris's case was more appropriately resolved by a prison term of 100 years, which gives Chris the prospect of release from the penitentiary at age 71. Chris was re-sentenced on December 15, 1999. At that time, although there was no anticipation of it, Chris Thomas for the first time publicly acknowledged his responsibility for Rafael Gasgonia's murder and wept as he apologized to the Gasgonia family.

2. Lessons

From the Thomas case and dozens of similar cases, I took a paramount lesson, one which the members of our Commission arrived at unanimously: if we are to have capital punishment, we must also be willing to pay for it. An entire chapter of our report to the Governor is dedicated to funding issues. In Illinois, our Supreme Court and our legislature have recently adopted significant measures to fund capital litigation, to create a qualified capital bar, and to enhance training of capital lawyers and judges. We supported all of these changes and in a number of instances recommended expanding them or making permanent those provisions currently subject to sunset. As tax revenues dwindle, there will undoubtedly be pressure to cut down on costly protections for capital defendants, but our shared sense of justice as Americans will never be satisfied by providing a $600 defense to a person whose life is at stake. If we are serious as a nation about restricting the chances of executing the innocent, we must start by ensuring that every capital defendant has representatives skilled in death penalty litigation, who are supported in turn by adequate funding for experts, investigators and forensic resources. Put bluntly again, if we are not prepared to do this the right way, we clearly should not do it at all.

Conclusion

Let me once more thank you, Mr. Chairman, and the Members of the Subcommittee for the opportunity to share my views with you. The death penalty debate in the United States has gone on literally for centuries and is not likely to end soon. The decisions of the United States Supreme Court have, in essence, recognized the right of the American public and its elected representatives to decide whether or not capital punishment should be imposed in each jurisdiction. In my observation, most Americans tend to reflect on the question only in terms of whether they deem the death penalty moral or immoral, and generally know less about the actual operation of the capital system. One potential advantage of a national death penalty moratorium is that it can provide an incentive for national contemplation in which Americans might feel motivated to seek out more information. As one who does not regard capital punishment as part of an alien morality, I have found the most challenging questions arising at the level of policy, which is where I believe our debate needs to be more focused. As a nation we need to decide if the costs of capital punishment—the staggering financial toll of litigation, the consumption of limited court resources, the many disparities in the system's results, and the enduring risk of executing the innocent—are worth the powerful denunciation of ultimate evil that capital punishment is meant to trumpet. Toward that end, the deliberations of this Committee and the important public forum you have provided today help foster debate on a more informed basis.

SCOTT TUROW

My name is Druanne White. I am the elected Solicitor (State's Attorney) of the Tenth Judicial Circuit in South Carolina. I have been a prosecutor since 1988. I have personally prosecuted approximately 170 homicides.

Bias of the Commission

I have read the Report of the Governor's Commission on Capital Punishment dated April 15, 2002. I would first like to comment on the membership of the Commission. Out of the seventeen Commission Members, only one was an active prosecutor. There were eleven attorneys in private practice. This obviously means that these eleven are criminal defense attorneys, not prosecutors. Despite the fact that the Commission made numerous recommendations about law enforcement techniques, there was no active law enforcement official on the committee. The Commission was supposedly "balanced" because some of the criminal defense attorneys had formerly been prosecutors. In the early 1990s many Democrats switched to the Republican Party. Would anyone claim that a Commission made entirely of Republicans, some of whom were former Democrats, was balanced? Nor is this Commission balanced just because some of the criminal defense attorneys used to be prosecutors.

Page i of the Report's Preamble states "All members of the Commission believe ... that the death penalty has been applied too often in Illinois since it was reestablished in 1977." On Page iii, the Report states "a narrow majority of the Commission would favor that the death penalty be abolished in Illinois". I strongly urge you to recognize that this report is far from being balanced. For instance, it is interesting to note that the report recommends ridiculous limits to eyewitness and jailhouse informant testimony. This

same report recommends, however, that a defendant be able to make a statement on his own behalf during the aggravation phase, without being subject to cross-examination.

Balancing Interests

I urge you to balance victims' rights, the community's safety and the safety of our prison guards with the rights of the defendants. On June 10, 2002, Jeff Jacoby wrote an article entitled "When Death Saves Lives". This article noted that the United States had a virtual national moratorium on the death penalty from 1965 to 1980. During this same period, the annual murder rate rose from 9,960 to 23,040. Mr. Jacoby noted that in the 1990s homicide rates fell in most states, but they fell the most in states that use capital punishment. He stated that the Texas murder rate was 15.3 per 100,000 in 1991. In 1999, the Texas murder rate had fallen to 6.1 per 100,000, a drop of 60%. Texas executes more murderers than any other state. Harris County, Texas, had the most aggressive death penalty prosecutions in Texas. Since executions resumed in 1982, Mr. Jacoby noted that murders have decreased by 72% in Harris County. Mr. Jacoby concludes, "We've been down the moratorium road before. We know how that experiment turns out. The results are written in wrenching detail on gravestones across the land."

Current Safety Measures

There is already intense scrutiny by the courts in death penalty cases. In South Carolina, a capital defendant is entitled to two attorneys, both of whom must meet certain qualifications. The State provides attorney fees of $25,000 and investigation fees of $20,000. Both may be increased upon petition of the court. The defense attorneys are excused from all other trial work for ten days before the death penalty trial. Notice of

evidence that the State intends to use in aggravation must be provided to the defense before trial. The State must file notice of its intent to seek the death penalty thirty days before trial. The jury must unanimously recommend death penalty. If it does not, the defendant is given a life sentence. Death penalty cases are appealed straight to the South Carolina Supreme Court. The defendant is appointed attorneys for appeals and post conviction relief hearings. To my knowledge, no innocent person has been put to death in South Carolina or in the United States in the post-Furman era. Reliable technology such as DNA ensures even more today than in the past that innocent people are not executed. Although many death penalty cases are reversed, most are reversed for technical reasons.

Commission's Proposals

I agree with forty-eight of the Report's proposals. I have no opinion on twelve. I disagree with twenty-five. For instance,

1) Recommendation 4 requires that all custodial interrogations of a suspect be videotaped. This would require an employee to transcribe each tape. Some tapes could last for hours. A prosecutor would then have to review each tape. Additionally, many people are reluctant to talk on tapes. If any inadmissible information is contained in the tapes, the tapes would have to be redacted. If a person is going to give a false confession, what difference does it make if it is on tape? The defendant will say he was coerced before the tape began.
2) Recommendation 28 reduces the current eligibility factor list from twenty to five. The recommended list excludes a murder committed during a felony. It further excludes the murder of a child.

3) Recommendation 30 establishes a mandatory review committee. This usurps the authority of the local prosecutor and creates another level of bureaucracy.

4) Recommendation 46 permits discovery depositions in capital cases. This would cause tremendous expense and delay.

5) Recommendation 69 prohibits a conviction based upon the testimony of a single eyewitness. What if the defendant kidnaps the victim and holds the victim for a period of one week? Would that witness not be qualified to identify the defendant? What if the eyewitness knew the defendant? Would that witness not be qualified to identify the defendant? Not all eyewitnesses view the defendant for just a few seconds. Recommendation 69 also prohibits the imposition of the death penalty on the uncorroborated testimony of an in-custody informant. Why would an in-custody informant be any less reliable than a witness who was not in jail? What if the defendant stands up in the jail cafeteria and admits to the crime? Would the State be prohibited from introducing the testimony of all of the inmates that were in the cafeteria?

I will be happy to answer any questions about any of the committee's proposals.