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# EFFORTS TO IMPROVE THE ILLINOIS CAPITAL PUNISHMENT SYSTEM: WORTH THE COST?

Thomas P. Sullivan \*

## I. INTRODUCTION

It has been over five years since the Illinois Governor's Commission on Capital Punishment made its eighty-five recommendations on ways in which the state's capital punishment system could be made more "just, fair and accurate,"<sup>1</sup> and more than four years since Governor George Ryan emptied death row of the 167 men and women awaiting execution.<sup>2</sup> Later in 2003, the Illinois General Assembly enacted, and the new governor signed, legislation<sup>3</sup> that adopted several of the commission's key proposals and established the Capital Punishment Reform Study Committee.<sup>4</sup> The committee is to report annually to the General Assembly and the Governor about the efficacy of the legislation and related matters.<sup>5</sup>

In the summer of 2004, I wrote about the chief reforms recommended by the commission and those that were and were not ad-

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1. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 1 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/Commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/Commission_report/complete_report.pdf) [hereinafter GOVERNOR'S COMM'N].

2. See Jeff Flock, 'Blanket Commutation' Empties Illinois Death Row, CNN.COM, Jan. 13, 2003, <http://edition.cnn.com/2003/LAW/01/11/illinois.death.row>; see also *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546, 554, 560 (Ill. 2004) (upholding the governor's exercise of clemency powers).

3. See 20 ILL. COMP. STAT. ANN. 3929/99 (West Supp. 2006).

4. See *id.* 3929/2 (establishing the Capital Punishment Reform Study Committee).

5. *Id.*

dressed in the new legislation.<sup>6</sup> Now that three years have passed, a current report on the status of reforms of the Illinois capital punishment system is in order.<sup>7</sup>

## II. THE USES OF CAPITAL PUNISHMENT IN ILLINOIS

It is helpful to look first at certain information about how the death penalty system has operated in Illinois since Governor Ryan commuted all the death sentences in January, 2003.<sup>8</sup>

### A. *Death Sentences Imposed—2003 to 2006*

From January 2003 until December 31, 2006, ten murder cases have been tried in Illinois in which the defendants were found guilty and a death sentence imposed. Five were tried in Cook County, which includes Chicago, and one each in the “downstate” counties of Coles, Lee (change of venue from Stark), Livingston, St. Clair (change of venue from Jefferson), and Will. The status of these cases as of February 20, 2007 was as follows:

- Five have been affirmed by the Illinois Supreme Court. Two certiorari petitions were denied by the United States Supreme Court, and three certiorari petitions are anticipated.<sup>9</sup>

- Two are on direct appeal to the Illinois Supreme Court and are not yet decided.<sup>10</sup>

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6. See Thomas P. Sullivan, *Preventing Wrongful Convictions—A Current Report from Illinois*, 52 DRAKE L. REV. 605 (2004).

7. This article contains my personal, individual views and is not intended to express the views of any other person or organization.

8. Illinois still has a moratorium on executions in effect, but there is no moratorium on seeking and obtaining new death sentences. See Press Release, Illinois Government News Network, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectID=3&recnum=359> (announcing a moratorium on executions in Illinois).

9. See *People v. Urdiales*, No. 98996, 2007 WL 495282, at \*56 (Ill. Feb. 16, 2007); *People v. Harris*, No. 98942, 2007 WL 289507 at \*27 (Ill. Feb. 1, 2007); *People v. Sutherland*, 860 N.E.2d 178, 240 (Ill. 2006); *People v. Thompson*, 853 N.E.2d 378, 409 (Ill. 2006), cert. denied, No. 06-7013, 2007 WL 559932 (Feb. 26, 2007); *People v. Mertz*, 842 N.E.2d 618, 671 (Ill. 2005), cert. denied, 127 S. Ct. 47 (2006).

10. *People v. Bannister*, No. 100983 (Ill.) (on file with author); *People v. Runge*, No. 103529 (Ill.) (on file with author).

- Three are pending in trial courts on post-trial motions.<sup>11</sup>

The number of capital sentences has dropped significantly in Illinois. The ten death sentences in the four years 2003 through 2006 is the same number imposed in Illinois during 2000 alone.<sup>12</sup>

### B. *The Resolution of Capital-Certified Cases in 2006*

During 2006, Illinois trial courts resolved cases involving sixty-one defendants who were charged in sixty-six indictments for first degree murder in which the State's Attorney had filed a certificate under Illinois Supreme Court Rule 416 that the state intended to seek the death penalty.<sup>13</sup> The results may be summarized as follows:<sup>14</sup>

- Three defendants received the death penalty.
- Four defendants were acquitted at trial of all charges. Four other defendants were acquitted at trial of the first degree murder charges, but found guilty of lesser, non-capital felonies.
- Six defendants pled guilty to non-capital felony offenses.
- The other forty-four defendants were convicted of first degree murder at trial or by pleas of guilty, and sentenced to life imprisonment or a term of years. In half of these cases, the prosecutor withdrew the capital certification.<sup>15</sup>

### C. *Observations on the Numbers*

There is sparse data from which to draw solid conclusions about the effect that the reforms enacted by the Illinois General Assembly have had on the state's capital punishment system. However, the foregoing analysis raises concerns about the fre-

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11. *People v. Baez*, No. 98911 (Ill., Cook County) (on file with author); *People v. Banks*, (Ill., Cook County) (on file with author); *People v. Nelson* (Ill., Will County) (on file with author).

12. See E-mail with attached data from Research Coordinator, Illinois Coalition to Abolish the Death Penalty to author (Feb. 15, 2007, 17:03 CST) (on file with author).

13. Three defendants were charged in multiple indictments. Prosecutors have 120 days from arraignment to certify capital-eligible homicide cases for capital punishment unless the trial judge extends the time for good cause shown. See Ill. Sup. Ct. R. 416(c).

14. All figures in this section are on file with the author.

15. In other cases, the capital certifications were not withdrawn, and the defendants were found guilty of first degree murder but were found not eligible for capital punishment or the death penalty was not imposed in the sentencing phase.

quency with which capital certifications were filed by Illinois prosecutors, which in turn implicates the standards they are using when deciding whether to seek the death penalty. Consider the following:

- Less than five percent of the defendants were given the death penalty in capital-certified cases.
- The defendants were acquitted of first degree murder charges in eight cases, thus making them ineligible for the death penalty, so that there were five more acquittals of first degree murder than death sentences imposed.
- Ten defendants were convicted of lesser, non-death eligible crimes, often with agreement of the prosecutor. Eight of these defendants received sentences of ten to fifteen years.

These results raise several serious questions in mind: Why were so many of these cases certified for capital punishment in the first instance? What criteria were used by the state's attorneys in the decisionmaking process?<sup>16</sup> What public policy was served by spending money, time, energy, angst and emotion as a result of certifying this large number of cases for capital punishment, when death sentences were imposed against only three defendants, who will engage in costly litigation in state and federal courts for the next decade? If their death penalty judgments are eventually affirmed, and executive clemency is denied,<sup>17</sup> they will not be executed until a decade or so after their crimes were committed.

It is not my intention to impugn the good faith or integrity of our state's attorneys, but rather to question the wisdom of their charging decisions.

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16. At the beginning of 2007, there were capital certified cases pending against 151 defendants in Cook County, and against sixteen downstate. See ILLINOIS COALITION TO ABOLISH THE DEATH PENALTY, 2007 ANNUAL REPORT 35-37 (2007), available at <http://www.icadp.org/2007%20Annual%20Report.pdf> [hereinafter ICADP REPORT]; E-mail from Executive Director, ICADP, to author (Apr. 9, 2007, 12:26 CST) (on file with author).

17. Under the Illinois Constitution, the governor has the power to commute sentences. ILL. CONST. art. V, § 12.

### III. THE CURRENT STATUS OF THE MAJOR REFORMS PROPOSED BY THE ILLINOIS GOVERNOR'S COMMISSION

#### A. *Electronic Recording of Custodial Interrogations of Arrested Homicide Suspects*

The Illinois General Assembly accepted the commission's recommendation that in potential capital cases, police questioning of suspects who are in custody must be recorded electronically, from the *Miranda* warnings to the end of the sessions, and that unrecorded statements are presumed inadmissible.<sup>18</sup> The statute contains various exceptions. For example, the presumption would not apply where the suspect refused to cooperate if recorded, or the recording device failed to operate properly.<sup>19</sup> The state may overcome the presumption of inadmissibility if it shows, by a preponderance of the evidence, that the statement was voluntarily given and is reliable.<sup>20</sup>

At the outset, many officers were skeptical, and some downright antagonistic, to the recording mandate. But as they gained experience and realized how favorable the results are for law enforcement, they became comfortable with being recorded. Most Illinois detectives have now come to agree—as do many others throughout the country—that electronic recordings are a powerful investigative and prosecutorial tool and they enthusiastically endorse the practice for a variety of reasons. For example, by recording interviews beginning to end, they put an end to claims that *Miranda* warnings were not given or were brushed aside, that police employed inappropriate tactics or coercion, and that the officers are misstating what the suspect said or did. Defense lawyers confirm that recordings “keep the police honest” by preventing rogue officers from using improper tactics or misstating what occurred. They also have been used to convince prosecutors not to indict by illustrating suspects' sincere, believable denials and exculpatory explanations, and false accusations by alleged accomplices.

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18. See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West Supp. 2006); GOVERNOR'S COMM'N, *supra* note 1, at 24–28.

19. See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West Supp. 2006).

20. See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West Supp. 2006).

Like instant replays in sporting events, recordings of station-house questioning sessions assure both suspects and police that whatever took place will be accurately recorded and repeated and will provide a reliable basis for prosecutors', judges', and juries' decisions. These recordings have become so successful among law enforcement officers in Illinois that some departments have begun to record custodial interviews in felony investigations even though they are not mandated by the statute, which applies only to homicides.

There is a clear movement by law enforcement agencies throughout the United States to adopt the practice of recording custodial interrogations in felony investigations. A number of states require recording custodial interviews of suspects in major felony investigations, some by statute,<sup>21</sup> and some as a result of court rulings.<sup>22</sup> In addition, my associates and I have identified almost five hundred police and sheriff departments, located in every state, that have voluntarily adopted the practice.<sup>23</sup> Experienced detectives and supervisors from each department have told us of their enthusiastic support for the practice.<sup>24</sup>

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21. See, e.g., D.C. CODE §§ 5-116.01, .03 (Supp. 2006); ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (Supp. 2006); N.M. STAT. ANN. § 29-1-16 (West Supp. 2006); WIS. STAT. ANN. § 972.115 (West 2007).

22. See *Stephan v. State*, 711 P.2d 1156, 1161–62 (Alaska 1985); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533–34 (Mass. 2004); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); see also N.J. CT. R. 3:17 (requiring officers to record interrogations for certain crimes). Many other state reviewing courts have noted the benefits of recording custodial interviews. See, e.g., *People v. Raibon*, 843 P.2d 46, 49 (Colo. Ct. App. 1992); *State v. James*, 678 A.2d 1338, 1360 (Conn. 1996); *Smith v. State*, 548 So.2d 673, 673–74 (Fla. Dist. Ct. App. 1987); *State v. Kekona*, 886 P.2d 740, 745–46 (Haw. 1994); *Stoker v. State*, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992); *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001); *State v. James*, 858 P.2d 1012, 1018 (Utah Ct. App. 1993); *State v. Kilmer*, 439 S.E.2d 881, 893 (W. Va. 1993); *In re Jerrell C.J.*, 699 N.W.2d 110, 120–23 (Wis. 2005).

23. See THOMAS P. SULLIVAN, DEPARTMENTS THAT CURRENTLY RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS (2007), [http://www.jenner.com/files/tbl\\_s18News/RelatedDocuments147/2959/ListofDepartments.pdf](http://www.jenner.com/files/tbl_s18News/RelatedDocuments147/2959/ListofDepartments.pdf).

24. See THOMAS P. SULLIVAN, NW. UNIV. SCH. OF LAW, (CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6–17 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>; Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128–29 (2005); Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interview, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175, 175, 178 (2006); Thomas P. Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, FED. LAW., September 2006, at 44, 45.

A cautionary note is in order. Although funds were provided by the Illinois General Assembly for training and equipment,<sup>25</sup> a major concern that Illinois law enforcement officials have expressed relates to other unfunded costs, including those required for transcribing electronic recordings into typewritten form and for storage. Therefore, provisions for funds to pay for equipment, training of officers in best practices, soundproof rooms, transcription of recordings, and storage of tapes and discs should accompany a statutory requirement of recording. Whatever these costs may be, far greater savings will result from conservation of officers' time in testifying as to what occurred during unrecorded sessions, prosecutors' time in defending pretrial motions to suppress, judges' time in hearing and deciding such motions and related appeals, trial time for all concerned owing to increased pleas of guilty when confessions and damaging admissions are recorded, and avoidance of the costs of defense and potential damage awards in civil rights cases.<sup>26</sup>

One other area related to this topic is the advisability of standard jury instructions on the methods that police officers are and are not permitted lawfully to use during custodial interrogations. Some examples are: promises that in exchange for a confession the suspect will be given psychiatric help<sup>27</sup> or that the suspect will obtain leniency in sentencing;<sup>28</sup> misrepresenting the evidence that establishes or indicates the suspect is guilty;<sup>29</sup> and using profanity, "street talk," or threats of violence. These instructions will afford assurances to law enforcement personnel that they may continue to use interview techniques that courts have sanctioned, while at the same time explaining the methods that may not properly be used under the United States Constitution and state law.

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25. See 20 ILL. COMP. STAT. ANN. 3930/7.5 (West Supp. 2006); 50 ILL. COMP. STAT. ANN. 705/10.3 (West 2005).

26. See, e.g., Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 403-04 (2005).

27. See *People v. Shaw*, 536 N.E.2d 849, 850-52 (Ill. App. Ct. 1989).

28. See *People v. Hartgraves*, 202 N.E.2d 33, 36 (Ill. 1964); *People v. Pugh*, 100 N.E.2d 909, 914 (Ill. 1951); *People v. Johnson*, 674 N.E.2d 844, 847-49 (Ill. App. Ct. 1996). *But see* *People v. Heide*, 135 N.E. 77, 79 (Ill. 1922); *People v. Ruegger*, 336 N.E.2d 50, 53 (Ill. App. Ct. 1975).

29. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *United States ex rel. Hall v. Dir., Dep't of Corr.*, 578 F.2d 194, 196 (7th Cir. 1978); *People v. Melock*, 599 N.E.2d 941, 953 (Ill. 1992); *People v. Martin*, 466 N.E.2d 228, 234-35 (Ill. 1984). *But see* *People v. Stevens*, 141 N.E.2d 33, 37 (Ill. 1957); *People v. Payton*, 462 N.E.2d 543, 545-46 (Ill. App. Ct. 1984).



## B. *The Eyewitness Identification Pilot Program*

With the availability of DNA in many cases, there is ever-growing evidence that flawed eyewitness identification procedures have led to an alarming number of wrongful convictions.<sup>30</sup> This led the governor's commission to make a number of fundamental recommendations regarding eyewitness identification procedures involving lineups and photo spread procedures.<sup>31</sup> The Illinois General Assembly adopted the proposed requirement that the administrator of the identification procedure give eyewitnesses instructions in advance that the suspect may not appear in the array, that the witness is not obligated to make an identification, and that the witness should not assume the administrator knows which person is the suspect in the case.<sup>32</sup> The legislation also provides that all lineups shall be photographed or otherwise recorded, that the photographs shall be disclosed to the defense, and that all photographs of suspects shown to an eyewitness during a photo spread shall be disclosed to the defense.<sup>33</sup>

With respect to procedures in conducting lineups and photo spreads, the commission recommended that when practicable the administrator be "blind," that is, "the person who conducts the lineup or photospread [sic] should not be aware of which member of the lineup or photo spread is the suspect."<sup>34</sup> Unfortunately, the legislature has not adopted this recommendation.

The commission also recommended that instead of the use of customary simultaneous procedures—in which the administrator

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30. See, e.g., Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 787 (1995) ("Mistaken identification is the single largest factor contributing to false convictions."); see also Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005) (noting that between 1900 and 1983 there were 136 known cases of eyewitness misidentification in the United States); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 244 (2006) ("[S]tudies have shown that eyewitness identifications are mistaken more than 58% of the time, whereas less than 1% of DNA matches turn out to be erroneous." (citation omitted)).

31. See GOVERNOR'S COMM'N, *supra* note 1, at 8–9, 31–40 (suggesting a problem with eyewitness identification and outlining solutions in Recommendations 10–15).

32. 725 ILL. COMP. STAT. ANN. 5/107A-5(b) (West 2006); see GOVERNOR'S COMM'N, *supra* note 1, at 34 (suggesting in Recommendation 11 that an eye witness should be told that he or she is not expected to make an identification).

33. 725 ILL. COMP. STAT. ANN. 5/107A-5(a) (West 2006); see GOVERNOR'S COMM'N, *supra* note 1, at 39–40 (suggesting in Recommendation 15 that police should videotape lineup procedures when possible).

34. See GOVERNOR'S COMM'N, *supra* note 1, at 32–33.

shows the witness all the persons in the lineup or all the photos in the photo spread at the same time—"a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time, and makes a decision ("that is the perpetrator" or "that is not the perpetrator") regarding each person before viewing another lineup member or photo."<sup>35</sup> This recommendation was qualified by a requirement that sequential procedures be "double-blind," that is, neither the witness nor the administrator know the identity of the suspected perpetrator. Controlled studies conducted in lab settings have shown that this system results in fewer mistaken identifications of fillers, that is, persons known not to be the perpetrator.<sup>36</sup> The explanation is that when using the traditional simultaneous viewing methods, witnesses tend to make relative judgments by selecting the person or photo that most closely resembles the witness's memory of the perpetrator. Whereas when viewing one-by-one, witnesses tend to make individual judgments as to each person or photo before going to the next, which requires the witness to respond based solely on the witness's memory as to each person shown, thus minimizing the risk of selections being made on less rigorous criteria.

Rather than adopting the commission's recommendation, the General Assembly funded a comparative pilot program in three police departments, conducted "consistent with objective scientific research methodology," to assess the relative effectiveness of the sequential procedure.<sup>37</sup> Departments were selected for the test in Chicago, Joliet, and Evanston. The report of the program,<sup>38</sup> an-

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35. GOVERNOR'S COMM'N, *supra* note 1, at 34–37 (suggesting a sequential procedure in Recommendation 12).

36. See Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45, 63 (2006); Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 460, 471 (2001) (giving an overview of the sequential method and comparing its accuracy to simultaneous lineups). The same lab studies show that the sequential system resulted in fewer correct identifications of the known perpetrator (in controlled settings the actual perpetrator is known), but this was believed to be offset by a greater reduction in erroneous selections of fillers. See, e.g., Wells, *supra*, at 63.

37. 725 ILL. COMP. STAT. ANN. 5/107A-10 (West 2006).

38. SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), <http://www.chicagopolice.org/IL%20Pilot%20Eyewitness%20ID.pdf> [hereinafter PILOT PROGRAM]; see also SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES add. (2006), <http://www.chicagopolice.org/Addendum%20to>

nounced in March 2006, came as a surprise to most experts in the field, because it found that the double-blind sequential procedures were not superior to, and in some instances were inferior to, simultaneous procedures.<sup>39</sup> In particular, the findings were that (1) witnesses correctly selected police suspects in a significantly greater number of cases when simultaneous rather than sequential procedures were used, and (2) witnesses selected fillers in a statistically greater number of instances when sequential rather than simultaneous procedures were used.<sup>40</sup> These results contradicted virtually all prior controlled studies, as well as anecdotal evidence from departments that have used sequential procedures for years but without comparison to a simultaneous control group.<sup>41</sup>

Shortly after the report was issued, it was revealed that a significant difference in procedures was employed during the pilot program: in the sequential lineups and photo spreads, the administrator was required to be blind (unaware of the police suspects' identity), whereas in the simultaneous procedures, the administrator was non-blind (aware of the police suspects' identity). Some experts in the field of eyewitness procedures and design of comparative studies questioned the validity of the reported results, reasoning that because of this discrepancy, which they said embedded a design error into the program known as "confounding variables," the procedures used were not parallel with respect to the administrators' knowledge of suspects' identities. This discrepancy created a risk that in the simultaneous procedures the

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%20IP-Report.pdf [hereinafter ADDENDUM TO PILOT PROGRAM]; REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES app. (2006), <http://www.chicagopolice.org/Appendx%20to%20IL%20Pilot%20on%20Eyewitness%20ID.pdf> [hereinafter APPENDIX TO PILOT PROGRAM].

39. PILOT PROGRAM, *supra* note 38, at i–ii.

40. PILOT PROGRAM, *supra* note 38, at iv–v, 39–40, 45–46; APPENDIX TO PILOT PROGRAM, *supra* note 38, at 10, tbl.3.a.

41. All police agencies in New Jersey have been using the double-blind sequential method for eyewitness identifications for the past six years. The administrator of the program has told me both police and prosecutors consider the program a success. Other agencies that use the system have reported similar results. These agencies include the Denver Police Department, departments in Santa Clara County, California, and Hennepin County, Minnesota, which includes Minneapolis. The following jurisdictions have also implemented the double-blind sequential method as standard procedure: Boston, Massachusetts; Northampton, Massachusetts; Madison, Wisconsin; Winston-Salem, North Carolina; Ramsey County, Minnesota; and Virginia Beach, Virginia. INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCH. OF LAW, YESHIVA UNIV., EYEWITNESS IDENTIFICATION REFORM 2 (2006), <http://www.innocenceproject.org/content/165.php>.

non-blind administrator could, consciously or inadvertently, signal the identity of the police suspect to the eyewitness, thus skewing the results in favor of the simultaneous method.<sup>42</sup>

A second flaw in the pilot program was also discovered: the administrators in two of the three departments in which almost all of the procedures were conducted (Chicago and Joliet) used either all sequential or all simultaneous procedures, rather than alternating between the two on a randomly assigned basis—a method customarily used to protect against administrator bias.<sup>43</sup>

These defects in the pilot program's methodology, the critics said, were inconsistent with fundamental, objective scientific research methodology.<sup>44</sup> The designers of the study took the position that it was appropriate when using the simultaneous procedures to use non-blind administrators, and to allow the administrators to use one of the two methods, because that is how lineups and photo spreads are currently conducted in Illinois.<sup>45</sup> The critics rejoined that proper scientific research methodology never-

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42. See OFFICE OF THE ATT'Y GEN., STATE OF WIS., RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES 3 (2006), <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf> [hereinafter OFFICE OF THE ATT'Y GEN.]; James M. Doyle et al., *The Street, The Lab, The Courtroom, The Meeting Room*, PUB. INT. L. REP., Summer 2006, at 13, 14; Timothy P. O'Toole, *What's the Matter with Illinois? How an Opportunity Was Squandered to Conduct an Important Study of Eyewitness Identification Procedures*, CHAMPION, Aug. 2006, at 18, available at <http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/03c451bfa6487584852571e300634d51?OpenDocument>; Lawrence Sherman, "To Develop and Test: The Inventive Difference Between Evaluation and Experimentation 14 (2006) (unpublished manuscript), available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/eyeID\\_attachments/\\$FILE/Sherman.pdf](http://www.nacdl.org/sl_docs.nsf/freeform/eyeID_attachments/$FILE/Sherman.pdf); Nancy Steblay, Observations on the Illinois Lineup Data 3 (May 3, 2006) (unpublished manuscript), available at [http://www.psychology.iastate.edu/FACULTY/gwells/Steblay\\_Observations\\_on\\_the\\_Illinois\\_Data.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/Steblay_Observations_on_the_Illinois_Data.pdf); Gary L. Wells, Gary L. Wells' Comments on the Mecklenburg Report (Apr. 24, 2006) (unpublished manuscript) available at [http://www.psychology.iastate.edu/faculty/gwells/Illinois\\_Project\\_Wells\\_Comments.pdf](http://www.psychology.iastate.edu/faculty/gwells/Illinois_Project_Wells_Comments.pdf).

43. See Sherman, *supra* note 42, at 13 (noting that administrators in Chicago and Joliet assigned procedures based on geographic area). See generally COLIN DYER, BEGINNING RESEARCH IN PSYCHOLOGY 220 (1995).

44. See OFFICE OF THE ATT'Y GEN., *supra* note 42, at 4; O'Toole, *supra* note 42; Sherman, *supra* note 42, at 12–13; Steblay, *supra* note 42, at 3, 6; Wells, *supra* note 42. See generally DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 5–6, 14 (1963); DYER, *supra* note 43, at 223–39.

45. See ADDENDUM TO PILOT PROGRAM, *supra* note 38, at 2; Ebbe B. Ebbesen & Kristin M. Finklea, *In Response to the Illinois Pilot Program on Simultaneous v. Sequential Lineups*, PUB. INT. L. REP., Summer 2006, at 9, 28, available at [http://psy.ucsd.edu/~ebbesen/Loyola\\_PILR\\_final.htm](http://psy.ucsd.edu/~ebbesen/Loyola_PILR_final.htm); Roy S. Malpass, *Notes on the Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, PUB. INT. L. REP., Summer 2006, at 5, 5, available at <http://eyewitness.utep.edu/Documents/Malpass06NotesonTheIllinoisPilotProgram.pdf>.

theless requires the use of parallel systems in order to yield a valid comparison of the two systems, and that the use of non-parallel, non-random procedures was not in accordance with proper scientific methodology.<sup>46</sup>

In the pilot project report, the authors assert that no one has ever shown an instance in which an administrator who knows the suspect's identity has indicated his knowledge to the witness, and none was shown to have occurred during this study.<sup>47</sup> It is an unfortunate fact, however, that this is precisely what has occurred in a number of highly publicized cases—leading to convictions of persons who were eventually exonerated by indisputable proof of their innocence, often after they served many years in jail, some under the threat of death sentences.<sup>48</sup>

In an earlier article in a professional journal, Professor Roy L. Malpass (who served as an analyst to the pilot program), Steven Penrod, and Gary Wells, among others, all well known researchers in the field of eyewitness identifications, published an authoritative study of eyewitness errors and suggestions for improving accuracy.<sup>49</sup> Their first recommendation was: "The person who conducts the lineup or photospread [sic] should not be aware of which member of the lineup or photospread [sic] is the suspect."<sup>50</sup> In the explanation for this proposal, they stated:

We need not assume that a lineup administrator's influence is conscious or deliberate in order to see the value of a double-blind recommendation. It is well established that people have natural pro-

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46. See Gary L. Wells, An Important Note on Field Studies of Eyewitness Identifications from Lineups: Filler Identifications are "Conditional Proxy Measures" 4 (Jul. 7, 2006) (unpublished manuscript), available at [http://www.psychology.iastate.edu/faculty/gwells/Filler\\_identifications\\_as\\_conditional\\_proxy\\_measures.pdf](http://www.psychology.iastate.edu/faculty/gwells/Filler_identifications_as_conditional_proxy_measures.pdf).

47. The authors wrote: "There also has been some speculation that the police 'lead' witnesses to suspect identifications, lowering the rate of filler identifications. There is no evidence to support this theory." PILOT PROGRAM, *supra* note 38, at iv. "Researchers also speculate that a low filler rate is due to police leading the witness in the direction of the suspect. There is no scientific basis for this speculation." *Id.* at 45.

48. A recent example may be found in *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003), in which a jury returned a \$15 million verdict for civil rights violations based on evidence that two Chicago Police Department detectives instructed an eyewitness to a murder to identify James Newsome, who was convicted and spent fifteen years in jail before he was exonerated and pardoned by the Illinois Governor. *Id.* at 302–03. See also Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at 1.

49. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998) [hereinafter *Procedures*].

50. *Id.* at 627.

pensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis. The confirmation bias in human reasoning and behavior is the seed that gives birth to the self-fulfilling prophecy phenomenon in which a person's assumption that a phenomenon will happen leads to behaviors that tend to make the phenomenon happen. *The simple use of procedures in which the person collecting the evidence is unaware of the "correct" answer is an effective prevention for this powerful phenomenon.*<sup>51</sup>

Indeed, in the pilot project report the authors acknowledged that "[t]he use of a blind administrator should increase public confidence that the eyewitness identification is not the product of suggestion by law enforcement," and "[t]he use of a blind administrator also should reduce claims of officer misconduct."<sup>52</sup>

It seems to me a truism that, to insure unbiased identifications, using an administrator who is unaware of the identity of the suspect is safer and better than using an administrator who knows the suspect's identity.

Prior to beginning the pilot program, the administrators were given training, but independent observers did not oversee the administrators' conduct as the program was carried out. As a result, there is no way to determine whether or not administrator bias in simultaneous procedures did or did not creep in. However, the Chicago Police Department opposed the governor's commission recommendation of use of the sequential, double-blind method. Further, the reported lack of filler identifications during use of the simultaneous method are out of kilter with prior studies and common experience. Thus, Professor Malpass reports that out of 100 simultaneous procedures in Chicago and Evanston, not a single eyewitness selected a filler.<sup>53</sup> Using a different method of analysis, Dr. Ebbe Ebbesen, the program's other analyst, reports just one filler choice out of eighty-six simultaneous procedures.<sup>54</sup>

These results have given rise to concern about the fairness of the simultaneous procedures. It must also be borne in mind that if the administrators directed witnesses to the police suspects,

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51. *Id.* at 627–28 (citations omitted) (emphasis added); see also Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1110 (2004) (explaining "[e]xperimenter [e]xpectancy [e]ffects").

52. PILOT PROGRAM, *supra* note 38, at 56–57.

53. APPENDIX TO PILOT PROGRAM, *supra* note 38, Exh. 17, at 10 tbl.3.a.

54. *Id.* Exh. 18, at 13 tbl.13.

they acted consistently with what the police regarded as the correct result.<sup>55</sup>

Other findings have undermined the accuracy and reliability of the results.

First, in the executive summary to the report, the authors state: "Analysis also showed that the rates of suspect and filler identifications did not vary according to age or cross-race,"<sup>56</sup> but based on the supporting data, this statement appears wrong. The results reported in the appendix to the pilot program report show that when witnesses and victims attempted to identify suspects who were in a different racial group than their own, they were less likely to identify the suspect as the culprit.<sup>57</sup>

Second, prior controlled studies, as well as common experience, contradict the finding in the report that the data collected "showed no difference between identification rates when injury or violence occurred, nor any difference when a weapon was present or absent, contrary to studies showing 'weapon focus.'"<sup>58</sup>

Third, double-counting of correct selection of suspects may have crept into the study. In Chicago, where the great majority of the procedures took place, the state's attorney requires that if a witness selects the police suspect from a photo spread, there must be a live lineup conducted. Since the already selected suspect is the only person in the lineup whose picture was in the photo

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55. I have no basis for saying that any of the simultaneous administrators intentionally signaled or suggested suspects' identities. But I do concur with the caution voiced by Professor Wells and his co-authors "that people have natural propensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis." *Procedures*, *supra* note 49, at 627 (citations omitted).

56. PILOT PROGRAM, *supra* note 38, at vii.

57. See APPENDIX TO PILOT PROGRAM, *supra* note 38, Exh. 17, at 4. Table 5 of Exhibit 17, prepared by Professor Malpass, shows a combined rate of 43% of cross-racial suspect identifications, versus 59% in same-race suspect identifications. See *id.*, Exh. 17, at 12 tbl.5. See also *id.*, Exh. 18, at 29-30 tbl.39. The authors of the Report acknowledge that the claimed lack of a negative cross-racial effect "appears to conflict with the classroom studies showing that cross-racial identifications are problematic." PILOT PROGRAM, *supra* note 38, at vii.

58. PILOT PROGRAM, *supra* note 38, at viii. Cf. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004) (describing the performance of eyewitnesses in stressful situations); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413 (1992) (examining the "weapon focus effect"); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 282 (2003) (describing a witness's ability to recollect incidences when weapons are involved).

spread, the witness is likely to select the suspect again, as would be natural, and both identifications are recorded as suspect identifications in the program's statistics.

The results of this pilot program will not be the last word on the subject. A number of police administrators, lawyers and law professors throughout the country who are interested in and knowledgeable about police identification procedures believe the Illinois pilot program does not represent a fair comparison between the two methods and cannot be relied upon to draw valid conclusions about their relative merits. They intend to conduct other comparative studies using protocols calling for parallel double-blind procedures applied on a randomly assigned basis, with independent oversight of the administrative process and without risk of double counting. They believe these studies will yield accurate, reliable comparisons.<sup>59</sup> It is my understanding that in the meantime the use of the sequential double-blind system is on hold in most Illinois police and sheriff departments.

### *C. Recommendations for Future Action and Study Regarding Eyewitness Identifications*

The authors of the pilot program report made a series of recommendations relating to eyewitness identification procedures that, in my judgment, provide fertile ground for further action:

(1) Pattern jury instructions should be prepared relating to the fallibility of eyewitnesses and the dangers inherent in the identification process.<sup>60</sup>

(2) New methods should be considered to ensure accurately capturing the responses of eyewitnesses.<sup>61</sup>

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59. For example, the National Institute for Justice of the United States Department of Justice has undertaken to assist in a new, comprehensive comparison of the simultaneous and sequential procedures (blind and non-blind simultaneous with blind and non-blind sequential), using rigorous, accepted scientific techniques. A similar comparison of double-blind sequential with double-blind simultaneous is planned by the Tucson, Arizona, Police Department.

60. See PILOT PROGRAM, *supra* note 38, at 62; see also *infra* Part III.J.

61. See PILOT PROGRAM, *supra* note 38, at 62 (describing, in Recommendation 2, technological options that could be used in the identification process).



(3) Extensive training of administrators and development of uniform standards for the training should be undertaken.<sup>62</sup>

(4) Studies should be implemented as to how to "assess, inquire and record witness certainty at the time of the identification."<sup>63</sup>

(5) Consideration should be given to the advantages of using blind administrators in all identification procedures whenever feasible.<sup>64</sup> As noted above, the authors of the report stated that:

[T]here still are perceived advantages to the use of a blind administrator. The use of a blind administrator should increase public confidence that the eyewitness identification is not the product of suggestion by law enforcement. The use of a blind administrator also should reduce claims of officer misconduct, a fact not lost on the survey respondents who cited protection from lawsuits as a welcome advantage of the blind administrator.<sup>65</sup>

(6) Consideration should be given to the need for caution and training in the use of sketches in identification procedures.<sup>66</sup>

(7) Standards should be developed for report writing of identification procedures, coupled with training on the procedures.<sup>67</sup>

(8) Study should be conducted on the factors that affect eyewitness identifications, such as "the type of crime, the type of witness, cross-racial identifications, the degree of prior relationship between the witness and the offender, the duration of [the] crime and the conditions of the crime."<sup>68</sup>

(9) Improvements should be made to the methods used to select fillers in both computer programs and live lineups.<sup>69</sup>

#### D. *Training Law Enforcement Investigators*

The advent of DNA testing has brought to light many (too many in my view) cases in which innocent persons have been

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62. *See id.* at 62-63.

63. *Id.* at 63.

64. *See id.*; *see also* GOVERNOR'S COMM'N, *supra* note 1, at 32-33 (suggesting in Recommendation 10 that police departments conduct blind lineups and photospreads).

65. PILOT PROGRAM, *supra* note 38, at 56-57 (referring to a post-program survey of officers who participated in the pilot program).

66. *See id.* at 63.

67. *See id.* at 63-64.

68. *Id.* at 64.

69. *See id.*

convicted for crimes they did not commit and for which they spent years in jail, resulting in severe personal and family consequences, while the actual criminals remained “on the street,” able to commit further crimes. A careful review of the records of cases in which the wrong person has been convicted show a pattern of causes, especially mistaken identifications by eyewitnesses, evidence of confessions that were not actually made or later shown to be untrue, and false testimony by so-called “jailhouse snitches.” Many of the cases involved law enforcement officers, usually detectives, who while well-intentioned, became convinced they knew the perpetrators and bent their efforts toward accumulating evidence to prove guilt. They were under the influence of what sociologists and psychologists call confirmation bias,<sup>70</sup> also known as tunnel vision. Most of us fall into this state of mind from time to time. It is especially dangerous for those involved in criminal investigations, but it is also understandable. Through long experience in investigating crime, detectives can easily acquire confidence in their feel for “whodunit.” When they focus their suspicions on the actual perpetrator and then obtain supporting evidence that shows they are correct, they are applauded for their intuitive instincts. However, havoc can result when they focus on the wrong person, pursue only proof that can be said to establish guilt, and brush aside or distort that which indicates innocence.

A related phenomenon I have observed is that the more horrible the crime, the less evidence of guilt is needed to convict. These are often the cases in which capital punishment is sought.

In Illinois, eighteen people have been exonerated since 1973, after having been convicted and given the death penalty.<sup>71</sup> If the percentages are applied to the overall number of Illinois non-capital felony cases, there are hundreds of innocent persons serving sentences in Illinois penitentiaries.

In order to avoid this state of affairs, the Illinois Governor’s Commission recommended in 2002 that police, prosecutors, and trial judges receive training in the dangers of tunnel vision.<sup>72</sup> This subject has been added to the annual refresher courses given to both new police recruits and experienced officers. This training

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70. See *supra* note 51 and accompanying text.

71. Death Penalty Information Center, Exonerations by State (Feb. 7, 2007), <http://www.deathpenaltyinfo.org/article.php?did=4128&scid=6#inn-st>.

72. GOVERNOR’S COMM’N, *supra* note 1, at 40, 96, 111.

should be made mandatory in all jurisdictions, not only for newcomers, but also for veteran criminal investigators, prosecutors, and trial judges.

#### E. *Eligibility Factors for the Death Penalty*

Illinois is divided into 102 counties, each of which has a state's attorney, who is elected every four years. The death penalty may be imposed only on those convicted of a homicide which involved one or more of the twenty-one statutory "eligibility factors"—the circumstances of the homicide that expose the defendant to a potential death sentence. Historically, each state's attorney decided in which cases to seek the death penalty from among the "death eligible" cases.

A majority of the governor's commission recommended that the number of eligibility factors be reduced from twenty-one to five; a minority recommended reduction to six, with retention of the felony-murder factor.<sup>73</sup> The General Assembly made changes in the language of several of the factors, but did not substantively change the eligibility factors.<sup>74</sup>

In Part II.B above, I have included statistics showing the large number of cases resolved in Illinois during 2006 that prosecutors initially certified for capital punishment, compared to the few that resulted in death sentences, by a margin of over twenty to one.<sup>75</sup> Legislatures should consider narrowing the classes of eligibility factors, to assure that only the "worst of the worst" homicide cases may be designated by prosecutors for ultimate punishment.

#### F. *Proportionality of Illinois Capital Prosecutions—Race and Locality*

Experts retained by the governor's commission conducted a statistical study of Illinois capital cases from 1988 to 1997 and concluded that there existed significant evidence of bias—also known as a lack of proportionality—in the way in which the capi-

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73. See *id.* at 67–68, 73–75.

74. See 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West Supp. 2006).

75. See *supra* notes 13–15 and accompanying text.

tal punishment system operated in Illinois.<sup>76</sup> According to the study, the bias manifested itself in two respects: capital punishment was sought more often and imposed in death eligible cases (1) when the victims were white, and (2) when the cases were prosecuted in rural rather than urban counties.<sup>77</sup>

To attempt to eliminate these biases, and to achieve greater statewide proportionality, the governor's commission made a number of interrelated recommendations.

*First*, the trial court should record this data about all Illinois first degree murder cases, regardless of whether or not the death penalty was sought or imposed, and the Administrative Office of Illinois Courts should keep this information.<sup>78</sup> This recommendation was not adopted by either the General Assembly or the Illinois Supreme Court.

*Second*, the Illinois Attorney General and Illinois State's Attorneys Association should "adopt recommendations as to the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty," with the qualification that "these recommendations should not have the force of law, or be imposed by court rule or legislation."<sup>79</sup> The Illinois General Assembly enacted a statute which provides, "The Attorney General and State's Attorneys Association shall consult on voluntary guidelines for procedures governing whether or not to seek the death penalty. The guidelines do not have the force of law and are only advisory in nature."<sup>80</sup> As noted below, these guidelines have been adopted.

*Third*, the General Assembly or the Governor should establish a five member state-wide review panel, made up of experienced judges and lawyers, to review death penalty certification.<sup>81</sup> The review panel should have the power to revoke the certification if a majority of panel members concludes that the case does not warrant capital punishment.<sup>82</sup> The Illinois State's Attorneys Association opposed this proposal on the ground that it impinges on each

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76. See GOVERNOR'S COMM'N, *supra* note 1, at 195-97.

77. See *id.* at 196.

78. *Id.* at 189.

79. *Id.* at 82.

80. 720 ILL. COMP. STAT. ANN. 5/9-1(k) (West Supp. 2006).

81. See GOVERNOR'S COMM'N, *supra* note 1, at 84.

82. See *id.* at 85.

elected state's attorney's exclusive power to determine whether or not the death penalty will be sought.<sup>83</sup> Neither the General Assembly nor the Governor has adopted this recommendation.

*Fourth*, when a jury convicts and sentences a defendant to death, the trial judge should be given power to override the jury's imposition of capital punishment, and impose a life sentence.<sup>84</sup> The General Assembly did not adopt this recommendation.

*Fifth*, after reviewing each case in which capital punishment has been imposed, the Supreme Court of Illinois should conduct a "proportionality review" of the sentence, considering, among other factors, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases."<sup>85</sup> Instead of adopting this proposal, the General Assembly inserted a provision into the criminal code that the supreme court may overturn a death sentence and order imprisonment "if the court finds that the death sentence is fundamentally unjust as applied to the particular case."<sup>86</sup>

Thus, only one of the commission's five proposals aimed at achieving a degree of uniformity in the Illinois capital punishment system has been adopted, which is merely advisory. To their credit, the Illinois Attorney General and the Illinois State's Attorneys Association adopted "Death Penalty Decision Guidelines," which are voluntary and "do not have the force of law, but . . . are intended to assist State's Attorneys in exercising their discretion in conformance with the highest standards of justice."<sup>87</sup> The guidelines, which are listed below, embody an excellent summary of factors state's attorneys should consider in deciding whether to pursue capital punishment "for the most heinous murders."<sup>88</sup>

(1) The strength of the State's case, which should convince the prosecutor to "have absolutely no doubt regarding the defendant's guilt" and to be "confident in the quality of the evidence and its

83. While I disagree with the association's position, this is not an appropriate place for rebuttal.

84. GOVERNOR'S COMM'N, *supra* note 1, at 152.

85. *Id.* at 166.

86. 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West Supp. 2006).

87. OFFICE OF THE ILL. ATT'Y GEN. & ILL. STATE'S ATT'YS ASS'N, DEATH PENALTY DECISION GUIDELINES 2 (2006).

88. *Id.*

ability to meet, and even surpass, the burden of proof of beyond a reasonable doubt.”<sup>89</sup>

(2) The accumulation of all available material and relevant evidence and “whether additional evidence is necessary in order to reasonably assure that a conviction may be obtained.”<sup>90</sup>

(3) The nature of the offense, resisting “the temptation or public pressure to seek a death sentence solely on the basis of the brutality of the crime without reference to other relevant factors.”<sup>91</sup>

(4) The views of the victim’s family.<sup>92</sup>

(5) The views of other experienced prosecutors.<sup>93</sup>

(6) The views of defense counsel, who should be “presented a fair opportunity to present valid reasons why the death penalty should not be sought.”<sup>94</sup>

While these guidelines are an admirable statement of general principles, they will only have whatever effect each of the 102 state’s attorneys chooses to give them. The discussion in Part II above, which shows how almost all of the death-certified cases resolved in 2006 resulted in a sentence of a term of years,<sup>95</sup> underlines the need for these guidelines. But because they are merely precatory, the Illinois General Assembly should consider adoption of the other four commission recommendations listed above.

### G. *Duties of Police and Prosecutors to Disclose Information*

The governor’s commission recommended that police officers provide prosecutors with all investigatory materials, including exculpatory evidence.<sup>96</sup> The Illinois Legislature adopted this proposal and made it applicable to all felonies.<sup>97</sup> The legislature also enacted a statute recommended by the commission, which re-

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89. *Id.* at 2, 4.

90. *Id.* at 4.

91. *Id.* at 5.

92. *Id.* at 8–9.

93. *Id.* at 7–8.

94. *Id.* at 9.

95. *See supra* Part II.B.

96. GOVERNOR’S COMM’N, *supra* note 1, at 22.

97. 725 ILL. COMP. STAT. ANN. 5/114-13(b) (West 2006).

quires prosecutors in a capital case to inform defense lawyers of any benefits promised or given to State witnesses.<sup>98</sup> Thus far, I have not learned of any problems arising from compliance with these requirements.

Prior to the issuance of the governor's commission report, the Illinois Supreme Court adopted Rule 412,<sup>99</sup> which requires prosecutors to provide relevant evidence to defense counsel,<sup>100</sup> and Rule 416(e),<sup>101</sup> which provides that the trial court may authorize discovery depositions in capital cases.<sup>102</sup> The court has thus far failed to address two other recommendations of the governor's commission: to define the kinds of exculpatory evidence prosecutors must give the defense before trial, and to adopt a rule explicitly embodying prosecutors' continuing postconviction duty to disclose exculpatory evidence.<sup>103</sup>

#### H. *Pretrial Hearings Regarding Jailhouse Informants*

Adopting one of the governor's commission's major recommendations,<sup>104</sup> the Illinois General Assembly enacted a statute—the first of its kind, so far as I am aware—applicable to capital cases in which the State intends to offer the testimony of a jailhouse informant (“snitch”). The statute requires the trial judge to hold a pretrial hearing with the burden on the State to prove, by a preponderance of the evidence, that the testimony is reliable.<sup>105</sup> Only after meeting this burden will the evidence be admissible at trial.<sup>106</sup>

I am aware of only one capital trial in which a pretrial hearing was held pursuant to this new statute.<sup>107</sup> It is my hope that the absence of other pretrial hearings reflects a growing recognition among prosecutors of the dangers inherent in this class of testi-

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98. *Id.* 5/115–22.

99. ILL. SUP. CT. R. 412.

100. *Id.*

101. ILL. SUP. CT. R. 416(e).

102. *Id.*

103. See GOVERNOR'S COMM'N, *supra* note 1, at 119–20, 168–69.

104. See *id.* at 122–23.

105. 725 ILL. COMP. STAT. ANN. 5/115-21 (West Supp. 2006).

106. *Id.*

107. *People v. LaGrone*, No. 03CF101 (Ill., DeWitt County) (on file with author); see E-mail from Jeffrey M. Howard, Capital Case Coordinator, Cook County Pub. Defender, to author (Feb. 2, 2007) (on file with author).

mony, which has played a part in far too many convictions of persons later shown to be innocent.<sup>108</sup>

### I. *Certification and Training of Trial Judges and Lawyers*

*Judges.* Illinois Supreme Court Rule 43 provides that judges who preside over capital cases shall attend a capital litigation seminar at least once every two years.<sup>109</sup> The governor's commission recommended the supreme court should specifically require that: (1) before trial court judges preside over capital trials, they complete capital litigation training, including training as to rules with respect to management of the discovery process, and (2) capital cases be tried only by judges who are certified as qualified to hear capital cases based on completion of specialized training and experience in hearing criminal cases.<sup>110</sup> In past years, reports were received that some judges in rural counties were not properly prepared to handle the complexities of capital cases. It appears corrective steps have been taken, and judges now assigned to try capital cases have the requisite knowledge and experience.

The responsibilities of the trial judge in capital cases include handling *ex parte* defense applications for legal fees, expert witnesses, and other expenses, payable from the Capital Litigation Trust Fund ("CLTF"). In some cases, these expenses can add up to sizeable sums. In one notorious case, the trial judge approved a defense lawyer's charges in excess of \$1 million. The judge explained that he had no discretion under the relevant statute to review or reduce the amounts requested.<sup>111</sup> This led the General Assembly to explicitly provide that the trial judge has authority to impose budgets on defense counsel and to reduce or decline requests for payments from the CLTF.<sup>112</sup>

*Trial lawyers.* An Illinois Supreme Court Rule requires that lead and co-counsel in capital cases be certified members of the Illinois Capital Litigation Trial Bar ("CLTB").<sup>113</sup> In order to main-

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108. See, e.g., GOVERNOR'S COMM'N, *supra* note 1, at 7–9. It seems illogical not to extend this pretrial hearing requirement to all felonies.

109. ILL. SUP. CT. R. 43.

110. See GOVERNOR'S COMM'N, *supra* note 1, at 94–101.

111. See 725 ILL. COMP. STAT. ANN. 124/10(b), (d) (West 2002).

112. See *id.* (a)(1), (d) (West Supp. 2006).

113. ILL. SUP. CT. R. 701(b).



tain their certification, members of the CLTB must attend regularly provided mandatory training seminars.<sup>114</sup>

*Prosecutors.* There has been no lack of qualified prosecutors available to try capital cases. The Illinois Attorney General's Office and the Office of the State Appellate Prosecutor assist local state's attorneys by providing the services of experienced members of the CLTB to take the lead or assist in capital prosecutions.

*Defense lawyers.* Public defender offices in Cook County and many other populous downstate counties employ experienced, talented trial lawyers on a full or part-time basis. However, when homicide cases are certified for capital punishment in counties that have no public defender, difficulties have arisen in locating lawyers who are CLTB members and are willing to act as defense counsel. The Office of the State Appellate Defender has alleviated this problem in rural communities by providing CLTB-certified trial lawyers to assist in capital trials.

### *J. Jury Instructions During the Guilt—Innocence Phase*

Three significant recommendations of the governor's commission relate to jury instructions. Recommendation fifty-six concerns factors for juries to consider with respect to eyewitness testimony, including the difficulties of making cross-racial identifications.<sup>115</sup> Recommendation fifty-seven cautions about the reliability of the testimony of in-custody informants.<sup>116</sup> Recommendation fifty-eight advocates the superior reliability of electronic recordings that contain the defendant's actual voice or statements written by the defendant, as compared to a non-recorded summary.<sup>117</sup>

For over two years I have unsuccessfully attempted to persuade the Illinois Pattern Jury Instruction Committee (Criminal) to consider making these three jury instructions applicable to all felonies.<sup>118</sup> I have been told, however, that the committee will

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114. *Id.* at 714.

115. GOVERNOR'S COMM'N, *supra* note 1, at 129.

116. *Id.* at 131.

117. *Id.* at 133.

118. Memorandum from Thomas P. Sullivan to the Justices of the Ill. Supreme Court and the Court's Committee on Pattern Jury Instructions in Criminal Cases (Mar. 7, 2005) (on file with author).

prepare pattern instructions only on subjects or rules that are codified in Illinois legislation or rulings of the Illinois courts.<sup>119</sup> I pointed out, but to no avail, that no limitation of this sort was placed on our work when I was a member of the original IPI-Criminal Committee in the 1960s. Also, a number of the instructions contained in the committee's current bound book of pattern instructions deal with subjects that are not supported by legislation or court opinions.

This is where the matter stands today, almost five years after the members of the governor's commission made these recommendations, despite the critical importance of jury instructions of these subjects, and adoption of cautionary instructions in other states.<sup>120</sup>

### K. *Practices During the Eligibility and Sentencing Phases*

The Illinois General Assembly adopted two of the governor's commission's recommendations relating to the sentencing phase of capital cases, namely, the judge or jury should consider evidence of the defendant's history of emotional or physical abuse or reduced mental capacity when deciding whether to impose the death penalty.<sup>121</sup> The legislature also adopted the recommendation that capital punishment may not be imposed if the only evi-

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119. See, e.g., Michael P. Toomin, *Capital Punishment Reform and the Illinois Supreme Court: At the Forefront of Change*, 92 ILL. B.J. 642, 646 (2004).

120. See, e.g., CAL. PENAL CODE § 1127a(b) (West 2004) (at the request of parties to a criminal trial, the court must give a jury instruction providing that "testimony of an in-custody informant should be viewed with caution and close scrutiny"); N.J. SUP. CT. R. 3:17(d) (the failure to electronically record a defendant's custodial interrogation must be a factor for consideration by the jury in determining whether the statement was made and what weight the statement should have); *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996) (commenting that the court gave a comprehensive four-page jury instruction that the jurors should consider in their evaluation of eyewitness testimony); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004) (noting that defendant is entitled to instruction informing the jury to view a defendant's alleged statement that was not recorded by the police with great care and caution); *State v. Werner*, 851 A.2d 1093, 1102-03 (R.I. 2004) (commenting that the trial court was careful to address the issues about eyewitness identification during jury instructions); *State v. Hubbard*, 48 P.3d 953, 960-61 (Utah 2002) (accepting jury instructions that educate the jurors by providing and explaining the factors that affect the accuracy of identifications).

121. 720 ILL. COMP. STAT. ANN. 5/9-1(c)(6)-(7) (West 2006); GOVERNOR'S COMM'N, *supra* note 1, at 141. See also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that Eighth Amendment "cruel and unusual punishment" clause prohibits executions of mentally retarded defendants).

dence of guilt is uncorroborated testimony of a jailhouse informant, a single eyewitness, or an accomplice.<sup>122</sup>

Two other recommendations have not been enacted: (1) the defendant should have the right to make a statement on his own behalf during the sentencing phase without being subject to cross-examination,<sup>123</sup> and (2) the jury should be instructed as to alternative sentences in the event they do not impose the death penalty.<sup>124</sup> At present, the jury is instructed on alternative sentences only when the alternative is a sentence of natural life, thus providing sentencing juries with the same information trial judges have when they impose sentences.<sup>125</sup> Again, future legislative consideration is appropriate.

#### L. *Scope of Illinois Supreme Court's Review of Capital Sentences*

In Illinois, capital cases are appealed directly to the Illinois Supreme Court.<sup>126</sup> A majority of the governor's commission recommended that the court should consider, among other factors, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases."<sup>127</sup> This is known as "proportionality review." The commission proposed that the Illinois Supreme Court be granted explicit authority to conduct this broad comparative analysis in order to ensure consistency and fairness in the statewide application of the death penalty.<sup>128</sup> This is especially pertinent in light of the commission's experts' findings of bias in the imposition of the death penalty, which they found to be imposed more frequently in rural areas and when the victim is white.<sup>129</sup> The commission also recommended using statistics collected at the trial court level about all indicted homicide cases to assist the supreme court in ensuring consistency and fairness.<sup>130</sup>

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122. 720 ILL. COMP. STAT. 5/9-1(h-5) (West Supp. 2006); GOVERNOR'S COMM'N, *supra* note 1, at 158.

123. GOVERNOR'S COMM'N, *supra* note 1, at 142.

124. *Id.* at 144-45 (adopted by a majority).

125. ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL), No. 7C.05.

126. 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West 2002).

127. GOVERNOR'S COMM'N, *supra* note 1, at 166.

128. *Id.* at 167-68.

129. *Id.* at 196.

130. *Id.* at 189.

While these two recommendations do not require legislative action, as the Illinois Supreme Court may adopt both proposals under its general supervisory and rulemaking powers,<sup>131</sup> neither the court nor the legislature has acted on either recommendation. Instead, as noted above,<sup>132</sup> the General Assembly adopted a provision authorizing the supreme court to overturn a death sentence and order imprisonment “if the court finds that the death sentence is fundamentally unjust as applied to the particular case.”<sup>133</sup>

In *People v. Mertz*, decided in 2005, the Illinois Supreme Court rejected the defendant’s argument that the court should implement a proportionality comparison in order to ensure that the imposition of the death penalty is procedurally fair.<sup>134</sup> The court explained that it had “repeatedly rejected arguments for proportionality comparisons in unrelated cases, capital or otherwise.”<sup>135</sup> The court adhered to the view that “each capital case ‘is unique and must be evaluated on its own facts.’”<sup>136</sup> In reaching this decision, the court also noted that the General Assembly did not adopt the commission’s proposal recommending proportionality evaluations in capital cases.<sup>137</sup>

Thus, the Illinois Supreme Court evaluates the fairness of a death sentence only by determining whether it “is fundamentally unjust as applied to the particular case.”<sup>138</sup> This decision might have an effect in cases in which the co-defendant is not sentenced

131. ILL. CONST. art. VI, § 16.

132. See *supra* Part III.F.

133. 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West Supp. 2006).

134. *People v. Mertz*, 842 N.E.2d 618, 668–69 (Ill. 2005).

135. *Id.* at 669.

136. *Id.* (quoting *People v. Ballard*, 794 N.E.2d 788, 807 (Ill. 2002)).

137. *Id.*; see also *People v. Thompson*, 853 N.E.2d 378, 404–05 (Ill. 2006) (“[C]omparative proportionality review in death penalty cases is not required by the United States Constitution, and it is not a feature of the capital sentencing process under the Illinois Constitution.”) (footnote omitted).

138. 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West 2006). Art. I, § 11 of the Illinois Constitution provides, in part, that “[a]ll penalties shall be determined both according to the seriousness of the offense. . . .” The Illinois Supreme Court has held this provision encompasses challenges to sentences on the ground that they are “cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.” *People v. McCarty*, 858 N.E.2d 15, 33 (Ill. 2006). In *People v. Szabo*, 447 N.E.2d 193, 205 (Ill. 1983), the Illinois Supreme Court said, “this court has a duty to ensure that the cases in which death is imposed are rationally distinguished from those in which it is not imposed. [citations omitted] Rationally, consistency, and evenhandedness in the imposition of the death penalty are constitutionally indispensable [citations omitted].”

to death, but it appears not to have an effect in cases involving a single capital defendant.

In my view, it is the responsibility of the Illinois General Assembly to address the findings that racial and geographic discrimination exist in the Illinois capital punishment system.<sup>139</sup> If the General Assembly fails to do so, the Illinois Supreme Court should use its supervisory powers over the Illinois judicial system to make arrangements for the accumulation of relevant statistics and to review the proportionality of each capital case presented to it.<sup>140</sup>

#### M. *Independent State Forensic Laboratory and Processing and Testing of DNA Samples*

The forensic laboratories, operated by the Illinois State Police Department, have the responsibility for processing and testing DNA samples in criminal cases in three areas: (1) testing DNA in cases that are in the investigative stages prior to trial;<sup>141</sup> (2) processing of DNA samples of persons convicted of felonies for inclusion in the federal Combined DNA Index System, known as "CODIS,"<sup>142</sup> and (3) testing DNA samples of convicted persons when the court orders forensic testing—including DNA comparisons—upon a showing that specific forensic evidence was not subject to testing at the time of trial.<sup>143</sup>

139. See GOVERNOR'S COMM'N, *supra* note 1, at 196.

140. In the legislation establishing the Capital Punishment Reform Study Committee, the General Assembly directed the Committee to "study the impact of the various reforms to the capital punishment system enacted by the 93rd General Assembly and annually report to the General Assembly on the effect of these reforms." 20 ILL. COMP. STAT. ANN. 3929/2(b) (West Supp. 2006). These reports shall include, among others points:

The impact of the reforms on the issue of uniformity and proportionality in the application of the death penalty including, but not limited to, the tracking of data related to whether the reforms have eliminated the statistically significant differences in sentencing related to the geographic location of the homicide and the race of the victim found by the Governor's Commission on Capital Punishment in its report issued on April 15, 2002.

*Id.*

141. See 725 ILL. COMP. STAT. ANN. 5/116-5 (West Supp. 2006).

142. See 725 ILL. COMP. STAT. ANN. 5/5-4-3(F) (West Supp. 2006); see also ILLINOIS STATE POLICE, 2005 DNA TESTING ACCOUNTABILITY REPORT 8, <http://www.isp.state.il.us/docs/6-684.pdf>.

143. 725 ILL. COMP. STAT. ANN. 5/116-3 (West Supp. 2006). To make a motion under section 116-3, the defendant must make a prima facie case that identity was at issue in the underlying trial, that the forensic evidence has not been compromised, and that the

A majority of the governor's commission recommended that an independent state forensic laboratory be created.<sup>144</sup> This laboratory would be operated by civilian personnel, with its own budget, separate from any police agency or supervision, rather than as a division of the Illinois State Police Department.<sup>145</sup> The recommendation was based on the belief that the overall quality of forensic services would be improved if the lab were truly independent, and because it is crucial that the public have confidence in the integrity of the state's forensic work.<sup>146</sup> This proposal was not adopted, and so the Illinois forensic laboratories have continued operation as a division of the Illinois State Police Department. The commission also recommended that the General Assembly provide adequate funding to hire and train forensic scientists to support expansion of DNA testing and evaluation and to purchase additional up-to-date facilities for DNA testing.<sup>147</sup>

The General Assembly has created the Illinois Laboratory Advisory Committee ("ILAC"),<sup>148</sup> the mandate of which includes: examining ways to make more efficient use of state laboratories;<sup>149</sup> examining ways to reduce lab backlogs;<sup>150</sup> making recommendations to ensure resources allow for accurate, timely and complete analysis of all samples submitted for testing;<sup>151</sup> and making recommendations to ensure quality assurance of private laboratory testing within the state.<sup>152</sup> The General Assembly also enacted a statute requiring the Illinois State Police Department to report to the governor and the General Assembly "the extent of the backlog of cases awaiting testing or awaiting DNA analysis."<sup>153</sup>

State-operated forensic labs have been beset with problems that have had a substantial negative impact on DNA testing. As of February 2007, the Illinois State Police Department had filed

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results of the testing have the potential to produce relevant evidence. *Id.* The results need not completely exonerate the defendant, however. *Id.*; see also GOVERNOR'S COMM'N, *supra* note 1 at 58–60.

144. GOVERNOR'S COMM'N, *supra* note 1, at 52–53.

145. *Id.*

146. *Id.*

147. *Id.* at 183.

148. 20 ILL. COMP. STAT. ANN. 3981/5(a) (West Supp. 2006).

149. *Id.* at (j)(8).

150. *Id.* at (j)(9).

151. *Id.* at (j)(5).

152. *Id.* at (j)(6).

153. 730 ILL. COMP. STAT. ANN. 5/5-4-3a (West 2006).

its report for 2005 but not 2006.<sup>154</sup> At the end of 2005, the DNA processing backlog (in excess of thirty days) was extremely high, consisting of 3063 samples at year end, owing in part to a discovery that hundreds of DNA samples had been mistakenly analyzed by a private firm to which the samples had been “outsourced” for testing.<sup>155</sup> To make matters worse, the ILAC has reported that the labs have serious problems in hiring qualified personnel, especially at the supervisory level, owing in substantial part to the salary structure.<sup>156</sup>

As the Illinois Legislature and Executive attempt to remedy these problems, I suggest they revisit the governor’s commission’s proposal—which is being replicated in many other states—that the labs be removed from state police control to an independent government agency.

#### N. *The Cost of Illinois Capital Cases*

As noted at the outset of this article, in the four years since Governor Ryan emptied Illinois’s death row in January 2003, ten men have been convicted of murder and sentenced to death, which computes to an average of between two and three capital sentences per year. What has this system cost?

In money terms, year in and year out, Illinois’s capital punishment system comes with a major price tag. The Illinois General Assembly has established the Capital Litigation Trust Fund to provide funds for the prosecution and defense of capital homicide cases.<sup>157</sup> The statistics provided by the Illinois State Comptroller summarizing the CLTF expenses for the years 2003 through 2006 show a total of \$53.6 million spent for expenses connected to trials, appeals and other postconviction proceedings of capital cases.<sup>158</sup> For the four-year period between 2003 and 2006, this represents an average of \$13.5 million per year. It must be kept

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154. ILLINOIS STATE POLICE, *supra* note 142, at 8. Owing to a 2006 change in statute, the next ISP report on the status of DNA testing is not due until August 1, 2007. 730 ILCS 5/5-4-3a.

155. ILLINOIS STATE POLICE, *supra* note 142, at 5, 8.

156. See ILLINOIS LABORATORY ADVISORY COMMITTEE, 2006 REPORT 3 (on file with author).

157. 725 ILL. COMP. STAT. ANN. 124/15 (West 2002).

158. E-mail and attached cost information sheets from Illinois Comptroller’s Office (Feb. 13, 2007, 14:15 CST) (on file with author).

in mind that these figures include costs arising from capital cases in which the death penalty was not imposed, either because the defendant was acquitted, a sentence other than death was given, the prosecutor withdrew capital certification, or the certified case is still pending. On the other side of the ledger, the figures do not take into account the cost of police investigations and time spent preparing for and attending trials, nor the salaries of the lawyers from the attorney general's office or the appellate prosecutor's office, nor many postconviction costs associated with the lengthy court and clemency appeals routinely made by defendants sentenced to death.

If the past is a guide to the future, almost all pending certified cases (over 150 as of December 31, 2006)<sup>159</sup> will be de-certified and resolved as non-capital.<sup>160</sup> I do not have available the cost of non-capital homicide cases from beginning to end, including the cost of imprisonment,<sup>161</sup> but I believe the money spent on capital cases is significantly disproportionate to the cost of processing homicide cases in which state's attorney does not certify the case for the death penalty.<sup>162</sup>

There have been unproven allegations that some state's attorneys outside Cook County have certified homicides as capital in order to tap into CLTF funds to avoid paying the costs from the local county budget. Before trial, the death certification is then removed—known as “de-deathed”—to avoid going through the three stage capital trial process in cases in which prosecutors did not intend to seek death in the first place. There have also been unproven allegations that some state's attorneys certify cases for the death penalty in order to bring pressure on the defendant—

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159. IACDP REPORT, *supra* note 16, at 31–35.

160. *See supra* Part II.B.

161. Exact numbers are not available. The governor's commission did not fund a cost study because a majority of the members believed that cost was outside the scope of the commission's charter. *See* GOVERNOR'S COMM'N, *supra* note 1, at 11, 198.

162. Studies in other states have repeatedly shown that the cost of capital cases, from indictment through the postconviction process to execution, exceeds by a substantial margin the cost of cases successfully prosecuted as non-capital cases, from indictment to imprisonment to the end of the postconviction process. *See id.*; *cf.* LEGISLATIVE DIV. OF POST AUDIT OF THE STATE OF KAN., PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 11–12 (2003), [http://www.kslegislature.org/postaudit/audits\\_perform/04pa03a.pdf](http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf) (estimating that cases in which the death sentence was sought and imposed cost about 70% more than murder cases that could have been but were not charged as capital).



who faces the risk that if the case is tried it will result in death—to plead guilty and negotiate a life sentence or term of years.<sup>163</sup>

As noted above in Part III.F and Part III.K,<sup>164</sup> the capital punishment system in Illinois lacks any overall, statewide system in place to assure consistency in capital certifications or to protect against the racial and geographic bias reported by the governor's commission. Nor is there any control to prevent capital certifications in the many first degree murder cases in which the facts are unlikely to lead to the imposition of the death penalty.

Capital cases in Illinois take far longer to resolve than those that do not involve the death penalty. The few cases in which the death penalty is imposed in Illinois are treated far differently by all participants in the process. As noted, each capital case has the potential for three separate trials: first, whether or not the defendant is guilty or innocent; second, if guilty, whether he/she is eligible for capital punishment; and third, if eligible, whether capital punishment should be imposed. Then follows years of review, in both state and federal courts, often requiring retrials. Then follow petitions for executive clemency.

Before the Illinois moratorium took effect in 2000, it was reported that the average time from sentence of death to execution was in excess of a dozen years, reflecting the frequency with which death cases are reversed on appeal, requiring re-trials of the guilt-innocence phase, or re-hearings of the eligibility or punishment phase.<sup>165</sup>

While the Illinois Supreme Court declines to review death cases for proportionality, it examines death penalty cases at length for trial errors, "subjecting the record to intense scrutiny to ensure that only those deserving of the ultimate penalty are so sentenced."<sup>166</sup> Take, for example, the capital cases heard and affirmed by the Illinois Supreme Court since January 2003:

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163. See, e.g., Adam Kovac, *Barsanti's Strategy of Using the Death Penalty to Leverage Plea Bargains Has Met With Mixed Results—and Some Criticism*, CHI. DAILY HERALD, July 18, 2006, at 1.

164. See *supra* Parts III.F., III.K.

165. See E-mail with attached data from Executive Director, Center on Wrongful Convictions, Northwestern University School of Law, to Jenner & Block (Mar. 30, 2007, 11:57 CST) (on file with author).

166. *People v. Thompson*, 853 N.E.2d 378, 397–98 (Ill. 2006).

- In January 2005, the supreme court affirmed the death sentence imposed on Anthony Mertz for a murder that occurred in 2001 (97 pages in Illinois Reports).<sup>167</sup>

- In April 2006 the court affirmed the death sentence against Curtis Thompson for a 2002 murder (59 pages).<sup>168</sup>

- Cecil Sutherland was initially indicted in 1988 for a murder that occurred in 1987; he was found guilty and sentenced to death in 1989.<sup>169</sup> The Illinois Supreme Court affirmed the verdict and sentence in 1992,<sup>170</sup> and the United States Supreme Court denied certiorari in 1993.<sup>171</sup> The state court denied a postconviction petition, but the Illinois Supreme Court reversed that ruling in 2000 for ineffective assistance of counsel and improper prosecutorial argument.<sup>172</sup> The case was retried in 2004, and Sutherland was again found guilty and sentenced to death. The Illinois Supreme Court affirmed in 2006 (92 pages).<sup>173</sup>

- In February 2007, the court affirmed the Ricardo Harris death sentence for a 1999 murder (40 pages)<sup>174</sup> and the Urdiales decision involving a 1996 murder (78 pages).<sup>175</sup>

Capital cases take a toll on the state's finances and the prosecutors and defense lawyers involved, and require an extraordinary amount of time and attention by the courts. But all of this pales in comparison to the psychological and often the financial injuries inflicted on victims' families, who are often required to come back to court to face again the once convicted perpetrator, and to rethink and re-testify about the most horrible experience in their lives. Often overlooked is the impact on condemned defendants' innocent family members, as well as the mental and physical devastation suffered by those mistakenly convicted and sentenced to death and later released from prison, which in Illinois in recent years exceeded ten percent of those given capital punishment.

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167. *People v. Mertz*, 842 N.E.2d 618, 622–23, 671 (Ill. 2005).

168. *Thompson*, 853 N.E.2d at 381–82, 409.

169. *People v. Sutherland*, 742 N.E.2d 306, 307–08 (Ill. 2000).

170. *People v. Sutherland*, 610 N.E.2d 1, 14 (Ill. 1992).

171. *Sutherland v. Illinois*, 510 U.S. 858 (1993).

172. *Sutherland*, 742 N.E.2d at 307, 312.

173. *People v. Sutherland*, 860 N.E.2d 178, 191, 240 (Ill. 2006).

174. *People v. Harris*, No. 98942, 2007 WL 289507, at \*1, \*27 (Ill. Feb. 1, 2007).

175. *People v. Urdiales*, No. 98996, 2007 WL 495282, at \*2, \*56 (Ill. Feb. 16, 2007).

## IV. CONCLUSION

The foregoing analysis of the current state of capital punishment reform in Illinois does not capture all of the nuances, the push and shove, or the costs—both human and financial—of capital cases litigated in Illinois since the governor commuted all of the death sentences in January 2003. But it will serve to illustrate some of the advances made, some still to be achieved, and some detriments to the Illinois system.

In Illinois, capital cases amount to less than two percent of all felony prosecutions. The reforms adopted by the Illinois General Assembly have for the most part been limited to those relatively few cases that are certified as capital. Yet a great many have equal application to the vast majority of non-capital felony cases, including homicides that are not certified or are not “death eligible,” in which defendants face the prospect of lengthy jail terms, often for life. It is an unfortunate fact that the capital punishment system inevitably diverts attention from efforts to reform the criminal justice system as a whole to focusing only on reforming homicide cases a state’s attorney certifies. It is for that reason that I believe the single most important recommendation of the governor’s commission was number eighty-three, which has nothing to do with capital cases and which has largely been ignored: “The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.”<sup>176</sup>

These considerations have caused me to conclude that the costs of the Illinois capital punishment system—for example, the money spent, the years of controversy entailed, the impact of frequent re-trials on victims’ families, the haphazard, inconsistent ways in which a fraction of homicides cases eventually end with death sentences, the time lapse from judgments to executions, the irreversible risk of errors, and the distracting effect on efforts to reform the entire system—are not justified by whatever the system is intended to achieve.

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176. GOVERNOR’S COMM’N, *supra* note 1, at 187.