

# DRAKE LAW REVIEW

PREVENTING WRONGFUL CONVICTIONS—  
A CURRENT REPORT FROM ILLINOIS

*Thomas P. Sullivan*

VOLUME 52

SUMMER 2004

NUMBER 4

# PREVENTING WRONGFUL CONVICTIONS—A CURRENT REPORT FROM ILLINOIS

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## I. INTRODUCTION—THE GOVERNOR'S COMMISSION

In 2000, after the thirteenth man was released from prison after having been convicted and sentenced to death by an Illinois court, Governor George Ryan imposed a moratorium on further executions and appointed the Governor's Commission on Capital Punishment to study the Illinois capital punishment system and make recommendations for reform.<sup>1</sup> The Commission's fourteen members brought to the table decades of prosecutorial and defense experience.<sup>2</sup> In April 2002, the Commission issued a lengthy report containing eighty-five proposals for improvements that the legislature, courts, and police should make in Illinois's capital punishment and criminal justice systems.<sup>3</sup> The report was the result of two years of consultation with police, prosecutors, defense lawyers, judges, experts, academics, exonerated defendants, families of victims, and studies of the many Illinois capital cases and relevant literature.<sup>4</sup>

When Governor Ryan was set to leave office in January 2003, none of the Commission's recommendations had been implemented. As one of his last official acts, Governor Ryan emptied Illinois's death row by commuting more than 160 death sentences.<sup>5</sup> That extraordinary action,

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1. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 1 (Apr. 15, 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).

2. The Commission's members included two State's Attorneys and three former Assistant State's Attorneys; the Chief of Staff of the Chicago Police Department; two former Assistant Illinois Attorneys General; a former U.S. Attorney; four former Assistant United States Attorneys; the former Chief Judge of the United States District Court in Chicago; the Cook County Public Defender; a former downstate Public Defender; the State Appellate Defender; the Deputy Governor with oversight responsibility for the state police, prison system, and forensic lab; a former United States Senator; and the son of a murder victim. *Id.* at v-vii.

3. *Id.* at 20-192. The Commission's major recommendations are summarized in Thomas P. Sullivan, *Repair or Repeal—Report of the Governor's Commission on Capital Punishment*, 90 ILL. B.J. 304 (2002), reprinted in CHAMPION, July 2002, at 10, and in FED. LAW., Sept. 2002, at 40.

4. See GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 2 (describing the procedures used by the Commission).

5. Agence France-Presse, *US Governor Overturns 167 Death Sentences in Momentous Blanket Clemency* (Jan. 12, 2003), available at [http://www.truthout.org/docs\\_02/011303G.ill.167.cmutd.htm](http://www.truthout.org/docs_02/011303G.ill.167.cmutd.htm). The Governor resentenced most to life sentences without parole. *Id.* The Illinois Supreme Court upheld the Governor's commutations, including those of inmates who had not personally consented to clemency and those of defendants awaiting resentencing after vacation of their death sentences. *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546, 554, 560 (Ill. 2004).

coupled with changes in the composition of the Illinois legislature, resulted in the enactment last year of some of the Commission's proposed reforms. But many of the Commission's key recommendations still await legislative action, and very few have been implemented by the Illinois Supreme Court, trial courts, or law enforcement agencies. What follows is a summary of the Commission's most important proposals and the responses to them by the agencies of Illinois government to whom they were directed.

## II. RECORDING IN-CUSTODY INTERROGATIONS

The Commission recommended that when an arrested homicide suspect is questioned in the police station, the entire session be recorded by video.<sup>6</sup> The Illinois General Assembly has enacted a law that will result in electronic recordings (including motion picture, audiotape, videotape, or digital recording) of in-custody suspects in homicide investigations starting in 2005, and in the meantime, four pilot programs will be conducted.<sup>7</sup> This is a major step forward for Illinois law enforcement. Recording the questioning of suspects has been adopted without legislative action by many police and sheriff's departments throughout the United States with excellent results; little or no impairment in police ability to obtain confessions and admissions; a marked decrease in motions to suppress based on claims of coercion and trickery; and a virtually unassailable record of what the defendant did and said, which in turn results in increased guilty pleas and convictions at trial.<sup>8</sup> It is law enforcement's version of the instant replay.<sup>9</sup> Another benefit is that officers who might be inclined to use improper tactics or to misstate what occurred will be

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6. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 24.

7. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West Supp. 2004); 720 ILL. COMP. STAT. ANN. 5/14-3(k) (West Supp. 2004).

8. THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS: A SPECIAL REPORT OF THE CENTER ON WRONGFUL CONVICTIONS (forthcoming 2004). When it is completed, this report can be accessed at <http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/CustodialInterrogations.html>.

9. The legislative Council of the District of Columbia and the Maine legislature recently enacted statutes requiring electronic recordings. D.C. CODE ANN. § 5-133.20 (Supp. 2003); L.D. 891, 121st Leg., 1st Reg. Sess. (Me. 2004). In addition, the Alaska and Minnesota Supreme Courts have required recordings for many years. See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (holding that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention" violated due process); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (holding that electronic recording of custodial interrogations shall be required when feasible and when the questioning occurs at a location of detention).

deterred by the presence of the recording.

Recording equipment should be used by police in all major felony investigations when an arrested suspect is questioned at the station, from the *Miranda* warnings until the end of the interrogations. It is a powerful weapon in law enforcement's arsenal.

### III. EYEWITNESS LINEUP AND PHOTOSPREAD IDENTIFICATION PROCEDURES

Mistaken eyewitness identifications have been a frequent cause of wrongful convictions.<sup>10</sup> Eyewitness fallibility is so common that the methods used by police in lineups and photospreads have come under the scrutiny of experts, who have made controlled studies of identification procedures.<sup>11</sup>

The Commission made a number of proposed improvements,<sup>12</sup> which the Illinois legislature enacted. Witnesses must be told that the suspect may not be in the array, that they are not obligated to make an identification, and that they should not assume the administrator knows which person is the suspect.<sup>13</sup> In addition, lineups and photospreads must be photographed or recorded when practicable.<sup>14</sup> The Commission also proposed the adoption of what are known as double-blind sequential lineups and photospreads.<sup>15</sup> Sequential lineup participants or photos must be displayed one at a time, and the witnesses must state whether or not

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10. See, e.g., *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (citing a study that "concluded 'mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined'" (quoting Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998))).

11. 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, 766-67, 775-82 (1995) (describing the problems with the methods used in lineups and photospreads and recommending several rules for law enforcement to reduce mistaken eyewitness identifications); Bill Nettles et al., *Eyewitness Identification: "I Noticed You Paused on Number 3."*, CHAMPION, Nov. 1996, at 11, 11-12, 57 (discussing the causes of mistaken eyewitness identification and which facts should be established at the pretrial hearing).

12. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 31-40.

13. *Id.* at 34; see 725 ILL. COMP. STAT. ANN. 5/107A-5(b) (West Supp. 2004) (enacting Recommendation 11).

14. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 39-40; see 725 ILL. COMP. STAT. ANN. 5/107A-5(a) (enacting Recommendation 15).

15. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 34.

they believe the person shown is the perpetrator and their degree of certainty, before the next is shown.<sup>16</sup> Double-blind lineups and photospreads prevent hints to witnesses because the administrators do not know which person is suspected of being the perpetrator.<sup>17</sup>

Experts' studies have shown that this procedure dramatically reduces mistaken identifications without significantly affecting accurate identifications.<sup>18</sup> This is because in traditional all-at-once or simultaneous viewing methods, witnesses tend to make *relative* judgments by selecting the person or photo from the group that most resembles the witness's memory of the perpetrator.<sup>19</sup> In contrast, when the sequential procedure is used, witnesses are required to make *absolute* judgments as to each individual person or photo before going to the next, so the identifications are based solely on the witness's memory with respect to the one person being shown, thus precluding selections based on relative criteria.<sup>20</sup>

Rather than requiring statewide use of this procedure, the Illinois General Assembly funded a one-year pilot program in three police departments in order to assess the effectiveness of the sequential lineup method.<sup>21</sup> Police and sheriffs in every town, city, county, and state, as well as federal law enforcement agencies, ought to give serious consideration to adopting this new, improved method for eyewitness identifications.<sup>22</sup>

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16. See *id.* at 34-36 (describing the proposed sequential lineup procedure); see also JOHN J. FARMER, JR., ATTORNEY GEN., OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES 4, 6, available at <http://www.njdcj.org/agguide/photoid.pdf> (Apr. 18, 2001) (providing guidelines for sequential photospreads and lineups).

17. See GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 32-33 (describing the recommended double-blind lineup procedure).

18. See Wells & Seelau, *supra* note 11, at 772 (finding that testing of these methods has "consistently shown that a sequential procedure produces fewer false identifications than does a simultaneous procedure with little or no decrease in rates of accurate identification").

19. *Id.* at 772-73.

20. *Id.* A major problem with eyewitnesses using relative criteria became apparent in the experts' simulations: When the actual perpetrator was not in the lineup or photospread, there was often one person who looked more like the perpetrator than all other members of the array. See *id.* at 773 ("When the lineup does not include the culprit, . . . relative and absolute judgments can produce quite different decisions because the relative-judgment process has no mechanism for rejection of the entire lineup.").

21. 725 ILL. COMP. STAT. ANN. 5/107A-10 (West Supp. 2004).

22. The sequential procedure has been used successfully by police departments in New Jersey. See Thomas P. Sullivan, *Three Police Station Reforms to*

#### IV. POLICE AND PROSECUTORS' DUTY TO DISCLOSE INVESTIGATIVE MATERIALS AND EXCULPATORY INFORMATION

In several Illinois cases in which innocent persons were convicted, information that supported exoneration of the defendant was later found in police files.<sup>23</sup> The Commission recommended that police be explicitly required to turn over all investigatory materials in their files to prosecutors—including exculpatory evidence.<sup>24</sup> The Illinois legislature adopted this proposal (applicable to all felonies),<sup>25</sup> which should be the policy of all law enforcement agencies, with or without enabling legislation. The Illinois Supreme Court has yet to act on two related proposals: (1) to adopt a rule defining the kinds of exculpatory evidence that prosecutors must give the defense before trial,<sup>26</sup> and (2) to adopt a rule explicitly embodying prosecutors' continuing postconviction duty to disclose exculpatory evidence.<sup>27</sup>

#### V. REDUCTION OF ELIGIBILITY FACTORS FOR CAPITAL PUNISHMENT

In 1983, the United States Supreme Court ruled that an aggravating circumstance must narrow the class of convicted persons who are subject to the death penalty and justify a more severe sentence imposed on the defendant in light of other persons found guilty of murder in the state under similar circumstances.<sup>28</sup> Illinois has long been out of compliance with this ruling because the breadth of the twenty-one statutory "eligibility factors" makes virtually every person indicted for first-degree murder

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*Prevent Convicting the Innocent*, CBA REC., Apr. 2003, at 30, 33 (discussing the positive implementation of the procedures in New Jersey).

23. The so-called "Ford Heights Four" case provides a horrible example of such a case. A few days after the crime, a witness disclosed the names of four rapists/killers to police investigators. CTR. ON WRONGFUL CONVICTIONS, PAULA GRAY CONFESSED TO A ROLE IN A CRIME SHE KNEW NOTHING ABOUT, SENDING HERSELF AND FOUR INNOCENT MEN TO PRISON, TWO OF THEM TO DEATH ROW, *at* <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Gray.htm> (last modified Jan. 22, 2003). A police report of that conversation was found in the files many years later, leading to the exoneration of the four convicted defendants (two of whom had received death sentences) and an alleged accomplice. *Id.* They had served a combined total of over seventy years in jail. *Id.* The three surviving actual criminals were eventually convicted. *Id.*

24. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 22.

25. 725 ILL. COMP. STAT. ANN. 5/114-13.

26. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 119.

27. *Id.* at 168.

28. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

subject to capital punishment.<sup>29</sup>

A majority of the Commission recommended reduction to five factors; the minority voted for six.<sup>30</sup> The Illinois legislature tinkered with language, but made no substantive changes to the all-encompassing list of factors,<sup>31</sup> leaving Illinois in violation of the federal Constitution. Each state legislature, including the Illinois General Assembly, should carefully review its statutory list of eligibility factors to make certain they identify only the most heinous murders, as required by the Supreme Court's ruling.

## VI. STATEWIDE REVIEW PANEL

Experts retained by the Commission performed a statistical analysis of past Illinois murder cases to determine whether death sentences were being meted out in a discriminatory manner.<sup>32</sup> They found statistically significant evidence of two disparities: Death was more often sought and imposed when murder victims were white and when murders were prosecuted in rural counties.<sup>33</sup>

To deal with this troubling state of affairs, the Commission recommended that a five-member panel be appointed to conduct a pretrial review of all cases in which a State's Attorney (there are 101 in Illinois) decides to seek the death penalty.<sup>34</sup> If a majority of the panel concludes that the case does not warrant capital punishment, the State's Attorney may not seek the death penalty.<sup>35</sup> However, the legislature failed to create the panel. The newly elected Illinois Governor has not acted on the Commission's alternate recommendation that, in the absence of legislative action, the Governor should establish a review process, with the presumption that the Governor will commute death sentences in any case

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29. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 66; see 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West Supp. 2004) (listing aggravating factors).

30. See GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 67-68, 73-75 (stating that the minority included the "course of a felony" factor in addition to those recommended by the majority).

31. 720 ILL. COMP. STAT. ANN. 5/9-1(b).

32. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 195-96.

33. *Id.* at 196.

34. *Id.* at 84. The panel would consist of the Illinois Attorney General or his or her designee, the State's Attorney of Cook County or his or her designee, the President of the Illinois State's Attorneys Association, a current State's Attorney from a county other than Cook County selected by lottery, and an experienced retired judge appointed by the Governor. *Id.*

35. *Id.* at 85.

not submitted for review unless the prosecutor offers a compelling explanation based on exceptional circumstances for failing to do so.<sup>36</sup>

A statewide pretrial oversight panel of independent, experienced members is designed to bring much-needed rationality and consistency to the Illinois capital punishment system.<sup>37</sup> A similar system should be considered by every state, especially those in which the death penalty is frequently sought and obtained.

#### VII. PROSECUTORS' DISCLOSURE OF INDUCEMENTS TO WITNESSES

The Illinois General Assembly enacted the Commission's recommendation that, prior to trial of capital cases, the prosecution must disclose to the defense any benefits promised or given to state witnesses.<sup>38</sup>

#### VIII. INDEPENDENT STATE FORENSIC LABORATORY

In Illinois, the statewide forensic laboratory is operated by the State Police Department.<sup>39</sup> An appearance of bias results because the lab's work is performed by an agency of the state, in whose name all felony prosecutions are brought. The Commission recommended creation of a new, independent laboratory, operated by civilian personnel.<sup>40</sup> The Illinois legislature has not acted on this proposal.

#### IX. PRETRIAL HEARINGS AND JURY INSTRUCTIONS REGARDING JAILHOUSE SNITCH TESTIMONY

In all too many wrongful conviction cases, prosecutors have introduced testimony of a "jailhouse snitch"—a person in jail with the defendant who claims to have heard an admission or confession.<sup>41</sup> This

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36. *Id.* at 84.

37. *See id.* at 84-85 (recommending a panel with "stability" that would ensure a "uniform and rational" application of "the most serious penalty imposed by law").

38. *Id.* at 120; see 725 ILL. COMP. STAT. ANN. 5/115-22 (West Supp. 2004) (enacting the recommendation).

39. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 52.

40. *See id.* at 52-53 (stating that the quality of forensic services and confidence in the integrity of the work product would improve if the laboratory were independent).

41. *See* INNOCENCE PROJECT, JAILHOUSE SNITCHES, at <http://www.innocenceproject.org/causes/snitches.php> (last visited Apr. 23, 2004) (stating that testimony of jailhouse snitches often "has been the key in sending an innocent man or woman to prison for a crime he or she did not commit").

testimony, often fabricated by the snitch, normally involves the prosecutor's promise of leniency.<sup>42</sup> The Illinois legislature adopted the Commission's recommendation that, in capital cases, the trial judge must hold a pretrial hearing, with the burden on the state to prove the snitch's proposed testimony is reliable, in order for the testimony to be admissible at trial.<sup>43</sup> The Commission also urged the committee that drafts the Illinois pattern jury instructions in criminal cases to require juries be instructed about the questionable reliability of this kind of testimony,<sup>44</sup> but the committee thus far has not done so.

#### X. ACCESS TO DNA AND OTHER FORENSIC TESTING

In many cases throughout the country, convictions have been called into question and vacated as a result of posttrial forensic testing, including the use of DNA, the genetic "fingerprint" that distinguishes one person from another.<sup>45</sup> The Illinois legislature enacted two of the Commission's recommendations on this subject. First, before trial, the court is authorized to order a database search comparing any DNA evidence recovered to the defendant's genetic profile and other DNA databases.<sup>46</sup> Second, after conviction in cases in which identity was the issue, the court may order forensic testing, including DNA comparisons, upon a showing by the defense that the evidence was not subject to testing at the time of trial, has not been altered, and the results have the potential to produce relevant new evidence, even though the results may not completely exonerate the defendant.<sup>47</sup> These provisions are not limited to capital cases.

#### XI. CERTIFICATION AND TRAINING OF TRIAL JUDGES

Illinois Supreme Court Rule 43 (adopted March 2001) requires all judges who preside over capital cases to attend a capital litigation seminar once every two years.<sup>48</sup> To ensure that only the most qualified judges

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42. *See id.* (observing that the testimony of jailhouse snitches is often obtained "in return for deals, special treatment, or the dropping of charges").

43. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 122; *see* 725 ILL. COMP. STAT. ANN. 5/115-21 (enacting the recommendation).

44. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 131-32.

45. *Id.* at 51.

46. *Id.* at 57; *see* 725 ILL. COMP. STAT. ANN. 5/116-5 (enacting the recommendation).

47. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 58-59; *see* 725 ILL. COMP. STAT. ANN. 5/116-3 (enacting the recommendation).

48. ILL. SUP. CT. R. 43.

preside in capital cases and are staying abreast of law and practice, the Commission recommended that the Illinois Supreme Court provide more training to judges, certify those who are qualified,<sup>49</sup> and appoint a committee of experienced judges to provide resources to them.<sup>50</sup> The court has provided additional training, but has not otherwise acted on these proposals.

## XII. JURY INSTRUCTIONS AS TO EYEWITNESS TESTIMONY

The Commission recommended that, when applicable in capital cases, the jury instructions should enumerate factors to consider regarding eyewitness testimony, including difficulties encountered in making cross-racial identifications, and that all eyewitness testimony should be examined carefully in light of other evidence.<sup>51</sup> The courts have yet to act on this proposal.

## XIII. TWO ADDITIONAL MITIGATING FACTORS

The Illinois General Assembly adopted the Commission's proposal that 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>52</sup>

## XIV. EVIDENTIARY LIMITS ON CAPITAL PUNISHMENT

The legislature also adopted the proposal that capital punishment may not be imposed if the only evidence of guilt is uncorroborated testimony of a jailhouse snitch, a single eyewitness, or an accomplice.<sup>53</sup>

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49. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 99.

50. *Id.* at 100.

51. *Id.* at 129.

52. *Id.* at 141; see 720 ILL. COMP. STAT. ANN. 5/9-1(c)(6),(7) (West Supp. 2004) (enacting the recommendation). The Commission also recommended that the death penalty not be imposed on mentally retarded defendants. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 156. Several months later, in *Atkins v. Virginia*, the United States Supreme Court determined that the federal Constitution restricts a state's power to take the life of mentally retarded defendants. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

53. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 158; see 720 ILL. COMP. STAT. ANN. 5/9-1(h-5) (enacting the recommendation).

## XV. TRIAL JUDGE OVERRIDE OF THE JURY'S DEATH VERDICT

In some cases in which a jury imposes a death sentence, the trial judge may harbor doubts about the appropriateness of the punishment. The Commission recommended that, in these circumstances, the trial judge should be empowered to set aside the jury verdict and impose a life sentence.<sup>54</sup> The Illinois legislature's response was the opposite: The trial judge may not alter the jury's sentence.<sup>55</sup> Rather, the judge is to place the reasons for disagreement with the sentence in the record for the reviewing court's consideration.<sup>56</sup>

## XVI. REVIEW AUTHORITY OF THE ILLINOIS SUPREME COURT AND COLLECTION OF RELEVANT DATA

In Illinois, capital cases are appealed directly to the Illinois Supreme Court.<sup>57</sup> The Commission proposed that, on these appeals, the court should consider, among other factors, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases."<sup>58</sup> This is known as "proportionality review."<sup>59</sup> The court compares imposition of the death penalty in the case before it with the penalties imposed in other like cases in which the defendant was sentenced to death—virtually every first-degree murder case prosecuted in Illinois—whether the case was disposed of by plea or trial, and whether a death sentence was sought or obtained.<sup>60</sup> Under proportionality review, if capital punishment was not imposed in similar cases, the Illinois Supreme Court would be empowered to vacate the death sentence and impose a term of imprisonment.<sup>61</sup>

In making this recommendation, Commission members noted that the research of its experts revealed geographic and racial bias in the

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54. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 152. The Commission proposed that if the eligibility factors were reduced to its recommended five, *see infra* Part V, the trial judge should be required to resentence the defendant to natural life. *Id.* at 152, 154.

55. 720 ILL. COMP. STAT. ANN. 5/9-1(g).

56. *Id.*

57. *Id.* 5/9-1(i) (West 2002).

58. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 1, at 166.

59. *Id.*

60. *Id.* (evaluating proportionality by comparing a sentence imposed with those sentences received by similarly situated classes of offenders).

61. *See id.* (recommending that a reviewing court be permitted to "modify the sentence . . . to conform to the sentences imposed in other cases").

imposition of the death penalty.<sup>62</sup> The Commission proposed that the Illinois Supreme Court be granted explicit authority to conduct proportionality review in order to ensure consistency and fairness in the statewide application of the death penalty.<sup>63</sup>

The Commission made a related recommendation that data about all Illinois first-degree murder cases, whether or not the death penalty was sought or imposed, be recorded by trial judges and kept by the Administrative Office of Illinois Courts.<sup>64</sup> These data should include the facts of the case, the defendant's background, "and the basis for the sentence imposed."<sup>65</sup> These data would provide a major resource for the Illinois Supreme Court in making proportionality reviews.

Neither of these recommendations called for legislative action, because the Illinois Supreme Court may adopt them under its general supervisory and rulemaking powers.<sup>66</sup> But neither the Illinois Supreme Court nor the legislature has acted on either proposal. Instead, the newly enacted legislation provides that the Illinois Supreme Court may overturn a death sentence and order imprisonment "if the court finds that the death sentence is fundamentally unjust as applied to the particular case."<sup>67</sup> This provision contemplates a far narrower inquiry than that called for by proportionality review, because the court is to consider only the facts of the case before it, rather than comparing the case at bar to all similar homicide cases.<sup>68</sup>

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62. *Id.* at 167 (citing Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, (Mar. 20, 2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/technical\\_appendix/section\\_1/a\\_race\\_region\\_death.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/section_1/a_race_region_death.pdf), reprinted in 81 OR. L. REV. 39 (2002), available at [http://www.law.uoregon.edu/org/olr/archives/81/81\\_Or\\_L\\_Rev\\_39.pdf](http://www.law.uoregon.edu/org/olr/archives/81/81_Or_L_Rev_39.pdf)).

63. *Id.* at 166.

64. *See id.* at 188-91 (identifying information that should be compiled and evaluated when considering whether the death penalty is being fairly applied).

65. *Id.* at 189.

66. *See* ILL. CONST. art. VI, § 16 (providing for the supreme court's administrative and supervisory authority exercisable by the chief justice over the state courts).

67. 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West Supp. 2004).

68. *See* Illinois State Senator John Cullerton et al., *Capital Punishment Reform in Illinois—A Model for the Nation*, DCBA BRIEF, Apr. 2004, available at <http://www.dcba.org/brief/aprissue/2004/art10404.htm> ("The fundamental justice amendment contemplates that the new 'fundamental justice' appellate review—which is *not* the same as 'comparative proportionality review'—will be fact-based and highly discretionary, and will lead to appellate reversal on substantive grounds in only a very small number of death penalty cases.").

## XVII. REFORMS IN NONCAPITAL CASES

Between 1987 and 1988, capital punishment was imposed in less than two percent of first-degree murder convictions prosecuted in Illinois, and an infinitesimal percent of all felonies.<sup>69</sup> Although the Commission focused specifically on capital cases, it did include a recommendation relating to noncapital cases that is undoubtedly its most far-reaching: “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>70</sup>

The foregoing discussion reveals that many of the proposed reforms are applicable to and should be adopted for all felony cases. With very few exceptions, this crucial proposal has not been implemented by the Illinois General Assembly, the Illinois Supreme Court or lower courts, the Administrative Office of the Illinois Courts, or Illinois law enforcement agencies. All those interested in improving the fairness and accuracy of state criminal justice systems should give thoughtful consideration to this proposal.

## XVIII. CONCLUSION

The process of study and proposed reforms undertaken by the Illinois Commission are models that other states should consider when assessing their justice systems. The recommendations adopted by the Commission cover the gamut of the criminal justice process—from the initial police investigation through pretrial, trial, postconviction appeal, and clemency proceedings. The importance of having a fair and accurate system in capital punishment cases is obvious. The proposals should be evaluated and acted upon by the judiciary, legislatures, and law enforcement agencies throughout the United States.

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69. GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, *supra* note 1, at 197 (citing Pierce & Radelet, *supra* note 62, at 1, 9).

70. *Id.* at 187.

