

CAPITAL PUNISHMENT REFORM STUDY
COMMITTEE

Minutes of meeting December 7, 2009

The forty-fourth meeting of the Capital Punishment Reform Study Committee was held at the office of Jenner & Block, 353 North Clark Street, Chicago, Illinois from 10 AM to noon.

Those present

Not present

Leigh B. Bienen

Kirk W. Dillard

Jennifer A. Bishop-Jenkins (via teleconference)

James R. Coldren, Jr. (via teleconference)

Walter Hehner

Jeffrey M. Howard

Boyd J. Ingemunson (via teleconference)

Edwin R. Parkinson (via teleconference)

Charles M. Schiedel

Richard D. Schwind

Geoffrey R. Stone (via teleconference)

Randolph N. Stone (via teleconference)

Thomas P. Sullivan

Michael J. Waller (via teleconference)

Eric C. Weis (via teleconference)

Also present: Cheryl Bormann, Illinois Appellate Defender;
David E. Olson, Loyola University (via teleconference); and
Jeremy Schroeder, Illinois Coalition to Abolish the Death Penalty
(via teleconference).

The minutes of the Committee meeting held on
November 23, 2009, were approved.

1. Report of David Olson.

Mr. Olson stated that, based upon additional responses to his
surveys, he has updated the survey data, and will soon distribute
the new results to committee members.

Mr. Olson addressed the survey to trial court judges. He has
agreed with representatives of the Administrative Office of Illinois

Courts to the following procedures: The AOIC will mail the survey forms to all judges who are certified as qualified to preside at capital punishment trials. It is anticipated that the surveys will be mailed next week, and the results received in January 2010.

Mr. Olson will then collate the data, and distribute the results to Committee members.

Ms. Bishop-Jenkins inquired whether it would be appropriate to add a question whether the judges' opinions regarding the adequacy of services available to victims, victims' families and witnesses. After discussion, it was agreed that Mr. Olson will add this subject to the survey.

2. *Reports of subcommittees.*

(1) *Report of Subcommittee 1 - Police and investigations.*

It was agreed that we will re-vote on the recommendations presented by subcommittee 1 that were voted upon at the meeting

of the Committee on November 23. Mr. Sullivan read the recommendations:

First Recommendation: In homicide investigations, blind administration should be required of all eyewitness identification procedures. Blind administration may be achieved by use of either of two methods:

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

(b) Use of a blind method.

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

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

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

The recommendation was adopted by a majority of the Committee, as follows:

Ayes - 9: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, G. Stone, R. Stone, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Waller, Weis.

The Committee next turned to the motion to revise the foregoing recommendation by the addition of the words “if feasible” at the beginning of the first sentence, so as to read:

If feasible, in homicide investigations, blind administration should be required of all eyewitness identification procedures.

The motion was adopted by a majority of the Committee, as follows:

Ayes - 9: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, G. Stone, R. Stone, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Waller, Weis.

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

The motion was adopted by a majority of the Committee, as follows:

Ayes - 9: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, G. Stone, R. Stone, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Waller, Weis.

Third Recommendation: If a blind administration is not used in a homicide investigation, a contemporaneous written report should be prepared explaining why a blind administration was not feasible.

The recommendation was adopted by a majority of the Committee, as follows:

Ayes - 9: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, G. Stone, R. Stone, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Waller, Weis.

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

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

Second, the Illinois Eavesdropping Act should be amended to permit electronic recording without the knowledge or consent of the participants.

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

The recommendation was adopted by a majority of the Committee, as follows:

Ayes - 9: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, G. Stone, R. Stone, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Waller, Weis.

Mr. Coldren said that subcommittee 1 had no additional matters to bring before the Committee at this meeting.

At this point, Mr. Waller left the meeting in order to attend to other duties.

(2) Report of subcommittee 2 - Eligibility for capital punishment and proportionality.

Ms. Bienen, Mr. Sullivan and Mr. Olson reported on a telephone conversation they had with Michael Radelet, a professor at the University of Colorado, who had conducted a study and rendered a report for the Governor's Commission on Capital Punishment, which is contained in an Appendix to the Governor's Commission report of April 15, 2002.

Ms. Bienen said that she and Messrs. Sullivan and Olson agreed that Mr. Radelet had offered to lend support to Mr. Olson

as needed, without charge, hence there was no need for the Committee to retain Mr. Radelet.

Ms. Bienen said she and Mr. Olson will report further on the results of the data she has collected at the Committee's meeting on December 17.

(3) Report of subcommittee 3 - Trial court proceedings.

Mr. Howard led a discussion of the recommendations attached as Appendix 4 to the Agenda for the Committee's meeting of October 26, 2009. The members of the subcommittee were equally divided as to whether the recommendations fall within the Committee's statutory purview, and whether certain of the verdict forms and jury instructions should be recommended by the Committee.

At this point, Mr. G. Stone left the meeting to attend to other duties.

Recommendation 1- In capital cases during the sentencing phase, the trial judge should instruct the jury:

“If any one of you believes that a mitigating factor is supported by the evidence, you may consider it in arriving at your decision even though all or some of the other jurors do not believe the mitigating factor is supported by the evidence.”

Mr. Howard said that this instruction has been rejected by the Illinois Pattern Jury Instruction Committee - Criminal; that it is supported by a 3 to 0 vote of subcommittee 3; and that the subcommittee had later discussed whether or not the instruction (or any other jury instruction) fell within the Committee’s statutory authorization.

Mr. Parkinson said he believes this instruction is outside the Committee’s authorization, and is inappropriate because it invites dissent by a single member of the jury. Mr. Schwind raised the question whether the Committee is authorized to make recommendations on jury instructions. Mr. Hehner said the better

form for the Committee is to send a letter about this instruction to the IPI Committee.

On motion and second, the Committee voted as to whether a recommendation of a jury instruction on this subject was within the Committee's statutory authorization. A majority of the Committee voted that the Committee is authorized to make recommendation as to jury instructions, as follows:

Ayes - 7: Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schwind, Sullivan, Turner.

Nays - 6: Messrs. Hehner, Ingemunson, Parkinson, Schiedel, Schwind, Weis.

On motion and second, a majority of the Committee voted to adopt Recommendation 1, set forth above, as follows:

Ayes - 8 Mss. Bienen and Bishop-Jenkins, and Messrs. Coldren, Howard, Schiedel, Schwind, Sullivan, Turner.

Nays - 5: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Weis.

Recommendation 2: IPI 3:15 should be amended to add a final sentence which states:

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

Mr. Howard stated that the two members of the subcommittee voted against this recommendation, while one member voted in favor; the fourth member was not present.

Mr. Sullivan stated that a recommendation to the same effect as Recommendation 2 was unanimously supported by the members of the Governor’s Commission.

On motion and second, a majority of the Committee voted to adopt Recommendation 2, as follows:

Ayes - 7: Mss. Bishop-Jenkins and Messrs. Coldren, Howard, Schiedel, R. Stone, Sullivan, Turner.

Nays - 5: Messrs. Hehner, Ingemunson, Parkinson, Schwind, Weis.

Abstention - Ms. Bienen.

(4) Report of Subcommittee 4 - Post-conviction proceedings, DNA and general topics.

No report was received from subcommittee 4.

At this point, a motion to adjourn was made and approved by unanimous vote.

3. Next meeting - Thursday, December 17, 2009 at 1 PM.

The next meeting of the Committee will take place on Thursday, December 17, 2009 at 1 PM. The meeting will be held at the offices of Jenner & Block, 353 N. Clark Street, 45th floor, conference call-in number 1-888-363-4734, access code 4209525, host pass code 3365.

Thomas P. Sullivan
Chair
December 11, 2009