

**ILLINOIS CAPITAL PUNISHMENT**  
**REFORM STUDY COMMITTEE**

**FOURTH ANNUAL REPORT**

**May 12, 2008**

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**REFORM STUDY COMMITTEE**

**FOURTH ANNUAL REPORT**

Leigh B. Bienen  
Jennifer A. Bishop-Jenkins (2/22/08)\*\*  
James R. Coldren, Jr.  
Kirk W. Dillard  
James B. Durkin (7/12/07)\*  
Theodore A. Gottfried (9/19/07)\*  
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Richard D. Schwind, Vice Chair  
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Thomas P. Sullivan, Chair  
Arthur L. Turner  
Michael J. Waller

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\* date of resignation  
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May 12, 2008

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# Capital Punishment Reform Study Committee

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Richard D. Schwind  
Vice Chair

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Jennifer A. Bishop-Jenkins

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May 12, 2008

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Minority Leader  
309A Capitol Building  
Springfield, IL 62706

Re: Fourth annual report of the Illinois Capital Punishment  
Reform Study Committee

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Gentlemen:

The statute which established this Committee provides that the Committee shall report annually to the General Assembly. 20 ILCS3929/2(b). The Committee's first report, submitted on April 27, 2005, covered activities from inception in early 2005 through April 27, 2005. The Committee's second report, submitted on February 28, 2006, covered activities during the balance of the year 2005, that is, from April 28 to December 31, 2005. The Committee's third report covered the calendar year 2006. This is the Committee's fourth report, covering the calendar year 2007.

**I. ADMINISTRATIVE MATTERS.**

**1. Committee membership.**

During 2007, two members of the Committee resigned, James B. Durkin and Theodore A. Gottfried, and were replaced respectively by T. Clinton Hull and Charles M. Schiedel. In February 2008, Jennifer Bishop-Jenkins was appointed to replace Thomas P. Needham, who resigned in May 2006.

**2. Proposed extension of the Committee's statutory tenure.**

The statute which established this Committee took effect on November 19, 2003. (20 ILCS 3929/1 and 2.) It provides in Section 3929/2(b) that "The Committee shall ... annually report to the General Assembly..." and in Section 3929(d) that "The Committee shall submit its final report to the General Assembly no later than 5 years after the effective date of this Act. Delays were encountered in the appointment of members, so that the Committee's first meeting was not held until February 14, 2005, 15 months after the enabling statute took effect. The Committee's First Annual Report, dated April 27, 2005, reported that the Committee had been established and met three times, but made no substantive recommendations. Since then, the Committee has sent its Second (February 28, 2006) and Third (April 9, 2007) annual

reports to the General Assembly. Accordingly, although the General Assembly requested that the Committee submit five annual reports to the General Assembly, the Committee's statutory tenure will expire on November 19, 2008, before the Committee will have filed its fourth and fifth annual reports.

The members of the Committee discussed these circumstances at the full Committee meeting on December 11, 2007. The members, who serve without pay, were unanimous in the belief that their work is of great significance with respect to the Illinois criminal justice system, especially as it relates to the matter of capital punishment, and is intertwined with the current moratorium on carrying out executions. We also recognize that, in the past, Illinois capital cases have taken many years, often over a decade, from indictment to final resolution, which has made the Committee's work somewhat tentative during its early years, because we are dealing with a small number of first degree murder indictments that have gone to trial with the prosecutor seeking capital punishment.

We intend to make a complete and careful study of the processing of capital cases, and the impact of the enacted reforms, which they have not been able to do and will not be able to do by November 18, 2008. We



desire at a minimum to submit reports of their findings to the Illinois General Assembly as contemplated by the Committee's enabling statute. The statute indicates that the General Assembly desires five annual reports, and that the fifth annual report will serve as the Committee's final report. See 20 ILCS 3929/2(b) and (d). The Committee's reports thus far have been as follows:

- The first report, dated April 27, 2005, advised the General Assembly that, owing to delays in the appointments of its members, the Committee did not hold a meeting until February 14, 2005, and that the Committee had held three meetings as of April 27, 2005. That report did not include any substantive information or recommendations. Rather, it was purely informational, to notify the General Assembly that the Committee was formed and beginning its work as required by the enabling statute.

- The second report, dated February 28, 2006, covering the period April 28 to December 31, 2005, advised the General Assembly of the Committee's organizational structure and membership, and the areas that the Committee intended to examine in pursuance of its statutory charter. No recommendations were included.

- The Committee's third report, dated April 9, 2007, relating to the calendar year 2006, was the first substantive report. We explained our activities during 2006, submitted several recommendations to the General Assembly and the Illinois Supreme Court, and outlined various areas we intended to pursue during 2007.

This report relates to the calendar year 2007, and will constitute the second substantive report of this Committee.

Accordingly, in order for the Committee to submit five substantive annual reports to the General Assembly concerning the impact of reforms to the Illinois capital punishment system, the Committee's statutory tenure should be extended to the end of 2010, so as to allow us to report on our work during five calendar years, 2006 through 2010.

After a thorough discussion of this subject, the Committee members unanimously agreed as follows: "At this time the Committee will include in the Fourth Annual Report a request that the Committee's tenure be extended to December 31, 2009, and that as that date approaches, the Committee will again consider whether to request an additional extension of its tenure."

*Recommendation:*<sup>1</sup> *The Illinois General Assembly should enact, and the Governor should approve, legislation extending the tenure of the Illinois Capital Punishment Reform Study Committee until December 31, 2009.*<sup>2</sup>

**3. Proposed Committee appropriation for the fiscal year ended June 30, 2009.**

Committee members serve without pay, although they are entitled to seek reimbursement for reasonable expenses necessarily incurred in connection with Committee business. Thus far, few expenses have been incurred.

The Committee retained the part time services of a Special Counsel, Peter G. Baroni, on an hourly rate basis for services, plus reasonable expenses necessarily incurred in connection with Committee business.

The Committee also entered into a contract with Loyola University Chicago to perform research and statistical analysis under the direction of Dr. David Olson. The amount budgeted for this contract supported a small portion of Dr. Olson's time, but was primarily intended to support

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<sup>1</sup> All recommendations made in this report were adopted unanimously.

<sup>2</sup> In February 2008, Senate Bill 2657 was introduced, sponsored by Committee member Senator Kirk W. Dillard, providing for extension of the Committee's tenure to December 31, 2009. The bill passed the Senate on April 16, and has been introduced in the House, sponsored by Committee member Representative Arthur L. Turner.

the costs associated with photocopying, postage, data entry and graduate research assistants that were to work on carrying out the research under Dr. Olson's supervision.

Both contracts have been entered into in accordance with the Illinois Procurement Act (30 ILCS 500/1-5 et seq), and are posted on the website of the Illinois Criminal Justice Information Authority (ICJIA).

The Committee expended \$20,613 for FYE June 30, 2006, and \$107,399 for FYE June 30, 2007. The Committee's budget was included with the appropriation of, and administered by, ICJIA.

During 2007, we requested that the General Assembly appropriate \$250,000 for the Committee for the fiscal year ended June 30, 2008, to be included within the budget of, and administered by, ICJIA. The General Assembly proposed an interim budget that included \$150,000 for the Committee, within the ICJIA appropriation, but the Governor vetoed the portion of the ICJIA appropriation that included \$150,000 for the Committee. As a result, the State Controller has not paid the bills for the services of Mr. Baroni or Dr. Olson after June 30, 2007.

At the unanimous agreement of the Committee's members, the Committee chair and co-chair sent a letter to the President of the Illinois Senate, dated September 5, 2007, requesting that the Committee's budget

be restored, in order that the Committee “may continue to study and report to the General Assembly concerning the ground breaking reforms you championed in 2003.” No response has been received.

By the end of 2007, no funds had been appropriated for the Committee for the fiscal year ended June 30, 2008, and the members have been advised that it is likely no funds will be appropriated for the Committee for that fiscal year. As a result, Mr. Baroni has withdrawn as the Committee’s counsel, and Dr. Olson has informed us that, while he is willing to complete the data entry and analysis of the surveys sent to all State’s Attorneys and Public Defenders, he will be unable to complete his other assigned tasks (surveys, data entry and analysis to be sent to judges, police and select private lawyers), unless and until funds are provided to pay Loyola University Chicago the costs associated with Dr. Olson’s services.

The members of the Committee unanimously agreed that our work will be seriously impaired if the funds we requested for the fiscal year ended June 30, 2009 are not appropriated, and that the necessary legislation should be enacted providing an appropriation of \$250,000 as

the Committee's budget for the fiscal year ended June 30, 2009, to be included within the budget of, and administered by, ICJIA.<sup>3</sup>

*Recommendation: The General Assembly and the Governor should take the necessary steps to provide \$250,000 for the Committee's budget for the fiscal year ended June 30, 2009, to be included within the budget of, and administered by, the Illinois Criminal Justice Information Authority.*

## **II. COMMITTEE MEETINGS.**

The notices, agendas and minutes of Committee and subcommittee meetings are posted on the CJIA website. All of our meetings have been and will continue to be open for public attendance as required by the Illinois Open Meetings Act.

### **1. Full Committee meetings.**

The full Committee held ten meetings during 2007, at the ICJIA offices, 120 S. Riverside Plaza, Chicago, Illinois 60606, on January 23, February 13, March 26, April 30, June 4, July 6, August 6, September 17, November 8 and December 11. Invited guests were in attendance at

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<sup>3</sup> In February 2008, Senator Dillard, introduced Senate Bill 2167, authorizing a budget of \$250,000 for the Committee for each of the fiscal years ended June 30, 2008 and 2009, to be administered by ICJIA. The bill has been referred to and is pending before the Senate Rules Committee.

several meetings, and members of the public were present at all meetings, some participating by teleconference.

## **2. Subcommittee meetings.**

Subcommittee meetings were held at various locations and dates, summarized below, on some occasions with invited guests in attendance. Members of other subcommittees, and Messrs. Baroni and Olson, attended some of these meetings.

### *Subcommittee 1 - Police and investigations.*

Members: James R. Coldren, Jr., chair, T. Clinton Hull (appointed to Committee October 31, 2007), Richard D. Schwind and Geoffrey R. Stone.

Meetings were held in 2007 attended by members of the subcommittee on February 7, also attended by Steven Hein, Research Assistant to James Coldren; Michael Chasen, Deputy Chief, Detective Division and Sergeant Timothy Gilbert, Chicago Police Department (CPD); May 30; June 29; September 17 (joint meeting with Subcommittee 4), also attended by Bernard J. Murray, Assistant Cook County State's Attorney; Daniel Nelson, Illinois Law Enforcement Training and Standards Board; Paul Taylor, Administrative Office of

Illinois Courts; Crystal H. Marchigiani, Assistant Cook County Public Defender; and Ellen Mandeltort, Deputy Attorney General.

*Subcommittee 2 - Eligibility for capital punishment and proportionality.*

Members: Leigh B. Bienen, chair, Kirk W. Dillard, Thomas P. Sullivan and Michael J. Waller.

Meetings were held in 2007 attended by members of the subcommittee on January 16, also attended by Mr. Baroni; Patrick Foley, Mr. Olson's research assistant; Molly Heiler, Ms. Bienen's research assistant; and Daniel D. Rippy, legal counsel to the Illinois Senate Judiciary Committee; February 8, also attended by Ms. Heiler; April 16, also attended by Mr. Baroni; Ms. Heiler; and Brett M. Hellinga, legal counsel to the Illinois Senate Judiciary Committee; June 4, also attended by Mr. Baroni; Patrick Foley, Mr. Olson's assistant; Ms. Heiler; and Mark R. Warnsing, legal counsel to the Illinois Senate Judiciary Committee; July 6, also attended by Mr. Baroni; Patrick D. McAnany and Regan McCullough, Illinois Coalition to Abolish the Death Penalty; Mr. Warnsing; Bernard J. Sarley, Capital Case Coordinator, Cook County Public Defender; and Sapna G. Lalmalani, Jennifer L. Cassel and Aaron J. Stucky of Jenner & Block; August 6, also attended by Patrick Foley, Loyola University; Mark Myrent and Jack Cutrone, CJIA; Mr. Warnsing;



and Jennifer Cordis, Michael Margolis and Ms. Lalmalani of Jenner & Block; and September 17, also attended by Ms. McMillan and Mr. Warnsing.

*Subcommittee 3 - Trial court proceedings.*

*Members:* Jeffrey M. Howard, chair, Boyd J. Ingemunson, Edwin R. Parkinson and Randolph N. Stone.

Meetings were held in 2007 attended by subcommittee members on January 30, also attended by Judge Stephen H. Peters, 6th Judicial Circuit; March 28, also attended by Judge Terry H. Gamber, 2nd Judicial Circuit; June 11, also attended by Judge Kathryn E. Creswell, Eighteenth Judicial Circuit; July 23; August 7, also attended by Cook County Circuit Court Judges Vincent M. Gaughan and Joseph G. Kazmierski; and October 31.

*Subcommittee 4 - Post-conviction proceedings, DNA and general topics.*

*Members:* Theodore A. Gottfried, chair (resigned from Committee, 9/19/07), Charles M Schiedel, chair (appointed to Committee, 9/19/07), James B. Durkin (resigned from Committee, 7/12/07), Gerald E. Nora and Arthur L. Turner.<sup>4</sup>

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<sup>4</sup> Ms. Jennifer A. Bishop-Jenkins was appointed to the Committee on 2/22/08, and assigned to subcommittee 4.

Meetings were held in 2007 attended by subcommittee members on January 23, also attended by Michael L. Atterberry, Illinois Attorney General's Office, and member, Illinois Laboratory Advisory Committee; February 8, also attended by Ms. Heiler; February 13; April 19, also attended by Brian Mackey, Chicago Daily Law Bulletin; May 22, also attended by Kathryn Saltmarsh, Assistant Defender/Legislative Liaison, Office of State Appellate Defender; Col. Jack Garcia, Lt. Col. Scott Giles and Donna Metzger, Illinois State Police Forensic Services Division; and Mr. Mackey; and September 17 (joint meeting with Subcommittee 1).

**3. Public hearing in Chicago, IL, February 26, 2007.**

The Committee's enabling statute provides, "The Committee shall hold hearings on a periodic basis to receive testimony from the public regarding the manner in which reforms have impacted the capital punishment system." 20 ILCS 3929/2(c).

The Committee held its second public hearing in the auditorium of the James R. Thompson Center on February 26, 2007, from 10 AM to 3 PM. Notices of the hearing were distributed to the news media and various groups concerned with matters relating to capital punishment and criminal justice reform. As with the Committee's first public hearing held

in 2006 in Springfield, the testimony was of interest and assistance to members of the Committee.

The following persons testified at the hearing:

Jean Bishop, Murder Victims Families for Human Rights

Jane Bohman, Executive Director, Illinois Coalition to Abolish the Death Penalty

Marva Jackson

Jennifer A. Bishop-Jenkins, Organization of Illinois Victims

Mary L. Johnson, Chicago Black United Community Families of the Wrongfully Convicted

Janet Kittliues, Death Penalty Issue Specialist, Illinois League of Women Voters

Marlene Martin, National Director, Campaign to End the Death Penalty

Catherine McMillan, Illinois Coalition to Abolish the Death Penalty

Steven L. Richards, Office of Illinois Appellate Defender

Alan J. Spellberg, Assistant Cook County State's Attorney

Bernard J. Sarley, Assistant Cook County Public Defender

Carrie Summers, Executive Director, Illinois Coalition to Abolish the Death Penalty

Darby Tillis, former Illinois death row inmate

Guidi Weiss, Illinois Liaison for the Grey Panthers

William Wendt

The transcript of this hearing is posted on the CJIA website.

### **III. SUBSTANTIVE MATTERS AND RECOMMENDATIONS.**

#### **1. Electronic recording of custodial interviews of homicide suspects.**

In 2003, Illinois enacted legislation which creates a rebuttable presumption that oral or written statements made to a law enforcement officer by a suspect who is in custody in a place of detention are inadmissible in evidence in a trial for homicide, unless the statements were electronically recorded from the *Miranda* warnings to the end of the interviews. The statute contains several exceptions from the recording requirement, and also provides that the presumption of inadmissibility may be overcome if the State proves by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. (705 ILCS 405/5-401.5; 725 ILCS 5/103-2/1.)

Illinois was the first state to enact mandatory recording legislation. Maine, New Mexico, North Carolina, Wisconsin and the District of Columbia have since enacted similar statutes. The highest courts of Alaska, Iowa, Massachusetts, Minnesota, and New Jersey have adopted rulings which we are informed have resulted in statewide custodial recordings, applicable to varying classes of felony investigations.

*(a) Illinois law enforcement experience with recordings*

The Illinois statute requiring electronic recording of custodial interviews of homicide suspects has been fully operational since July 2005. Committee members have heard from police and prosecutors in various parts of the state, as well as defense lawyers, all of whom speak favorably about this practice, although – as discussed in part (b) below – there is a need for additional funding.

Committee members visited CPD headquarters at Belmont and Western, and were given a tour and demonstration of the electronic recording facilities. The reports we received during 2007 verified information we had previously received: Officers who were initially skeptical about recordings have come to enthusiastically accept the practice (see Third Annual Report, pp. 8-10). A CPD representative said that more than 1,800 custodial interviews of homicide suspects have been recorded without losing any owing to technical malfunctions. The recordings have proven useful in training new detectives, and in assisting experienced detectives improve their interviewing techniques. We were told of several instances in which suspects, while alone in interview rooms, engaged in incriminating conduct that was videotaped.

The statewide training given to law enforcement officers regarding recording custodial interviews is summarized in Part 6(a) below.

Several judges who have presided over capital cases told Committee members that electronic taped interviews have been helpful to both judges and juries, by allowing the fact finders to hear and/or observe first hand the circumstances under which statements were given, rather than hearing second hand testimony of witnesses. They have observed no technical difficulties in showing videotapes in the courtroom.<sup>5</sup>

*(b) The need for additional funding.*

In the Committee's Third Annual Report (page 12), we recommended that the General Assembly should provide additional funding to law enforcement agencies for expenses incurred to the carry out the statutory mandate of recording custodial interviews in homicide investigations, for example, cost of equipment, sound proof rooms, training detectives, reviewing, transcribing, and storing tapes and discs.

A statute was enacted providing that the Illinois Law Enforcement Training Board (see 50 ILCS 705/2-3) provide training in the technical aspects of conducting electronic recordings of interrogations, and to

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<sup>5</sup> One trial court judge expressed the view that the statutory provisions requiring custodial recordings and pretrial hearings regarding jailhouse informant testimony should be extended to all serious felonies.

develop guidelines for the recording of custodial interviews in homicide investigations. (50 ILCS 705/10.3.) We have been informed that this statute has not been funded, and therefore no action has been taken to carry it into effect. The other portions of our prior recommendation were not acted upon. Accordingly, we submit the following recommendations:

*Recommendations: The General Assembly should provide funding (1) to carry into effect the provisions of 50 ILCS 705/10.3, relating to training programs and guidelines for the mandated recordings of custodial interviews in homicide investigations, and (2) to law enforcement agencies for expenses related to their electronic recording of custodial interrogations in homicide investigations, for example, expenses relating to purchase of electronic equipment, assuring equipment compatibility, sound proof rooms, reviewing and transcribing recordings, and storage of tapes and discs.*

*(c) The need for pattern jury instruction regarding interrogation techniques.*

In the Committee's report for 2006 (pp. 13-14), we recommended that the Illinois Supreme Court Pattern Jury Instruction Committee should draft, and the Supreme Court should approve, pattern jury instructions explaining which methods may lawfully be used by law enforcement officers during custodial interrogations of suspects, and which may not, in

accordance with rulings of the United States and Illinois Supreme Courts. A copy of our 2006 report was sent to the IPI Committee, calling attention to that recommendation, but no instructions have been forthcoming.

Accordingly, we repeat our recommendation:

*Recommendation: The Illinois Pattern Jury Instruction Committee should draft, and the Illinois Supreme Court should approve, pattern jury instructions explaining which methods may lawfully be used by law enforcement officers during custodial interrogations of suspects, and which may not, in accordance with rulings of the United States and Illinois Supreme Courts*

**2. Eyewitness lineups and photo spreads.**

*(a) The use of “blind” administrators.*

In the Committee’s 2006 report, the following recommendation was included on page 16:

*Legislation should be enacted requiring that whenever practicable the administrator of an eyewitness lineup or photo spread should not be aware of which member of the array is the police suspect.*

Upon reconsideration of this recommendation, the Committee voted at its November 2007 meeting to authorize the chair and co-chair to send a letter to the Speakers and Leaders of the Illinois General Assembly



Senate and House, advising that we withdraw the foregoing recommendation, in order that we may further study and discuss this subject. The letter is dated November 9, 2007.

This matter is now under active review, and we anticipate this matter will be addressed in our next annual report.

*(b) Recording eyewitness identification procedures.*

This year we will also address the questions of whether eyewitness identification procedures, through lineups and photo spreads, that occur in police facilities, should be electronically recorded, by audio and/o videotape, and if so whether the Illinois Eavesdropping Act (720 ILCS §5/14, et seq) should be amended to permit electronic recording of what is said during those procedures.

*(c) Use of sequential procedures.*

The pilot program conducted pursuant to the 2003 statute (725 ILCS 5/107A-10) was discussed in our Third Annual Report (pp. 14-16). We will continue to monitor the experiences of other law enforcement agencies with the sequential system, and the results of pilot programs conducted in other law enforcement departments, and report to the General Assembly if and when reliable information is received.

### 3. **Comparative proportionality review.**

#### (a) *Our statutory mandate.*

In our Third Annual Report (pp. 18-21), we explained the efforts we have made to comply with our statutory mandate that we study and report on “the tracking of data related to whether the reforms [enacted by the General Assembly relating to capital cases] 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 in its report issued on April 15, 2002.” (20 ILCS 3929/2(b)(1).)<sup>6</sup>

#### (b) *The eligibility factors and State’s Attorneys selection power.*

Illinois statutes provide 21 factors which make a first degree murder case potentially eligible for capital punishment. Among the indictments for first degree murder returned in each of our 102 counties, the local State’s Attorney decides in which cases he/she will seek capital punishment rather than a penitentiary sentence. The rules of the Illinois Supreme Court require that “The State’s Attorney or Attorney General shall provide notice of the State’s intention to seek or reject imposition of

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<sup>6</sup>See, Report of the Governor’s Commission on Capital Punishment (April 2002), pp. 195-97, and Technical Appendix; see also *Race, Region, and Death Sentencing in Illinois, 1988-1997*, G.L. Pierce and M.L. Radelet, 81 Oregon Law Review 39 (2002).

the death penalty” by filing a notice “as soon as practicable,” and “In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise.”<sup>7</sup>

(c) *Facts needed for comparative proportionality review.*<sup>8</sup>

In an effort to comply with the statutory mandate mentioned above, we are attempting to obtain from each of the State’s Attorneys offices copies of all first degree murder indictments returned from January 1, 2003 until December 31, 2007. This is merely a first step in the process. In order to make the required analysis from this data, we must:

- (1) Determine whether or not each indicted first degree murder case presented a capital eligible offense under the applicable Illinois

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<sup>7</sup> IL Supreme Court Rule 416(c). Several assistant public defenders have told us that some judges do not treat this notice requirement as binding and, despite defense objections, will permit notices of intent to seek capital punishment to be filed after the expiration of 120 days.

<sup>8</sup> After the Governor’s Commission report was issued, a statute was enacted that provides the Illinois Supreme Court may overturn a capital sentence and order a term of imprisonment “if the court finds that the death sentence is fundamentally unjust as applied to the particular case.” (720 ILCS 5/9-1(i).) This language appears to restrict the Court’s review to the particular case before it, without comparison to other capital or capital eligible cases. The Supreme Court has recently ruled that it will not engage in a comparative proportionality analysis. *People v. Mertz*, 842 N.E.2d 618, 668-69 (Ill. 2005); *People v. Thompson*, 853 N.E.2d 378, 404-05 (Ill.2006). The Court has affirmed the sentences in each of the capital cases it has reviewed since January 2003.

statutes, regardless of whether or not the State's Attorney filed notice of intent to seek capital punishment, and

(2) As to all capital eligible cases, assemble sufficient facts so that meaningful comparisons may be made between (a) cases in which capital punishment was imposed in the trial court, and (b) all other capital eligible cases, namely, (i) capital eligible cases in which no notice to seek capital punishment was filed by the State's Attorney, plus (ii) those in which a notice to seek capital punishment was filed but capital punishment was not imposed in the trial court.

*(d) The Capital Crimes Database.*

Our effort to fulfill our statutory obligation could be materially assisted by the newly enacted statutory mandate to create a Capital Crimes Database, 20 ILCS 3930/7.6 (2007), as recommended by our Third Annual report (p. 21). That statute directs ICJIA to "collect and retain in the Capital Crimes Database information on the prosecution, pendency, and disposition of capital and capital eligible cases in Illinois." Agencies "required to provide information on capital cases to the ICJIA, as the ICJIA may request" for the Database, are the Attorney General, Department of Corrections, State Police, all county State's Attorneys and Public Defenders, and Appellate Prosecutor and Appellate Defender.

(Section 7.6(d).) In addition, the Administrative Office of Illinois Courts and all county circuit court clerks may be “requested to provide information on capital cases to the ICJIA” for the Database. (Section 7.6(e).)

However, as explained in the following section, funding has not been provided for data collection.

*(e) Funding to implement the Capital Crimes Database.*

We have been told that no funds have been appropriated to cover the costs of the data collection and analysis for the Capital Crimes Database, hence no actions have been taken to implement the statute or to undertake compilation of the Database.<sup>9</sup>

The ICJIA Executive Director and her staff have advised us that consolidating and analyzing the data will cost approximately \$100,000 to \$150,000 per year. This does not include the costs ICJIA will incur as required by the statutory mandate to “develop rules to provide for the coordination and collection of information in the Capital Crimes Database” (7.6(c)), and “procedures and protocols for the submission of

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<sup>9</sup> Several knowledgeable members of the Committee are of the opinion that funds of the Capital Litigation Trust Fund may not be used to pay the costs involved in implementing this statute.

information relating to capital and capital eligible cases to the data base in conjunction with the agencies submitting information” (7.6 (f)).

If and when the data are collected for the data base, we may be required to retain experts to assist in the recording, coding, arrangement, comparison and analysis of the data, so as to present the information in a form that is useful for prosecutors, defense lawyers, the Illinois Supreme Court and others, for the purpose of comparative proportionality review.

Accordingly, we submit the following recommendation:

*Recommendation: The General Assembly and the Governor should take the steps necessary to provide the funding necessary to implement the collection, recording, coding, arrangement, comparison and analysis of the data in a professional manner, as called for in the statute mandating creation of a “Capital Crimes Database,” 20 ILCS 3930/7.6.*

*(f) Reduction of eligibility factors.*

A majority of the Governor’s Commission on Capital Punishment recommended that the number of factors that make a first degree murder case eligible for capital punishment be reduced to five, while a substantial minority recommended reduction to six, as follows:

Briefly stated, the majority proposed (Rec. 28, pp. 67-72) that the factors be (1) murder of a police officer or firefighter, (2) murder of a

person at a correctional institution, (3) murder of two or more persons, (4) intentional murder involving torture, and (5) murder by a person under investigation or convicted of a person involved in the investigation, prosecution or defense. The minority voted to retain murder committed in the course of committing a felony (pp. 73-75).

During the current year, we will attempt to determine the number of cases since January 1, 2003 in which State's Attorneys have filed notice of intent to seek capital punishment, which eligibility factors were the basis of the filings, and the number of cases in which a death penalty was imposed, compared to the number of capital eligible cases in which the defendant was found guilty of first degree murder and given a penitentiary sentence, or was found guilty of a crime other than first degree murder, or not guilty of any crime. This information will enable us to determine whether to formulate additional recommendations.

**4. Calculating the costs of the Illinois capital punishment system, and the cost impact of the enacted reforms.**

The statute which created the Committee provides that we are to study and report to the General Assembly on "The impact of the various reforms on the costs associated with the administration of the Illinois capital punishment system." (20 ILCS 3929/2(b)(5).) As explained

below, with the information now at hand, we are unable to make reliable statements, or even reliable estimates, about those costs.

A statute was enacted effective January 1, 2000, establishing the Capital Litigation Trust Fund (CLTF), from which many – but far from all – of the costs associated with capital cases are paid from state funds. (725 ILCS 124/15.) Through the end of 2007, more than \$50 Million of CLTF funds has been spent, and \$11.2 Million has been appropriated for 2008.<sup>10</sup>

In January 2003, the Governor commuted all the effective Illinois death sentences, and imposed instead sentences of life without parole on most of the 164 persons then on death row. As of December 31, 2007, an additional 13 men have been convicted of first degree murder and sentenced to death in Illinois. With approximately \$40 Million expended from CLTF funds during that five year period – January 1, 2003 to December 31, 2007 – it may appear on first glance that the CLTF has spent an average of at least \$3 Million for each capital sentence imposed, but this is not the case. These figures do not reflect the “costs associated with the administration of the Illinois capital punishment system” during

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<sup>10</sup> The information contained in Part III 4 and 5 of this report concerning CLTF expenditures from 2000 through 2007, and budget for 2008, has been supplied by the Office of the Illinois State Treasurer.



that period, nor do they establish the budgetary cost impact, on either side of the ledger, of the recently enacted reforms.

In order to achieve a more realistic and accurate accounting of the costs associated with the Illinois capital punishment system, and the financial impact of the reforms, since January 1, 2003, other information is required, for example:

- The amount of money spent and the time expended by personnel on capital prosecutions not paid by the CLTF, for example, the Capital Trial Assistance and Capital Post-Conviction Units of the State Appellate Defender, the Attorney General, the State Appellate Prosecutor, and county personnel.
- Expenses that would not have been incurred if capital eligible cases had been prosecuted as a non-capital first degree murder cases, because, for example, there would have been no pretrial depositions, no eligibility and sentencing hearings, and no costs related to proof of aggravation and mitigation. Perhaps there would have been faster jury selection, less drawn out appellate and post-conviction proceedings, fewer reversals for new trials or sentencing hearings, fewer federal habeas corpus petitions and clemency petitions to the Governor. These

proceedings require services of prosecution and defense lawyers, non-legal personnel, and experts, as well as additional expenditure of judicial time and attention.

- The amount of money spent and the institutional time expended on indicted first degree murder cases in which a notice of intent to seek the death penalty was filed by the State's Attorney, but which resulted in the imposition of a sentence other than capital punishment, either by trial or plea of guilty. These expense must be compared to what would have been incurred if those cases had been prosecuted as first degree murder cases without the State's Attorney having filed a notice to seek capital punishment.

These are examples of the calculations, involving various assumptions and variables, which must be made in order to make a reasonable estimate of "the costs associated with the administration of the Illinois capital punishment system." We are also unable to determine or estimate the cost savings, or the additional costs, if any, attributable to the reforms to the capital punishment system adopted by the General Assembly. Far more information than that now available to this Committee is required.

If and when the Capital Crime Database is operable, experts may be able to estimate the cost of the Illinois capital punishment system, and the savings or additional costs resulting from the enacted reforms. That is why it is critical that the General Assembly and the Governor act upon the recommendation made above, to provide funding to implement the Capital Crimes Database.

**5. The Capital Litigation Trust Fund.**

As noted above, the CLTF has been in existence since January 2000. As of December 31, 2007, the fund had disbursed (using rounded numbers):

Cook County	\$31 Million
Other counties	20 Million
Administration	<u>2.5 Million</u>
Total 2000 through 2007	\$53.5 Million <sup>11</sup>

It is significant to observe that most of this money was spent on cases in which (1) the defendants were acquitted of first degree murder, some of whom were convicted of lesser felony offenses, or (2) the prosecutors agreed to plea agreements to first degree murder involving

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<sup>11</sup> The CLTF budget for 2008 (including interest and using rounded numbers) is \$11.2 Million, of which \$6.7 Million is allocated for Cook County, and \$4.5 Million for other counties.

sentences other than death, for example, life without parole, or a term of years, and in some instances pleas to lesser felonies, or (3) the judge or jury declined to impose a death sentence on a defendant convicted of first degree murder, and the judge imposed a non-capital sentence. Those were the results in all but a few of the cases in which the State's Attorneys initially filed notices of intention to seek capital punishment.

*(a) An incentive for prosecutors to serve notices for capital punishment – to shift costs.*

Committee members interviewed trial court judges who handled capital cases through to verdict, and who were called upon to approve prosecution and defense expenditures from the CLTF. Confirming the problem identified in our Third Annual Report (p. 25), several trial judges expressed concerns that financial pressures in some counties have led to incentives for State's Attorneys to seek capital punishment in cases in which any eligibility factor exists, in order to shift the cost burden from the county to the use of state funds from the CLTF. One judge said this pressure exists in almost all downstate counties. Another judge said that, in deciding whether or not to serve a capital punishment notice, there are often strong budgetary and public relations incentives for elected State's Attorneys to take into consideration the availability of funds from the

CLTF, rather than using county funds to pay the expenses of first degree murder cases.<sup>12</sup>

Pending further study, we do not have a recommendation on this matter, but we will continue to explore it in the coming year.

*(b) Other suggested problems with and improvements to the CLTF statute.*

- One judge reported abuses of the CLTF in connection with expenses for expert witnesses.
- Two judges said that trial judges should have supervisory control over prosecutors' budgets, just as they have with defense budgets (see 725 ILCS 124/15(h) and (i)).
- Committee members have been informed of wide disparities in the practices among different trial court judges with respect to budget

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<sup>12</sup> Indeed, one of our own knowledgeable Committee members said he suspected, although he could not prove, that some State's Attorneys from sparsely populated downstate counties had filed notices of intent to seek the death penalty in order to avoid having the costs paid with county funds. On a related subject, a downstate trial judge said there are pressures on prosecutors in small counties in his circuit to seek the death penalty in all first degree murder cases that might be capital eligible because there are few murders committed in these areas, and murder is especially abhorrent to members of the community.

management practices, and the approval of defense funding requests from the CLTF.

- A Committee member has suggested that budget hearings and decisions should be heard and ruled upon by a judge other than the trial judge.

In addition, a downstate defense lawyer noted the following problem: Defense lawyers were appointed in cases in which notices for capital punishment were filed by the State's Attorneys. Shortly before the trials were to begin, the State's Attorneys served notices that capital punishment would not be sought. This put the appointed lawyers in the position of not being able to obtain funds for final trial preparation and trial of the case from the CLTF. They were instead required to seek funding from county boards, which were not receptive to their requests, and/or which had inadequate funds to meet the requests.

The Committee will make further inquiries into these matters during the current year.

**6. Training of police, prosecutors, defense attorneys and judges.**

The Committee's enabling statute directs us to report concerning "The implementation of training for police, prosecutors, defense attorneys, and judges as recommended by the Governor's Commission on Capital Punishment." (20 ILCS 32929/2((b)(2).)

*(a) Police training regarding electronic recordings.*

We met with representatives of the Law Enforcement Training and Standards Board and the Illinois Attorney General's office, regarding training of law enforcement personnel.

A working group of law enforcement personnel and prosecutors was convened to devise and conduct statewide training programs to instruct on compliance with the statutory requirement that custodial interviews of homicide suspects be electronically recorded. The training sessions were attended by approximately 1,000 police and sheriff officers, and the sessions were converted to DVD format and distributed to an additional 1,200 Illinois officers. Training modules have been made available by the CPD Training Academy, the Cook County Sheriff, the Suburban Police Academy in DuPage County, the Police Training Institute in Champaign, the Southwest Academy in Belleville. Mobile

training units have provided interrogation training to more than 1,800 officers.

A CPD representative told us that the department provides a training course of approximately two days for all new detectives regarding recording custodial interviews.

*(b) Prosecutor and defense attorney training – the Capital Litigation Trial Bar.*

Rule 701 of the Illinois Supreme Court provides that in capital cases, only members of the Capital Litigation Trial Bar may act as lead or co-counsel for either the prosecution or defense.<sup>13</sup>

The trial judges with whom our members spoke were unanimous in their support for and praise of the CLTB, as a method of assuring that a cadre of competent lawyers are available to handle capital cases for both prosecution and defense.<sup>14</sup>

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<sup>13</sup> See Supreme Court Rules 416 (d) (appointed counsel for indigent defendants) and 714 (certification and training process for the CLTB). The elected Attorney General and State's Attorneys are exempted from this requirement. Rule 714(c).

<sup>14</sup> One judge from southern Illinois stated that many experienced defense lawyers in his area have opted not to join the CLTB, which has made it difficult for him to find lawyers in the vicinity for appointment to represent indigent capital defendants.



In June 2007, the Cook County State's Attorney's Office offered an ISBA Continuing Legal Education accredited two-day capital punishment training session with approximately 180 Cook County Assistant State's Attorneys in attendance, and a 12 hour training session held in Springfield. The courses include training on DNA evidence, taught by a staff DNA specialist, and psychiatry. The office has also developed a four-hour seminar on ethics. The State Appellate Prosecutor's Office conducts an annual 12-hour training course in Springfield, and two other four day capital courses in the spring and fall of each year for prosecutors, all of which are fully accredited CLE programs. Much of this training is subsidized by the CLTF.

Representatives of the Cook County Public Defender Office explained the training offered for defense lawyers who are members of the CLTB. The State Appellate Defender's office offers a four-day capital punishment trial education course, and trial education classes for third chair lawyers in capital cases. These courses have been evaluated and approved by a representative of the Administrative Office of Illinois Courts.

We are satisfied that the training for CLTB lawyers is appropriate and adequate.

*(c) Trial judge training.*

Illinois Supreme Court Rule 43 requires that any circuit court judge or associate judge who may be called upon to preside over a capital case must attend a Capital Litigation Seminar at least once every two years. The seminars are held twice yearly at various locations throughout the state. The information available to us indicates that the judges who have tried capital cases during the past several years have handled the trials ably, and have been well qualified.

**7. Pretrial matters.**

*(a) Pretrial hearings regarding jailhouse informants.*

Committee members spoke with a trial judge who was required to hold pretrial hearings regarding the reliability of several jailhouse informants' ("snitch") testimony, pursuant to 725 ILCS §5/115-21. He said the hearings proved helpful to the truth finding process, and allowed

the trial to proceed more efficiently.<sup>15</sup> These sentiments were confirmed by a member of our Committee who participated in the trial.

*(b) Discovery depositions.*

Committee members spoke with five trial judges about the Illinois Supreme Court rule which provides that, in capital cases, the parties may take discovery depositions with leave of court upon a showing of good cause (Rule 416 (e)). The judges found the rule to be working well. One judge emphasized that depositions are an aid to the judicial process by preventing surprise at trials.

Several judges, prosecutors and defense lawyers who handled pretrial matters in capital cases told us they believed the words “good cause” in the Supreme Court rule should be defined more precisely, in order to avoid disputes and disparities among judges. Pending receipt of the responses to the surveys Dr. Olson has sent to both State’s Attorneys and Public Defenders, we will at this time make no recommendation on this subject.

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<sup>15</sup> The same judge recommended extending this statutory requirement, and the recording of custodial interviews, to all felony cases.

(c) *Case management conferences.*

The judges and trial lawyers to whom we spoke were unanimous in their support for case management conferences, which have proved very helpful in the efficient processing of cases.

**8. Trials.**

(a) *Pattern jury instructions during the guilt-innocence phase.*

In our Second Annual Report (p. 11), we called attention to the desirability of having jury instructions prepared by the Illinois Supreme Court Committee on Pattern Jury Instructions for use during the guilt-innocence phase of capital trials, as recommended by the Governor's Commission of Capital Punishment (Recs. 56, 57, 58). Since no action has been taken on this matter, we repeat our suggestion in the form of a recommendation:

*Recommendation: The Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases should prepare pattern jury instructions for use in the guilt-innocence phase of capital cases, relating to jurors' consideration of factors to be considered in assessing the reliability of (1) eyewitness testimony, (2) statements attributed to the*

*defendant from custodial interviews that were not electronically recorded, and (3) statements attributed to the defendant by jailhouse informants.*

*(b) Jury questionnaires, and pattern jury instructions relating to the eligibility and sentencing phases.*

Several trial judges advocated use of jury questionnaires in capital trials.

A trial judge said that comprehensive pattern jury instructions for capital cases would be of assistance to trial judges. An Assistant Public Defender urged that we recommend preparation of pattern jury instructions for use during the eligibility and sentencing phases of capital trials, so that the same standards for evaluating the statutory aggravating and mitigating factors are applied statewide. Compare IPI-Criminal 7B.01 to 7B.09 and 7C.01 to 7C.07.

We will postpone further consideration of these subjects pending receipt of the responses to the surveys sent to prosecutors and public defenders.

*(c) Involvement of State Appellate Defender.*

One of the trial judges to whom our members spoke expressed the view that the participation of lawyers from the Office of the State Appellate Defender (OSAD) presents an appearance of a conflict of

interest. One perceived conflict, for example, is that the OSAD lawyers may present issues to the trial court judge with the purpose of having the trial judge reject the position, thus laying groundwork for appellate reversal in the event of conviction, and that this and similar tactics may not be in the defendant's interests at trial. However, we have not heard this as presenting a problem from the other trial court judges who have handled capital trials, and therefore make no recommendation on the matter.<sup>16</sup>

#### **9. Forensic Science Laboratories.**

The Illinois State Police (ISP) operates nine state forensic science laboratories located throughout the state. The ISP is required by statute to report annually on "the extent of the backlog of cases awaiting testing or awaiting DNA analysis." (730 ILCS 5.5-4-4-3a.)<sup>17</sup> In 2005, the General Assembly established the Illinois Laboratory Advisory Committee (ILAC), to oversee and report on the activities of, and make

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<sup>16</sup> Compare Recommendation 80, Report of Governor's Commission on Capital Punishment (April 15, 2002).

<sup>17</sup> The 2007 ISP report states (p. 3), "Through the Illinois Criminal Justice Information Authority and the National Institute of Justice, the ISP has spent nearly 41.2 million in FY 2007 funding," obtained from several grant programs.

recommendations regarding public and private laboratories in Illinois, including forensic science labs. (20 ILCS 3981/5.)

In the Committee's Third Annual Report (pp. 26-29), we discussed several matters regarding the various state forensic laboratories, the ISP's "2005 DNA Testing Accountability Report," and the ILAC's "2006 Annual Report."

We have spoken with three ranking officials of the ISP Forensic Services Division (FSD), the Chair of the ILAC, and the representatives to the ILAC of the Attorney General and of the Illinois State Appellate Defender (ISAD). We have received reports concerning scientific testing from the attorneys for the ISAD and the Cook County Public Defender who are involved in current capital cases, and read the ISP's "FY 2007 DNA Testing Accountability Report," and ILAC's "2007 Annual Report."

In addition to the ISP laboratories, other forensic science labs operate in Illinois, some associated with local sheriff and police departments, and others that are privately owned.

*(a) Salary and benefits problems in state operated laboratories.*

According to information we have received, there are a number of problems with the current salary and benefit structures in the ISP forensic science laboratories that require attention:

*First*, we have been told that the salaries paid to highly trained forensic scientists in the ISP FSD are below those available to them in the private sector, which often leads to FSD scientists' resignations for opportunities elsewhere.<sup>18</sup>

*Second*, the pensions provided for scientists in the ISP FSD are below those available in other states' facilities to employees holding similar positions, and to those available in private sector labs.<sup>19</sup>

*Third*, the salary structures among scientists employed by the ISP FSD are out of kilter. Both the 2006 and 2007 ILAC reports draw attention to the unacceptable situation in the state forensic science labs owing to this situation, and the bizarre institutional results often yielded by the current salary discrepancies. The 2007 report states (p. 2):

“Multiple instances exist where bench-level scientists are being compensated at a higher rate than the supervisors and directors to whom they report.”

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<sup>18</sup> Newly employed scientists are given one to two years of specialized training. In an effort to avoid their leaving soon after receiving the training, the ISP has instituted a work commitment requirement, pursuant to which the employees agree to remain employed by ISP for two years for every year of training, and to repay the ISP for the training if they leave to work elsewhere before fulfilling the commitment.

<sup>19</sup> The ISP FSD pensions are set at 1.67% for every year of employment, compared to 2.2% provided to other states' employees holding similar positions.



The result is that many qualified scientists decline management positions. We will not undertake here to repeat in full what the ILAC has recounted in those two reports. Their warnings are exemplified by the following (2007 Report, 2):

“As the ability of our laboratories to encourage their best and brightest employees to accept leadership positions becomes increasingly limited, there will be fewer individuals with the skills and attributes needed to lead Illinois laboratories in their mission to protect the citizens of Illinois.

“What can be expected as a result of this problem are the following:

- increased case backlogs
- delayed testing results
- instances of incompetence or misconduct
- a decreased capacity of our criminal justice system to adjudicate its cases in a timely fashion
- a decreased ability to bring the full capabilities of State laboratories to bear on matters pertaining to public health
- an overall decline in the quality of life in Illinois.”

The proposed salary structure is set forth in detail in Appendix B to the ILAC 2006 report, page 11.

We agree with and adopt the ILAC recommendations in Section 1 of its 2007 report, because if they are not acted upon promptly, the Illinois criminal justice system may suffer severe negative consequences.

*Recommendations: Salaries and pensions of scientists in the Illinois forensic science laboratories should be raised to a level compatible with those in other states and the private sector, and steps should be taken to eliminate the unnatural salary discrepancies that have developed in Illinois forensic science laboratories, as explained in the 2006 and 2007 reports of the Illinois Laboratory Advisory Committee.*

*(b) Filling ISP FSD positions.*

Under current state law,<sup>20</sup> the ISP FSD is unable to hire new scientists without first complying with a two-step process: (1) permission must be obtained from the Governor to seek applicants for open scientist positions, and (2) when permission is obtained, and after posting and interviewing, the candidate selected must be approved by the Governor. Both steps of this approval process entail extensive paper work, and many months often go by waiting for approvals from the Governor's office. In the meantime, well qualified applicants often accept other positions, and the process must begin again.

In the forthcoming year, we will discuss this subject further with representatives of the Governor's office and the ISP FSD.

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<sup>20</sup> See 20 ILCS 405/292(a)-(b), applicable to State agencies "subject to the Governor."

*(c) DNA sample testing.*

In our Third Annual Report (pages 28-29), we discussed the 2005 ISP report concerning the ISP FSD's backlog of over 3,000 DNA samples awaiting testing at the end of 2005. The ISP 2007 DNA Accountability Report (p. 2) states that the backlog – defined as a lapse of more than 30 days from the date the ISP FSD received the sample – was 668 cases, with a turnaround time of 72 days.

A subcommittee meeting in May 2007 was attended by three representatives of the FSD. They told us that the backlog was then approximately 630 active cases, 300 of which were sent to accredited outside labs for testing. They explained that if the samples were not outsourced, the backlog would be double or triple the current size, and that outsourcing is restricted to testing in cases which are not “rush” or high profile. The FSD target is to discontinue outsourcing completely, and fully eliminate the backlog.

We heard no complaints about the quality of the work being done by any of the state forensic labs with respect to testing of DNA samples in capital cases. A member of the Office of the Illinois State Appellate Defender told the Committee that its attorneys, and members of the Cook County Public Defenders Office with whom he has spoken, have

confirmed that forensic testing by Illinois labs in the capital cases they are handling has not been unduly delayed.

Based upon these sources, we conclude that the problems previously existing with respect to testing of DNA samples have been or are in process of being resolved satisfactorily. We will continue to monitor this subject in the current year.

*(d) Responses to recommendations of the Illinois Laboratory Advisory Committee.*

The Chair of the ILAC has informed Committee members that, despite making reports and recommendations as required by its enabling statute, the ILAC has received no response from members of the General Assembly. The Chair put it in these terms:

“Because of the critical importance of forensic science laboratories to the fair and effective adjudication of criminal cases in Illinois, it would be highly beneficial if the House and Senate judiciary committees heard testimony from the ILAC chair or designee on a regular basis so as to maintain a familiarity with the ILAC committee’s recommendations and deliberations. Currently, no reliable mechanism exists to ensure that ILAC recommendations are being given due consideration. This will afford the Governor, General Assembly, and Illinois Supreme Court an opportunity to advise the ILAC committee on matters requiring its expertise.”

The members of the Committee will monitor this matter during the current year. Meanwhile, we submit the following recommendation:

*Recommendation: Representatives of the General Assembly Judiciary Committees and the Chair of the ILAC should discuss and attempt to resolve the concerns expressed by the ILAC Chair.*

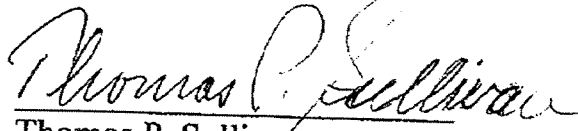
*(e) Accreditation of private Illinois forensic laboratories.*

This subject was discussed briefly in our Third Annual report (pages 29-30). In Section 2 of its 2007 report, the ILAC recommends that Illinois law “require laboratories engaging in post-conviction DNA analysis to be accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), or a body that accredits crime laboratories against both the ISO 17025 international standard and the G19 standard published by the International Laboratory Accreditation Cooperation.” The ILAC explains that many post-conviction DNA samples are old, deteriorated and likely sparse, hence official accreditation is advisable.

During the coming year, the Committee will make additional inquiries into this matter, and submit our conclusions in our next annual report.


**IV. CONCLUSION.**

Please contact us if further information is desired.

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