

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

**Minutes of meeting December 17, 2009**

The forty-fifth meeting of the Capital Punishment Reform Study Committee was held at the office of Jenner & Block, 353 North Clark Street, Chicago, Illinois from 1 to 4 PM.

Those present

Leigh B. Bienen

Jennifer A. Bishop-Jenkins

James R. Coldren, Jr. (via teleconf.)

Kirk W. Dillard

Walter Hehner

Jeffrey M. Howard

Edwin R. Parkinson (via teleconf.)

Charles M. Schiedel

Richard D. Schwind

Randolph N. Stone

Not present

Boyd Ingemunson

Geoffrey R. Stone

Thomas P. Sullivan

Arthur L. Turner (via teleconf.)

Michael J. Waller (via teleconf.)

Eric C. Weis (via teleconf.)

Also present: David E. Olson, Loyola University; Cheryl Bormann, Illinois Appellate Defender; Jeremy Schroeder (via teleconf.) and Patrick McAnany, Illinois Coalition to Abolish the Death Penalty; Mark Warnsing, Frank Strauss and Ben Ruddell, Senate Republican Staff (via teleconf.); and Erica D. Roberts, Jenner & Block.

With amendments, the minutes of the Committee meeting held on December 7, 2009, were unanimously approved.

*1. Report of David Olson.*

Mr. Olson stated that the surveys to the State's Attorneys and Public Defenders were re-sent to offices that had not previously responded, resulting in additional responses. The data are being

collated, and Mr. Olson expects that by the end of December the updated results will be made available to all members of the Committee.

The draft survey to trial judges has been submitted to the Administrative Office of Illinois Courts (AOIC). AOIC responded that several of the items in the draft were deemed inappropriate for the survey. Mr. Olson is revising the survey to comply with AOIC's position. The revised survey will soon be sent to AOIC and all Committee members, and when approved will be submitted to the Loyola Institutional Review Board (LIRB). Because the survey will go out under the name of the AOIC (rather than Loyola), Mr. Olson anticipates that LIRB approval will be obtained promptly. Mr. Olson believes the survey will be mailed to judges early in January 2010, and that by the end of February 2010 the surveys will be returned, the data

analysis will be complete, and the results sent to Committee members.

Mr. Olson said that the Illinois Department of Corrections will soon publish statistics on the number of persons convicted of murder in Illinois through the end of 2009. This in turn may shed light on the questions whether there has been progress made in eliminating the statistically significant discrimination found by the Governor's Commission in the application of capital punishment depending on the location of the prosecutions and the race of the victims.

*2. The Committee's sixth and final report.*

The Committee's statutory tenure will expire on December 31, 2009. Mr. Sullivan said that the Committee's work will necessarily continue into 2010, because Mr. Olson's survey reports will not be received until February or March, 2010, and because the Committee's final report will not be drafted, approved

and submitted to the General Assembly until the spring of 2010. He said that it may be necessary for the Committee members to meet again in 2010 in order to discuss the data obtained through Mr. Olson's surveys, and the content of the Committee's final report.

It was unanimously agreed that (1) if deemed appropriate by a Committee member, minority reports, comments and/or recommendations may be included in the Committee's final report; (2) all prior recommendations of the Committee contained in its previous annual reports will be repeated in the Committee's final report, together with a description of action, if any, taken to implement the recommendations; and (3) the target outside deadline for submission of the Committee's final report is June 1, 2010.

3. *Reports of subcommittees.*

(1) *Report of Subcommittee 1*

Mr. Coldren said the subcommittee has no further reports, recommendations or business to bring before the Committee.

(2) *Report of Subcommittee 2*

Ms. Bienen said that the subcommittee has no further reports, recommendations or business to bring before the Committee.

(3) *Report of Subcommittee 3*

On behalf of subcommittee 3, Mr. Howard submitted the following recommendations regarding instructions and verdict forums to be added to Illinois Pattern Jury Instructions - Criminal:

*First recommendation: The State has introduced the testimony of an in-custody informant as to a statement allegedly made by the defendant. This testimony is to be examined and weighed by you with care. Whether the in-custody informant's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making this determination, you should consider: (1) whether the in-custody informant has*

*received anything, or expects to receive anything, in exchange for his/her testimony; (2) any other case in which the in-custody informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the in-custody informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the in-custody informant has ever changed his/her testimony; (4) the criminal history of the in-custody informant; and (5) any other evidence relevant to the in-custody informant's credibility.*

Mr. Howard said that paragraphs (1) through (5) should be included only if supported by evidence in the case.

He said that members of subcommittee 3 had approved this instruction by vote of 3 to 0, one member not present and voting.

After discussion, this recommendation was approved by a majority of Committee members present, as follows:

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

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

*Second recommendation: You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made. You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. An electronic recording that contains the defendant's actual voice or a statement written by the defendant may be more reliable than a non-recorded summary.*

Mr. Howard said that this instruction was disapproved by vote of 2 to 1, one member not present and voting, with agreement that the instruction would be presented to the full Committee.

After discussion, this recommendation was approved by a majority of the Committee members present, as follows:

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

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

*Third recommendation: If any one of you finds that a mitigating factor listed in these instructions is supported by the*



*evidence, you must treat that mitigating factor as a reason why the defendant should not be sentenced to death. You may not treat that listed mitigating factor as a reason why the defendant should be sentenced to death.*

Mr. Howard said that this instruction was disapproved by vote of 2 to 1, one member not present and voting, with agreement that the instruction would be presented to the full Committee. It was observed that this instruction states current Illinois law, *see People v. Kuntu*, 196 Ill. 2d 105, 142 (2001).

After discussion, this recommendation was approved by a majority of the Committee members present, as follows:

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

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

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

*Fourth recommendation: Under the law, the defendant shall be sentenced to death if you unanimously find after considering the factors in aggravation and mitigation that death is the appropriate sentence.*

*If after considering the factors in aggravation and mitigation one or more jurors determines that death is not the appropriate sentence, the court shall impose a sentence [(other than death) (of natural life imprisonment, and no person serving a sentence of natural life imprisonment can be paroled or released, except through an order by the Governor for executive clemency)].*

Mr. Howard said that the effect of this instruction is to change the word “weighing” in the current IPI instruction to the word “considering.” Mr. Parkinson said that the current IPI instruction, No. 7C.05A, accurately tracks the Illinois statute on this subject, 720 ILCS 5/9-1(g).

After discussion, this recommendation was approved by a majority of the members present, as follows:

Ayes - 6: Mss. Bienen and Bishop-Jenkins and Messrs. Coldren, Howard, Schiedel, Turner.

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

Abstention - 1: Mr. Sullivan.

At this point, Randolph N. Stone entered the meeting.

*Fifth Recommendation: In deciding whether the defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence.*

*Aggravating factors are reasons why the defendant should be sentenced to death. Mitigating factors are reasons why the defendant should not be sentenced to death. Aggravating factors include:*

*First:*

*(Insert any statutory aggravating factor or factors found by the jury at the first stage of the death penalty hearing)*

*Second: Any other reason supported by the evidence why the defendant should be sentenced to death.*

*Where there is evidence of an aggravating factor, the fact that that aggravating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.*

*Mitigating factors include:*

*First: [(Any or all of the following) (The following)] is supported by the evidence:*

*The defendant has no significant history of prior criminal activity.*

*The murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution.*

*The murdered person was a participant in the defendant's homicidal conduct or consented to the homicidal act.*

*The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.*

*The defendant was not personally present during the commission of the act or acts causing death.*

*The defendant's background includes a history of extreme emotional or physical abuse.*

*The defendant suffers from a reduced mental capacity.*

*Second: Any other reason supported by the evidence why the defendant should not be sentenced to death.*

*Where there is evidence of a mitigating factor, the fact that the mitigating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.*

*If you unanimously determine from your consideration of all the evidence after considering the factors in aggravation and mitigation that death is the appropriate sentence, then you should sign the verdict requiring the court to sentence the defendant to death.*

*If after considering the factors in aggravation and mitigation one or more jurors determine that death is not the appropriate sentence, then you should sign the verdict requiring the court to impose a sentence [(other than death) (of natural life imprisonment)].*

*Sixth Recommendation: After considering the factors in aggravation and mitigation, we the jury unanimously determine that death is the appropriate sentence.*

*The court shall sentence the defendant \_\_\_\_\_ to death.*

*[Signature lines]*

*Seventh recommendation: After considering the factors in aggravation and mitigation, one or more of the jurors determines that death is not the appropriate sentence.*

*The court shall sentence the defendant to a sentence other than death.*

Mr. Howard said that the effect of these recommendations is to change “weigh” and “weighing” to “consider” “consideration”

and “considering.” It was noted that IPI instruction 7-C-06 provides.

*If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.*

*If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.*

After discussion, the Fifth, Sixth and Seventh recommendations were approved by a majority of the Committee members present, as follows:

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

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

Abstention - 1: Mr. Sullivan.

*Eighth recommendation: “Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification.*

*This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine. It is your duty to determine whether that evidence is to be believed. You may, however, take into account the results of the psychological studies, as just explained to you, in making that determination.”*

Mr. Howard said the subcommittee had considered but had not voted on this recommendation. Mr. Weis said that psychological studies as referred to are not admissible in evidence under current Illinois law. Messrs. Hehner, Schwind and Waller said this was a confusing, inconsistent and partisan instruction. Mr. Waller observed that an Illinois statute (725 ILCS 5/107A-10) requires the administrator to tell the witness that the suspect may not be in the array. Mr. R. Stone said this instruction was intended

to deal with faulty eyewitness identifications, which have been exposed as a problem in a number of overturned Illinois criminal convictions. Mr. Howard said that eyewitnesses should be made aware of and avoid the risks of making wrong identifications.

After further discussion, this recommendation was not approved by a majority of the Committee members present, as follows:

Ayes - 2: Messrs. Stone, Turner.

Nays - 8: Ms. Bishop-Jenkins and Messrs. Coldren, Hehner, Howard, Parkinson, Schwind, Waller, Weis.

Abstentions - 3: Ms. Bienen and Messrs. Schiedel, Sullivan.

*Ninth recommendation: In this case, the defendant, \_\_\_\_\_ (insert name), is of a different race than \_\_\_\_\_ (insert name of identifying witness), the witness who has identified [him] [her]. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human*



*experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.*

*You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]*

Mr. Howard said that the members of the subcommittee voted 2 to 1 against this recommendation for the reason that it is unnecessary, with agreement that the instruction would be presented to the full Committee.

Mr. Sullivan said that many studies have shown that cross racial identifications are more difficult than those of members of one's own race.

After discussion, this recommendation was not approved by a majority of the members present, as follows:

Ayes - 4: Messrs. Coldren, Howard, Sullivan, Turner.

Nays - 6: Ms. Bishop-Jenkins and Messrs. Hehner, Parkinson, Schwind, Waller, Weis.

Abstentions - 2: Ms. Bienen and Mr. Schiedel.

Mr. Howard said subcommittee 3 has nothing further to bring before the Committee.

At this point, Messrs. R. Stone and Weis left the meeting.

#### 4. *Subcommittee 4*

Mr. Schiedel and Ms. Bishop-Jenkins presented a series of recommendations to the Committee, as follows:

*First recommendation: The Committee repeats the recommendation it made at page 27 of its Fifth Annual Report: Representatives of the General Assembly Judiciary Committee and the Chair of the ILAC should discuss and attempt to resolve the concerns expressed by the ILAC Chair.*

This recommendation was approved unanimously by the members present.

*Second recommendation: The General Assembly should fund SR 297, which passed the Illinois Senate calling for a study*

*into the costs associated with the death penalty in Illinois. We recommend that the Illinois General Assembly fully fund this study into the costs of the death penalty, enabling a needed cost-benefit analysis into the process that will better inform the public policy debate.*

This recommendation was approved unanimously by the members present.

*Third recommendation: A statutory amendment should be adopted to the Capital Litigation Trust Fund (CLTF) statute 725 ILCS 124/15 to authorize payment for victims' services in capital punishment prosecutions.*

Mr. Turner said he is opposed to this recommendation, because the CLTF is currently under-funded for the payments of prosecution and defense costs of capital litigation. Instead, additional funding should be provided for victims' services through the existing statute that deals with victims' services, the Crime Victims' Compensation Fund (CVCF) 740 ILCS 45/17. Mr. Turner emphasized that he is in favor of funding for services of victims and their families, but believes the proper way to obtain

the funding is through the CVCF, rather than through the CLTF, which deals with the funding of entirely different expenses.

After further discussion, this recommendation was approved by a majority of members present, as follows:

Ayes - 6: Ms. Bishop-Jenkins and Messrs. Coldren, Hehner, Parkinson, Schiedel, Schwind.

Nays - 2: Messrs. Howard, Turner.

Abstentions - 2: Ms. Bienen, and Mr. Sullivan.

*Fourth recommendation: Training should be implemented throughout the state to all law enforcement and public officials that are first responders to murder scenes to insure that victims' families are told of their rights, as required by law.*

After discussion, this recommendation was approved unanimously by the members present.

*Fifth recommendation: The General Assembly should fully fund the Capital Litigation Trial Fund for the trial expenses, and where appropriate the appellate expenses, of the prosecution and defense of capital prosecutions in all areas of the state.*

This recommendation was unanimously approved by the members present.

Regarding the Capital Litigation Trust Fund, Ms. Bormann said that the Fund had been abused by the defense lawyer in the *Sutherland* case. As a result, the Illinois Treasurer was added by statute (725 ILCS 124/10) to the trial court judge as an additional reviewer of the applications for fees and expenses submitted by defense counsel.

There was a discussion of evidence that the Committee had uncovered of State's Attorneys in several downstate counties filing notice of intention to seek capital punishment in order to move the financial burden from the local county to the state.

There followed a discussion of preventing further abuses of the CLTF. The members present unanimously approved the following comment:

*Comment: Since public attention was called to the CLTF's occasional misuses, the General Assembly has passed some*

*reforms giving judges and the State Treasurer more gateway control over CLTF disbursements. We commend the legislature for taking this action. It is our conclusion that these improvements were a needed and helpful reform, but we believe it is too soon to evaluate long term whether those improvements will be adequate to prevent other abuses of the funds.*

This comment was approved unanimously by the members present.

There followed a discussion of House Joint Resolution CA0019, which contains a proposal to amend the Illinois Constitution Bill of Rights provision relating to crime victims.

The members present voted on whether or not to adopt the following comment:

*Comment: We urge the General Assembly to give favorable consideration to this Resolution. House Joint Resolution CA0019.*

A majority of the members present agreed to adopt the Comment, as follows:

Ayes - 5: Ms. Bishop-Jenkins and Messrs. Coldren, Hehner, Parkinson, Schwind.

Nays - 2: Messrs. Howard, Schiedel.

Abstentions - 3: Ms. Bienen and Messrs. Sullivan,

Turner.

There being no further business to come before the  
Committee, the meeting was adjourned.

Thomas P. Sullivan  
Chair  
December 28, 2009