

## **CAPITAL PUNISHMENT REFORM STUDY COMMITTEE**

### **Minutes of the meeting October 23, 2006**

The fifteenth meeting of the Capital Punishment Reform Study Committee was held at the Illinois Criminal Justice Information Authority, 120 S. Riverside Plaza, Chicago, Illinois from 1 to 3:30 P.M.

#### Those present

Leigh B. Bienen (via teleconference)  
James R. Colden, Jr. (via teleconference)  
James B. Durkin (via teleconference)  
Theodore A. Gottfried  
Jeffrey M. Howard  
Boyd J. Ingemunson (via teleconference)  
Gerald E. Nora (via teleconference)  
Richard D. Schwind  
Randolph N. Stone (via teleconference)  
Thomas P. Sullivan  
Michael J. Waller (via teleconference)

#### Not present

Kirk W. Dillard  
Edwin R. Parkinson  
Geoffrey R. Stone  
Arthur L. Turner

Also present: Peter G. Baroni, Special Counsel; Dan Rippey, counsel to Senator Dillard (via teleconference); and Joel Baise, counsel to Representative Durkin.

The minutes of the meeting on September 7, 2006 were approved unanimously.

*1. Public hearing on November 13, 2006 in Springfield.*

Mr. Baroni distributed drafts of a proposed press release and notification letter to interested persons and groups. It was agreed that suggested revisions will be sent to Mr. Baroni by Thursday, October 26, and the press release and notification letter will be sent Monday, October 30. The Committee also agreed on a list of persons and groups to be notified of the public hearing, which includes law schools, bar associations and other community based organizations interested in the capital punishment system.

Mr. Baroni was instructed to assemble the final lists, and distribute them to Committee members for comment. Mr. Baroni has arranged for the Clerk of the Illinois House to record the hearing, and a transcript of the hearing will be made available on compact disc.

*2. Survey document and retention of an expert.*

Messrs. Coldren and Baroni reported that two survey documents were drafted, and a Request for Proposal for an expert was drafted, circulated to Committee members, finalized and issued by the Criminal Justice Information Authority at the end of September. The deadline for submissions is November 3, 2006.

3. *Reports of Subcommittees.*

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

Mr. Coldren reported that the subcommittee met on October 20, 2006 at which the subcommittee's minutes of its June 21, 2006 meeting were approved (attached as Appendix 2 to minutes of Committee meeting of September 7, 2006). The draft minutes of the October 20 meeting are attached as Appendix 1. The subcommittee will meet on December 11 to discuss the "Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures," dated March 17, 2006, which was conducted pursuant to statute. Ms. Sheri Mecklenburg, General Counsel to the Superintendent of the Chicago Police Department, and other members of the CPD, will attend the meeting to discuss the Report.

The subcommittee has also agreed to meet in early December with various downstate law enforcement and attorneys regarding their experiences with recording interrogations in homicide investigations. The subcommittee also plans to meet with suburban major crimes task forces in December regarding custodial recordings.

(2) *Report of Subcommittee 2 – Eligibility for capital punishment, DNA and proportionality.*

Ms. Bienen reported that the subcommittee held a meeting on October 17, 2006; the draft minutes are attached as Appendix 2.

As to the DNA backlog issue, Mr. Baroni reported that the Governor's Office failed to provide information regarding the backlog relating to the Illinois State Police

DNA testing of open cases, and the Department of Corrections DNA testing of convicted felons in its facilities or on mandatory supervised release. Mr. Baroni said he was told by Andrew Stolfi, an attorney in the Governor's Office, that Mr. Stolfi made a number of inquiries, and that the office would make a policy decision about the release of that information by the end of November. Mr. Baroni will contact Ms. Mecklenburg at the CPD for further information regarding the DNA backlog. Mr. Baroni observed that individual county probations departments are responsible for testing convicted felons who are not sentenced to the prison, and that he will contact various county probation offices to attempt to obtain more information.

Ms. Bienen reported that the subcommittee continues to input first degree murder indictment information into its database, which is almost complete. Mr. Nora said the Cook County State's Attorney's database should be ready by the end of October.

*(3) Report of Subcommittee 3 – Trial court proceedings.*

Mr. Howard reported that the Subcommittee met in Pontiac, Illinois on October 16, 2006, with Judge Harold J. Frobish of Livingston County (11<sup>th</sup> Judicial Circuit); the draft minutes are attached as Appendix 3. Mr. Howard summarized Judge Frobish's remarks as follows: Judge Frobish expressed enthusiasm for the Capital Litigation Trial Bar, which he views as positive and beneficial to all. He expressed frustration about his inability to know or oversee the prosecution's use of the Fund; he believes judges should be aware of all spending from the Fund, not just that of the defense. He also believes the

Chief Judge of each Circuit should be empowered to assign the best, most experienced judges to preside over capital cases, because random assignment of judges may lead to serious problems if inexperienced judges are selected. Judge Frobish raised concerns regarding the pressure on some downstate State's Attorneys to pursue capital punishment in murder cases, because by doing so the costs are paid by the Fund rather than the County. He is concerned that the use of depositions may be abused by the defense in capital cases; as an example, he told of a capital case he presided over handled by the Office of the State Appellate Defender (OSAD). He said that in some capital cases OSAD's involvement may create the appearance of a conflict of interest.

Mr. Gottfried said OSAD becomes involved in many capital trials, similar to the Office of the State Appellate Prosecutor (OSAP), but only if requested by defense counsel.

Mr. Schwind said the OSAP's involvement in any case, capital or non-capital, must be approved by the Office of the Attorney General, and that the AG's office is working on a protocol for when the OSAP/AG should become involved in local criminal prosecutions.

Mr. Waller suggested it may be worth a review of data from the State Treasurer's Office to determine how Capital Litigation Trust Fund money is being spent.

Mr. Howard reported that the subcommittee will meet on December 13, 2006 in Decatur with Judge Stephen H. Peters of DeWitt County (6th Judicial Circuit), and that

Judge Scott A. Shore of Peoria County (10<sup>th</sup> Judicial Circuit), has agreed to answer questions submitted to him by the subcommittee.

*(4) Report of Subcommittee 4 – Post-conviction proceedings and general topics.*

Mr. Gottfried reported that the subcommittee met earlier in the day on October 23, 2006; the draft minutes are attached as Appendix 4. The subcommittee has approved the minutes of its meeting on June 19, 2006 (attached as Appendix 7 to minutes of Committee meeting of September 7, 2006).

Mr. Gottfried outlined matters the subcommittee will explore in the immediate future: (1) continue a study of forensic labs in Illinois; (2) study the training of attorneys and judges involved in capital litigation; (3) study the issue of resource allocation to State's Attorneys and Public Defenders; (4) examine experience with the police perjury review process; (5) continue studying post-conviction issues related to the AG and OSAD, who handle virtually all direct appeal and post-conviction capital litigation; and (6) study the use of the fundamental justice amendment created for use by the Illinois Supreme Court in capital appeals.

Mr. Gottfried said the subcommittee's next meeting will be held on Wednesday, December 13, 2006 at noon at the CIJA office, 120 S. Riverside Plaza, Chicago, Illinois.

*4. Other business.*

*(1) Governor's appointment to the Committee.*

The Committee agreed to take up this matter again at its December meeting.

(2) *Personal appearance at Committee meeting*

The Committee agreed to request a personal appearance at a future meeting by Michael Sheppo, Director of the State Police Forensic Services, to address the DNA testing backlog.

5. *Next meeting –December 13, 2006, 1 P.M.*

It was agreed that the next meeting of the Committee will be held on Wednesday, December 13, 2006 at 1 P.M., at the Illinois Criminal Justice Information Authority, 120 S. Riverside Plaza, Chicago, Illinois.

Thomas P. Sullivan  
Chair  
December 1, 2006

Attachments: Appendices 1 through 4.

**Capital Punishment Reform Study Committee**  
**Minutes of Subcommittee No. 1 meeting**

**October 20, 2006**

On October 20, 2006 at 2 P.M, a meeting of Subcommittee 1 was held. Attending were James R. Coldren, Jr., Gerald E. Nora and Geoffrey R. Stone.

Minutes of the June 21, 2006 Subcommittee meeting were approved.

*Eyewitness pilot program.*

Mr. Coldren agreed to speak with Sheri Mecklenburg of the Chicago Police Department to seek her attendance at the December regular meeting of the Subcommittee. The meeting would include a discussion of the eyewitness pilot study, and our desire to re-analyze some of the data according to Mr. G. Stone's suggestions.

*Recording custodial interrogations.*

We will also seek to obtain from Ms. Mecklenburg an update on how CPD is experiencing/handling recording custodial interrogations of suspects in murder interrogations.

*Future meetings.*

The next regular Subcommittee 1 meeting is set for December 11, 2006 at 2 PM at the University of Chicago Law School, 1111 East 60th Street, Chicago, IL 60637.

The Subcommittee also agreed to have a meeting downstate to study that region's use of videotaping and line-ups. Members agreed to set up an appropriate time and place and post as much on the Committee website.

The Subcommittee adjourned at 2:20 p.m.

Peter G. Baroni  
Special Counsel to the CPRSC  
Leinenweber & Baroni  
Attorneys at Law

**Capital Punishment Reform Study Committee**  
**Minutes of Subcommittee No. 2 conference call meeting**

**October 17, 2006**

On October 17, 2006 at 10 A.M., a meeting of Subcommittee 2 was held via conference call. Attending were Leigh B. Bienen, Michael J. Waller, Gerald E. Nora and Peter G. Baroni. Kirk W. Dillard and Thomas P. Sullivan did not participate.

Minutes of the August 14, 2006 Subcommittee meeting were approved.

*DNA backlog.*

Mr. Baroni reported that the Governor's Office has agreed to respond before the end of October to the Subcommittee's request for information on DNA testing backlogs.

*First degree murder indictment data collection.*

Mr. Nora told the Subcommittee that the Cook County State's Attorney's Office is almost finished putting together a database of all first degree murder indictments filed since 2003. He has detected several glitches in the system, and anticipated resolving them by the end of September.

*Capital punishment protocols.*

Mr. Waller reported that the protocols have been jointly adopted by the Attorney General's Office and the Appellate Prosecutor's Office. He will forward a copy to Mr. Baroni for distribution to the entire Committee.

The meeting was adjourned.

Peter G. Baroni  
Special Counsel to the CPRSC  
Leinenweber & Baroni  
Attorneys at Law

**Capital Punishment Reform Study Committee**  
**Minutes of Subcommittee No. 3 meeting**

**October 16, 2006**

On October 16, 2006 at 12:15 P.M., a meeting of Subcommittee 3 was held at the Livingston County Courthouse Square, Pontiac, IL. Attending were Jeffrey M. Howard, Boyd J. Ingemunson, Edwin R. Parkinson, Randolph N. Stone, Judge Harold J. Frobish and Peter G. Baroni.

Minutes of the June 19, 2006 Subcommittee meeting were approved as submitted.

*Interview of Judge Harold Frobish.*

Judge Frobish is a judge of the Livingston County 11th Judicial Circuit. Subcommittee members asked Judge Frobish questions regarding his experience with recent reforms to the capital punishment system relating to trial proceedings.

Judge Frobish extolled the virtues of the Capital Litigation Trial Bar. He believes that the most significant change is probably that prohibiting unqualified counsel to handle capital cases. He also believes there should be regular re-certification of defense lawyers.

Judge Frobish believes judges presiding over capital cases should also be certified, and chosen by the Chief Circuit Judge based on training and experience, rather than the current random assignment of judges.

Judge Frobish expressed concern with the Office of the State Appellate Defender (OSAD) becoming involved in capital trial litigation, which may present the appearance of a conflict of interest. He said that in his opinion several OSAD attorneys had inserted themselves inappropriately into a capital case he presided.

Judge Frobish believes the Capital Litigation Trust Fund money flowing to the prosecution should be overseen by the presiding trial judge, similar to the judicial oversight of defense spending of Trust Fund money.

Judge Frobish believes the use of depositions should remain a discretionary decision of the presiding trial judge. He views the need for depositions in most cases as limited.

Judge Frobish believes case management conferences and certificates of readiness are very effective tools for insuring both parties are prepared to proceed with a capital case

Judge Frobish said he likes the jury instruction change from “mitigation sufficient to preclude death” to “death is appropriate.”

Also, as to jury instructions, Judge Frobish does not require a potential juror to provide evidence of hardship in order to avoid serving on a capital jury. He conducts individual *voir dire* with panels of 10 in the morning and 10 in the afternoon. He usually takes seven days to choose a capital jury. He allows the defense and prosecution to submit questions on *Witherspoon* or any other issue before the venire begins, and if appropriate integrates those questions into the questions he asks potential jurors.

Judge Frobish believes there should be a mechanism to allow downstate prosecutors to avoid seeking death in death eligible cases. He perceives that in almost all downstate counties there is often political pressure on the State’s Attorney to seek capital punishment in death eligible cases, which shifts the financial burden of the case from the county (non-capital murder) to the Trust Fund (capital murder). Without a mechanism, he thinks downstate prosecutors will, solely from financial motivations, often seek death if the case is statutorily eligible.

*Future meetings.*

The next Subcommittee meeting was set for December 12, 2006 at noon at the DeWitt County Courthouse.

The Subcommittee adjourned at 2:15 PM.

Peter G. Baroni  
Special Counsel to the CPRSC  
Leinenweber & Baroni  
Attorneys at Law

**Capital Punishment Reform Study Committee**  
**Minutes of Subcommittee No. 4 meeting**

**October 23, 2006**

On October 23, 2006 at 12 P.M., a meeting of Subcommittee 4 was held at the Criminal Justice Information Authority, Chicago, IL. Attending were Theodore A. Gottfried, Richard D. Schwind, James B. Durkin (via teleconference) and Peter G. Baroni.

Minutes of the June 19, 2006 Subcommittee meeting were approved.

Ted Gottfried led a discussion on the next set of reforms the Subcommittee should study as follows:

*Police perjury.*

Mr. Baroni was requested to talk to the Law Enforcement Training and Standards Board and the Department of Labor to determine if the police perjury provision had been utilized.

*Training of attorneys and judges.*

A number of state and local legal organizations have capital litigation training programs. Mr. Baroni was asked to gather information on how many organizations have programs, and their focal points.

*Post conviction.*

The members decided to interview attorneys in the Office of the State Appellate Defender's Office and the Attorney General's Office who focus on post conviction litigation in capital cases.

*Forensic testing and oversight.*

Mr. Durkin expressed an interest in studying the issue of forensic testing. Specifically, he would like to look at the oversight and certification, as well as compliance with federal funding mandates.

*Fundamental justice provision.*

The Subcommittee will study the use and application of the fundamental justice provision by the Illinois Supreme Court.

*Resources/Capital Litigation Trust Fund.*

The Subcommittee will study resource allocation, including a review of the application and administration of the Capital Litigation Trust Fund. The members view what occurred in the *Sutherland* case as an instance of abuse of the Fund. Mr. Schwind suggested the Subcommittee discuss the issue of guidance to judges for managing a complex capital defense case budget.

*Future meetings.*

The next subcommittee meeting was set for December 13, 2006, noon at the Criminal Justice Information Authority.

The Subcommittee adjourned at 1 PM.

Peter G. Baroni  
Special Counsel to the CPRSC  
Leinenweber & Baroni  
Attorneys at Law