

CAPITAL STUDY REFORM STUDY COMMITTEE

Minutes of meeting, June 13, 2005

The fourth meeting of the Committee was held at 160 N. LaSalle, Room N-502, from 2 to 5 P. M.

Those present:

Leigh B. Bienen
James R. Coldren, Jr.
Kirk W. Dillard (conference phone)
James B. Durkin
Theodore A. Gottfried
Jeffrey M. Howard
Thomas P. Needham
Gerald E. Nora
Edwin R. Parkinson
Richard D. Schwind
Randolph N. Stone (conference phone)
Thomas P. Sullivan
Jeffery J. Tomczak
Michael J. Waller

Not present:

Geoffrey R. Stone
Arthur L. Turner

Also present: attorney Peter G. Baroni; Edwin Colfax, Northwestern University Center on Wrongful Convictions; Jude J. Geiger, Yale law student from Jenner & Block; Patrick D. McAnany, Illinois Coalition to Abolish the Death Penalty; Dan Rippy, Legal Counsel, Illinois Senate Republican Caucus; and Tracey B. Wollenberg, Columbia law student from Jenner & Block.

The minutes of the meeting of April 25, 2005 were approved as written.

Open Meetings Act.

An Illinois Attorney General's representative has advised that meetings of this Committee are subject to the provisions of the Illinois Open Meetings Act (5 ILCS 120). Tom Sullivan will consult with Dan Rippey, and distribute a memorandum concerning Committee members' rights and obligations under the Act. It was agreed that Tom Sullivan and Richard Schwind will be responsible for compliance as to full Committee meetings, and that the chairs of the four subcommittees will be responsible to assure that subcommittee meetings comply with the Open Meetings Act.

Funding – The Illinois Criminal Justice Information Authority.

The Illinois General Assembly adopted the following provision in the general appropriations statute:

“Section 45. The sum of \$150,000, or so much thereof as may be necessary, is appropriated from the General Revenue Fund to the Criminal Justice Information Authority for costs and expenses related to a capital punishment reform study committee.”

Lori G. Levin, the Executive Director of the Illinois Criminal Justice Information Authority (CJIA), joined the Committee meeting. Ms. Levin explained that CJIA is a statutory, state funded organization, whose non-policy

level employees are union members, and that CJIA is subject to various state budget, administrative, personnel and reporting rules and regulations.

In due course, the Committee will consult with Ms. Levin about retaining a person to assist the Committee's work on a part time basis. It was agreed that Richard Schwind will serve as the Committee's liaison with CJIA.

Ms. Levin offered to have future Committee meetings held at the CJIA offices, 120 S. Riverside, with parking at 500 W. Monroe, at Monroe and the river.

Contacts with other government agencies.

Mr. Sullivan reported that he has spoken with Cynthia Y. Cobbs, the Director of the Administrative Office of the Illinois Courts, and she agreed that her office will cooperate with our Committee. Ms. Cobbs stated that our contacts initially should be with Assistant Director Doug Bowie (217-785-2125).

It was agreed that members of the four subcommittees will attempt to coordinate with one another in order to avoid multiple, disjointed contacts with state agencies relevant to our activities.

Report of Subcommittee 1 – Police and Investigations.

The members of this subcommittee – Messrs. Coldren, Chair, Needham, Nora and G. Stone – have met, and the minutes of their meeting of May 23 are attached hereto as Exhibit 1. With respect to paragraph 3, relating to sequential lineups and photo spreads, Mr. Sullivan stated that he has been in touch with Sheri

Mecklenburg, General Counsel of the Chicago Police Department, who is handling the arrangements for the three eyewitness identification pilot projects being conducted in police departments in Chicago, Evanston and Joliet. These programs are each for one year, and consist of comparisons between the sequential and simultaneous methods. Mr. Sullivan has scheduled a meeting with Ms. Mecklenburg, Senator John Cullerton, and Representative Julie Hamos, for June 15; Tom Needham will attend the meeting as a representative of Subcommittee 1.

Report of Subcommittee 2 – Eligibility for Capital Punishment, DNA and Proportionality.

The members of this subcommittee – Leigh Bienen, Chair, Kirk Dillard, Thomas Sullivan and Michael Waller – have met, and the minutes of their meetings of May 9 and June 6 are attached as Exhibits 2 and 3.

With respect to the study of proportionality, it was proposed that all death eligible cases should be included in our study, in addition to cases in which capital punishment was or will be sought by the prosecution; and that the subcommittee should obtain information on all first degree murder cases filed in Illinois on and after January 1, 2003.

Mr. Waller reported that the Illinois States Attorneys Association (ISAA) is working on a model States Attorneys protocol for the selection process for capital cases, to be discussed at the ISAA meeting at the end of this month.

Report of Subcommittee 3 – Trial Court Proceedings.

The members of this subcommittee – Messrs. Howard, Chair, Parkinson, R. Stone and Tomczak – have met, and the minutes of their meeting on May 27 are attached as Exhibit 4.

Report of Subcommittee 4 – Post-Conviction Proceedings and General Topics.

The members of this subcommittee – Messrs. Gottfried, Chair, Durkin, Schwind and Turner – have met, and the minutes of their meeting on May 16 are attached as Exhibit 5.

Subcommittees 3 and 4 have arranged to meet with Nadine Jackabowsky, Program Coordinator of the Illinois Capital Litigation Trust Fund on Friday, June 24 at 9:30 A.M. at 203 N. LaSalle, 24th Floor. All Committee members are invited to attend.

Other business.

Prior to the meeting, several members of the Committee met in closed session with attorney Peter Baroni, concerning his potential retention as a reporter

and special counsel to the Committee. This matter will be discussed at the next Committee meeting.

It was agreed that the Committee will postpone the matter of selecting a Treasurer.

Next meeting – August 8, 2005, 2 P.M.

It was agreed that the next meeting of the full Committee will be held on August 8 at 2 P. M., at the CJIA offices, 120 S. Riverside Plaza, Chicago.

Thomas P. Sullivan
June 23, 2005

Attachments

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE
Police and Investigations Subcommittee

Subcommittee Meeting
University of Chicago Law School (Prof. Geoffrey Stone's Office)
23 May 2005, 9am to 10am

Subcommittee members present: Chip Coldren, Jerry Nora, Tom Needham, Geoff Stone (all present)

- Subcommittee members discussed who might serve as the Subcommittee Chair. Chip Coldren agreed to serve as Chair of this Subcommittee.
- First, the Subcommittee reviewed the statutes that might fall under its purview, and agreed on the following list (five categories):
 1. 50 ILCS 705/6.1: Decertification of Police Officers, specifically procedures for decertifying police officers found to have committed perjury in a murder case
 2. 725 ILCS 5/116-4: Preservation of Evidence
 3. 725 ILCS 5/107-A-10: Sequential Line-Ups [includes 725 ILCS 5/107-5, "Lineup and Photo Spread Procedure"]
 4. 725 ILCS 5/103-2.1: Mandatory Recording of Custodial Interrogations in murder cases (eff. July 2005)
 5. 725 ILCS 5/114-13: Disclosure obligations in criminal (homicide) offenses.
- The Subcommittee discussed several other statutes that had been discussed in prior, full Committee meetings, and determined that they do not fall under its purview:
 - 720 ILCS 5/14-3, and 20 ILCS 3930/7.2, regarding eavesdropping exemptions; the Sub-Committee suggests that these statutes comprise enabling legislation and need not be a focus of its work
 - 730 ILCS 5/5-4-3(f), regarding genetic markers and removing records from DNA databases; this is a post-conviction issue, though the Illinois State Police do have responsibilities in this
 - 725 ILCS 124/15(e)(2), Funding for DNA Testing from Capital Litigation Trust Fund, not applicable to the Sub-Committee's work as it is a defense issue
- The Subcommittee then discussed each of the five categories in more detail, as follows (note that we have included some preliminary thoughts regarding research and fact-finding that will be required to ascertain the impact of these provisions):
 1. 50 ILCS 705/6.1: Decertification of Police Officers – studying this issue and its impact will involve learning from the Illinois Law Enforcement Training Standards Board (ILTSB) and other individuals and organizations what procedures, if any, have been instituted to ensure compliance with this law, and whether it has been applied in any

instances. In addition, the Subcommittee discussed the need to learn about the process from allegation of false statements made by police officers in capital cases (e.g., Who might file a formal complaint? How should the procedure work? If complaints are not filed when they could be, why not?); we estimated that there could be 250-300 murder prosecutions per year in Illinois, can we get information on motions to suppress to examine this matter?

Thoughts on research and fact-finding: initiate discussions with the Police Training Board, possibly with the Illinois Association of Chiefs of Police, the Labor Relations Board or other similar entities to assess the awareness of and rules or procedures in place to ensure compliance; in addition, consider tracking homicide prosecutions to determine motions to suppress involving allegations of false statements by police; determine the likelihood of someone with such an allegation actually filing a formal complaint, and whether impediments to this process exist; consider some statewide survey work around this issue

2. 725 ILCS 5/116-4: Preservation of Evidence – this is primarily an issue of determining awareness of the new rules and compliance, which could be addressed through surveys and other means; the law covers all types of police organizations

Thoughts on research and fact-finding: This is a compliance matter. It could be investigated through a statewide survey looking into whether County Clerks Offices and Police Departments think they are in compliance, and things they have done, specifically, to come into compliance, or things they need to do, assistance they might need.

3. 725 ILCS 5/107-A-10: Sequential Line-Ups – our primary focus here should be obtaining information and reports regarding the pilot study undertaken by Ms. Mecklenberg and the Illinois State Police (ISP); we surmised that there are several interesting issues here, such as: single vs. multiple witnesses, single vs. multiple suspects in a lineup(s), and the independent administrator of the lineup (this seems to be the most difficult issue); the Illinois study may be the only true “experimental” study of this issue yet in the U.S.

Thoughts on research and fact-finding -- Since a thorough study of this matter is underway, and soon to be concluded, the Subcommittee did not identify particular research or fact-finding issues in this category; the Subcommittee will learn of the findings from the pilot study, then give more serious consideration to research and data needs; this might be a good topic for focus groups

4. 725 ILCS 5/103-2.1: Mandatory Recording of Custodial Interrogations in murder cases – This should be one of the most influential and far reaching of the police and investigation reforms; there should be a joint ISP/ICJIA study report available soon on a pilot project; the Sub-Committee should begin its work in this area by learning what it can from this report.

Thoughts on research and fact-finding – will these reforms suppress the number of confessions obtained through interrogations? What will the ripple effect of this law be on

the system? There is much experience to draw on from overseas (British Home Office). This topic lends itself to survey work, focus groups, and case tracking; since it has the possibility of broad, significant, and long-term impacts on the death penalty system, it will warrant significant attention.

5. 725 ILCS 5/114-13: Disclosure obligations in criminal (homicide) offenses – This, too, is a matter for investigation of knowledge and understanding of the law, and compliance.

Thoughts on research and fact-finding – This category will likely involve some contact with practitioners and experts, and some survey work, to determine knowledge, understanding, and compliance with new rules.

- In the process of discussing these matters, the Subcommittee came up with several important thoughts or suggestions, which should be discussed at the larger Committee meetings:
 - Circulation of notes from subcommittee meetings
 - Subcommittee responsibilities vs. Committee staff responsibilities, coordination and communication between the Committee, subcommittees, and Committee staff
 - Coordination of fact-finding and research matters that come from the subcommittees; for example, this Subcommittee will consider several different options for research and ‘fact-finding,’ such as: statewide surveys, surveys of professional groups (e.g., public defenders, police), focus groups, meetings with experts/practitioners, informal polling of colleagues; the larger Committee needs to be coordinated on this matter before any one sub-committee initiates research or ‘fact finding.’ This Subcommittee (and others) might consider conducting some focus groups in particular areas, primarily those that are very new and the criminal justice system is ‘learning as it goes;’ focus groups help elicit thoughts and experiences from practitioners that will help in the development of future surveys, help in the identification of new, promising, or ‘best’ practices, and will help the Committee become aware of emerging issues
 - One outcome of this Subcommittee’s work (and that of others) is documentation or recommendations regarding ‘best’ or ‘promising’ practices in certain areas, such as preservation of evidence, or independent administration of sequential lineups.

The members of this Subcommittee did not set a date for the next meeting, preferring instead to wait until the next full Committee meeting to determine when and where the next Subcommittee meeting will be held.

In the meantime, Subcommittee members will review Chip’s notes on today’s meeting and provide additions or clarifications where needed.

Sullivan, Thomas P

From: Haskin-Watkins Juana [jhaskin@law.northwestern.edu]
Sent: Monday, May 16, 2005 5:37 PM
To: Sullivan, Thomas P; senator@kdillard.com; mwaller@co.lake.il.us; lbienen@law.northwestern.edu; geinora@uchicago.edu
Subject: minutes of subcommittee conference call 5/9/05

Subcommittee members, please review the minutes of the meeting held May 9, 2005 and if there are no corrections or addendum by Thursday, May 19, 2005 the minutes will be sent to all other members.

TO: Capital Punishment Reform Study Committee Members

FROM: Leigh B. Bienen

DATE: May 16, 2005

RE: Subcommittee Meeting held May 9, 2006

On May 9, 2005 at 8am – 9am the Subcommittee on Eligibility for Capital Punishment, Proportionality Review, and DNA (Subcommittee No. 2) held a meeting via conference call.

Present: Tom Sullivan, Michael Waller, Kirk Dillard, Leigh Bienen (subcommittee) and Gerald Nora joined us.

Next Meeting: The next Subcommittee Conference call was set for 8am on June 6, 2005, with information on how to log in to follow.

The first order of business was the confirmation of the chairman, Leigh Bienen. We then turned to general discussion of what might be within our jurisdiction with regard to the procedures for calling for and processing DNA evidence under the reform statute enacted in 2003, effective No. 19, 2003: 725ILCS 5/116-5. Although the Article containing this section is labeled 'post trial motions,' the language of the statute refers to 'defendants charged with an offense,' and clearly the statute envisions some applicability prior to trial. Michael Waller, Gerald Nora and Kirk Dillard talked generally about what is standard procedure in their counties with regard to requesting DNA evidence in capital cases. There was agreement issues regarding DNA might arise past conviction or pre-trial or during trial.

We suggested inviting an attorney familiar with the latest technical advances in DNA to address the Committee, and all agreed that would be useful. There was notice taken of varying reports on the delays at the state DNA testing and evaluation center. Tom Sullivan is planning to raise the issue of how DNA requests are handled with Sherry Mecklenberg when he discussed other issues with her. Larry Treat from the Chicago Police was suggested as another source of information about the current practices. The general sense was that the statute, although part of the reforms of 2003 did not radically change the prior practice at least in the counties our members were familiar with.

Exhibit 2

5/16/2005

Turning to proportionality review, the members of the committee familiar with prosecutors practices reported that there is generally in place in the Cook County State's Attorney's Office a system for regularly reviewing homicide cases to determine the eligibility for capital punishment and the procedures for deciding whether to proceed with capital prosecution punishment. Michael Waller reported that a similar reviewing system was in place in Lake County. There was discussion of how we could obtain an accurate count of all indictments since the reforms, and Tom Sullivan and Leigh Bienen and Michael Waller (the others had to leave the meeting) suggested that the provisional start date for conducting research should be January 1 2003, to make a clean set of data on a calendar basis.

The current practice is for a bail hearing to take place 48 hours after arrest, and the prosecutors on the committee indicated that at that time the prosecutor will often know whether or not the case is going to be prosecuted capitally, and bail will be denied if it is a capital case. An indictment follows within 30 days, and there is a statutory requirement that a decision regarding capital prosecution be made within 120 days of indictment. We discussed how we might be able to get information on all indictments for murder from the 102 county clerks. Tom Sullivan is going to speak to Cynthia Cobbs, the head of the Administrative Office of the Courts, and we will also approach Michael Tardy on her staff. Both Gerald Nora and Michael Waller noted that the States' Attorney's Executive Committee and the Association as a whole were meeting at the end of June, and they would informally bring up the issue of getting accurate information from the County Court Clerks' offices at their meetings. They also said that the States Attorneys Association was considering the issue of drafting statewide guidelines for selecting death eligible cases for capital prosecution.

It was agreed that during the next conference call we would discuss in greater detail the actual practices now in place and used to select capital cases at the Lake and Cook County prosecutors' offices. There was also a notation that some other groups in the state might have a list of death eligible cases, and we should find out what is already available in terms of capital case identification. We can build on the research on case identification which has already been done.

It was noted that a grant of funding for staff from the state was pending.

Juana Haskin

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TO: Capital Punishment Reform Study Committee Members

FROM: Leigh B. Bienen

DATE: June 6, 2005

RE: MINUTES -- Subcommittee Meeting held June 6, 2005

On June 6, 2005 at 8am -- 9am the Subcommittee on Eligibility for Capital Punishment, Proportionality Review, and DNA (Subcommittee No. 2) held a meeting via conference call.

Present: Tom Sullivan, Michael Waller, Kirk Dillard, Leigh Bienen (Subcommittee Chair).

The meeting began with the acknowledgement that the current State budget included a \$150,000 per annum appropriation for staff and technical assistance for the work of the Reform Study Committee. Much appreciation was expressed for that grant of assistance. The money will be administered by the CJIA. Staff assistance in collecting data for a meaningful analysis of proportionality will account for some significant fraction of that money.

The members of the subcommittee agreed that the universe of cases to be considered for proportionality review must be greater than simply the cases in which death was formally sought by the State's Attorney. The subcommittee agreed that the universe of cases must be opened up to include all cases in which there was a factual basis for the prosecution of a capital case, whether or not death was sought.

Mike Waller noted that there seemed to be a decline in the number of capital prosecutions in recent years. That would be an important trend to document. Measuring the decline in capital prosecutions would be meaningless, however, without an indication of whether or not the observed decline in the number of capital cases was a decline in comparison to all cases which could have been brought, or a decline due to a drop in the number of all death eligible homicides.

Mike Waller said that he was working with a staff member to put together a list for Lake County for a single year, so that we could see what was involved in this collection of information. Mike Waller said that he estimated that Lake County had about 15-20 homicide cases a year, not all of which would result in a prosecution for murder. Some would be suicides, some would be cases in which no arrest was made, etc.

It was noted that the vast majority of death eligible cases would be likely to come from Cook County, Lake County and DuPage County. These three high incidence counties advised the Governor's Commission that they do now have in place protocols and procedures for deciding whether a case should be prosecuted capitally. The decision is made by a Committee in the individual State's Attorney's office, with the final decision approved by the State's Attorney. There has been no formal documentation of that, to date.

The subcommittee agreed it is very important in addition to have the smaller counties clocked in

for the purposes of proportionality review, both to document the incidence of death eligible homicides in these counties over the relevant period and also for the procedures or protocols used to decide whether or not a case should be prosecuted capitally.

It was noted that the decision to prosecute a case capitally in a small county might be made differently now that the Capital Litigation Fund was available, and small counties no longer state were required to fund a capital prosecution out of their current account budget. All of the counties in Illinois have full time paid county prosecutors, and this will facilitate obtaining the information needed from each county.

Tom Sullivan noted that in April of 2002 Recommendation No. 29 of the Governor's Commission Report asked that the State's Attorney's Association to establish statewide standards as to the procedures for deciding whether or not a case should be prosecuted capitally. To date the State's Attorney's Association Executive Committee, and the Association itself, has not yet issued such statewide guidelines or protocols. The matter is on the agenda of the Executive Committee for their meetings at the end of June. Mike Waller said he would raise the issue again. The new President of the State's Attorney's Association is Gerald Hooker, Brown County.

Leigh Bienen asked Mike Waller to assure the State's Attorneys that the Committee would not be inundating the State's Attorneys with lengthy requests to fill out computer printouts for the purposes of proportionality review. What we need from them is factual information on identified cases of homicide for an identified time period. And we will ask for the information we need in a simple and comprehensible fashion. Then our staff and their assistants can put the information into a quantitative format useful for analysis and compilation. The State's Attorneys will not be overwhelmed with incomprehensible requests for statistical information from this Committee.

Tom Sullivan reported that he had a preliminary conversation with Sherry Mecklenberg about the status of pending cases for DNA analysis. There were some issues to be resolved regarding whether all pending requests had been included in the most recent statistical reports. Tom Sullivan was going to have further discussions with her and others, including Larry Trent (previously incorrectly identified as Larry Treat) at the State Police.

Tom Sullivan was planning to speak to Peter Baroni about data collection and the appropriate universe of cases.

The full Committee will meet again at 2pm on June 13th at 150 N. La Salle, room N-502, and these minutes and the minutes of the previous meeting will be distributed to the Committee at that time.

To: Capital Punishment Reform Study Committee Members
From: Jeff Howard
Date: May 31, 2005
Re: Trial Sub-Committee Meeting Held on May 27, 2005

The Trial Sub-Committee held its first meeting on 5/27/05. Present were Jeff Howard and Randy Stone. Ed Parkinson participated by phone. Ted Gottfried joined us.

Our sub-committee discussed tentative topics to be studied. The following topics were identified: Capital Litigation Trial Bar (CLTB); Capital Litigation Trust Fund (CLTF); pre-trial motion practice including snitch testimony; videotaping the interrogation process and use in court of such recordings; identification procedures; mental retardation; the change in the standard for imposing death; judge's recommendation to Supreme Court if he/she differs from jury's death verdict; training of judges; training of attorneys; appointment of counsel in capital cases; filing of appearance by OSAD; no doubt and residual doubt at sentencing phase; IPis; discretion of the prosecution in seeking death; notice practice for seeking death; case management conferences; certificate of readiness conferences and form used; definition of inherently violent crime for felony murder eligibility factor; two new statutory mitigating factors; de-certification as a capital case by trial judge; assistance rendered by OSAD; and assistance rendered by AG and Appellate Prosecutor's Office. We realize some of these issues may overlap with issues to be studied by other sub-committees. For that reason, our list is tentative at this time. We agreed to start with three topics. They are the CLTF and its use; the CLTB, including training of judges and attorneys; and the exercise of discretion by prosecutors and the notice provisions. Ted Gottfried informed us that his sub-committee is next meeting on 6/24/05 at 9:30 at which Nadine Jakubowski of the State Treasurer's Office will be discussing the CLTF. We agreed that we will hold our next meeting with that sub-committee. It is to be held at 203 N. LaSalle, the 24th Floor. Ed Parkinson agreed to have Pat Delfino supply our sub-committee with info concerning the prosecutors' exercise of their discretion and the use of the notice provisions in all counties other than Cook. We believe we will need to rely on fellow committee member Gerry Nora for what the SAO in Cook County does. As for the CLTB topic, I will contact Judge Toomin of Cook County regarding the training of judges and what the Supreme Court Committee does regarding the requirements for training attorneys. I can address what my office does for training our attorneys. Steve Richards of OSAD can inform us regarding other training opportunities for defense attorneys. Again, we will need info from Gerry Nora regarding the training of ASAs in Cook County and Pat Delfino for training of prosecutors in other parts of the State.

I am the chair of this sub-committee. Hopefully, Randy will be able to provide a law student to attend our meetings to take the minutes. If one is unavailable, we agreed that we will take turns writing up the minutes of our meetings.

**MINUTES OF THE MEETING OF
THE POST-CONVICTION PROCEEDINGS SUB-COMMITTEE OF
THE CAPITAL PUNISHMENT REFORM STUDY COMMITTEE**

May 16, 2005

Office of the State Appellate Defender
First District Office
Conference Room
203 N. LaSalle, 24th Floor, Chicago, IL

The meeting began at 9:30 a.m. In attendance were Jim Durkin, Richard Schwind, and Ted Gottfried. Kathy Saltmarsh, Legislative Liaison for the Office of the State Appellate Defender, attended and agreed to help the sub-committee.

The scope of the sub-committee work was discussed. It was agreed that the committee would look at all reforms in the Post-conviction area and would also look at the operation of the Capital Litigation Trust Fund.

Sub-committee members agreed to collect materials and share them with the sub-committee and to send a questionnaire to people who are doing post-conviction and death penalty appellate work.

The sub-committee also agreed it would invite people with knowledge of issues before the sub-committee to address those issues. Nadine Jakubowski from the Treasurer's office will be invited to speak to the sub-committee on the operation of the Capital Litigation Trust Fund. (Ms. Jakubowski was contacted and has agreed to speak to the committee on June 24.)

A long discussion involved problems with the Capital Litigation Trust Fund and current efforts in the legislature to deal with them.

The next meeting of the Post-Conviction Proceedings Sub-committee will be held on Friday, June 24, at 9:30 a.m. in the First District Office conference room.

The meeting was adjourned at 11:15 a.m.