

**DUE PROCESS
AND THE DEATH PENALTY
IN ILLINOIS**

A Report by

THE CHICAGO COUNCIL OF LAWYERS

with the assistance of

THE CHICAGO APPLESEED FUND FOR JUSTICE

March, 2000

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I. INTRODUCTION

Two and one-half years ago, in the wake of disclosures that nine innocent men had been wrongly convicted and sentenced to death in Illinois, the Chicago Council of Lawyers and its sister organization, the Chicago Appleseed Fund For Justice initiated a major campaign seeking a moratorium on imposition of the death penalty until the system could be fixed.

In the intervening time, four more persons have been released from Death Row. This means that Illinois actually has exonerated more persons than it has executed since capital punishment was reinstated in 1977. During that time, 13 persons have been exonerated¹ and 12 have been executed.

The Council and Chicago Appleseed in 1997 urged Governor Jim Edgar, the Illinois General Assembly and the Illinois Supreme Court to call a halt to executions. When George Ryan became Governor in 1999, the Council and Chicago Appleseed renewed their request. Last month, Governor Ryan agreed to declare a moratorium and to establish a commission to study the system.

In the meantime, with the assistance of Chicago Appleseed, the Council over the past eight months has been conducting its own study², the results of which are contained in this report. The report will be submitted to the Governor's Commission,

¹ Perry Cobb, Darby Tillis, Joseph Burrows, Rolando Cruz, Alejandro Hernandez, Verneal Jimerson, Dennis Williams, Gary Gauger, Carl Lawson, Anthony Porter, Steven Smith, Ronald Jones and Steven Manning.

² The study was conducted under the supervision of the Council's Committee on the Death Penalty (Ed McManus, chair). Assisting in the study were Kate Merrill of Skadden, Arps, Slate, Meagher and Flom, Council intern Elissa Germaine, and Chicago Appleseed's Harvey J. Badesch Fellow, Kristina Smith. The report was written by Ms. Smith and Mr. McManus.

as well as to study committees appointed by the Illinois Supreme Court and the Illinois House of Representatives.

The fact that 13 persons in 13 years have been freed from Death Row because of wrongful convictions suggests that the state's capital punishment system is seriously flawed. While no criminal justice system is perfect, it is intolerable that a system involving the taking of life by the State is so unreliable. Moreover, serious questions about the guilt of a number of those remaining on Death Row have been raised by their attorneys.

Early in 1997, the American Bar Association issued a report sharply critical of the administration of the death penalty system nationwide and called for a moratorium on executions until each state and the federal government could study and reform it. The Council soon thereafter became the first local or state bar association in the country to call for a moratorium. The Council and Chicago Appleseed drafted legislation for a moratorium which was introduced in the Illinois General Assembly³; led a coalition of organizations and individuals in filing an *amicus curiae* brief with the Illinois Supreme Court calling for a moratorium⁴; and petitioned Governor Edgar to stop executions.

Other organizations pressed the issue with government officials as well. Northwestern University School of Law sponsored a widely publicized Conference on Wrongful Convictions and the Death Penalty in November, 1998. The Illinois Death

³ House Bill 2291, 90th General Assembly, by Rep. Schakowsky et al.

⁴ Brief submitted in *People v. Kliner*, July, 1997.

Penalty Moratorium Project persuaded the House of Representatives to pass a resolution in April, 1999, urging the Governor to declare a moratorium and establishing a study commission. The *Chicago Tribune* ran a series of articles in November, 1999, that were very critical of the system.

One member of the Illinois Supreme Court, Justice Moses Harrison, announced his opposition to the system in November, 1998, calling it “profoundly unjust.”⁵

A committee of 17 judges was appointed in April, 1999, by the Supreme Court to study the system, and the committee issued a report on November 23, 1999, recommending several amendments to the Court’s rules aimed at improving the system.⁶ The Council views that report as an excellent document. While we do not necessarily endorse all of the committee’s recommendations and we go further than the committee in proposing various reforms, we believe their report represents a very important step toward improving the system, and we urge the Illinois Supreme Court and the Illinois General Assembly to give it serious consideration.

The Council, with the assistance of Chicago Appleseed, began its own study of the Illinois death penalty system in June, 1999. The primary focus of the study was a review of published case law of all inmates under death sentence.⁷ To our knowledge, this is the first time an Illinois bar association has conducted such a review. The

⁵ *People v. Bull*, 185 Ill.2d 175 at 228, 705 N.E.2d 824 at 848 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part).

⁶ *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999).

⁷ As of June 30, 1999, there were 159 inmates on Death Row (64 at Menard, 92 at Pontiac, 3 at Tamms and 3 females at Dwight), according to the Illinois Department of Corrections. Published case law was not available for 17 inmates.

purpose of the case reviews was to identify patterns in the arrest and prosecution of the inmates, in an effort to draw conclusions as to how the system could be reformed. The study also consisted of a review of case law of the 13 persons exonerated; a review of literature on capital punishment issues; and personal interviews with numerous attorneys. Based on the study findings, the Council is making several recommendations.

What we discovered in preparing this report was that capital prosecutions were prone to the common sorts of errors, shoddiness and outright misconduct found in even the most ordinary criminal cases. These flaws may be found in all corners of the justice system: state's attorneys, defense counsel, the police, juries and judiciary. Sometimes, as we shall see, these flaws result in reversible error; sometimes, they are deemed harmless or are waived. But irrespective of the ultimate outcome of the conviction, a close reading of this case law defies the common expectation that extra care is taken in capital cases, betrays recurrent violations of the "death is different" standard of due process laid down by the U.S. Supreme Court,⁸ and shakes confidence in the convictions.

Although the Council makes recommendations for improvements in the capital punishment system, the limited purpose of these suggestions must be made clear. *The*

⁸Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (citations omitted): "[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Council in no way endorses the continued application of the death penalty in Illinois.

Members of the Council differ on whether Illinois ought to abolish the death penalty or retain it, and that dialogue will continue with the publication of this report. The Council also refrained in this Report from commenting on other major issues of fairness in the system, raised by the American Bar Association, which do not specifically concern the due process afforded capital defendants. The project was confined to a study and recommendations concerning why Illinois has sentenced at least 13 innocent persons to death. No set of recommendations, though, can warranty perfection in the criminal justice system or stem deliberate misconduct.

It should also be noted that while our recommendations for reform are aimed at the capital punishment system, in some cases they may well apply to the criminal justice system as a whole. For example, effective assistance of counsel is vital for all criminal defendants; in urging special concern for capital defendants because their lives are at stake, we are not disregarding the importance of this issue to non-capital defendants.

The report is divided into five areas of study, relating to the major players in the system: the prosecution, the defense, the police, the jury and the courts.

II. THE PROSECUTION

A. Prosecutorial Misconduct

There are many fine prosecuting attorneys in Illinois dedicated to a vigorous effort to put criminals behind bars while respecting their constitutional rights. But there are also prosecutors who engage in misconduct in their determination to win a conviction and, in capital cases, a death sentence. A recent, notorious case was *People v. Murray Blue*,⁹ where the prosecutors introduced a bloody and brain-splattered police uniform at trial (ostensibly to corroborate the location of the victim's wounds), used narrative objections to prejudice the jury and exhorted the jurors in closing to let the dead officer's family "hear" from the jury. Despite the Supreme Court's statement that the record evidence was sufficient to convict the defendant, such overt misconduct violated the defendant's right to a fair trial and rendered the conviction invalid.¹⁰

Prosecutorial misconduct is seldom so easy to uncover and to remedy. It may include introducing deliberately misleading testimony¹¹ or withholding evidence from the defense. A prosecutor's well-intentioned desire to clean up the streets -- fueled by high-profile cases, the public's demand for a tough stand against crime and the lack of consequences for his or her actions -- can eventually become overreaching.¹² One

⁹2000 WL 70206 (Jan. 27, 2000).

¹⁰See also *People v. Woolley*, 178 Ill. 2d 175, 687 N.E.2d 979 (1997) (death sentence vacated where prosecutor invited testimony by police officer that defendant's prior crimes "could have been" charged as felonies, and then argued to jury in closing that it should treat the prior crimes as if they were felonies).

¹¹*People v. Olinger*, 176 Ill. 2d 326, 680 N.E.2d 321 (1997) (on post-conviction petition, court orders hearing on claim that state used knowingly perjured testimony).

¹² Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 Geo. J. Legal Ethics 1083 at 1085 (1994).

form of misconduct is the failure to disclose exculpatory or mitigating evidence, known as *Brady* material,¹³ to the defense.¹⁴

Appellate courts do not always reverse convictions even where the misconduct of the prosecutor is demonstrated on the record. The Supreme Court may, and often does, hold that the misconduct was “harmless error.” In instances where convictions are reversed on this basis, it is rare for prosecutors to receive any sort of punishment for their conduct, despite the fact that it may violate the Illinois Rules of Professional Conduct.¹⁵

The most publicized case of alleged prosecutorial misconduct in recent Illinois history involved Rolando Cruz and Alejandro Hernandez, who were ultimately exonerated in the murder of Jeanine Nicarico after spending 10 years on Death Row. The circuit court that acquitted Cruz found that police lied about a statement supposedly made to them by Cruz, and prosecutors allegedly endorsed and perpetuated the lie. Prosecutors were also found to have failed to disclose evidence suggesting Hernandez’s innocence and to have concealed the fact that another man had confessed to the murder.¹⁶

¹³ *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

¹⁴ *People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998) (on post-conviction petition, court orders hearing into possible *Brady* violation).

¹⁵ Rule 3.8(b) states: “A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.”

¹⁶ *People v. Hernandez*, 1997 U.S. Dist. LEXIS 14526. Following the defendants’ release, three prosecutors and four police officers were indicted for conspiring to obstruct justice and perjury. However, a jury found all seven not guilty.

In the case of exonerated inmate Verneal Jimerson, the Illinois Supreme Court ruled that prosecutors knowingly allowed their chief witness against Jimerson and co-defendant Dennis Williams to lie, falsely denying the existence of an agreement with the state not to pursue charges against her.¹⁷

A witness against exonerated inmate Joseph Burrows testified at a post-conviction hearing that he was pressed by prosecutors to provide false evidence.¹⁸

At least thirty-two inmates currently on Death Row contend that prosecutorial misconduct was a major factor leading to their convictions.

Current inmate John Pecoraro contended that information was not disclosed to him that a clergyman had told police that another man confessed to the crime, and that the other man failed a lie detector test. Pecoraro's lawyers also said they were not told that the state's key witness, Martha Jackson, had been arrested in a separate case for allegedly hiring Pecoraro to kill her husband; that those charges were dropped; and that Jackson failed a lie detector test.¹⁹

Hector Sanchez contended that the prosecutor's cross-examination of him was improper and prejudicial. The Illinois Supreme Court said the cross-examination "admittedly gives us pause" but found the error harmless.²⁰ In a dissent, Justice Goldenhersh stated that this was "the most flagrant example of improper, prejudicial

¹⁷ People v. Jimerson, 166 Ill.2d 211, 652 N.E.2d 278 (Ill. 1995).

¹⁸ People v. Burrows, 172 Ill.2d 169, 665 N.E.2d 1319 (Ill. 1996).

¹⁹ People v. Pecoraro, 175 Ill.2d 294, 677 N.E.2d 875 at 881 (Ill. 1997).

²⁰ People v. Sanchez, 115 Ill.2d 238 at 279, 503 N.E.2d 277 at 293 (Ill. 1987). The prosecutor repeatedly pressed the defendant, over objections of counsel, to describe a picture of the brutally beaten murder victim.

cross-examination to come before the Court in the many cases involving death penalties.” In a second dissent, Justice Simon said he would “indelibly stamp the tactics employed here as unconstitutional.” He attributed the majority’s decision to a fundamental misunderstanding of the nature of sentencing hearings and how the harmless error standard is to be applied to them.

Edward Spreitzer contended that it was misconduct for the prosecutor to cross-examine him on a matter that had been excluded in a motion *in limine*. The Illinois Supreme Court found that the cross-examination did constitute misconduct but that the issue had been waived by the defense’s failure to object to it at trial.²¹

James Tenner contended that the prosecutor made inflammatory comments to the jury, including expressing the prosecutor’s personal belief that Tenner deserved the death penalty, telling the jury to act on behalf of the victims, and suggesting that the defense was concealing a witness. A federal district court, ruling on a habeas petition, ruled that these claims were barred by procedural default.²²

John Whitehead contended that the prosecutor impermissibly highlighted his failure to testify, made an issue of the defense attorney’s sincerity, misled the jury and referred to Whitehead as a “pervert.” The Illinois Supreme Court held that the claims were waived because of defense counsel’s failure to object in a timely manner.²³

²¹ People v. Spreitzer, 123 Ill.2d 1, 525 N.E.2d 30 (Ill. 1988). This is also an example of ineffective assistance of counsel. See section on The Defense.

²² Tenner v. Gilmore, 1998 WL 721115 (N.D. Ill. 1998).

²³ People v. Whitehead, 116 Ill.2d 425, 508 N.E.2d 687 (Ill. 1987). Also see People v. Thomas, 951 F.Supp. 1338 (Ill. 1996) (prosecutor made racial remarks to jury; claim of misconduct barred by procedural default); People v. Ward, 154 Ill.2d 272, 609 N.E.2d 252 (Ill. 1992) (misconduct claimed but court found issue was waived for review).

Recommendation

Prosecutors in Illinois capital cases have told outright lies to jurors, exaggerated the criminal backgrounds of defendants, used inflammatory arguments and misstated the law. Ultimately, it is up to defense counsel to challenge these actions, and it is up to judges to put a stop to them. But one key step that could correct serious abuses would be to toughen the requirements for pre-trial discovery.

The Special Supreme Court Committee on Capital Cases has addressed this issue, and the Council conditionally endorses two of the committee's recommendations:

(1) To require certification 14 days before trial that the prosecution has conferred with individuals involved in the investigation and trial preparation of a capital case to determine the existence of *Brady* material. The proposal establishes an affirmative duty on the part of the prosecution to ask individuals working on the case about *Brady* material in their possession or control. "This duty will ensure that all available *Brady* material reaches the prosecution, and that the prosecution is aware of all the *Brady* material it must disclose to the defense."²⁴

(2) To require the prosecution to specifically identify by description or otherwise any *Brady* material disclosed. The Committee said this requirement would help to focus the prosecution on its responsibility to determine the existence of *Brady*

²⁴ *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 35-36.

material and to disclose it and would ensure that the defense does not lose sight of essential evidence in what may be voluminous discovery materials.²⁵

While the Council applauds the Committee's concern about discovery, it feels that the Committee's recommendations do not go far enough. The Council therefore recommends:

- (1) That certification be required within 60 days of arraignment, or within 90 days if good cause is shown.
- (2) That the certification be signed not only by the prosecutors on the case but also by the elected or appointed State's Attorney or Attorney General.
- (3) That the certification requirement apply not only to *Brady* material but also to *Giglio*²⁶ material (material damaging to the defense's case) and all material subject to disclosure under Illinois Supreme Court Rule 412.
- (4) That if the court finds, either at trial or at post-conviction, that the prosecution has violated discovery rules, the court would be obligated to refer the matter to the Attorney Registration and Disciplinary Commission (ARDC).
- (5) That the certification requirement be made applicable not only to prosecutors but to agents of a police department and any other investigative agency involved in a case.

²⁵ Id. at 36-37. This proposal is drafted in terms that would make the new requirements applicable to any felony case.

²⁶ *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1971).

The Council also recommends that Illinois Supreme Court Rule 412 be expanded to require the prosecution in murder cases — in addition to all disclosure currently required by the rule — to disclose or make available to the defense the following materials:

- (1) All documents, physical evidence and tangible things obtained in connection with the investigation which led to the filing of the charges.
- (2) Criminal histories for all persons listed in any discovery that is disclosed.
- (3) Any promises, inducements, or benefits offered to any person listed.
- (4) Identification of all instances in which any person listed has previously testified for the prosecution in a criminal case, other than persons employed by a law enforcement or governmental agency.
- (5) Any information that is material to the preparation of the defense or which may tend to exculpate the accused or impeach the credibility of any person listed.
- (6) The identities of all individuals other than the accused who have been at any point a subject of the investigation that led to the pending charges, and a fair description of the basis on which those individuals were subjects.

The Council also recommends that such disclosures be made mandatory and automatic, rather than upon written motion of the defense as in the present rule, unless the prosecution obtains a protective order for good cause.²⁷

²⁷ An additional recommendation, that prosecutors be required to meet certain standards of experience and training, is contained in the Defense section because it applies to defense counsel as well.

B. Lack of Notice

Illinois is the only state in the country in which prosecutors are not required to give some advance notice that they will seek the death penalty,²⁸ yet the Illinois Supreme Court has upheld the constitutionality of the statute.²⁹ The defense often files a motion requesting that the prosecution disclose its intent regarding the death penalty, and although such motions are typically granted, the prosecution is under no obligation to respond.³⁰

Although it is rare in experience for the state to actually wait until the beginning of trial to declare its intention to seek death, the very option is an affront to due process. Lack of notice deprives defendants of full opportunity to make intelligent decisions about their defense. Defendants may also be deprived of public resources earmarked for capital cases until notice is given that it is a capital case.

Recommendation

The Illinois State's Attorneys Association has recommended that the state be required to provide notice of its intent to seek the death penalty within 120 days of

²⁸ Reinberg, *The Constitutionality of the Illinois Death Penalty Statute: The Right to Pretrial Notice of the State's Intention to Seek the Death Penalty*, 85 Nw. U.L. Rev. 272 at 274 (1990). See also *People ex. Rel. Carey v. Cousins*, 77 Ill.2d 531 (Ryan, J., dissenting): There is no requirement that the defendant, at any stage of the proceeding prior to or during the hearing to determine his guilt or innocence, be notified that the death penalty will be requested.

²⁹ *People v. Caballero*, 102 Ill.2d 23, 464 N.E.2d 223 (Ill. 1984); *People v. Silagy*, 101 Ill.2d 147 at 161-162, 461 N.E.2d 415 (Ill. 1984); *People v. Gaines*, 88 Ill.2d 342, 430 N.E.2d 1046 (Ill. 1981). See also *Silagy v. Peters*, 905 F.2d 986 at 994 (7th Cir. 1990) (pretrial knowledge regarding the certainty of a request for the death penalty is not essential for purposes of the Sixth Amendment).

³⁰ Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 AUT Law & Contemp. Probs. 193 at 206 (1998).

arraignment,³¹ and the Special Supreme Court Committee on Capital Cases has accepted that recommendation.³² However, the Council believes that is not sufficient notice, given the gravity of the sentence. Defendants, in order to take any and all steps necessary to protect their rights, are entitled to be informed as early in the process as feasible that they potentially might lose their life. The Council therefore recommends that the state be required to provide notice of its intent to seek the death penalty within 30 days of arraignment, or within 90 days if there is good cause.

³¹ Illinois State's Attorneys Association, April 27, 1999.

³² *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 46-47, recommending that the state be required to provide notice of its intent "to seek or decline to seek" the death penalty within 120 days after a defendant is arraigned.

III. THE DEFENSE

A. Competence of Counsel

Capital cases are the most demanding criminal prosecutions in the United States. Every task ordinarily performed in the representation of a criminal defendant becomes more difficult and time-consuming when the defendant is facing execution. Despite the level of difficulty, attorneys who have defended those accused of capital cases have been problematic, as the cases reveal.³³ On one day in 1999, the Illinois Supreme Court ruled on challenges to two death sentences based on ineffective assistance of counsel, both on post-conviction petitions. In the first, appellate counsel failed on direct appeal to preserve a challenge to sufficiency of evidence to support the sentencing jury's finding.³⁴ In that case, the sentence was voided and the state was declared barred from seeking reimposition of the sentence based on double jeopardy. In the second, appointed counsel failed to make routine amendments to a *pro se* prisoner petition that might have overcome a procedural bar of waiver.³⁵

The trials of former Death Row inmates Dennis Williams and Verneal Jimerson demonstrate the low quality of some capital defense counsel. Williams and Jimerson were part of what came to be known as the Ford Heights Four, a group of men convicted of rape and murder who were exonerated when DNA test results showed their innocence. Subsequent to the testing, another man confessed that he and three

³³ Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103 at 1119 (1999).

³⁴ *People v. West*, 187 Ill. 2d 418, 719 N.E.2d 664 (1999).

³⁵ *People v. Turner*, 187 Ill. 2d 406, 719 N.E.2d 725 (1999).

others actually committed the crimes. DNA tests of these men confirmed that they were the killers.

At his first trial, Williams was represented by a court-appointed attorney who was defending himself against disbarment proceedings at the same time.³⁶ Williams' attorney, Archie Weston, eventually was found guilty of neglecting client matters, committing acts prejudicial to the administration of justice and acts which intentionally caused damage and prejudice to his client, and commingling and converting client funds. He was disbarred in 1982.³⁷ Williams spent 18 years in prison before being exonerated.

Verneal Jimerson was similarly represented at trial by a court-appointed attorney who had been before the Attorney Registration and Disciplinary Commission. His attorney, Earl Taylor, was just coming off a one-year suspension for a "pattern of consistent neglect" when he was assigned to represent Jimerson.³⁸

In the case of exonerated inmate Carl Lawson, Asst. State's Atty. Walter Bradon appeared in court at Lawson's arraignment, then later resigned from the State's Attorney's Office and wound up as Lawson's defense attorney. The Illinois Supreme Court found that Bradon's representation of both the State and the defendant in the same matter constituted a *per se* conflict of interest.³⁹

³⁶ People v. Williams, 93 Ill.2d 309, 444 N.E.2d 136 (Ill. 1982), *cert. denied*, 466 U.S. 909 (1984).

³⁷ In re Weston, 92 Ill.2d 431, 442 N.E.2d 236 (Ill. 1982).

³⁸ In re Taylor, 66 Ill.2d 567, 442 N.E.2d 845 (Ill. 1977).

³⁹ People v. Lawson, 163 Ill.2d 187, 644 N.E.2d 1172 (Ill. 1994).

At least twenty-six of the inmates currently on Death Row have made claims of ineffective assistance of counsel. For example, Tuhran Lear was sentenced to death for the murder of a gas station manager.⁴⁰ His appointed trial counsel was fresh out of law school, had never tried a homicide case before and never received any formal training on defending capital cases. He did not consult with other attorneys nor hire investigators. He did not conduct jury *voir dire* on racial bias despite the fact that the crime was interracial. He failed to inform the jury that the State's key witness gave contradictory testimony, and he failed to present a defense theory. Although the the Illinois Supreme Court denied Lear's defense on procedural default grounds, the dissent in Lear's post-conviction appeal concluded that, "there was an unreasonable risk that the defendant was unfairly sentenced to death."⁴¹

One area of ineffective assistance is in the investigation and presentation of mitigating evidence.⁴² Due to a lack of resources or experience, some defense attorneys have provided scant support during the penalty phase, thereby lessening the State's burden of establishing the propriety of a death sentence. For example, counsel appointed to defend Johnny Neal Jr. was alleged to have made no investigation except for interviewing Neal and his wife.⁴³ The attorney had no training or supervision and

⁴⁰ People v. Lear, 143 Ill.2d 138, 572 N.E.2d 876 (Ill. 1991).

⁴¹ People v. Lear, 175 Ill.2d 262, 677 N.E.2d 895 at 904 (Ill. 1997) (Freeman, J., dissenting).

⁴² People v. Towns, 182 Ill. 2d 491, 696 N.E.2d 1128 (1998) (on post-conviction petition, court orders hearing on claim of ineffective assistance of counsel at sentencing phase); People v. Ruiz, 177 Ill. 2d 368, 686 N.E.2d 574 (1997) (same); People v. Howery, 178 Ill. 2d 1, 687 N.E.2d 836 (1997) (on direct appeal, finding ineffective assistance of counsel at sentencing phase where counsel conducted perfunctory investigation and failed to present mitigating evidence).

⁴³ Neal v. Peters III, 1996 WL 11085 (N.D.Ill. 1996).

did not present any evidence in mitigation. But Neal's claim of ineffectiveness was rejected on appeal.

Other examples:

John Pecoraro's attorney had previously conducted only four jury trials, had no staff or co-counsel, lacked training in capital cases and was paid a total of \$200.⁴⁴ The Illinois Supreme Court, however, determined that Pecoraro was not denied his right to effective assistance of counsel.

Prior to and during Leroy Orange's trial, defense counsel had four ARDC complaints filed against him.⁴⁵ One of them subsequently resulted in a six-month suspension from the practice of law. Additionally, Orange's attorney and the father of one of Orange's victims were high school classmates. At trial, counsel failed to present any evidence in mitigation and failed to investigate Orange's claims of police coercion. Orange's claims of ineffectiveness were rejected on appeal.

Gregory Madej's court-appointed attorney allegedly failed to investigate or present mitigation evidence.⁴⁶ The Illinois Supreme Court agreed that the lawyer failed to provide an adequate defense, stating that the defense was "tantamount to the presentation of no evidence at all." However, the court upheld Madej's death sentence, stating that the "outcome would not have been different if his attorney had investigated and prepared more adequately."

⁴⁴ People v. Pecoraro, 144 Ill.2d 1, 578 N.E.2d 942 (Ill. 1991).

⁴⁵ People v. Orange, 168 Ill.2d 138, 659 N.E.2d 935 (Ill. 1995).

⁴⁶ People v. Madej, 177 Ill.2d 116, 685 N.E.2d 908 (Ill. 1997).

Although defense counsel in Andrew Maxwell's trial allegedly advised him to waive a jury based on her inadequate understanding of the admissibility of prior criminal acts, the Illinois Supreme Court ruled that she was not ineffective.⁴⁷ Further, she was not held ineffective even though she failed to present evidence in mitigation and gave Maxwell incorrect advice that he would not receive the death penalty from the judge. The dissent in the post-conviction case strongly disagreed with the majority's opinion, stating, "The result of the majority's decision is to permit execution of this defendant despite serious constitutional flaws in [his] prosecution."⁴⁸

As these cases⁴⁹ demonstrate, even serious errors committed by defense counsel will not render the attorney's performance constitutionally deficient. This is due in part to the almost unattainable standard for finding counsel ineffective handed down by the U.S. Supreme Court in *Strickland v. Washington*⁵⁰ and followed by courts in Illinois.⁵¹ In *Strickland*, the Court established a two-prong test for ineffectiveness: (1) counsel's performance must be so seriously deficient as to fall below an objective standard of

⁴⁷ *People v. Maxwell*, 148 Ill.2d 116, 592 N.E.2d 960 (Ill. 1992).

⁴⁸ *People v. Maxwell*, 173 Ill.2d 102, 670 N.E.2d 679 at 696 (Ill. 1996) (McMorrow, J., dissenting).

⁴⁹ See also *People v. Shatner*, 174 Ill.2d 133, 673 N.E.2d 258 (Ill. 1996) (trial counsel failed to make an opening statement, present evidence or make an argument against the death penalty); *People v. Szabo*, 113 Ill.2d 83, 497 N.E.2d 995 (Ill. 1986) (trial counsel eventually disbarred, with 78 complaints against him made to ARDC); *U.S. ex rel. Emerson v. Grimley*, 883 F.Supp. 225 (N.D. Ill. 1995) (trial counsel failed to make opening statement, interview witnesses, consult defendant prior to trial, develop a coherent defense theory or prepare or present mitigation evidence); *People v. Palmer*, 643 N.E.2d 797 (Ill. 1994) (Harrison, J., dissenting) (dissent stated that attorney completely abandoned his role as an advocate by urging defendant to accept a blind plea of guilty without attempting to obtain a concession on sentencing); *Pitsonbarger v. Gramley*, 103 F.3d 1293 (1996) (Seventh Circuit characterized the quality of defendant's representation at post-conviction hearings as "deplorable" but declined to grant petition).

⁵⁰ 466 U.S. 668, 104 S.Ct. 2052 (1984).

⁵¹ Some jurisdictions have rejected *Strickland* under state law and imposed higher standards on counsel. See *People v. Claudio*, 83 N.Y.2d 76, 607 N.Y.S.2d 912, 629 N.E.2d 384 (1993); *State v. Smith*, 68 Haw. 304, 712 P.2d 496 (1986).

reasonableness under prevailing professional norms and (2) the deficient performance must so prejudice the defense as to deny the defendant a fair trial.

Recommendation

Clearly, a higher standard must be adopted for defense counsel in capital cases. The Special Supreme Court Committee on Capital Cases has recommended creation of a capital litigation trial bar with specific experience and training qualifications for admission.⁵² This proposal would apply to both prosecuting and defense attorneys and it would apply to both appointed and retained counsel. To qualify as lead counsel an attorney would be required to:

- (1) Be a member in good standing of the Illinois Bar or admitted *pro hac vice*.
- (2) Be an experienced and active trial practitioner with at least five years of criminal litigation experience.
- (3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois.
- (4) Have prior experience as lead or co-counsel in no fewer than eight felony trials which were tried to completion, at least two of which were murder prosecutions, and either:

⁵² *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 3.

- (a) have completed within two years prior to appointment at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, or
- (b) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology, and DNA profiling evidence.

Qualifications for co-counsel would be to demonstrate three years of criminal litigation experience and participation as lead or co-counsel in five felony jury trials tried to completion.

The Council applauds the committee's proposal and conditionally endorses it. However, the Council believes the standard should be higher and recommends that lead counsel:

- (1) Be required to have five years of full-time criminal litigation experience or demonstrated equivalent experience.
- (2) Be required to have experience in no fewer than 12 felony trials, at least four of which were murder prosecutions.⁵³
- (3) Be required to have completed at least 20 hours of training.

Additionally, the Council recommends that every capital case have at least two attorneys representing the defendant.

⁵³ The Council recognizes that in some parts of Downstate Illinois, there is a shortage of attorneys and it may not be possible to find attorneys who meet the qualifications. However, this is not a reason to deprive the defendant of adequate representation. In such cases, attorneys should be brought in from other parts of the state.

B. Funding of the Defense

The shortage of funding often prevents counsel from presenting an adequate defense. Exonerated defendant Anthony Porter presents one example of this problem. Porter's appellate attorneys claimed his trial counsel did not generate exculpatory evidence because he was not paid in full for legal services.⁵⁴ It was ultimately discovered that another man actually committed the murders for which Porter was convicted. That man ultimately confessed when his identity was discovered by a team of journalism students at Northwestern University and a private investigator, and Porter was freed.

A poignant example is presented by another exonerated defendant, Carl Lawson, who was denied funding to hire a shoeprint expert.⁵⁵ In his counsel's motions to obtain the funding, he explained that he had no familiarity with the details of such evidence and required assistance in order to prepare a defense and cross-examine the state's expert. The trial court repeatedly denied his motions despite the fact that the shoeprint evidence was the only evidence linking Lawson to the crime. Moreover, in closing arguments the prosecutor stated that the shoeprint evidence was "the single, strongest piece of evidence in this case, and it's a piece of evidence that you can't get around." Thus, the jury convicted Lawson based on the uncontroverted evidence of the state's expert.

⁵⁴ *People v. Porter*, 164 Ill.2d 400, 647 N.E.2d 972 (Ill. 1995).

⁵⁵ *People v. Lawson*, 163 Ill.2d 187, 644 N.E.2d 1172 (Ill. 1994).

The shoeprint had been found in blood near the victim's body, and the prosecutor claimed only the murderer could have left the print because it was left while the blood was still wet. Lawson was allowed to hire experts at a retrial ordered by the Illinois Supreme Court, and he was acquitted after it was revealed that the blood was still wet when the victim's body was found and that the shoeprint could easily have been left by any number of people from the neighborhood (including Lawson) who gathered around the body before police arrived.

Another exonerated defendant, Verneal Jimerson, claimed his trial counsel failed to present mitigation evidence.⁵⁶

Requested funding was denied to the defense of at least 10 current Death Row inmates. One of them is William Keene. Keene is left-handed, and at the trial a pathologist testified for the state that the killer was likely left-handed.⁵⁷ Keene's counsel could not rebut the state's expert because the defense was denied funding for its own pathologist. The court refused on the grounds that the issue did not go to "the heart of the defense."

Johnny Neal Jr., in a post-conviction petition, filed a motion for appointment of an expert to conduct a forensic psychological analysis. The post-conviction petition was dismissed without ruling on the request for an expert.⁵⁸ He raised the issue in a second post-conviction petition, but the court held that since he did not request a ruling

⁵⁶ People v. Jimerson, 166 Ill.2d 211, 652 N.E.2d 268 (Ill. 1995). Also see People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983 (Ill. 1991); People v. Burrows, 148 Ill.2d 196, 592 N.E.2d 997 (Ill. 1992).

⁵⁷ People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (Ill. 1995).

⁵⁸ People v. Neal, 568 N.E.2d 908 (Ill. 1990).

in the first proceeding, he was deemed to have acquiesced in the court's dismissal without ruling on his request. Therefore, the court held, Neal could not now claim error.⁵⁹

An important step toward correcting the problem of inadequate defense funding occurred during the past year in Illinois with passage of the Capital Crimes Litigation Act.⁶⁰ The act establishes a Capital Litigation Trust Fund. Public defenders and state's attorneys can apply for assistance from the fund. Defense expenditures may include payment for an investigator; for expert, forensic or other witnesses; and for mitigation specialists. However, the new legislation does not unambiguously apply to retained counsel, although in practice requests by retained counsel for funds may be honored. Often, a defendant chooses to retain private counsel, only to discover later that the fee he or she is able to pay is not nearly sufficient to enable the attorney to hire an investigator, pay for forensic testing or retain experts to testify at trial. There is also the open issue of whether the defendant must return such funds if the state determines not to seek death.

Several states recognize the importance of assuring that counsel has adequate funding to stage a competent defense.⁶¹ The United States Supreme Court in 1985 held

⁵⁹ People v. Neal, 689 N.E.2d 1040 (Ill. 1997).

⁶⁰ P.A. 91-589 (S.B. 574), enacted August 14, 1999, effective Jan. 1, 2000.

⁶¹ See Anderson v. Justice Court of San Benito County, 99 Cal. Rptr. 274 (1st Dist. App. 1979); Johnson v. Snyder, 417 So.2d 783 (Fla. Ct. App. 1982), citing Florida Code of Criminal Procedure 2.111(b)(4); Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975).

that a murder defendant was constitutionally entitled to hire a psychiatrist to testify to his mental state and the State was obligated to pay for it if he was indigent.⁶²

Recommendation

If a trial is to be a fair search for the truth, both sides must have equivalent resources with which to investigate and present their case. It is essential that defense counsel be able to mount a meaningful defense. Since the recent funding reforms do not apply to retained counsel, the Council recommends that the Illinois Supreme Court adopt a rule directing circuit courts to grant reasonable requests for funding in capital cases in which the defendant is represented by retained counsel. Such requests should be made to the Presiding Judge of the Criminal Division of the Circuit Court. Denial of such requests should be the basis of expedited, interlocutory appeal.

⁶² Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985).

IV. THE POLICE

A. False Confessions

Confessions are very powerful evidence in criminal prosecutions. Someone who confesses, one recent study concluded, is presumed guilty by the system and may suffer rougher treatment by every criminal justice official and at each stage of the trial.⁶³ Jurors may find it difficult to believe defendants claiming innocence who once allegedly confessed to the crime.⁶⁴ We must be concerned, then, when coerced and even false confessions occur in capital cases.

False confessions may occur in different circumstances:

First, a person may seek out police and confess to crimes he or she did not commit due to psychological or mental impairments, to achieve notoriety, to seek relief from generalized guilt, or because he or she cannot distinguish between reality and imagination.⁶⁵ In these situations the suspect should receive, although only upon consent of the defendant and his or her counsel, a psychological evaluation.

⁶³ Ofshe & Leo, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law: II. Coerced Confessions: The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L. Rev. 979 at 983 (1997).

⁶⁴ Prettyman, *Commentary: False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. Pub. Int. L.J. 719 at 726 (1997).

⁶⁵ Prettyman, *Supra* at 741.

Second, the pressures and demands of interrogators may produce so much anxiety in certain people that they will do anything to cause it to end, including confessing to a crime they did not commit.

Third, the suspect may confess by coming to believe the suggestions of the police, even though the suspect has no memory of committing the crime and even though he is actually innocent.

Physical Coercion

It was only through DNA evidence that Ronald Jones was exonerated of a murder for which he had been sentenced to death. Before Jones' trial, DNA testing was not sophisticated enough to yield accurate results. Once it became available, Jones' appellate counsel came up against considerable resistance by prosecutors and the court to his request for testing. Jones, whose conviction was based on his confession, claimed that he only confessed because the police beat him.⁶⁶ Even after the DNA test proved he was innocent, he spent another 22 months in jail while the state's attorney reinvestigated the case and debated whether to retry him.

Courts and other public bodies have made findings in cases of alleged police coercion. In 1993, an investigation into police practices at the Chicago Police Department's Area Two and Area Three Violent Crimes headquarters found that over the course of 15 years, Lt. Jon Burge and his detectives had been allegedly using physical torture and threats to coerce confessions. Their alleged methods included

⁶⁶ People v. Jones, 156 Ill.2d 225, 620 N.E.2d 325 at 332 (Ill. 1993).

suffocation with plastic typewriter covers, cattle prods, bats, sticks, radiators, cigarette burns, Russian roulette and beatings. The Police Department's Office of Professional Standards issued a report, written by Investigator Michael Goldston, finding that physical abuse, including "planned torture," occurred under Burge's command on a systematic basis over a period of many years.⁶⁷

At least twenty-seven current Illinois Death Row inmates allege that they were coerced into confessing by the police; 10 of them⁶⁸ allege they were coerced at the hands of Burge and his detectives.

One of the most publicized is Aaron Patterson, who claims he was physically abused and threatened for 25 hours and repeatedly denied a lawyer.⁶⁹ A "confession" was written by an Assistant State's Attorney and used to convict him, but he never signed it. Instead, he used a paper clip while he was alone in the interrogation room and etched a message on a steel bench stating that his confession was a lie and that he was tortured. Photographs were taken of the etchings, but the trial judge refused to admit them into evidence.⁷⁰

Death Row inmate Leonard Kidd claims that his alleged confession, which was never recorded, was the result of threats made by a police sergeant who held a gun to

⁶⁷ Brief *Amicus Curiae*, filed by the Ad Hoc Committee for a Full Inquiry Into Police Torture and the Death Penalty, in *People v. Patterson*, December, 1998.

⁶⁸ Madison Hobley, Stanley Howard, Leonard Kidd, Derrick King, Ronald Kitchen, Jerry Mahaffey, Reginald Mahaffey, Andrew Maxwell, Leroy Orange and Aaron Patterson.

⁶⁹ *People v. Patterson*, 145 Ill.2d 414, 610 N.E.2d 16 (Ill. 1993).

⁷⁰ The message, dated "4/30," said, "Aaron lied. . . . Police threaten me with violence. . . . Slapped and suffocated me with plastic. . . . Signed false statement to murders."

Kidd's stomach.⁷¹ Kidd claims he requested that a lawyer be present during his interrogation but his requests were denied. The public defenders assigned to his case stated that they attempted to visit Kidd but were given misleading statements as to his whereabouts.

Derrick King also claims his confession was coerced through physical abuse by police.⁷² Although several witnesses testified that Kidd appeared to have been beaten, the judge found that his statement was voluntary.

Stanley Howard not only alleged that his confession was coerced by beatings and suffocation, he had medical reports to back it up, but he was nevertheless convicted. Later, an investigator for the Chicago Police Department Office of Professional Standards found that the abuse had occurred and that officers had lied about it.⁷³

Madison Hobley also alleged he was beaten and suffocated before confessing. The police officer who obtained the confession testified that he had no notes because they got wet and torn and he tossed them away.⁷⁴

Mental Coercion

Psychological coercion and verbal threats, in contrast to physical abuse, do not leave any marks to show the court.⁷⁵ This form of questioning produces a subject who may admit to almost anything suggested by his or her interrogators.

⁷¹ People v. Kidd, 178 Ill.2d 92, 687 N.E.2d 945 (Ill. 1997).

⁷² People v. King, 155 Ill.2d 232, 48 N.E.2d 514 (Ill. 1986).

⁷³ People v. Howard, 147 Ill.2d 103, 588 N.E.2d 1044 (Ill. 1991).

⁷⁴ People v. Hobley, 182 Ill.2d 404, 696 N.E.2d 313 (Ill. 1998).

⁷⁵ Prettyman, *Supra* at 744.

In a review of defendants who falsely confessed, one study reported several techniques used in different jurisdictions.⁷⁶ First, suspects were isolated in interrogation rooms without a lawyer, family member or friend. Second, interrogations were relentless and lengthy. Third, the police often strategically lied to the suspect about the overall strength of the case against him. Finally, suspects were often told that they had a psychological problem that would be alleviated only through confession and that it is not uncommon for perpetrators to bury memories of their crimes.

Also, information known by the police is sometimes unwittingly communicated to the suspect. During high-pressured interrogation, the suspect may adopt this information into the false confession, leading the police to believe in the validity of the confession. When the confession is presented to the jury with details “known only to the actual killer,” the prosecutor improves the chances of a conviction.

Inmate Patrick Page alleges that he was coerced into confessing through lies and false promises by the police and the state’s attorney and that he was refused contact with an attorney or with family members.⁷⁷

Gary Gauger of McHenry County was convicted of killing his parents, based on a confession he made, but he has now been exonerated and another man has admitted he killed them. Gauger’s conviction was reversed on the grounds that the police did not even have probable cause to arrest him in the first place. Gauger filed a lawsuit in October, 1999, contending he was coerced into the confession by police and that

⁷⁶ *Id.* at 730.

⁷⁷ *People v. Page*, 614 N.E.2d 1160 (Ill. 1993).

evidence in his case was withheld by the state's attorney. He alleged that police denied him sleep for 21 hours until he was in a weakened psychological state and told him they had physical evidence connecting him to the crime even though they did not. He says he was brainwashed into thinking he could have committed the murders, in part by engaging in a game of hypotheticals with police.⁷⁸

B. Other Misconduct

Not only have police coerced confessions, but in some instances they have manufactured evidence. In Rolando Cruz's final trial, a police detective admitted that he had lied about the facts surrounding a statement the defendant allegedly made about a "vision," leading to the exoneration of Cruz and co-defendant Alejandro Hernandez.

One way to assure the validity of confessions is to record interrogations and confessions electronically. Several law enforcement agencies in Illinois recently have begun to employ videotaping. Bills requiring electronic recording were considered last year by the General Assembly but were not approved. The Special Supreme Court Committee on Capital Cases stated that routine electronic recording of all custodial interrogations and confessions would be a major improvement in criminal procedure.⁷⁹ The committee said it believed adoption of a recording requirement would be best dealt

⁷⁸ *Freed Death Row Inmate Sues Prosecutors, Police*, Chicago Tribune, October 2, 1999.

⁷⁹ *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 60-61.

with by the voluntary action of individual executive agencies or by legislative enactment, but it should be encouraged by the courts.

Electronic recording of interrogations currently is required by court decision in Alaska and Minnesota and by statute in Texas. The Alaska Supreme Court held that electronic recording is mandated by the due process clause of the state constitution.⁸⁰ In Minnesota, the Supreme Court established a recording requirement on the basis of its supervisory power to insure the fair administration of justice.⁸¹

Recommendation

Juries, in order to reach a just verdict, must be in a position to evaluate the truthfulness, reliability and circumstances of confessions. One way to assure this is quick presentment of the defendant. State law already provides (under 725 ILCS 5/109-1) that a “person arrested with or without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge,” and sanctions should be available against law enforcement agents who do not heed this requirement in murder cases.

Another way of deterring undue coercion is by videotaping not only the confession but the entire interrogation process leading up to it. In the long run, videotaping will greatly reduce litigation and will result in a far greater sense of security about the convictions obtained.

⁸⁰ Stephen v. State, 711 P.2d 1156 (Alaska 1985).

⁸¹ State v. Scales, 518 N.W.2d 587 (Minn. 1994).

The Council therefore recommends that the General Assembly enact legislation requiring non-stop videotaping at police stations of the interrogations and confessions of all persons taken into custody in connection with homicides. The legislation should provide that custodial statements by the defendant would be inadmissible if the prosecution was unable to show good cause why interrogations or confessions were not videotaped.

One other proposal that would indirectly affect the police is contained in the Prosecution section of this report: the requirement that police departments as well as prosecutors certify that all *Brady*, *Giglio*, and Ill. S. Ct. Rule 412 materials have been disclosed to the defense prior to trial.

V. THE JURY

A. Eyewitness Testimony

In a 1999 case, the Illinois Supreme Court reversed and ordered acquittal of a defendant sentenced to death who was tried on the testimony of a single eyewitness.⁸² The Court held unanimously that the single witness — who was contradicted by others, who made a contradictory written admission to defense counsel five months earlier, and who was believed to have a motive to finger the defendant (to cover for her sister's boyfriend) — could not establish proof beyond a reasonable doubt for the state.

Eyewitness testimony is deemed by many professionals to be inherently unreliable.⁸³ Erroneous identifications are the result of the universal fallibility of sense perception and memory, and the susceptibility of the mind to suggestive influences. Environmental factors, such as the observer's stress, biases, race, age, sex and susceptibility to suggestion by the questioner, also affect the ability of the eyewitness to relate accurately what was observed.

The unreliability of eyewitness testimony is confounded by the tendency of jurors to give great weight to in-court eyewitness testimony, especially where the witness appears confident in the identification. Jurors universally share the misconception that outward expressions of confidence reflect the accuracy of the

⁸²People v. Smith, 185 Ill. 2d 532, 708 N.E.2d 365 (1999).

⁸³Westlin, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 Or. L. Rev. 93 (1992).

identification. This expression of confidence, however, is seldom related to the factual accuracy of the identification. Witnesses tend to want to avoid negative perceptions by the jurors, judges, spectators and the media. As a result, they may exude more confidence in their identification than they actually feel. Jurors then incorrectly interpret this confidence as a demonstration that the identification is accurate.

Such testimony is also easily faked or manipulated, such as found in the cases of exonerated inmates Steven Smith and Anthony Porter. Smith was convicted of the murder of a prison warden primarily on the basis of eyewitness testimony of Deborah Caraway, who provided the only direct evidence linking him to the crime.⁸⁴ At the time of trial, Caraway's sister was dating the leader of a street gang who was suspected of the murder, giving Caraway a strong incentive to direct the investigation elsewhere. Despite her bias, Smith was convicted and spent 13 years on Death Row before the Illinois Supreme Court vacated his conviction, finding there was insufficient evidence.

Porter was convicted on the basis of the eyewitness testimony of Henry Williams and William Taylor.⁸⁵ Both men identified Porter in a mug book as the person who shot the victims, and Taylor identified Porter in a lineup.⁸⁶ After Porter spent 16 years on Death Row, both men admitted they never saw him commit the murders. They said they lied due to police coercion. Another man then confessed to the crimes.

⁸⁴ People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 at 905 (Ill. 1990).

⁸⁵ People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (Ill. 1986).

⁸⁶ People v. Porter, 112 F.3d 1308 (7th Cir. 1997).

B. Accomplice Testimony

Testimony by accomplices must be viewed with great caution. Suspected accomplices have a strong incentive to implicate others so they can lessen their own responsibility or obtain a favorable deal from the prosecution.

The primary evidence to connect Verneal Jimerson and Dennis Williams to the murders that resulted in their death sentences was that of an alleged accomplice, Paula Gray. Gray, a 17-year-old girl with mental retardation--an IQ of 64--testified that Jimerson, Williams and two other men killed a young man and woman.⁸⁷ Gray, who was in prison awaiting trial for her part in the murders, was allowed to testify falsely at their trial that she had not been promised anything in return for her testimony. In reality, Gray had been promised by the state that the murder charges against her would be dropped if she testified against them. Evidence of this deal, however, was never given to the defense or presented to the jury. Gray eventually gave a statement to private investigators and a team of Northwestern University journalism students admitting she lied under police pressure.

Joseph Burrows was convicted of murder substantially based on the testimony of two alleged accomplices with absolutely no physical evidence linking him to the murder.⁸⁸ The accomplices, who had adjacent cells during Burrows' trial, both gave trial testimony inculcating Burrows that was inconsistent with the testimony given when

⁸⁷ People v. Jimerson, 166 Ill.2d 211, 652 N.E.2d 278 (Ill. 1995).

⁸⁸ People v. Burrows, 172 Ill.2d 169, 665 N.E.2d 1319 (Ill. 1996).

they were arrested. After Burrows was convicted, they recanted. One of them, Gayle Potter, admitted that she was solely responsible for the murder and that Burrows was not even present at the crime scene. Her inculpatory statement was supported by a substantial amount of corroborating evidence. She explained that she was now telling the truth as part of her drug rehabilitation program. The other alleged accomplice, Ralph Frye, stated that he lied under pressure from Potter and the prosecutor. Another witness came forward and verified that Potter had committed the murder, and after five years on Death Row, Burrows was exonerated.

As with alleged eyewitness testimony, accomplice testimony can also too easily be faked or manipulated. Two other exonerated inmates, Perry Cobb and Darby Tillis, were convicted based on the testimony of an accomplice, Phyllis Santini. Without her testimony, the state would have been left with a flimsy case built only on circumstantial evidence.⁸⁹ The trial court denied admission of evidence that Santini's testimony was based on her expectation of reward and refused to grant the defendants' request of an accomplice instruction. Santini eventually recanted her testimony, stating that she was lying to protect her boyfriend. Cobb and Tillis endured five trials over an eight-year period before finally being exonerated.

At least twenty inmates currently on Death Row were convicted in part by accomplice testimony, including:

⁸⁹ People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 at 36 (Ill. 1983).

Hector Sanchez. His co-defendant, Warren Peters Jr., testified at Sanchez's trial, prior to his own sentencing. Peters later admitted that he lied at Sanchez's trial in order to get a more lenient sentence.⁹⁰

John Szabo. Robert Leatherman, an accomplice, was the state's key witness against Szabo. Leatherman was 16 years old at the time the crimes were committed and testified pursuant to an agreement with the State that he would be tried as a juvenile and released when he reached 21.⁹¹

William Franklin. Buddy Williams testified against Franklin as the state's sole eyewitness and was portrayed to the jury as an innocent bystander, with no fear of prosecution.⁹² In reality, according to the dissent in Franklin's appeal, Williams was an accomplice charged with armed robbery and testified with the expectation of favorable treatment.⁹³ Williams' true motive for testifying was never disclosed to the jury.

C. Jailhouse Informants

The testimony of a so-called "jailhouse snitch," who claims to have had an inculpatory conversation with the defendant while they both were incarcerated, is possibly the most unreliable type of testimony in a criminal case. Such informants have every reason to lie in order to garner favor and receive leniency in their own cases.

⁹⁰ People v. Sanchez, 115 Ill.2d 238, 503 N.E.2d 277 (Ill. 1986).

⁹¹ People v. Szabo, 113 Ill.2d 83, 497 N.E.2d 995 (Ill. 1986).

⁹² People v. Franklin, 167 Ill.2d 1, 656 N.E.2d 750 (Ill. 1995).

⁹³ Id. at 763 (McMorrow, J. dissenting).

Exonerated inmate Dennis Williams was convicted partly on the basis of testimony by a cellmate, David Jackson, who said Williams admitted killing the victims. Jackson later admitted he fabricated the conversation because he held a grudge against Williams.⁹⁴

A fellow inmate of Rolando Cruz, Stephen Ford, testified that Cruz told him he had “kind of killed” a girl. Ford was impeached, however, with testimony from Cruz=s first trial, in which he said he was unsure about the defendant’s statement to him. Ford also conceded that he had received two five-year concurrent sentences for two burglary charges and numerous other burglary charges were “possibly” dropped less than two weeks after he reported his conversation with Cruz to authorities.⁹⁵

Steven Manning, the most recent inmate exonerated, was convicted on the word of a jailhouse informant, Tommy Dye, who had a long history of telling lies.⁹⁶

Seventeen current inmates were convicted partly on the basis of testimony by jailhouse informants, including:

Remon Williams. Tony Whitehead testified against Williams. The following day, Whitehead was released from jail.⁹⁷

Robert Wayne Owens. The key state witness at his trial was David Toliver, a cellmate. In exchange for his testimony stating that Owens confessed the crime to him, burglary charges against Toliver were reduced. Owens argued on appeal that the trial

⁹⁴ People v. Williams, 93 Ill.2d 309, 444 N.E.2d 136 (Ill. 1982).

⁹⁵ People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (Ill. 1994).

⁹⁶ People v. Manning, 182 Ill.2d 193, 695 N.E.2d 423 (Ill. 1998).

⁹⁷ People v. Williams, 182 Ill.2d 171, 695 N.E.2d 380 (Ill. 1998).

court prevented him from cross-examining Toliver, which would have exposed his bias, but the reviewing court stated that it was within the trial court's discretion to limit cross-examination.⁹⁸

Arlie Davis. William Joe Tennison, a cellmate, testified that Davis made several incriminating statements to him. But jailers testified that Davis never talked to fellow inmates. Davis himself testified that he caught Tennison rifling through Davis' court papers, and Tennison later told prosecutors that Davis had confessed to him. Davis' attorney had requested that he be placed in a cell by himself, but he was turned down.⁹⁹

Ronald Kitchen was convicted of a murder based partly on the testimony of Willie Williams, a friend of his. Williams, who was in prison at the time, claimed he placed a collect call to Kitchen and Kitchen confessed to him. But telephone company records showed no call from the prison to Kitchen.¹⁰⁰

Recommendation

The Special Supreme Court Committee on Capital Cases has recommended the use of discovery depositions in capital cases when other forms of discovery do not permit full preparation for trial.¹⁰¹ The proposal would permit depositions of persons

⁹⁸ People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (Ill. 1984).

⁹⁹ People v. Davis, 185 Ill.2d 317, 706 N.E.2d 473 (Ill. 1998).

¹⁰⁰ People v. Kitchen, 636 N.E.2d 1 (Ill. 1994).

¹⁰¹ *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 37-38.

disclosed as potential witnesses “upon leave of court for good cause shown.” The Council endorses this recommendation, but would go further. In view of the serious problems outlined above with regard to sole eyewitness testimony, accomplice testimony and jailhouse informant testimony, the Council recommends that the state’s proffer of these three types of testimony be considered *per se* evidence of good cause. Such depositions should be limited, though, to the defense who (unlike the state) customarily lacks access to the witnesses. Also, care must be taken to prevent such discovery depositions from being admitted in the place of live witness testimony at trial, which would impair the jury’s ability to observe and assess demeanor and the defendant’s right to confrontation.

The Illinois Pattern Jury Instructions contains a section on Testimony of an Accomplice¹⁰² which provides:

When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

In view of the problems with regard to jailhouse informant testimony, the Council recommends that a similar jury instruction be given for such testimony.

The Council also recommends that a special jury instruction be instituted with regard to eyewitness testimony. It would caution jurors to examine such testimony carefully because its reliability is sometimes questionable--what people think they saw

¹⁰² Illinois Pattern Jury Instructions, Criminal No. 3.17 (3d ed. 1992).

and what actually happened may be two different things. It is especially unwise in a capital case to rely heavily on a single eyewitness.

D. Residual Doubt

Many jurors in criminal trials are confident enough in their verdict to convict a defendant but nevertheless open to an argument that their level of confidence falls short of the complete moral certainty needed to take a person's life. Yet Illinois law does not allow defendants to argue "residual doubt."

United States Supreme Court Justice O'Connor wrote of the residual doubt standard that it is "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and absolute certainty."¹⁰³ Proponents of using a residual doubt standard in capital cases argue that the heightened standard provides an additional safeguard that is necessary because the "beyond a reasonable doubt" standard is not infallible and death is irrevocable.¹⁰⁴ Some argue that, after the penalty phase, if the jury still thinks that there is a slight possibility that the defendant is innocent, residual doubt should be considered in the sentencing phase as a mitigating factor. In this instance, the residual doubt standard should be explained through standard jury instructions prior to deliberation.

¹⁰³ Franklin v. Lynaugh, 487 U.S. 164 at 188, 108 S.Ct. 2320 (1988) (plurality opinion). The Supreme Court in this case rejected the argument that capital defendants have a constitutional right to argue residual doubt as a mitigating factor.

¹⁰⁴ Treadway, *Residual Doubt in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 Case W. Res. 215 at 217 (1992).

Other supporters of utilizing residual doubt advocate a more limited use of the standard. Professor Craig M. Bradley of Indiana University School of Law states: “If any jury retains[s] any lingering doubt about the defendant’s guilt, the death sentence should not be imposed.”¹⁰⁵ However, Bradley would limit it to situations where the defendant claims total non-participation or non-awareness of the crime.

Use of a residual doubt standard is potentially meaningful when the prosecution’s case is largely circumstantial and the doubt involves the defendant’s level of participation in the crime. Thus, where jurors are unsure as to the defendant’s level of participation, a residual doubt argument may result in a sentence other than death.

The Illinois Supreme Court has routinely upheld the trial court’s denial of the defense’s request to argue residual doubt to the jury.¹⁰⁶

Recommendation

The Council believes that the State of Illinois must not be allowed to execute a person if a member of the jury has doubt about the person’s guilt. We therefore call upon the General Assembly to enact a statute requiring that capital juries be instructed, at the eligibility phase of the sentencing process, that if any member of the jury has any residual doubts about the defendant’s guilt, the jury must return a non-death verdict.

¹⁰⁵ Bradley, *A Genuinely Modest Proposal Concerning the Death Penalty*, 72 Ind. L.J. 25 (1996).

¹⁰⁶ *People v. Terrell*, 185 Ill.2d 467, 708 N.E.2d 309 (Ill. 1999); *People v. Brown*, 172 Ill.2d 1, 665 N.E.2d 1290 (Ill. 1996); *People v. Hooper*, 172 Ill.2d 64, 665 N.E.2d 1190 (Ill. 1996).

E. Lack of Remorse

A study of jury deliberation revealed that jurors frequently rely on the defendant's lack of remorse as a significant factor in their decision to impose the death penalty.¹⁰⁷ In fact, many of the jurors polled in the study named remorse as the most compelling reason for their sentencing decision. Moreover, the jurors stated they most likely would have voted for a life sentence had the defendant expressed remorse.

Surprisingly, the jurors based their decision of whether the defendant felt remorse not on his or her expression of sorrow, but instead on how the defense presented its case. For example, jurors express nearly universal disfavor of defendants who testify on their own behalf that they were actually innocent. In this situation, jurors feel that the defendant refuses to accept responsibility. In contrast, a defendant's verbal acknowledgment of responsibility for the murder increased the likelihood of receiving a life sentence. However, acknowledgment must occur sooner rather than later. If the defendant first accepts responsibility during the penalty phase, this tends to be viewed by the jury as a disingenuous attempt to avoid a death sentence after he has already been convicted.

Where a defendant fails to take responsibility either at all or until the penalty phase, jurors tend to look cynically at other mitigating evidence presented by the defense and regard it as another attempt to deny responsibility. If the defendant fails to

¹⁰⁷ Sundby, *Symposium: The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 Cornell L. Rev. 1557 (1998).

express responsibility and the prosecutor argues lack of remorse, the jury seems more likely to sentence the defendant to death.

Lack of remorse was used against eight current Death Row inmates.

In the trial of Aldwin McNeal, the prosecutor argued in closing that "he is not sorry and you can't assure yourselves that he won't do this again, even in prison."¹⁰⁸

The prosecutor at the sentencing hearing of William Peoples argued that the defendant "demonstrated a complete lack of remorse in word and deed."¹⁰⁹ At the sentencing hearing of Leslie Palmer, the judge stated that he had not seen any remorse exhibited by the defendant in the "nine plus months of numerous court proceedings."¹¹⁰

A defendant who is actually innocent is put in a perilous situation. If he chooses to contest his guilt, the jurors are likely to regard this as failure to accept responsibility.¹¹¹ On the other hand, if he chooses to accept responsibility in order to avoid death, he will be convicted for a crime he did not commit.

Recommendation

The Council recommends that the prosecution be barred from arguing that a refusal to admit guilt supports a sentence of death.

¹⁰⁸ People v. McNeal, 175 Ill.2d 335, 677 N.E.2d 841 (Ill. 1997).

¹⁰⁹ People v. Peoples, 155 Ill.2d 422, 616 N.E.2d 294 (Ill. 1993).

¹¹⁰ People v. Palmer, 643 N.E.2d 797 (Ill. 1994).

¹¹¹ Sundby, *Supra*.

VI. THE COURTS

A. The Court's Role in Examining Evidence

Under the current standard for reviewing sufficiency of the evidence in a criminal case in Illinois, the reviewing court is instructed to examine each piece of evidence in the light most favorable to the prosecution. The reviewing court--either the trial judge in a post-trial motion or an appellate court--must determine whether, assuming the jury believed the state's evidence, that evidence was sufficient for a rational person to find the defendant guilty.

This standard applies to all criminal cases, but it is argued that a capital case should have a more rigorous standard in order to reduce the risk of executing an innocent person. Several states have addressed this issue:

Ohio reviewing courts undertake a three-part review in capital cases.¹¹² First, as with other criminal appeals, the court considers the errors of law asserted by the defense. Second, the court independently weighs the evidence to determine whether the aggravating circumstances outweigh the mitigating factors. Finally, the court determines whether the death sentence is in excess of or disproportionate to the penalty imposed in similar cases.

In Missouri, the reviewing court conducts a proportionality review of the whole record, independent of the findings and conclusions of the judge and jury.¹¹³ The court

¹¹² People v. Watson, 61 Ohio St.3d 1, 572 N.E.2d 97 (Ohio 1991).

¹¹³ People v. Chaney, 967 S.W.2d 47 (Mo. 1998).

goes beyond a mere inquiry into whether the evidence is sufficient to support a conviction; it also compares the weight of the evidence in other cases in which the death penalty was given.

In Oklahoma, the trial judge in capital cases files a report with the Court of Criminal Appeals.¹¹⁴ One of the questions the judge must answer is: “Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant’s guilt?”

In Florida, the appellate court must make an independent examination of the facts and compare them to other cases in which death was imposed. The court may then let the death sentence stand, reduce it to life, or remand to the trial court for resentencing or reweighing of mitigating factors.

Some states have what is known as the Jury Override. Montana, Florida and Alabama do not allow the jury to make the final determination of sentencing. In Montana, the sentencing is conducted entirely by the court.¹¹⁵ In Alabama, the jury returns an “advisory verdict.” The court then determines the sentence.¹¹⁶

In Florida, the jury makes a recommendation for sentencing. The recommendation does not have to be unanimous. The trial court then decides the sentence. Upon review, the court uses the size of the jury vote as a factor in its proportionality review (discussed above). For example, if the jury vote is 7-5 or 8-4,

¹¹⁴ People v. Dodd, 1999 WL 521976 (July 22, 1999). The court granted rehearing in this case in October, 1999, and withdrew the opinion pending rehearing. (1999 WL 907406).

¹¹⁵ Mont. Code Anno. Sect. 46-18-301.

¹¹⁶ Code of Ala. Sect. 13A-5-47.

the reviewing court is more likely to reduce the sentence to life than if the jury vote was 12-0 in favor of death.

A recent instance in which the Illinois Supreme Court reviewed sufficiency of evidence was in the case of Steven Smith. The Court reversed Smith's conviction and death sentence after finding that the evidence against him, primarily the testimony of a single eyewitness, Debrah Caraway, was insufficient.¹¹⁷ Justice Heiple wrote:

. . . [a]lthough the testimony of a single witness is sufficient to convict *if positive and credible* (citation omitted), given the serious inconsistencies in, and the repeated impeachment of, Debrah Caraway's testimony, we find that no reasonable trier of fact could have found her testimony credible. Moreover, the circumstantial evidence tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim, without pointing specifically to the defendant. . . . What is involved here is the standard of proof which is applicable to all crimes. That is to say, conviction beyond a reasonable doubt. Whether the crime charged be trespass, shoplifting, armed robbery, or murder, the test is the same. The burden of meeting this standard falls solely on the prosecution. If it fails to meet this burden, a defendant is entitled to a finding of not guilty. No defendant is required to prove his innocence.

Recommendation

In view of the extreme importance of establishing guilt with certainty in capital cases, the Council recommends that trial judges more vigilantly exercise their authority to grant a judgement notwithstanding the verdict (JNOV) in cases where they have any

¹¹⁷ People v. Smith, 185 Ill.2d 532, 708 N.E.2d 365 (Ill. 1999).

doubt about the defendant's guilt. Moreover, the Illinois Supreme Court should conduct a *de novo* review in all death cases.

B. Post-conviction Proceedings

A person under sentence of death should never be precluded from raising a constitutional issue in a post-conviction petition, no matter how much time has passed. One need only look at the case of Dennis Williams, who spent 18 years on Death Row before the system determined he was not guilty. Yet Illinois statutes place strict time limitations on all defendants. The law¹¹⁸ states that no proceedings shall be commenced more than six months after the denial of a petition for leave to appeal or more than 45 days after the defendant files a brief in the appeal or 3 years from the date of conviction, whichever is sooner.

Recommendation

The Council recommends that the General Assembly amend the statute to eliminate the time limitation for post-conviction petitions in capital cases.

C. Judicial Training

Just as defense counsel are often inexperienced in handling capital cases, some judges lack experience in this complex area of the law. Several recent cases from the Supreme Court reveal the sort of simple errors that can be made by judges in trying

¹¹⁸ 725 ILCS 5/122-1(c)

and sentencing capital defendants.¹¹⁹ It is essential that a judge trying a case involving the death penalty have a thorough knowledge of capital litigation.

Recommendation

The Council endorses the recommendation of the Special Supreme Court Committee on Capital Cases¹²⁰ to establish a regular schedule of seminars on topics relevant to capital cases, and to require judges to attend a seminar at least once every six years.

¹¹⁹People v. Shaw, 186 Ill. 2d 301, 713 N.E.2d 301 (1998) (erroneous jury instructions); People v. Davis, 185 Ill. 2d 317, 713 N.E.2d 1161 (1998) (exclusion of proffered mitigation evidence in sentencing phase); People v. Steidl, 177 Ill. 2d 239, 685 N.E.2d 1335 (1997) (judge admitted relying on his personal knowledge of defense counsel's performance in other cases to weigh ineffective assistance of counsel claim); People v. Alvine, 173 Ill. 2d 273, 671 N.E.2d 713 (1996) (erroneous jury instructions).

¹²⁰ *Findings and Recommendations of the Special Supreme Court Committee on Capital Cases* (1999) at 59.

VII. CONCLUSION

Violent crime is a very serious problem for society, and Illinois is fortunate in having skilled police officers, prosecutors and judges whose duty is to protect the people of the state from its criminals. There is no doubt that many individuals incarcerated in Illinois prisons belong there for the horrendous crimes they have committed. But a criminal justice system that goes beyond its scope and imprisons the innocent is unacceptable in a civilized society. And a system that condemns innocent persons to death, in the name of the people of the State, is intolerable.

So far, since 1977, 13 persons who were sentenced to death have been found innocent. Twelve others have been executed, although serious questions were raised about the guilt of some of them. And this study has raised many more questions concerning current inmates of Death Row.

The United States Constitution guarantees reliability in the imposition of capital punishment. The United States Supreme Court has recognized that because of the severity and the irrevocability of the death penalty, a higher standard of reliability is required.¹²¹ It is therefore incumbent on the State of Illinois to take whatever steps are necessary to achieve that higher standard. We submit that the adoption of the recommendations contained in this report will go a long way toward guaranteeing, "as

¹²¹ Woodson v. North Carolina, 428 U.S. 280 at 305 (1976). See also Gardner v. Florida, 430 U.S. 349 at 357-58 (1977) and Beck v. Alabama, 447 U.S. 625 at 637-38 (1980).

much as humanly possible” (in the words of Justice O’Connor¹²²), that innocent persons will not be executed by the State of Illinois.

¹²²Eddings v. Oklahoma, 455 U.S. 104 at 118 (1982) (O’Connor, J., concurring).

APPENDIX A
SUMMARY OF RECOMMENDATIONS

The Prosecution

1. To require certification 60 days after arraignment (or 90 days with good cause) that the prosecution has conferred with individuals involved in the investigation and trial preparation of a capital case to determine the existence of *Brady, Giglio* or Ill. S. Ct. Rule 412 material. The certification must be signed by the prosecutors on the case and by the State's Attorney. The certification requirement also would apply to police departments and other investigative agencies. (Pages 10-11)
2. To require the prosecution to specifically identify any material disclosed. (Pages 10-11)
3. To provide that if the prosecution fails to abide by discovery rules, the court shall refer the matter to the Attorney Registration and Disciplinary Commission. (Pages 10-11)
4. To expand Illinois Supreme Court rules to require the prosecution to disclose in murder prosecutions — in addition to all other materials currently required to be produced — all documents, physical evidence and tangible things obtained in connection with the investigation; criminal histories for all persons listed in discovery; any promises, inducements or benefits offered to persons listed; identification of all instances in which persons listed have previously testified for the prosecution in a criminal case; any information that is material to the preparation of the defense or which may tend to exculpate the accused or impeach the credibility of a person listed; and the identities of all individuals who have been a subject of the investigation. (Page 12)
5. To require the state to notify the defense within 30 days of arraignment (or 90 days with good cause) of its intent to seek the death penalty. (Pages 13-14)

The Defense

6. To create a capital litigation trial bar with experience and training qualifications for admission. Prosecutors and defense attorneys would be required to have five years of full-time criminal litigation experience or substantial equivalent; have experience in no fewer than 12 felony trials, at least four of which were murder prosecutions; and have completed at least 20 hours of training. Every capital case would be required to have at least two defense attorneys. (Pages 20-21)
7. To require the circuit court to grant reasonable requests for funding in capital cases in which the defendant is represented by retained counsel. (Page 25)

The Police

8. To require quick presentation of murder defendants to a judge, and to provide for sanctions against law enforcement agents who do not heed this requirement. (Page 32)
9. To require videotaping of custodial interrogations and confessions in homicide cases. If the prosecution is unable to show good cause why interrogations and confessions were not videotaped, statements by the defendant would be inadmissible. (Pages 32-33)

The Jury

10. To permit the use of discovery depositions in capital cases upon leave of court for good cause shown. Testimony by a sole eyewitness, by an accomplice or by a jailhouse informant would be considered *per se* evidence of good cause. Such discovery depositions would be at defendant's option and would not be permitted to stand in the place of live witness testimony at trial (Pages 40-41)
11. To require a special jury instruction on testimony by eyewitnesses and jailhouse informants, instructing the jury to consider the testimony with caution. (Pages 41-42)
12. To require that if any member of a jury has a lingering doubt about the defendant's guilt, the jury must return a non-death verdict. (Pages 43-44)
13. To bar the prosecution from arguing that a refusal to admit guilt supports a sentence of death. (Page 45)

The Courts

14. To reinforce that the trial judge has a duty to reduce the sentence from death if the judge has doubts about the defendant's guilt. (Pages 48-49)
15. To require the Illinois Supreme Court to conduct a *de novo* review in all death cases. (Page 49)
16. To eliminate the time limitation for post-conviction petitions in capital cases. (Page 49)
17. To require judges to undergo periodic training in capital litigation. (Page 50)

APPENDIX B

MAJOR ISSUES: CURRENT AND EXONERATED* INMATES

The Council's research discovered claims by the following inmates in selected categories:

(Note: The claims of these particular defendants may or may not have merit; the Council does not necessarily support each claim.)

Alleged Prosecutorial Misconduct--Murray Blue, Dedrick Coleman, Roland Cruz*, Alejandro Hernandez*, Verneal Jimerson*, Dennis Williams*, Steven Manning*, Joseph Burrows*, Henry Brisbon, Robert Cloutier, Roger Collins, Mario Flores, William Franklin, Delbert Heard, Madison Hobley, Andrew Johnson, Leonard Kidd, Ronald Kitchen, Jerry Mahaffey, Reginald Mahaffey, Perry Olinger, Patrick Page, John Pecoraro, Jimmy Ray Pitsonbarger, Hector Sanchez, Larry Scott, Edward Spreitzer, Cecil Sutherland, James Tenner, Walter Thomas, Willie Thompkins, Sherrell Towns, Robert Turner, Jerry Ward, John Whitehead, Elton Williams, Frank Williams, Martin Woolley.

Competence of Counsel--Gary Gauger*, Carl Lawson*, Dennis Williams*, Verneal Jimerson*, Juan Caballero, Dedrick Coleman, Dennis Emerson, James Foster, Mario Flores, William Franklin, Anthony Hall, Bernon Howery, Andre Jones, Tuhran Lear, Gregory Madej, Andrew Maxwell, Johnny Neal Jr., Leroy Orange, Leslie Palmer, John Pecoraro, Jimmy Ray Pitsonbarger, Jeffrey Rissley, Luis Ruiz, Darrin Shatner, Darryl Sims, Edward Spreitzer, John Szabo, Terrence Towns, Robert Turner, Paul West.

Denial of Funds to the Defense--Carl Lawson*, Anthony Porter*, Verneal Jimerson*, Dennis Williams*, Joseph Burrows*, Ronald Burt, Roger Collins, William Clair Keene, Tuhran Lear, Johnny Neal Jr., Robin Wayne Owens, William Peeples, Frank Redd, Willie Thompkins, Patrick Wright.

Alleged Coerced Confessions--Ronald Jones*, Gary Gauger*, Johnnie Lee Evans, James Foster, Oasby Gilliam, Demetrius Henderson, Madison Hobley, Stanley Howard, Renaldo Hudson, Mark Johnson, Leonard Kidd, Derrick King, Ronald Kitchen, Jerry Mahaffey, Reginald Mahaffey, Andrew Maxwell, Joseph Miller, Edward Moore, Johnny Neal Jr., Leroy Orange, Robin Wayne Owens, Patrick Page, Aaron Patterson, John Pecoraro, Daniel Ramsey, Bobby Sims, Robert St. Pierre, Paul West, Elton Williams.

Testimony by Accomplices--Joseph Burrows*, Verneal Jimerson*, Perry Cobb*, Darby Tillis*, Dennis Williams*, Anthony Brown, Ronald Burt, Roger Collins, Mario

Flores, William Franklin, David Harris, Lawrence Jackson, William Clair Keene, Ronald Kliner, Charles McLaurin, Aldwin McNeal, Robin Wayne Owens, Hector Sanchez, Robert St. Pierre, John Szabo, Christopher Thomas, Robert Towner, Sherrell Towns, Robert Turner, Remon Williams.

Testimony by Jailhouse Informants--Joseph Burrows*, Gary Gauger*, Steve Manning*, Dennis Williams*, Rolando Cruz*, Juan Caballero, Arlie Davis, Victor Ganus, Ronald Kitchen, Roosevelt Lucas, Geno Macri, Edward Moore, Robin Wayne Owens, John Pecoraro, Darrin Shatner, Robert Todd, Sherrell Towns, Robert Turner, Elton Williams, Remon Williams, Glenn Wilson, Martin Woolley.

Lack of Remorse Argued--Robert Cloutier, Paul Erickson, Jerry Mahaffey, Aldwin McNeal, Johnny Neal Jr., Leslie Palmer, William Peeples, Sherrell Towns.