

Testimony of
Mr. Donald Hubert

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Mr. Chairman and distinguished Senator members of this Committee:

I am honored to be invited to participate in this hearing, sharing the very positive experiences Illinois has achieved through Governor Ryan's moratorium on the death penalty in hopes that it may assist your deliberations on a federal moratorium.

Governor Ryan is owed great thanks from the People of Illinois for taking such a bold, courageous and innovative stand in the face of startling facts that Illinois was on the doorstep of executing men who were absolutely and without any doubt not guilty of murder.

I am thankful that you have heard about and listened to our anguished efforts to right the death penalty process through the Governor's Commission on the Death Penalty. This discussion at the federal level alone will reverberate throughout the country to create communication, understanding and knowledge in all 50 states. Few fair-minded people contest that the time is ripe to decide whether we need a national moratorium to give us breathing room to deliberate dispassionately whether the death penalty only executes the guilty under standards that apply equally to all.

My message to you is this: a moratorium can be supported by all, whether you favor the death penalty or seek its abolition, where facts similar to those in Illinois exist. I am here to assist in identifying those Illinois facts all to the end that a profile be constructed to measure the fairness of the federal and state death penalty systems.

Executing one innocent person is contrary to the fundamental principles that are the guiding light for our system of justice. How embarrassing it is that Illinois has become the poster child and primary example of government on the brink of executing the innocent. You have heard over and over the fact that we have exonerated 13 men in 12 cases who were sentenced to die, in many instances for a murder they absolutely did not commit or participate in committing. How chilling it is that Anthony Porter was about 2 days away from dying when his innocence stunned the judiciary into action.

Public support for the moratorium has been great in Illinois. Although polls were not the guiding light causing Governor Ryan to impose the moratorium and to establish the Commission, there is overwhelming support in Illinois for the moratorium. Equally true, there will be significant pressure on any Governor to prove, clearly and convincingly, that Illinois' death penalty system has been repaired. Anything less, in the words of former United States Attorney for the Northern District of Illinois and Commission co-chair, Tom Sullivan, should cause a public outcry for repeal. I agree with Tom that in Illinois we must "repair or repeal." This simple but great motto arose from the moratorium and from the Commission.

I now share with you some of my own background and Commission experiences. There were only 14 Commission members. Some were immensely well known; others were unknown. My own background included stints as only the second African-American to serve as President of the 127 year old Chicago Bar Association and my membership in the Cook County Bar Association, the country's oldest African-American bar association. I served as a state prosecutor in the Special Prosecutions Unit of the Illinois State Attorney General's office handling federal habeas corpus murder appeals on behalf of the State. My first trial as a lawyer was a federal habeas corpus trial in a murder case presided over by the late and great Federal Judge Hubert Will.

I worked in private practice under the mentor ship of great criminal defense lawyers such as George C. Howard, Chester Slaughter, James D. Montgomery, Adam Bourgoies, Sr. and R. Eugene Pincham. I have handled five murder cases as part of a pro bono program initiated by Illinois Supreme Court Justice Thomas Fitzgerald when he was presiding judge of the Cook County Criminal Court system. In other words, I have participated in both the prosecution and defense of murder cases, for fee and for free.

Last week, I was honored to be appointed Special Assistant State's Attorney under the leadership of Special Prosecutor Ed Egan to investigate former Chicago Police Detective John Burge who has been accused, with other detectives, of torturing suspects into giving confessions in murder investigations, including death penalty murder cases.

I support the death penalty as a democratically approved sentence. I have not found determinative, though they are powerful, the arguments by death penalty opponents for abolition. It is not that I am personally for the death penalty. It is that I will not work against the will of the majority of people who favor it. Some murders are so cruel and inhumane that I accept that in a democracy the majority of the people have the right to seek the sanction of death.

I do not support the death penalty in its present form in Illinois. Our death penalty system is broken. It must be corrected for me to support it again. If it is not repaired, then I favor its repeal. The 12 cases of exoneration in Illinois were outrageous and unacceptable as a standard of justice in a democracy.

The shining lights in the Illinois criminal justice system have been the moratorium and the Commission. We needed time to think, gather facts, reflect and recommend. Throughout the Commission process the Governor was our unflinching supporter. We were led by people who already had legacies of greatness, Former Federal Chief Judge Frank McGarr, Former Senator Paul Simon and Former United States Attorney Tom Sullivan. Our process never included hostility, animosity or meanness. All 14 members treated one another with respect and deference. We were divided into subcommittees to consider different subjects and then each subcommittee came together as a committee of the whole for further deliberations. Our process was guided by a project manager, Matt Bettenhausen, and a project researcher and writer, Jean Templeton. We met regularly for two years. I can honestly say that it was the most enjoyable committee on which I have ever served, and I have served on many.

Members were for and against the death penalty. One member had a dad who was viciously murdered when he was only a boy. Another member was States' Attorney for one of Illinois' larger counties. Another was a legal adviser to a police superintendent. One was a Public

Defender. Another was a former United States Attorney for the Northern District of Illinois. Yet another was a former U.S. Senator, and another a Chief Judge of the Northern District of Illinois. One was a specialist in murder appeals. Yet another was former First Assistant States' Attorney. Another was an internationally famous author. All brought their best thinking to the process; all left their egos at the door. There were blacks, whites and a Hispanic. Men and woman participated in equal numbers.

Throughout our process the criminal justice system never suffered. Murder cases continued to be prosecuted. The death sentence continued to be handed down. The moratorium and the work of the Commission did not interfere with that process.

Others should consider a moratorium if their process resembles our findings in Illinois. Illinois has a distinguished criminal justice system with cases such as *People v. Witherspoon* coming from our state. Our laws are similar to those in most states. No better, but no worse. We have 102 counties and therefore the same number of State's Attorneys who decide whether to seek the death penalty. Our state is blessed with many ethnic and racial groups. The City of Chicago is home to nearly equal numbers of whites, African-Americans and Latinos. The Asian-American population is one of our fastest growing constituencies. Our state is rich in resources, but regularly struggles to balance the budget.

Yet, innocent men were sentenced to death. Black men are disproportionately receiving the death sentence. Prosecutorial misconduct was abundant. Criminal defense lawyers, some court-appointed, were incompetent. Defendants were poor and unable to hire a lawyer. Elected judges did not prevent lawyers - some prosecutors, some defense -- from running amuck. The appellate process sent no warning signals. Funding for indigent defense, crime labs, appropriate testing, even basic police work, was low priority. Laws were stacked on top of more laws to expand the number of defendants subject to the death penalty. The crimes were so heinous that the public - in large numbers -- did not care what happened as long as someone was found guilty.

Notwithstanding a state full of great judges, police, prosecutors and defense lawyers, it was some journalism students at Northwestern University who set off the first alarm by uncovering a police report that identified a murderer - who was free -- while an innocent man had been sentenced to die.

Please note that not only did we ruin the lives of the innocent men who were wrongly convicted and wrongly sentenced to death, we also ignored the actual murderers and thus broke faith with society at large, the survivors, and the families of the murder victims, the majority of whom are African-American. We met, as a Commission, with victims' rights groups and we concluded Illinois should do more to assist victims, survivors and families of survivors of these horrendous crimes, starting with convicting the actual perpetrator or perpetrators.

We also made a recommendation, number 83, that many of the new methods and procedures we recommend should be applied to the criminal justice system as a whole. This might be our least-noted recommendation, but it also may be our most far-ranging. Here's why.

In a democracy, people must believe in the administration of justice. There must be faith in the legal system, or one must prepare for social upheaval. Illinois' death penalty system does not inspire confidence among the people in their legal system. It shouldn't. What is worse, its errors

serve - in all communities - to denigrate our values, our practices, our laws and even the Constitution that each one of us at some point has pledged to uphold. The ill-repute of so solemn a public function as determining guilt for murder and carrying out a sentence of death eats at the social fabric which is supposed to bind us together as one people. The people of Illinois deserve better than that. They deserve a criminal justice system in which they can have confidence. They deserve one of which they can be proud.

We think Recommendation #83 will help us get there. We think increasing the standards by which society treats suspects, by which police investigate, by which the bar prosecutes and defends the accused, and by which the bench tries and sentences, will make Illinois' criminal justice system stronger, more worthy of public respect and support. That will make Illinois' society stronger in every neighborhood.

Yes, a federal moratorium is appropriate if the federal system resembles our Illinois experience. I do not claim to be an expert on the federal system or those of other states. Yet, Maryland's moratorium suggests that Illinois does not stand alone in having a broken death penalty system.

Again, I thank you for this opportunity to submit a written position paper, to appear and to speak and answer your questions. The country owes you a debt of gratitude for this hearing process.

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