Testimony of

Mr. John J. Kinsella

June 12, 2002

I have been a prosecutor in Illinois for 21 years. I am currently the First Assistant State's Attorney of DuPage County. DuPage County is the second largest County in Illinois, with a population of nearly one million residents. I have tried over 100 felony cases to verdict, including many murder cases. I have tried six capital cases and have had two defendants sentenced to death. I am currently the First Vice President of the Illinois Prosecutors Bar Association. I have taught and lectured for the National College of District Attorneys, National Louis University, the Suburban Law Enforcement Academy (Illinois), the Illinois State's Attorney's Association and the Illinois Appellate Prosecutor's Office. I am a member of the Association of Government Attorneys in Capital Litigation and have recently been certified by the Illinois Supreme Court for membership in the Capital Litigation Trial Bar. I have been an active participant in the on going debate in Illinois over the death penalty and many of the proposed reforms that have been discussed over the past several years.

While I am appearing here today as an Illinois prosecutor and as an Assistant State's Attorney from DuPage County, Illinois, I am speaking on my own behalf and not as a representative of any of the organizations of which I am a member. I will be expressing my own views and not those of any other individual or organization.

I was asked to appear here today to express the views of an Illinois prosecutor on the issues of the Governor's moratorium and the Governor's Commission on Capital Punishment. I do so with a sense of gratitude for the tremendous honor of appearing before this committee. I am truly humbled by this opportunity and hope I am able to provide a worthwhile perspective on the Illinois experience. The State's prosecutors obviously do not speak with a single voice. However, I am confident that our views are consistently bi-partisan, victim sensitive, and formed with a keen sense for protecting our communities. We are the voice of the victims of crime and the last line of defense to those who may become victims in the future.

The Moratorium Issue

The moratorium in place in Illinois is the result of the Governor's decision to halt executions and is not the product of any change in legislation or judicial action. The last person executed in Illinois was Andrew Kokoraleis who was executed on March 17, 1999. He was sentenced to death in connection with the mutilation murders of 16 young women. In January of 2000, Governor Ryan announced a moratorium. It was imposed without notice to any prosecutor or victim's family member and without regard to the individual circumstances of their cases. He stated that he would not permit another execution in the State until he had a commission examine the State's system of capital punishment. Notwithstanding the Governor's moratorium, it should be pointed out that the death penalty remains the law in Illinois. Prosecutors continue to seek death sentences, courts continue to impose death sentences, and the Illinois Supreme Court

continues to uphold death sentences. The only direct impact has been that the Illinois Supreme Court has not issued any execution dates because the Illinois Attorney General, in deference to the Governor, has not sought the entry of such an order. However, many have commented that the Governor does not have the Constitutional authority to nullify, even temporarily, the Illinois death penalty law. Ultimately, this is largely an academic question in light of the acquiescence to his Governor's position.

The Illinois Supreme Court has consistently found the Illinois death penalty law to be constitutional, as have the various federal courts that have been asked to review the statute. In fact, since the moratorium was put in place, the Illinois General Assembly has passed two bills that created two new grounds for seeking the death penalty. The Governor has vetoed each of these bills. Recent reported polling shows that about 50% of people accept the Governor's position and support the current review, but the fact remains, that the death penalty is still supported by a majority of the general public and their elected representatives.

No one would dispute that the Governor's actions were prompted by a series in the Chicago Tribune on capital punishment entitled "The Failure of the Death Penalty in Illinois." This series had been preceded by a story in the Tribune entitled "The Verdict: Dishonor" in which the paper attempted to make the case that prosecutorial misconduct in murder cases was a nation-wide systemic problem dating back some forty years. Prosecutors around the country uniformly criticized the article and questioned the reliability of the research.

The Tribune's compilation of case names and numbers detailing 13 "exonerated" death cases formed the basis for the claim of "wrongful convictions" by the Governor. The Governor's Commission also examined these same 13 cases. It is worth noting that these 13 cases represent all the cases since reinstatement of capital punishment in Illinois in 1977 wherein a defendant having at least once been sentenced to death was later either acquitted or against whom the charges were later dropped. Therefore, by definition, any person having once been convicted and sentenced to death and the charges having ultimately been dismissed or the defendant acquitted are included in the category of "wrongfully convicted" and eventually labeled as "innocent." While all 13 were sentenced to death at some point while their case was pending, it is worth noting not all the defendants were facing a death sentence when their case was ultimately resolved. For example in the Gauger case, the defendant's death sentence was vacated immediately following his trial. The prosecutor later dismissed his case after the Appellate Court ruled that he was arrested without probable cause and therefore his confession was deemed inadmissible. In the Hernandez, case the defendant was initially sentenced to death in 1985. He was re-tried in 1990 and 1991, however following his second conviction he was sentenced to a term of years and did not receive a second death sentence. The second conviction was overturned and the case was dismissed in 1996.

By making these observations I am in no way suggesting that even one man being convicted for a crime he did not commit is somehow acceptable or insignificant. Clearly, from what has been learned in at least some of these cases the defendants were in fact shown to be innocent. These cases are very disturbing and merit the closest scrutiny. By the same token it is important to understand that not all these defendants have been shown to be "innocent." For example in the Smith case (one of the 13 cases in question), the Illinois Supreme Court in overturning his

second conviction and second death sentence went to great lengths to clarify that their opinion should not be read as a declaration of his innocence. Their decision was based upon their determination that the evidence was legally insufficient to support his conviction. However, in spite of the Court's admonitions, many death penalty opponents will make the unequivocal claim that all 13 defendants, including Smith were shown to be innocent. Such claims are in most instances simply expressions of opinion and not a legal conclusion. Ultimately, we should all be concerned about any miscarriage of justice, whether it is in one case or a dozen. The remaining question is what do we do about it and how should that experience impact the handling of other unrelated prosecutions.

From the beginning of the current death penalty debate in Illinois, various concerned entities, beyond the Governor, have reacted. The Illinois Supreme Court has instituted substantial changes in how capital cases are handled in Illinois. These include new rules on the qualifications of those who can prosecute, defend, or preside over a death case. The court has ordered that capital defendants are entitled to extensively greater discovery, including depositions of State witnesses. The court ordered mandatory training for everyone involved in such litigation. The new rules are designed to afford greater protections to the accused and to assure a far greater degree of confidence in the judgments of the courts. The legislature, in recognizing that among the most common complaints about capital cases in Illinois was the adequacy of defense counsel and the lack of funding for the defense, has established a capital litigation trust fund that is now available to finance the defense in capital litigation.

In addition to the actions of the Supreme Court and the creation of the capital litigation trust fund, many substantial reforms have been instituted or proposed. For instance, in legislation supported by prosecutors across Illinois we became among the first states to establish the right of a convicted offender to obtain post-conviction DNA testing in order to pursue a claim of actual innocence. Further, prosecutors have advocated many of the reforms put into place by the Supreme Court and have proposed legislation that will assist convicted defendants in post-conviction challenges to their convictions.

Among the most uniform objections that prosecutors have had about the Governor's imposing a moratorium is the fact that none of these changes or proposed reforms will have any legal impact on the cases of the approximately 170 men and women currently on death row in Illinois. Thus, the moratorium has only served to put on hold all the cases that have proceeded through the myriad levels of review to a point at which an execution date should be ordered. The Illinois Supreme Court has already ruled that no new rule can have a retroactive application, nor do the new rules provide a basis for finding that a case tried 20 years ago is to be measured by any newly enacted rules. This has lead to the demand by prosecutors that the Governor, on a case-by-case basis, examine each case individually. No one questions the Constitutional right of the Governor to exercise his Constitutional power of clemency in vacating a death sentence for any reason he chooses. With all due respect to the Governor, if he believes that any death row inmate is innocent, he not only can, but also should, act accordingly. But, the effect of his moratorium is such that cases have been halted on the theory that some new procedural law or rule will somehow affect the ultimate disposition. This delay in the resolution of cases already tried, sentenced, and reviewed by the courts was imposed without notice to any prosecutor or victim's family member and without regard to the individual circumstances of the case. These cases

include prosecutions where the defendant pleaded guilty to the murder or where no legitimate claim of actual innocence has ever been articulated by the defense.

Prosecutors generally believe that each case is unique and that the judgment rendered in that case must rise or fall on it's own merits. The facts and types of issues raised in each of the 13 cases, which actually stem from 10 separate crimes (several are co-defendants) are different and unique. Similarly, the facts and issues in every death case are different and unique, each deserving it's own individual examination. If a defendant has received a fair trial, had full access to all the levels of review, and there is no credible claim of residual doubt justice demands that the lawful sentence of the court be carried out.

Having expressed these concerns I do want to state that prosecutors throughout Illinois sincerely believe that any process that critically examines what we do and how we do is welcomed. Our laws must always be examined and re-examined in an unending effort to assure that we are always striving to improve our system of justice. The refinement of our Anglo-American system of truth seeking should never be viewed as complete. We must continue to vigorously pursue improvement and meaningful reform.

At the root of the current debate is essentially an attack on the how we arrive at justice through our truth seeking process. There are those who believe that these 13 cases reveal a fundamental flaw in the Anglo-American legal tradition such that the system simply cannot reliably find the truth. If accepted, this contention would not be logically limited to capital cases but place into question the reliability of every judgment arrived at in any court of law. Uniformly, prosecutors, and one could argue the public as well, are unwilling to accept such a fatalistic view of justice in America. We are confident that if everyone involved in the process does there job ethically and competently, justice will be obtained. When there is a breakdown in that process, safeguards are in place to guarantee that all reasonable doubt goes to the accused and no innocent person ever suffers the ultimate punishment. No prosecutor, just as no person, ever wants to see an innocent person convicted, let alone executed.

Response to the Commission's Report

Preliminarily, I want to express my opinion that the Commission members did a commendable job and obviously worked very hard in tackling a very complex issue. While Illinois prosecutors have strong objections to some of the recommendations, Illinois prosecutors, nonetheless support the overwhelming majority of the Commission's work.

Before address some of the Commission's specific recommendations, there are several general observations that I would like to make. There was only one active prosecutor among the 14 people on the Commission. Among the thirteen others were some of the most vocal opponents of the death penalty regardless of the jurisdiction. Of even greater concern is the fact that many of the most controversial recommendations reflect a very negative opinion of the integrity of policeman, and in many instances directs how the police are to do their job and manage their investigations. However, there was not a single police official or representative on the Commission. Of perhaps equal significance, was the absence of representatives from any victim rights groups or representatives of the victims perspective.

The report overall is very "suspect friendly" and seems to advocate an approach to law enforcement that could impede the ability of the police to investigate the most serious crimes. This would not serve the larger public interest in protecting its citizens. The report seems designed to limit the application of the death sentence to only serial killers and cop killers and to place more and more obstacles to seeking a death sentence rather than reforms that are designed to remedy the perceived systemic shortcomings observed in their examination of capital cases in Illinois.

The following are some of the specific criticisms that have been made by Illinois prosecutors:

1. The expansion of the Fifth Amendment right to appointed counsel to any suspect who requests representation even when not being questioned is very troublesome. This practice could seriously undermine the ability of police to solve crime, while expanding suspect's rights far beyond those contemplated by the Miranda decision.

1. Mandating the use of videotaping of all interrogations of suspects and witnesses is of concern to prosecutors. Videotaping of suspect's statements is always advisable when possible. However, mandating that every statement heard by a police officer be recorded on the premise that they cannot be trusted to tell the truth is disturbing. The use of videotaping should be strongly encouraged. Yet, the Commission's report bespeaks an unjustified distrust of police.

1. Many of the recommendations of the Commission constitute an attempt to micro-manage police procedures. These include the areas of how to question suspects and witnesses and how to conduct identification procedures. While some of the suggestions are appropriate, it should not be the subject of legislation that suggests that any other approach is inherently unreliable.

1. Most prosecutors agree that many of the death penalty eligibility factors could be eliminated, but they believe the Commission's recommendation goes too far. While the elimination of felony-murder, murder of a child, or a contract killing will dramatically reduce the number of death eligible murders, it would do so at the cost of justice in many cases. The abduction, rape and murder of a young child are crimes for which the death penalty should at least be a sentencing option.

1. The responsibility of making the decision should not be left to a state mandated committee. There is no correlation between the charging decision and improving the truth seeking process in capital cases. A person singularly responsible to the public he or she serves should make this critical decision.

1. The concept of a pre-trial reliability hearing for any category of witness runs against the historical role of the jury in the truth seeking process. There are other more appropriate means of addressing the legitimate concerns associated with the use of a true jailhouse informant.

1. Specially categorizing the testimony of eyewitnesses is unnecessary and highlighting racial considerations in evaluating the testimony of a witness is inappropriate.

1. Allowing a defendant to testify before a jury without being subject to cross-examination is a dramatic departure from the most traditional method of truth seeking known to our Anglo-

American legal tradition. This could permit factual testimony being presented without facing the rigors of cross-examination, which often reveals serious questions of the reliability of such testimony.

Conclusion

Prosecutors throughout Illinois embrace reform and are open to any meaningful change that enhances the reliability of the truth seeking process. The majority of the recommendations of the Governor's Commission are supported by prosecutors in Illinois (attached please find a copy of the response of the Illinois State's Attorney's Association). However, several of the more substantive recommendations will not enhance the ability of police or prosecutors to appropriately investigate or prosecute a murder case. To the contrary it will create hurdles designed to assist the accused beyond any level previously recognized under the Constitution. Some have opined that the resulting statutory scheme intended by these recommendations so limits the availability of the death penalty and creates so many obstacles that it would have the practical effect of ending capital punishment in Illinois. In fact, the majority of the Commission voted in favor of abolishing the death penalty in Illinois.

The debate over whether Illinois needs to reform it's criminal justice system or whether Illinois should continue to have capital punishment is a debate well worth having. Those of us in law enforcement welcome the debate, provided it is open, honest and allows all voices to be heard. If the result of such a debate is a more reliable capital justice system wherein the public's confidence is enhanced, we will all be the better for it. If the result is the elimination of capital punishment, we will accept the will of the people.

In addressing the Governor's moratorium, prosecutors in Illinois have consistently maintained that it was not appropriate or necessary. Opinions include a strong argument that the Governor exceeded his Constitutional authority in announcing the moratorium. The only actual consequence to date has been that many capital cases have been procedurally put on hold for three years, still leaving the remaining issues in those cases unresolved. Ultimately, the question of having capital punishment in Illinois is a matter for the legislature. Unless and until the Illinois General Assembly re-visits the issue and abandons the death penalty as a sentencing option, every participant in the criminal justice system has an obligation under the law to enforce the law and play their role, including the Governor. In response to the moratorium, prosecutors have consistently sought to have each case follow the proper course, which ultimately ends with the Governor's obligation to exercise his executive authority to use his discretion in considering every claim of actual innocence, or any other basis for commuting the sentence. Justice delayed in these cases serves no one's interests, least of all the family of the victims in a capital case.