Testimony of

The Honorable Matthew R. Bettenhausen

June 12, 2002

Chairperson Feingold, distinguished members of the United States Senate:

It is an honor to be here before you this morning to discuss the work of Governor Ryan's Commission on Capital Punishment. As you know, the Commission engaged in extensive research and analysis of Illinois' capital punishment system from initial police investigation through trial, appeal and post-conviction review. My name is Matt Bettenhausen. I am the Deputy Governor for Criminal Justice and Public Safety and I served both as a member and as Executive Director of Governor Ryan's Commission on Capital Punishment.

The Governor's Commission on Capital Punishment's report contains 14 chapters that order the recommendations from police and pretrial investigations all the way through the post-conviction and more general and funding recommendations. The report also contains a short Appendix, which is bound with the Report, and a longer Technical Appendix, which has been separately bound as Volume II of this Report. The separately bound Technical Appendix contains complete copies of the research reports initiated at the request of the Commission, data tables displaying information collected on the cases in which individuals have been sentenced to death row in Illinois, and supplementary materials, from Illinois and elsewhere, such as jury instructions. The report includes the following introduction and background information concerning the commission's work:

"Governor Ryan imposed a moratorium on capital punishment in Illinois on January 31, 2000. The moratorium was prompted by serious questions about the operation of the capital punishment system in Illinois, which were highlighted most significantly by the release of former Death Row inmate Anthony Porter after coming within 48 hours of his scheduled execution date. Porter was released from death row following an investigation by journalism students who obtained a confession from the real murderer in the case. The imposition of the moratorium in Illinois sparked a nation-wide debate on the death penalty. A number of states embarked on detailed studies of their capital punishment systems, or proposed moratoria of their own.1

The Commission on Capital Punishment was appointed by the Governor on March 9, 2000 to advise the Governor on questions related to the imposition of capital punishment in Illinois. Commission members represent some of the diverse viewpoints in the state on the issue of capital punishment. Some members publicly opposed capital punishment under any circumstances, while others support capital punishment.

The Executive Order issued by the Governor described the duties of the Commission as follows: A. To study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people.

B. To examine ways of providing safeguards and making improvements in the way law enforcement and the criminal justice system carry out their responsibilities in the death penalty process - from investigation through trial, judicial appeal and executive review.

C. To consider, among other things, the ultimate findings and final recommendations of the House Death Penalty Task Force and the Special Supreme Court Committee on Capital Cases and determine the effect these recommendations may have on the capital punishment process.

D. To make any recommendations and proposals designed to further ensure the application and administration of the death penalty in Illinois is just, fair and accurate.

The Governor's moratorium on the imposition of the death penalty in Illinois continued in effect during the pendency of the Commission's deliberations, and is still in effect. This Report summarizes the Commission's recommendations and findings following its examination of capital punishment in Illinois.

Organization of the Commission's work

In order to accomplish the goals set forth in the Governor's executive order, the Commission initiated efforts to gather information, to assess the capital punishment system in Illinois and to develop suggested recommendations. The Commission's work encompassed nearly 2 years of concentrated study and discussion.

The Commission divided itself into subcommittees to examine specific issues in detail. The Commission convened as a whole at least once per month for day long meetings, and while its subcommittees met monthly as well throughout its review period to intensively study the questions posed about capital punishment and to develop specific suggestions for changes to the system. Public hearings were held in August, September and December of 2000 in both Chicago and Springfield to solicit input with respect to concerns about the capital punishment system from members of the general public.2 The Commission met privately with representatives of surviving family members of homicide victims in order to understand concerns about capital punishment from this perspective. Private meetings also occurred with some of the thirteen men released from death row in Illinois in order to gain a better perspective on flaws in the system. Other meetings were also conducted with those who had specific recommendations to correct flaws in the system and improve the quality of justice in Illinois.

Commission members reviewed recommendations contained in written reports from other groups that had already studied the system, including the Special Supreme Court Committee on Capital Cases and the Senate Minority Leader's Task Force on the Criminal Justice System. The Commission also benefitted from information in other reports, such as the Report from the Task Force on Professional Practice in the Illinois Justice System.3 In addition to reviewing Illinois materials, the Commission also had the opportunity to review recommendations from other jurisdictions, including public reports issued by other states and public inquiries by several

Canadian provinces into cases of wrongful conviction. The Commission also conducted its own research to develop suggestions for improvements. Those research efforts included:

1. An intensive examination of the cases involving the thirteen men released from death row.4

2. A broader review of the more than 250 cases in which a death penalty has been imposed in Illinois since 1977.

3. Special studies by researchers on victim issues in the death penalty process and a separate study on the impact of various factors on the death sentencing process.

4. A review of death penalty laws in the 37 other death penalty jurisdictions related to several issues, including eligibility factors, mitigating factors, and jury instructions.

5. Solicitation of views from various experts in particular areas of concern, such as police practices and eyewitness testimony.

6. An analysis of efforts in other jurisdictions to address specific or systematic problems relating to death penalty prosecutions.

These research efforts underpin many of the recommendations in this Report.

The Illinois death penalty statute and its history

In 1972, the United States Supreme Court found that state schemes for imposing the death penalty were unconstitutional. States were forced to re-evaluate the imposition of the death penalty in their respective jurisdictions in order to comply with the constitutional mandate imposed in Furman v. Georgia , 408 U.S. 238, 92 S. Ct. 2726 (1972.) Following the Supreme Court's decision in Furman, the imposition of the death penalty in Illinois was also precluded. See Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562 (1972).

Illinois revised its death penalty scheme, contained in Ch.38, par. 1005-8-1A, in 1973.5 The original scheme contained six eligibility factors6, and provided that the decision about whether to impose a death sentence would be handled by a three-judge court. The original scheme also provided for an appellate process which began, as with other criminal appeals, with the appellate court.7 This death penalty scheme was found unconstitutional by the Illinois Supreme Court in Rice v. Cunningham, (61 Ill. 2d 353, 336 N.E. 2d 1 (1975)) both for its requirement of a three judge panel, which the Court held would divest the individual judges of their constitutional authority to decide cases, and for its appeal process imposing an intermediate level of review, which the Court held would violate those provisions of the 1970 Constitution which required a direct appeal to the Supreme Court in death penalty cases.

A new death penalty statute was enacted in 1977, which developed the basic structure that is in use today. The 1977 Act authorized the imposition of the death penalty when a first degree murder involved any one of seven eligibility factors. The original statute included among its eligibility factors the murder of a peace officer or fireman, murder of an employee of the

Department of Corrections or of someone present in the institution, multiple murders, murder in the course of hijacking, contract murder, murder in the course of one of nine enumerated felonies and the murder of a witness in a prosecution or investigation of the defendant.

Under the 1977 Act, a death penalty hearing only occurs "where requested by the State."8 The death penalty hearing, often referred to as the "sentencing phase" of the trial, occurs following the defendant's conviction for first degree murder. The sentencing phase of the trial usually occurs in two distinct phases: the eligibility phase and the aggravation/mitigation phase. During the eligibility phase, the prosecution must establish either before the jury or the judge proof beyond a reasonable doubt that one of the eligibility factors is present. The prosecution must also establish that the defendant is eighteen years of age, as Illinois prohibits the imposition of the death penalty on those under eighteen. When the jury (or the judge in a bench sentencing) determines that the defendant is eligible for the death penalty, the aggravation/mitigation phase commences. During the aggravation/mitigation phase, the prosecution presents information to the jury or the judge which it believes warrants the imposition of the death penalty in a particular case. The defendant presents information in mitigation, or which he or she believes establishes reasons for not imposing the death penalty in a particular case.9

Under Illinois law, the jury imposes the death penalty unless it finds sufficient mitigation to preclude the imposition of the death penalty. Once the jury imposes the death penalty, the Illinois Constitution and court rule require a direct appeal to the Illinois Supreme Court.

Amendments to the 1977 Act followed shortly. In 1982, the General Assembly added a new eligibility factor, which provided that death could be imposed if the victim of the murder was under 16 years of age and the murder was committed in a brutal and heinous manner.10 The legislature subsequently amended this provision to lower the threshold age for the victim from 16 to 12, and to amend the eligibility factor to authorize the death penalty where the victim was a witness and the murder was intended to prevent the person from testifying or assisting in any prosecution or investigation of either the defendant or another.11 During the remainder of the 1980's, additional amendments to the statute were prompted by the rewrite of sections of the criminal code.12

Beginning in 1989, however, amendments to the death penalty statute began to broaden the scope of factors making a defendant eligible for the death penalty. At present, the Illinois statute contains 20 separate eligibility factors which may result in the imposition of the death penalty. In the spring legislative season of 2001, the legislature enacted HB 1812, which added a 21st eligibility factor. That bill was vetoed by the Governor.13 During the fall session of the legislature in December of 2001, the legislature passed House Bill 2299, enacting new anti-terrorism provisions. Among other things, the bill added a death penalty eligibility factor for a first degree murder resulting from a terrorist act. The bill was vetoed by the Governor in February of 2002 and returned to the legislature with amendments to its other provisions.14

Recent changes to the death penalty process in Illinois

Prompted by the release of 13 men from death row over a period of little more than 10 years, various groups began to examine the death penalty process in Illinois. Simultaneous examination

of the capital punishment system was conducted by a special Supreme Court Committee, a Senate Task Force, a House Task Force, and several private groups, such as the Chicago Council of Lawyers.

Special Supreme Court Committee
The Illinois Supreme Court appointed a Special Committee on Capital Cases, composed of experienced Illinois trial court judges from around the state. The Committee issued a preliminary report in 1999, conducted public hearings in Chicago and Springfield in 1999, and issued a report containing its Supplemental Findings and Recommendations in October of 2000. The recommendations from the Committee covered a wide range of issues, including the qualification of counsel for capital cases, new discovery rules, new capital case procedures, and new standards for discovery of DNA evidence. Most of these recommendations were enacted into Rules by the Supreme Court, effective March 1, 2001.15 The Commission considered many of the observations made by the Committee, and has made a number of recommendations based upon those findings in this Report.

Senate Minority Leader's Task Force on the Criminal Justice System
Senate Minority Leader Emil Jones appointed a task force consisting of legislative leaders, state and federal judges, prosecutors, public defenders and the private bar to make specific recommendations for improvements to the criminal justice system in Illinois. The March, 2000 report of the task force covered issues relating to qualification of counsel, police practices (including addressing the question of whether or not to videotape interrogations), and prosecutor misconduct. Although none of the recommendations advanced by the Task Force have been enacted into law, a number of legislative proposals embodying many of the proposals have been introduced in both the Illinois House and Senate. The Commission separately considered many of the recommendations made by the Task Force.

House Task Force As of December 31, 2001, the House Task Force has not yet issued its written report.

Research initiated by the Commission

Although the Commission members benefitted from the work undertaken by other committees and task forces, the Commission initiated its own research into issues of concern. The Commission's research initiatives included efforts undertaken by Commission members themselves, staff research, and specific studies the Commission requested be conducted by other researchers. This section summarizes some of the more significant research efforts.

Cases involving the thirteen men released from Death Row
Commission members studied these cases intensively. The review effort included not only reading the reported decisions, but in some cases consulting with the attorneys who handled the underlying case and/or reviewing specific materials related to the case. This intensive review enabled the Commission to develop a framework for identifying specific topics that were of particular concern, and guided much of the ultimate research.

Review of cases in which a death sentence was imposed.
Since Illinois reinstated its death penalty in 1977, more than 275 individuals have been sentenced to death. Of that number, approximately 16016 are currently on death row. Twelve inmates have been executed under the current statute, and thirteen released from death row. Of those individuals who have been sentenced to death in Illinois, there are over 250 proceedings in which there has been at least one reported Illinois Supreme Court decision.17

Commission members believed that in addition to the intensive review undertaken of the cases in which inmates were released from death row, some broader overview was warranted of all cases in which a death penalty had been imposed at some point in the criminal justice process. In order to accomplish this task, a group of volunteers attorneys was organized to review the case opinions, and to provide information to the Commission staff with respect to factual details. Information provided was then verified for accuracy by Commission staff. Further description of the case review project and the data collected from it is contained in the Technical Appendix to this Report.

Examination of laws of other states with the death penalty
Presently, 37 states and the federal government have a death penalty. At the outset, it was apparent that the Commission could benefit from understanding the procedures in other states. To that end, statutory provisions were collected18 from most states in the following areas:

? Definition of capital murder and corresponding aggravating factors
? Statutory mitigating factors
? Jury instructions in specific areas, including consideration of aggravating/mitigating factors, eyewitness testimony, accomplice testimony, in-custody informant testimony
? Post-conviction provisions
? Clemency proceedings
? Proportionality issues

The Commission also benefitted from the willingness of officials from other states to share information about the operation of certain aspects of their death penalty proceedings. In some limited and specific areas, research of decisional law from other states was also undertaken.

Sentencing Study
Early in its process, the Commission heard presentations on the issue of proportionality and the potential impacts of race in decision making as it relates to the death penalty. Most states which conduct proportionality reviews, such as New Jersey, Nebraska, and Georgia, require the collection of extensive factual information from the trial court level. This data permits an examination of proceedings at every stage in the process, from charging decision through sentencing, and enables the reviewing court or researchers to identify trends.

Unfortunately, Illinois does not systematically gather this type of data. Commission members found their efforts to come to grips with the complexities of the death penalty system circumscribed by a lack of reliable information that would provide insight into the range of issues occurring in death penalty cases. There is no state-wide database which would enable an examination, for example, of charging decisions by prosecutors. Even with new Supreme Court rules which require the filing of a notice of intent to seek the death penalty, information is still

not collected in any regularized fashion to document decisions that are made in the process. More important, to be truly valuable, information needs to be collected not only on death penalty cases, but also on all murder cases in which the death penalty is not sought or imposed in order to comparatively examine and review death penalty decisions and the process itself.

The Commission also became acquainted with a number of academic studies which pointed to extra-legal influences in the death sentencing process. Some of those studies examined the impact of race on the ultimate question of who was sentenced to death, and most have found that defendants who kill white victims are much more likely to receive a death sentence than those who kill black victims. Others examined geographic disparities in the death sentencing process. Assessing the degree to which such factors were present in Illinois appeared to Commission members to be an important task.

In view of the lack of existing data, and in view of the complexities in undertaking a global study of this type even with complete data, the Commission elected instead to initiate a more focused inquiry.

The study of Illinois sentencing decisions, completed by Drs. Pierce and Radelet, had several purposes. First, it resulted in the creation of a database combining sentencing data and victim data which should enable further study by scholars. Second, it was also intended to assess the degree to which extra-legal factors, such as race or geographic location, influenced sentencing decisions in Illinois. Finally, it also was intended to assess, in a limited way, the degree to which the death penalty was being applied to the 'worst' offenders, as opposed to being applied haphazardly.

A complete discussion of the methodology of the study and its results is contained in the separate report by Drs. Pierce and Radelet.19

Results of the research

While the research results are discussed in more detail throughout this Report, there are several key facts which emerged from the research described above.

Thirteen released death row inmates
Commission members found a number of common themes in these cases, which provided a framework for analyzing the remaining cases in which the death penalty has been imposed. All 13 cases were characterized by relatively little solid evidence connecting the charged defendants to the crimes. In some cases, the evidence was so minimal that there was some question not only as to why the prosecutor sought the death penalty, but why the prosecution was even pursued against the particular defendant. The murder conviction of former death row inmate Steven Manning was based almost completely upon uncorroborated testimony of an in-custody informer. No physical evidence linked Manning to the murder he was said to have committed, nor was there any solid corroboration of the alleged statements he made admitting to the murder. Gary Gauger was convicted in McHenry County of the double murder of his parents even though no physical evidence at the scene linked Gauger to either murder, nor was there any satisfactory explanation of a possible motive. The primary evidence against Mr. Gauger were statements, allegedly made by Gauger, that the police claimed were indicative of guilt, made during an

interrogation that was not memorialized. Gauger denied the statements. Following a federal investigation, two other persons were subsequently convicted in Wisconsin of murdering Mr. Gauger's parents. Despite scant evidence, each of these cases resulted in a conviction, and a death penalty.

There were a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain. In some cases, this was an accomplice20, while in other cases it was an in-custody informant. The "Ford Heights Four" case involved the conviction of four men in south suburban Cook County for the 1978 double murder of a man and a woman. Two of the men, Verneal Jimerson and Dennis Williams, were sentenced to death, while the other two were sentenced to extended prison terms. The primary testimony against the men was provided by their alleged accomplice, Paula Gray, who was then 17.21 All four men were ultimately released in 1996, after new DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime.

Former death row inmate Joseph Burrows was convicted in Iroquois county for the murder of an elderly farmer based upon the testimony of an alleged accomplice, who admitted her own involvement in some of the events. No physical evidence connected Burrows with the crime, and he presented alibi testimony from several witnesses. The alleged accomplice, Gayle Potter, eventually recanted her testimony implicating Burrows and admitted that she committed the murder. There was physical evidence linking Potter to the crime scene.

Testimony from in-custody informants played a significant role in the Steven Manning case, described above, as well as the DuPage county case involving Rolando Cruz and Alex Hernandez. Hernandez and Cruz were tried separately for the 1983 murder of a child. Evidence from in- custody informants was presented against both men at various times, including the testimony from another death row inmate who claimed that Cruz had made incriminating statements while on death row.22 DNA testing subsequently excluded both Hernandez and Cruz as the source of the semen at the scene. Another man, who was in custody on unrelated charges in another county, made statements suggesting that he had committed the crime.

There were also several cases where there was a question about the viability or reliability of eyewitness evidence. Former death row inmate Steven Smith was convicted and sentenced to death based upon the questionable testimony of one eyewitness, testimony which the Illinois Supreme Court later found unreliable. Anthony Porter's convictions and death sentence rested primarily upon the testimony of two eyewitnesses, both of whom were acquainted with Mr. Porter. Those witnesses later recanted, and another man subsequently confessed to the crime for which Mr. Porter was convicted. He entered a plea of guilty and is currently serving a prison term for that crime.23 These cases seemed to reaffirm recent academic findings about the potential fallacies of eyewitness testimony.

At least one of the cases involving a released death row inmate involved a confession which was later demonstrated to be false. Ronald Jones made statements to police in which he allegedly confessed to raping the victim. Jones later indicated that the statements were made as a result of coercion by the police. DNA testing which occurred after Jones had been convicted and

sentenced to death established that he could not have been the source of the semen recovered from the victim.

Other Death Penalty cases

The broader review of the more than 250 cases in which a death penalty has been imposed24 revealed some areas for concern. Overall, more than half of all of these cases were reversed at some point in the process.25 Most of the reversals occurred on direct appeal, with roughly 69% of the reversed cases falling into this category. Of the cases reversed on direct appeal, almost 58% of those were reversed on sentence only, and not on the underlying murder conviction.

Reasons for case reversals varied widely. A significant number of cases were reversed based upon legal issues that had little to do with the conduct of the trial itself. Both the United States Supreme Court and the Illinois Supreme Court have, from time to time, announced new rules of law that resulted in reversal of a number of cases that had been pending on appeal. In a number of cases, the Illinois Supreme Court decided that under the facts of that particular case, the death penalty was excessive. In a similar number of cases, the Court found that the prosecution had failed, for one reason or another, to establish that the defendant was eligible for the death penalty under the statute, and reversed the sentence. There were also a number of cases reversed on issues pertaining to the defendant's fitness for trial, based upon the claim that the defendant had been administered small quantities of medication during his pre-trial incarceration. When other legal issue related reversals are included, these factors explain some 17% of reversals.

The remainder of the reversals stemmed from the conduct of either the prosecutor, defense counsel or the trial judge.

Following reversals, many defendants were sentenced to life in prison, or a prison term long enough that it was the functional equivalent of a life sentence. About 38% of those defendants whose cases were reversed were sentenced to life or prison terms exceeding 60 years. Some 25% were resentenced to death, and over 20% of the cases in which there has been a reversal are still pending at some point in the process of resentencing.26

Outside of the cases involving the 13 men released from death row, cases in which a death sentence is imposed based upon a single eyewitness, an accomplice or an in-custody informant without some kind of corroboration are more rare. In many of the cases where a defendant has been sentenced to death, there is some kind of forensic evidence -- such as fingerprint evidence, DNA evidence and so forth-- which links the defendant to the crime.

Included among these cases are a small subset often referred to in media reports as the "Death Row Ten."27 The most common characteristic shared by these cases is the allegation of excessive force by police officers to extract a confession. In some of these cases, the confession represented the most significant piece of evidence linking the defendant to the crime. Judicial proceedings and review continue in most of the "Death Row Ten" cases. Comment on pending proceedings is not appropriate. It is hoped that the judicial review of these cases will be expeditious and thorough. However, in light of the recommendations contained in this report, these cases should be closely scrutinized by the courts, and, if necessary, the Governor, to insure that a just result is reached.

Victim issues

Commission members believed it important to consider the impact of the criminal justice system on the surviving family members of homicide victims, and to understand their perspective on issues related to the death penalty. It is fair to say that, like the general public, there is a diversity of viewpoints among surviving family members about the death penalty. However, it became clear that there were some unanswered needs that should be addressed by prosecutors, courts and our social service network.

It was the view of many Commission members that more attention should be given to the special needs of family members of a murder victim during the time period immediately following the event, including grief counseling. Information and assistance in such matters as obtaining a death certificate, making insurance claims, obtaining Social Security benefits, tax liability and other fiscal matters relating to eligibility for benefits for a family in such a tragic situation should be provided expeditiously.

In addition to hearing views from a number of surviving family members of homicide victims, the Commission also requested several studies to assess different facets of this issue. These studies were completed at the Commission's request by the Illinois Criminal Justice Information Authority (the Authority)28 during the fall and winter of 2001-2002. Results from all of these studies are discussed in detail in Chapter 14 of this Report. The initial study29 summarized national research evaluating the needs of crime victims and assessing the effectiveness of victim assistance programs. It also reported on specific research that the Authority had recently completed with respect to intimate partner homicides in Chicago, and the Authority's evaluation of the Cook County Victim Witness Program. Finally, it commented upon the Authority's process to define a plan for investigating the sufficiency of services delivered to crime victims.

As a follow up to this research, the Authority convened a special series of focus groups of the family members of homicide victims in order to elicit views about their experiences with the criminal justice system. Focus groups were conducted in both Chicago and Springfield, and participants' views were elicited through the assistance of a trained facilitator. The Authority's report30 provided helpful insights into the challenges facing surviving family members of homicide victims as the criminal case progresses through the system.

In its third and final report31, the Authority provided a summation of a panel discussion involving individuals who had been wrongfully convicted, including a number of individuals who had been released from death row in Illinois. The wrongfully convicted are also victims, and while some of the cases involving the wrongfully convicted have generated media attention, less effort has gone into identifying the specific needs that should be addressed to assist their re-entry into society following their release from prison.

Sentencing Study

The results of the sentencing study,32 demonstrates the need for improvements to the capital punishment system in Illinois. The study examined first degree murder convictions where the

defendant was sentenced between 1988 and 1997 throughout the state, using data provided by the State of Illinois. The examination of the data included an assessment as to whether the imposition of a death sentence could be explained best by legally relevant factors, such as the fact that a defendant had killed two or more persons,33 or whether "extra-legal" factors such as the race of the defendant or victim played a role in the death sentencing process. This is the first study of its kind to be completed in Illinois in more than twenty years, and it provides firm evidence of potential problems with the sentencing process.

Costs related to the imposition of the death penalty
Commission members had varying views on the question of whether or not the issue of the costs associated with the death penalty should play a role in determinations about its efficacy. Some Commission members were of the opinion that if the death penalty is viewed as an appropriate societal response to certain types of murder, then the costs associated with its implementation were not relevant to the discussion. Other Commission members expressed the view that while costs might be unrelated to the moral question of whether or not the death penalty was an appropriate remedy, it was an important consideration with respect to the allocation of scare resources in the criminal justice system. Some Commission members also observed that, in some respects, the financial resources associated with implementation of the death penalty might be more appropriately spent on addressing the needs of the surviving family members of homicide victims.

While undertaking a detailed study with respect to the costs associated with the death penalty in Illinois was beyond the capacity of the Commission, and in light of the inherent problems associated with studying the cost issue, initiating research is this area seemed unwise. The Commission did identify several studies from other jurisdictions which attempted to articulate the cost differential between capital and non-capital murder prosecutions."

In a moment I will give a review of some of the Commission's 85 recommendations that include the creation of a statewide panel to review prosecutors' request for the death penalty; banning death sentences on the mentally retarded; significantly reducing the number of death eligibility factors; videotaping all interrogations in homicide cases; and controlling the use of testimony by jail house informants and accomplices.

Illinois' track record since it reinstated capital punishment in 1977, speaks for itself--though it does not speak well for itself. In the past 25 years, thirteen men have been exonerated and set free from Illinois' death row, that number is one more than the number of those executed in that same time period. While much has been mentioned of the Governor's Commission, it is also important to recognize that in the interim, the State of Illinois and Governor Ryan have worked to improve the present capital punishment system while the moratorium has been in place. For example, in August of 1999, Illinois created the Capital Litigation Trust Fund to provide funds for capital defense. Thus far this fund has made over $35 million available exclusively for capital cases in order to help ensure that we thoroughly investigate and try our capital cases correctly in the first instance. In addition, Illinois was also one of the first states to provide for post-conviction DNA testing. We have passed several pieces of legislation requiring the preservation of DNA evidence and we provide statutory compensation for the wrongfully convicted. In 2000,

after declaring the moratorium, Governor Ryan traveled to Washington D.C. to testify in support of the Innocence Protection Act and appeared with Senators Leahy and Feingold along with Illinois Congressman Ray LaHood and Congressman William Delahunt to discuss this legislation. This important Act contains a number of criminal justice reforms aimed at reducing the risk that innocent people are executed by affording greater access to DNA testing and ensuring better quality legal defense for capital defendants. As you know, many of its provisions were modeled after some of the reforms enacted in Illinois.

While we have had some successes in improving our capital punishment system, there is still much that must be done. The Governor's Commission proposes 85 recommendations for improving Illinois' capital punishment system to better ensure that it is fair, just and accurate. Despite many of the significant advancements Illinois has already recently made, we still have a long way to go.

Some of the recommendations include:

? Creating a statewide review panel to conduct a pre-trial review of prosecutorial decisions to seek capital punishment. The panel would be comprised of four prosecutors and a retired judge. Having 102 separate decision makers in capital cases is an invitation for inconsistency. Public pressure to pursue the death penalty in smaller or more rural counties can often times cause an elected prosecutor to seek the death penalty in a case that would never receive consideration for the ultimate punishment in Chicago or Cook County. In fact, a sentencing study that was commissioned by the Governor's Commission and conducted by Professors Glenn Pierce and Michael Radelet did show that defendants in murder trials were over 7 times more likely to receive the death penalty than those in Cook county.

? Significantly reducing the current list of death eligibility factors from twenty to five including: murder of a peace officer or firefighter; murder in a correctional facility; the murder of two or more persons; the intentional murder of a person involving torture; and any murder committed by a suspected felon in order to obstruct the justice system.

? Banning the imposition of the death penalty for defendants found to be mentally retarded.

? No person may be sentenced to death based solely on uncorroborated single eyewitness or accomplice testimony or the uncorroborated testimony of jail house informants.

? Recommending other reforms concerning the use of jail house informants who purport to have information about the case or statements allegedly made by the defendant, including requiring a preliminary hearing to be conducted by the court as to the reliability of such witnesses and their proposed testimony, full-disclosure of benefits conferred for such testimony, early disclosure to the defense about the background of such witnesses and special cautionary instructions to the jury.

? Videotaping the statements of defendants and the entire interrogation process in homicide cases.

? Allowing trial judges to concur or reverse a jury's death sentence verdict. This will allow the trial judge to take into account potential improper influences such as passion and prejudice that may have influenced a jury's verdict, consider potential residual doubt about the defendant's absolute guilt, consider trial strategies of counsel, credibility of witnesses and the actual presentation of evidence, which may differ from what was anticipated in making pre-trial rulings in either admitting or excluding evidence.

? The Illinois Supreme Court should review all death sentences to determine if the sentence is excessive or disproportionate to the penalty imposed in similar cases, if death was the appropriate sentence given aggravating and mitigating factors and whether the sentence was imposed due to some arbitrary factor.

? The report contains several recommendations relating to eyewitness identification for procedures that should be required when police conduct a "lineup" or "photospread." These recommendations include:

¥ Having someone who is unaware of the suspect's identity conduct the lineup.

¥ Having police tell the eyewitness that the suspected perpetrator may not be in the lineup or photospread.

¥ Taking a clear written statement of any statements made by eyewitnesses as to the level of confidence they have in identifying a suspect, and

¥ When possible, videotaping both the lineup procedures and the witnesses confidence statement.

? Adequate funding to eliminate backlogs and expand DNA testing and evaluation, including continued support for a more comprehensive DNA database.

? Revise Illinois' complicated and confusing statute so that juries can understand simply that they must determine, in light of all the evidence and the mitigating and aggravating circumstances, whether the death penalty is the appropriate sentence.

? To eliminate confusion and improper speculation, juries should be instructed as to all the possible sentencing alternatives before they consider the appropriateness of imposing a death sentence.

? Like defendants in any other criminal case, capital defendants should be afforded the opportunity to make a statement to those who will be deciding whether to impose the ultimate punishment allowed by the state, a sentence of death.

With these and many other suggested reforms, the Commission believes that Illinois' capital punishment system would be more just and better equipped to ensure fair and accurate results. However, the report recognizes and the commission members unanimously agreed that "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death." This

report represents the Commission's best efforts to ensure, that we strive for perfection and a more just, fair and accurate criminal justice system.

Finally, I wish to address the issue of cost. The full implementation of the Commission's 85 recommendations would undoubtedly result in millions of dollars in increased annual costs to the already extraordinary costs of seeking and imposing the death penalty in Illinois. If the ultimate penalty is to be sought or imposed, justice demands that when life and death are at stake that money not be an issue. On the Federal level, passage and full funding of Acts such as the Innocence Protection Act and the Paul Coverdell Forensic Science Improvement Act represent an indispensable first step in providing some of the necessary resources to ensure fairness and accuracy in capital case proceedings. On the state level, the Commission has recommended that leaders in both the executive and legislative branches must significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms.

Given the increasing number of innocent people being discovered in prisons and death rows across the nation, supporters of capital punishment must step-up and provide the necessary funds to repair our nation's broken system of capital punishment. In the words of former U.S. Attorney and fellow Commissioner Thomas P. Sullivan who, unfortunately could not be with us this morning: "The message of the [Governor's] Commission on Capital Punishment's report is clear: repair or repeal. There is no other principled course."

Thank you again Chairperson Feingold and the honorable members of the Constitution Subcommittee for the incredible honor of appearing before you this morning.

APPENDIX

1. States undertaking an examination of their own death penalty systems included Arizona, Indiana, Nebraska and North Carolina. Texas and Maryland considered, but did not pass, a moratorium. See, e.g. "Death penalty debate slowly shifts," Chicago Tribune, January 31, 2001.

2. The transcripts from the public hearings are presented in full on the Commission's website, www.idoc.state.il.us/ccp.

3. This report provided an analysis of salary disparities in the criminal justice system, which have the practical effect of discouraging many attorneys from pursuing careers in this area.

4. The names of the thirteen men released from Illinois death row are: Joseph Burrows, Perry Cobb, Rolando Cruz, Gary Gauger, Alejandro Hernandez, Verneal Jimerson, Ronald Jones, Carl Lawson, Steven Manning, Anthony Porter, Steven Smith, Darby Tillis, and Dennis Williams. Citations to the Illinois Supreme Court opinions involving these former inmates may be found in the Technical Appendix.

5. The complete text of P.A. 78-921 is set forth in the Supreme Court decision which subsequently invalidated the scheme.

6. Murder of a police officer or firefighter, murder of employee or person present in a Department of Corrections facility, multiple murders, murder in the course of hijacking, contract murder, murder in the course of a felony.

7. P.A. 78-921 added a new par. 1005-8-1A to chapter 38, which provided, in part: "If the 3 judge court sentences the defendant to death and an appeal is taken by the defendant, the appellate court shall consider the appeal in two separate stages. In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there were errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court finds there were no errors justifying modification or reversal of the findings of the trial court, the appellate court shall conduct an evidentiary hearing to determine whether the sentence of death by the 3 judge court was the result of discrimination. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment."

8. 720 ILCS 5/9-1(d).

9. A copy of the complete statutory provision governing the death sentencing process as it currently exists is contained in the Appendix.

10. See P.A. 82-677.

11. See P.A. 82-1025. The original eligibility factor was limited to the murder to prevent the testimony of a witness against the defendant; the subsequent amendment broadened the eligibility factor to include the murder to prevent the testimony of witness in any criminal prosecution or investigation, whether against that defendant or another.

12. A table containing the amendments to the eligibility factors contained in the death penalty statute, showing the public act number and effective date, is contained in the Appendix.

13. On August 17, 2001, Governor Ryan vetoed House Bill 1812, which sought to add a new provision to the State's death penalty sentencing statute making a defendant eligible for the death penalty where the murder was committed in furtherance of the activities of an organized gang. The Governor noted in his veto message that the almost annual effort to add eligibility factors to the statute introduced more arbitrariness and discretion, raising potential constitutional concerns. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.

14. On February 8, 2002, Governor Ryan returned House Bill 2299 to the legislature with significant amendments to its anti-terrorism provisions and deletion of the new death eligibility factor. The bill is currently pending in the legislature. A copy of the Governor's veto message is contained in the Technical Appendix to this Report.

15. The Illinois Supreme Court Rules, with Commentary, can be found on the Supreme Court's website, www.state.il.us/court/SupremeCourt.

16. The number of inmates on death row varies as cases are reversed or are resentenced, or as inmates die from other causes.

17. In some cases, although a death sentence has been imposed by the trial court, no opinion on direct review has yet been issued by the Supreme Court. Trial courts continue to impose death sentences in Illinois, although the Governor's moratorium prevents any executions from occurring.

18. This Report contains citations to various authorities from other states. Some of the materials from other states are included in the Technical Appendix to this Report.

19. A complete copy of the report by Drs. Pierce and Radelet is contained in the Technical Appendix to this report, published separately.

20. The cases of former death row inmates Perry Cobb and Darby Tillis also illustrate the problem of relying upon a witness with something to gain. Their convictions were based upon the testimony of Phyllis Santini, who claimed that Cobb and Tillis had committed the robbery and murder of two men on the north side. Her testimony was later impeached in a subsequent trial by Lake County prosecutor who testified that he knew Santini and she had made statements to him that Santini and her boyfriend had committed a robbery. There was one other witness who claimed in one of the trials to have seen men who looked like Cobb and Tillis in the vicinity of the robbery, but this witness had failed to positively identify the men in earlier trials.

21. Ms. Gray recanted her story at one point in the proceedings, and then recanted her recantation. Questions were also raised about Gray's mental capacities. She was, herself, tried in the original proceedings and sentenced to 50 years for her alleged role in the crimes. Her conviction was affirmed (87 Ill. App. 3d 142, 1980). Ms. Gray's conviction was subsequently reversed by the Seventh Circuit Court of Appeals (721 F. 2d 586, 1983) on the ground that she received ineffective assistance of counsel. Her co-defendant, Dennis Williams, had been granted a new trial by the Illinois Supreme Court, based upon ineffective assistance of counsel, and Ms. Gray and Mr. Williams were represented by the same lawyer.

22. In 1987, death row inmate Robert Turner testified in the retrial of Rolando Cruz, claiming that Cruz had described the crime to Turner. Turner claimed that he expected nothing in return for his testimony, a claim which was undercut by the fact that the prosecutor in the Cruz case subsequently testified at Robert Turner's own capital resentencing.

23. Alstory Simon plead guilty to the murder for which Porter was to have been executed, and is currently serving a sentence of 37 years in prison.

24. From re-enactment of the death penalty in 1977 through December 31, 2001, there have been more than 250 cases in which a death penalty has been imposed in Illinois and in which the Illinois Supreme Court has issued an opinion. A number of those cases have been reversed, and a sentence other than death imposed.

25. Summary tables for this information are contained in the Appendix bound with this report, while data tables displaying the results in individual cases are in the Technical Appendix. The

Summary tables are based upon the data tables found in the Technical Appendix, which is published separately.

26. In some cases, the defendant has died while the case was pending.

27. The "Death Row Ten" are death penalty cases in which allegations were made that excessive force was used by police to extract confessions from defendants. The following defendants are included in this group: Madison Hobley, Stanley Howard, Grayland Johnson, Leonard Kidd, Ronald Kitchen, Jerry Mahaffey, Reginald Mahaffey, Andrew Maxwell, Leroy Orange, and Aaron Patterson. Citations for Illinois Supreme Court opinions involving these defendants are contained in the Technical Appendix.

28. Copies of these research reports are contained in the Technical Appendix to this Report.

29. Report on Victim and Survivor Issues in Homicide Cases, Illinois Criminal Justice Information Authority, December 6, 2001.

30. Victim and Survivor Issues in Homicide Cases: Focus Group Report, Illinois Criminal Justice Information Authority, February 19, 2002.

31. The Needs of the Wrongfully Convicted: A Report on a Panel Discussion, Illinois Criminal Justice Information Authority, March 15, 2002.

32. Race, Region and Death Sentencing in Illinois, 1988-1997, Dr. Glenn Pierce and Dr. Michael Radelet, March 20, 2002. A complete copy of this research report is included in the Technical Appendix to this Report.

33. Under Illinois law, the intentional murder of two or more persons in either the same or separate incidents makes the defendant eligible for the death penalty.