Testimony of

Mr. Scott Turow

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Summary
The witness, an author who has continued to practice law, illustrates some of his conclusions as a member of Governor George Ryan's Commission on Capital Punishment by reference to his experiences representing defendants in the post-trial phases of two different capital prosecutions in the 1990's. The witness asserts that because capital punishment is constitutionally limited to "the worst of the worst," capital cases by their nature are highly inflammatory, occasionally making reasoned deliberation by law-enforcement officers, prosecutors, judges and juries more difficult. Thus not only the finality of the penalty, but the highly-charged nature of the crime and the response it inevitably provokes counsel in favor of measures such as those proposed by the Illinois Commission designed to enhance evidentiary safeguards and to provide pre-trial review of the death penalty election. Finally, the witness calls attention to the Illinois Commission's unanimous conclusion that a higher degree of confidence in the outcomes in capital cases requires a significant increase in public funding, especially to insure that capital defendants are represented by qualified counsel with effective support.

Chairman Feingold and Members of the Subcommittee:

My name is Scott Turow. I am an author and an attorney.

Thank you for the extraordinary privilege of appearing before you to share my reflections related to my experience as a member of Governor Ryan's Commission on Capital Punishment. I am especially honored to testify in the same hearing with Governor Ryan, who has been a courageous and visionary Chief Executive for our state, and with my colleagues from the Governor's Commission, Matt Bettenhausen and Don Hubert. Membership on the Commission is one of the highpoints of my career at the bar. I am very proud of the work of the Commission, due not only to the thoroughness of our research and deliberations, but also because of the extraordinary openness and patience with which the members reasoned with one another, notwithstanding many enduring differences, thus allowing us to reach consensus on the need for many reforms. It is a signal honor to appear here as one of the representatives of that distinguished group, whose individual biographies are attached as an Appendix to my statement.

I am also delighted to appear with Professor Lawrence Marshall of Northwestern University. Like Matt and Don, Larry is a cherished friend and a professional colleague with whom I worked for years as co-counsel in an extraordinary case.

I am sure that when I was appointed to the Commission some Illinoisans were startled to see someone whom they think of principally as a storyteller chosen to help deliberate about what is probably the gravest real-life problem in the law. Although I spend the majority of my time these days as a writer, I have always continued to practice. I have been a partner in the Chicago Office of Sonnenschein Nath & Rosenthal since 1986, when I left my first job as a lawyer as an Assistant United States Attorney in Chicago (a position to which I had been appointed by one of the Co-Chairs of our Commission, Thomas P. Sullivan, yet another dear friend.) When literary success freed me from some of the constraints other lawyers face, I began to devote a substantial portion of the limited time I spend in practice to pro bono matters. Thus, I spent the bulk of my

hours as practicing lawyer in 1990's representing two defendants in the post-trial phases of two very different capital prosecutions. These activities do not make me a death-penalty expert by any stretch; many of my colleagues on the Commission had capital litigation experience far more extensive than mine. Nonetheless both cases were prolonged and intense and did a great deal to inform my views about what confronts us in creating the fair, just and accurate capital punishment system that Governor Ryan requested when he declared a moratorium on executions in Illinois and appointed the Commission. For purposes of today's discussion, these two cases provide convenient illustrations in helping me explain why I supported certain reforms our Commission recommended. I do so without attempting to speak for my colleagues who may have had very different reasons for reaching the same conclusions.

The Case of Cruz and Hernandez

1. Background

Because I was an Assistant United States Attorney from 1978 to 1986, before the re-enactment of the federal death penalty became effective, I had very little prosecutorial experience with capital cases. Notwithstanding that, in the fall of 1991 I agreed to take on the appeal of Alejandro Hernandez, the less-celebrated co-defendant of Professor Marshall's client, Rolando Cruz. Dubbed by the press "The Case That Broke Chicago's Heart," the murder of 10 year-old Jeanine Nicarico was a causa belli from the moment the crime was discovered on February 25, 1982. The outraged suburban community of Naperville, Illinois rallied around Jeanine's parents who had endured the ultimate parental nightmare, returning from work to discover their daughter kidnapped and then two days later confronting the hideous news that her body had been discovered in a nearby nature preserve. Jeanine had died as result of repeated blows to the head, administered only after she had been blindfolded with adhesive tape and subjected to a variety of sexual assaults.

More than forty law enforcement officers joined a multi-jurisdictional task force organized to find Jeanine's killer and a $10,000 reward was offered. When those efforts, as well as a Special Grand Jury's investigation failed to yield results, the Nicarico case became a pivotal issue in the primary election for DuPage County State's Attorney conducted early in 1984. Although the sitting State's Attorney had declared six weeks before that there was "insufficient evidence" to return any indictments, Hernandez, Cruz and a third man Stephen Buckley were indicted on March 6, 1984, with the primary only days away.

The primary winner and eventually-elected State's Attorney, James Ryan (now the Attorney General of Illinois) proceeded to trial in January, 1985. Hernandez and Cruz were both convicted and sentenced to death. There was no physical evidence against either man--no blood, semen, fingerprint or other forensic proof tied either to the crime. Instead, the state's case had consisted solely of each defendant's statements, a contradictory maze of mutual accusations, whose verity and motives were in doubt from the start, given both the incentive of the reward money and the fact that Alex's IQ is about 75. By the time the case reached me in late 1991, Cruz's and Hernandez's original convictions and death sentences had been reversed by the Illinois Supreme Court due to "a deliberate and constitutionally unacceptable attempt by the prosecution to circumvent the strictures of Bruton and the confrontation clause," People v. Cruz, 121 Ill.2d 293, 333, cert. denied, 488 U.S. 869 (1988), but the men had been convicted yet again in separate capital trials, with Cruz re-sentenced to death, and Hernandez to 80 years.

The facts of these vexed cases resist convenient summary. Furthermore, any efforts I might make would inevitably reflect the ire of a still-impassioned advocate. Instead, I attach as a further Appendix a copy of the Illinois Appellate Court's opinion in Alex's case, People v. Hernandez,

No. 2-91-0940, at 20 (1/30/95 unpublished)(hereinafter Hernandez II) in the hope that it will provide a more dispassionate version of the contentions of each side. To make a very long story much shorter, after heroic efforts by Professor Marshall, the Illinois Supreme Court again reversed Cruz's conviction on July 14, 1994. I argued Alex's appeal in December of that year before the Illinois Appellate Court, which reversed the case a month later on separate grounds. Cruz was retried in a bench trial in November, 1995 and acquitted, after a police officer admitted having given false testimony in earlier proceedings in the case in order to corroborate other officers. The case against Hernandez was dismissed shortly afterwards.

Accepting that my view of things is far from objective, let me nonetheless state what I regard as the operative facts for purposes of the present discussion. My client was tried for his life three times and twice convicted of a crime of which he was clearly innocent. In 1985, after Hernandez and Cruz were first convicted, another little girl, Melissa Ackerman, was abducted and murdered about twenty miles away in a fashion so similar to the crime committed against Jeanine Nicarico that the Illinois Supreme Court ultimately determined in Cruz's second appeal that the Ackerman murder could be deemed evidence of modus operandi. Brian Dugan was apprehended for the Ackerman murder. In the course of plea- bargaining he confessed, in an attorney proffer, not only to the Ackerman killing, but to the Nicarico murder as well. As stated by the Illinois Appellate Court, "Dugan's statements were significantly corroborated by the evidence," Hernandez II at 20, including eyewitness testimony, physical evidence such as tire tracks where the body was found that matched Dugan's car, and the fact that Dugan knew a number of details of the crime never publicly revealed. The Illinois State Police investigated Dugan's confession and concluded he was the lone murderer of Jeanine Nicarico, and DNA tests in 1995 ultimately showed that Dugan--and Dugan alone--matched the DNA profile of Jeanine's sexual assailant.

Despite Dugan's confession, the DuPage County State's Attorney's Office persisted with these prosecutions for another ten years. I can again only be blunt in stating my personal view: those prosecutions were not conducted in good faith. After Cruz and Hernandez were freed, four police officers and three prosecutors were indicted for conspiracy to obstruct justice in the Cruz case, charges of which they were ultimately acquitted in a jury trial. In my view, all three of Alex's trials were characterized by police testimony that flouted reason, sometimes bolstered by prosecutorial misconduct. As but one of a catalog of possible examples, let me point to Alex's second trial, in which the state sought to overcome the lack of physical evidence by linking Alex to certain shoeprints discovered outside the Nicarico home. Ten different witnesses testified about the prints and a number of demonstrative exhibits were admitted. Testimony was then introduced that Alex, who stands 5'3", wore shoes about size seven. Finally, the state's police expert testified the prints in issue were "about a size 6." In truth, both the expert and the prosecutor who elicited his testimony knew and did not disclose to the defense that the shoeprints had been identified by the manufacturer as coming from girl's shoes and that the "size 6" testified to was the much smaller female, as opposed to a male, size. Explaining this astonishing due process violation in a capital case, the prosecutor (one of the men later indicted) offered varying explanations, the last of which was that disclosing these facts had "slipped my mind." See Hernandez II at 27-8.

2. The Lessons I Took

As the Chairman and the Members of the Subcommittee are undoubtedly aware, Cruz and Hernandez are but two of thirteen men in Illinois who were exonerated after being placed on death row. Studying those cases and bearing my experience in Hernandez in mind, I have taken certain lessons, although they may well be better regarded as the observations of a writer, rather

than a lawyer. In Zant v. Stephens, 462 U.S. 872, 878 (1983), the U.S. Supreme Court made clear that the class of persons subject to capital punishment must be far narrower than those merely convicted of first-degree murder. In practice, capital punishment is reserved for "the worst of the worst," those crimes which most outrage the conscience of the community. Paradoxically, that fact makes for the system's undoing, because by its nature, capital punishment is invoked in cases where emotion is most likely to hold sway and where rational deliberation is most often problematic for investigators, prosecutors, judges and juries. Thus, not only the finality of the penalty, but the inflammatory nature of the crimes requires that special strictures be in place to ensure the accuracy of the judgments arrived at.

Bearing the experience of many cases in mind, our Commission made a number of recommendations aimed at safeguarding against the most volatile or dubious elements of our evidentiary system:

· We recommended videotaping all questioning of a capital suspect conducted in a police facility, and repeating on tape, in the presence of the prospective defendant, any of his statements alleged to have been made elsewhere.

· In light a growing body of scientific research relating to eyewitness identification, we proposed a number of reforms regarding such testimony, including significant revisions in the procedures for conducting line-ups.

· We recommend that capital punishment not be available when a conviction is based solely upon the testimony of a single eyewitness, or of an in-custody informant, or of an uncorroborated accomplice.

· We offered several recommendations aimed at intensifying the scrutiny of the testimony of in-custody informants, including recommending a pre-trial hearing to determine the reliability of such testimony before it may be received in a capital trial.

· We recommended a number of measures expanding a capital defendant's access to DNA testing, both before and after trial.

The highly emotional nature of these cases can also occasionally become the by-way to over-reaching by prosecutors or police. Such overreaching occurred in many of the thirteen exonerated cases, but those cases remain a small subset of capital prosecutions. In my experience, the overwhelming majority of prosecutors and law-enforcement officers seek to be fair. But special challenges are presented by highly visible cases, especially ones where an outraged community demands results and where the thought of someone perceived as a vicious criminal going free is nigh on to intolerance to those whose job it is to safeguard the public. The high rate of reversals in capital prosecutions--about 65% in Illinois, which is in line with national figures derived in a recent study--is due to a number of factors, but one I venture to say, after reading hundreds of such opinions, is the frequency with which prosecutors and law-enforcement officers feel obliged to push the envelope. One of the most serious issues of political theory surrounding the death penalty is whether we are wise to place the machinery of death in the hands of any human being, when the inherent nature of the crimes so tempts bad impulse.

Our Commission proposed that a state-wide body, composed of the state Attorney General, three prosecutors and a retired judge, be created in Illinois; that panel's concurrence would be required before any of Illinois 102 State's Attorneys could seek capital punishment. The principal purpose of this proposal was to ensure that the law is applied uniformly throughout the state so that a capital sentence is not determined solely by the venue in which a murder occurred. Yet a review mechanism also provides further assurance that the extraordinary power to seek death is being employed in a dispassionate manner.

As a final thought about the highly-charged nature of capital cases, I want to address the role of victims. When I was appointed to the Commission, I was very conscious of the fact that because I never prosecuted a capital case, I did not have a ground-level understanding of the anguish and perspectives of a murder victim's surviving family and loved ones. Along with many of my colleagues, I was eager to hear testimony from those persons. Survivors of course do not have uniform points of view anymore than Senators do. But certain things struck me in the hours we spent with victims' families. First, losing a loved one to a murder is unlike any other loss--that is because the death is the result not of something as fickle and unfathomable as disease, or as random as a destructive act of nature. Instead it is the product of the conscious choice of another human being and is particularly intolerable for that reason. Second, although there is much talk of "closure" in connection with the death penalty, victims' families seemed to be driven by other emotions to call for execution of the killer. One particularly strong impulse is the victim's family's need to feel certain that other families will not suffer as they have; were the murderer to kill again it would render even more meaningless their loved one's death. A second desire is for a sense of equivalence. Again and again victims' families expressed frustration and outrage over the fact that they can never again share birthdays or holidays with the person they've lost, while a murderer, even if confined for life, will enjoy those opportunities.

Speaking solely for myself and in no way representing the views of others on the Commission, I believe our approach to the surviving loved ones of a murdered victim needs more careful reflection. I came of age as a prosecutor in a different era, when crime victims were not at the forefront of the criminal process. As late as 1987, the United States Supreme Court held in Booth v. Maryland, 482 U.S. 496 (1987) that it violated the Eighth Amendment to offer evidence in a capital sentencing of the impact of a murder on the survivors, deeming such information an invitation to arbitrariness and irrelevant to the only proper issues, the character and blameworthiness of the defendant and the nature of the offense. By now, the national Victim Rights movement has reversed that result. Survivors now have the right in many jurisdictions to appear before the sentencer, and to a great extent survivors even claim a form of "ownership" over the process. In the Hernandez case I was repeatedly struck by the irony that Brian Dugan was sentenced to natural life for his killing of Melissa Ackerman, while the sentence visited on Cruz and Hernandez for the nearly-identical Nicarico murder was death. Dugan received natural life because the Ackerman family preferred a certain result and quick resolution, while one of the powerful motives for seeking death for Jeanine's killers was the staunch views of the Nicarico family, who rallied public support. A system in which persons live or die because of the character of the survivors is not a rational one. Nor does it aid reasoned deliberation to have the angriest people at center-stage of the process of delivering justice. Victims deserve a system that recognizes their legitimate needs and treats them with respect, that provides meaningful punishment that eliminates any temptation for victims to resort to self-help and which does not depreciate the death of their loved ones, especially by allowing a convicted murderer to kill again. But I am dubious that the justice system ought to be charged with assuaging victims' sense of irretrievable loss. We were fortunate on our Commission to have as a member Roberto Ramirez, who had lost his father to a murder which his grandfather in turn avenged. He was very much in tune with the needs of the surviving loved ones and helped turn our attention in that direction. We made no formal recommendations about meeting the victim's loved-ones' needs, but the Illinois Criminal Justice Information Authority contributed important research papers to the Commission, emphasizing that victims often suffer from a lack of both compassionate services and reliable communication about developments in the case as it proceeds through the

justice system. Meeting those needs, rather than a providing a determinative role in the death penalty process, may be better answers to their needs to come to emotional terms with the murder.

The Case of Christopher Thomas

1. Background

Following the conclusion of the Hernandez case, several younger lawyers at Sonnenschein and I assumed the pro bono representation Christopher Thomas in 1996, accepting the case from the Capital Litigation Division of the Illinois Appellate Defender's Office. Chris had been convicted of the first-degree murder of Rafael Gasgonia on October 25, 1994. The murder took place behind Mr. Gasgonia's place of employment during the course of an attempted armed robbery, which had resulted first in a struggle between Chris, his two accomplices and the victim, and ultimately in the shooting of Mr. Gasgonia. After a sentencing hearing in which Chris adamantly proclaimed his innocence, despite three prior confessions, he was sentenced to death on June 27, 1995. The Illinois Supreme Court affirmed his conviction and sentence on September 18, 1997. People v. Thomas, 178 Ill.2d 215, 687 N.E.2d 892 (1997), cert.denied, 118 S.Ct. 2375 (1998)

The Thomas case was poles apart from Hernandez in virtually every critical aspect. For one thing, Chris's numerous confessions and the well-corroborated statements of his co-defendants left me with few concerns about my client's innocence, notwithstanding his protests at sentencing. Secondly, I was privileged throughout to deal with prosecutors who conducted themselves with the highest degree of professionalism. Lake County State's Attorney Michael Waller, who ultimately became my colleague on the Commission, and his Felony Chief, Michael Mermel, defended the Thomas conviction vigorously; but they also endured my advocacy with patience and attention, and remained open throughout to reconsidering the legal and factual bases of the case.

Again being blunt, Chris was essentially on death row for the crime of having bad lawyers. Chris had been defended by two local private attorneys who were under contract to the Lake County Public Defender's Office. They were each paid $30,000 per year to defend 103 cases, an average of less than $300 per matter. By terms of the contract, two cases had to be first-degree murders, and another one a capital case. One lawyer had no experience in capital trials; the other had been stand-by counsel one time for a pro se capital defendant.

Chris got all the defense you would expect for $600. His lawyers clearly regarded the case a clear loser at trial and, given its relatively unaggravated nature, virtually certain to result in a sentence other than death. When state witnesses omitted mention that the shooting had taken place in the course of a struggle, the defense lawyers failed to impeach them with their prior signed statements to that effect. Inexperienced in mitigation investigations, the lawyers had uncovered only a sliver of the background information ultimately developed by the Capital Litigation Division and our office, and the lawyers' limited efforts had been hobbled by the fact that one of them had previously prosecuted the chief mitigation witness, Chris's aunt, who, not surprisingly, ultimately refused to cooperate with her former antagonist. (Neither lawyer thought that antagonism merited withdrawal, which would have obliged the lawyer to take on another capital case.) And finally, despite the clear mandate of Estelle v. Smith, 451 U.S. 454 (1980) and Illinois law protecting the confidentiality of mental health records, Chris's lawyers had failed to object when the state introduced Chris's prior court-ordered psychological examinations, which became the cornerstone of the state's case in aggravation.

This latter legal defect ultimately became the basis for overturning Chris's sentence when Judge Barbara Gilleran-Johnson conducted a hearing on the lengthy post-conviction petition we had

filed on Chris's behalf. After negotiations with State's Attorney Waller, in which he admitted being struck by the new mitigation evidence showing that Chris had endured an exceptionally deprived and abusive childhood, an agreement was reached that rather than execution, Chris's case was more appropriately resolved by a prison term of 100 years, which gives Chris the prospect of release from the penitentiary at age 71. Chris was re-sentenced on December 15, 1999. At that time, although there was no anticipation of it, Chris Thomas for the first time publicly acknowledged his responsibility for Rafael Gasgonia's murder and wept as he apologized to the Gasgonia family.

2. Lessons

From the Thomas case and dozens of similar cases, I took a paramount lesson, one which the members of our Commission arrived at unanimously: if we are to have capital punishment, we must also be willing to pay for it. An entire chapter of our report to the Governor is dedicated to funding issues. In Illinois, our Supreme Court and our legislature have recently adopted significant measures to fund capital litigation, to create a qualified capital bar, and to enhance training of capital lawyers and judges. We supported all of these changes and in a number of instances recommended expanding them or making permanent those provisions currently subject to sunset. As tax revenues dwindle, there will undoubtedly be pressure to cut down on costly protections for capital defendants, but our shared sense of justice as Americans will never be satisfied by providing a $600 defense to a person whose life is at stake. If we are serious as a nation about restricting the chances of executing the innocent, we must start by ensuring that every capital defendant has representatives skilled in death penalty litigation, who are supported in turn by adequate funding for experts, investigators and forensic resources. Put bluntly again, if we are not prepared to do this the right way, we clearly should not do it at all.

Conclusion

Let me once more thank you, Mr. Chairman, and the Members of the Subcommittee for the opportunity to share my views with you. The death penalty debate in the United States has gone on literally for centuries and is not likely to end soon. The decisions of the United States Supreme Court have, in essence, recognized the right of the American public and its elected representatives to decide whether or not capital punishment should be imposed in each jurisdiction. In my observation, most Americans tend to reflect on the question only in terms of whether they deem the death penalty moral or immoral, and generally know less about the actual operation of the capital system. One potential advantage of a national death penalty moratorium is that it can provide an incentive for national contemplation in which Americans might feel motivated to seek out more information. As one who does not regard capital punishment as part of an alien morality, I have found the most challenging questions arising at the level of policy, which is where I believe our debate needs to be more focused. As a nation we need to decide if the costs of capital punishment--the staggering financial toll of litigation, the consumption of limited court resources, the many disparities in the system's results, and the enduring risk of executing the innocent--are worth the powerful denunciation of ultimate evil that capital punishment is meant to trumpet. Toward that end, the deliberations of this Committee and the important public forum you have provided today help foster debate on a more informed basis.

SCOTT TUROW