CAPITAL PUNISHMENT REFORM STUDY COMMITTEE
PUBLIC HEARING, NOVEMBER 13, 2006
ILLINOIS CAPITAL BUILDING, SPRINGFIELD, IL

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE
PUBLIC HEARING, NOVEMBER 13, 2006
ILLINOIS CAPITAL BUILDING, SPRINGFIELD, IL

Table of Contents

Committee Members Present

Leigh B. Bienen

James R. Coldren, Jr.

Kirk W. Dillard

James B. Durkin

Theodore A. Gottfried

Jeffrey M. Howard

Boyd J. Ingemunson

Gerald E. Nora

Richard D. Schwind, Vice Chair

Thomas P. Sullivan, Chair

Peter G. Baroni, Special Counsel

Thomas P. Sullivan

My name is Tom Sullivan. I am the Chair of the Capital Punishment Reform Study Committee, formed by the Illinois legislature several years ago to study the reforms that have been adopted and proposed to the Illinois capital punishment system. I welcome all of you, and we look forward to hearing your testimony today.

The statute that authorized the formation of this Committee provides that the Committee shall hold hearings on a periodic basis to receive testimony from the public regarding the manner in which reforms have impacted the capital punishment system. We have filed two reports with the Illinois legislature. We have been directed to file reports for five years. All of our hearings and meetings are open under the Illinois Open Meetings Act, and all of our minutes and the notices of our meetings are on our website, which is under the Illinois Criminal Justice Information Authority.

Because of the number of witnesses that we have, we are going to limit the time for testimony. If there are questions from members of the Committee, we can extend the time, but I'm going to ask the speakers to try to hold your remarks to within about seven minutes.

I'd like to introduce the members of the Committee, and then I will read the slips that I have here, and that will be the order in which we will call the witnesses,

unless there is somebody here that has a reason to move up in the order because of other commitments. We have Jim Durkin, Boyd Ingemunson, Jerry Nora, Chip Coldren, Pete Baroni, our Special Counsel, Ed Parkinson, Ted Gottfried, Jeff Howard, Rick Schwind and Leigh Bienen. These are not all the members of the Committee, but the majority of the members. We are missing a few members.

This is the order in which I intent to call the witnesses: Jerry Nora. Jerry is a member of the Committee, and has requested an opportunity to speak on behalf of the Cook County State's Attorneys office. Then Pat McAnany of the Illinois Coalition to Abolish the Death Penalty. Then Regan McCullough from the same organization. Then Jennifer Jenkins of the Illinois Victims Organization. Then Gail Rice, a family member of the victim in a felony murder case. Then Larry Golden of the Downstate Illinois Innocence Project. Then Linda Virgil of the National Alliance for Mental Illness. Then Robert Haida from the Illinois State's Attorneys Association.

Are there any other persons in the audience who would like to speak this afternoon? (No response.)

Jerry, if you would step down we'll start with you.

Gerald E. Nora

Mr. Sullivan, colleagues and also my fellow witnesses, thank you for your courtesy in allowing me to speak on behalf of the Cook County State's Attorneys

office. Since the State's Attorneys office in Cook County prosecutes a substantial portion of the death penalty cases in this state, they wanted to make preliminary observations that will help the Committee before its hearing next year in Chicago, when our office will have much more substantial observations to make.

Much of our experience on the reforms enacted by the legislature and by the Supreme Court involves cases that are still in litigation, so at the present time we can only discuss them in so much detail under the constrictions of our professional rules. Nevertheless, we can make the following five general observations, which we think are the most important things we are encountering so far, that with the greatest degree of confidence we can advise the Committee to look into.

The first of these five issues involves a review that is being done now by the Police and Investigation subcommittee, and that involves videotaped interrogations. As you know this is an unfunded mandate from the Illinois legislature, and a very important reform, which the Cook County State's Attorney led and implemented in Cook County. But it is nevertheless an unfunded mandate, and we are running into several problems that I think the Committee will also find in its investigation.

For instance, in suburban courthouses for Cook County, there is one video camera provided per suburban District. For a jurisdiction that has 134 suburban

municipalities that may be involved in homicide investigations, that this is clearly inadequate.

Second, many police agencies do not have something as simple as a sound proof room. Consequently, when we are getting videotaped interrogations in many of these jurisdictions, it is hard to discern what is being said. So their technical difficulty will have to be met in the future with more ways and means.

Finally, in terms of unfunded mandates, there are substantial costs of obtaining, copying, storing, redacting, editing and then finally presenting the videotaped statements for litigation. That unfunded mandate is falling largely upon the prosecutor's office, so we feel that intensely, and urge the Committee to look into it.

There are several areas that involve the pretrial stage of litigation that we urge the Committee to look into. First, depositions. Depositions are an important reform to enable the truth finding process to go forward, and the Supreme Court has provided a guideline for when a deposition is appropriate: good cause. When good cause is shown there should be a deposition. The Committee should look into how well this standard is working as far as giving guidance to the courts. We think there is a great divergence between different courts on how this standard is being applied. I think the Committee will easily find that in some cases the good cause standard is providing two or three depositions, and in other cases it may be

approaching 100 depositions, on matters which most attorneys would agree are collateral matters.

The Supreme Court also provided that the rules of discovery are applicable to the capital cases, and also that there would be a certificate of readiness filed before a capital case commences. This would be to prevent the last minute delays, for example, a day or two before trial a new witness is discovered, or a problem with the defense going forward is found. The Committee should look into what is actually happening in terms of delays, and whether or not there are late answers to discovery, and very late readiness certificates. Instead of the case being continued continuously with only two or three days left on the countdown, the Committee will find that the cases are being delayed frequently, just as long as they were before, but it's before the four or five week deadline for the case management certificate to be filed. In one recent death penalty case that was pending for five years, the answer to discovery was filed six weeks before trial, but it was also filed with the indication that the names of experts and expert's reports would not be filed until the next court date. So, the issue of delay has to be addressed, we respectfully submit.

Finally, case management conferences are a very important idea in terms of getting these complex cases tried in an efficient manner. The Committee should look into how these case management conferences are actually being used. We

fear that in a number of cases they are devolving into *de facto* plea discussions, where counsel are trying to get the judge to indicate whether or not he would give the death penalty if it were to go to a bench trial or a bench sentencing. This is very invidious in several different ways. First of all, it is not done as a Rule 402 plea conference, and there is a rule to provide for that. The other side is not going to be that ready if it devolves in that direction. The defendant is also entitled to certain admonishments of rights concerning his situation in the trial court, and he has to agree to any plea conference under Rule 402. It is not appropriate for a *de facto* Rule 402 conference to be held under the guise of a different type of case management conference.

Those suggestions might sound generally prosecution oriented, but we are going to see what the prosecution has trouble with more than anything else.

Let me close with the fifth observation, which is relevant to both sides of the bar. A very important problem has been encountered with the so-called broken cases under the former system was the lack of professionally trained attorneys, and in some instances perhaps, also under-trained judiciary. Several years ago we had the report of the Task Force on Professional Practice in the Illinois justice system. This was issued before all the other reform initiatives were undertaken, and it recommended that the attorneys who were handling the vast bulk of capital cases, all of the Assistant States Attorneys and all of the Public Defenders, should be

given more adequate compensation, in order to retain a professional group of attorneys competent to handle these cases. Ideas such as loan forgiveness and also other stipends were recommended at that time. This report, which has not been impeached once, has been adopted and cited by a number of bodies including the Illinois Supreme Court, and the Ryan Commission in their recommendations to the legislature. While the Committee studies the reforms that have been implemented, it has to also keep in mind what reforms have never been implemented, and when it assesses a reform such as increased training and increased compensation for private defense attorneys, it should also look into the continuing problems faced by the public sector in retaining and attracting the appropriate attorneys.

Those are the five general comments that the attorneys in our office have come up with, that they thought would be helpful to the Committee. I thank you for letting me put those on the record.

Mr. Sullivan. Thank you very much, Jerry. Does any member of the Committee wish to ask Jerry a question, or make a comment on Jerry's testimony?

Questioner. Inaudible.

Mr. Nora. No, the information that I have is under the state funding through the Illinois State Police, one hand held camera was provided per suburban District. So the Sheriff's department in Old Orchard from the Second District would have one, and five were being shared under that plan for approximately 135 municipalities.

There may be some departments that have purchased their own video cameras, but we have not yet encountered them in a homicide investigation, we do not know about them.

Mr. Sullivan. Jerry, may I ask you with regard to the electronic recording. Apart from the matters that you mentioned, which is the lack of adequate recording facilities and the sound proof rooms, otherwise is the recording going alright as far as the recordings are concerned.

Mr. Nora. As far as the technical recording goes, I know of no other technical problems with the recording.

Mr. Sullivan. What do you hear back from the police about their support of or opposition to the idea of recording?

Mr. Nora. The best reports I've read have been reported by yourself, Mr. Sullivan. I think the police generally adapt to any legal requirement placed on their investigations, and this has been another instance of that. I'm sure there are some officers who feel less comfortable in front of the camera than others, but that has nothing to do with their opposition to the reform. It is being done. Indeed, I think the subcommittee that I sit in on, when it heard evidence from the two suburban homicide task forces, the implication that I gained from them was the police, if they are doing anything, are erring on the side of insisting upon getting video or tape equipment available before they will undertake an interrogation. So this isn't

a police opposition problem, but it is a change in practice problem that has implications for the truth finding process. If the police are not adequately trained on the fact that they can take statements when there is no equipment available, their ability to investigate is going to be crippled a bit, if they are unwilling to talk to those suspects.

Questioner. With regard to the problem you mentioned regarding the improper use of case management conferences, I believe, and the plea discussions, is there any documentation as to how often that has occurred, or where it has occurred, or in what kinds of cases it might occur?

Mr. Nora. I cannot comment on cases that are presently pending. I think the Committee, when it talks to other attorneys, should consistently look into that problem when cases are completed, after a verdict, a finding, or plea. I think then it is appropriate to review those cases and see if that sort of thing has happened.

It might also be good to talk to judges and ask them if there have been attempts. I don't mean to say that's misconduct or misuse. I think it's a very natural thing, when an attorney representing a client who may be facing death is in front of a judge and has to give him information about the case. There may be a natural tendency to do everything you can for one's client, and kind of read the tea leaves and then jiggle the cup a little bit to get the tea leaves to move, and then it falls down.

Questioner. So it might it be an appropriate thing for us to inquire of judges when we ask judges about various reforms?

Mr. Nora. I would trust your subcommittee to look into it any way that is appropriate. I just can't go into specifics on cases.

Mr. Gottfried. I'd like to ask you something. You mentioned something about loan forgiveness and compensation. I just returned from a meeting of nationwide public defenders, and one of their big concerns were that we spend all of this money training attorneys to be really fine trial lawyers, and then they leave because they have to address this huge debt that they have. Is that a similar problem for State's Attorneys?

Mr. Nora. It's the same problem for State's Attorneys. Both the Public Defenders and State's Attorneys attract a cadre of attorneys who are not coming first for the pay, but for the joy of the work, the love of the work. But it's a matter of being able to get them in the first place, and then to keep them. Family responsibilities, inflation, and other things get caught up. Mr. Howard's office, I don't know if they've had a cost of living for several years. But that essentially is a pay cut that his attorneys are sharing with the attorneys in my office, and other things don't go down.

Mr. Sullivan, when I entered law practice some time after you did, my gross salary as an Assistant State's Attorney would pay for my entire education at

Georgetown Law Center in under 11 months. Now Chicago law students in any of our area law schools coming to my office is going to have to work over two and a half years before their gross salary will match the money they spent in law school. A much higher percentage of that now is typically in loans rather than past paid tuition.

Questioner. Jerry, you mentioned earlier, you said there is one camera per the five judicial Districts, that one hand held camera is in each of the five Districts?

Mr. Nora. That is my information, yes.

Questioner. How much does one hand held camera cost? I mean, I don't understand why this is. The police have looked at this as a significant financial burden. Who is the keeper of the camera in each District?

Mr. Nora. I think that like many things, the best intentions frequently have unintended consequences. What happened here was the legislature provided money to the State Police to set up pilot programs, then the mandatory taping caught up with that pilot program reform. At the same time other agencies, such as my office, are encouraging police departments to adopt uniform recording practices. You know, we don't want Robbins and Skokie and Evanston to have three completely different types of recording programs, using DVDs in one place, tapes in another place, with technology that may become obsolete. We'd like them all to use the same ones.

So it's a matter of 136 jurisdictions looking for leadership. The leadership was provided, but the money was not provided, so it's the equivalent of not having armor on our HUMVs.

Questioner. I just don't know how expensive those hand held cameras are. Maybe someone from the police association, I'd like to talk to them about their applications. I agree with you there should be some kind of uniform standards that should be applied, because you do have multiple ways to record statements, and one may be better than the other, but I think for purposes of clarity, and as you said it would make a lot of sense to have one. I just am having a hard time trying to absorb the fact that these municipalities feel this is a significant out of pocket expense for them to purchase a hand held camera.

Mr. Nora. I don't pretend to speak for where they are coming from now, but I would remind us that some of our jurisdictions in Cook County, we literally have some jurisdictions that cannot afford to have a police department, where they are driving automobiles with 200,000 miles on them; where they have not yet put in a fax machine; where they are trying to find other departments to take over policing responsibilities. Those are the jurisdictions where we are going to have many of the homicides, unfortunately, so I think this is an area where a comprehensive reform may be appropriate. Sure, some police departments probably could shell out $500 for a system very easily. Whether it would fit in or be the ultimate thing

or not, I don't know, but I think that comprehensive reform in addition to this reform would be very good. Thank you.

Mr. Sullivan. Thank you very much, Jerry. I'd like to introduce Kirk Dillard, he's just joined us. Kirk, glad you came. And Dan Rippy, would you give your office? *Mr. Rippy.*

Legal Counsel to the Illinois Senate Judiciary Committee.

Mr. Sullivan. Pat McAnany is our next witness, from the Illinois Coalition to Abolish the Death Penalty.

Patrick McAnany

Tom, what I'd like to do is bring our Research Assistant with me. I'm going to give a short introduction, then she has a lot more that you'll see in front of you to talk about, Regan McCullough.

My name is Patrick McAnany. I'm President of the Illinois Coalition to Abolish the Death Penalty. I want to thank all of you for the opportunity to testify before the Committee, and for what I know is going to be a long two or three years of service that you've already done, and for what you are going to do.

Let me say something about our organization and just in passing, why abolition, I think, is an appropriate topic for this Committee.

It's true that the enabling legislation that created this Committee doesn't say that it should consider abolition, only that it should study the impact that the

reforms have on the capital punishment system. Still, I think the logic of this statement suggests, even if it doesn't demand, that with finding none of these reforms are working in capital punishment, that would raise consideration of abolition as an alternative to reform.

Be that as it may, the ICADP is here to ask the question of how the system is working now. We have some answers to that question, as our Research Assistant, Regan McCullough, will be reporting shortly. But the data we present and we have collected raised many more questions than we ourselves are able to answer. We want to put these questions before the Committee so they can come up with some answers to the questions that our data raise.

For starters, the ICADP would urge the Committee to take up the issue of creating a permanent and ongoing data collection system that would support definitive answers to the questions raised in the enabling legislation. At present, all we have by way of statewide and publicly accessible data are the several reports issued by ICADP, and we here readily acknowledge in public that our data is far from complete and not entirely accurate, since all the data we collect depends upon our ability to beg from those agencies that do collect the data, to give us some of that data. So, that's the first thing.

Second, ICADP would ask the Committee to examine very carefully the issue of eligibility in selection for the death penalty. I know you're doing that, but

we want to emphasize that again. We think this is the heart of the matter, since however fully compliant the system is in terms of procedural due process, if the system has a biased protocol for determining who will get the death penalty, then procedural fairness will not cure this fatal taint of arbitrariness.

I mention here what the Committee already knows, but it bears repeating. First, that the Illinois statute defining eligibility is extremely broad, inviting choices which make bias all but impossible to exclude. Factors making up this breadth are, first, a very generous definition of first degree murder. I know there are many lawyers on the Committee, and they would know this as well as I, but when you look at the Illinois statute and you read down in the murder statute, you will find that you can be convicted of murder by knowing that the act you did creates a probability of great bodily harm. Now I think that is a very, very broad definition of murder, as well as the fact that these acts can be first degree murder if committed in the course of a forcible felony, and further, as the Governor's Commission reported, there are 20 factors of eligibility for selecting people for the death penalty. I think these things together should alert us and the Committee that this needs careful consideration.

This raises of course the issue of overbreadth, which is a constitutional issue. How you all researched this we are not trying to tell you, just the fact that, yes, we know you are doing it, yes, we urge you to do it carefully and well. We realize that

the State's Attorneys Association has issued protocols on selecting people for the death penalty, and we would ask the Committee to carefully consider what those protocols do by way of limiting that choice.

The third area of concern of the ICADP is the degree of proof under current law in imposing the death penalty. After people are already found eligible for the death penalty, then either the jury or the judge has to make a determination based upon aggravating and mitigating factors of whether or not the death penalty should be imposed.

Last year this issue was raised in the General Assembly by a consideration of the no doubt bill, and some of you may have been there for that discussion. It passed the House, it failed in the Senate. What the bill would have done is raise the proof of imposition of the death penalty from beyond a reasonable doubt to no residual doubt.

I raise that issue here because of our concern about the impact of such a rule on such cases as defendants who are seriously mentally ill. Later in the testimony someone from NAMI is going to talk about that issue, but I pinpoint it here.

A final area we'd like to mention is cost. Now Jerry Nora has already mentioned cost, and costs are a critical consideration. Indeed, the enabling legislation says that the Committee has to look at cost, but Illinois has had many considerable committees looking at the death penalty, and there never has, to my

knowledge, been a cost study done in Illinois. So, it seems obvious to us that this Committee that is committed to examining the impact of all of these reforms, Supreme Court rules, etc., etc., on the death penalty system, you are going to have to look at the issue of cost.

Thank you for taking this testimony. Know that ICADP is just as interested as this Committee in answering the question of how the death penalty system works in Illinois, and will continue to aid the Committee's work where we can. Thank you very much.

Mr. Sullivan. Thank you Pat. Regan, are you going to supplement what Pat said?

Regan McCullough

I am. I'm going to speak to the data that we have currently. I'd like to take a minute to say thank you for letting me speak today, I appreciate the opportunity.

Speaking to Pat's point about appreciating what the Committee is doing, and wanting to answer the same types of questions, we thought we would come today with the data that we have, and what we know, and how we got it, and how we think the reforms have impacted the trends that we are seeing currently.

Now this is 2006 data, so it's for all the cases that are going on in Illinois this year, whether they are pending or they have been resolved, or ended in a non-death sentence. There were three this year that have ended in death. So basically

what we know is that Illinois as a whole has 208 current cases for this year. 139 of these are still pending, and 66 have been resolved throughout the state.

One of the major trends that we have been seeing is that the death penalty cases are now, more than ever, being resolved without being handed a death sentence. In three of these cases this year the defendant was found not guilty. So I think that is worth examining.

Mr. Sullivan. Will you repeat those statistics slower please?

Ms. McCullough. Sure. Illinois as a whole has been resolving cases at a much higher rate, meaning that they have been ending capital cases in non-death sentences, that is how we defined resolved. Cook County has resolved 30% of their current case load for 2006, and the greater Illinois area has resolved 40% of their capital cases this year. Three of those, two in Cook County and one in greater Illinois area, have ended in a not guilty verdict. As a whole, the State has only handed down three death sentences this year, which represents about 1% of all the current cases in Illinois. This trend seems to suggest that prosecutors will seek the death penalty as a way to use it as a plea bargain to secure a conviction or a long sentence. I've submitted an article too with my packet, in which the Kane County State's Attorney admitted that he seeks the death penalty, at least in part, to enhance his plea leverage. I also put in my packet our Excel sheets, showing you

in those cases that were resolved without death what the outcomes are, to the best of our knowledge.

Since the moratorium in 2000, the number of death sentences has continued to decline and has remained relatively low. Currently there are 10 men on death row in Illinois, and this is equal to the number of death sentences that were imposed in the year 2000 alone, so that shows a trend that suggests that if it keeps going in that direction, the death sentences handed down each year will soon approach zero.

The question about this decline in the number of death sentences is whether or not this decline can be attributed to the enacted death penalty reforms in Illinois. National data suggests that the reforms may not play as big a part as we had thought, because in other states where there have been no reforms the decline of death sentences also exists. The national trend, in fact, is a steady decline in the number of death sentences per year. Indiana went from 2.9 per year in the time period '88 to '97, to 1.3 deaths per year in '98 to 2005. Similarly Missouri went from 9.2 to 2.9, which is a 69% decrease. Ohio went from 12.4 to 5.9, suggesting a 53% decrease, and Illinois went from 11.5 to 3.9, which is a 66% decrease.

A 2005 Gallup poll suggested that public support for the death penalty had dropped to 64%, which could also help explain this decline in death sentencing and in seeking the death sentence. Public opinion has changed since we've had so

many exonerations, and with Governor Ryan's commutations. The national trend, especially to life without parole as an alternative, has been to reject the death penalty. The number of death sentences imposed annually has been at a historic low since the death penalty was reinstated in '76. Research is also suggesting that the public finds life without parole to be a more severe punishment than the death sentence.

As ICADP has reported in the past, Cook County accounts for a large majority of the capital cases in Illinois. They make up 88% of all in greater Illinois, which is made up of 101 counties. Only 9 counties are currently seeking the death penalty. DuPage County is currently prosecuting 7 of the 18 pending cases throughout the greater Illinois area, and the next closest single county is Kane County, which has 3 pending cases.

Another major issue in that we wanted to address, in addition to the statistical data presented, was that the prosecutions of death penalties have raised some serious issues. We wanted to highlight a few of the cases for you. In Will County this year, a juror was improperly removed after deliberations had stalemated in the death penalty trial of Brian Nelson. The judge, who favored the death penalty for the defendant, replaced the juror in question rather than discharging the jury. The death sentence was returned by the new jury. I have also attached an article for you regarding that.

Maurice LaGrone, a prosecution in DeWitt County. Enormous sums of money were expended in a trial that saw the use of numerous jailhouse snitches, which continues to be an issue. The case involved the drowning of three children in the lake. The defendant maintained that it was an accident. His attorney sought an involuntary manslaughter charge to the jury, but the judge refused. After finding the defendant guilty of first degree murder, the jury refused to return a death penalty eligibility finding, even though LaGrone was convicted of three murders, because they did not believe the killings at issue were intentional.

There was also a case in Gallatin County, the case of Jenny Gibbs, that ended in a not guilty verdict from the jury. The prosecution cut a deal with her co-defendant in a double murder home invasion robbery case.

Mr. Sullivan. We are not here to debate whether there should be a death penalty.

Ms. McCullough. I understand. Beyond the issues we've raised regarding the administration of the death penalty, I think it's most important to note the challenges we face in regards to data collection. Reform number 84 called for the creation of a database. The Governor's Commission recommended in its report that the information be collected at the trial level of all first degree murder prosecutions, and not just in cases where death was sought. They decided that this information would be helpful in determining whether the death penalty was being applied fairly, and they recommended collecting the data on a form that contained

various details of the trial, and that these forms be collected and maintained in a central location. Although they advised against any form being a public record, they suggested that the Illinois Criminal Justice Information Authority keep the data in an anonymous format and make it available to the public. We strongly encourage this reform, and encourage you to look at it as one that can have a severe impact if it were imposed.

Recently Lisa Madigan's office put out guidelines for seeking the death penalty in first degree murder cases. The guidelines included a form called the Capital Litigation Doc Sheet. We feel that it is essential that prosecutors fill out this form and maintain the data contained in the forms in a manner that is accessible to the public. This way, when it's time for election, the general public can make informed decisions based on the issues that their elected officials are taking.

Another reason why the fact sheets are important is because continued critical examination of the application of the death penalty is essential to insure a fair criminal justice system.

We are the only organization in the state currently that is maintaining a publicly available database in capital cases. I know Pat spoke to this point, but to that end we cannot claim that our information is official, but it's the best we can get our hands on. So in keeping with recommendation number 84 of the

Commission, we think that the fact sheet should be filled out for all first degree murder cases.

There have been numerous issues raised by the commission, 85 recommendations suggested to fix our system, and we maintain that the system cannot be fixed.

Mr. McAnany. Let me just, if I might just add. Regan has first hand experience because part of her job when she came on in June, July I think it was, part of her job was going to the court and pulling these records. What we began to find is that the records, even of completed cases, are often hard to put back together. We thought we could go, oh, all you've got to do is pull the record, pull the file and you'll find all the answers. The answer is these cases are very, very hard to reconstruct even from what is in the official record. So, even if we did keep records, it would certainly have to be improved.

Mr. Sullivan. Thank you very much Regan. Pat, before you leave, given your direct testimony, now we may have cross examination.

Mr. Nora. I've dealt with other members of your organization. It's been always a pleasure to deal with folks in your organization. As you make your case in the future, I'm sure that you would agree with me that it's important that you do not, inadvertently, promote any myths that when they are debunked they undercut whatever value there is in your case.

Mr. McAnany. Thank you.

Mr. Nora. One myth that is going around today and, it was repeated just a few minutes ago is this: there is a misunderstanding that the Illinois death penalty statute would permit the death penalty whenever the shooter, or killer, is committing an aggravated battery, that is, in your words, a person who know that his actions have a great probability of causing death or great bodily harm. That is not the case. If a defendant is committing an aggravated battery, it would be unconstitutional, it would be what the Supreme Court would call double enhancement, to say that just the fact of death enables it to become a death penalty case.

I think when the data becomes available in better form, you will find that approximately 25% of the murders occurring in Illinois are, on their face, before we get to the age of the defendant, or the mental condition based on the act itself, possibly might be eligible for the death penalty, and that approximately 75% are automatically ineligible. But year in and year out, that's the approximate figure. We will get the data, any data your need, and you know that we've been supplying data to you.

Mr. McAnany. You have supplied us some data, yes.

Mr. Nora. I wouldn't expect you to change your case and suddenly say the death penalty is a good idea, but I want you to make the best case possible without promoting that misunderstanding.

Mr. McAnany. Jerry, we don't have time to debate this. We will talk about this later, because I want to understand the remarks you're making.

Mr. Nora. Secondly, both sides of this debate need the best data and should make the best cases possible. I would caution anyone from ever predicting that things will max out at zero, or at 100%. Otherwise a few years ago we'd have been saying that everyone will be committing murder in another 20 years.

Murders are going down, clearance rates are going down, and therefore death penalties will be going down. I urge you to disaggregate your data and to make the best case possible.

Mr. McAnany. Thank you very much.

Ms. Bienen. You mentioned in the summary of your quantitative data that there were three cases where the outcomes were not guilty verdicts?

Ms. McCullough. Yes.

Ms. Bienen. What do you see, what do you think is the significance of that, and why do you include that?

Ms. McCullough. Well, in keeping with the issue of cost that we raised earlier and how that needs to be looked into, I think that funds are definitely spent that, if

death was not on the table in the beginning, it wouldn't have happened. So I think that's important. If the jury is returning a not guilty verdict, in my opinion that shows that in the beginning we probably could have not sought the death penalty, there could have been some kind of plea agreement in the beginning. I don't know that that's how it works.

Questioner. Is it possible that the defense put on a better defense because of the death penalty?

Ms. McCullough. No.

Mr. Schwind. I'm looking at the second page of your handout saying currently there are 10 men on death row. Do you know how many of those cases have gone to the Supreme Court, and have their sentences been confirmed?

Mr. McAnany. Two.

Mr. Schwind. Two, correct, and both of those cases were done after the reforms, or just about when the reforms were coming in, but they were both prosecuted under the reforms, is that correct?

Mr. McAnany. That is my understanding. One of them was tried by you.

Mr. Schwind. Yes, that's correct, Curtis Thomson. I won't get into that because this is not a debate as to whether the death penalty should be a law or not. But I do take exception to some of the factual misrepresentations in your People of the State of Illinois v. Curtis Thomson summary. Be that as it may, as to the other

eight current death row inmates, their cases are before the Supreme Court. Would it be accurate, and I'm just asking this, wouldn't it be accurate to say that there has to be some idea, or at least some effect of these reforms have come into play, because the death penalty was affirmed by the Illinois Supreme Court?

Mr. McAnany. I think, Mr. Schwind, the answer to that is certainly the impact of the reforms has had some effect. I think the point here of citing national data is that we can't simply assume that the death penalty is being driven down only by reforms. That's the point.

Mr. Schwind. I understand, and that actually leads to the segue right into my next question. On the next page you say that in fact the national trend is a steady decline in the number of death sentences per year. In '99 there were 276 death sentences nationally, and by 2005 that number had dropped to less than half that amount. How many cases were there where the death penalty was a factor that didn't result in the death penalty, do you know?

Mr. McAnany. We don't know that.

Ms. McCullough. I don't know.

Mr. McAnany. No, we don't know.

Mr. Schwind. What about 1999?

Mr. McAnany. For Illinois or for nationally?

Mr. Schwind. Do you know how many death sentences were sought in the 276 nationally where the death sentence was handed down?

Mr. McAnany. No, Rick, we don't even know it for Illinois. NOW collected the data on the number of first degree murder convictions in that ten year period, so they did that and it was painstaking, but right now I don't know that Jerry Nora or anybody else can say, how many first degree murder indictments there have been, how many first degree murder convictions there have been, and then how many death penalty cases there have been. So we don't know. All we know is that, in the end, we've got three death penalty cases this year, and we have some cases we know that were resolved without the death penalty, but we don't know what that represents, those total figures. That's exactly the type of thing that Professor Bienen and your Committee are collecting and going to be looking at, and it will be a big help to us.

Mr. Schwind. So there is really nothing you can put, you can't put any emphasis on these numbers until you get more data then?

Mr. McAnany. Well I think maybe that's the point of introducing what data we have, and saying you guys have a lot of work to do to fill in many, many, many blanks.

Mr. Schwind. But you do admit in the beginning that the downward trend could be because of the enactment of the reforms. Is that fair to say?

Mr. McAnany. Oh yes, I don't think there is any doubt that we are saying the reforms had some impact. It's for you guys to figure out how much impact it has, and what else is happening in this whole system. Not just the reforms, but its cost type of thing. To me, I'm amazed that Illinois has never done a cost study. Many other states have done cost studies, and so the legislature is going to say, wait a minute now, what's this costing us? How much are we putting out to get this result? Is it going to be worthwhile? That's why I said bringing up abolition, call it any name you want, but cost benefit analysis is going to be ultimately important here. A cost benefit analysis is going to be important for the legislature to say, what are we getting for the money we are putting into it this system? I think it's a legitimate question.

Mr. Schwind. I'm done, thank you sir.

Mr. McAnany. Yes, thank you. Thank you Mr. Schwind.

Questioner. I just wanted to mention that the Death Penalty Information Center might have information nationally available, and that's on the web. But also I want to ask whether or not the coalition would be good enough to provide the Committee with an electronic form of the data you have collected on cases, and also whether or not you have collected any data on statutory aggravating and mitigating factors by case?

Ms. McCullough. We have very sparse data on the aggravating and mitigating circumstances. We get it where we can, if we can. That's why I didn't include it in this table, because it's not very complete at all. Same with victim data.

Mr. Sullivan. Regan and Pat, thank you very much.

Mr. McAnany and Ms. McCullough. Thank you.

Mr. Sullivan. Thank you. Our next witness is Jennifer Bishop Jenkins, for the Illinois Victims Organization.

Jennifer Bishop Jenkins

Hello my name is Jennifer Bishop Jenkins. I'm from Northfield, Illinois.

On April 7th 1990, a 16 year old Winnetka resident shot and killed my pregnant sister, Nancy Bishop Langert, her husband Richard, and their unborn child.

My day job is that I am an Illinois Field Director for the Brady Campaign To Prevent Gun Violence. I'm here today primarily in my capacity with an organization, Illinois Victims Organization, that has recently organized itself around issues of sentencing that are of interest to Illinois victims.

I wanted to thank you all, especially for reaching out to me and inviting me to come and speak, because what you all are doing is so incredibly important to victims. I want to really inject, if you don't mind, the emotional component. You

guys are going to be dealing with a lot of data, and a lot of laws, and a lot of procedures, and a lot of meetings, and a lot of white paper. But in the end, what you do, and what comes out of what you do, is so important to so many peoples' lives.

It really does make a difference in our healing, in our emotional state and in our health, and I just want to applaud you for the process that you are undertaking in trying to make the system better for people, and I really am grateful to you for that.

My main point that I would like to get across to you today on behalf of victims is that it's more important than I can every possibly tell you, that when prosecutions take place, and when trials take place, that they get the right guy. That is so important to victims.

I could spend hours telling you the stories of the agony of victims where they haven't gotten the right guy. Just for example, in my case, there was a six month period between the time of the murder and the actual arrest of the offender. During that six month period of time, some of you may recall some of the bizarre theories that floated in the media. They actually ignored evidence that would have led them to the correct killer. They actually had clues; a pawn shop found some handcuffs that were turned in, that a guy had bought handcuffs from them. They

actually had an evidence card that the offender was seen near the scene, and he already had a record on other issues.

They actually ignored pieces of evidence that would have led them to the killer at the right time. Instead, what they pursued was this bizarre theory about international terrorism and the Irish Republican Army, because of some human rights work that my sister had done, and pursued a bizarre, politically media flashy, very strategic theory, that made them look good and got a lot of headlines, and seemed very splashy politically.

But in the end my point is this: that in their investigations, politics has more of an influence than evidence sometimes. So I would really like to emphasize, to ask you all as a committee, to emphasize that when investigations are done in murder cases, that you all would help them to create a system where politics matters less, and evidence matters more.

There's tremendous devastation that happens to victims in the course of obviously not just the murder, but the process after that. I want to just briefly mention, and I could supply documents to your committee more if you want from national organizations, but trauma is a very real thing. Trauma has mental and physical consequences that are extremely severe. It also has costs to our society as whole, larger costs. People become depressed, they become disabled, they are not able to perform their work, they get sick. People become re-traumatized by the

system that happens after the crime, in addition to what happened at the actual crime.

Even more interesting from a victim's perspective is what happens emotionally. In the victim's mind, as a bond is created to the very process that the prosecutors and the police and the whole investigation and trial process takes place, there is an actual emotional bond that is formed. Because at the time of the greatest crisis of their lives, those people that are handling the case become their saviors, their only hope for healing, and they cling on to them in ways that are so profound. I think we have actually seen examples of this in some of the exonerated death penalty cases that came from the time before the reforms, where victims family members have been unable to let go of the belief that it was the first person that was accused, when it in fact wasn't, because they have been unable to let go of that. That emotional re-traumatization has been quite profound and quite severe.

There is a very strong relationship that exists between victims and the sentences that are given. Now, I'm here representing many victims. We have diverse opinions on the death penalty. Some of them strongly favor it. Just even in the victims' organizations that I am a leader in, both in the state and national level, there are very diverse opinions on the death penalty.

I personally oppose the death penalty, because I believe it is bad for victims because of the process. It ultimately promises things that it cannot possibly deliver, it artificially prolongs their healing, and it holds them in a place of anger and seeking vengeance that is not healthy, for a long time. But I know there are many diverse opinions about that.

One thing that most of us do agree on, however, is that life without parole is absolutely a good thing for victims, and for first degree murder cases where there is no mental illness there's just no question that life without parole is a really good sentence, it's got tremendous benefits for me personally. I've been able to do for the last 16 years some very significant work in crime prevention, in public advocacy, in ministry work, in victim offender mediation, in peace making efforts. I've been very, very active, and all of these things I've been able to do because I've had the peace knowing that my offender will never get out, and that I will never have to constantly go to appeal cases and trials, ultimately resulting in executions.

So for us, death penalty cases being rare and really well done is incredibly important, and that you continue to protect an unthreatened life without parole and truth in sentencing. Protecting the work of prosecutors and law enforcement is also very, very important to victims.

My sister's killer is an unrepentant sociopath who, even though he was a juvenile at the time of his crime, is dangerous. Life without parole was a very appropriate sentence for him. The research says that he will probably never be able to be reformed.

But these reforms seem to me are really working, every single one of the reforms that I have watched, and I have been watching very closely. I have been deeply involved with this issue for over a dozen years, and I believe these reforms are good. In fact I would encourage you to take up even more of them. But there are a couple of things that I have been seeing that I think might be worthy of note at this point.

One thing that I am seeing since the reforms have been put into place is that there are some delays in the system. Delays in the system are not good for victims. It's very, very difficult for us emotionally as we go through this process. We don't get the help, the support, the information that we need in order to understand these things.

Some delays obviously are in order to make sure you get the right guy, that's all for the good. But when you have, for example, I understand the new discovery depositions, they can delay them for good cause shown. Sometimes these can be used to actually, I think, hurt the victims in artificial ways that are not necessary, so I would encourage you to look at that deposition reform.

And then also the process of discovery with regard to defense attorneys. I know quite often defense attorneys in recent cases are not providing evidence under discovery until just a matter of weeks until the trial begins. This also delays trials, and is very hard on victims. So I would ask that both prosecution and defense work in whatever ways they can to come forward in as speedy a manner as possible.

But in the end, whatever we can to do to make sure that we're convicting only the right people. All of the other reforms I strongly support, the videotaping of testimony and so on, are so important, because we have to make sure we don't do what we did already 18 or 19 times at least that we know of here in Illinois in recent years, when we put those victims families through unbelievable hell because we've gone after the wrong guy.

So, thank you so much for being about good process, because process matters to victims. Thank you.

Mr. Sullivan. Thank you Jennifer. Now let's see if we have some questions.

Questioner. Does your organization recommend an independent agency to help the victims during the trial process?

Ms. Jenkins. Yes, sir, it does. Thank you so much for asking that question. It is one of the problems for victims in the system. I've been in national conferences

where we've had meetings about this. This is an issue that I've given some thought to, and I know a lot of folks have.

Right now, nationally, victim witness advocates are employed by prosecutor's offices. I understand to a certain degree they have to, because of the fact that they need access to the information that prosecutors' offices have. So for that reason I think that there needs to be some relationship. But when you have the prosecutor and the defense attorney in an adversarial justice system, with the victim sometimes caught in the middle, and each side has to advocate for certain points of view in a trial process, the victims can sometimes, if they are emotionally tied to the prosecutor as they are, the victims can be bound up in this win-lose scenario, like if the prosecutor doesn't win I don't win. This is a very dangerous situation for victims emotionally. The state that actually tried it – it was a really good system – they just ran out of money, was Minnesota. They had the victim advocacy piece under an independent ombudsman, and yes, they had a liaison to the prosecutor offices. But having victim advocates as primarily an independent agency is a reform that we have done national reports on and submitted to organizations in the hope that they would consider it. I understand that State Representative Jackie Collins may have actually even drafted a bill around that issue, and I hope that it will get some serious play in the future.

Speaker. Thank you very much for your testimony today, I would just like to urge you to please give to our Committee any national reports or studies that you think are relevant.

Ms. Jenkins. Absolutely.

Speaker. It is important for us to have, with of course the understanding that they would become matters of public record.

Ms. Jenkins. Absolutely, I will make sure I get those to the Committee. Thank you.

Speaker. Just out of a selfish interest for the subcommittee that I work on, have you taken any positions locally or nationally on lineup procedures, on getting the right person? I'd be most interested in hearing about that.

Ms. Jenkins. Yea, I actually can send you some things. Our Illinois group has not, but I know that California's group has, and Texas' group has. I know that victims are very interested in the psychology of what happens under the pressure and the trauma of that point.

I can tell you this from personal experience. When you are in those first few days and weeks and months after a murder like that, your brain is jelly, ok, your brain is jelly. To ask them to make decisions about things that important, at a time when even just the brain chemistry of trauma indicates that there's some very unreliable things happening there. I think it's a significant issue, and I know that

the victims have been very interested in learning more about what the brain research is showing us, and what trauma research is showing us, and so we'll try to get you some articles about that.

Mr. Sullivan. Thank you very much. Just an open question, I'll direct this at you Jerry. In capital cases it is important to discuss what the penalties are and how they should proceed. Now you confer with the victims, the family of the victims anytime there is a case in which you decide you are going to, perhaps, proceed with the death penalty. What weight does the wish of the family have in your decision whether to proceed?

Mr. Nora. I think Ms. Bishop would agree with me that it's the typical practice in Cook County to have substantial, ongoing discussions with the survivors, and it's given a great deal of weight. It's not dispositive weight, there are others, it's not the be all and end all, and I think that's been what you've found.

Ms. Jenkins. Yes, and I think that's as it should be, I don't think the victim should determine sentencing.

Mr. Nora. No, people are split over the state and through the nation on the ultimate penalty, but I think some victims look at the sentence of death as a way to bring closure, and I think that's something which most people, at lot of people in this room would understand, and that it's very important to them to move on. I understand this is doing justice, but also it is trying to proceed with some type of

way to bring resolution to. I understand you've been through a terrible tragedy, and I'm familiar with that case, and I know your sister too.

Ms. Jenkins. Yes, I know.

Mr. Nora. Yes, I do. Just being out of the office for a number of years, I do think there is a considerable consideration that's taken on the wishes of the family of whether or not - if they say that they don't believe in the death penalty and think the death penalty is not warranted in this case, I know it's not something that's dismissed by the prosecutors.

Ms. Jenkins. I would say two things with regards to your comments there. Number one is that most families are actually divided on the issue. In my case alone, there are 12 immediate family members, and that's just brothers and sisters and parents, and then of course the extended family. Victims' families can be a fair amount, a number of people, and quite often there's division within the family members about the issue, and that can be very problematic when a death penalty is at stake.

Another conversation that's interesting that's happening among victims is about this whole psychological phenomenon of closure. I think the current best practice stuff that I'm reading is really saying that the closure is kind of a myth. The victims' movement is moving on - an understanding that really what you hope for is a healing, and an ability to move on and function well in your new normal.

But for the most part you don't ever close, nor should you even want to close that missing piece in your life. It will forever be with you.

Finally, just to affirm that you're right, prosecutors definitely listen to victims. My husband's son was killed in Virginia, that's how we met, at a murder victims' conference. In his case he went to the Virginia prosecutors and said I don't want a death penalty, and they arranged a plea bargain based on the family's request, so it does happen.

Mr. Nora. I'm not quite sure if I agree with you about the closure, I mean I can't speak, I can't stand in your shoes, let's put it that way. But I think it's just a difference of opinion. But you also raise the issue about depositions and perhaps deposition reform, and now I think that sometimes delay ultimately will help the case - that was the purpose of depositions. Depositions were put into place with the intention of strengthening good cases, but also getting rid of bad cases at the early stages. We use the examples we used in civil cases, and that's why depositions are taken left and right in civil cases, because you can bring resolution to bad cases quite early, and that is pro-victim.

Ms. Jenkins. Yes, very much.

Mr. Nora. And that's pro-government, that's all good. But also, I think that a deposition, even though it takes time and they can be delayed, we ultimately will strengthen a better case, which is a good case, and at the next stage before the

Supreme Court. So I think that this is a practice that is being monitored. It's still in its infancy, but I think that it's a very significant reform that was made a few years ago, and whether we go in and make those changes, I think it will take time.

Ms. Jenkins. I support doing them. I want you to know that our organization wanted to speak in support of prosecutors knowing that that can sometimes be a frustrating process for them.

Mr. Nora. It's frustrating. The whole system is frustrating, but being part of the system is probably the most frustrating part, because you're a victim, you're a witness.

Ms. Jenkins. Amen, amen.

Mr. Nora. But that's one of the things, those are the responsibilities we undertake. With that, I appreciate your comments.

Ms. Jenkins. Thank you, thank you.

Mr. Sullivan. Ms. Bishop, you spoke about Steven, and you've indicated that you supported his life long incarceration no matter how long that might be.

Ms. Jenkins. That's correct, that's correct.

Mr. Sullivan. With no possibility of parole, no matter how long he may live?

Ms. Jenkins. Correct.

Mr. Sullivan. No matter how much his medical care and other security needs might be in the future?

Ms. Jenkins. That's correct.

Mr. Sullivan. Do I correctly infer from that that you don't believe that his life, and by inference I assume the lives of the victims in your family, that the life and death of a human being should ever be reduced to a cost-benefit analysis?

Ms. Jenkins. Yes. I think, yes. With great respect to Mr. McAnany who is a good friend and a man I respect, I think that it isn't always about cost. In this case, the killer is an unrepentant sociopath. Research indicates, he was diagnosed as a dangerous unrepentant sociopath. There is no therapy, there is no medication, and the research indicates he will be in this condition all of his life. So there is a matter of public safety. So in that sense it isn't just about the cost of his incarceration, although executions are far more expensive. I think that his incarceration is also a public safety matter.

Mr. Sullivan. Thank you very much. We appreciate your coming.

Ms. Jenkins. Thank you all very much for the good work you are doing.

Mr. Sullivan. All right. Our next witness is Gail Rice.

Gail Rice

Thank you very much. I am Gail Rice. I live in Palos Heights, Illinois. And I was advised by my friend, Jennifer, that my comments need to be short. I have a bit more detailed copy that I will submit to your written record, and also an article in the March 18, 2001 Rocky Mountain News which is pertinent to the case that I

am going to talk about. I appreciate this opportunity to talk to you about issues of fairness in sentencing and the felony murder law.

I come to you both as a murder victim family member, and also as a person who has spent a lot of time with inmates in kind of the restorative rehabilitative nature, working in prison jail and prison literacy, and also prison ministry for the 18 years prior to my brother's murder, and the 9 years since.

I have very grave concerns about the felony murder law as it is carried out, and whether it brings about restorative justice. I come as a person who is very, very committed to the idea of balanced and restorative justice. Even though my brother's case took place in Colorado, I think some of the issues involved might be pertinent to what you will discuss. My brother, Bruce VanderJagt, was a Denver police officer. He was murdered by a skinhead, Matthaus Jaening, on November 12, 1997. Yesterday was the 9-year anniversary of my brother's murder. Jaening was assisting a woman named Lisl Auman, whom he had met the night before. They had decided to move her things out of a lodge 30 miles away from Denver, and move them into her girlfriend's Denver condo. At the same time, they also decided to burglarize her former boyfriend's room at the lodge. And so they loaded up her things and his things as well, and this crime constituted a felony, the burglary of his home. Although Lisl had been worried after she had

met Jaening about his violence and so on, she decided to go with him anyway. He was in a stolen Trans Am with two assault rifles and another rifle.

The burglary was discovered at the lodge, and lodge members called the Jefferson County Police, who began to give chase just as they had loaded up and were ready to depart. While they were being pursued by the Jefferson County police officer, Jaening was high on methamphetamines and he was going in a car that would travel over 100 miles per hour on winding mountain roads. At one point Jaening had Lisl steer the car so that he could use both hands to fire one of the three assault rifles at the pursuing Jefferson County police officer. My brother was one of the first Denver officers on the scene when the car entered Denver, and then nearly crashed in the Denver condo complex of Lisl's girlfriend. Police did not see Jaening at that time, they saw Lisl, and they ordered her to surrender, handcuffed her, and put her in a squad car, and were looking for Jaening whom they knew was armed and dangerous. They think that before Lisl was taken into custody she might have handed Jaening the assault rifle.

Jaening was crouched in a dead-end stairwell, but they thought that he had run down an alley. And so as my brother peered around the wall into what he thought was the alley, Jaening blasted my brother with ten bullets from the assault rifle, killing him instantly. The place immediately became a war zone, swarming

with police officers. Eventually, when the shooting stopped, the police discovered that Jaening had used my brother's service revolver to commit suicide.

Meanwhile, Lisl was transported to the Denver Police Station. She knew that Jaening had killed a policeman, but she did not know that Jaening was dead also. In two separate taped interrogations with the Denver police, she lied to them repeatedly about the burglary. Lisl initially was not going to be charged with felony murder, but this case became very sensationalized because my brother's murder came in the middle of an unprecedented three weeks of skinhead police violence in Denver. Shortly after my brother's funeral there was yet another skinhead murder.

Lisl's supporters pointed out that the political climate of recent skinhead police violence, added to the fact that a policeman had been killed, and that the real killer, Jaening, could not be prosecuted for the murder, led to the decision by prosecutors to try her for felony murder. In July 1998, Lisl was convicted of conspiracy to commit burglary, second degree burglary, and felony murder because of Jaening's shooting at the pursuing police car. Because the crimes resulted in a murder, she was also convicted of first degree felony murder, and under Colorado's felony murder law her sentence was life with no parole.

The jury that convicted her had no idea of the sentence that she would receive if she were found guilty, and some regretted the sentence. One juror

contacted the trial judge and begged to change her vote. That juror was so remorseful that she subsequently dedicated herself to publicizing the case and raising money for Lisl's subsequent appeals. And Lisl's case also became a nationally and internationally publicized case.

Lisl became the national poster child for everything that was wrong with the felony murder law. Her supporters argued in the Colorado Appellate and the Colorado Supreme Court that she had had no intention of committing murder, and she shouldn't have been charged with murder because she was not committing a crime or fleeing from it at the time of the murder. It was extremely rare in the entire country that anyone was convicted of felony murder while they were in police custody at the time of the murder. Even though I was outraged by Bruce's murder, the sentence of life with no parole was troubling to me. I had dealt with many, many inmates, some of them murderers, and I knew that Lisl had received a sentence that was much harsher than many murderers get. Lisl and her supporters were able to use the unfairness of that sentence to rally people to Lisl's defense. The late author and journalist, Hunter S. Thompson, took up her cause, using his money and his celebrity connections to begin a Free Lisl Movement, complete with rallies, her own website, and endless publicity.

After losing the appeal in the Appellate Court, Lisl's lawyers appealed to the Colorado Supreme Court. Meanwhile the Free Lisl Movement and sympathy for

her grew. I was outraged that Lisl was using the unfairness of the felony murder law and her life sentence to obscure her real guilt and responsibility in Bruce's death. In fact, she viewed herself as the real victim. She was painted by her supporters as the primary victim, and she convinced a lot of people who didn't know the facts of the case that she was the real victim.

When the Supreme Court ruling in Colorado came down, both the prosecution and the defense were stunned by the ruling. They upheld the felony murder law and its application to Lisl, but they overturned her conviction and ordered a new trial based on one word that was omitted in the judge's directions to the jury. Neither the prosecution nor the defense had ever argued that point, and I suspect that the Colorado Supreme Court was in fact looking for some kind of loophole because of the enormous public pressure to change the sentence. In order for everyone to avoid the horrible ordeal of a retrial, the prosecution accepted a plea bargain, and Lisl pled guilty to second degree burglary, accessory to first degree murder. In August of last year she was sentenced to six months in a half way house, and nine to twelve years of community corrections supervision.

So after eights years of prison, Lisl was freed. Was I happy that she was not in prison for life? Yes. Was I happy at the amount of time she served? No. I felt that 15 to 20 years was much more appropriate for her crime. I opposed the felony murder for several reasons, besides the fact that it estranged me from my family

members, my sister-in-law, and some of the police officers and prosecutors who wanted Lisl to be in prison for the rest of her life, whether it seemed fair or not.

I believe that an accountability theory is wrong when it treats people who did not intend to commit murder, and who don't actively and knowingly participate in the murder, in the same way that murderers are treated. I think that accountability should be determined on a case by case basis. Ideally, sentences should reflect differing degrees of intent, participation and guilt. When people are convicted of felony murder under an accountability theory, and receive sentences as harsh or harsher than most murderers get, they are likely to feel more like victims than victimizers. Their lives revolve around the injustice that has been done to them, rather than the harm that they have done to others. Because there was an all or nothing mandated sentence of life imprisonment for felony murder, Lisl had no chance to escape life imprisonment except to deny her guilt completely and portray herself as an innocent victim. Her failure to acknowledge her guilt harmed everyone, and compounded the pain of those of us who were the real victims.

I am sure many victims experience this lack of remorse from those sentenced for felony murder. Had no felony murder law been in place, and Lisl had been sentenced to 15 or 20 years, everyone, including Lisl, I think, would have acknowledged her guilt and she might have spent her time. . . .

Mr. Sullivan. Ms. Rice excuse me. Would you . . . .

Ms. Rice. Sure. My experience has led me to believe that the felony murder law is not a deterrent to the death penalty, because I don't think inmates think about it seriously before they commit the crime. Also, I oppose the felony murder law because it has been used in the past to sentence people to death. When I became involved in death penalty abolition work several years ago, I was horrified to discover the number of people who were not actual murderers but who were on death row because of being convicted under the felony murder law. And I hope as you consider death penalty reforms that you would reserve that most extreme penalty for actual murderers. Thank you.

Mr. Sullivan. Thank you very much. We may have some cross-examination from all these lawyers.

Mr. Schwind. I am sorry, I was outside the chamber when you started, and I did not get your name.

Ms. Rice. Gail Rice.

Mr. Schwind. Nice to meet you.

Ms. Rice. Thank you.

Mr. Schwind. You understand in Illinois, death penalty application to felony murder, the person can only be subject to the death penalty under the felony murder law if that defendant or person actually did the killing, or participated and

gave or inflicted an injury simultaneously with the injury that caused the death? Do you understand that?

Ms. Rice. I guess my issue with the law, and I know that they have narrowed down the number of cases that . . .

Rich Schwind. It has always been that way in Illinois. I am sorry. I didn't mean to talk over you.

Ms. Rice. I know they have narrowed the number of felonies in which felony murder can apply. I guess my question is whether everyone who is convicted of felony murder actually has been in fact truly intending to and very much a participant, and not a person who perhaps was caught up in something and didn't know what they were getting into, didn't intend it. That is my concern.

Mr. Schwind. Well, my concern is that you understand that everybody that is convicted in Illinois of murder, first degree murder under the felony murder rule, is not subject to the death penalty.

Ms. Rice Right.

Mr. Schwind. Only certain of the participants, depending on what their participation was. And it is, as you stated, you hoped that the felony murder rule would be dealt with on a case-by-case basis. It is. In Illinois there is no blanket it's the death penalty or not. You understand that?

Ms. Rice. Yes.

Mr. Schwind. The system in Illinois on the death penalty is a bifurcated system. Just because you are convicted does not mean you automatically get the death penalty. You understand that?

Ms. Rice. Yes. Does it automatically mean that one gets life in prison, however?

Mr. Schwind. Well, it depends on the facts of the case, and usually that is the case. That was my next point again, a good segue. The jury in cases in Illinois, and I am only speaking of Illinois, in cases in Illinois, when it is either death or life without parole, are the only two sentences that are available. The jury in Illinois is informed that if you do not sentence him to death, he will receive life without parole. So the jury knows that if we don't give this man death, he is going to be in prison without parole. So the jury doesn't think, oh my gosh, this serial killer, if we don't convict him and put him to death, he is going to be out on the street at some point in time.

Ms. Rice. Yes. But I would question whether some people who may be convicted of felony murder, perhaps because of their degree of involvement or intent, do not deserve a life without parole sentence, which was true in Lisl's case, I think. She deserved plenty of years, much more than she got.

Mr. Schwind. I understand that. But you also understand that is Colorado. And I have been a career prosecutor, and I think it just from the bare facts that you gave it would be very difficult here in Illinois to convict that lady of felony murder,

based on the facts that you just recited. But thank you for coming in and offering your opinion and the facts, and my condolences.

Ms. Rice. Thank you very much.

Speaker. Mrs. Rice, in this business we meet many people whom we only know through the people they left behind. Everyone on this Committee knows that your brother must have been a most impressive man. Thank you for the great thoughts you brought us today.

Ms. Rice. Thank you.

Mr. Sullivan. Mrs. Rice, did you happen to bring material?

Ms. Rice. Yes. I just brought one copy.

Mr. Sullivan. Give it to Mr. Baroni here and he will distribute it. I had one question. Your brother was a Denver policeman?

Ms. Rice. Yes.

Mr. Sullivan. In what year did this occur?

Ms. Rice. 1997.

Mr. Sullivan. What was his last name?

Ms. Rice. VanderJagt. Bruce VanderJagt.

Mr. Sullivan. Thank you very much.

Ms. Rice. Sure. Thank you.

Mr. Sullivan. Our next witness is Larry Golden from the Downstate Illinois Innocence Project. Sir, do you have written material too?

Lawrence Golden

I do. It is coming around.

Mr. Sullivan. Thank you very much. Please proceed.

Mr. Golden. Mr. Chairman and members of the Committee, my name is Larry Golden. I am an Emeritus Professor of Political Studies and Legal Studies at the University of Illinois at Springfield. And I am Co-Director of the Downstate Illinois Innocence Project located at the University. We thank you for your good work thus far in capital punishment criminal justice reform, and we thank you for the invitation today to speak to you as you assess the state of these reforms.

The Downstate Illinois Innocence Project has been in existence for six years. Its work has focused on providing investigative resources to individuals who are serving long prison sentences where there is substantial evidence that they are actually innocent.

Most of the cases the Project finds itself working on are capital eligible cases where the death penalty was withdrawn during the early stages of the investigation. I can't say how much, by the way, I appreciated the prior testimony of Jennifer Bishop about the need to get it right. We get to see these cases when the State doesn't get it right, but won't admit so in most of the instances.

Most recently the project found much of the evidence that was used in the retrial of Julie Rea-Harper charged in the 1997 murder of her ten year old son Joel in Lawrenceville, Illinois. Mrs. Harper was found not guilty in her retrial in July of this year, after serving two years in prison after her first trial.

We have also been assisting Herb Whitlock, the co-defendant of Randy Steidl. Randy was finally released from prison for a double murder in Paris, Illinois, due to a lack of credible evidence and ineffective assistance of counsel. Mr. Whitlock, who did not receive the death penalty in his original trial, remains in prison, despite the fact that he was convicted on the same evidence as Randy Steidl.

I start with somewhat of a challenge to you. I will posit that the success of your work has actually contributed to the number of potentially innocent people who are being put into prison in Illinois. As I indicated, the Downstate Illinois Innocence Project thus far has dealt with capital cases where the death penalty has been withdrawn in the early stages of investigating the crime. Each of the cases we have been involved in has involved circumstantial or questionable evidence. There has been virtually no direct evidence, forensic or personal, that would implicate the defendant. In each of the cases there was an unwillingness of authorities to look deeply for alternative evidence. In each case, the effect of the prosecutor's withdrawal of the death penalty immediately interfered with evidence

gathering and the quality and extent of legal representation. That is because of the resource question, which I will mention in a second. In each case, the defendant was found guilty despite the weakness of the evidence. It is fair to hypothesize that had the defendants been charged with the death penalty, the ensuing resources from investigation, representation, and trial would likely resulted in findings of innocence.

It is also fair to hypothesize that downstate prosecutors, and I can't speak as much to the Cook County process here, knowing that defendants would be at a disadvantage due to their inability to access resources from the Capital Litigation Trust Fund, and some of the other reforms for capital punishment victims, such as the guarantee of quality, experienced legal representation, strategically withdraw the death penalty during the course of the case.

The Julie Rea-Harper case serves as an excellent example of this problem. Mrs. Harper's son, Joel, was killed in the early morning hours in her home. Prosecutors immediately focused on Julie, rejecting alternative evidence, turning evidence that could have exonerated her against her, such as the wounds she suffered in the struggle with the intruder, which the State argued were self-inflicted. Her crime appears to be that she was in the same house with her son when he was killed, and therefore no one else could have done it. After Mrs. Harper was arrested, she requested the two experienced attorneys guaranteed in

capital punishment cases. The prosecutor withdrew the death penalty, and Julie was left with a public defender who never tried a capital murder case, and she lost the investigative and other resources that could have been accessed through the Capital Litigation Fund. Julie was eventually found guilty, despite there being no physical evidence linking her directly to the crime, but significant physical evidence which supported her report of what happened. Yet with the help of investigation by the Downstate Illinois Innocence Project, a serial killer in Texas was identified as having been in the area at the time of the murder, and he confessed to committing the crime. Other parts of the investigation found that local police lied about evidence in the case, and that authorities did little to pursue the alternative evidence that would have proven Julie innocent. In a continuation of this focus on Mrs. Harper as the only possible perpetrator in this case, State prosecutors issued a statement following Julie's acquittal that no further investigation would be done, leaving the murder of a ten year old boy unsolved.

The point of all this is that something needs to be done to equalize the playing field, to take away the tool that prosecutors are using to put defendants in weak capital cases at a major disadvantage to defend themselves. While many changes may need to be made to the way capital cases are approached, we urge as a start that the Committee look carefully at the effect of the reforms, and recommend to the legislature that they be extended to capital eligible cases, so that

withdrawal of the death penalty does not result in potentially innocent individuals being convicted and given long prison sentences.

I return to my original point with regard to capital punishment reform. The reforms have succeeded in not only providing meaningful protection to those who are facing capital punishment, but also having the result of prosecutors not asking for capital punishment in cases where prior to the reforms they would have. While there may be fewer prosecutions under the death penalty, potentially innocent individuals are being convicted because they are not facing the death penalty. We assure that such a consequence is unintended and undesirable in the Committee's view.

I thank you for your time, and will be pleased to provide you with more analysis and recommendations in the future if you wish so.

Mr. Gottfried. Thanks for your testimony. I would like to ask you a question about a project my office had. It was funded with federal funds, and we lost the funds, but we were given money to provide expert witnesses in serious cases to small counties. Generally speaking, what they did, these small county public defenders, they would use them in serious murder cases, and they would hire investigators and expert witnesses. If the General Assembly were to give our office a program like this, do you think that would help meet the needs that you are talking about?

Mr. Golden. There is no question about it. The program you are talking about was under the Rural Defense Fund. It was unfortunate that that did not get re-funded by the legislature this year. How this gets done is not as critical in our view, as the fact that it does get done. The importance is that we need to understand that when we are dealing with capital eligible cases, it shouldn't be a chess game, although given our system, I understand that it is a chess game in a certain way. In terms of what charge is preferred and what charge is not preferred, with the idea that if you don't charge on one level the resources are taken away, and then the individual is put at a disadvantage. The kind of program that you are talking about goes to exactly that issue, although not to the extent that I would like in terms of the other reforms that impact on this. So I appreciate that.

Mr. Sullivan. I am troubled by this statement on page 1 of your submission that the success of our work has contributed to the number of potentially innocent people who are being put into prison in Illinois, and you talk about Randy Steidl and Julie Rea-Harper. Those are pre-recommendation of reform cases, aren't they?

Mr. Golden. Well, the Julie Rea-Harper case happens right at the cusp of some of the reforms, such as the introduction of the need to have experienced legal counsel. She would have been eligible for experienced legal counsel in her case. What I had indicated is that those are cases that our project has worked on. We are also

working on other cases that are presently pending, where in fact the reforms had begun to take effect, and we are seeing the same kind of problem.

Again, that was not an accusation against the Commission. What I was pointing out was a contradiction in the work, and asking you to look at the impact of providing reforms in a set of cases where, if the prosecutor says we will pursue capital punishment, then in fact there are resources there. Whereas, if the prosecutor says we are not going to pursue capital punishment, but it is still essentially in that same category, the resources are not there. In those instances, put yourself in the position of a prosecutor. Let's say you have, even in your mind, a circumstantial case, you know it may not be the strongest kind of case, and you are faced with this. You can in fact impact on that case by withdrawing the death penalty at that point, and the resources won't kick in. What I am saying is those weak cases, those weaker cases, are exactly one of the points where we need to put some attention. And in fact that is where we are seeing potentially innocent people being put into prison, and certainly being tried without the resources because of that decision being made.

Mr. Sullivan. Well, I question the accuracy of what you are saying because the cases you are citing. If you are talking about the Ryan Commission, the report was issued in April 2002. These are pre-2002 cases you are talking about. If you have cases that have occurred since then in which you say this is happening, then I think

you should tell us about which cases they are, not just make these general statements. Also, I call your attention to the fact that in Recommendation number 83 of the Ryan Commission, it was recommended that the reforms that were recommended that apply in non-death cases be adopted by the Illinois legislature and the Illinois Supreme Court. That was already recommended. So, please don't talk about our work. You may talk about the Illinois Supreme Court or the Illinois legislature, but I don't think you have any cases to support what you are saying, and secondly, I don't think it is our work that you should be criticizing, if it is the fact. All right. That is my opinion.

Mr. Golden. Mr. Chairman, let me just say, I didn't intend the comments to come across as a criticism.

Mr. Sullivan. Well, I don't know how you else you could read this sentence.

Mr. Golden. Okay. I will tell you that my intention was not that it come across as a criticism, but that in fact, as I said, we appreciate the reforms and the recommendations. Maybe what I should have emphasized more is that the recommendation that you just suggested or indicated is in the group, that it be passed along with the resources to pursue it. In other words, I am talking about the recommendations that have passed up to now, not necessarily the recommendations that . . .

Mr. Sullivan. It was number 83, if you read it. . .

Mr. Golden. Okay.

Mr. Sullivan. And I thought, and I have written this, that it is the single most important recommendation of that Report, because it applies to the 98% of the cases that aren't capital punishment, which is the vast majority of cases

Mr. Golden. Well, and I guess what I am saying is, I am supporting exactly your point and I apologize.

Mr. Sullivan. Well, I wish you would change your language in.

Mr. Golden. I will do so, so it is not interpreted in the way that you suggest, because that was not my intention.

Mr. Sullivan. Okay.

Mr. Golden. We are working on other cases, and we are seeing other cases which are post-2002. The Julie Rea-Harper case was in the spring of 2002, March 2002. We are working on other cases presently, but we don't have the results of those, where we are seeing exactly the same kind of pattern. And so, you know, I pointed to those only because those were cases just to indicate the work that our project was doing, not that they are illustrative of the best examples of post-reform.

Questioner. Let me rephrase it. You would say the prosecutors downstate may be withdrawing the death penalty after first seeking it in order to gain an advantage over defendants. I have been hearing other people saying that prosecutors are seeking the death penalty downstate because it shifts the cost to the State from

their understrapped county budgets. Both arguments are *ad hominem* and incapable of proof. They are simply castigating the prosecutor. I understand the remedy you seek is we should simply provide the same means to non-capital defendants as capital defendants. Is that your case?

Mr. Golden. That's correct.

Questioner. Then I suggest, that as you continue to develop that case, avoid the *ad hominem* arguments, and then look for the specific remedies that would be well served in providing them to non-capital defendants.

Mr. Golden. I appreciate your comments. I guess what I would encourage, and I obviously have, at least for some of you, done it in the wrong way, is to encourage you to look at this issue, to look at the way in which these decisions are being made, and the impact on those decisions in terms of the process. And that is really where I am going. So, I think we agree on the end here.

Questioner. You are an attorney, correct?

Mr. Golden. No, I am not.

Unknown. Well, I suggest, ask the defense attorneys on your staff to come in with the evidence, they'll know what I mean. We are hearing criticisms here of circumstantial cases. Trial lawyers will tell you that frequently the strongest case may be circumstantial, such as DNA, that show us where it would be meaningful, practical, just, whatever. But give us the evidence for where these means for these

defense attorneys would make a difference. It is when we start engaging in collateral attacks on the motives of prosecutors, or the competence of police officers, things that are incapable of proof, that you make a case that is too easily impeached and you lose credibility. So bring us in the evidence next time. I think it is a very important remedy that you are seeking.

Mr. Golden. Thank you.

Ms. Bienen. Mr. Golden, thank you very much for your testimony. I would just like to ask you to please bring forward any specific facts or documents regarding cases in the area where you are proceeding with investigations, particularly since you are covering the downstate area. Anything that you could bring to the attention of the Committee or share with us, we would very much appreciate that. Thank you.

Mr. Golden. Thank you.

Mr. Sullivan. Mr. Golden, I apologize if I raised my voice to you. I didn't mean to become angry.

Mr. Golden. Mr. Sullivan, you are the last person here that I wanted to or expected to offend in any way with my remarks. So I appreciate your sensitivity, and I think that we are after the same goal here, and if I expressed myself indelicately, that's my apology.

Mr. Sullivan. Okay, I think we understand each other. That is fine.

Unknown. Take my words as encouragement.

Mr. Golden. I did. And again I think what really is important here, part of it is we speak out of concern for the people that we have been working with, who we find spend years in prison who are ultimately found innocent. The point of my concerns here is the very important need to look at the impact or at least the decision point with regard to the inequities of resources, between asking for the death penalty on the one hand, and withdrawing it in capital eligible cases. And as the Chairman has indicated, that is one of your reforms that has been recommended. And I guess my testimony here was intended to buttress that as strongly as I could.

Questioner. I may be beating a dead horse, but do you off the top of your head have other cases where you can tell us the prosecutor sought the death penalty and then withdrew it because he thought it was a tactical advantage to him not to seek the death penalty?

Mr. Golden. Well, I think at this point I would rather not jump into that pond, because I would be jumping into the *ad hominem* pond.

Unknown. Well, you dove right into it.

Mr. Golden. That's right. I can tell you that we are working on other cases which were capital eligible cases where when the death penalty was pulled or taken off, that the resources were not there for the defense of the individual.

Unknown. Because it is no longer a capital case.

Mr. Gottfried. Because it is no longer a capital case.

Unknown. Right. But from what you are implying is that the State's Attorney did that in order to gain a tactical advantage over the defendant.

Larry Golden. I am saying that is certainly a possibility. It's one possibility.

Unknown. But you have no evidence of that.

Mr. Golden. It would be very difficult to be able to provide direct evidence that, short of the prosecutor saying that that's what he or she was doing.

Mr. Sullivan. Larry, we are going to be having another public hearing in Chicago early next year. So maybe we will see you again. Thank you very much, Larry.

Mr. Parkinson. So there is no misunderstanding, the prosecutor he is talking about in the Julie Rea-Harper case is me. And I tried to stay quiet on this. I only want to make this point. The reason the death penalty was not pursued in the first trial against Julie Rea-Harper was based upon many considerations. I prosecuted both trials. The first ended in a conviction, the second one did not, this summer. Mr. Golden is correct. But insinuating that that is the reason the death penalty was taken off the table is not accurate at all. Julie Rea-Harper went to the State of Indiana upon her indictment. And being in Indiana, we faced extradition problems, and complete consideration of the case. This was a circumstantial case of a young boy killed in the home of his mother. And a lot of considerations went into that,

and a deal was struck in this sense in that if she gave up on the extradition fight and came back willingly to Illinois, bond would be set, a reasonable bond, that we would then proceed that way. And it wasn't used as a hammer, and resources were not intended to be withdrawn from her at all. It just simply was not a capital case. It was pre the reforms. So that was the reason. I just want to set the record straight. And those involved in the case, including Mr. Golden, Professor Golden, know that.

Mr. Sullivan. Thank you. All right. Our next witness is Linda Virgil, from the National Alliance on Mental Illness.

Linda Virgil

Mr. Chairman and members of the Committee. Thank you for allowing me to speak today. My name is Linda Virgil, and I am the legislation Chair for the National Alliance on Mental Illness in Illinois. We are a support, education and advocacy organization for people with mental illness and for their families. In Illinois we have approximately 9,000 members.

The death penalty has always seemed to me to be a rather barbaric, somewhat uncivilized, and certainly an inadequate response, particularly for people with serious mental illnesses. Although certainly we can all understand the feelings of a family whose loved one has been murdered, and their desire for the death penalty for the perpetrator of the murder, I am certainly unable to say for

certain that that isn't what I would want. That kind of revenge might be what I would want, but I would hope that those less personally involved would be objective and wise enough to stop the cycle of death.

I am here to speak specifically about what NAMI's, and we have shortened it to "NAMI," position is on the death penalty for people with mental illness. NAMI believes the death penalty for people with mental illness represents the profound injustice in our criminal justice system. A diagnosis of mental illness means that the brain is ill, and normal patterns of thought and behaviors are affected by this illness. In this enlightened age about mental illness, we understand that a person when they are in the midst of a psychotic episode is not responsible for their behaviors in the same way as you and I are. But there is a real irony at the point that the mental health system and the criminal justice system intersect. Both systems acknowledge that a person's thoughts and behaviors are very much affected by their illness. Yet, when a person is unmedicated, and their behaviors are affected to the point that they even commit murder, what do we do? We give them medication to make them well enough to put them to death. The irony goes even further. If we were to commit the funds that it takes to have a comprehensive mental health system, the number of persons with mental illness who commit crimes would be so dramatically reduced that it would only occasionally surface as a problem in society. Remember, the President's new Freedom Commission on

Mental Health stated that America's mental health system is "a system in shambles," and those of us immersed in it can certainly testify to that. Also when the national NAMI organization graded the states on their mental health systems, Illinois got an F. An adequately funded mental health system would eliminate most of society's problems with people with mental illness, not to mention what it would do for those people themselves.

The irony is this: we know how to treat people with mental illness, we now know what to do, but at this point we prefer to spend money in the criminal justice system, including capital punishment, rather than the less expensive mental health services. But this is an irony that we can correct. Again, I am speaking on behalf of NAMI, and asking for humane treatment for people with mental illness. The death penalty is as far from humane treatment for people with mental illness as we can get.

Now I want to keep this short, and not go into great detail, because it is getting late in the afternoon, but the national NAMI does have a set of recommendations that I think your group would find very interesting and hopefully helpful. I didn't know exactly what type of Committee this was, and now that I find out what type it is, I find that the recommendations from the national NAMI might be very useful to your group, and I would offer the local or the Illinois NAMI. We have an office here in Springfield, and our Executive Director, Laura

Thomas, is sitting back here. We would like to offer ourselves to you for questions you might have, any information you might like on the death penalty as it pertains to people with mental illness. We would really appreciate that you ask us, and we would love to give you any information we have that might help you in your study. Thank you for your time.

Mr. Sullivan. We are broken down into four subcommittees. The function of one is roughly tracking the system as it goes. I think that it would be appropriate if our fourth subcommittee, which is Mr. Gottfried's, this handsome man right here, would be in touch with you. Then you can appear before his subcommittee and bring your written materials or whatever. Then he will bring it to our full Committee. We would like to take advantage of that.

Ms. Virgil. Great. Thank you so much. Mr. Gottfried, I will be in touch. Thank you.

Mr. Howard. If you know, how many states in this country forbid the death penalty to be imposed against someone with a diagnosed mental illness?

Mr. Golden. I don't know.

Ms. Bienen. Thank you very much for your testimony. I also hope you will submit to our Committee the guidelines that have been prepared by your organization and your national organization. I have a question as to whether or not your organization has addressed the very difficult problem of when during the

presentation of a capital case evidence of the mental illness of the defendant should come in, and how it should be brought to the attention of the people who were bringing the case. Perhaps your organization has addressed that.

Ms. Virgil. We have not specifically addressed that.

Mr. Sullivan. You said that there was a report that gave Illinois an F, and that the mental health system in this country is in a shambles? What report are you talking about?

Ms. Virgil. There were two reports that I referenced. The one was President Bush's commission to study the mental health system throughout the United States. His commission was quite effective in stating that the mental health system across the country is in shambles. It's quite an extensive report. The other one that I referenced was the National Alliance for the Mentally Ill, based in Washington, D.C.. They did a study on the mental health services in all of the states. There were others that got an F, but that is like the kid saying, "but he hit someone too." So, that doesn't make me feel any better that there were others that got an F. But obviously the mental health system across this country needs to be addressed, and certainly in Illinois because we got an F. That means our services are not anywhere near where they could be, so people and their families are really suffering.

Mr. Sullivan. That is out of our realm, but it is a very discouraging thing to hear.

Ms. Virgil. Right. It certainly is.

Mr. Sullivan. Thank you very much for coming, we appreciate it. Our eighth and last is Robert Haida, representing the Illinois State's Attorneys Association. We're glad to have you.

Robert B. Haida

Mr. Chairman, Committee, it is a pleasure to be here. I am deeply appreciative of the opportunity to speak to you and answer any questions. I am, I think the professor left, but I think I'd be considered a downstate State's Attorney.

There isn't a more considered and difficult decision that a State's Attorney makes than the decision on whether to certify a murder case for capital punishment prosecution.

I am the State's Attorney in St. Clair County. It is not the largest downstate county, but one of the largest downstate counties. We have currently two cases pending death penalty prosecutions in the court, certified, proceeding according to all the rules, the reforms included. Unfortunately, we have a murder case involving four victims that is pending consideration for capital punishment prosecution at the current time, and we are likewise engaging the reforms in the course of making that decision.

I am here on behalf of the Association, but as I'm sure most of you can understand, we have Jerry Nora from Cook County State's Attorneys office

representing the largest office, and obviously they handle more of the capital cases than anyone else.

I can't really speak for all of the 101 other State's Attorneys specifically, but I can give you my personal experience, and my observation about the reforms, and how I think they are working. My observation is that, whether they are working or not is somewhat of a difficult concept. I think all of us identify that, because the reforms address various issues in the process. Some of them relate to post-verdict issues, such as what the trial judge can do and so on. I can't speak to whether that works or not, because we haven't adjudicated a case to that point yet. I can tell you that the reforms as they relate to the gathering of evidence, the amount of evidence, specifically interrogations, lineups, use of informants, those reforms have raised the bar significantly in terms of what my office, and I would submit, all State's Attorneys offices, use in what we require of investigators, whether it's the Illinois State Police or Sheriff departments, local police departments, everyone has received the message. Everyone on the law enforcement side, I would submit, understands that the rules have changed.

I can give you an example, and I think Pete Baroni knows this, I don't know if Rick Schwind specifically knows this, but other members of the Attorney General's Office certainly know this. St. Clair County started a videotape interrogation process before the reform package was passed. I have to tell you that

initially law enforcement was not totally on board. They perceived it as intrusive into their decision making. We went through much training. Certainly having the statute that codified the reforms put into place made my case easier, because they were looking at the effective date as it related to homicide cases, and they applied that and realized that what I'd been telling them for 18 months or two years was in fact true. There were going to be initiatives on a statewide basis, and we were best served by getting out in front.

It has been so overwhelmingly successful that most of the police departments in my jurisdiction now video tape interrogations in almost every felony investigation.

The police, law enforcement realize that it's better for them. It protects them from false accusations of physical or mental coercion. It's a better end product. It now becomes a judicial decision to make on admissibility, but many of the related issues that we had to deal with, and many issues I think were the foundation for some of the exoneration cases, are now gone, at least in St. Clair County, and certainly across the State, as it relates to homicide cases, I'm happy to report. I know that this gets somewhat beyond the scope of what this Committee is dealing with, but I can tell you that most law enforcement in St. Clair County has responded very positively to this, and it's working for us. At least that part is working for us. I think I'll end with that.

Unknown. You heard Jerry Nora earlier allude to prosecutors maybe being more prone to seek the death penalty, because then the Capital Litigation Trust Fund can be used. In other words, it becomes State financed rather than County finance. What is your impression of that?

Mr. Haida. What I thought Jerry was saying is that, there was an allegation that was being made. We include the 120 days for us to make the decision. Just like everything, there's good and bad in that decision. For example, under the rules I can't talk a lot about the case that's under consideration now in St. Clair County, but I don't think I'd be violating the rules to tell you that the 120 days in that particular case is, we are going to have to make a decision before we're probably going to have information on the psychiatric background of the defendant, just because of the time frames. There certainly are very legitimate reasons to have the 120 day rule for a prosecutor to certify or not. But, the devil's in the details, so to speak. As it relates to that particular case, it can become somewhat problematic.

We include in our process prior to making a decision certainly, and I was struck by what one of the previous witnesses had said about the victims, we get significant input from the victims. We have had it actually both ways. We have certified in a case where the victim survivors asked us not to, they told us that they, what I always get from the victims is, most of the time, they are so appreciative of the opportunity just to talk to somebody about what they are going through. Not

that we can answer all of their questions or solve all their problems, but we've had people tell us we'll support whatever you do, our preference would be no, and we've balanced that with everything else, and sought it, and we've gone the other way. We've had victim survivors pound on, literally pound on the table demanding that we seek the death penalty, and we have, after considering all the facts and circumstances including what they've had to say, and we've declined to certify. We had a question from one of the other members about that, and that's how we do it.

But we also include defense attorneys. If they choose, most of the time they choose not to, but we have had cases where defense counsel has come in and made, without disclosing confidences, but made a pitch so to speak, off the record about what they think the merits or demerits of our case might be, and we've had very fruitful discussions in certain cases about that.

I know you are not trying to put me on the spot, but in terms of prosecutors doing it to shift cost, I don't think that happens, I'd like to think it doesn't happen. But the professor, there certainly is an issue about non-capital cases, and funding of competent counsel. I think, I don't know what anyone else thinks, but my two cents worth is that I think that counsel is a bigger issue on non-capital homicide cases than funding for experts and investigators. Certainly that's not, that's a close second, but I think you have to have, in order to know what expertise you might

need in terms of expert witnesses and the like, you need a competent trained defense attorney to evaluate the case first, and that would be my opinion on that.

Unknown. I think up in Cook County we have a very fine Public Defender office, so it's not such a major problem up there.

Mr. Haida. More of an issue downstate, or out of state I suspect.

Unknown. And in other states where they don't have public defenders, particularly of the quality that we have. I wanted to ask you whether you've had experience with the statute that requires the pretrial hearing on jailhouse informants?

Mr. Haida. I'm glad Mr. Nora left, because I would tell you, we would not, St. Clair County would not, prosecute a death case that relied on a jailhouse informant, and that will not happen as long as I'm a State's Attorney.

Unknown. Right, but now there's a statute that says in a murder case at least you have to submit it to the judge.

Mr. Haida. Right, we haven't done that.

Unknown. That hasn't happened?

Mr. Haida. No.

Ms. Bienen. Did I understand your testimony at the beginning to be, one, you felt the reforms have had an effect, and that a more stringent standard was being applied in whether or not the eligibility criteria was being met for capital

punishment, and two, that as a result the number of capital prosecutions in your office was down?

Mr. Haida. Up to the last part. It's hard to take periods of time and compare, I think. We have two pending, so I don't know if that tells us anything. But I do think that the videotaping of interrogations is significant. I also think that the safeguards that are put in place, that the intended safeguards about lineups has also been significant, and I also think the reforms relative to DNA and other scientific testing, the ripple effect. I think the biggest thing is the Capital Litigation Trust Fund has so many different tentacles if you will, of impact. It truly does take away an issue from the trial judge in the pre-reform times, who was going to pay for a second DNA expert? It juxtaposed the trial judge with a County Board or a Chief Judge who had control of purse strings. It's all gone, and that has to help defendants in the process of determining the legitimacy of and the introduction of scientific evidence.

Ms. Bienen. About how many homicides a year do you get in your county, and approximately, if you want to say something about how many of those are death eligible, approximately, just as a guess?

Mr. Haida. I could easily get the Committee those numbers. I apologize for not having those numbers. I would say we have approximately 45 homicides a year,

and then we get into how many are solved and those issues. I'm sorry, I don't want to speculate because it's important not to.

Ms. Bienen. No, that's fine. Thank you.

Mr. Haida. You're welcome.

Mr. Coldren. Hi, Chip Coldren. I know I'm going to come down with my sub-committee and visit with you.

Robert Haida. Yes you're coming to my office in the next couple of weeks.

Mr. Coldren. Yes, I appreciate that very much. I want to just push on one point just a little bit further if I might. You did make the comment that since these few reforms, especially regarding the investigations and interrogations, that things have been so overwhelmingly successful and you mentioned better cases, protection against false accusations, and you said a better end product. I wonder if you'd just go into a little deeper, what are the four or five things that really mean success to you, and what exactly are these reforms producing in terms of a better product?

Mr. Haida. Speaking about the interrogations, that is what my comment really was related to. The issues relating to the thoroughness, the existence of, and the thoroughness of the *Miranda* warnings. That is significantly addressed by an interrogation that is videotaped. Likewise, the mental condition, the physical and emotional state of the defendant is better capable of assessment because it is videotaped. In other words, and obviously I am viewing this - everybody knows I

am a prosecutor, I am viewing this as a prosecutor. Not to suggest that a defense attorney would in bad faith raise an issue. But whereas before, if we had a written statement and the defense attorney came to me ten years ago and said, well my guy can't even read and write, I have to deal with that. Now it's more capable of being dealt with. If the defense attorney hasn't seen the videotape yet, maybe that issue is resolved by looking at the videotape, one way or the other. Or if he has seen the videotape and he is still raising it, then my antennae is really up, because I know that I got a problem, because he or she is not going to raise that if there is not a valid point there.

So it makes for a better prosecution case. We look at the videotapes before we make a charging decision, whether it's a homicide or a forgery case. So we have already evaluated as best we can the admissibility, the viability of that as a piece of evidence, and charged it and put it into the system. And so it is a better piece of evidence for us, because it deals with so many issues that before were still going to be raised or could be raised without us really being able to address it, but in a real complete way. I hope I answered your question.

Mr. Coldren. I want to find out if this is a statewide problem, or maybe just a Cook County problem. Jerry Nora when he testified was talking about depositions and good cause shown, and the variation of interpretations that people are giving that. Is that just Cook County?

Mr. Haida. No, that's not Cook County. That's just something that we have to deal with. Many judges are my friends, but I think it is easy now for the judges to just grant the right to the deposition. But that's just the cost of the process now.

Mr. Schwind. Bob, its been said among our Committee members, and I've been one of them that has reached back in my experience traveling around the state prosecuting the death penalty cases that I have prosecuted, and I wanted to get your input in regard to the certification of defense attorneys into the Capital Litigation Bar Association. Have you found that in your County, and you are, I would say, one of the more populace areas in St. Clair County in southern Illinois, do you find that the defense bar is not seeking capital litigation certification? I found where it is hard to find private attorneys that are qualified in a death case to find one, if not two as the rules state, to find a qualified lawyer that will sit and take the time, because of the complicated and time consuming nature of death penalty cases. Have you found in your area, maybe not in your County, but in talking with your fellow State's Attorneys, that has been a problem in southern Illinois?

Mr. Haida. Yes, I think it is a problem. Our circuit, the 20th Judicial Circuit, has five counties, and I know that in the southernmost County in the Circuit, court is probably 65 miles away. That may not mean anything to the Chicagoland folks. But we have St. Clair County defense attorneys that are being called to that county to defend the cases because they don't have anybody in that county to do it. And

actually if you looked at the number of attorneys in St. Clair County, a very small percentage of the attorneys, even the attorneys who practice criminal law, criminal defense law, a very small percentage of those are certified.

Mr. Schwind. Thank you.

Mr. Parkinson. It's hard to argue with Professor Coldren's one point in particular. I think he touched on it. It seems if a case is prosecuted as a death case and one that isn't, we should have close to the same resources. That is my own personal opinion. It seems like when you are not seeking death that you're still going to have a complicated and serious matter. You are trying to put a person away for many, many years, if not life. There shouldn't be that disparity. Are you aware of any efforts to get the fund to go that way?

Mr. Haida. Well, my thought when the Professor was testifying was that it's probably beyond where this Committee can go. I think anybody who believes that should lobby the legislature for an appropriate funding mechanism. It might put the Fund at risk. The tricky part is the capital eligible. It is to a certain extent in the eye of the beholder whether a murder case is capital eligible or not. You know, when I would make my trips to Springfield three or four years ago when we were in the midst of the, I don't know, it was pre-commutation and the post-commutation fallout. We were testifying, and coming here, and going to meetings, and there were statements made that were on both sides of it. Well, you know, the

prosecutors can prosecute every murder case as a death case, and then the other side. So, it is somewhat problematic, and I don't know if there is enough money in the Capital Litigation Trust Fund. That would be a legislative budget issue, to fund the defense of every murder case. I am sure there is not.

Questioner. Just on that point. I was the sponsor of the Litigation Trust Fund bill back in the late 90s, and quite frankly to come back to the legislature for more money when I think in six months we may not even be able to pay the electric bills in this building, I just don't see even if we did, even if the State was in a better financial position, I don't think that we will extend the financial resources to the non-capital cases. We've all kind of had a few, you know, arm wrestling matches with my committee a few years ago, and we talked about some of the things about the depositions and also on the snitch, the reliability hearings, and I thought that some of those things should be applied to non-capital cases. And on the cases where the 16 or 17 year old who has a double murder, you know, he is not eligible for the death penalty, but he is getting natural life. Should some of those reform mechanisms apply in that type of case? I think that maybe is something we should consider. Depositions cost money, but some of the other reforms, maybe they should go beyond just capital cases. But I just want to get back on the financial issue. I am in the minority. I would say it is virtually impossible that you will see that we will extend it any further.

Mr. Sullivan. Bob, thank you very much for coming.

Mr. Haida. Thank you, Mr. Chairman.

Mr. Sullivan. All right. I think that we have finished the testimony that we came to hear. I want to speak on behalf of the members of the Committee, that we appreciate all of you coming down and sharing your experiences and concerns with us. We are going to be holding another hearing in Chicago early next year. So if there is any of you in the audience who hasn't spoken or would like to speak again then, we're certainly happy to have you. So without further ado, I think we'll be adjourned.

Mr. Schwind. Make a motion that we adjourn?

Mr. Sullivan. Yes, Mr. Schwind. All in favor?

All. Aye.

Mr. Sullivan. We're adjourned.

- END -