

Empire State Injustice:
Based Upon a Decade of New Information, A
Preliminary Evaluation of How New York's Death
Penalty System Fails to Meet Standards for Accuracy
and Fairness

The Committee on Capital Punishment
The Association of the Bar of the City of New York

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INTRODUCTION: A PRELIMINARY EVALUATION

In striking down a provision of New York's death penalty law last year and thereby initiating a moratorium on capital punishment, the New York Court of Appeals created an important opportunity for the Legislature to re-examine New York's capital punishment system.¹ In the years since 1995, when New York reinstated the death penalty, it has become apparent that the death penalty does not function properly.

Since 1995, press reports and studies have shown that numerous people have been erroneously convicted of capital crimes. The risks of executing innocent persons have become clearer as advances in DNA technology have conclusively shown that innocent people have come perilously close to being executed.² Examination of how innocent people ended up on death row in these cases reveals a variety of systematic errors that may exist in a far larger number of cases. DNA evidence, of course, is not a solution by itself. In many capital cases, DNA evidence may not exist and thus cannot help exonerate the unknown number of innocent people condemned to death.³

The Empire State is far from immune from these risks. In December 2002, *Newsday* reported that it found eleven New York cases involving thirteen men who were

¹ See *People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341(2004).

² Further, there may be executed innocents for whom DNA tests will never be ordered or taken.

³ See Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty: A Death Penalty Information Center Report*, Sec. 5 (Sept. 2004) (noting that DNA evidence was responsible for only 12% of the 116 recent exonerations of death row inmates), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150>.

wrongly convicted of murder in the preceding five years.⁴ These wrongful convictions resulted from significant flaws in New York's system -- flaws that have not yet been rectified and could still lead to the execution of innocent people in New York.

The flaws lead not only to the conviction of innocent defendants but also to death sentences that are applied unfairly and arbitrarily. For example, nationally, in 2000, a team of researchers headed by Professor James Liebman at Columbia University released results of an extensive study in which they found a stunning 68 percent appellate reversal rate in capital prosecutions.⁵

The concerns about the operation of the death penalty that have been raised recently across the country by judges, prosecutors and various commentators have resulted in several studies and recommendations for ways to improve capital punishment systems.⁶ The discovery of thirteen wrongfully convicted men on death row in Illinois led Governor George Ryan to appoint a commission to study the possibility of error in capital sentencing. Ultimately, following the commission's report on problems with both

⁴ Sean Gardiner, *Dynamics of Righting a Wrong/ The DA's Role in Reversals*, Newsday, Dec. 10, 2002, at A35. See also Sean Gardiner, *For Them, No Justice: Bad convictions put 13 men in prison*, NEWSDAY, Dec. 8, 2002, at A03; Sean Gardiner and Herbert Lowe, *Free to Struggle*, NEWSDAY, Dec. 9, 2002, at A06; Herbert Lowe, *Friend Becomes Freedom Fighter*, NEWSDAY, Dec. 10, 2002, at A07; Sean Gardiner, *Getting it Right: Experts eye measures to prevent injustices*, NEWSDAY, Dec. 11, 2002, at A08; Graham Rayman, *Wrongfully Convicted: Two pursue cash awards*, NEWSDAY, Dec. 14, 2002, at A31.

⁵ James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000), available at <http://www.justice.policy.net/cjedfund/jreport>. An abridged version of the report is available in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000). See also *United States v. Quinones*, 205 F. Supp. 2d 256, 264-68 (S.D.N.Y. 2002) (discussing evidence showing a high risk of executing innocent persons), *rev'd* by 313 F.3d 49, 64-65 (2d Cir. 2002) (noting that the legislature has the responsibility to weigh the risks of executing innocent persons).

⁶ See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 COLO. L. REV. 1, 21-71 (2002); Ronald J. Tabak, *Finality Without Fairness: Why We are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 734-45 (2001).

capital convictions and capital sentences, the governor commuted the sentences of everyone on Illinois' death row.

In 2002, after careful study, the Illinois Commission issued a set of recommendations aimed at reducing the possibility of error in capital cases.⁷ These recommendations range from changes in police practices that would help minimize false confessions to independent scientific review of forensic evidence. A comparison of the Illinois Commission recommendations to procedures in place in New York shows that New York laws fall short in many respects.

Following the Illinois Commission report, in September 2003, the Republican governor of Massachusetts, Mitt Romney, seeking to initiate the death penalty in Massachusetts but wary of problems other states were having with it, created his own Council on Capital Punishment. The Council's objective was to offer proposals for legal and forensic safeguards that would be necessary before a fair death penalty statute could be considered in Massachusetts.⁸ The Council made ten recommendations for safeguards it deemed necessary to minimize the risk of executing innocent people; nine of those recommendations are inconsistent with New York's current death penalty law.

Of course, the only way the state can be sure to resolve the problems with capital punishment and entirely eliminate the risk of executing innocent persons is for the Legislature not to bring back the death penalty.⁹ However, in the event that the New

⁷ See REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (Illinois 2002), available at <http://www.idoc.state.il.us/ccp/ccp/reports/>.

⁸ MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT at 3 (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04/MassDPReportFinal.pdf>.

⁹ For this reason and others addressed in prior reports and statements, the Association maintains its opposition to capital punishment. See, e.g., *The Death Penalty*, 39 THE RECORD 419 (Oct. 1984); *The*

York Legislature considers whether to reinstate the death penalty, this Report provides some guidance to the discussion of problems with New York's death penalty and some essential reforms in procedures.

This Report touches upon some of the areas in which New York law fails to meet the minimum recommendations advocated in the Illinois and the Massachusetts reports. The recommendations in those reports arise from extensive studies by qualified experts about how to minimize significant accuracy and fairness problems, and thus, New York should not move forward without full consideration of those reports. This Report discusses rules regarding informant testimony, rules regarding witness testimony and scientific corroboration, the importance of videotaped interrogations, rules regarding line-up procedures, the value of independent review of scientific evidence, the need for a narrower list of death penalty eligibility factors, the importance of different juries for each stage of a bifurcated capital trial, the need for a heightened burden of proof, the need for judicial discretion to overturn death sentences, and a need for an ongoing capital punishment review commission. The issues we raise have particular resonance when the defendant faces the ultimate, irreversible penalty of death.

This Report is an initial investigation of some of the areas that would need to be addressed in any capital punishment regime, and is not an exhaustive examination of the problems with New York's capital punishment system. The recommendations discussed here relate solely to some issues of guilt and innocence, eligibility for the death penalty, and jury selection. A large number of the Illinois and Massachusetts recommendations

Death Penalty: It Should Be Abolished, 32 THE RECORD 225 (March 1977). The submission of the suggestions in this Report for consideration by the New York Legislature does not alter the Association's view that the death penalty should not be reinstated in New York.

are not included here, but almost all of the recommendations require further investigation and consideration in New York. In short, prior to making any decisions about a death penalty statute, at a minimum, there needs to be a thorough consideration and analysis of the existing statute in light of new information bearing on the danger of unfair outcomes under this statutory scheme.

I. INFORMANT TESTIMONY RULES

A. Importance of Rules for Informant Testimony in Capital Cases

Noting that several wrongful capital convictions involved testimony by unreliable parties, the Massachusetts Council recommended that the jury be instructed that "statements by codefendants or informants, especially when the codefendant or informant receives or hopes to receive any benefit from the state (such as a reduction of criminal charge or sentence), may be unreliable, and should therefore be evaluated with great care." If any benefit was received by the codefendant or informant in exchange for the statement, "the jury must be told about the benefit."¹⁰

The Illinois Commission similarly recommended, "A pattern jury instruction should be adopted providing a special caution with respect to the reliability of the testimony of in-custody informants."¹¹ The Commission unanimously agreed that the testimony of in-custody informants presented particular problems and required special procedures to ensure that such witnesses were reliable. It found that false testimony from

¹⁰ Recommendation 5, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

¹¹ Recommendation 57, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT.

in-custody witnesses played a part in several of the 13 cases of men released from death row in Illinois.¹²

In addition to the Illinois cases, the Illinois Commission considered criminal justice literature and reports. In particular, the report considered a major inquiry into wrongful convictions in Canada.¹³ The Special Commissioner in the “Morin Inquiry,” as it was known, recommended substantive policy changes that emphasized the importance of establishing the credibility of informers' testimony through corroborative evidence and careful examination of the circumstances under which the informant made his statement.¹⁴ The Morin Inquiry considered another investigation into the use of in-custody informant testimony in Los Angeles between 1979 and 1990 that found numerous instances in which false informant testimony had been used.¹⁵

The Illinois Commission concluded, “In light of the frequency with which [in-custody] testimony has appeared in the cases of those who were ultimately released from death row, the Commission believes that a special emphasis on this credibility issue is warranted.”¹⁶ It recommended both a pre-trial evidentiary hearing to determine the reliability of the in-custody informant's testimony at either the guilt or sentencing phase and pattern jury instructions cautioning jurors about the value of such testimony.

¹² REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 7-8, 120, 132.

¹³ *Id.* at 21.

¹⁴ *Id.* at 122-23.

¹⁵ *Id.*

¹⁶ *Id.* at 132.

B. New York Law Regarding Informant Testimony

Although New York has long viewed self-interested witnesses with suspicion, New York criminal procedure law does not specifically address the reliability of in-custody informant testimony. Before taking any action on reinstating the death penalty in New York, the Legislature should consider treating informant testimony with the same scrutiny as accomplice testimony in those cases. New York Criminal Procedure law requires corroborating evidence, in addition to that furnished by the accomplice, tending to connect the defendant with the commission of the crime.¹⁷ The purpose of the accomplice statute is to protect the defendant against the risk of a motivated fabrication and to insist on proof other than testimony from a possibly unreliable or self-interested accomplice.¹⁸ Similarly, the reports from other states found that jurors should be instructed to apply the same caution to the testimony of in-custody witnesses. In New York, the model jury instructions that apply to accomplice testimony can easily be altered to reflect this concern.¹⁹

¹⁷ N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2003).

¹⁸ *People v. Gaines*, 87 A.D. 2d 616, 617 (2d Dept. 1982).

¹⁹ Parts of Model Charge 4:2 may be modified as follows:

1. The testimony of [an in-custody informant], if credited by the jury may . . . not . . . prove that the defendant committed [the crime], providing there is other truly independent proof to satisfy the tending-to-connect requirement.
2. The independent evidence may not depend for its weight and probative value upon the testimony of the [in-custody informant].
3. The purpose of the corroboration requirement is . . . to protect the defendant against the risk of a motivated fabrication, and to insist upon proof other than that which originates from a possibly unreliable or self-interested [witness].
4. Traditionally the law has viewed [the testimony of in-custody informants] with a suspicious eye.

...

II. WITNESS TESTIMONY AND SCIENTIFIC CORROBORATION RULES

A. Importance of Rules for Witness Testimony and Scientific Corroboration in Capital Cases

The Massachusetts Council took particular note of the unreliability of eyewitness testimony. It found a common theme that many wrongful convictions involved erroneous eyewitness testimony. The Council considered scientific research that documents the unreliability of eyewitness testimony, especially as regards cross-racial identification. In order to address this problem, Massachusetts recommended that the jury be instructed at both the guilt-innocence and sentencing phases that "(1) eyewitness testimony, even from a confident eyewitness, may be unreliable, especially in connection with extremely emotional events such as murder, and should therefore be evaluated with great care; (2) cross-racial identification may be particularly unreliable."²⁰

In addition to jury instructions, the Massachusetts Council suggested a further measure to safeguard against convictions based on erroneous witness testimony. It recommended that at the capital sentencing phase the jury be required to find that "there is conclusive scientific evidence (i.e. physical or other associative evidence) reaching a

10. Although an [in-custody informant] is competent to testify as a witness, his testimony may often lack the inherent trustworthiness of a disinterested witness.

11. One who [is in custody] and testifies against another might be doing so in order to curry favor with authorities.

12. Courts have exercised the utmost caution in dealing with [in-custody informant] testimony, especially when testimony is exchanged for immunity or other favorable prosecutorial consideration. . .

1 CHARGES TO JURY & REQUESTS TO CHARGE IN CRIM. CASE IN N.Y. 4:2, *available at* Westlaw CTJNY § 4:2 (2004).

²⁰ Recommendation 5, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

high level of scientific certainty that connects the defendant to either the location of the crime scene, the murder weapon, or the victim's body, and that strongly corroborates the defendant's guilt of capital murder" prior to the imposition of a death sentence.²¹ The Council stated that this requirement "should not be subject to waiver by the defendant because society itself has a compelling interest in ensuring that no innocent person ever receives a sentence of capital punishment."²² The Council recognized the possibility that a defendant could be sentenced to a lengthy prison term on the basis of erroneous human evidence, but at least in a non-capital case there remained the opportunity for the justice system to correct its mistake.²³

Although it did not recommend requiring scientific corroboration for a conviction, the Illinois Commission also found that cases involving in-custody informants, accomplices and single eyewitnesses were the most problematic cases in which to make a reliable determination as to whether the death penalty should be imposed. In addition to modifications to trial practice and police procedure to help address some of these issues, the Illinois Commission ultimately recommended that the death penalty not be imposed on the basis of uncorroborated testimony from a single eyewitness, an accomplice, or an informant. Recommendation 69 states:

Illinois should adopt a statute which provides:

- A. *The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant should not be the sole basis for the imposition of a death penalty.*

²¹ *Id.*, Recommendation 6.

²² *Id.* at 21.

²³ *Id.*

B. Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

Even with a pre-trial hearing to assess the reliability of an in-custody informant and a special curative instruction, the Illinois Commission concluded that the potential for testimony of questionable reliability remained high. As noted in the previous section, the Illinois Commission found that a number of cases in Illinois in which the defendants were released from death row involved proffers of testimony from in-custody informants of dubious veracity. It therefore determined that the death penalty should not be imposed if the conviction is based solely on the testimony of an in-custody informant. Similarly, the Illinois Commission found that an accomplice might have just as much incentive as a jailhouse informant to shade the truth in a manner that is beneficial to the accomplice. It noted that at least two of the Illinois convictions in which the defendants were released from death row were based on accomplice testimony.²⁴

The Illinois Commission also recognized legitimate concern about the reliability of eyewitness testimony. The Illinois Commission recommended some ways to alleviate this problem, such as new methods of conducting police line-ups and photo spreads, admissibility in appropriate cases of expert testimony regarding the fallibility of eyewitness testimony, and revisions to jury instructions on eyewitness testimony. However, it still concluded that the dangers of eyewitness testimony were great enough to

²⁴ REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 159.

recommend that eligibility for the death penalty not ever be based upon the testimony of a single eyewitness.²⁵

Illinois has since adopted legislation to address this recommendation. As part of a death penalty reform package effective November 19, 2003, the Illinois legislature made it possible to retract death-eligibility based on limited evidence.²⁶ At the close of the prosecutor's case, the defendant or the court may move to decertify the case as a capital case "if the court finds that the only evidence supporting the defendant's conviction is the uncorroborated testimony of an informant witness . . . concerning the confession or admission of a defendant or that the sole evidence against the defendant is a single eyewitness or single accomplice without any other corroborating evidence."²⁷ The state is also required to provide information to the defense in discovery concerning jailhouse informants, including criminal history, any inducements for testimony, details of the purported statements of the accused, whether the informant ever recanted, other cases in which the informant testified and whether inducements were offered in those case(s), and any other information relevant to the credibility of the witness.

B. New York Law Regarding Witness Testimony and Scientific Corroboration

As mentioned above, New York has a corroboration statute applicable only to accomplice testimony. It has no statute addressing corroboration requirements for in-

²⁵ *Id.* at 160.

²⁶ See 2003 Ill. Legisl. Serv. P.A. 93-605 (SB 472) § 6.1 (Nov. 19, 2003). For a discussion of some other actions taken by the Illinois General Assembly in response to the Illinois Commission's recommendations, see Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done*, 51 FED. LAWYER 37 (July 2004).

²⁷ 720 ILL. COMP. STAT. 5/9-1 (h-5) (2003).

custody informants or cases that rely solely on the testimony of a single eyewitness. New York Criminal Procedure Law Section 60.22(1)(2003) reads as follows:

A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.²⁸

As discussed above, the purpose of the statute is to protect defendants against the risk of conviction based solely upon testimony from a possibly unreliable or self-interested accomplice. The previous section noted that in-custody informants have similar motives to fabricate testimony in order to curry favor with the state, and therefore the New York Legislature should not consider reinstating capital punishment without addressing such other potentially unreliable testimony.

Similarly, in order to reduce the chances of wrongful imposition of the death penalty, if the Legislature contemplates reinstating capital punishment, it should consider expanding the statute to prohibit the imposition of a death sentence based upon the testimony of a single eyewitness. Many studies, as well as the spate of convictions that have recently been overturned, demonstrate the inherent fallibility of eyewitness identification testimony. One study of 40 convicts who were subsequently exonerated by DNA analysis indicated that 90% of the trials resulting in the convictions involved faulty

²⁸ N.Y. CRIM. PROC. LAW § 60.22(1) (McKinney 2003).

eyewitness identification.²⁹ Of the thirteen wrongfully convicted men featured in the Newsday article, ten were put behind bars largely on the word of a single eyewitness.³⁰

To decrease the chances of an innocent person being executed, the Massachusetts Council recommended that murder cases should require physical or other associative evidence strongly corroborating guilt in order for a defendant to be eligible for a death sentence. If New York were to consider the Massachusetts recommendation for capital cases, the corroborating evidence should comport with scientific standards discussed further in Part V of this report.

III. VIDEOTAPING INTERROGATIONS

A. Importance of Videotaping Interrogations in Capital Cases

Death penalty studies from both Illinois and Massachusetts found that cases of wrongful conviction often involved failures in human evidence such as erroneous eyewitness testimony, false confessions, or testimony from an in-custody informant or codefendant. The Massachusetts Governor's Council on Capital Punishment Report recommended that statements by defendants while in police custody "should be contemporaneously audio- or video-recorded in their entirety, and the lack of such a recording should be considered when evaluating the reliability of such a statement" and that the jury be instructed "that statements made by the defendant in police custody are

²⁹ G.L. Wells, E.F. Wright, & A.L. Bradfield, *Witnesses to crime: Social and cognitive factors governing the validity of people's reports*, in *PSYCHOLOGY AND LAW: STATE OF THE DISCIPLINE*, 53-87 (R. Roesch & S. Hart eds. 1999).

³⁰ Sean Gardiner, *For Them, No Justice/ Bad Convictions Put 13 Men in Prison*, *NEWSDAY*, Dec. 8, 2002, p. A.03

not always inherently reliable, and should therefore be evaluated with care."³¹ The Council noted that recent experience has shown that police may pressure a defendant in order to exact a statement and that statements made in custody may therefore not always be reliable. Although the Council noted that it was beyond its purview to mandate audio- or video recording, it encouraged the practice.³²

The Illinois Commission had a broader mandate with respect to police procedures, and the Report of the Illinois Governor's Commission on Capital Punishment made the following specific recommendations for videotaping statements:

Recommendation 4

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

Recommendation 5

Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

Recommendation 6

There are circumstances in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audio taped.

Recommendation 8

The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.³³

³¹ Recommendation 4, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

³² *Id.* at 19-20.

³³ Recommendations 4-6, 8, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT.

The Illinois Commission noted the serious problem of suspects confessing to crimes for which they are later exonerated. In at least one of the cases of the 13 men released from death row in Illinois, others were subsequently convicted for a crime to which the defendant had allegedly confessed. In order to ensure that confessions are not made in circumstances that provide significant doubt as to their accuracy and in order to alleviate the problems associated with disputes between police and defendants as to what happens behind closed doors at police stations, the Illinois Commission recommended videotaping the entire interrogation process.³⁴

The Illinois Commission found that videotaping the entire interrogation process of a suspect is important for a number of reasons. First, it helps prevent the admission of false confessions by allowing courts to monitor interrogation practices and thereby enforce other safeguards. Second, the presence of a video camera deters the police from using interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed decisions about whether interrogation practices were likely to lead to an untrustworthy confession. Additionally, videotaping interrogations offers several potential benefits to law enforcement, including providing the best evidence that interrogation practices did not include physical coercion or undue influence.³⁵

The Illinois Commission noted that Alaska and Minnesota have mandated recording interrogations by judicial interpretation. For example, the Alaskan Supreme Court held that the Alaska Constitution Due Process Clause requires that all custodial

³⁴ *Id.* at 24-25.

³⁵ *Id.* at 25 (citation omitted).

interrogations be recorded from beginning to end. The Alaska court reasoned that such recordings not only protect defendants but aid law enforcement:

The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.³⁶

Although a majority of the Illinois Commission members believed that videotaping the entire interrogation process is crucial to the fair administration of justice, they were sensitive to concerns expressed by various police departments that videotaping interrogations may inhibit the police from rigorously pursuing interrogations. In response to these concerns it cited a 1993 National Institute of Justice study that found that once police had adjusted to the idea of being videotaped, they found the process useful. Allegations of police misconduct dropped, and videotaping confessions assisted prosecutors and defense lawyers in evaluating cases, helped in plea negotiations and resulted in more guilty pleas.³⁷

A year after the Illinois Commission's report was finalized, in July 2003, both houses of the Illinois Legislature approved a bill providing for the presumption of inadmissibility of statements made by suspects in murder cases resulting from custodial interrogation occurring in a place of detention, unless the interrogation was recorded in its entirety. The presumption can be overcome by a preponderance of the evidence that

³⁶ *Stephan v. Alaska*, 711 P.2d 1156, 1161 (Alaska 1985).

³⁷ REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 27.

the statement was voluntary and is reliable based on the totality of the circumstances. Otherwise inadmissible statements may still be used for impeachment purposes. This bill has since been signed into law.³⁸

Since the Illinois Commission's report was issued, the benefits of videotaping interrogations have been further substantiated in a study conducted by the Co-Chair of the Illinois Commission, Thomas P. Sullivan, after the Illinois Commission's Report was released. His study examined the experiences of 238 police and sheriff's departments that voluntarily used electronic recordings in video rooms. The resulting report confirmed the Illinois Commission's conclusion that recording is an efficient and powerful law enforcement tool. Recordings prevent disputes about officers' conduct, the treatment of suspects, and statements made. The study found that "[v]irtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."³⁹ Police were pleased to be able to focus on the interview rather than on note taking. Recordings dramatically reduced the number of defense motions to suppress statements, resulted in more guilty pleas and when the cases went to trial, was great evidence for the jury and for trial and reviewing court judges.⁴⁰ Other benefits include increased public confidence and approval of police practices and that the videos can be used to teach interrogation practices to detectives.⁴¹

³⁸ Public Act 93-605 of November 19, 2003, 2003 Ill. Legisl. Serv. P.A. 93-605 (West); Public Act 93-517 of August 12, 2003, 2003 Ill. Legisl. Serv. P.A. 93-517 (West).

³⁹ *Police Experiences with Recording Custodial Interrogations*, presented by Northwestern School of Law's Center on Wrongful Convictions, 6 (Summer, 2004), available at <http://www.law.northwestern.edu/wrongfulconvictions/>.

⁴⁰ *Id.* at 6-12.

⁴¹ *Id.* at 16.

The commonly feared drawbacks to recording interrogations -- that suspects would not cooperate and that costs would be excessive -- were considered unfounded by veteran officers using the procedures. Those interviewed stated that recording did not cause suspects to refuse to be interviewed or fail to cooperate. In many cases the recording is covert; however, even in places where the suspect was informed of the recording, the suspect's awareness was not a hindrance because the suspect focused on the subject of the interview. Also, recording in some places, like Alaska and Minnesota, is not mandatory when the suspect objects. Therefore the interview can be continued even after the recorder is turned off.⁴² The report also found that the cost of equipment was far outweighed by benefits in other areas, including being offset by savings in frivolous litigation.⁴³ The costs of videotaping interrogations may also be minimized by the fact that many police departments already possess and use videotaping technology for a variety of purposes.

Aside from the Sullivan study, other new research provides support for enacting a statute requiring videotaping of the entire interrogation. A recent study by the Innocence Project at Benjamin N. Cardozo School of Law indicates that false confessions may even be a more serious problem than the Illinois Commission understood. The 2003 study documented the seriousness of the false confession problem, finding that false confessions were given in 23 percent of cases in which a person was exonerated after conviction.⁴⁴ Social psychologist Richard Ofshe has suggested that the number of false

⁴² *Id.* at 21.

⁴³ *Id.* at 10.

⁴⁴ *Crime, False Convictions and Videotape*, N.Y. TIMES, Jan. 10, 2003.

confessions could be as high as 60 percent.⁴⁵ Thus, the videotaping of interrogations is important to limiting false confessions and wrongful convictions in capital cases.

B. New York Law Regarding Recording Interrogations.

For the reasons discussed above, any effort to reinstate the death penalty in New York should include serious consideration of mandating electronic recording of suspect interrogations from the very beginning of questioning in potential capital cases.⁴⁶ It is common in New York City and other jurisdictions for confessions to be videotaped; therefore expanding recording to include interrogations would not be as great a burden as some opponents may claim.

The New York City Council and New York State Assembly have considered bills that would require videotaping of interrogations. Last year's New York Assembly bill addressed many of the concerns raised by proponents and opponents of electronic recording of interrogations. The bill called for both audio and video recording for all felonies, yet it remained flexible by incorporating exceptions. It provided for training in the new technology and required preservation of recordings through an individual's appeals and habeas corpus petitions.⁴⁷

However, last year's Assembly bill did not meet the standards of the Illinois Commission recommendations. For example, the bill would have required electronic

⁴⁵ Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 729-30 (1996-1997).

⁴⁶ The New York State Bar Association supports the videotaping of interrogations. *See NY State Bar Assn. Supports Videotaping of Police Interrogations*, DAILY RECORD (ROCHESTER, NY), 2004 WL 63189950, June 25, 2004.

⁴⁷ A. 5162, 2003 Leg., 226th Sess. (N.Y. 2003); S.6913, 2004 Leg., 227th Sess. (N.Y. 2004). *See also* New York City Council Int. No. 122 (2004).

recording only for custodial interrogations of a felony suspect that occur in a place of detention. The Illinois Commission recognized that many important interrogations take place in the field, and recommended that police investigators carry tape recorders to use in interviewing homicide suspects outside the station.

Last year's bill also did not specify when recording should begin. Given the bill's requirement that the administration of the *Miranda*⁴⁸ warnings and any waiver be recorded, it appears that the bill would have called for all subsequent interrogation to be recorded. However, the timing of *Miranda* warnings is an issue on which there is considerable litigation, and it may be in the interest of judicial efficiency for any recording proposal to be more precise about its timing requirement.

In evaluating the use of recorded interrogations in capital cases, consideration should also be given to recording the interviews of witnesses and victims in felony cases may provide additional benefits. Witnesses, especially accomplices, may be subject to the same police coercion and suggestive questioning as suspects. The Illinois Commission recommended that police record interviews with significant witnesses so that if the witness's account changes, the judge and jury can see the witness's original version. In the cases of the 13 men released from death row in Illinois, the Illinois Commission found that there were a number of witnesses whose testimony was questionable and that resolution of questions relating to their testimony might have been aided by the existence of a videotape of the initial interrogation.

In deciding whether or not to reinstate the death penalty, the Legislature should consider additional safeguards to ensure suspects are not unduly pressured to waive the

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

recording of their interrogation. For example, last year's New York bill would have created an exception to the presumption of inadmissibility for unrecorded statements where the suspects refused to speak if recorded. In addition to requiring that the suspect's statement agreeing to respond only if no recording is made be recorded, a new statute could require recorded statements from the interrogator and the suspect as to whether any pre-waiver interrogation or discussion had taken place. This requirement could reveal some improprieties and give the suspect an opportunity to object to his or her treatment. The Illinois Commission also recommended that any un-recorded statements be repeated to the suspect on tape, and his or her comments recorded.⁴⁹

A corollary to the use of the videotaping procedure might be a higher standard of proof for the applicability of exceptions. Videotaping proposals considered in Louisiana, Missouri, and New Mexico required that the applicability of any exceptions be shown by clear and convincing evidence. An initial proposal in Illinois applied the clear and convincing evidence standard to one exception, that videotaping was not feasible, while the state was required to prove the other exceptions only by a preponderance of the evidence.⁵⁰ The clear and convincing evidence standard can be adopted for all exceptions or only those thought to be open to abuse.

A final point to consider in thinking through an interrogation videotaping procedure is the importance of evaluating and, where appropriate, incorporating new

⁴⁹ Recommendation 5, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 28.

⁵⁰ Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 388 (Winter 2001) discussing House Bill 4697, which failed to pass in the 2000 session of the Illinois General Assembly.

research and technological changes. Such information bearing on electronic recording of interrogations should be evaluated and incorporated as new discoveries are made.⁵¹

In conclusion, major studies have found that videotaping interrogations would greatly improve the reliability of the convictions obtained in capital cases. In New York, these procedures should be evaluated prior to the consideration of reestablishing the death penalty.

IV. LINEUP PROCEDURES

A. Importance of Lineup Procedure Practices in Capital Cases

As part of its findings regarding the lack of reliability of eyewitness testimony as a source of error in capital cases, the Illinois Commission found that in some cases, witnesses had participated in pretrial lineups that may have impacted their ultimate courtroom testimony. Because of the notorious suggestiveness of police lineup practices, the Illinois Commission made the following recommendations to ensure that pretrial lineups do not taint the reliability of identifications in capital prosecutions:

⁵¹ For example, a recent study found that the camera angle in an interrogation room could have a significant impact. In an article published in *Current Directions in Psychological Science*, a journal of the American Psychological Society, G. Daniel Lassiter described a phenomenon called "illusory causation" finding that when the camera focuses directly on a suspect, mock jurors were more likely to think that a recorded confession was voluntary and that the suspect was guilty. These mock jurors also recommended more severe sentences. Lassiter's study found that using a camera focused equally on the interrogator and suspect, or even an audiotape or transcript of the interrogation, was less prejudicial. Daniel G. Lassiter, *Illusory Causation in the Courtroom*, CURRENT DIR. IN PSYCHOL. SCI., Volume 11, Number 6, 204-08 (December 2002).

Recommendation 10

When practicable, police departments should insure that the person who conducts the lineup or photo spread should not be aware of which member of the lineup or photo spread is the suspect.

Recommendation 12

If the administrator of the lineup does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member at a time and makes a decision regarding each person before viewing another lineup member.

Recommendation 15

When practicable, the police should videotape lineup procedures, including the witness' confidence statement.⁵²

The concern with the suggestiveness of lineup procedures is not specific to Illinois. Social psychologists have long commented upon the inherent unreliability of police station lineup procedures. In unusual or threatening situations, people are prone to judge the appropriateness of their behavior by relying on others in a position of trust – notably the officer administering the lineup. Conformity to authority is at a peak when pressure is high and when judgments are made without anonymity.⁵³

The recommendation for double-blind lineups would have particular importance in capital cases. A double-blind lineup is a lineup in which neither the administrator nor

⁵² Recommendations 10, 12, and 15, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 34-39. Additionally, Recommendation 11(a) notes that “[e]yewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photo spread.” *Id.* at 34. A “witness’ confidence statement,” as mentioned in Recommendation 15, is defined in Recommendation 14 as a statement made by the eyewitness “as to his or her confidence that the identified person is or is not the actual culprit.” *Id.* at 37.

⁵³ See generally, Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALBANY L. REV. 389, 415-17 n.190-99 and accompanying text (1996) (collecting authority on social psychology issues).

the witness knows in advance the identity of the suspect in the lineup or photo spread. This procedure helps eliminate the problem of unintentional verbal and body cues given by the lineup administrator to the witness that encourage the witness to choose the person the administrator has in mind as the likely perpetrator.⁵⁴

Regarding the other recommendations, research has shown that the use of sequential identification procedures significantly increases the accuracy of identifications “because the witness is required to make an absolute judgment as to each individual person or photo, rather than what often is a relative judgment as to which one among those displayed at the same time most resembles the witness’ memory of the perpetrator.”⁵⁵ Also, because the suggestiveness of lineup practices is notoriously difficult to impress upon a jury through testimony, the requirement that lineups be videotaped is of particular usefulness.

B. New York Law Regarding Lineup Procedures

New York has considered at various times, and is considering now, reformation of lineup practices. Following the Central Park jogger exonerations, Brooklyn District Attorney Charles Hynes became the first New York City district attorney to endorse double-blind lineups.⁵⁶ A bill proposed in the New York State Assembly in January

⁵⁴ See REPORT OF THE ILLINOIS GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT at 33.

⁵⁵ Thomas P. Sullivan, *Capital Punishment Reform: What’s Been Done and What Remains to Be Done*, 51 FED. LAWYER 37, 38 (July 2004). See e.g., Gina Kolata & Iver Peterson, *New Jersey is Trying New Way for Witnesses to Say, “It’s Him,”* N.Y. TIMES, July 21, 2001, at A1 (discussing study that shows that the use of a sequential line-up reduces the rate of false identification from 20 to 40% to less than 10%). Note that Illinois Recommendation 12 only mandates the use of sequential lineups where the person or persons conducting the lineup do not know which person is the suspect. The reason is that if the sequential lineup is not double-blind, the administrator of the lineup will be able to inadvertently communicate the identity of the suspect.

⁵⁶ *Hynes to Alter Way Crime Line-Ups Are Done*, N.Y. DAILY NEWS, December 23, 2002.

2002⁵⁷ would have required shuffling lineup orders where multiple witnesses are performing identifications. The bill did not call for double-blind administration or for the videotaping of police station lineups.

In the absence of any controlling statutory authority, New York courts have differed over the protections to which a defendant is entitled. Generally speaking, courts have not been protective against unreliable lineup procedures. For example, courts have ruled that the fact that a witness knows the perpetrator is in the lineup does not prove unreliability.⁵⁸ Some courts have ordered double-blind lineups where requested by the defendant,⁵⁹ but these instances remain the exception rather than the rule. The New York City Police Department has expressed reluctance to reform lineup practices, and it has suggested that reform by order of the courts is unlikely given the long established case law approving existing practices.⁶⁰

Court decisions, however, do encourage videotaped lineups as a practical matter. Courts have recognized that videotapes are especially useful at proving the suggestiveness of lineups in a manner that testimony cannot depict.⁶¹ Further, courts

⁵⁷ A.9578-A, 2002 Leg., 225th Sess. (N.Y. 2002).

⁵⁸ See, e.g., *People v. Brown*, 459 N.Y.S.2d 227, 230-31 (Westchester Co. Ct. 1983); *Ranta v. Bennett*, No. 97 Civ. 2169, 2001 WL 11000082 at *38 (E.D.N.Y. May 23, 2000) (“there is nothing unduly suggestive about a witness’s being informed of the purpose of a lineup. . . .”).

⁵⁹ See, e.g., *In re Investigation of Thomas*, 733 N.Y.S.2d 591 (N.Y. Sup. 2001) (ordering double-blind lineup citing unrebutted scientific evidence); *People v. Wilson*, 741 N.Y.S.2d 831 (N.Y. Sup. 2002) (granting double-blind lineup, but denying request for sequential lineup).

⁶⁰ See comments of George A. Grasso, Gina Kolata and Iver Peterson, *New Jersey Is Trying New Ways for Witnesses to Say, 'It's Him'*, N.Y. TIMES, July 21, 2001, at A1.

⁶¹ See, e.g., *People v. Turnstall*, 468 N.Y.S.2d 32 (2d Dept. 1983), *aff'd as modified*, 63 N.Y.2d 1 (1984).

hold that videotapes of lineups are admissible to establish the credibility of eyewitness identification.⁶²

Given the well-established concerns with the reliability of eyewitness testimony in general and with eyewitness testimony affected by suggestive pretrial lineup procedures, the Illinois reforms should be evaluated as a guard against the risk of wrongful conviction, which is of special concern in capital cases. Indeed, in capital cases, the concerns generating the risk of mistaken identification are particularly high – the cases are especially emotional and because of public demand for retribution, the desire to conform to authority is higher than normal. Of course, given the irreversibility of executions, the cost of error is also higher than normal. Therefore, prior to taking any action on reinstating the death penalty, the New York Legislature should study Recommendations 10, 12 and 15 of the Illinois Report as, at a minimum, being a prerequisite to any capital prosecution.

V. INDEPENDENT REVIEW OF SCIENTIFIC EVIDENCE

A. The Importance of Independent Review of Scientific Evidence in Capital Cases

Both the Illinois Commission and the Massachusetts Council recommended independent scientific review of evidence presented in capital cases. The Illinois Commission recommended establishment of an independent state forensic lab staffed by civilians and operated separately from police agencies.⁶³ The Massachusetts Council

⁶² *Id.*

⁶³ Recommendation 20, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT.

recommended the Massachusetts Supreme Judicial Court initiate a formal process to ensure the independent scientific review of physical or other associative evidence in every capital case in which a sentence of capital punishment is imposed.⁶⁴

The Massachusetts Council also recommended that an Independent Scientific Review Advisory Committee appoint independent members to a panel whose job would be to review "the collection, handling, evaluation, analysis, preservation, and interpretation of and testimony and all other matters relating to, physical or other associative evidence presented in the particular case" in which the death sentence was imposed to make sure it was up to adequate standards.⁶⁵ The Council noted that high standards have not always been met by those in the front lines of criminal investigations in crime labs and forensic offices throughout the country and determined that independent evaluation would assist in ensuring proper standards are met.⁶⁶ The Council's conclusion was undoubtedly influenced by a number of scandals that have been associated with forensic labs around the country in recent years.

The *Chicago Tribune* recently examined 200 DNA and Death Row exoneration cases since 1986 and found that more than a quarter of them involved faulty crime lab work or testimony.⁶⁷ The *Tribune* found that problems such as faulty blood analysis, fingerprinting errors, flawed hair comparisons and contamination of evidence used in DNA testing have been discovered at crime labs in at least 17 states as well as the FBI

⁶⁴ Recommendation 8, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

⁶⁵ *Id.*

⁶⁶ *Id.* at 24.

⁶⁷ Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHICAGO TRIB., Oct. 21, 2004, at 1.

crime lab. Most of these scandals have come to light as a result of the independent DNA testing that has led to post-conviction exonerations. These cases have far-reaching consequences, as analysts involved in the faulty forensic work have testified in hundreds of trials that jurors (especially in this era of television shows like *C.S.I.*) place a great deal of weight on scientific testimony.

The *Tribune* series noted both a lack of independent oversight over labs, which resist letting outsiders in, and the use of questionable science in obtaining convictions.⁶⁸ A part of the problem is that at state police labs, the forensic scientists saw their role as members of the state's attorney's teams rather than as independent scientists. Further, of 260 accredited U.S. forensic labs, 90 percent are affiliated with law enforcement agencies and are not the subject of meaningful outside review.⁶⁹ Thus, the Illinois Commission and the Massachusetts Council recognized that if a state has the death penalty, an independent review of scientific evidence is essential.

B. New York Law Regarding Review of Scientific Evidence

New York has no independent crime laboratory that provides for independent review of scientific evidence. Given the weight this type of evidence carries in court and the types of problems that have been discovered in forensic labs in recent years, the establishment of an independent laboratory, or at least a means for independent review of scientific evidence, should be seriously considered as part of a thorough review of New York's capital punishment system.

⁶⁸ Flynn McRoberts et al., *Forensics Under the Microscope: Unproven Techniques Sway Courts, Erode Justice*, CHICAGO TRIB., Oct. 17, 2004, at 1.

⁶⁹ Steve Mills et al., *When Crime Labs Falter, Defendants Pay: Bias Toward Prosecution Cites in Illinois Cases*, CHICAGO TRIB., Oct. 20, 2004, at 1.

VI. A SIGNIFICANTLY NARROWER LIST OF DEATH PENALTY ELIGIBILITY FACTORS

A. Importance of Narrowing the List of Death Penalty Eligibility Factors

One major recommendation made both by the Massachusetts Council and the Illinois Commission was that if there is to be a death penalty, then the list of murders eligible for the death penalty should be quite narrow.⁷⁰ Massachusetts recommended that there be a maximum of six elements that may make one eligible to be guilty of murder in the first degree, or capital, murder.⁷¹ Similarly, the Illinois Commission recommended limiting the list of eligibility factors for capital punishment to a maximum of five.⁷²

⁷⁰ Commentators have made similar recommendations, encouraging elected officials to limit the death penalty eligibility factors and thus “reassert meaningful control over this process, rather than letting the courts and chance perform the accommodation on an ad hoc, entirely irrational basis.” Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 32 (1995).

⁷¹ Specifically, the Council recommended that one of the following six elements must be present for murder in the first degree.

- (a) *The defendant committed the murder as an act of political terrorism;*
- (b) *The defendant committed the murder for the purposes of influencing, interfering with a criminal investigation, grand jury proceeding, trial, or other criminal proceeding of any kind, including a possible future proceeding, or in retaliation for the victim's role in the investigation or adjudication impeding, obstructing, hampering, delaying, harming, punishing, or otherwise of a prior criminal case (including the implementation of the defendant's sentence), against:*
 - (1) *a victim whom the defendant knew or believed to have played an official role within the criminal justice system...*
 - or*
 - (2) *a victim whom the defendant knew or believed to have been (i) a witness to a crime committed on a prior occasion, or (ii) an immediate family member of such a witness . . .*
- (c) *The defendant intentionally tortured the victim for a prolonged period of time and in a gratuitous and depraved manner, during or immediately prior to the murder:*
- (d) *The defendant committed murder in the first degree against two or more victims.*
- ..;
- (e) *The defendant has a previous conviction for murder in the first degree . . .;*
- (f) *At the time the defendant engaged in the conduct . . . the defendant was subject to a sentence of imprisonment for life, without the possibility of parole, as the result of a previous conviction for murder*

The reason the Massachusetts Council recommended narrowly defining the death penalty eligibility factors is that the factors make up the "one and only place in the entire death penalty system" where substantive limits can be imposed on the death penalty that are not discretionary.⁷³ A long list of eligibility factors would allow most murders to be eligible for the death penalty, leaving individual prosecutors with extraordinary discretion to decide in which out of all these cases to seek the death penalty. The Massachusetts Council noted that when various decision-makers have too much discretion within a large pool of death-eligible murders, prejudices could influence the decision. This broad discretion results in the serious problem of racial disparity in application of the death penalty.⁷⁴ Expansive statutes also lead to geographic disparity as prosecutors in one area

Recommendation 1, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT at. 6-7.

⁷² Illinois Commission Recommendation 28 states:

There should be only five eligibility factors:

- 1. The murder of a peace officer or firefighter killed in the performance of his/her official duties or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.*
- 2. The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.*
- 3. The murder of two or more persons . . .*
- 4. The intentional murder of a person involving the infliction of torture.*
- 5. The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors or investigators.*

Recommendation 28, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT.

Regarding the fourth eligibility factor, "torture" is defined as the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain. Recommendation 28, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 71.

⁷³ MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT at 10-11.

⁷⁴ *Id.* at 11.

may more aggressively seek the death penalty than prosecutors in other counties. The Council thus decided to limit discretion by narrowing the eligibility factors to those kinds of murders that are among the most heinous of all crimes.⁷⁵

Similarly the Illinois Commission was concerned with narrowing the discretion of the sentencer and providing more uniformity to the way in which the law is applied. The Commission expressed concern that the Illinois list of eligibility factors (or aggravating circumstances) was so long that almost any murder could be fit on the list.⁷⁶ In particular, the Commission noted that since so many murders are potentially eligible as being committed in the "course of a felony," that aggravating circumstance lends itself to disparate application throughout the state and allows prosecutors too much discretion in deciding which cases to pursue as capital crimes.⁷⁷

B. New York Law's List of Eligibility Factors

New York has 13 death penalty eligibility factors, including murder for pecuniary gain and intentional felony murder for a large number of felonies.⁷⁸ Thus, New York has more than twice the number of aggravating circumstances recommended by either the Illinois Commission or the Massachusetts Council. New York's list encompasses a large number of murders and grants the prosecutor a great deal of discretion in deciding which cases to charge as a capital offense. Recently, one death penalty supporter agreed that

⁷⁵ *Id.*

⁷⁶ REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 66-67.

⁷⁷ *Id.* at 72.

⁷⁸ N.Y. PENAL LAW §125.27 (McKinney 2003). The "course of a felony" eligibility factor is listed in section 125.27 (a)(vii), and the pecuniary gain factor is listed in section 125.27 (a)(vi). Note that the intentional felony murder lists more than ten felonies that help qualify one for the death penalty, thereby making this factor extremely broad by itself. N.Y. PENAL LAW §125.27 (a)(vii).

New York should eliminate aggravating circumstances such as intentional felony murder and killings by persons serving a life sentence.⁷⁹

Of course, all murders are horrible crimes that create suffering and are deserving of some type of punishment, but overbroad death penalty statutes create arbitrariness and may be unconstitutional.⁸⁰ Although it is beyond the scope of this Report to determine which murders should fall in the narrow category of capital murder, it is clear that the overbroad 1995 death penalty statute does not accomplish this task.⁸¹ Narrowing the list of eligibility factors, as suggested by the Illinois Commission and the Massachusetts Council, would help reduce inconsistencies in the application of the death penalty law in New York and also help avoid the use of capital punishment for murders that are not among the very worst.⁸²

⁷⁹ Robert Blecker, *Who Deserves to Die? A Time to Reconsider*, 15 N.Y.L.J. 2 (July 22, 2004). Professor Blecker also proposes narrowing other aggravating factors, such as the witness-killing circumstance and the killing to prevent law enforcement factor. *Id.* However, to follow Professor Blecker's additional idea of adding some other factors that were not included by the Legislature in 1995 would magnify the current arbitrariness problems. For example, his suggestion of imposing the death penalty for current second-degree murder crimes committed recklessly with depraved indifference, while not imposing the death penalty for other second-degree intentional murders, could result in an unconstitutional arbitrary disparity.

⁸⁰ *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (noting that a capital punishment system must be able to distinguish the few murders that are capital from the many that are not). *See also* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY B. RTS. J. 345, 430-59 (1998) (noting that a large number of aggravating circumstances in a statute may make the statute unconstitutional).

⁸¹ As a starting point, the New York Legislature should eliminate every aggravating circumstance that is not included in both the Illinois and Massachusetts reports' lists of the maximum set of eligibility factors. If desired, the Association would give further input to the Legislature on this subject.

⁸² A previous report by the Association raised concerns about the list of eligibility factors. *See* Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Record Assoc. Bar N.Y. 129 (2000). "The more broadly the bill sweeps (e.g. by covering felony murders), the more likely it is (a) to engender the sort of arbitrariness that the courts have repeatedly condemned (i.e. that crimes and criminals of equal culpability will receive unequal punishment), and (b) to be held unconstitutional." *Id.* (quoting Letter from Barbara Paul Robinson [President, Association of the Bar of the City of New York], at 1 (March 3, 1995)). As discussed above, studies since the New York law

VII. USE OF DIFFERENT JURIES FOR EACH STAGE OF A BIFURCATED CAPITAL TRIAL

A. Importance of Using Different Juries for Each Stage of a Capital Case

In its fourth recommendation, the Massachusetts Council addressed a problem with using the same jury for the sentencing phase and the guilt phase.⁸³ It noted that if a defendant vigorously protests his innocence at the guilt-innocence stage, the defendant might undermine his or her ability to accept responsibility or express remorse at the penalty phase. Because the jury has already observed the defendant's denial of responsibility at the guilt-innocence phase, it may not find the defendant's remorse credible.

This jury consideration presents a strategic dilemma for the defendant that could be avoided if the defendant has the option of having a new jury for the sentencing stage.⁸⁴ The Council therefore recommended that if a defendant is found guilty, he or she should have the right to choose whether to proceed to sentencing with the original jury, or to have a new jury selected for the sentencing phase.

An additional concern is that death penalty cases are tried under rules that systematically increase the chances that the innocent will be convicted compared to noncapital cases. A reason for this injustice is the "death qualification" of juries. States

was enacted have raised similar concerns.

⁸³ Recommendation 4, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

⁸⁴ MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT at 18. *See also* United States v. Green, 343 F. Supp. 2d 23 (D. Mass. 2004) (requiring bifurcated juries in a capital murder case); United States v. Green, 2004 WL 2998772 (D. Mass. Dec. 29, 2004) (making findings as to why bifurcation is appropriate).

are entitled to exclude potential jurors with a fixed conviction in opposition to capital punishment.⁸⁵ The “death qualification” process is concerned about sentencing but it affects the guilt phase. It results in a jury panel that is more likely to find a defendant guilty, and thus the death qualification process results in a non-representative biased jury at the guilt phase.⁸⁶ Therefore, a bifurcated jury system would allow courts to do the death qualification process only for the sentencing jury, allowing the guilt phase jury to be unbiased.

B. New York Law Regarding Sentencing Juries

New York does not provide defendants with the option of a new jury for sentencing, thus limiting defendants' strategic options. The Legislature should consider studies that show that death-qualified juries, like those in New York, are less accurate in their assessment of guilt than ordinary juries.⁸⁷

Further, other studies have pointed out other problems with using the same jury for the guilt phase and the sentencing phase of a capital trial.⁸⁸ For example, “studies suggest that death-qualification leads to the exclusion of a disproportionate number of black and female jurors,” so using a death-qualified jury for both the guilt phase and

⁸⁵ See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

⁸⁶ See, e.g. Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 692-96 (2002); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 & n.164 (2000) (describing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries). See also J.W. Filkins, C.M. Smith & R.S. Tindale, *An Evaluation of the Biasing Effects of Death Qualification: A Meta-Analytic/Computer Simulation Approach*, in THEORY AND RESEARCH ON SMALL GROUPS, 153-75 (R.S. Tindale ed., Plenum Press 1998); Brief for Amicus Curiae American Psychological Association in Support of Respondent, *Lockhart v. McCree*, 476 U.S. 162 (1986) (No. 84-1865).

⁸⁷ See Rozelle, *supra* note 77, at 692-96.

sentencing phase results in the limitation of black and female jurors deciding whether or not a defendant is guilty.⁸⁹ Therefore, should New York decide to reinstate its capital punishment laws, it should provide for a capital defendant to have the right to have a new jury selected for the capital sentencing phase.⁹⁰

VIII. A HEIGHTENED BURDEN OF PROOF

A. Importance of a Heightened Burden of Proof in Capital Cases

The Massachusetts Council recommended that at the sentencing stage, as a prerequisite to the imposition of the death penalty, the jury should be required to find that there is "no doubt" about the defendant's guilt of capital murder.⁹¹ This recommendation was made to allow any residual or lingering doubt about the defendant's guilt, even after a conviction, to be sufficient to preclude imposition of the death penalty. The Council made this recommendation for a higher standard of proof at sentencing based on its determination that it could have some value in preventing potential mistakes if the jury has some concerns over its verdict.⁹²

Additionally, as discussed in the previous section, death-qualified juries have been shown to be more pro-prosecution and less accurate in assessing evidence than

⁸⁸ See, e.g., Craig Haney, et al., "Modern" Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUMAN BEHAVIOR 619 (1994).

⁸⁹ See *United States v. Green*, 343 F. Supp. 2d at 33.

⁹⁰ The Legislature should look to other states to see the options for how a separate sentencing jury is instructed. Again, the Association would be willing to comment on the various options.

⁹¹ Recommendation 7, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

⁹² *Id.* at 22.

regular juries.⁹³ Thus, the heightened burden of proof may assist in preventing wrongful convictions in capital cases. Furthermore, the heightened burden may discourage prosecutors from seeking the death penalty in cases in which the death penalty may not be truly warranted simply because it is easier to secure a conviction from a jury in a capital case.

B. New York Law Regarding Heightened Burden of Proof

New York has no law allowing residual doubt to preclude imposition of the death sentence in the sentencing phase, but this recommendation should be considered as part of a comprehensive review of the capital punishment system. This heightened burden of proof is particularly necessary in light of studies that show that death-qualified juries, like those in New York, are less accurate in their assessment of guilt than ordinary juries.⁹⁴

IX. DISCRETION OF JUDGES TO OVERTURN DEATH SENTENCES THEY BELIEVE ARE UNWARRANTED

A. Importance of Judicial Discretion to Overturn Death Sentences

Both the Massachusetts Council and the Illinois Commission recommended giving judges broad authority to set aside a jury's recommendation for a death sentence at the time of the trial. Illinois Recommendation 66 states:

After the jury renders its judgment with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she concurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming

⁹³ See, *supra*, Section VIIA.

⁹⁴ See Rozelle, *supra* note 77, at 692-96.

adoption of the new death penalty scheme limited to five eligibility factors).⁹⁵

The Massachusetts' Council recommended allowing the judge to decide that a case is not death-eligible before the trial. Also, as with the Illinois recommendation, the Council recommended that after trial, the judge could set aside the verdict of guilt of capital murder and the corresponding death sentence and direct the entry of a verdict of guilt of first degree murder if the judge finds the sentence to be inappropriate for any reason, including if the judge simply disagrees with the jury.⁹⁶ The Commission and the Council both found that trial judges are in the best position to correct any mistakes a jury may have made. The Illinois Commission further found that requiring the concurrence of a judge in the sentence of death would be a way to address the issue of residual doubt and proportionality (a problem which the Massachusetts Council also handled by recommending the option of a second jury for sentencing as discussed in Section VII).⁹⁷

In addition, both the Illinois Commission and the Massachusetts Council recommended allowing courts broad authority to consider new evidence and substantively review death penalty convictions and sentences in post-conviction proceedings. The Commission and the Council both concluded it was important to grant courts the authority to reverse death sentences they do not believe are warranted and that procedural bars and narrow legal constructions should not get in the way of judges' ability to determine that a sentence has been wrongfully imposed. For example, the

⁹⁵ Recommendation 16, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT

⁹⁶ Recommendation 9, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

⁹⁷ REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT at 153.

Illinois Commission suggested an amendment of the Illinois Post-Conviction Hearing Act to allow claims of actual innocence at any time after a conviction regardless of other time limits on presenting new evidence.⁹⁸

Similarly, the Massachusetts Council recommended allowing appellate courts to overturn death penalty cases on substantive and not merely procedural grounds. It noted that the Illinois Supreme Court was recently granted authority under the "Fundamental Justice Amendment" to reverse any death sentence it finds fundamentally unjust on the facts of the case. It then recommended that in death penalty cases, the Massachusetts Supreme Court also exercise this substantive review authority "without regard to any procedural default rules or other procedural barriers to review, including a defendant's failure to properly raise issues in prior proceedings."⁹⁹ The Council reasoned that appellate courts have the final responsibility to ensure the appropriateness of the death sentence in an individual case and they should not be constrained by procedural issues if they wish to reverse a death sentence that appears unjust. Both recommendations help to ensure that new evidence, when it would undermine confidence in the outcome of a trial, is not overlooked for procedural reasons.

B. New York Law Regarding Judicial Discretion to Overturn Death Sentences

Although under New York law a trial judge can set aside a death sentence on the motion of the defendant, the Illinois and Massachusetts recommendations would grant judges broader authority to set aside a jury's verdict *sua sponte* if they determine that the

⁹⁸ Recommendation 74, REPORT OF THE ILLINOIS GOVERNORS COMMISSION ON CAPITAL PUNISHMENT at 171.

⁹⁹ Recommendation 9, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

sentence is unjust. Also, various procedural bars apply in New York that may prevent defendants from bringing forth belatedly discovered new evidence of innocence.

Therefore, these recommendations should be considered as additional precautions to prevent the execution of innocent persons. Expanding judicial discretion may also help prevent over-application of the death penalty to crimes that are not the "worst" crimes and to defendants who have significant mitigating factors, such as mental illness, that may not have been properly considered by the jury.¹⁰⁰ Allowing broad judicial discretion to overturn death sentences may also help alleviate racial and geographic disparities in the application of the death penalty to the extent they may not be adequately dealt with by an overall proportionality review.¹⁰¹

X. AN ONGOING REVIEW COMMISSION

A. Importance of an Ongoing Review Commission

The Massachusetts Council's final recommendation was for the creation of a death penalty review commission to investigate claims of substantive error made by any person subject to a death sentence.¹⁰² The findings of its investigations would be made public and could be the basis for reform of a capital punishment system. The Council noted that

¹⁰⁰ Studies show that juries often give inconsistent consideration to mitigating circumstances. *See, e.g.,* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998).

¹⁰¹ For example, studies of New York's recent experience with capital punishment indicates a geographic disparity in the way it is applied. *See, e.g.,* Gene Warner, *Counties Differ Widely in Invoking Death Penalty*, BUFFALO NEWS, July 9, 2001, at A1.

¹⁰² Recommendation 10, MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT.

such commissions exist in England and Canada and have resulted in some number of convictions being set aside.¹⁰³

In addition to the Massachusetts Council's recommendation, New York should consider New Jersey's success with proportionality review as one means of ensuring consistency in capital sentencing. In New Jersey, a special master appointed by the New Jersey Supreme Court maintains an extensive statistical database to determine trends in prosecution and jury attitudes and whether community standards of decency support the death penalty for a particular category of criminal. In 2002, the New Jersey Supreme Court struck down a sentence on grounds of proportionality, becoming the first state supreme court to do so on the basis of statistical evidence of disproportionality.¹⁰⁴ New York should examine the New Jersey approach to determining proportionality of sentencing and consider ways to ensure that the death penalty is applied in a proportional manner.

B. New York Law Regarding a Review Commission

Although the New York Court of Appeals has promulgated rules regarding capital case data reports,¹⁰⁵ no commission has been established to review wrongful convictions. If the death penalty is reinstated in New York, an on-going study of the capital punishment system should be mandatory to help ensure that mistakes are caught, sentences are proportional, and reforms are made as necessary.

¹⁰³ *Id.* at 28-29.

¹⁰⁴ *State v. Pappasavvas*, 170 N.J. 462, 790 A.2d 798 (N.J. 2002) (holding that defendant's death sentence was disproportionate to sentences imposed in similar cases).

¹⁰⁵ *See* Rules of the New York Court of Appeals in Capital Cases, § 510.18. These reports themselves, however, do not give an adequate review because they only consider actual capital cases and do not consider all cases that could have been brought as first-degree murder capital cases. *See id.*

CONCLUSION: LEARNING FROM EXPERIENCE SINCE 1995

Since New York established the death penalty in 1995, there have been numerous developments that have provided new insight into the failures of capital punishment systems around the country. For example, through the use of scientific knowledge developed during the past decade, we now know that a number of convicted murder defendants were innocent.¹⁰⁶ Further, because of systemic problems and the fact that not every case has DNA evidence, we still have not discovered all of the current innocent inmates, and the innocent will continue to be convicted of capital crimes. These risks, in addition to risks of arbitrariness, exist in New York, which lacks several of the criminal justice reforms recommended by the Illinois Commission on Capital Punishment and the Massachusetts Council on Capital Punishment, as discussed in this Report.

Before the New York Legislature considers whether to re-institute the death penalty, the Association of the Bar of the City of New York urges the Legislature to evaluate the wealth of research that has been done since 1995. Analysis should begin with the issues discussed in this Report and the other recommendations developed in Illinois and Massachusetts. As a start, there needs to be an evaluation of the need for

¹⁰⁶ For example, in 2002, *Newsday* ran a four-part series, entitled “The Wronged Men,” consisting of several articles about cases of wrongful convictions in New York during the 1990’s. *See, e.g.*, Sean Gardiner, *For Them, No Justice: Bad convictions put 13 men in prison*, *NEWSDAY*, Dec. 8, 2002, at A03; Sean Gardiner and Herbert Lowe, *Free to Struggle*, *NEWSDAY*, Dec. 9, 2002, at A06; Sean Gardiner, *Dynamics of Righting a Wrong: The DA’s role in reversals*, *NEWSDAY*, Dec. 10, 2002, at A35; Herbert Lowe, *Friend Becomes Freedom Fighter*, *NEWSDAY*, Dec. 10, 2002, at A07; Sean Gardiner, *Getting it Right: Experts eye measures to prevent injustices*, *NEWSDAY*, Dec. 11, 2002, at A08; Graham Rayman, *Wrongfully Convicted: Two pursue cash awards*, *NEWSDAY*, Dec. 14, 2002, at A31. *See also Innocence and the Crisis in the American Death Penalty* (Death Penalty Information Center, Sept. 2004), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150>.

rules regarding informant testimony, rules regarding witness testimony, videotaped interrogations, lineup procedures, the use of scientific evidence, narrowing the list of eligibility factors, the use of bifurcated juries, a heightened burden of proof for capital cases, judicial discretion, and the creation of an ongoing review commission. Adoption of laws and procedures in these areas could lead to a less inaccurate and unfair system with regard to capital punishment.

The recommendations in this Report, however, are only the beginning of an attempt to limit arbitrariness and unfairness in New York's criminal justice system with post-1995 knowledge. For example, any in-depth examination should also consider whether the New York death penalty statute sufficiently protects against arbitrariness and racial discrimination¹⁰⁷ and ensures that people with significant mental illness are not subject to execution.¹⁰⁸ Similarly, in light of new studies, the Legislature should examine the danger that existing jury charges may be inadequate to prevent jurors from basing their decisions on misunderstandings of the law.¹⁰⁹ Finally, in addition to consideration

¹⁰⁷ See, e.g., Raymond Paternoster, et al., *An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction* (Jan. 7, 2003), available at <http://www.deathpenaltyinfo.org/article.php?did=105&scid=5>. This recent study, commissioned by the governor of Maryland, found that race and geography within the state affected who received the death penalty. *Id.* at 43.

¹⁰⁸ See, e.g., National Alliance for the Mentally Ill, *The Criminalization of People with Mental Illness* (2004), available at http://www.nami.org/Content/ContentGroups/Policy/WhereWeStand/The_Criminalization_of_People_with_Mental_Illness__WHERE_WE_STAND.htm.

¹⁰⁹ A number of recent studies indicate "the penalty phase instructions in capital murder trials produce high levels of confusion in the minds of jurors." Richard L. Wiener, Melanie Rogers, et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL., PUB. POL'Y, & L. 516, 571 (2004). See also James R.P. Ogloff & Sonia R. Copra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL., PUB. POL'Y, & L. 379, 402 (2004) (noting "a large body of research, using differing methodologies, which suggested that capital jury instructions are poorly understood. . .").

of the recommendations from the Illinois Commission and the Massachusetts Council, the Legislature should consider recent recommendations made by the Constitution Project,¹¹⁰ the American Bar Association's Section of Individual Rights and Responsibilities' protocols,¹¹¹ the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,¹¹² and any additional reputable studies that are released.

This Report shows the necessity of a thorough analysis of post-1995 studies and New York's laws before seriously considering the reinstatement of a death penalty law. Such changes and analysis are essential to protecting the innocent, providing fairness, and improving the quality of justice in the Empire State.

¹¹⁰ *Mandatory Justice: Eighteen Reforms to the Death Penalty* (The Constitution Project 2001), available at <http://www.constitutionproject.org/dpi/>. The Constitution Project created a bipartisan committee of both death penalty supporters and opponents to create recommendations to address problems with the death penalty. *Id.* at 8.

¹¹¹ American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487 (2002), also available at <http://www.abanet.org/moratorium/reportsandlaw.html>.

¹¹² ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, [hereinafter "ABA Counsel Guidelines"], *reprinted* at 31 HOFSTRA L. REV. 913, 932 (2003). The Supreme Court of the United States has noted the significance of the ABA Counsel Guidelines. *See* *Wiggins v. Smith*, 123 S. Ct. 2427, 2536-37 (2003) (invalidating a death sentence when the performance of defense lawyers "fell short of the standards for capital defense work articulated by the American Bar Association – standards to which we have long referred as "guides to determining what is reasonable").

It is essential that the New York Legislature review New York's post-conviction process in light of the ABA Counsel Guidelines. In recent testimony before members of the New York Assembly, Professor Eric M. Freedman, who served as reporter for the ABA Counsel Guidelines, noted that New York's system of post-conviction defense fails the standards of the ABA Counsel Guidelines and "to bring the system into compliance would require a significant structural overhaul and accompanying financial investment." Testimony of Professor Eric M. Freedman, *Joint Public Hearing of New York Assembly Standing Committees on Codes, Judiciary, and Correction Regarding the Death Penalty in New York*, at 3 (Dec. 15, 2004).