Capital Punishment Reform in Illinois – A Model for the Nation

By Illinois State Senator John Cullerton, Illinois State Senator Kirk Dillard and Peter G. Baroni

"State legislators should take a bow. They have set in motion a series of laws that are destined to become a model for other states."1

Introduction

Over the last three to four years the legislative and executive branches of Illinois government have sought to reform the capital punishment system in the State. This endeavor was prompted by numerous death row exonerations meted out by Illinois courts over the last decade. A major portion of that legislative and executive effort came to pass between August 2003 and January 2004 when comprehensive legislation was enacted into law by way of Public Act 93-0517 (mandatory recording of homicide confessions), Public Act 93-0605 (death penalty system reform), and Public Act 93-0655 (police perjury decertification in homicide cases). These new public acts codify a litany of changes that make Illinois the national model for death penalty reform. The changes embodied in these acts range from pre-trial hearings for jailhouse snitches and a ground breaking new process by which the Illinois Supreme Court reviews death penalty appeals to mandatory recording of homicide confessions and the decertification of police who lie at a homicide proceedings. This article explains the foregoing changes and the legislative intent behind those changes.

I. Mandatory Recording of Homicide Confessions — Public Act 93-0517

Public Act 93-0517 ("Recorded Statements Act") creates a presumption that any in-custody statement, taken at a place of detention (police station) in connection with a homicide (a violation of Article 9 of the Illinois Criminal Code) investigation is inadmissible at trial as substantive evidence, if it is not electronically recorded.2 This electronic recording requirement applies to adult and juvenile offenders.3 Electronic recording includes motion picture, audiotape, videotape or digital recordings.4 In other words, the new Recorded Statements Act applies the exclusionary rule to such confessions that are not recorded.5

Historically, the exclusionary rule applies to only constitutionally protected rights. It requires the exclusion of evidence at trial, if a defendant's constitutional right is violated by police.6 The exclusion of evidence is the most invasive remedy, heretofore reserved for only the most egregious law enforcement conduct — violations of a defendant's constitutional rights.7 The Recorded Statements Act expands that muscular procedural remedy to custodial interrogations based on the absence of a recording. This is a profound departure; the statutory mandate for murder confessions changes from no procedural relief for failing to record an in custody statement, to one of the most significant forms of procedural relief —

exclusion of evidence at trial. According to the Commission on Capital Punishment,8 electronic recording of such interrogations is "crucial to the fair administration of justice."

The Recorded Statements Act limits the application of this stark change in memorializing murder confessions by establishing a number of exceptions to that presumption of inadmissibility. Those exceptions, allowing such an in custody statement into evidence absent a recording, are as follows: (1) a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing; (2) a statement made during a custodial interrogation that was not recorded as required by this section, because electronic recording was not feasible; (3) a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness; (4) a statement made under exigent circumstances; (5) a spontaneous statement that is not made in response to a question; (6) a statement made after questioning that is routinely asked during the processing of the arrest of the suspect; (7) a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement agreeing to respond to the interrogator's question, only if a recording is not made of the statement; (8) a statement made during a custodial interrogation that is conducted out-of-state; (9) a statement given at a time when the interrogators are unaware that a death has occurred; or (10) any other statement that may be admissible under law.9

In raising one of these exceptions, the State bears the burden of proving, by a preponderance of the evidence, that one of the exceptions is applicable. 10 Also, nothing in the Recorded Statements Act precludes the admission of a statement, otherwise inadmissible under this section, that is used only for impeachment and not as substantive evidence.11

Moreover, there is one additional catchall exception to the presumption of inadmissibility of an unrecorded statement made by a suspect at a custodial interrogation. That catchall provides that the presumption may be overcome if the State proves, by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.12 Further, the sections of the Recorded Statements Act that mandate recorded statements take effect on August 6, 2005.

Finally, a Freedom of Information Act (FOIA) exemption is added to the electronic recording mandate, thus videotaped interrogations/confessions would not be subject to a FOIA request.13 Also, a new exception to the State's eavesdrop ban is created for recorded murder confessions.14

II. Death Penalty System Reform — Public Act 93-0605

1. DNA actual innocence hearing

This section of Public Act 93-0605 ("Act") codifies the current case law mandate in *People v. Savory*.15 That case requires that a defendant's request for forensic testing under 725 ILCS 5/116-3 must be allowed whenever such testing would significantly advance the defendant's claim of actual innocence, even if it would not, by itself, exonerate him.16

2. Defense Right to DNA database genetic marker grouping analysis

A defendant, charged with any offense where DNA evidence may be material to the defense investigation or relevant at trial, may request the court to order a DNA database search by the Illinois State Police.17 The defense shall also have the right to view the comparison analysis and any docu-mentation related to that analysis.18 This section of the bill is intended to allow a defendant use of the State DNA database in preparation for trial and as a means to seek out potentially exculpatory evidence.

3. Express coverage of DNA testing in the Capital Crimes Litigation Act

This section of the Act mandates funding from the Capital Crimes Litigation Act be made available for forensic testing requested by a capital defendant.19 Arguably, the Act already applies to such testing; this section makes that application clear.

4. No death penalty for the mentally retarded

This portion of the Act mandates Illinois comply with the recent U.S. Supreme Court case of *Atkins v. Virginia*.20 The Act makes the moving party bear the burden of establishing his or her mental retardation by a preponderance of the evidence at either a pretrial hearing or at the aggravation and mitigation stage.21 If the court denies a defendant's pretrial motion, finding that defendant is not mentally retarded, the defense may raise such evidence in mitigation at a capital sentencing hearing.22 If a court determines that a capital defendant is mentally retarded, the case shall no longer be considered a capital case and the procedural guidelines established for capital cases shall no longer be applicable to the defendant.23 The State may appeal such a ruling to the extent permitted by the Rules of the Illinois Supreme Court.24

Additionally, the Act requires that mental retardation (IQ of 75 or below *and* significant deficits in adaptive behavior in at least two enumerated skill areas) existed before the defendant reaches 18 years of age.25 IQ and psychometric testing procedures must be recognized by experts in the field of mental retardation.26 This requirement is intended to limit initiating testing procedures following arrest, because there would be a strong motivation to score as low as possible, thereby negating the reliability of the test.

Because the *Atkins* Court couched its prohibition on executing the mentally retarded in the Eighth Amendment's ban on cruel and unusual punishment, the new prohibition must be applied retroactively.27 Therefore the Act expressly mandates such retroactive application.28

5. Disclosure of Evidence to Prosecuting Authority by Law Enforcement

This section of the Act requires all law enforcement and investigative agencies responsible for investigating homicide offenses to provide to the prosecuting authority in the case all investigative material, including but not limited to reports, memoranda, and field notes that have been generated by or have come into the possession of the investigating agency concerning the homicide offense being investigated.29 In addition, the investigating agency shall provide to the prosecuting authority any material or information, including but not limited to reports, memoranda, and field notes, within its possession or control that would tend to negate the guilt of the accused of the offense charged or reduce his or her punishment for the homicide offense.30 Additionally, for "non-homicide" investigations the foregoing disclosure requirements apply, except with respect to "field notes."31 In other words, field notes need not be disclosed, unless it contains exculpatory value.

6. Reissue of Capital Crimes Litigation Act

This section extends funding for capital defense attorneys thereby continuing the first piece of death penalty reform legislation passed in Illinois.32 This provision, alone, puts Illinois ahead of most other states by insuring competent counsel for death penalty defendants.33

7. Actual Innocence Hearing

This portion of the Act allows capital defendants to raise claims of actual innocence even though their post-conviction petitions may be untimely or successive.34 It also requires trial judges to first make sure that the claim is not frivolous in order to avoid abusive filings.35 Although the Illinois Supreme Court has held that the Illinois Constitution guarantees the ability to bring a freestanding claim of actual innocence, it has also held that the procedural restrictions of the Post-Conviction Act need to be complied with.36

Moreover, the defendant must bear the burden of proving actual innocence by clear and convincing evidence.37 Finally, this section of the Act creates a due diligence clause, requiring a defendant to assert his claim of actual innocence within a reasonable period of time after discovering the exculpatory evidence.38

8. Reduction of the death eligibility factors

The former Governor's Commission on Capital Punishment suggested a far more sweeping limitation on the factors that allow for death penalty eligibility.39 This Act significantly reduces the eligibility factors, but only within the most used category of the eligibility factors – felony murder (when a person kills a person during the course of committing a felony).40 Six of the 15 predicate felonies, that were the basis for imposing death if a killing resulted, are eliminated.41 Those six felony offenses are: (1) armed violence; (2) forcible detention; (3) arson; (4) burglary; (5) criminal drug conspiracy; and (6) street gang drug conspiracy.42 However, the list of predicates does contain the addition of felonies that are "inherently violent crimes," including, but is not limited to, a list of enumerated offenses.43 Thus, the new Act leaves the list of felony murder predicates open ended, to some extent, in order to include other crimes that either do not exist now or were overlooked, and may fall under the definition of "inherently violent."44 Additionally, this section expands the eligibility factor allowing for death if a person murders an individual "involved in the investigation or prosecution of a criminal case."45 Previously, such individuals were limited to "material witnesses," now the factor includes "trial judges, prosecutors, defense attorneys, investigators, witnesses or jurors."46

9. Replace the death penalty mitigation jury instruction of "no mitigation sufficient to preclude death" with another mitigating instruction that "death is appropriate"

Despite the Illinois Supreme Court and federal courts consistently rejecting any claim that the above Illinois statutory jury instruction was unconstitutionally vague, critics have argued that it is confusing and may lead a jury to believe that the death penalty is mandatory. Both the prosecution and the defense typically argue to the jury about the appropriateness of the death sentence in each particular case. Thus, to the extent that this change reduces any perceived ambiguity, however slight, it was included in the Act. The change eliminates the requirement that the jury find "that there are no mitigating factors sufficient to preclude the imposition of the death sentence" and instead requires the jury, "after weighing the factors in aggravation and mitigation, [to find] that death is the appropriate sentence."47

10. Add death penalty mitigation factors including the defendant's (1) background of extreme emotional/physical abuse and (2) reduced mental capacity

Under previous law, abuse and reduced mental capacity mitigation evidence was regularly presented by the defense in a capital case, but was not explicitly listed in the statute as mitigating factors.48 This proposal simply expands, statutorily, the list of mitigating factors that a jury may consider to include the defendant's history of extreme emotional or physical abuse and the defendant's reduced mental capacity.49

11. Judge must provide a written opinion to the Supreme Court if he or she does not concur in the death verdict

This section directs the trial judge to provide a written opinion to the Supreme Court if he or she disagrees with the jury's death verdict, explaining the reasoning behind his or her decision to "non-concur" with that verdict.50 The death verdict will stand, but the reviewing court will have the trial court's written opinion as to why he or she disagrees with the verdict. Under previous law, judges had the authority to grant a new trial or sentencing hearing (or even enter a judgment notwithstanding the verdict) based on post-trial motions. This change expands this trial court authority to allow for increased Supreme Court scrutiny of death verdicts.

12. Judicial decertification of death eligibility if the only evidence of guilt is the uncorroborated testimony of an in-custody informant, a single eye witness or an accomplice

This provision allows a court to decertify a capital case if the evidence against the defendant is limited to particular types of uncorroborated admissible evidence. The motivation for this change is recent studies and analyses pointing to the fallibility of such witness testimony, absent corroborating evidence. Those types of evidence requiring corroboration are (1) the uncorroborated testimony of an in-custody informant concerning the confession of the defendant; (2) the uncorroborated testimony of a single eyewitness; and (3) the uncorroborated testimony of a single accomplice.51

Additionally, the term "uncorroborated" is intentionally left undefined in this section of the Act because it is a term that must be defined on a case by case basis. However, the term "corroboration" is historically a broadly defined term.52 For instance, the definition most likely applicable to "uncorroborated" in the Act is a diminimus one, based on the corpus delecti definition of corroboration.53

13. Pre-trial reliability hearing for jailhouse snitches or in-custody informants

Under previous law, "jailhouse snitches" or "in-custody informants" were treated the same as other unreliable witnesses, such as drug addicts, etc. The jury was given curative instructions describing the unreliable nature of the witness. However, the ultimate determination of witness reliability was left to the jury.

This Act creates a new section in the Criminal Code called Informant Testimony.54 It creates a broad definition of a "jailhouse snitch" or "informant" and then requires the court conduct a "reliability hearing," unless the defendant waives such a hearing.55 At the reliability hearing the prosecution must prove by a preponderance of the evidence that the witnesses' testimony is reliable.56

This is a significant departure from the historical treatment of witnesses giving direct evidentiary testimony. This section supplants the traditional role of the jury, as the trier of fact, to make witness reliability determinations. Further, this section of the Act places the burden on the State, not the party seeking exclusion of the evidence, to prove witness reliability at a pre-trial hearing.57 No other state in the Union removes reliability determinations from the jury on any witness testimony. This section clearly illustrates the profound lengths the General Assembly was willing to go to insure that death penalty cases are viewed under a microscope.

14. Fundamental Justice Amendment

The fundamental justice amendment of the Act is ground breaking in scope and conception. It is a result of deliberations beginning in the Capital Litigation Subcommittee of the Illinois Senate Judiciary Committee during the 92nd General Assembly and continuing through deliberations in the Senate Judiciary Committee during the 93rd General Assembly.58 This fundamental justice amendment authorizes the Supreme Court to engage, in death penalty cases only, in a new and important kind of appellate review. This new kind of appellate review is designed to be substantive, rather than procedural, focusing on the key substantive question: whether the death sentence is "fundamentally just" as applied to the particular case.59

Until now, appellate review in death penalty cases, as in all other criminal cases, has focused almost exclusively on identifying, and remedying, any procedural errors that may have occurred during the trial or sentencing hearing. While such procedural appellate review is important and should continue, to the extent that it is otherwise authorized by law, the fact that appellate review in death penalty cases has been effectively *limited* to procedural issues has caused serious problems.

It cannot be denied that juries (and trial judges) imposing capital sentences, occasionally make substantive mistakes, in other words, they sometimes impose a death sentence even though such a sentence is not appropriate in the particular case, either because the defendant may not be factually guilty, or because the defendant, even though factually guilty, may not deserve a death sentence. In some cases, these substantive mistakes result from procedural errors that occurred during the trial or sentencing hearing. For example, the trial judge may have erroneously admitted some evidence, or may have erroneously instructed the jury about the relevant law. In such cases, the traditional kind of appellate review, focusing on procedural errors, is capable of identifying, and remedying, the substantive mistake as well. In such cases, the defendant will get either a new trial or a new sentencing hearing, at which justice can be done.

But what about a death penalty case in which the jury, or the trial judge imposing a capital sentence, makes a substantive mistake that is not the result of a clear

procedural error that occurred during the trial or sentencing hearing?60 In such a case, prior to passage of the fundamental justice amendment, there were only two possible outcomes, and both were extremely problematic.

The first possibility was that the appellate court may have felt compelled to grant relief to the defendant, even though no clear procedural error occurred that would normally support such a grant of relief. In such a case, the appellate court would have been required to search for, and ultimately find, some new kind of procedural error – a kind not previously declared by the court – in order to justify the reversal of the defendant's death sentence. This phenomenon has contributed substantially to the explosive modern growth in new procedural rules that are applicable only to death penalty cases (usually pursuant to the Eighth Amendment of the United States Constitution). This explosive growth, in turn, often leaves lower court judges, who must apply such new procedural rules to particular cases, feeling dazed and confused.

Moreover, and more importantly, each time an appellate court finds and declares some new kind of procedural error, in order to justify the reversal of a particular defendant's death sentence, the ruling affects much more than the particular case before the appellate court. All other death penalty cases, in which the same kind of procedural error occurred, also become subject to the same kind of legal challenge and possible reversal, even if those other cases did *not* involve a substantively unjust death sentence.

The second possibility, which was even more problematic, that the appellate court – despite having a clear sense that the defendant deserves relief from the death sentence – would feel bound by the traditional notion that appellate review is for procedural errors only, and would therefore feel incapable of granting such deserved relief to the defendant. This could have lead to the ultimate tragedy of a fundamentally unjust execution.

The fundamental justice amendment solves the problem by granting to the Illinois Supreme Court the authority to reverse a particular death sentence whenever the Court finds that the sentence is not "fundamentally just" as applied to the particular case. The fundamental justice amendment liberates the appellate court from the existing requirement that it must find some new kind of procedural error in order to remedy a death sentence that is not fundamentally just.

The fundamental justice amendment contemplates that the new "fundamental justice" appellate review – which is *not* the same as "comparative proportionality review" – will be fact-based and highly discretionary, and will lead to appellate reversal on substantive grounds in only a very small number of death penalty cases. The issue of "fundamental justice" should be decided, and the decision announced by the court, in a manner that does not contribute to the development of yet *another* body of legal precedents applicable to death penalty cases. The "fundamental justice" of a death sentence, as applied to a particular case, cannot

generally be determined on the basis of legal rules. It is a moral issue, not a legal one, and must be based on the facts of the particular case and the moral compass of the decision maker. If the appellate court decides that a particular death sentence is not "fundamentally just," then the court should issue a written opinion to explain its decision, but other courts should not be allowed to use such written opinions as precedent for the review of future death penalty cases. Instead, each claim arguing that "fundamental justice" was abridged in a death penalty case must be reviewed by the Supreme Court on its own merits.

It has been suggested that the new fundamental justice review power given the Supreme Court is no different than the "excessiveness" doctrine. In reviewing the few cases in which the Illinois Supreme Court has used its "excessiveness" authority (as well as many cases in which it has declined to do so), it is clear that the court has used this power (along with the related "disproportionality" doctrine) to review two particular substantive issues only: (a) whether the sentencer might have overlooked, or grossly underweighted, one or more mitigating or extenuating circumstances offered by the defendant; and (b) whether the defendant's death sentence was obviously inconsistent with the sentence received by a co-defendant in the same crime.61

The Court itself has summed up the "excessiveness" and "disproportionality" doctrines exactly this way. In *People v. Strickland*,62 for example, the court stated:

Unlike the mitigating evidence in prior cases in which this court has found a sentence of death to be excessive, the mitigating evidence in the case at bar did not suggest that the defendant's offenses were triggered by or resulted from substantial extenuating circumstances. (See People v. Leger (1992), 149 Ill. 2d 355, 173 Ill. Dec. 612, 597 N.E.2d 586; People v. Johnson (1989), 128 Ill. 2d 253, 131 Ill. Dec. 562, 538 N.E.2d 1118; People v. Buggs (1986), 112 Ill. 2d 284, 97 Ill. Dec. 669, 493 N.E.2d 332; People v. Carlson (1980), 79 Ill. 2d 564, 38 Ill. Dec. 809, 404 N.E.2d 233; see also People v. Gleckler (1980), 82 Ill. 2d 145, 44 Ill. Dec. 483, 411 N.E.2d 849 (vacating death sentence as excessive; also finding death sentence to be disproportionate to codefendant's sentence).) For these reasons, we do not believe that death is an excessive sentence here.63

While these two particular substantive issues are important, there are many others that might also affect the "fundamental justice" of a death sentence — including, most importantly, the possibility of "residual doubt" about the defendant's guilt (the main reason for most of the Illinois death row exonerations). As for such "residual doubt," the Supreme Court clearly does not see this as falling within the scope of the "excessiveness" doctrine.64 Under the fundamental justice amendment *all* issues that might relate to the "fundamental justice" of a death sentence — including "residual doubt" — are open to full consideration by Supreme Court.

Another reason the fundamental justice amendment is a profound change in death penalty appellate review lies in the fact that that the "excessiveness" doctrine grew out of the Illinois Supreme Court's general power to review criminal sentences on direct appeal. As a result, the Court has held that "excessiveness" review can be "waived" if the defendant doesn't raise the issue on direct appeal. In other words, if such a case comes back up to the Supreme Court on appeal from a post-conviction motion, the Court will not do any "excessiveness" review, unless it finds the defense attorney to have been constitutionally ineffective. This kind of procedural "waiver" bar to substantive review, however, is one of the things that the fundamental justice amendment was designed to avoid. Because the automatic appellate review provision of the Illinois Criminal Code's death-penalty statute, where the fundamental justice amendment now appears, applies both to direct appeals and to appeals in post-conviction cases.65 Thus, the Court's broad new substantive review power, via the fundamental justice amendment, is the same in post-conviction cases as it is in direct appeal cases, not true under the Court's "excessiveness" review power.

Perhaps the best evidence that the "excessiveness" doctrine in Illinois is not as useful as the fundamental justice amendment is the fact that all the cases suggested as proof that the Court previously had the power to discard unjust death penalty cases involved death sentences that were decided by the trial judge, after the defendant had waived jury sentencing.66 In these cases, it was far easier than usual for the Court to act on substantive grounds, because the court did not have to act as a 13th juror, in other words, the Court did not have to disagree with the substantive judgment of the jury. The fundamental justice amendment, on the other hand, directly authorizes Court to disagree with the jury on the merits, if it believes the decision was fundamentally unjust.

15. Line up and photo spread procedure

This section requires police to conduct line ups appropriately, the way they should have been conducting them under previous law, requiring appropriate memorialization and disclosure to the defense.67 It requires the police officer administering the line up to admonish the witness that the offender may or may not be in the line up or photo spread and that the witness should not assume the defendant is in the line up or photo spread.68 Further, the witness must sign a statement memorializing the foregoing admonition.69

16. Sequential Line up Pilot Program.

The Act creates a sequential line up pilot program. The pilot program shall be established, by the Illinois State Police, in three different jurisdictions across the State.70 Those jurisdictions are required to conduct sequential line ups for one year.71 Then the State Police must study the effectiveness of the program and report to the General Assembly.72 This pilot program begins on July 1, 2004.73

The State Police must report back to the General Assembly by September 1, 2005.74

This section of the Act allows for the study of sequential line up procedures to determine if they are the fairest or most appropriate means for administering a line up.

III. Police Perjury in Homicide Cases — Public Act 93-0655

Public Act 93-0655 ("Police Perjury Act") requires the decertification of police officers who "knowingly and willingly made false statements as to a material fact going to an element of the offense of murder" at a murder proceeding.75 An accused police officer must be proven to have made a material false statement by clear and convincing evidence.76 The Police Perjury Act contains two parallel processes for claiming a police officer committed perjury.

1. A claim of perjury after a murder conviction

Under Police Perjury Act, after a defendant is convicted of murder, she may allege the police officer in the case made "material false statements at the trial that deprived [her] of [her] constitutional rights."77 She must do so in her post conviction petition (the collateral appeal of the murder conviction, filed after the direct appeal is denied).78 If the trial judge grants a post conviction evidentiary hearing on the issue of police perjury – because it "would have violated the defendant's constitutional rights and likely affected the outcome of the trial" – then the Illinois Labor Relations Board Executive Director must appoint an administrative law judge ("ALJ") to conduct a hearing on the allegations of police perjury.79

If the trial judge denies a post conviction evidentiary hearing on the issue of police perjury, then the police perjury claim is dismissed without the right to appeal.80 If an ALJ conducts a hearing, then he or she must forward his or her finding to the Labor Relations Board and the Board will then vote on that finding.81 If the Labor Relations Board, by a majority vote, finds that the officer committed perjury based on clear and convincing evidence, then the Labor Relations Board forwards their finding to the Illinois Law Enforcement Training and Standards Board.82 That Board would then revoke the officer's certification. If the Labor Relations Board finds no perjury was committed, the police perjury claim is dismissed with no appeal.83

2. Claim of perjury after a murder acquittal

If the defendant is acquitted of murder and claims a police officer committed perjury, then she must file a verified complaint with the Law Enforcement Training and Standards Board.84 That Board's executive director then decides if the claim has merit or is frivolous. If he finds the claim without merit, the issue is

dead with no appeal.85 If he finds the claim meritorious, then he appoints an ad hoc committee of seasoned investigators to investigate the claim.86 The investigator's report is then forwarded to the executive director of the Labor Relations Board.87

The Labor Relations Board's executive director then conducts another review and decides again if the claim has merit or is frivolous.88 If he finds the claim without merit, the issue is dead with no appeal.89 If he finds it meritorious, then he appoints an ALJ and the process proceeds as stated in the above section addressing a post conviction claim of police perjury.90 At the ALJ hearing, the defendant is represented by an attorney, free of cost, and the prosecution (or at that point the People) is represented by an attorney from the Illinois Department of Professional Regulation.91

In addition to the forgoing, Police Perjury Act requires the executive director of the Labor Relations Board to report to the General Assembly on the number of complaints, hearings and decertifications deliberated upon by the Board.92 The Police Perjury Act took effect on January 20, 2004.93

Conclusion

This reform effort is the culmination of years of deliberation in the Illinois legislature and the Commission on Capital Punishment. It is a comprehensive effort to insure the fairness and integrity of the capital punishment system. The legislation is a national model embodying thoughtful reform to allow capital punishment in the worst of worst cases. At the same time, it affords capital defendants additional safeguards that often tip the scales of justice in their favor so that there is no doubt as to guilt because death is the People's remedy.

1 CHI. TRIB, *Lead editorial*, April 7, 2003.

2 725 ILCS 5/103-2.1(b)(one violation of Article 9 not included under the Recorded Statements Act mandate is Concealment of Homicidal Death, 720 ILCS 5/9-3.1).

3 725 ILCS 5/103-2.1(adults); 705 ILCS 5/401.5(juveniles)(the juvenile section of the Recorded Statements Act mirrors the adult section).

4 725 ILCS 5/103-2.1(a).

5 725 ILCS 5/103-2.1(b).

6 *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

7 *Id.*

8 See Thomas P. Sullivan, *Repair or Repeal – Report of the Governor's Commission on Capital Punishment*, 90 ISBJ 304-307, 325 (a summary by the co-char of the most significant changes to the Illinois capital punishment system recommended by the commission).

9 725 ILCS 5/103-2.1(e).

10 725 ILCS 5/103-2.1(d).

11 725 ILCS 5/103-2.1(e).

12 725 ILCS 5/103-2.1(f).

13 725 ILCS 5/103-2.1(g).

14 720 ILCS 5/14-3(k).

15 197 Ill. 2d 203, 756 N.E.2d 804 (2001).

16 725 ILCS 5/116-3(a) and (c)(1).

17 725 ILCS 5/116-5(a).

18 725 ILCS 5/116-5(c).

19 725 ILCS 124/15(e)(2).

20 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002).

21 725 ILCS 5/114-15(b) and (c).

22 725 ILCS 5/114-15(e).

23 725 ILCS 5/114-15(f).

24 Ill. S. Ct. Rule 604

25 725 ILCS 5/114-15(d).

26 *Id.*

27 *See* *Atkins v. Virginia*, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002).

28 725 ILCS 5/122-2.2 (requiring death row defendants to file a post conviction petition alleging the defendant's mental retardation within 180 days of the enacting date of this Act or February 2, 2004).

29 725 ILCS 5/114-13(b).

30 *Id.*

31 *Id.*

32 Public Act 91-589.

33 725 ILCS 124/19 (b).

34 725 ILCS 5/122-1(a-5).

35 *Id.*

36 *People v. Washington*, 171 Ill. 2d 475, 489, 665 N.E.2d 1330, 1337 (1996).

37 725 ILCS 5/122-1(a)(2).

38 725 ILCS 5/122-1(a-5).

39 *See* *supra* n. 8; Senator Dillard sponsored a bill encompassing virtually all the reforms suggested by the Commission on Capital Punishment during the 92nd General Assembly at the request of the Governor. Ultimately, there were several reforms included in that legislation that could not be resolved through negotiations and, therefore, Dillard decided to hold the bill, in order to work on the compromise that resulted in the Death Penalty System Reform Act (Public Act 93-0605).

40 720 ILCS 5/9-1(b)(6)(c).

41 *Id.*

42 *Id.*

43 720 ILCS 5/9-1(b)(6)(c).

44 *Id.*

45 720 ILCS 5/9-1(b)(8).

46 *Id.*

47 720 ILCS 5/9-1(g).

48 720 ILCS 5/9-1(c).

49 *Id.*

50 720 ILCS 5/9-1(c).

51 720 ILCS 5/9-1(h-5).

52 *See*, *e.g.*, *Smith v. United States*, 348 U.S. 147, 99 L. Ed. 192, 75 S. Ct. 194 (1954), *Opper v. United States*, 348 U.S. 84, 99 L. Ed. 101, 75 S. Ct. 158 (1954), *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

53 *See Opper*, 348 U.S. 84, 93, 99, *Warszower v. United States*, 312 U.S. 342, 347, 85 L. Ed. 876, 61 S. Ct. 603 (1941), *United States v. Wilson*, 436 F.2d 122, 123 (3d Cir. 1971).

54 720 ILCS 5/115-21.

55 720 ILCS 725 ILCS 5/115-21(d).

56 *Id.*

57 *Id.*

58 The committee was assisted in its deliberations and subsequent legislative drafting of the Fundamental Justice Amendment by Professor Joseph Hoffman of the Indiana University School of Law.

59 720 ILCS 5/9-1(i).

60 *See*, *e.g.*, the claim that was made unsuccessfully by the defendant in *Herrera v. Collins*, 506 U.S. 390 (1983).

61 *People v. Strickland*, 154 Ill. 2d 489; 609 N.E.2d 1366 (1992).

62 *Id.*

63 *Id.* at 493.

64 *See People v. Strickland*, 154 Ill. 2d 489; 609 N.E.2d 1366 (1992).

65 See *People v. Lewis*, 105 Ill. 2d 226; 473 N.E.2d 901 (1984).

66 See *People v. Leger*, 149 Ill. 2d 355, 173 Ill. Dec. 612, 597 N.E.2d 586 (1992); *People v. Johnson*, 128 Ill. 2d 253, 131 Ill. Dec. 562, 538 N.E.2d 1118 (1989); *People v. Strickland*, 154 Ill. 2d 489; 609 N.E.2d 1366 (1992); *People v. Buggs*, 112 Ill. 2d 284, 97 Ill. Dec. 669, 493 N.E.2d 332 (1986); *People v. Carlson*, 79 Ill. 2d 564, 38 Ill. Dec. 809, 404 N.E.2d 233 (1980); *People v. Gleckler*, 82 Ill. 2d 145, 44 Ill. Dec. 483, 411 N.E.2d 849 (1980).

67 725 ILCS 5/107A-5(a).

68 725 ILCS 5/107A-5(b).

69 *Id.*

70 725 ILCS 5/107A-10 (a).

71 725 ILCS 5/107A-10 (b).

72 *Id.*

73 *Id.*

74 725 ILCS 5/107A-10 (g).

75 720 ILCS 705/6.1(h).

76 720 ILCS 705/6.1(k).

77 720 ILCS 705/6.1(h).

78 720 ILCS 705/6.1(k).

79 *Id.*

80 *Id.*

81 720 ILCS 705/6.1(n).

82 *Id.*

83 *Id.*

84 720 ILCS 705/6.1(h)(1).

85 720 ILCS 705/6.1(h)(2).

86 720 ILCS 705/6.1(i).

87 720 ILCS 705/6.1(j).

88 720 ILCS 705/6.1(i).

89 720 ILCS 705/6.1(h)(2).

90 720 ILCS 705/6.1(j).

91 720 ILCS 705/6.1(k).

92 720 ILCS 705/6.1(r).

93 P.A. 93-0655.

Senator John Cullerton *(D-Chicago) is co-chair of the Illinois Senate Judiciary Committee and chief sponsor of the Death Penalty System Reform Act (P.A. 93-0605) and the Police Perjury Decertification Act (P.A. 93-0655). He has represented the north side of Chicago in the Senate since 1992 and also serves on the Insurance and Rules Committees. From 1978 to 1992, Cullerton represented the same area of Chicago in the Illinois House where he served as Speaker Pro Tempore and House Democratic Floor Leader. Prior to the House, he served as an assistant public defender in Chicago. He is a member in the law firm of Fagel Haber LLC in Chicago. Cullerton attended Loyola University of Chicago where he earned his Bachelor's degree in Political Science in 1970 and his Juris Doctor from the School of Law in 1974.*

Senator Kirk Dillard *(R-Hinsdale) is co-chair of the Illinois Senate Judiciary Committee and co-sponsor of the Death Penalty System Reform Act (P.A. 93-0605), the Mandatory Recording of Homicide Confessions Act (P.A. 93-0517), and the Police Perjury Decertification Act (P.A. 93-0655). He has represented the western suburbs since 1994. Prior to the Senate, he served as former Governor Jim Edgar's chief of staff, was director of legislative affairs for former Governor James R. Thompson, and was a judge on the Illinois Court of Claims. He is a partner at Lord, Bissell & Brook in Chicago. He graduated, with honors, from Western Illinois University with a Bachelor of Arts degree and received his Juris Doctor from the DePaul University College of Law.*

Peter G. Baroni *is a principle in the law firm of Leinenweber & Baroni LLC with offices in Chicago and Wheaton. His practice concentrates on municipal prosecutions, as well as criminal and employment law. He is also a principle in the government relations firm of Leinenweber & Baroni Consulting, Inc. As a government relations consultant, Baroni advocates for clients in the Illinois General Assembly. Previously, he served as legal counsel to the Illinois Senate Judiciary Committee, the Senate Republican Caucus and the Senate President. In that capacity, Baroni staffed both Senator Cullerton and Senator Dillard in drafting the death penalty reform legislation addressed in this article. From 1996*

through 2000, he was an assistant state's attorney for the DuPage County State's Attorney's Office. Peter graduated cum laude *from Howard University School of Law in 1996 and was an editor on the Howard Law Journal. In 1989, he received his undergraduate degree from DePauw University in History and English Literature.*