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ARTICLES

THE ILLINOIS DEATH PENALTY: WHAT WENT WRONG?

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DEDICATION

This article is dedicated to the memory of Richard E. Cunningham, a noble warrior and great leader in the battle against capital punishment.

INTRODUCTION

A citizen of Illinois who had been measured for his coffin and was within two days of execution is proven innocent of the murders for which he had been convicted and sentenced to death. Twelve other men, also convicted and sentenced to death in Illinois, are similarly exonerated, declared innocent, and set free. The belief of the complacent in the efficacy of the criminal justice system is shattered by revelations of police torture, prosecutorial misconduct, and ineffectiveness of defense counsel. This is Illinois in the year 2001, and the whole world is watching.

And Illinois is not unique, particularly with respect to the percentage of reversals and other relief granted to defendants under a sentence of death. Indeed, according to a recent survey by Professor James S. Liebman, and his colleagues at Columbia University, the rate of reversible error for Illinois capital cases from 1973 to 1995 was 66%.[1] The national error rate for the comparable

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1. James S. Liebman et al., *Capital Attrition: Error Rates in Capital*

period was 68%.[2] In contrast, the national serious error rate for non-capital cases during the comparable period was 15%.[3]

Notwithstanding the high serious reversible error rate, the number of executions in this country has risen sharply over the years. From 1984 to 1991, an average of fifteen men and women were executed annually.[4] Between 1992 and 1994, the number rose to twenty seven a year, and to fifty three a year from 1994 to 1998.[5] In 1999, the number rose to eighty eight.[6]

Liebman and his associates reviewed a total of 5,760 capital cases.[7] Of that number, 313 inmates were executed during the period.[8] There were 4,578 state capital convictions of which state court judges vacated 47% of the death sentences.[9] The study also showed that thereafter federal judges vacated the death sentence in 40% of the remaining cases.[10] Again, Illinois statistics are consistent with the rest of the nation. Liebman finds a 43% reversal rate by the state courts in Illinois death penalty cases, and a 40% reversal rate of the remaining cases by the federal courts on habeas corpus.[11] Liebman then combines the overall serious error found by Illinois state courts on direct appeal, state courts on post-conviction and federal habeas reversals to reach the total serious error rate in death penalty cases of 68%.[12]

It is also interesting to note that of the capital cases reversed and retried nationally, 82% did not receive the death penalty on retrial or resentencing, and 7% were found innocent.[13]

Professor Liebman concluded that the two main reasons for the numerous reversals nationally were "(1) egregiously incompetent defense lawyers who didn't even look for and demonstrably missed important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who did discover that kind of evidenced but suppressed it . . . keeping it from the jury."[14]

Liebman also reported from a parallel study conducted by the U.S. Department of Justice, which tracked 263 cases where death was imposed in 1989.[15] Only 103 of these cases had reached the final

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Cases, 1973-1995, 78 TEX. L. REV. 1839, 1854 (2000). See also, *infra*, chart in Appendix.

2. Liebman, *supra* note 1, at 1854.
3. *Id.*
4. *Id.* at 1858 n.58.
5. *Id.*
6. *Id.* at 1858 n.58.
7. Liebman, *supra* note 1, at 1846.
8. *Id.*
9. *Id.* at 1847.
10. *Id.* at 1849.
11. *Id.* at 1849.
12. Liebman, *supra* note 1, at 1850.
13. *Id.* at 1852.
14. James S. Liebman, *Executive Summary* (Source on file with author).
15. Liebman, *supra* note 1, at 1861.

disposition stage by 1998.[16] Of that number, 76% had been reversed or remanded for a new sentencing hearing.[17] While Liebman's research gives a fine overall picture of the number of death penalty reversals, it does not discriminate as to how many reversals were due to different types of error. In order to fill this gap, at least for Illinois, the authors of this article recently undertook a review of death penalty reversals in Illinois. The authors have classified these cases according to the kinds of error that led in each instance to grants of relief from state and federal reviewing courts or from the Governor.

It is important to note that for the purpose of this article, the term "wrongful conviction" means more than the conviction of the innocent. "Wrongful conviction" means *any conviction or sentence which was obtained wrongfully*—obtained, in other words, in violation of the Illinois or United States Constitution as interpreted by the Illinois Supreme Court, the federal district courts in Illinois, the Seventh Circuit Court of Appeals, or the United States Supreme Court. Any grant of relief in a death penalty case beyond a limited remand is an official announcement of a wrongful conviction.

This article will begin with a review of the parameters and applicable law with respect to the effectiveness of defense counsel in death penalty cases, prosecutor responsibilities, judicial obligations, and other questions, including those of fitness and mental health. We will attempt to categorize the cases in which relief has been granted in order to discover the general nature of the problem. Finally, we will comment on some proposed solutions to the problems identified in our analysis, and offer some suggestions of our own.

I. PARAMETERS AND PRINCIPLES OF DEATH PENALTY JURISPRUDENCE: CONSTITUTIONALITY OF THE DEATH PENALTY IN AMERICAN JURISPRUDENCE

At the time of the passage of the Eighth Amendment prohibiting cruel and unusual punishment, the death penalty was a viable sentence in colonial America. From 1791 to date, the death penalty has been viewed as constitutional and not barred by the Eighth Amendment.[18] Although in 1972, in *Furman v. Georgia*,[19] the method of administering the death penalty was declared to violate the cruel and unusual punishment clause of the Eighth Amendment.[20] By 1976, legislation had seemingly cured

16. *Id.*
17. *Id.* at 1861.
18. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972).
19. *Id.* at 239.
20. *Id.*

this problem, and the death penalty was approved once again by the United States Supreme Court in *Gregg v. Georgia*.[21]

However, continuous attacks have been made on the constitutionality of the death penalty, particularly in light of the fact that the Eighth Amendment is a kinetic amendment, changing with the times. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[22] Nagging questions of the impact of race as a determinant of who gets the death penalty, statistics from the rest of the world where the death penalty has been abolished, international treaties dealing with the rights of both adults and juveniles that the United States has signed (*e.g.*, the Vienna Convention), and the increase in the number of states forbidding execution of the mentally retarded, all place pressure on those thirty eight states that still retain death to constantly review its viability as a fair and meaningful penalty.

II. GROUNDS FOR REVERSAL

A. Ineffective Assistance of Counsel

1. Legal Background

With respect to counsel in death penalty cases, *Powell v. Alabama* guaranteed counsel for indigents accused of capital murder under the due process clause of the 14th Amendment.[23] However, it was not until 1963, in *Gideon v. Wainwright* that counsel was guaranteed to capital defendants (and all indigent felons) at trial under the aegis of the Sixth Amendment.[24]

Counsel was also guaranteed to all indigent felons and capital litigants at the initial appellate stage if the state had an appellate procedure for those who could not afford counsel.[25] However, with respect to post-conviction remedies, the United States Constitution did not guarantee counsel, even in a capital case.[26] In Illinois, however, the legislature has provided a statutory right to counsel in capital post-conviction cases, and the United States Congress has provided for counsel in federal habeas corpus proceedings.[27]

However, the fact that counsel in post-conviction and habeas proceedings is a statutory and not a constitutional right resonates

21. 428 U.S. 153, 187 (1976).
22. Trop v. Dulles, 356 U.S. 86, 101 (1958).
23. 287 U.S. 45, 73 (1932).
24. 372 U.S. 335, 342-44 (1963).
25. Douglas v. California, 372 U.S. 353, 358 (1963).
26. Murray v. Giarratano, 492 U.S. 1, 10 (1989).
27. McFarland v. Scott, 512 U.S. 849, 859 (1994). *See also*, 725 ILL. COMP. STAT. 5/122-4 (West 2000) (granting indigent capital defendants a right to counsel in post conviction hearings).

in the question of the standard for ineffectiveness of counsel as a reason for reversing a conviction or sentence in a capital case. The standard for ineffectiveness of counsel where such a right arises under the Sixth Amendment is clearly spelled out by the United States Supreme Court in *Strickland v. Washington*.[28] Recently, in *Williams v. Taylor*, the United States Supreme Court found that a defense lawyer had rendered ineffective assistance of counsel during the sentencing phase of a capital case in violation of *Strickland v. Washington*.[29] In *Williams*, the district court had noted five categories of mitigation not brought out by trial counsel, a) evidence of Williams' background, b) evidence of abuse by his father, c) testimony by prison officials that Williams received commendations for helping to break up a drug ring in prison, and testimony of correctional officers that he would not be dangerous in the future, d) prominent character witnesses who would have testified in his behalf, and e) evidence of petitioner's borderline mental retardation.[30]

However, where the right to counsel is statutory, the standard for ineffectiveness of post-conviction counsel in a capital case may be only a reasonable level of assistance.[31] Clearly, where a lawyer fails to follow the dictates of Supreme Court Rule 651(c), which requires post-conviction counsel to read the transcript of the trial, confer with the defendant, and file or amend the post-conviction petition in accordance with the defendant's claims of constitutional violation, that lawyer is ineffective.[32]

Our study found that a significant portion of the grants of

28. 466 U.S. 668, 689 (1984) (holding that counsel's performance must so undermine the proper functioning of the adversary process that the trial cannot be relied upon to have produced a just result, and that but for counsel's errors there is a reasonable probability that the outcome would have been different).

29. Williams v. Taylor, 529 U.S. 362, 372-73 (2000). *See also Strickland*, 466 U.S. at 688 (holding that ineffective assistance of counsel exists only when sufficient prejudice exists to warrant reversal).

30. *Williams*, 529 U.S. at 372-73.

31. *See* People v. Cloutier, 732 N.E.2d 519, 527-28 (Ill. 2000).

32. *See* People v. Johnson, 609 N.E.2d 304, 306 (Ill. 1993). In *Johnson*, the defendant was found guilty and sentenced to death for murder, aggravated kidnapping, deviant sexual assault, and attempt murder. Johnson had filed a pro-se Post Conviction petition, after which counsel was appointed for him. *Id.* However, that lawyer failed to investigate the claims raised in the pro-se petition, but the circuit court dismissed the petition without a hearing. *Id.* On post-conviction appeal, defendant alleged that his post-conviction counsel failed to follow the requirements of Illinois Supreme Court Rule 651(c). *Id.* The Illinois Supreme Court reversed and remanded to allow the filing of an amended post-conviction petition. *Id.* at 314-15. *See also* People v. Turner, 719 N.E.2d 725, 730 (Ill. 1999) (holding counsel ineffective where post-conviction counsel met only once with the defendant, never accepted phone calls, failed to attach affidavits to the post-conviction petition, and failed to file an amended petition).

relief involved ineffective assistance of counsel, both in terms of percentage (19%) and absolute numbers (28).[33] Excluding for a moment those cases which involved only limited remands (five cases),[34] Illinois courts have made twenty three findings of ineffective assistance, eight of which mandated a new trial,[35] and fifteen of which mandated a new sentencing hearing.[36] Of the twenty three cases in which trial or sentencing relief was eventually granted based upon a finding of ineffective assistance, two involved conflicts of interest,[37] four involved failures to challenge or to appeal critical errors of law or fact,[38] five involved mistaken concessions or stipulations to guilt, death-eligibility, or the existence of prior felony convictions,[39] and twelve involved the

33. *See, infra*, Appendix, pie chart entitled "Error in Illinois Capital Cases."

34. *See generally* People v. Ruiz, 686 N.E.2d 574 (Ill. 1997); People v. Orange, 659 N.E.2d 935 (Ill. 1995); People v. Johnson, 609 N.E.2d 304 (Ill. 1993); People v. Caballero, 533 N.E.2d 1089 (Ill. 1989); People v. Ruiz, 547 N.E.2d 170 (Ill. 1989).

35. *See generally* People v. Steidl, 685 N.E.2d 1335 (Ill. 1997); People v. Lawson, 644 N.E.2d 1172 (Ill. 1994); People v. Salazar, 643 N.E.2d 698 (Ill. 1994); People v. Thomas, 545 N.E.2d 654 (Ill. 1989); People v. Chandler, 543 N.E.2d 1290 (Ill. 1989); Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987); People v. Hattery, 488 N.E.2d 513 (Ill. 1985); People v. Williams, 444 N.E.2d 136 (Ill. 1982).

36. *See generally* People v. West, 719 N.E.2d 664 (Ill. 1999); United States v. Gilmore, 35 F. Supp. 2d 626 (N.D. Ill. 1999); People v. Morgan, 719 N.E.2d 681 (Ill. 1999); People v. Towns, 696 N.E.2d 1128 (Ill. 1998); People v. Thomas (unpublished order of the Circuit Court of Lake County); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); People v. Howery, 687 N.E.2d 836 (Ill. 1997); People v. Ruiz, 686 N.E.2d 574 (Ill. 1997); People v. Tye (unpublished order of the Circuit Court of Cook County); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996); People v. Mack, 658 N.E.2d 437 (Ill. 1995); People v. Pugh, 623 N.E.2d 255 (Ill. 1993); People v. Perez, 592 N.E.2d 984 (Ill. 1992); People v. Watkins, No. 90 CR 27536 (Unpublished order of the Circuit Court of Cook County); Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989).

37. *See generally* People v. Lawson, 644 N.E.2d 1172 (Ill. 1994) (defense counsel appeared as prosecutor at defendant's arraignment); People v. Thomas, 545 N.E.2d 654 (Ill. 1989) (defense counsel also represented a witness).

38. *See generally* People v. Salazar, 643 N.E.2d 698 (Ill. 1994) (appellate counsel failed to challenge voluntary manslaughter jury instructions which had previously been ruled unconstitutional); People v. West, 719 N.E.2d 664 (Ill. 1999) (appellate counsel failed to challenge finding of death-eligibility under two-murders eligibility where State failed to prove prior murder was committed intentionally); People v. Williams, 444 N.E.2d 136 (Ill. 1982) (defense counsel who failed to make motion to suppress hair evidence and made numerous other errors of judgment was later disbarred for neglect of other matters and commingling client funds); People v. Mack, 658 N.E.2d 437 (1995) (appellate counsel failed to challenge fact that jury returned improper verdict, setting out some but not all elements of eligibility during the eligibility phase of sentencing).

39. *See generally* People v. Chandler, 543 N.E.2d 1290 (Ill. 1989) (defense counsel conceded guilt and asserted nonexistent defense, arguing that defendant, although guilty of underlying felony, should be acquitted because

failure to investigate or present exculpatory or mitigating evidence.[40]

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he did not personally kill the victim); People v. Hattery, 488 N.E.2d 513 (Ill. 1985) (defense counsel presented no defense and conceded defendant's guilt); People v. Pugh, 623 N.E.2d 255 (Ill. 1993) (defense counsel stipulated that defendant was eligible for death, not realizing that guilty plea to felony murder, without proof of intent, could not qualify defendant for death; counsel also failed to present evidence which would have discredited prosecution's only eyewitness and tended to show killing was accidental); Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987); People v. Thomas, (unpublished order of the Circuit Court of Lake County) (defense counsel was ineffective at sentencing where there was no proof that defendant intended to kill and he was therefore improperly found eligible for death).

40. *See generally* People v. Steidl, 685 N.E.2d 1335 (Ill. 1997) (defense counsel was ineffective for failing to obtain an expert examination of physical evidence); People v. Morgan, 719 N.E.2d 681 (Ill. 1999) (defense counsel failed to present evidence that the defendant's aggressive behavior was attributable to neurological problems and brain damage); People v. Towns, 696 N.E.2d 1128 (Ill. 1998) (defense counsel was ineffective for failing to present in mitigation defendant's "pervasive history of child abuse and maltreatment, coupled with substance abuse and mental illness"); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) (defense counsel failed to investigate and present witnesses who would have testified that the defendant saved the life of a child saved another person from drowning, and helped the victim of an armed robbery; in addition, counsel gave a closing argument which did not refer to mitigation and focused solely on the morality of the death penalty); People v. Howery, 687 N.E.2d 836 (Ill. 1997) (defense counsel at sentencing was "demoralized" and failed to present available mitigation evidence as to the defendant's background and good character); People v. Ruiz, 686 N.E.2d 574 (Ill. 1997) (defense failed to present and investigate substantial mitigating evidence, including evidence of physical abuse, learning disability, and the involvement of some of defendant's relatives in crime and substance); People v. Tye (unpublished order of the Circuit Court of Cook County) (defense failed to present expert testimony as to Tye's mental, psychological, or social history); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996) (defense counsel met only briefly with defendant, did no investigation, failed to put on mitigation evidence, and lost the confidence of his client during the trial of his case); People v. Perez, 592 N.E.2d 984 (Ill. 1992) (defense failed to obtain defendant's school records, which showed that he had an IQ in the borderline range, failed to obtain a full mental history of the defendant, and failed fully to investigate his background); People v. Watkins, No. 90 CR 27536 (Unpublished order of the Circuit Court of Cook County) (defense counsel failed to present: evidence of defendant's traumatic childhood and adolescence, which involved severe and repeated physical and emotional abuse at the hands of a violent, alcoholic father; evidence of defendant's long history of emotional and psychological disturbances, which led to multiple suicide attempts by defendant during both his youth and adulthood; and evidence of defendant's exemplary record of adjustment to incarceration during the two years he spent in Cook County Jail awaiting trial and sentencing; in addition, defense counsel had suffered from serious personal and professional problems that undermined his ability to represent defendant competently); Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989) (defense counsel failed to present available mitigating evidence, including fifteen potential character witnesses; in addition, counsel gave a rambling and incoherent closing argument which virtually invited the jury to sentence the defendant to death); United States v. Gilmore, 35 F. Supp. 2d 626

2. Mitigation and Sentencing

In reviewing the cases reversed or remanded by the Illinois Supreme Court and the federal courts, the weakest link in attorney preparation seems to be in the area of mitigation and sentencing. In case after case, the trial lawyer in a death penalty case failed to conduct a comprehensive study of the defendant's background; review available records from hospitals, schools, Juvenile Court, the military, or prison; or hire appropriate forensic experts who could provide the sentencer with the total picture of the defendant, necessary for an informed decision. The classic example in this field is *People v. Perez*.[41] Domingo Perez was an inmate of the Illinois correctional system, and was convicted of the murder of a fellow inmate.[42] In *Perez*, counsel had asked the defendant for information about his family and the whereabouts of mitigation witnesses.[43] The defendant refused, and thereafter counsel failed to conduct any investigation.[44] The Illinois Supreme Court reversed the trial court's denial of defendant's post-conviction petition, vacated the defendant's death sentence, and remanded for a new sentencing hearing.[45] The court concluded that counsel was ineffective for failing to obtain the defendant's school records.[46] These school records showed that the defendant had an IQ of between sixty two and seventy seven, which was in the borderline range for mental retardation.[47] The court also concluded that counsel was incompetent for failing to obtain a full mental history of the defendant, and for failing to obtain more information about his family background.[48] On remand, the state did not seek death.

A similar case involving a failure to investigate is *People v. Morgan*.[49] Morgan was charged with murdering two people, as well as aggravated kidnapping and rape.[50] The circuit court found him guilty, eligible for death, and imposed the death sentence.[51] The defendant filed a post conviction petition, which was dismissed by the circuit court after a hearing on defendant's allegation of ineffectiveness of counsel for failure to investigate and present mitigation and expert testimony on his behalf.[52]

(N.D. Ill. 1999).

41. 592 N.E.2d 984 (Ill. 1992).
42. *Id.* at 985.
43. *Id.* at 986.
44. *Id.*
45. *Id.* at 997.
46. *Perez*, 592 N.E.2d at 997.
47. *Id.* at 987-88.
48. *Id.* at 997.
49. 719 N.E.2d 681 (Ill. 1999).
50. *Id.* at 687.
51. *Id.* at 692.
52. *Id.*

The Illinois Supreme Court vacated the death sentence and ordered a new sentencing hearing.[53] The court noted that defense counsel had been on notice during the trial that there was a possibility of brain damage, but he failed to obtain medical records, or to thoroughly investigate Morgan's social and family history, or hire an expert to examine the defendant.[54] The court noted that on post-conviction, the defendant was subjected to psychological, neuro-psychological, and neurological testing, and a social worker prepared a mitigation report.[55] The reports indicated that his aggressive behavior may well have been attributable to neurological problems and brain damage.[56]

Likewise in *People v. Ruiz*, Luis Ruiz was convicted of murder and sentenced to death for his participation in a "gangland" slaying of three teenagers.[57] Thereafter, his conviction and sentence were affirmed on direct appeal, but the defendant filed a post-conviction petition, which was denied by the circuit court.[58] However, on appeal the Illinois Supreme Court remanded the case for reassignment to a different judge.[59] He was again denied relief without an evidentiary hearing, but on appeal the Illinois Supreme Court remanded the case back to the circuit court for a hearing on the issue of ineffective assistance of counsel at sentencing.[60]

After an evidentiary hearing, the trial court granted the defendant's post-conviction petition alleging ineffective assistance of counsel for failing to investigate and present substantial mitigating evidence, including evidence of physical abuse, learning disability, and the involvement of some of defendant's relatives in crime and substance abuse.[61] The Illinois Supreme Court affirmed the trial court's grant of the petition and remanded for resentencing.[62]

Another case on point is *Hall v. Washington*.[63] The defendant, Anthony Hall, was convicted of the murder of a food service worker in the prison, and sentenced to death.[64] He appealed, but all Illinois courts affirmed his conviction and sentence, both on direct appeal, and on post-conviction review.[65] Thereafter, he filed for a

53. *Id.* at 712.
54. *Morgan*, 719 N.E.2d at 711-12.
55. *Id.* at 694-96.
56. *Id.* at 711.
57. 686 N.E.2d 574, 575 (Ill. 1997).
58. *Id.* at 576.
59. *Id.*
60. *Id.*
61. *Id.* at 582.
62. *Ruiz*, 686 N.E.2d at 584.
63. 106 F.3d 742 (7th Cir. 1997).
64. *Id.* at 744.
65. *Id.*

writ of habeas corpus in the federal district court.[66] That too was denied.[67] On appeal to the Seventh Circuit Court of Appeals, that court granted the writ with respect to sentencing, based on ineffective assistance of counsel.[68]

The Seventh Circuit held that defense counsel failed to investigate and present mitigating evidence such as three witnesses who would have testified to separate incidents where Anthony Hall saved the lives of three people, a child, a woman who was drowning, and a victim of an armed robbery.[69] In addition, in closing argument his trial lawyer focused on the morality of the death penalty instead of mitigation for the client.[70]

In *People v. Towns*, a jury convicted Towns of murdering a convenience store clerk in Fairview Heights, Illinois.[71] The jury also found him eligible for the death penalty on the basis that he had committed the murder in the course of an armed robbery, and voted for death.[72] The defendant filed for post-conviction relief.[73] Among his allegations was a claim of ineffective assistance of trial counsel at the capital sentencing hearing.[74] Post-conviction counsel attached an affidavit to the record from a social worker and mitigation specialist detailing Towns' "pervasive history of child abuse and maltreatment, coupled with substance abuse and mental illness," which evidence was not presented to his sentencing jury.[75] Towns' petition was dismissed by the circuit court without hearing, but on appeal, the Illinois Supreme Court reversed and remanded the case for an evidentiary hearing on the issue of ineffectiveness of counsel at sentencing.[76] Thereafter, the circuit court held an evidentiary hearing and ordered a new sentencing hearing.

Another example of a case where a defendant might have been executed due to the ineffectiveness of trial counsel in the sentencing stage is the case of *People v. Tye*.[77] Jimmy Tye was charged with the murder of his three-year-old daughter by beating her with an electrical cord to punish her.[78] He was convicted and sentenced to death by the Circuit Court of Cook County in a bench

66. *Id.*
67. *Id.*
68. *Hall*, 106 F.3d at 744.
69. *Id.* at 752.
70. *Id.* at 750.
71. 696 N.E.2d 1128, 1130 (Ill. 1998).
72. *Id.* at 1132.
73. *Id.* at 1131.
74. *Id.* at 1133.
75. *Id.* at 1136.
76. *Towns*, 696 N.E.2d at 1143.
77. 565 N.E.2d 931 (Ill. 1990).
78. *Id.* at 934.

trial.[79] On appeal, The Illinois Supreme Court affirmed his conviction and sentence.[80] However, three Justices dissented from the necessity to impose death in this case.[81] The three dissenting judges pointed out that he had no prior record, was the father of six children, with no prior history of beatings.[82] The defendant then filed a post-conviction petition in the circuit court, alleging ineffective assistance of trial counsel for failure to investigate either guilt-innocence claims or present expert testimony as to Tye's mental, psychological, or social history. The circuit court vacated his death sentence and ordered a new sentencing hearing, after which Tye received a sentence of no-death.[83]

3. Guilt/Innocence & Eligibility Phases

In addition to failure to investigate the social history and family background of defendants, criminal defense lawyers have provided ineffective representation in the guilt-innocence stage as well. The Illinois Supreme Court has determined that there were cases where defense counsel simply did not know the law. In others, defense counsel stipulated to the guilt of the defendant or actually told the jury in so many words that the defendant was guilty.

In *People v. Williams*, the case was reversed because of ineffectiveness of counsel in that counsel was under disciplinary proceedings.[84] The defendant, Dennis Williams was convicted of two counts of murder, two counts of aggravated kidnapping, and rape.[85] Williams and his co-defendants in this case became widely known as the "Ford Heights Four." Williams was sentenced to death.[86] Initially the Illinois Supreme Court rejected Williams' appeal in which he claimed ineffective assistance of his trial

79. *Id.*
80. *Id.*
81. *Id.* at 947-50.
82. *Tye*, 565 N.E.2d at 947.
83. *See also* People v. Orange, 521 N.E.2d 69 (Ill. 1988) (trial counsel failed to investigate and present possible mitigation, including evidence from friends and employers); People v. Caballero, 464 N.E.2d 223 (Ill. 1984) (defense counsel failed to put on mitigation witnesses who would have testified to the defendant's good qualities and the weakness and recency of his ties to gangs); Kubat v. Theiret, 867 F.2d 351 (7th Cir. 1989) (reversing conviction because counsel failed to present available mitigating evidence, including 15 potential character witnesses); People v. Watkins, 688 N.E.2d 798 (Ill. App. Ct. 1998), (original trial counsel failed to investigate and present available mitigating evidence regarding traumatic childhood, emotional and psychological disturbances, and an exemplary record of adjustment in prison); and People v. Steidl, 568 N.E.2d 837 (Ill. 1991) (counsel failed to obtain expert examination of physical evidence and failed to present any mitigating evidence).
84. 444 N.E.2d 136, 137 (1982).
85. *Id.*
86. *Id.*

counsel.[87] The trial lawyer had represented three of the defendants in this case.[88] Simultaneously, the attorney was neglecting legal matters, converting clients' funds and committing acts prejudicial to the administration of justice.[89] However, while Williams' request for a rehearing was pending, the court heard arguments on the disciplinary case against defendant's trial attorney.[90] The court allowed the petition for rehearing, then reversed and remanded the case for a new trial.[91] On retrial, Williams was convicted again and given the death penalty, which was again affirmed by the Illinois Supreme Court.[92] Thereafter, DNA evidence proved that he was innocent and he was acquitted of all charges.

In addition, several cases have been reversed where the court found that defense counsel had a conflict of interest. In *People v. Lawson*, defense counsel appeared at the defendant's arraignment as the prosecuting assistant State's Attorney.[93] The Illinois Supreme Court found a conflict of interest.[94] In *People v. Thomas*, the court also found a conflict of interest when defense counsel simultaneously represented both the defendant and a state witness.[95]

In *People v. Thomas*, Christopher Thomas was accused of the murder of a delivery driver in the course of a felony (burglary and robbery).[96] He was convicted by a jury, and sentenced to death by the Court in Lake County.[97] The Illinois Supreme Court affirmed the decision.[98] Thereafter, the defendant filed a post-conviction petition in the circuit court.[99] Among other allegations, the defendant argued ineffectiveness of trial counsel, and that privileged mental health records were improperly introduced against him at the eligibility stage, contrary to Illinois law.[100] In addition, the defendant argued that being convicted of felony murder in and of itself, absent proof of intent to kill, was an insufficient prerequisite for the death penalty.[101] The Circuit Court of Lake County vacated the death penalty, and resentenced

87. *Id.*
88. *Id.* at 137.
89. *Williams*, 444 N.E.2d at 138.
90. *Id.* at 137.
91. *Id.* at 143.
92. *People v. Williams*, 588 N.E.2d 983, 988 (Ill. 1991).
93. 644 N.E.2d 1172, 1185 (Ill. 1994).
94. *Id.* at 1186.
95. 545 N.E.2d 654, 658 (Ill. 1989).
96. 687 N.E.2d 892, 895 (Ill. 1997).
97. *Id.*
98. *Id.* at 910.
99. *Id.* at 907.
100. *Id.* at 989.
101. *Thomas*, 687 N.E.2d at 989.

the defendant to a term of years.[102]

4. Appellate Counsel

Post conviction proceedings may also be utilized in Illinois to give relief to a death row inmate where his appellate counsel was ineffective as well. In the case of *People v. West*, the Illinois Supreme Court affirmed Paul West's conviction and death sentence.[103] The defendant then filed a post-conviction petition, which was dismissed without hearing by the circuit court.[104] The Illinois Supreme Court reversed the dismissal by the circuit court and remanded the case for a new sentencing hearing.[105] The Illinois Supreme Court held that under the Illinois death penalty statute, the defendant would be eligible for the death penalty if he had intentionally committed two murders.[106] West had plead guilty to a prior murder, which the State had introduced as the basis for his eligibility for the death penalty in the case at bar.[107] However, the Supreme Court held that the State failed to prove that the prior murder was committed intentionally.[108] Therefore, he was ineligible for the death penalty in the present case.[109] Moreover, since his eligibility to receive the death sentence in the trial at bar was not established, the constitutional prohibition against double jeopardy barred the State from seeking the death penalty again.[110] Therefore, West could only be sentenced to a

102. *See also* People v. Chandler, 543 N.E.2d 1290, 1292 (Ill. 1989) (where defense counsel conceded guilt and asserted a nonexistent defense when he argued that the Defendant, although guilty of the underlying felony, should be acquitted because he did not personally kill the victim); People v. Hattery, 488 N.E.2d 513, 516 (Ill. 1985) (where counsel presented no defense and conceded client's guilt); People v. Pugh, 623 N.E.2d 255, 257 (Ill. 1995) (where defense counsel stipulated that the Defendant was eligible for death, not realizing that a guilty plea to felony murder alone could not qualify the Defendant for death; he also failed to present evidence which would have discredited the prosecution's only eyewitness and shown that the killing was accidental); People v. Lewis, 473 N.E.2d 901, 912 (Ill. 1984) (defense counsel mistakenly stipulated during sentencing that the client had four felony convictions when in fact one felony charge had been dismissed, and another reduced to a misdemeanor). Of course, in *Lewis*, the prosecution was equally culpable, if not more so, because when an assistant state's attorney and an assistant attorney general discovered the error, they did not tell the defense or the court. The death sentence was finally vacated by the Seventh Circuit Court of Appeals. Lewis v. Lane 832 F.2d 1446, 1465 (7th Cir. 1987).

103. 719 N.E.2d 664, 668 (1999).

104. *Id.*

105. *Id. at 681.*

106. *Id.* at 680.

107. *Id.*

108. *West*, 719 N.E.2d at 680.

109. *Id.*

110. *Id.*

penalty less than death upon resentencing.[111] Since West's appellate lawyer failed to raise that issue on direct appeal, the Illinois Supreme Court held that West was deprived of the effective assistance of counsel on appeal.[112]

Likewise, in *People v. Mack*, Larry Mack was accused of the murder of a bank security guard and armed robbery, and convicted by the Circuit Court of Cook County.[113] Thereafter, the jury sentenced him to death, and the Illinois Supreme Court affirmed.[114] On post-conviction review, Mack argued ineffectiveness of appellate counsel for not bringing to the court's attention that the verdict returned by the jury during the sentencing phase was improper.[115] The jury found that the murder was committed in the course of an armed robbery, but omitted reference to his mental state at the time.[116] Specifically, the jury failed to find that he had committed the acts with the intent to kill or knowing that his acts would create great bodily harm.[117] The post-conviction court vacated the death penalty, and ordered a new sentencing hearing.[118] The State appealed, but the Illinois Supreme Court affirmed the circuit court's order of a new sentencing hearing.[119]

B. Prosecutorial Misconduct

1. Legal Background

It has long been recognized that the responsibility of insuring that a criminal defendant receives a fair trial lies, in heavy measure, upon the prosecutor. As Justice Abe Fortas observed in *Giles v. Maryland*, "a criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."[120]

In particular, the prosecutor has special responsibilities in discovery. A prosecutor must give to the defense all material exculpatory evidence in his own possession or in the possession of the police, and he must do so even in the absence of a specific request by the defense.[121] A prosecutor is allowed to promise

111. *Id.* *See also* People v. Salazar, 643 N.E.2d 698, 707-08 (Ill. 1994) (appellate counsel failed to challenge involuntary manslaughter jury instructions that had previously been ruled unconstitutional).
112. *West*, 719 N.E.2d at 680.
113. *See generally* People v. Mack, 695 N.E.2d 869 (Ill. 1998).
114. *Id.* at 870.
115. *Id.* at 871.
116. *Id.*
117. *Id.*
118. *Mack*, 695 N.E.2d at 872-73.
119. *Id.*
120. 386 U.S. 66, 96 (1967) (Fortas, J., concurring).
121. Kyles v. Whitley, 514 U.S. 419, 454 (1995); Brady v. Maryland, 373 U.S.

leniency to a state witness in return for "truthful testimony," but must disclose the terms of any agreement to defense counsel and to the court.[122] Moreover, if a state witness testifies falsely on the stand that there was no offer of leniency or misrepresents the terms of the offer, the prosecutor is required to notify the court that this witness is lying.[123]

Given the clear limits upon the prosecutor's authority, it is particularly distressing that so many of the Illinois death penalty reversals have been based, in whole, or in part, on prosecutorial misconduct. Our survey reveals that of all reversals, prosecutorial misconduct accounted for 21%, or just over one fifth.[124] The category was the second most important, ranking behind judicial error (50%) and just ahead of error by defense counsel (19%).[125] The absolute number of prosecutorial reversals was also quite significant: 30 total reversals, 13 resulting in new trials,[126] and 17 resulting in new sentences or new sentencing hearings.[127]

Common forms of misconduct included: (1) discrimination against African Americans or women in jury selection (2 cases);[128] (2) pursuit of a death sentence after promising or agreeing that death was not appropriate (2 cases);[129] (3) attacks on the integrity of counsel or defense witnesses (4 cases);[130] (4) use of inadmissible

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83, 91 (1963).

122. Giglio v. United States, 405 U.S. 150, 155 (1972).

123. Alcorta v. Texas, 355 U.S. 28, 29 (1957).

124. *See infra*, Appendix, pie chart entitled "Error in Illinois Capital Cases."

125. *Id.*

126. These are: People v. Blue, 724 N.E.2d 920 (Ill. 2000); People v. Williams, 695 N.E.2d 380 (Ill. 1998); People v. Blackwell, 665 N.E.2d 338 (Ill. 1996); People v. Jimerson, 652 N.E.2d 278 (Ill. 1995); People v. Hope, 589 N.E.2d 503 (Ill. 1992); People v. Kidd, 591 N.E.2d 431 (Ill. 1992); People v. Enis, 564 N.E.2d 1155 (Ill. 1990); People v. Cruz, 521 N.E.2d 18 (Ill. 1988); People v. Hernandez, 521 N.E.2d 18 (Ill. 1988); People v. Johnson, 506 N.E.2d 563 (Ill. 1987); People v. Hope, 508 N.E.2d 202 (Ill. 1986); People v. Bean, 485 N.E.2d 349 (Ill. 1985); and People v. Emerson, 455 N.E.2d 41 (Ill. 1983).

127. These are: People v. Woolley, 687 N.E.2d 979 (Ill. 1999); People v. Mulero, 680 N.E.2d 1329 (Ill. 1997); People v. Williams, 641 N.E.2d 296 (Ill. 1994); People v. Hooper, 552 N.E.2d 684 (Ill. 1989); People v. Harris, 547 N.E.2d 1241 (Ill. 1989); People v. Gacho, 522 N.E.2d 1146 (Ill. 1988); People v. Adams, 485 N.E.2d 339 (Ill. 1985); People v. Lyles, 478 N.E.2d 291 (Ill. 1985); People v. Brisbon, 478 N.E.2d 402 (Ill. 1985); People v. Ramirez, 457 N.E.2d 31 (Ill. 1983); People v. Holman, 469 N.E.2d 119 (Ill. 1984); People v. Yates, 456 N.E.2d 1369 (Ill. 1983); People v. Davis, 452 N.E.2d 525 (1983); People v. Brownell, 449 N.E.2d 1318 (Ill. 1983); People v. Szabo, 447 N.E.2d 193 (Ill. 1983); People v. Walker, 440 N.E.2d 83 (Ill. 1982); and People v. Walker, 419 N.E.2d 1167 (Ill. 1981).

128. People v. Blackwell, 665 N.E.2d 338 (Ill. 1996); People v. Hope, 589 N.E.2d 503 (Ill. 1992).

129. People v. Brownell, 449 N.E.2d 1318 (Ill. 1983); People v. Walker, Jr., 419 N.E.2d 1167 (Ill. 1981).

130. People v. Kidd, 591 N.E.2d 431, 434 (Ill. 1992) (in a case involving arson and murder, the prosecutor repeatedly characterized defense counsel's

evidence or misuse of evidence properly admitted for a limited purpose (9 cases);[131] (5) invalid appeals to emotion or prejudice (9 cases);[132] and (6) knowing use of false or misleading evidence (4

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arguments as a "smokescreen"); People v. Bean, 485 N.E.2d 349, 359 (Ill. 1985) (prosecutor unfairly argued that defense counsel's attacks on a codefendant were a subterfuge designed to create reversible error); People v. Emerson, 455 N.E.2d 41, 45 (Ill. 1983) (prosecutor accused defense counsel of trying to "lay a smokescreen" and "dirty up the victim," as defense attorneys always do; prosecutor also said to jury: "we can't tell you everything he did after his arrest and he knows it. Maybe when this is over I will tell you . . . "); People v. Lyles, 478 N.E.2d 291, 301 (Ill. 1985) (prosecutor personally attacked the defense psychiatrist, calling him a liar, a fraud, and a prostitute).

131. People v. Enis, 564 N.E.2d 1155 (Ill. 1990) (prosecutor improperly cross-examined defendant about a prior criminal sexual assault charge, using hearsay statements and failing to prove up the misconduct he had implied); People v. Hernandez, 521 N.E.2d 25 (Ill. 1988) (after a codefendant's hearsay statement had been improperly admitted without sufficient redaction to eliminate references to the defendant, the prosecutor repeatedly referred to the phrase "friends" contained in the statement in order to alert the jury that the defendant had been implicated); People v. Johnson, 506 N.E.2d 563 (1987) (prosecutor introduced out-of-court statements made by the codefendant and then used them in closing argument); People v. Mulero, 680 N.E.2d 1329 (Ill. 1997) (prosecutor used defendant's properly filed motion to suppress her confession to cross-examine her at sentencing to show lack of remorse); People v. Harris, 547 N.E.2d 1241 (Ill. 1989); People v. Blue, 724 N.E.2d 920 (Ill. 2000) (prosecutor used the admission of a slain officer's oath of service and the placement of his "star" at police headquarters to argue that the jury should send a message to all police officers "[f]rom the superintendent down to the newest rookie," that they were grateful for their service; prosecutor also improperly cross-examined defense witness using spurious testimonial objections and personal comments on the witness's credibility); People v. Williams, 695 N.E.2d 380 (Ill. 1998) (after procedurally maneuvering to ensure that defendant was tried together with his codefendant, prosecutor used inadequately redacted statements of codefendant to argue that defendant was guilty); People v. Szabo, 447 N.E.2d 193 (Ill. 1983) (prosecutor cross-examined defendant about why he remained silent after his arrest and argued during closing argument that the lack of a death penalty had led to an increase in crime); People v. Cruz, 521 N.E.2d 18 (Ill. 1988) (prosecutor deliberately introduced evidence which would encourage jury to believe that the codefendant's redacted statement referred to the defendant and then improperly urged the jury to consider the codefendant's statement against the defendant).

132. People v. Brisbon, 478 N.E.2d 402 (Ill. 1985) (prosecutor argued that defendant could be released on parole in eleven years and that statistics he had read indicated that murder rate increased during period when death penalty ruled unconstitutional); People v. Holman, 469 N.E.2d 119 (Ill. 1984) (prosecutor argued: that if defendant was not sentenced to death, he would escape and kill guards and other people; the victim was an honor student; the victim's mother had "moral fiber"; death is the appropriate penalty for all homicides except voluntary manslaughter; he personally believed in the death penalty); People v. Walker, 440 N.E.2d 83 (Ill. 1982) (prosecutor argued that defendant might be released on parole); People v. Hope, Jr., 508 N.E.2d 202 (Ill. 1986) (prosecutor introduced evidence of victim's surviving family at trial and then argued that the jury should convict the defendant because the victim's spouse did not know that was the last time she would see the victim);

cases).[133]

2. *Failure to Disclose*

In *People v. Jimerson*, Jimerson and three others were convicted and sentenced to death in Cook County for the murder of Larry Lionberg and the murder and rape of Carol Schmal.[134] On appeal, the Illinois Supreme Court initially affirmed his convictions. Thereafter, he filed a post-conviction petition, alleging that the State had promised leniency to a state witness in return for her testimony, without informing the defense or the court of that fact.[135] Moreover, the witness testified that she had not been promised anything in exchange for her testimony.[136] The petition was dismissed without an evidentiary hearing.[137]

The Illinois Supreme Court reversed on appeal, holding that the State was required to correct the perjured testimony of the state witness at trial.[138] The court ordered a new trial,[139] after which Jimerson was exonerated of all charges.

In *People v. Olinger*, Perry Olinger and an accomplice were found

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People v. Davis, 452 N.E.2d 525 (Ill. 1983) (prosecutor, during eligibility phase, informed jury that defendant was under sentence of death for another murder; and that victim's wife gave birth one day after victim killed); People v. Ramirez, 457 N.E.2d 31 (Ill. 1983) (prosecutor: called widow of victim to stand during eligibility hearing; commented on defendant's decision not to take stand at hearing; argued that victim's status as police officer was factor in deciding whether to impose death); People v. Williams, 641 N.E.2d 296 (Ill. 1994) (prosecutor introduced eight foot chart detailing defendant's misconduct and used police officer to help display the chart to the jury during sentencing; prosecutor also argued that defendant's plea bargain to prior manslaughter conviction was a sham); People v. Hooper, 552 N.E.2d 684 (Ill. 1989) (prosecutor commented at sentencing that defendant might kill a guard or prison chaplin in jail and that if the jurors failed to sentence the defendant to death they would be lying "to the judge and to God"); People v. Yates, 456 N.E.2d 1369 (Ill. 1983) (prosecutor argued that jurors should not worry if they convicted the wrong person because the prosecutor "will take the risk"; and he had never sought death penalty before but this was the worst crime he could think of, and it merited death).

133. People v. Jimerson, 652 N.E.2d 278 (Ill. 1995) (prosecutor knowingly presented perjured testimony of witness who testified that she had not been promised anything in return for that testimony); People v. Woolley, 687 N.E.2d 979 (Ill. 1999) (prosecutor in closing argument knowingly mischaracterized defendant's misdemeanor convictions as felonies); People v. Gacho, 522 N.E.2d 1146 (Ill. 1988) (prosecutor argued at sentencing that defendant, who could only receive death or life without parole, might get out like "Richard Speck" and "hurt someone else"); People v. Adams, 485 N.E.2d 339 (Ill. 1985).

134. 652 N.E.2d 278, 280 (Ill. 1995).

135. *Id.* at 286-88.

136. *Id.* at 284.

137. *Id.* at 279.

138. *Jimerson*, 652 N.E.2d at 288.

139. *Id.*

guilty of the murders of three people.[140] The defendant's conviction and sentence of death were affirmed on direct appeal to the Illinois Supreme Court.[141] Thereafter, the defendant filed a post-conviction petition, alleging that the prosecutors had failed to disclose the full extent of a "deal" that had been offered to a state witness in return for his testimony, and that the prosecutor at trial knowingly used the perjured testimony of that witness to obtain the conviction.[142] The trial court dismissed Olinger's petition, without holding an evidentiary hearing, even though there were allegations that the witness had not disclosed that prosecutors in other states were also going to drop charges against him if he testified as a state witness in Illinois, and that the Illinois prosecutor had brokered this leniency.[143] The Illinois Supreme Court remanded the case back to the trial court for a full evidentiary hearing on defendant's claims of prosecutorial misconduct and perjury.[144] Unfortunately, Olinger died in prison before the evidentiary hearing took place.

3. Improper Argument

Another example of prosecutorial misconduct held by the Illinois Supreme Court to require reversal is *People v. Gacho*.[145] The defendant's convictions for multiple murders were affirmed, but the Illinois Supreme Court vacated his death sentence and remanded for a new sentencing hearing because: (1) the prosecutor argued that the defendant, who could only be sentenced to death or natural life without the possibility of parole, might, like "Richard Speck," get out on parole and "hurt someone else," and (2) the trial judge had refused to instruct the jury that the defendant, if not sentenced to death, would serve a term of natural life without the possibility of parole.[146] On remand, the defendant received a sentence of natural life in prison.

In *People v. Emerson*, after Dennis Emerson was convicted of murder and sentenced to death, the Illinois Supreme Court reversed on the ground that the prosecutor's numerous improper statements during closing argument had deprived the defendant of a fair trial.[147] The court held that the following comments of the prosecutor were prejudicial: (1) the argument that: "we can't tell you everything he did after his arrest and he knows it. Maybe when this is over I will tell you what he did when he was arrested,"[148] and (2) the argument that defense counsel, like all

140. 680 N.E.2d 321, 325 (Ill. 1997).
141. *Id.*
142. *Id.* at 329-30.
143. *Id.* at 330-31.
144. *Id.* at 331.
145. 522 N.E.2d 1146 (Ill. 1988).
146. *Id.* at 1162-63, 1165-66.
147. 455 N.E.2d 41, 47 (Ill. 1983).
148. *Id.* at 45.

defense attorneys, was trying to "lay a smokescreen," and "dirty up the victim."[149] On remand, the defendant was again convicted and sentenced to death.[150] This case is currently on post conviction review.

In the case of *People v. Mulero*, the defendant's conviction was affirmed, but her death sentence was vacated and the case remanded for a new sentencing hearing because the prosecutor improperly used the defendant's motion to suppress her confession to cross-examine her at the death penalty hearing, attempting to show that this demonstrated lack of remorse.[151] On remand, the defendant was sentenced to serve natural life in prison.

In *People v. Blue*, Murray Blue was convicted of the murder of a police officer and sentenced to death.[152] The Illinois Supreme Court reversed the defendant's conviction and remanded the case for a new trial because of the cumulative effect of prosecutorial misconduct in combination with several erroneous rulings by the trial court.[153] The court found that the trial court had erred by allowing the admission into evidence and submission to the jury during deliberations of the victim's blood and brain spattered uniform shirt mounted on a headless mannequin.[154] This error was further exacerbated by the prosecution's numerous prejudicial statements during the guilt-innocence phase, including: (1) telling the jury that the victim's family needed to "hear" from them; and (2) saying that jury should send a message to all police officers from the "superintendent to the newest rookie, "that they were grateful for their service.[155] The trial court, at the behest of the prosecution, mistakenly allowed the prosecution to introduce evidence of the victim's oath of service and the fact that his "star" had been given a place of honor at police headquarters.[156] Moreover, the prosecutors violated the advocate-witness rule by repeatedly interrupting a witness they had interviewed before trial with spurious testimonial objections and comments on the witness's credibility.[157]

Speaking for the court, Justice Heiple found that the prosecutor's strategic choices, combined with their improper conduct and the judge's mistaken rulings had a "synergistic effect," reflecting "an intent by the State to place the jury's responsibility as citizens on trial, as much as the State placed defendant on

149. *Id.*
150. People v. Emerson, 522 N.E.2d 1109, 1110 (Ill. 1987).
151. 680 N.E.2d 1329, 1336 (Ill. 1997).
152. People v. Blue, 724 N.E.2d 920, 921 (Ill. 2000).
153. *Id.* at 940.
154. *Id.* at 938.
155. *Id.* at 937.
156. *Id.* at 938.
157. *Blue*, 724 N.E.2d at 940.

trial."[158] The court also noted that the prosecutors and defense counsel had both engaged in numerous other instances of improper conduct, which included, on the part of the prosecutors, harassing and shouting at a defense witness, throwing photographic exhibits onto a table in front of defense counsel, and insulting one of defendant's attorneys in the judge's chambers.[159] The Illinois Supreme Court admonished both sides not to repeat this "infantile" conduct upon retrial.[160] On remand, the defendant was convicted again, but did not receive the death penalty.[161]

C. Actual Innocence: DNA, Witness Recantation, & Other Special Circumstances

In some cases, wrongful convictions of defendants under sentence of death were established by circumstances other than ineffectiveness of defense counsel or prosecutorial misconduct. In fact, *au contrare*, it was the persistence of defense counsel and the cooperation of the state which assisted in the exoneration of the

158. *Id.* at 941.

159. *Id.*

160. *Id.* at 942.

161. *See also* People v. Kidd, 675 N.E.2d 910 (Ill. 1996) (holding that prosecutor's repeated and prejudicial attacks on counsel's strategies as a "smokescreen" designed to confuse jurors were inflammatory); People v. Bean, 485 N.E.2d 349 (Ill. 1985) (the prosecutor argued that the codefendant's attorney's attacks on the Defendant were subterfuges designed to create reversible error); People v. Lyles, 478 N.E.2d 291 (Ill. 1985) (the prosecutor attacked the defense psychiatrist by calling her a liar, a fraud, and a prostitute).

Other examples of prosecutor misconduct include: People v. Enis, 564 N.E.2d 1155 (Ill. 1990) (the prosecutor cross-examined the defendant about a prior charge of rape using hearsay statements, without later proving it up with live witnesses); People v. Szabo, 708 N.E.2d 1096 (Ill. 1988) (the State's Attorney cross-examined John Szabo about why he remained silent after arrest); People v. Ramirez, 500 N.E.2d 14 (Ill. 1986) (called widow of the victim to the stand during the eligibility hearing, commented on Ramirez's decision not to testify at the hearing; and argued that the victim's status as police officer was a factor in deciding whether to impose death); People v. Woolley, 687 N.E.2d 979 (Ill. 1999) (mischaracterized the defendant's misdemeanor convictions as felonies when arguing during sentencing); People v. Hooper, 665 N.E.2d 1190 (1996) (commented at sentencing that the defendant might kill a guard or prison chaplin in jail and that not sentencing Murray Hooper to death would be a lie "to the judge and to God"); People v. Holman, No. 85897, 2000 Ill. Lexis 782 (Ill. May 30, 2000) (argued that if not sentenced to death Holman would escape, kill guards and other people, that the victim was an honor student and that death was appropriate for all homicides except for voluntary manslaughter, and the prosecutor personally believed in the death penalty); People v. Yates, 456 N.E.2d 1369 (Ill. 1983) (the prosecutor argued that jurors should not worry if they convicted the wrong person, the prosecutor "will take the risk"; that he had never sought death before, but this was the worst crime he could think of, and it merited the death penalty).

defendant.

In *People v. Jones*, the defense counsel never gave up in his efforts to prove Ronald Jones' innocence.[162] The defendant was convicted of murder and aggravated sexual assault of a south side woman in 1985.[163] He was sentenced to death.[164] The Illinois Supreme Court, despite defendant's claim of innocence, affirmed the convictions and sentence.[165]

The defendant then filed a post-conviction petition, charging that the police beat him into a confession, and he requested DNA testing to establish his innocence.[166] The trial Judge stated on the record: "What issue could possibly be resolved by DNA testing?"[167] Jones was exonerated after DNA testing was done, and the Cook County State's Attorney's office agreed to vacate his conviction and drop all charges against him in the light of that definitive evidence.

In *People v. Burrows*, Burrows was convicted of murder and armed robbery, and sentenced to death by a jury.[168] At trial no physical evidence linked him to the crime, however, two co-defendants testified against him.[169] Both of these co-defendants later recanted their testimony, and stated that Burrows was innocent.[170] One of these co-defendants testified on post conviction that she alone had committed the murder.[171] In addition, physical evidence and another witness corroborated her testimony.[172] The Illinois Supreme Court remanded for a new trial, and Burrows was subsequently set free.[173]

Another case in which the defendant was found to be absolutely innocent was *People v. Porter*.[174] In *Porter*, the defendant, Anthony Porter was accused of shooting two people in a Chicago park.[175] After conviction and a sentence of death, the defendant filed a post-conviction petition arguing that his trial lawyer had failed to thoroughly investigate the case, and that one

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162. *See generally* People v. Jones, 620 N.E.2d 325 (Ill. 1993). That lawyer was Richard Cunninghan, to whom this article is dedicated.
163. *Id.* at 328.
164. *Id.*
165. *Id.* at 339.
166. *Id.*
167. Ken Armstrong & Steven Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, § 1, at 1.
168. 665 N.E.2d 1319, 1320 (1996).
169. *Id.* at 1325.
170. *Id.* at 1325-26.
171. *Id.*
172. *Id.* at 1326, 1327-29.
173. *Burrows*, 665 N.E.2d at 1329.
174. The last Illinois Supreme Court Opinion prior to dismissal is *People v. Porter*, 659 N.E.2d 915 (Ill. 1995).
175. *Id.* at 916-20.

Alstory Simon was the real killer.[176] The defendant's petition was denied.[177] At a subsequent clemency hearing, a defense psychologist testified that Porter had an I.Q. of 52. Thereafter, his attorney filed a petition in the Circuit Court of Cook County alleging that Porter was mentally unfit to be executed under the authority of *Ford v. Wainwright*.[178] The Capital Litigation Division of the State Appellate Defender Office was appointed to the case. While his lawyers prepared for the fitness hearing, Northwestern University journalism students under the tutelage of Professor Protess, found Alstory Simon in Milwaukee and convinced him to confess. At a subsequent hearing in circuit court, the murder conviction and death sentence were dismissed upon a joint motion of the State and Defense.

The case of Hubert Geralds is another example, of a person to be released from death row in Illinois after it was discovered that he was absolutely innocent. According to the police, Geralds confessed to the murder of Rhonda King, age 24. According to his confession, they smoked crack cocaine together and then he strangled her. She was found dead in a south side attic in 1994. However, on January 31, 2000, another man, Andre Crawford, confessed to that murder along with the murders of nine other women and the sexual assault of a tenth woman. To the State's Attorney's credit, when this information surfaced, the State moved to vacate both the conviction and death penalty of Hubert Geralds. He still faces charges on five other murders.

D. Judicial Error

1. Legal Background

The Judge has responsibility to oversee the trial, rule on the admissibility of evidence and insure that the defendant receives a fair trial. In a death penalty case, the court must be especially careful to insure a fair *voir dire*, where one of the issues is determining those jurors who may be excluded from serving on the jury due to their inability to impose the death penalty.[179] In addition, the court must also insure exclusion of jurors if they would automatically impose the death penalty on a finding of guilt.[180] The trial court must also instruct the jury properly, and

176. *Id.*
177. *Id.*
178. 477 U.S. 399 (1986).
179. *See* Witherspoon v. Illinois, 391 U.S. 510, (1968); Wainwright v. Witt, 469 U.S. 412 (207); *but see* People v. Seuffer, 582 N.E.2d 71 (Ill. 1991) (excluding for cause a potential juror who first stated that he was opposed to the death penalty, but stated unequivocally that his views would not prevent him from considering it in the appropriate case).
180. *See* Morgan v. Illinois, 504 U.S. 719, 725 (1992) (reversing a trial Judge

preside over a proceeding where the final outcome will determine the ultimate judgment on life or death. In a number of cases the Illinois Supreme Court has found error in those proceedings, or has simply reduced a death sentence to life.[181]

2. *Wrongful Sentencing*

The Illinois Supreme Court has not hesitated to reverse the death penalty where it was wrongfully imposed under Illinois law. Examples of these cases include: *People v. Lucas*, where the death penalty imposed for the murder of a child under age of 12 was erroneously imposed, since the State did not prove the requirement that it "resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty";[182] *People v. Reid*, where the only statutory aggravating factor alleged, murder in the course of a home invasion, was not proven by the State;[183] *People v. Scott Kellick*, the defendant was found to qualify for the death penalty under the wrong statute which fixed death as the penalty for

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who refused to ask whether a prospective juror would automatically impose the death penalty on a finding of guilty). *See also* People v. Smith, No. 86775, 2000 WL 1763261 (Ill. Dec. 1, 2000) (where the trial court judge refused to ask jurors whether they would automatically vote for death in every murder case); *accord* People v. Lewis, 651 N.E.2d 72, 80-82 (Ill. 1995); People v. Johnson, 636 N.E.2d 485, 491 (Ill. 1994); and *People v. Cloutier*, 732 N.E.2d 519, 527 (2000).

181. *See, e.g.* People v. Gleckler, 411 N.E.2d 849, 861 (1980) (affirming the defendant's convictions for two murders, but vacating his death sentence and remanding the case for the imposition of a sentence other than death). The Supreme Court relied upon its assessment that defendant, "with no criminal history, the personality of a doormat, and a problem with alcohol, was not the ringleader in this sordid affair; nor are his rehabilitative prospects demonstrably poorer than [his co-defendants] who received imprisonment terms." *Id. See also People v. Smith*, 685 N.E.2d 880, 901 (Ill. 1997) (holding the death penalty excessive in a case where a woman hired a co-defendant to kill her boyfriend's wife, where there was significant mitigating evidence and great potential for rehabilitation); People v. Leger, 597 N.E.2d 586, 611-13 (Ill. 1992) (finding the death sentence was excessive because the crimes were a product of the defendant's marital, emotional, and drinking problems). In addition, there was mitigating evidence of excellent military and work records, serious medical problems, and lack of any significant criminal history. *Id. See also* People v. Johnson, 538 N.E.2d 1118, 1131 (Ill. 1989) (holding the death sentence was excessive given the Defendant's youth, family background, employment history, lack of prior convictions, emotional problems, and drug/alcohol dependency); People v. Buggs, 493 N.E.2d 332, 336-37 (Ill. 1986) (finding that the death penalty was not warranted due to the Defendant's military service, lack of prior criminal record, alcoholism, and marital problems); People v. Carlson, 404 N.E.2d 233, 245 (1980) (holding that the death sentence excessive in light of the fact that there was no prior history of significant criminal activity, and the defendant acted under the influence of extreme mental/emotional disturbance).

182. 548 N.E.2d 1003, 1023 (Ill. 1989).

183. 688 N.E.2d 1156, 1164 (Ill. 1997).

murder of a 15 year old, where the relevant statute for his case was one that set victim's age at 12 or younger;[184] *People v. Taylor*, where the defendant was not qualified for the death penalty on the murder charge after being acquitted on the armed robbery charge, which would have been the aggravating factor;[185] *People v. Tiller*, the defendant was not eligible for death based upon his participation in armed robbery which resulted in two murders which the Defendant neither planned nor carried out;[186] *People v. Greer*, the Defendant was not eligible for the death sentence under the multiple murder eligibility factor due to the fact that a fetus is not a "person" under Illinois law;[187] *People v. Simms*, the Defendant was not eligible for death where the state relied on a nonexistent eligibility factor at that time (murder during course of residential burglary);[188] *People v. Hayes*, the death sentence relied on the improper and irrelevant aggravating factor that victim was just leaving church services;[189] *People v. Brownell*, the death sentence relied on the "killing of an eyewitness" as the eligibility factor where the crime witnessed and the murder for which death was imposed were part of the same, contemporaneous incident.[190]

3. Inadequate Review

Nor should the court be in a rush to dismiss post-conviction proceedings where the parties have not completed their investigation and preparation. In several cases the Illinois Supreme Court has made it clear that judges who act too hastily to dismiss post-conviction petitions will be reversed. For example, in *People v. Kitchen*, the defendant was convicted of murder and sentenced to death for setting a building on fire that killed five members of a family.[191] The Illinois Supreme Court affirmed the case, but the defendant filed for post-conviction relief.[192] The circuit court specifically allowed continuance dates for hearings on the progress of the discovery, which had been requested to support defendant's post-conviction petition.[193] Although the State had not yet filed a motion to dismiss the defendant's post conviction petition, when defense counsel appeared in court for a discovery status date, the circuit court dismissed the petition without a hearing.[194] Kitchen appealed to the Illinois Supreme Court, which

184. 464 N.E.2d 1037, 1043-45 (Ill. 1984).
185. 463 N.E.2d 705, 714 (Ill. 1984).
186. 447 N.E.2d 174, 185 (Ill. 1982).
187. 402 N.E.2d 203, 209 (Ill. 1980).
188. 572 N.E.2d 947, 953 (Ill. 1991).
189. 564 N.E.2d 947, 953 (Ill. 1990).
190. 404 N.E.2d 181, 195 (Ill. 1980).
191. 727 N.E.2d 189, 190 (Ill. 1999).
192. *Id.* at 190-91.
193. *Id.* at 191.
194. *Id.* at 192.

vacated the circuit court's order denying relief, and remanded for further proceedings in post-conviction.[195]

Similarly, in the case of Frank Bounds, he was convicted of murder and criminal sexual assault and sentenced to death.[196] The Illinois Supreme Court affirmed, and the defendant filed a post conviction petition in circuit court.[197] The circuit court did not set a date for hearing on the State's motion to dismiss, and continued the case for resolution of discovery issues.[198] On a date set for discovery matters the circuit court, with no prior notice to defendant, dismissed the petition.[199] On appeal of the dismissal of the post-conviction petition, the Illinois Supreme Court found that defendant was denied due process when the lower court dismissed the post-conviction petition on a date set for status.[200]

It would seem elementary that at the very least a court must listen to evidence of the defendant's mental health and family background in a death penalty case, however that did not occur in *People v. Thompkins*.[201] Thompkins was convicted of the murder of two people and sentenced to death in Cook County.[202] The Illinois Supreme Court affirmed his conviction and sentence.[203] Thereafter, he filed for post-conviction relief.[204] The circuit court dismissed the petition without a hearing. The Illinois Supreme Court affirmed the lower court's action except for the claim of ineffective counsel at sentencing.[205] With respect to that claim, the court remanded the case back to the circuit court for an evidentiary hearing.[206]

At that evidentiary hearing the Circuit Judge denied the defendant's request to call as witnesses a psychologist, an art therapist, a criminal defense trial expert, and a clinical social

195. *Id.* at 195.

196. People v. Bounds, 694 N.E.2d 560, 560 (Ill. 1998). *See also* People v. Hooper, 665 N.E.2d 1190 (Ill. 1996). Hooper was charged with the murder of three people, armed robbery, and kidnapping. *Id.* at 1191. After conviction and sentences to death, the defendant filed for post-conviction relief. *Id.* The petition was dismissed by the circuit court before a proper amended petition could be filed. *Id.* at 1191-92. On appeal from dismissal of the Post-Conviction petition, the Illinois Supreme Court issued a one page unpublished opinion remanding the case back to the circuit court in light of its prior decision in *People v. Bounds*.

197. *Bounds*, 694 N.E.2d at 560.

198. *Id.*

199. *Id.*

200. *Id.* at 562.

201. 690 N.E.2d 984 (Ill. 1998).

202. *Id.* at 986.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Thompkins*, 690 N.E.2d at 986.

worker.[207] He allowed the social worker to testify as a "fact witness."[208] He also denied all requests for offers of proof for these witnesses.[209] He did allow the offer of proof for the testimony of defendant's appellate counsel on direct appeal, but left the bench and went into his chambers, rather than listen to the offer of proof.[210]

The Illinois Supreme Court held that the cumulative effect of these actions constituted an abuse of discretion by the post-conviction hearing Judge, and remanded the case back to the circuit court to reopen the evidentiary hearing.[211]

4. Jury Selection

Other areas where capital cases have been reversed at least in part due to judicial error are those relating to jury selection, instructions, etc. For example, in *People v. Kuntu*, the jury foreman's personal acquaintanceship with the state's attorney was not revealed during jury selection, and the post conviction judge took no action when it was brought to his attention.[212] The Illinois Supreme Court reversed for an evidentiary hearing on the issue.[213]

In another case, *People v. Hope*, the Circuit Court refused to question prospective jurors prior to the sentencing hearing about racial bias, even though the defendant was an African American who pled guilty to the murder of a white police officer.[214] Thereafter, the Illinois Supreme Court vacated the death sentence, and remanded the case for a new capital sentencing hearing.[215]

5. Bias

Consistent with the court's obligation to insure as far as possible a fair trial, especially in a death penalty case, is the court's responsibility to be like Ceasar's wife, Calpurnia, and avoid

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207. *Id.* at 987
208. *Id.*
209. *Id.*
210. *Id.* at 988.
211. *Thompkins*, 690 N.E.2d at 995. That reopened hearing was held before another Circuit Judge, and her findings were submitted to the Illinois Supreme Court. On June 15th, 2000, the Illinois Supreme Court vacated the death sentence and remanded for a new sentencing hearing. People v. Thompkins, 732 N.E.2d 553, 573 (Ill. 2000).
212. 720 N.E.2d 1047, 1048 (Ill. 1999).
213. *Id.* at 1049.
214. 702 N.E.2d 1282, 1284 (Ill. 1998). *See also* People v. Daniels, 665 N.E.2d 1221, 1227 (Ill. 1996) (holding that denying a capital defendant the proper number of preemptory challenges warranted a new trial); People v. Ramey, 603 N.E.2d 519, 538-39, 546 (vacating a death sentence because the lower court refused to instruct the jury that they must find that the defendant acted with intent to kill or knew of a strong probability of death or great bodily harm in order to qualify for the death penalty).
215. *Hope*, 702 N.E.2d at 1289.

even the perception of bias. When reviewing courts were made aware of possible bias or bribes in capital cases, the courts acted. A case on point is the matter of Fields and Hawkins.[216] In that case, Hawkins, Fields, and a co-defendant (Carter) were charged with the murders of two people.[217] Hawkins and Fields were tried together.[218] The court, who also found them eligible for death, found them guilty.[219] A jury then sentenced them to death.[220] The Illinois Supreme Court affirmed, and the defendants filed for post-conviction relief in the Circuit Court of Cook County.[221] The circuit court heard evidence that the trial Judge (Maloney) had accepted a bribe of $10,000 in their case, and then returned it when he feared that the FBI was watching him.[222] The circuit court then vacated their convictions and death sentences.[223] The State appealed, but the Illinois Supreme Court affirmed the ruling of the circuit court.[224]

In another case presided over by Judge Maloney of the Circuit Court of Cook County, the matter was remanded by order of the United States Supreme Court for further discovery.[225] William Bracy and Roger Collins were convicted of aggravated kidnapping and multiple murders in the course of an armed robbery in a jury trial.[226] The defendants pointed out that Judge Maloney had been convicted of taking bribes in criminal cases within months (both before and after) their trial, resulting in the acquittal of those defendants.[227] They argued that Judge Maloney insured convictions and the harshest sentences for non-paying defendants as part of his cover-up.[228] Initially denied relief by Illinois courts and the lower federal courts, the United States Supreme Court granted review and remanded the case for further discovery.[229] The federal district court then granted relief with respect to the claim of judicial bias in the sentencing phase, and ordered a new sentencing hearing.[230]

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216. People v. Hawkins, 690 N.E.2d 999 (Ill. 1998).
217. *Id.* at 1000.
218. *Id.* at 1001.
219. *Id.*
220. *Id.* at 1000
221. People v. Fields, 552 N.E.2d 791, 791 (Ill. 1990).
222. *Hawkins*, 690 N.E.2d at 1001.
223. *Id.* at 1002.
224. *Id.* at 1003.
225. United States v. Collins, 49 F. Supp. 2d 597, 605 (N.D. Ill. 1999).
226. *Id.* at 598.
227. *Id.*
228. *Id.*
229. *Id.* at 599.
230. *Collins*, 49 F. Supp. 2d at 599. The case is currently on appeal in the Seventh Circuit Court of Appeals.

6. Evidentiary Rulings

Another common error made by Illinois judges in death penalty cases was in the admissibility of evidence. In the case of Rolando Cruz, the trial court's decision almost sent an innocent man to his death. After the defendant was convicted of murder and sentenced to death, the Illinois Supreme Court reversed his conviction and remanded the case for a new trial.[231] The court held that the trial court had erred by excluding evidence corroborating that another man, Dugan, whose confession to this crime was admitted into evidence, had committed a series of similar crimes.[232] The Illinois Supreme Court also held that the trial court should have excluded evidence that bloodhounds called to the crime scene had followed a certain trail, evidence which was used by the prosecution in closing argument to attack Dugan's confession.[233]

In *People v. Anderson*, after the defendant had been convicted of murder and sentenced to death, his conviction was reversed and the case remanded for a new trial.[234] The Illinois Supreme Court found that the trial court had erred by admitting evidence that the defendant was silent after receiving his *Miranda* warnings, and by excluding hearsay evidence which the defendant's expert psychiatric witness had relied upon in arriving at his conclusion that the defendant was insane.[235] As a result of the decision in this case, forensic experts could refer to findings made by social workers or reports that were not in evidence, but which would normally be used by psychiatrists and other experts in reaching their ultimate diagnoses.[236] On remand, the defendant received a non-death sentence.[237]

Additional capital cases where relief was granted due to judicial error in admitting or denying certain evidence include *People v. Wilson*, where the defendant had been found guilty of murder and sentenced to death, but, the Illinois Supreme Court reversed the defendant's conviction and remanded for a new

231. People v. Cruz, 643 N.E.2d 636, 639 (Ill. 1994).

232. *Id.* at 655.

233. *Id.* at 662. The defendant was eventually found not guilty of all charges and exonerated.

234. 495 N.E.2d 485, 490 (Ill. 1986).

235. *Id.* at 488-89

236. *Id.*

237. *See also* People v. Melock, 599 N.E.2d 941, 941 (Ill. 1992) (excluding evidence of circumstances surrounding a polygraph exam); People v. House, 566 N.E.2d 259 (Ill. 1990) (where the Court excluded a spontaneous declaration by the victim which described assailants in way which did not match the defendant; the Judge also excluded a statement by a third party admitting involvement in the murder and exculpating the Defendant); and *People v. Mahaffey*, 651 N.E.2d 174 (1995) (where the Court erroneously admitted the co-defendant's statement into evidence against the defendant at their joint trial).

trial.[238] The Illinois Supreme Court found that the trial court erred by failing to suppress the defendant's statement after it was shown that the defendant had been injured while in police custody.[239] He charged that he was shocked with electric wires, smothered with a plastic bag, burned against a hot radiator, and repeatedly punched and kicked.[240] On remand, the defendant received a non-death sentence.[241]

7. Clemency

In *People v. Garcia*, the Governor granted her clemency after the Illinois Supreme Court had upheld her conviction and sentence.[242] Ms. Garcia had been released from the Department of Corrections after serving 10 years of a 20-year sentence for the murder of her 11-month-old daughter and four aggravated arsons.[243] Shortly after her release, she married George, 26 years

238. 506 N.E.2d 571, 581 (Ill. 1987).

239. *Id.* at 574-577.

240. *Id. See also* Steven Mills & Ken Armstrong, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, § 1, at 1.

241. *See also* People v. Jones, 541 N.E.2d 132 (Ill. 1989) (admitting hearsay statements and failing to give a jury instruction concerning circumstantial evidence); People v. Lampkin, 550 N.E.2d 278 (Ill. 1990) (admitting blood evidence against the defendant, but not telling the jury that blood was later found not to match that of the defendant); People v. Cobb, 455 N.E.2d 31 (Ill. 1983) (excluding evidence that the State's main witness told another person she hoped to get a reward for her testimony, and refusing to give the jury a cautionary accomplice instruction concerning the State's main witness); People v. Hill, 401 N.E.2d 517 (Ill. 1980) (holding that the defendant could not be sentenced to death for murders which took place before the post-Furman death penalty statute); People v. Davis, 220 N.E.2d 222 (Ill. 1966) (refusing to consider the defendant's good behavior in jail as a mitigating factor); People v. Boclair, 544 N.E.2d 715 (Ill. 1989) (refusing to consider psychiatric evidence that the defendant suffered from a paranoid personality disorder); People v. Rogers, 528 N.E.2d 667 (Ill. 1988) (admitting, at the second phase of his death penalty hearing, the tape-recorded statements of the co-defendants, which blamed the defendant for the crime); People v. Turner, 539 N.E.2d 1196 (Ill. 1989) (allowing the confession of one of the co-defendants that implicated Turner to be heard by the jury in sentencing phase); People v. Williams, 563 N.E.2d 385 (Ill. 1990) (improperly reopening a motion to quash and suppress after it had already been litigated by a prior judge); People v. Manning, 695 N.E.2d 423 (Ill. 1998) (improperly admitting evidence that the defendant and a jailhouse informant discussed other crimes unrelated to the charged murder because discussions of the murder did not appear on the tape obtained by the jailhouse informant, who later received a reduction in his sentence from 14 years to six; and improperly admitting testimony that the victim told his wife before disappearance to tell the FBI that the defendant killed him, if he dies); and Gaines v. Thieret, 846 F.2d 402 (7th Cir. 1988) (holding that the judge erred when he admitted hearsay evidence that the defendant's brother had implicated him).

242. Unpublished decision of Governor James Edgar granting clemency. *See generally*, People v. Garcia, 651 N.E.2d 100 (Ill. 1995).

243. *Id.* at 103

her senior, for the second time.[244] The defendant had first met George while she was a teenage prostitute years earlier.[245] The defendant lived with George for several weeks before leaving him and moving in with her grandparents.[246] Four months later, the defendant and her new boyfriend were looking for money, so the defendant had her boyfriend drive her to her husband's apartment building.[247] Upon seeing her husband in the parking lot, the defendant grabbed her boyfriend's .357 magnum pistol and forced her husband into his pickup truck.[248] An argument immediately ensued, and there was a struggle over the gun.[249] The defendant shot her husband at point blank range once in the chest.[250] He fell to the pavement and bled to death.[251] Before leaving the scene, the defendant took the keys to her husband's truck.[252] She told her boyfriend, "that mf—— deserves to die."[253] When later questioned by police, the defendant stated that she wanted to get the person responsible for her husband's death and told police she believed her boyfriend was the killer.[254] The defendant ultimately confessed to her husband's murder.[255]

The evidence showed that during childhood and adolescence, the defendant had experienced at least three closed head injuries, one requiring hospitalization.[256] A psychiatric examination revealed that she had suffered "many traumatic experiences" in her life.[257] While a teenager on probation for prostitution, the defendant had murdered her infant daughter by suffocating her because she was frustrated over a custody dispute involving the child.[258] At the age of 19, the defendant and an accomplice tied up, pistol whipped, and robbed her first ex-husband and his girlfriend.[259] Two years later, the defendant set fires on the anniversaries of her daughter's birth and death.[260] Evidence also showed that the defendant had been sexually abused for a period of years as a child.[261] She suffered from a borderline personality

244. *Id.*
245. *Id.*
246. *Id.*
247. *Garcia*, 651 N.E.2d at 103.
248. *Id.* at 103-04.
249. *Id.* at 104.
250. *Id.*
251. *Id.*
252. *Garcia*, 651 N.E.2d at 103.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 115.
257. *Garcia*, 651 N.E.2d at 115.
258. *Id.* at 112.
259. *Id.* at 113.
260. *Id.*
261. *Id.*

disorder with sociopathic features, chronic depression and alcoholism.[262] The defendant had been drinking on the day of her husband's murder and was drunk both before and after the crime.[263] Jail guards testified that the defendant was made a trustee based on her exemplary behavior.[264] They described the defendant as a model inmate who had voluntarily cleaned sores found on new inmates who were formerly homeless persons.[265]

By a 5-2 vote, the Illinois Supreme Court upheld the defendant's death sentence.[266] The court concluded that the defendant's "checkered criminal history," including the prior murder of her daughter, the robbery of her ex-husband, and four aggravated arson convictions, outweighed any mitigation regarding her history of sexual abuse as a child or her good behavior in prison.[267] Governor Edgar, however, granted the defendant executive clemency, reducing her sentence to natural life imprisonment without parole.[268]

E. Fitness to Stand Trial & Other Mental Health Issues

1. Legal Background

One of the most difficult problems facing Illinois courts has been the question of whether a defendant is fit to stand trial, fit to pursue his post-conviction remedies, or to waive his rights and be executed. Several of these cases involved capital defendants, each one of which was unique. In *Pate v. Robinson*, the Illinois Supreme Court held that a judge has a duty to hold a hearing if he has a *bona fide* doubt that the defendant may not be competent to understand the nature of the charge against him or cooperate with his lawyer.[269]

2. Illinois Cases

In the case of Robin Wayne Owens, he was convicted of armed robbery and murder in the Circuit Court of Will County, and sentenced to death.[270] On appeal, the Illinois Supreme Court affirmed his conviction and sentence.[271] Thereafter, defendant

262. *Garcia*, 651 N.E.2d at 113.
263. *Id.* at 116.
264. *Id.*
265. *Id.*
266. *Id.* at 114.
267. *Garcia*, 651 N.E.2d at 113.
268. *See* Ray Long, *Edgar Commutes Death Sentence of Condemned Woman* (visited Feb. 19, 2001) *available at* http://www.soci.niu.edu/~critcrim/dp/dpill/dpgarcia. commute.
269. 383 U.S. 375, 385 (1966).
270. People v. Owens, 564 N.E.2d 1184, 1185 (Ill. 1990).
271. *See generally* People v. Owens, 464 N.E.2d 252 (Ill. 1984).

filed a petition for post-conviction relief.[272] The Will County Public Defender was appointed, and filed a motion for appointment of an expert to determine the defendant's fitness to assist counsel at the post-conviction stage.[273] He stated that he had reports detailing defendant's bizarre behavior and treatment with anti-psychotic drugs by the Department of Corrections.[274]

The circuit court denied the petition, and the Illinois Supreme Court reversed, holding that Supreme Court Rule 651(c) could not be satisfied where a defendant could not communicate with appointed counsel to shape his claims of constitutional deprivation.[275] The Illinois Supreme Court remanded the case to the trial court to determine if there was a bona fide doubt of defendant's fitness to participate in the post-conviction procedure.[276]

Another major case which has been a problem for Illinois courts, prosecutors, and defense counsel is *People v. St. Pierre*, where the Illinois Supreme Court reversed the trial court on direct appeal for admitting a statement which should have been suppressed because the defendant unambiguously asked for counsel.[277] However, thereafter the defendant plead guilty, then filed post-conviction proceedings, but then waived all of his post-conviction rights.[278] He then changed his mind, and after remanding the matter back to the circuit court for a fitness hearing, the Illinois Supreme Court accepted his waiver.[279] However, the Seventh Circuit Court of Appeals reversed, noting that St. Pierre (who suffers from Bi-Polar Disorder) changed his mind the next day and wanted to proceed on post conviction.[280] Currently, the case is back in the Federal District Court for the Northern District of Illinois.[281]

IV. PROPOSED SOLUTIONS

There have been a number of commissions, task forces, and committees formed to look into the problems of Illinois criminal justice system as exemplified by the discovery of 13 men released from Death Row because of actual innocence since the United

272. *Owens*, 564 N.E.2d at 1185.
273. *Id.* at 1186.
274. *Id.*
275. *Id.* at 1187.
276. *Id.* at 1191. Robin Wayne Owens was declared unfit, and until this day sits on death row in Illinois Prison, until he can recover sufficiently to assist his counsel in post-conviction proceedings.
277. 522 N.E.2d 61, 69 (Ill. 1988).
278. People v. St. Pierre, 588 N.E.2d 1159, 1161 (Ill. 1992).
279. *Id.* at 1165
280. St. Pierre v. Cowan, 217 F.3d 939, 944 (7th Cir. 2000).
281. *Id.* at 951.

States Supreme Court reinstated the death penalty in 1976.[282] The Tribune, in a series of articles by Ken Armstrong and Steve Mills, found that of 285 death penalty cases since 1977, in 33 cases a defendant sentenced to death was represented at trial by a lawyer who was disbarred or his license suspended, in 35 cases the jury that sentenced a black defendant was entirely white, and in 46 cases, a jailhouse informant was used by the prosecution, a practice that has come under suspicion recently in several states for its unreliability.[283]

Our analysis has revealed problems with defense lawyers, prosecutors, and the Judiciary. There is no one reason for the recent failure of our criminal justice system. The problem is system-wide. In a proper functioning system, the innocent are weeded out by the police, or the prosecutor, or the court, so that by the time a defendant survives preliminary hearing or indictment, and the State seeks the death penalty in a capital felony proceeding, the chances of innocence should be remote, but they are not in Illinois. Moreover, in a capital case when the most experienced prosecutors, defense lawyers, and judges should be involved, the kinds of errors we have documented should not take place in a proper functioning system. But, they have taken place in Illinois. The Tribune reporters found that more than 10% of Illinois death penalty cases were reversed for a new trial or sentencing because of prosecutorial misconduct.[284] As we have noted at the outset of this article, Illinois is not alone in this problem. Mills and Armstrong reported that nationwide 381 defendants had their homicide convictions reversed due to prosecutors concealing evidence or knowingly using false evidence.[285] All in all the Tribune estimates that as many as 49% of death penalty cases have resulted in new trials or sentencing hearings due to the combined errors of prosecutor, court, and defense counsel.[286]

The problem will not be solved unless there are massive efforts to change the thinking of some of the main actors in the criminal justice system, and to change some of the methods utilized by the police and prosecution, to provide the training needed to arrest and process cases in accordance with due process standards. A change in attitude by the police such as training to insure that all arguable suspects are investigated in a case, instead of concentration by the police on a single suspect is an example. Police torture must be absolutely rejected by local and state governments, and if it is proven in a given case that it

282. Armstrong & Mills, *supra* note 167, § 1, at 1.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*

occurred, it must be acknowledged and not hidden. The suggestions that confessions ought to be videotaped should not be resisted by the police or the prosecution since it would go a long way to insure that confessions such as those obtained from Hubert Geralds or Ronald Jones would not take place. Additionally, not only must the police honor the warrant process in search and arrest situations, but they must honor International treaties such as the Vienna Convention on Consular Relations, which requires the police to notify arrested foreign nationals of their right to call their consulates or embassies prior to making a statement.[287]

Prosecutors, judges, and defense lawyers must also meet Supreme Court and Bar Association standards for the prosecution and defense of capital cases. Recently, the Special Supreme Court Committee on Capital Cases recommended that all assistant state's attorneys and defense counsel who handle capital cases be required to meet specified experience standards. The American Bar Association and the National Legal Aid and Defender Association both recommended that two defense lawyers be assigned to each capital case, and that lead counsel have prior experience in death penalty litigation as well as specialized legal training in capital litigation.[288] In January, 2001 the Illinois Supreme Court approved these recommendations and authorized the creation of a capital litigation trial bar which would implement these minimum standards.

Currently in Illinois, most capital litigation at the trial level is handled by public defenders or appointed counsel. At the Appellate level, death penalty cases are represented by the Supreme Court Unit of the Illinois State Appellate Defender Office or the Cook County Public Defender Appeals Division. In Capital Post Conviction cases, the Capital Litigation Division of the State Appellate Defender Office is appointed by the Illinois Supreme Court or County Circuit Courts. That office utilizes a panel of approximately 120 lawyers, including lawyers from almost all of the major firms in Chicago, who work *pro bono*. The other lawyers on the panel, including former public defenders, private criminal defense lawyers, and former prosecutors work for a small hourly fee, as compared with the prevailing rates for lawyers in Illinois. The office provides investigative, social work, and legal support to the panel lawyers.

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287. The fact that the Seventh Circuit Court of Appeals has just held that failure of the police to notify foreign nationals of their consular rights under Article 36 of the Vienna Convention does not result in the suppression of a confession made to the police under such circumstances, does not help our image abroad as an honorable nation that keeps its promises when it signs treaties. *See* United States v. Lawal, 231 F.3d 1045, 1048-49 (7th Cir. 2000).

288. *Standards for the Appointment of Counsel in Capital Cases*, (Nat'l Legal Aid and Defender Ass'n, Washington, D.C. 1988) (Source on file with author).

In addition, in 1999, the Illinois Legislature allocated $17,000,000 for improvements in capital prosecution and defense. The Illinois State Appellate Defender established a Death Penalty Trial Assistance Division, which would provide lawyers to second chair death penalty cases outside of Cook County, and also provide criminal investigators and social workers. It also will sponsor a series of training seminars for lawyers, investigators, and social workers that deal with capital defendants.

The Legislature also established a capital trust fund to pay appointed counsel in capital cases from state funds.

The Task Force on Professional Practice in the Illinois Justice System has also recommended that the State create a fund, similar to the Capital Trust Fund to provide funds to ensure necessary expert witnesses for the indigent and partially indigent. This suggestion by the Task Force would be an excellent way to ensure that cases like Samuel Morgan and others like his are diagnosed at the trial level so that the sentencing judge can have that information, instead of waiting for expert examination at the post conviction stage.

Defense counsel in capital cases are for the most part paid by the State. They must be paid adequately to attract the finest lawyers in our profession and to retain them. As long as a Public Defender's office is viewed as a place to train for three years before leaving for private solo practice or a greater salary at a big law firm, the finest talent in our legal system will not be available for these cases.

The Special Supreme Court Committee on Capital Cases also recommended that the Illinois Rules of Professional Conduct be amended to state that the duty of a prosecutor is to seek justice, not merely to convict.[289] This would bring Illinois into conformity with the American Bar Association's Standards for Criminal Justice. In addition, the Committee proposed that prosecutors make a good faith effort to specifically identify discovery material favorable to the accused.[290] That is certainly a step in the right direction. It also suggested that discovery depositions be allowed in capital cases at the discretion of the court. That suggestion should be adopted as well so that we avoid "trial by ambush" in Capital cases. Prosecutors now receive peer support when they win death penalty cases. They must also receive peer support when they

289. *See* Illinois Supreme Court Rules, Article VIII, Illinois Rules of Professional Conduct, Rule 3.8. Special Responsibilities of a Prosecutor (*amended* March 1, 2001) *available at* http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII.htm#3.8. On March 1st, 2001, the Illinois Supreme Court amended rule 3.8 to provide that "[t]he duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." *Id.* 3.8(a).

290. Aaron Chambers, *Panel Eases Call for Evidence Disclosure*, CHI. DAILY LAW BULL., Nov. 1, 2000, at 3.

turn over "*Brady*" material to the defense which assists the defense, and when they make a principled decision not to ask for the death penalty in every case.

The Illinois Supreme Court has also adopted the committee's recommendation for specialized training for the Judiciary so that judges would participate in capital case training at least once every two years.[291] The Judiciary must not be graded on how quickly they dispose of a death penalty case at trial or post-conviction. The Illinois Supreme Court is to be praised for their reversals of several cases where the post conviction courts hastened dismissal of cases before post conviction petitions could be fully perfected.

Another change that should be made in order to improve the workings of the criminal justice system in Illinois is the abolition of the use of the death penalty against mentally-retarded defendants. Although in *Penry v. Lynaugh*, the United States Supreme Court held that allowing the execution of the mentally retarded was not unconstitutional,[292] thirteen states nevertheless have passed legislation banning the execution of the mentally retarded in their respective states.[293]

Apart from the moral and philosophical question of whether a retarded person has the same comprehension as an average person when he commits murder, there is a practical problem with the representation of such a person. In the case of Hubert Geralds, whose conviction and sentence was vacated only after another

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291 *See* Illinois Supreme Court Rules, Article I, General Rules, Rule 43. Seminars on Capital Cases (March 1, 2001) *available at* http://www.state.il.us/court/ SupremeCourt/Rules/Art_I/ArtI.htm#43. On March 1st, 2001, the Illinois Supreme Court adopted Rule 43, that provides:

> Rule 43. Seminars on Capital Cases
>
> (a) In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing Capital Litigation Seminars approved by the Supreme Court shall be established for judges that may as part of their designated duties preside over capital litigation. The Capital Litigation Seminars should include, but not be limited to, the judge's role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year.
>
> (b) Any circuit court judge or associate judge who in his current assignment may be called upon to preside over a capital case shall attend a Capital Litigation Seminar at least once every two years.

Id.

292. 492 U.S. 302, 340 (1989). On March 26, 2001, the United States Supreme Court granted certiorari in order to revisit the specific issue of whether the execution of the mentally retarded violates the cruel and unusual punishment clause of the Eighth Amendment. *See* McCarver v. North Carolina, No. 00-8727, 2001 U.S. LEXIS 2690 (March 26, 2001).

293. *See* David G. Savage, *A Second Opinion: Case of a Mentally Retarded Murderer Comes Back to the Court 12 Years Later*, 87 A.B.A. J. 33, 33 (2001).

person confessed to the crime, one of his lawyers suggested Geralds might well have been executed for a murder he did not commit because his limited I.Q.[294] prevented him from communicating adequately with his lawyer. Nor could Anthony Porter communicate adequately with his lawyer about his case. His I.Q. was measured at anywhere from 51 to 76. Porter came within two days of his execution before it was discovered that he was absolutely innocent.

A bill to exempt the mentally retarded was introduced in the Illinois State Legislature, but it was vetoed by former Governor Thompson. However, that was before cases like Hubert Geralds' and Anthony Porter's.

VI. CONCLUSION

Will these suggestions and others made by the various task forces and commissions solve the problems of Illinois' criminal justice system? Certainly, many of these recommendations will help, but whether we can ever be assured that an innocent person or a person who does not deserve the death penalty will not be executed in our state, given the arbitrariness and race biases built into the system, the frailty of human nature, the possibility of human error, and our own unconscious biases, cannot be answered positively with assurance.

There are many hurdles to overcome and consider. First of all, suppose that all the actors in the system agree to these reforms, what do we do about all the cases now in the system where capital punishment has been imposed, should we vacate all of those death sentences, knowing that they were imposed under a flawed system? Even if we adopt all the reforms recommended by the various commissions- is there any guarantee that a system allowing the death penalty will work even then, or is there something inherently corrupting that allows as an end the State to deliberately and with moral certitude kill one of its citizens? Consider the fact that Professor Liebman found a 68% error rate nationally in death penalty cases as opposed to a 15% error rate in non-capital cases. It is certainly a dilemma, both moral and practical. Liebman concluded that "this much error and the time needed to cure it, impose terrible costs on taxpayers, victims' families, the judicial system and the wrongly condemned. And it renders unattainable the finality, retribution, and deterrence that are the reasons usually given for having a death penalty."[295]

There are those who believe that once reforms are instituted, the system will work, and the abiding fear that a "wrongfully convicted" person will be put to death in Illinois will be a spectre of

294. Geralds' I.Q. was estimated as that of an 8 year old.
295. *See* Liebman, supra note 14.

the past. In order to be sure that this is true, the Illinois Moratorium should be extended for a minimum of five years after all reforms have gone into effect to determine whether the Judicial, Prosecutorial, and defense counsel errors have been eliminated, and whether the new system actually works.

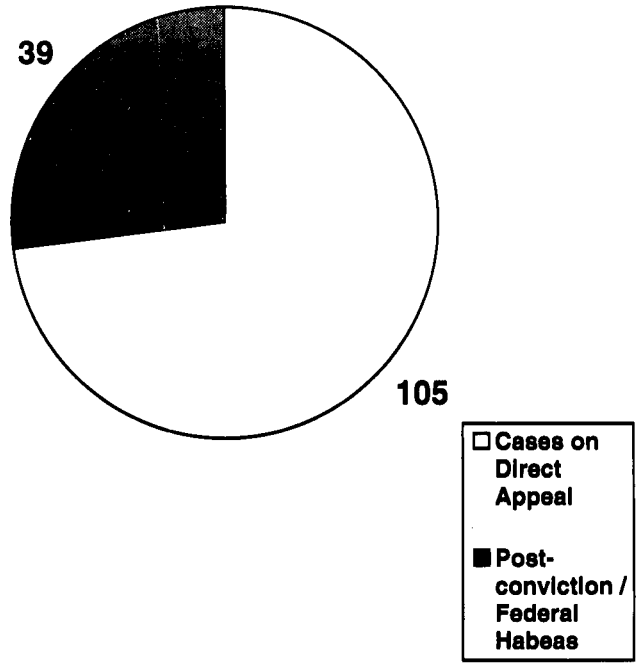
Perhaps the parting words of United States Supreme Court Justice Blackmun as he left the bench after 24 years of service are the most eloquent and illuminating on this subject. He stated:

> Perhaps one day this court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic, though, that such a day will come. I am more optimistic though that this court eventually will conclude that the ... death penalty must be abandoned altogether. I may not live to see that day, but I have faith that eventually it will arrive.[296]

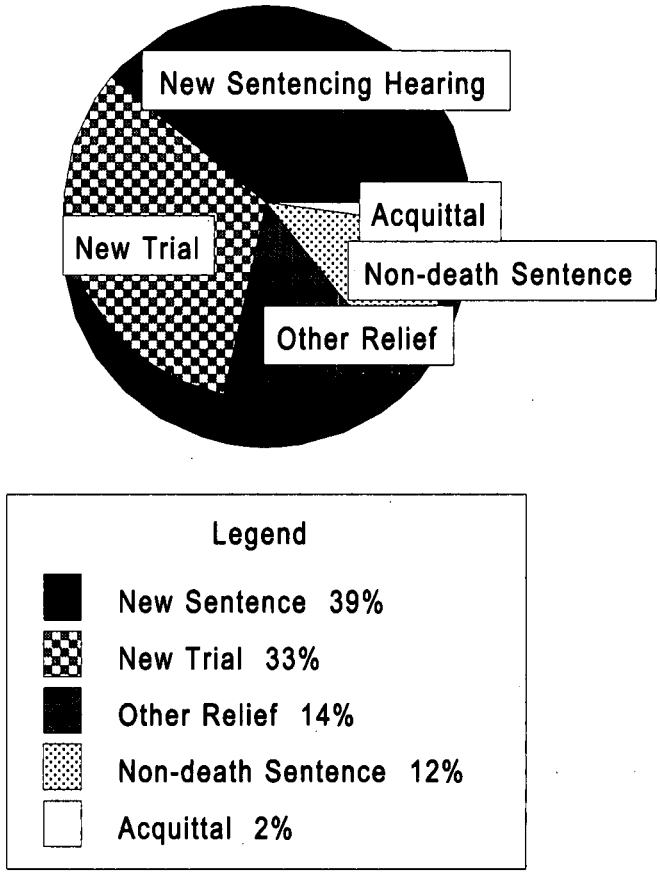
296. Callins v. Collins, 114 S.Ct. 1127, 1138 (1994) (Blackmun, J., dissenting) (internal quotation marks and citations omitted).

APPENDIX

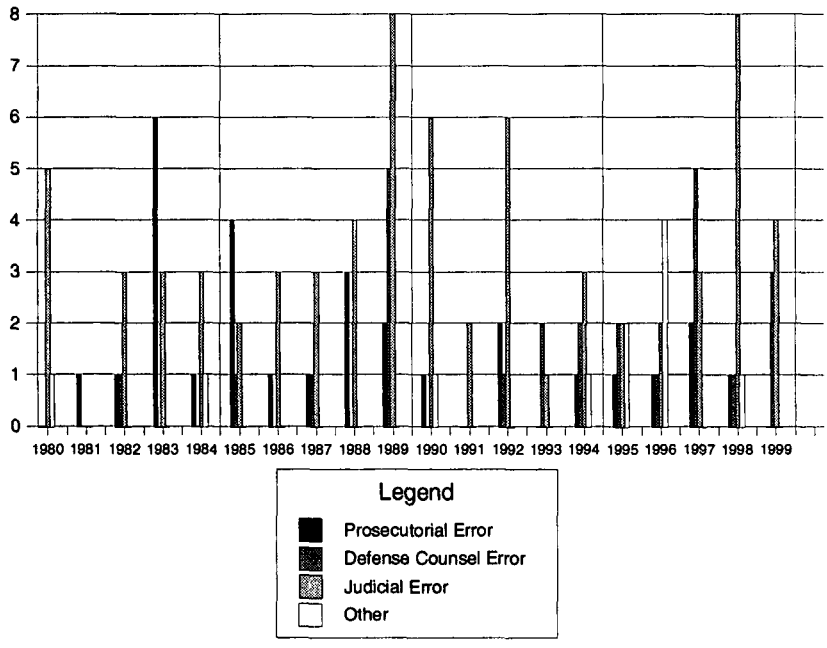
Stages at which Relief Granted



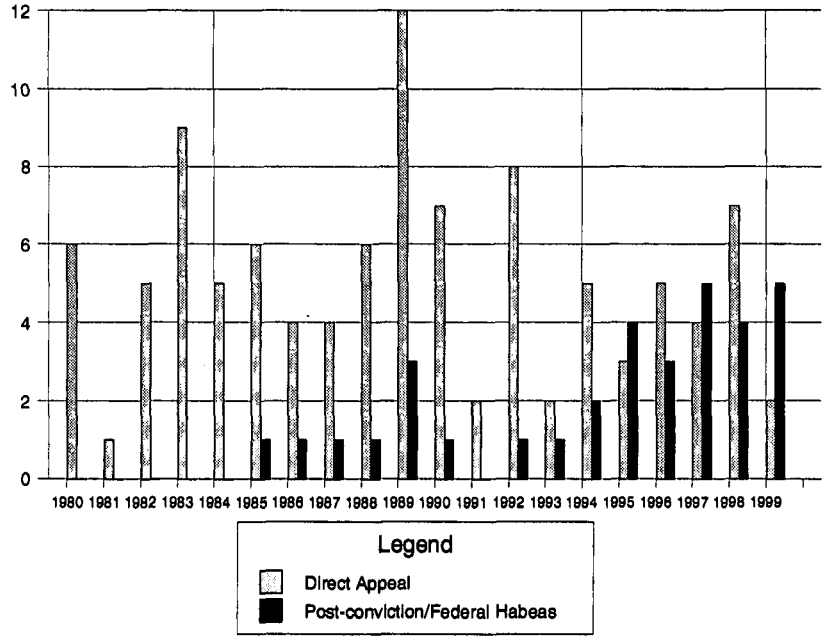
Relief in Illinois Capital Cases



Kinds of Error by Year



Frequency of Relief on Review



Error in Illinois Capital Cases