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PROCEDURAL REFORMS IN CAPITAL CASES APPLIED TO PERJURY

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INTRODUCTION

Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate.[1]

Illinois Governor George Ryan, February 1, 2000.

Governor Ryan made this announcement of a death penalty moratorium in Illinois after thirteen death penalty defendants had been freed from death row.[2] Examination of those thirteen cases reveals many interacting causes for the wrongful convictions. However, the most common and direct cause of those wrongful convictions is perjury, rather than ineffective assistance of counsel, or prosecutorial misconduct, as one might expect from the media coverage of the cases.[3] A number of the proposals to reform the capital case guilt/innocence determinations directly or indirectly address perjury.

This article will examine the Illinois capital cases where perjury has arguably played a role in convicting innocent persons. It will then consider the proposed reforms' prospects for reducing wrongful convictions and executions by reducing perjury. This article will not consider the total abolition of the death penalty.

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1. Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure," Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1N [hereinafter Armstrong & Mills, *Ryan*].

2. *Id.*

3. Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois, Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, at 1; Ken Armstrong & Maurice Possley, *How Prosecutors Sacrifice Justice to Win, The Verdict Dishonor*, CHI. TRIB., at Jan. 10, 1999, at 1.

Although the author believes only its abolition can prevent the execution of an innocent defendant, the popularity of the death penalty and the resulting support for it among our political leaders has now focused attention on procedural reforms. This article's purpose is to evaluate the strengths and weaknesses of those reforms without tackling the abolition debate.

I. INSTANCES OF PERJURY IN ILLINOIS CAPITAL CASES

A. Perjury by a Retarded Girl in Return for Leniency

Paula Gray's perjury resulted in death sentences for two innocent men, Dennis Williams and Vernal Jimerson, for the 1978 murder and rape of a woman and her fiancé.[4] Gray, a retarded seventeen year old who was briefly hospitalized for mental problems, told police, a Grand Jury, and several other juries that she had seen Williams, Jimerson, and two other men, rape and murder the victims.[5] However, on four other occasions, Gray gave sworn testimony denying any knowledge of the crimes.[6] During the defendants' trials, Gray said she had held a disposable cigarette lighter to illuminate the dark room where the rapes took place.[7] Furthermore, she denied that anyone made promises of leniency to her in return for her testimony.[8]

Many years later, an entirely different group of men were shown to have committed these crimes, and all of Gray's testimony against the original defendants proved to be false.[9] Members of the second group of men confessed, and DNA testing incriminated them while exculpating the original defendants.[10] Three defendants of the second group were convicted of the crimes in 1997.[11] Paula Gray had not seen the original defendants commit the crime.[12] Furthermore, contrary to her testimony that no promises had been made to her in return for her testimony, the prosecution had promised that the murder charges against her

4. David Protess & Rob Warden, *Nine Lives: The Justice System Sentenced These Men to Death. The Justice System Ultimately Set them Free. Is That Justice?*, CHI. TRIB., Aug. 10, 1997, at 20, *available in* 1997 WL 3576969.

5. People v. Jimerson, 652 N.E.2d 278, 280 (Ill. 1995).

6. *Id.*

7. *Id.*

8. *Id.*

9. Ken Armstrong & Maurice Possley, *Trial and Error; How Prosecutors Sacrifice Justice to Win; Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at 1.

10. *Id.*

11. *Id.*

12. People v. Gray, 408 N.E.2d 1150, 1153 (Ill. App. Ct. 1980); *rev'd,* U.S. ex rel. Gray v. Director, 721 F.2d 586, 587 (7th Cir. 1983) (reversing on defense counsel's conflict of interest).

would be dropped "if she testifie[d] honestly."[13]

Law enforcement officials have never offered an explanation as to how Paula Gray formulated her perjured testimony.[14] She was not charged with perjury for her false testimony against the defendants.[15] However, she was convicted of perjury, based on her testimony at a preliminary hearing, in which she stated that she knew nothing about the crime.[16]

B. Actual Killer Protects Herself with Aid of Second Witness

Gayle Potter committed perjury and incriminated Joseph Burrows to conceal her own guilt for the 1988 armed robbery and murder of an elderly man in his home.[17] Ralph Frye also committed perjury in the case, even though he had no role in the crime.[18] Based on information obtained during his police interrogation, Frye supported Potter's testimony out of fear of the police, as well as pressure from Potter and the prosecutors.[19] As a result, despite his innocence, Joseph Burrows received the death penalty.[20]

Potter and Frye became prosecution witnesses after they themselves were indicted for the murder.[21] Potter's blood had been found at the crime scene and her gun had been used to commit the crime.[22] She explained this evidence against her by claiming that she had gone to the scene with Burrows and Frye to borrow money from the victim, and that Burrows had shot the victim with her gun when the victim refused to lend her money, then hit Potter on the head causing her to bleed.[23]

On direct appeal, the Illinois Supreme Court upheld Burrows' conviction despite evidence that Potter was an accomplice drug user with a criminal record, and despite a recantation by Frye.[24] The Court found that recantations were "inherently unreliable," that the evidence could not "reasonably be considered closely balanced," and that Frye's testimony corroborated Potter's testimony.[25] Subsequently, however, Potter's recantation, corroborated by her admission of guilt to a newly discovered

13. *Jimerson*, 652 N.E.2d at 284.
14. Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, CHI. TRIB., Jan. 24, 2000, at 1.
15. *Id.*
16. *Gray*, 408 N.E.2d at 1151.
17. People v. Burrows, 665 N.E.2d 1319, 1323 (Ill. 1996).
18. *Id.* at 1322.
19. *Id.* at 1323.
20. *Id.* at 1320.
21. *Id.* at 1321.
22. *Burrows*, 665 N.E.2d at 1321.
23. *Id.*
24. People v. Burrows, 592 N.E.2d 997, 1010 (Ill. 1992).
25. *Id.*

witness in post-conviction proceedings, convinced the post-conviction petition court and the Illinois Supreme Court that Burrows had been wrongly convicted.[26]

C. Perjury to Protect Boyfriend

Phyllis Santini committed perjury to protect herself and her lover, Johnny Brown, from prosecution for a 1977 armed robbery and double murder at a Chicago hot dog stand.[27] As a result, Perry Cobb and Darby Tillis were convicted and sentenced to death.[28] Years later, the Illinois Supreme Court ordered a new trial, in part because the judge had not instructed the jury that Phyllis Santini was a suspect accomplice witness.[29] At that time, an Assistant State's Attorney from another Illinois county read about the case and recalled Phyllis Santini as a co-worker in a factory.[30] Santini had told him that she had to go to court because she, her boyfriend, and another person, not Cobb or Tillis, had robbed a hot dog stand and two men were killed.[31] After four jury trials, three of which had ended in hung juries, the fifth trial, without a jury, resulted in an acquittal.[32] The Court found Phyllis Santini's testimony unworthy of belief in light of the testimony of the Assistant State's Attorney.[33]

D. Jailhouse Informant

Con man and jailhouse "snitch," Tommy Dye, got an eight-year reduction of his prison sentence, and was placed in the witness protection program along with his girlfriend, in return for testimony about two alleged confessions from Steve Manning for the armed robbery and murder of a drug dealer.[34] The absence of those alleged confessions from audio recordings Dye made, when he said Manning confessed, did not prevent Manning's conviction and death sentence.[35] Dye explained that the recording device had malfunctioned at those two crucial points in the hours of recordings.[36] Dye convinced the jury that Manning, a former Chicago Police officer, explained and demonstrated to Dye how he had committed the murder during a portion of the recording that

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26. *Burrows*, 665 N.E.2d at 1325.
27. Linnet Myers, *4 Years on Death Row*, CHI. TRIB., Sept. 4, 1998, at 1C.
28. *Id.*
29. People v. Cobb, 455 N.E.2d 31, 37 (Ill. 1983).
30. Myers, *supra* note 27, at 1C.
31. *Id. See also* Norman Alexandroff, *"Thank God for Mike Falconer,"* CHI. LAWYER, Feb. 1987, at 1.
32. Myers, *supra* note 27, at 1C.
33. *Id.*
34. People v. Manning, 695 N.E.2d 423, 427-28 (1998).
35. *Id.* at 428.
36. *Id.* at 427.

contained only two seconds of unintelligible sounds.[37] The jury believed Dye despite the fact that he had ten prior felony convictions, that he had lied to a Grand Jury, and had used numerous aliases.[38]

After the Illinois Supreme Court ordered a new trial as a result of evidentiary errors,[39] further investigation of Dye found more reasons to doubt his reliability as a witness.[40] Law enforcement authorities in four states wanted Dye, he provided testimony or information to federal prosecutors against five defendants although a federal prosecutor had written that Dye was "a pathological liar," and he had been thrown out of the witness protection program.[41] One of Manning's prosecutors had helped Dye's efforts for leniency on his other cases, and another of Manning's prosecutors had become Dye's criminal defense attorney after leaving the State's Attorney's office.[42] Two months after the publication of this information, prosecutors dropped the murder charge on which Manning had been sentenced to death.[43]

II. ANALYSIS OF PROPOSED REFORMS

Reforms intended to address perjury illustrate the complexity and difficulty of eliminating wrongful convictions. Some of the proposed reforms will be less effective than others, some of the proposals will make convictions more difficult to obtain, and some of the proposals will add to the length, cost, and complexity of trials. Problems with the criminal justice system complicate reforms. While this article focuses on perjury, each instance of perjury occurs in a context that may include racism,[44] inadequate assistance of counsel,[45] and misconduct by police or prosecutors.[46]

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37. *Id.*

38. Steve Mills & Ken Armstrong, *The Inside Informant: The Failure of the Death Penalty in Illinois*, CHI. TRIB., Nov. 16, 1999, at 1N.

39. *Manning*, 695 N.E.2d at 434.

40. Mills & Armstrong, *supra* note 38, at 1N.

41. *Id.*

42. *Id.*

43. *Id.*

44. In the Cobb and Tillis cases discussed above, the prosecution used peremptory challenges in the first three trials to seat only one African American juror on each of the first two juries and none on the third jury. Flora Johnson Skelly, *Death Derailed*, CHI. LAWYER, Nov. 1983, at 7-8.

45. *See* People v. Jimerson, 535 N.E.2d 889, 897 (Ill. 1989) (holding that the defense counsel's failure to confront Paula Gray with three of her four prior statements that she knew nothing about the crime was not ineffective assistance of counsel because he had strategic reasons for not confronting her with her prior statements).

46. *See Burrows*, 665 N.E.2d at 1323 (showing that prosecutors pressured Frye to corroborate Potter's testimony incriminating Burrows based on information Frye had learned during police interrogation). *See also Jimerson*, 652 N.E.2d at 283 (showing that prosecutors had allowed Paula Gray's denial

The most serious weakness of prospective reforms is the difficulty in meaningfully applying them to the likely past convictions and death sentences of unknown innocent persons already sentenced to death. It is certain, however, that the procedures that resulted in the above wrongful convictions would be improved by the proposed reforms.

A. Cautionary Jury Instructions

Jury instructions, warning that certain types of witnesses have suspect credibility, are easy to use, but are of uncertain effectiveness. A patterned accomplice instruction is available in Illinois when probable cause exists to believe that the witness could be guilty of the offense as a principal or by accountability.[47] Judges could give similar instructions on jailhouse informants, or witnesses testifying in return for leniency, with little burden on the speed or expense of trials.

The Illinois House of Representatives Special Committee on Prosecutorial Misconduct has proposed legislation requiring an instruction cautioning that testimony of jailhouse informants should be received with greater care than testimony of ordinary witnesses.[48] Juries will be further instructed to consider the informant's inducements for testimony, other cases where the informant has testified, whether the witness has changed his testimony, the informant's criminal history, and any other evidence bearing on the informant's credibility.[49] The legislature should expand the existing accomplice witness instruction to include such reliability criteria as criminal history, inducements for testimony, and prior inconsistent statements by the accomplice.

Cautionary instructions allow defendants to attack suspect witnesses with the authority of the law. Prosecutors counter with arguments to the jurors that suspect witnesses are credible based on their detailed corroborated knowledge of the crime. They also argue that if the crime in question is to be prosecuted, they have no choice but to rely on such witnesses. In emotionally-charged heinous cases, these arguments are powerful because jurors want to punish someone for the terrible crime.

Determining which witnesses require the giving of cautionary instructions is sometimes problematic, as demonstrated by the

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of any promises being made to her when she had been promised leniency).

47. Illinois Patterned Jury Instructions, Criminal, 3.17 (4th ed. 2000). *See also* People v. Cobb, 455 N.E.2d 31, 35 (Ill. 1983) (stating the test required for the accomplice jury instruction).

48. Illinois House of Representatives Special Committee on Prosecutorial Misconduct proposed a bill to amend the Code of Criminal Procedure by adding section 115-21, July 2000.

49. *Id.*

many appeals in Illinois on whether the trial court erred in refusing to give the accomplice witness instruction.[50] It is not always easy to decide whether a witness is an accomplice, particularly when the witness denies as much involvement in the crime as possible, while the defense contends the witness was more involved than he or she has testified.

Doubts about the effectiveness of cautionary instructions are illustrated by its failure to catch perjury in the past. Despite accomplice instructions, jurors believed Paula Gray when she testified against Verneal Jimerson and Dennis Williams,[51] and jurors believed Gayle Potter when she testified against Joseph Burrows.[52] Half of the jurors in their fourth trial accepted Phyllis Santini's testimony against Perry Cobb and Darby Tillis, after the Illinois Supreme Court ruled that the trial judge should have given an accomplice instruction when they were previously convicted and sentenced to death based on Santini's testimony.[53]

B. Residual Doubt Instruction

Perhaps the easiest reform in the effort to prevent perjury from resulting in death sentences for innocent persons would be a jury instruction at the death penalty hearing stating that the sentencing jurors may consider any lingering or residual doubts they might have about a defendant's guilt as a reason not to impose the death penalty. Studies of capital juries have shown residual doubts about guilt to be one of the most compelling concerns of sentencing jurors.[54] While jurors may consider such doubts in the absence of an instruction, an instruction would promote juror consideration of residual doubt. Since current Illinois Supreme Court law rejects the need for such an

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50. *See e.g.*, People v. Albanese, 464 N.E.2d 206, 215 (1984) (upholding a ruling that a cautionary instruction was not justified); People v. Robinson, 319 N.E.2d 772, 777 (Ill. 1974) (upholding a ruling that a cautionary instruction was not justified).

51. People v. Jimerson, 652 N.E.2d 278, 280 (Ill. 1995). Paula Gray did not testify against Dennis Williams in his first trial, but she did testify against him in his second trial when he was again convicted and sentenced to death. *Id.*

52. *Burrows*, 665 N.E.2d at 1322.

53. Skelly, *supra* note 44, at 5, 10. Cobb and Tillis' first two trials ended in hung juries with black jurors in the minority for acquittal. *Id.* Their third jury trial before an all white jury resulted in convictions and death sentences. *Id.* The fourth trial resulted in a hung jury with six jurors finding the defendants guilty, and six jurors finding the defendants not guilty. Rosalind Rossi, *2 Freed in Killings After 5th Trial*, CHI. SUN TIMES, Jan. 21, 1987, at 3. Cobb and Tillis were acquitted in their fifth trial when they waived a jury. *Id.*

54. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998); William S. Greimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988).

instruction, a change in the law would be required.[55]

While a residual doubt instruction might prevent some wrongful executions, it would not prevent wrongful convictions, since it relates only to death penalty sentencing. For the same reason a residual doubt instruction would not stop perjury, the effectiveness of such an instruction in stopping wrongful executions depends upon how close the question of guilt or innocence appears to jurors. Prosecutors can urge the jury in sentencing argument that the jurors have decided the guilt issue properly and need not revisit it.

C. Pretrial Witness Reliability Hearings

The Illinois House of Representatives Special Committee on Prosecutorial Misconduct has proposed legislation mandating reliability hearings before allowing jailhouse informants to testify.[56] At these hearings the prosecution would have the burden of showing reliability.[57] The court may consider the informant's criminal history, any inducement for the informant's testimony, the testimony expected, the circumstances of the alleged incriminating statements to the informant, whether the informant has ever recanted the testimony, and other cases in which the informant has testified.[58] The above instances of perjury by accomplice witnesses suggest that the House legislation might be amended to include accomplices, and that reliability criteria be established for accomplices.

Giving trial courts power to bar the prosecution from presenting witnesses that the court finds too unreliable would be an effective step toward stopping perjury, especially if the courts applied meaningful criteria for doing so, and consistently barred suspect witnesses. The pressures on judges to allow marginal witnesses would, however, be enormous in high profile murder cases of the sort in which the death penalty is sought, particularly if the prosecution is largely dependant upon witnesses of uncertain reliability.

Such hearings and rulings would add to the length and complexity of litigation, but reasonably so. They would be similar to hearings on motions to suppress evidence and motions *in limine* that are routine in criminal cases. Given the already complex nature of death penalty litigation, the additional burden on the system posed by such hearings would be insignificant. If more staff or other resources are required for prosecutors or defense

55. People v. McDonald, 660 N.E.2d 832, 847-48 (Ill. 1995).

56. Illinois House of Representatives Special Committee on Prosecutorial Misconduct proposed a bill amending the Code of Criminal Procedure to add section 115-21, July 2000.

57. *Id.*

58. *Id.*

counsel, the additional costs would be warranted by the benefits of the resulting reduction in the risk of wrongful convictions.

The State's Attorney of Cook County has argued that such hearings will prejudice defendants' rights to speedy trials.[59] Since delays attributable to the defense suspend the speedy trial period,[60] defense requests for reliability hearings, or discovery depositions, would not cause any greater threat of speedy trial violations than currently exist. Criminal defendants have always had to deal with the tension between speedy trial rights and adequate trial preparation. Capable defense counsel representing defendants who may be innocent will advise their clients that the need for careful investigation and trial preparation outweighs the advantages of pressing for speedy trials. Opponents of such hearings will argue that jurors are capable of making their own reliability judgments about jailhouse informants and accomplice witnesses when all of the facts reflecting on the reliability of the witnesses are presented to the jury. However, the convictions in the above cases refute this argument.

Opponents of such hearings will also argue that giving the court the power to bar unreliable witnesses is too great an interference with prosecutorial discretion. Prosecutors are given broad discretion as to when to prosecute, and courts making pretrial credibility determinations may in some cases thwart prosecutors' decisions to prosecute. Barring unreliable witnesses, however, is no different in its impact upon prosecutorial discretion than barring junk science,[61] or suppressing unconstitutionally obtained evidence. Prosecutorial discretion has limits, and among them certainly must be society's overriding interest in trying to preclude death sentences based on perjury.

D. Discovery Depositions

One of the proposals of the Illinois Supreme Court Special Committee on Capital Cases is an amendment to the Supreme Court rules allowing discovery depositions of witnesses, "upon a showing of good cause."[62] Similarly, although somewhat more limited, the Illinois House of Representatives Special Committee on Prosecutorial Misconduct has proposed legislation which allows discovery depositions (at the discretion of the court) of eyewitnesses, or any person who will testify about incriminating statements made to a person other than a law enforcement official

59. Adrienne Drell, *Statement Law Would Slow System: Devine*, CHI. SUN TIMES, Sept. 10, 2000, at 8.

60. 725 ILL. COMP. STAT. 5/103-5(f) (1998).

61. People v. Baynes, 430 N.E.2d 1070, 1079 (Ill. 1981).

62. Illinois Supreme Court Special Committee on Capital Cases, Findings and Recommendations, Proposed Supreme Court Rule 416(e), Oct. 28, 1999.

or the crime victim.[63]

Discovery depositions will increase costs, add to pretrial delays, and place burdens on deposed witnesses and counsel. Concerns also will be raised that depositions will be used to harass witnesses on both sides. These drawbacks, however, are offset by the benefits to the truth seeking process, and by the trial court's control over depositions. The trial court need only allow depositions when the witness is important. The trial court can discipline counsel who abuses the deposition.

The interests in improving the truth-seeking goal alone merit depositions in capital litigation. Indeed, from the perspective of finding the truth, greater danger exists in severely limiting depositions than in abusing them. Death penalty litigation is at least as important as civil litigation where depositions play a prominent role. As in civil litigation, depositions will aid the parties in investigation, and refine trial preparation and trial testimony by limiting surprises in the testimony. Depositions will promote greater, more equal access to witnesses for both parties, particularly for the defense, which often has fewer investigative resources and is often unable to speak to witnesses who refuse to be interviewed. Depositions may also promote judicial economy by previewing strengths or flaws of cases sufficiently to lead to guilty pleas, reduced charges, or even dismissed charges.

The Illinois Supreme Court's Special Committee on Capital Cases found sixteen states using depositions and ten states barring depositions.[64] The states that use them demonstrate that they can be employed without a calamity.[65] However, the variance in the deposition statutes in states that permit them indicates that many options are available which will result in debate and litigation in Illinois.

E. Barring Suspect Witnesses in Capital Cases

A direct way of reducing perjury would be to preclude classes of suspect witnesses from being prosecution witnesses, at least in capital cases. Other states have recognized the bad track record of jailhouse informants.[66] Illinois' experience with accomplices is

63. Illinois House of Representatives Special Committee on Prosecutorial Misconduct proposed bill amending the Code of Criminal Procedure by adding section 115-22, July 2000.

64. Illinois Supreme Court Special Committee on Capital Cases Findings and Recommendations, Tab 28, Oct. 28, 1999.

65. Florida R. Crim. P. 3.220(h); WTHR-TV v. Indiana & Cline, 693 N.E.2d 1 (Ind. 1988).

66. *See, e.g.*, McNeal v. State, 551 So.2d 151, 158 (Miss. 1989) (observing that "the testimony of jailhouse informants, or 'snitches,' is becoming an increasing problem in this state, as well as throughout the American criminal justice system"); Tibbs v. State, 337 So.2d 788, 790 (Fla. 1976) (reversing a capital case in part because the testimony by a jailhouse informant was "the

itself enough to question whether courts should ever permit relying on accomplice testimony for a death sentence. Opponents to this proposition will argue that such a dramatic limitation upon the prosecutor's prerogatives will be too great a disability for the prosecution, and broader than necessary to protect the innocent. There will be cases in which a prosecution can only be pursued with suspect witnesses. There will also be cases in which there is corroboration for the suspect witness.[67]

The simplest response to those objections is that the prosecution is only being barred from seeking the death penalty. If jailhouse informants and accomplices must be relied upon, natural life imprisonment is still available. Natural life prison terms protect the public, but will not satisfy death penalty proponents.

A practical problem with barring suspect witnesses lies in deciding which witnesses are so unreliable. Jailhouse informants, accomplices, witnesses testifying for leniency, witnesses protecting others, witnesses with extensive criminal records, gang members, and uncorroborated eyewitnesses could all be included. The exclusion of so many suspect witnesses would significantly reduce the number of times that death sentences could be sought.[68]

F. Improved Defense Counsel and Resources

Every death penalty reform discussion begins with better defense counsel along with better defense resources. The Illinois Supreme Court Special Committee on Capital Cases has recommended a Capital Litigation Trial Bar with higher experience criteria for defense attorneys in capital cases.[69] The Illinois legislature has improved funding for capital cases with the Capital Crimes Litigation Act,[70] and created the Death Penalty Trial Assistance Office of the State Appellate Defender's Office[71] to advise and assist trial defense counsel in capital cases. While

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product of purely selfish considerations"). *See also* Mark Curriden, *No Honor Among Thieves*, A.B.A. J., June 1989, at 52 (stating that jailhouse informants are motivated by the desire to help themselves and are notoriously dishonest and unreliable witnesses).

67. Corroboration for suspect witnesses can be illusory as illustrated by several of the above cases. Witnesses often learn corroborative facts from second hand sources as did Paula Gray and Ralph Frye in the first two cases above. *Jimerson*, 652 N.E.2d at 287; *Burrows*, 665 N.E.2d at 1322.

68. Mills & Armstrong, *supra* note 38, at 1N. The Chicago Tribune found that at least 46 death sentences had followed from the use of jailhouse informants. *Id.*

69. Illinois Supreme Court Special Committee on Capital Cases Findings and Recommendations, Proposed Amendments to Supreme Court Rule 714, Oct. 28, 1999.

70. 725 ILL. COMP. STAT. 124/15 (1998).

71. 725 ILL. COMP. STAT. 105/10(c)(5) (1998).

more experienced, better-funded counsel will undoubtedly have a better chance of exposing perjury, only the naive would see having good counsel as a panacea. Several of the wrongly convicted had experienced counsel who failed to convince jurors and judges that witnesses were committing perjury. Illinois' experience with perjury in capital cases demonstrates that judges and jurors will sometimes be deceived by perjury no matter how skilled or well financed the defense might be.

G. Retroactive Reform?

With the above examples of perjury in capital cases, it is reasonable to fear that there may be other innocent persons among those now on death row who have not been able to establish perjury by key witnesses against them. The proposed reforms will reduce future perjury in capital cases; they will not, however, be available to defendants who may have already been victimized by perjury.

Examining past cases in light of new reforms would aid in evaluating the risk of perjury in those cases, but will not reveal perjury. The old cases in which suspect witnesses have been relied upon could be reviewed and investigated, but the passage of time will make investigation of possible perjury difficult. Advocates of the past convictions will argue that not every suspect witness is a perjurer, that the evidence of guilt is compelling, and that the prosecution was forced to rely upon the available witnesses.

Focusing on suspect witnesses may cause the courts to miss perjury by witnesses who appear reliable. Police officers, for example, may perjure themselves in the misguided belief that they must do so to convict a suspect they are convinced is guilty. The problem of defining the classes of unreliable witnesses also remains.

The available venues for applying new reforms to existing death sentences would be Illinois courts and the Governor's executive clemency powers. In many of the cases, the Illinois courts will have concluded their review of the cases, requiring the creation of a new level of review if the courts are to make that review. Further, courts will be loath to overturn convictions, or death sentences, on the unproven possibility that witnesses may have committed perjury. Using executive clemency for the factual review of many past capital cases would place an enormous burden on the Governor, and the Governor's staff, which may not be well-suited to review decades-old cases.

The Attorney General of Illinois and the State's Attorney of Cook County, have responded to the release of defendants from death sentences by offering to review cases in which innocence is

claimed.[72] In addition to the inherent problems in determining where perjury has occurred, these offices may be well-intentioned, but will be viewed as biased and having a conflict of interest in evaluating cases they prosecuted.

One of the old cases, where a witness testified in return for leniency, illustrates the difficulty of applying procedural reforms retroactively. William Franklin received the death penalty for a 1980 murder.[73] Franklin was convicted on the testimony of Ulric "Buddy" Williams, who in return for his testimony got a six-year sentence on an armed robbery charge.[74] The jury was not told that Williams had also been promised that he would not be prosecuted for the murder about which he testified, and that Williams had admitted knowing that a beating of the victim was contemplated when he witnessed Franklin shoot the victim.[75] Williams testified that he was driving Franklin's car in which the victim, Franklin, and another defendant, were passengers, in what Williams said he believed to be an errand to dispose of stolen auto parts.[76] Williams testified that when he was instructed to stop the car in an isolated area, the victim was called to the rear of the car and shot twice by Franklin.[77] The other testimony against Franklin was the testimony of the victim's grandfather, who when shown a photo array two years after the murder, identified Franklin as the man driving a car his grandson entered on the day of the murder.[78] The grandfather cautioned on cross-examination that he saw the front of the driver's face for "no more than a second."[79] At a preliminary hearing, the grandfather had testified he saw only the side of the driver's face and the back of the head.[80]

The court did not use a cautionary accomplice instruction on Williams' credibility at trial.[81] Defense counsel did not request the instruction, and the Illinois Supreme Court found that the omission did not constitute ineffective assistance of counsel.[82] One can only guess whether such an instruction, or a residual doubt

72. Editorials, *Fatal Flaws of Capital Punishment*, CHI. TRIB., Feb. 12, 1999, at 26.

73. People v. Franklin, 552 N.E.2d 743, 762 (Ill. 1990).

74. *Id.* at 749.

75. *Id.* Although Franklin's co-defendant was granted a new trial because Williams and prosecutors had failed to divulge this information to the jury. People v. Holmes, 606 N.E.2d 439, 446 (Ill. App. Ct. 1992). Both the Illinois Supreme Court and the Federal Courts held that Franklin's appellate counsel had defaulted the error. People v. Franklin, 656 N.E.2d 750, 754 (Ill. 1995); Franklin v. Gilmore, 188 F.3d 877, 882 (7th Cir. 1999).

76. *Franklin*, 552 N.E.2d at 749.

77. *Id.*

78. *Id.* at 748.

79. *Id.*

80. *Id.*

81. *Franklin*, 552 N.E.2d at 754.

82. *Id.* at 755.

instruction, would have resulted in acquittal or a sentence other than death. Similarly, it can only be speculated as to whether the outcome would have been different if a discovery deposition, or a reliability hearing, had been conducted. Barring Williams' testimony, as an inherently suspect witness, certainly would have had a significant impact on the case. It might have made it impossible to prosecute Franklin, or perhaps forced further police investigation for more reliable evidence. That does not necessarily mean, however, that Franklin's conviction will be overturned as unreliable, if the barring of suspect witnesses is one of the adopted reforms. The other evidence of Franklin's guilt, i.e., the grandfather's identification, will be cited as demonstrating that Williams was credible, as well as independent evidence of guilt. Finally, since Franklin has exhausted his Illinois appeals, the problem arises of what institution would have jurisdiction to determine whether application of such reforms to William Franklin would require relief from his death sentence. Applying procedural reforms under such circumstances would be a subjective process with little hope of distinguishing the innocent from the guilty.

If death penalty reforms are enacted, Illinois will be faced with a choice between three unsatisfactory responses to the cases that predate the reforms. Either, (1) resuming executions, ignoring the risk that innocent persons are among those already sentenced to death; or (2) attempting to review past cases to identify innocence in light of the reforms; or (3) the Governor commuting all prior death sentences to prison terms to eliminate the risk that innocent persons will be executed. The first would be intellectually dishonest and dangerous given the demonstrated deficiencies of the system that convicted these defendants. The second would be less controversial, but almost as dangerous given the difficulties of applying reforms retroactively. The third would ensure that innocent persons are not executed, but would be politically unpopular.

H. The Human Factor

If a meaningful package of reforms is enacted, the effectiveness of the reforms in limiting perjury will depend upon the vigilance and prudence of the attorneys and judges who use them. Prosecutors must choose their witnesses with concern for reliability, even if it means weakening the prosecution's case, or not seeking the death penalty, or dismissing the case. Defense attorneys must challenge the reliability of witnesses with complete investigation, pretrial motions, and skilled cross-examination. Judges should liberally exercise their powers to give cautionary instructions, order depositions, or bar unreliable witnesses. The search for the truth and safeguarding the innocent must be the

highest priority for everyone in the system, rather than convictions.

Prosecution objections to the proposed reforms of the Illinois House of Representatives Special Committee on Prosecutorial Misconduct have described the proposals as "anti-victim" and as "unmanageable."[83] This rhetoric from such powerful political quarters illustrates how difficult the adoption of an effective package of procedural reforms will be. If the above reform proposals are reduced to the less powerful tools against perjury, such as cautionary instructions, the reforms will be much less effective. Political opponents of reform must ask themselves what it will do to the public's declining confidence in the criminal justice system, not to mention wrongly convicted innocent defendants, if additional innocent defendants are found to have been sentenced to death.

CONCLUSION

The proposed reforms fail to meet Governor Ryan's test of "moral certainty" that everyone sentenced to death is "truly guilty."[84] Despite imperfections, however, procedural safeguards which help to reveal perjury will add to the quality of justice in Illinois. Each of the reforms would reduce the risk of innocent persons being sentenced to death in the future. The more reforms implemented, the greater the reduction of the risk. The significant pragmatic flaw in the reforms is the difficulty of meaningfully applying them retroactively.

Since there is no reason to believe that perjury and the other failings of the system are limited to capital cases, procedural reform should be extended to all felony cases. The current unprecedented interest in convictions of innocent persons presents an unusual opportunity to improve Illinois' criminal justice system, which we should not squander.

83. *Prosecutors Doth Protest Too Much*, CHI. TRIB., Sept. 10, 2000, at 22; Aaron Chambers, *'Prosecutorial Misconduct' Panel Draws More Fire*, CHI. DAILY L. BULL., Sept. 18, 2000, at 1.

84. Armstrong & Mills, *Ryan*, *supra* note 1, at 1N.