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ILLINOIS TAKES BOLD STEPS TO REVOLUTIONIZE CAPITAL LITIGATION

By Thomas M. Lombardo

On the morning of January 17, 1977, a Utah firing squad executed Gary Gilmore, the first man to be put to death since the United States Supreme Court lifted its moratorium on capital punishment, which was first imposed in 1972. By January 2002, the 25th anniversary of the resumption of executions in the United States, over 750 prisoners have been executed nationwide, 600 of them since 1990.

Capital punishment has been the focus of major national debate since that cold morning in 1977. Opponents of capital punishment are quick to point out the many flaws with the dispensing of justice. For example, critics point to the 18 people executed for crimes they committed as juveniles. Likewise, the scores of mentally ill or retarded that have forfeited their lives to the state cause concern. Others draw attention to the fact that 80 percent of those sentenced to death were convicted for killing whites, despite the fact that statistics show African-Americans and Caucasians are killed in roughly equal numbers. Additionally, a *Chicago Tribune* investigative report discovered that 33 defendants sentenced to die in Illinois were represented by attorneys who have since been disbarred or had been suspended.

Recently, a new debate has sparked over the very troubling issue of innocent men being sentenced to death and ultimately executed. Since 1977, 90 people sentenced to death have subsequently been released based on newly discovered or examined evidence.

I. One State Takes Action

The State of Illinois has chosen to tackle these problems head on. In Illinois, after 13 men were recently freed based on the discovery of exculpatory evidence or procedural error, Governor George Ryan declared a moratorium on executions on January 29, 2000. Since 1977, more people have been freed from death row than have been executed in Illinois.

In announcing the moratorium, Governor Ryan stated, "I can't support a system which in its administration has proven to be so fraught with error and has come so close to the ultimate nightmare: the state's taking of innocent life." The moratorium prompted the Illinois Supreme Court to address the procedural problems that have caused trouble with the capital litigation process throughout the state. The Court created a committee in April of 1999 to address the needed changes.

As a result of the committee's report, the Court has promulgated four new rules and three rule amendments. These sweeping changes put Illinois at the forefront of the 38 states in the U.S. that still allow the death penalty. Among the new requirements are the creation of the Capital Litigation Trial Bar and a demand that judges hearing capital cases attend mandatory training seminars. Additionally, new requirements have been placed on attorneys which require them, for example, to make certain disclosures to their opponents and to treat DNA evidence a certain way.

The centerpiece of the new rules is the creation of the Capital Litigation Trial Bar. Under the new Illinois Supreme Court Rule 714, attorneys who wish to take part in capital cases must become certified by the Illinois Supreme Court. Required qualifications include the following: five years of criminal trial experience; completion of eight felony trials, two of which must have been murder trials; and proficiency in DNA profiling and medical evidence. Twelve hours of training is being made available to those who need additional training in DNA and medical evidence proficiency.

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-- Illinois Governor George Ryan

Likewise, judges who expect to hear capital cases must attend a two-day seminar to educate themselves on the new rules and to become more fully acquainted with the special nature of death penalty trials.

Nonetheless, Cook County Circuit Court Judge Michael P. Toomin, who was selected to chair the faculty committee that will train judges, stated, "This is geared to getting the judges in a position to know what the right rulings were, and the types of things that will be thrown at them by defense, by the state. They can be more prepared for those curveballs." The seminars are being taught by nine experienced judges and two law professors, James P. Carey of Loyola University Chicago School of Law and Thomas F.

Geraghty of Northwestern University.

Another major change appears in Illinois Supreme Court Rule 412, "Disclosure to Accused." Under Rule 412, prosecutors must now flag and identify to defense counsel all potentially favorable evidence when *Brady* material, discovery material that is favorable to an accused in a criminal case, is handed over.

II. Reaction from the Bar

Although Cook County State's Attorney Richard Devine has declared all of the new rules acceptable, others in his office see troubling issues with the new disclosure requirements.

Assistant State's Attorney Mike Rogers, Supervisor of the Auto Theft Unit in Cook County, is troubled by Rule 412. Rogers, who has capital litigation experience, is concerned about the requirement that potentially favorable evidence to the accused must be identified and explained to defense counsel. Said Rogers, "It is one thing to disclose information, we already have to do that. Our concern with the new (disclosure) rule arises where the prosecutor is placed in the position of having to be accountable for a defense lawyer's failure to analyze the evidence that has been tendered to them by the prosecution. Because I as a prosecutor am not privy to the defense theory of the case, I may not consider some evidence useful to the defense."

An additional concern of prosecutors and public defenders alike is the new Capital Litigation Trust Fund. Currently in Cook County, a court-appointed lawyer in a capital case is compensated $30-$40 per hour. Under the nearly $15 million trust fund, the attorney's fees will rise to over $125 per hour, not including expenses. Although this money will better allow defendants to secure DNA tests and hire expert witnesses, it is feared that a new breed of lawyers will emerge, seeking appointments to death penalty cases in an effort to be highly compensated and to have vast resources for unnecessary testing. Judges will have the ultimate say in how this money is spent for expenses.

Defense counsel are also displeased with the reforms, but for other reasons. Under an additional new rule, defendants must file a ready-to-proceed letter before a capital trial may commence against them. This letter must state that the defendant's counsel has gone over the entire case completely and thoroughly, and that he is ready to proceed with trial. "In effect," said Cook County Assistant Public Defender Denise Streff, this obligates the defendant "to try to make the system look good as it tries to execute him."

III. Changes Not Yet Proven

Whether or not the new changes will solve the potentially terrifying possibility that an innocent man will be put to death is uncertain. Richard Cunningham, a defense attorney who currently represents nine men on death row in Illinois, stated, "These reforms will make the death penalty [system] better, but they will not make it perfect. It may reduce the number of innocent convicted of murder sentenced to death, but it certainly won't eliminate the number of people convicted of murder and sentenced to death wrongly."

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-- Richard Cunningham, Defense Attorney

Others disagree. Former Illinois republican gubernatorial candidate Patrick O'Malley has called on Governor Ryan to lift the moratorium in the wake of the new rules. Calling the moratorium illegal and unfair to the voters, O'Malley said, "Our criminal justice system is turned upside down, and it's time to turn it right side up."

Thus far, Governor Ryan has not reinstated the death penalty in Illinois, although people are still being convicted and sentenced to death. Whether the changes will have a positive impact on the process of capital litigation is yet to be seen.

"In Illinois, we really recognized that we had a problem and, due to the Governor's moratorium, we had time to study the problem and take action. Although no one can say for certain at this time that we solved all of the problems of capital punishment in Illinois—time will only tell if that has happened—we feel certainly that our system of justice will be greatly improved," stated Chief Justice Moses W. Harrison II of the Illinois Supreme Court.

Addressing doubts as to the real effect the new rules will have on capital litigation and its inherent difficulties, Judge Toomin, quoting Supreme Court Justice Charles Freeman stated, "Nonetheless it remains one of the best [systems] in the world and the only system we have." Currently 108 countries worldwide have banned the death penalty. Over 300 people are currently on death row in Illinois alone.