

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE

Agenda for meeting on July 7, 2009

The meeting will be held at 1 PM on Tuesday, July 7 at the office of Jenner & Block, 330 North Wabash Avenue, 40th Floor, Chicago, IL. The conference call in number is 888-363-4734, access code 4209525, host code 7732.

1. Approval of minutes of May 20, 2009.
2. Report from David Olson regarding survey to law enforcement departments.
3. Funding for FYE 6/30/09.
4. Status of Fifth Annual Report for 2008.
5. Subcommittee reports.

Subcommittee 1: Police and investigations.

James R. Coldren, Jr.
Richard D. Schwind

Geoffrey R. Stone

Consideration of eyewitness identification procedures:

Attached are (1) Appendix 2 to meeting of December 4, 2008, and (2) Appendix 4 to minutes of meeting of March 9, 2009.

Subcommittee 2: Eligibility for capital punishment and proportionality.

Leigh B. Bienen
Kirk W. Dillard

Thomas P. Sullivan
Michael J. Waller

Subcommittee 3: Trial court proceedings.

Jeffrey M. Howard
Boyd J. Ingemunson

Edwin R. Parkinson
Randolph N. Stone

Consideration of jury questionnaires, jury instructions, and verdict forms:

Attached are pages 9 to 11 of the minutes of the September 17, 2008 meeting, and Appendix 5 to those minutes.

Attached are minutes of the Subcommittee 3 meeting of January 9, 2009, and Attachment 11 re instruction on cross racial identification.

Subcommittee 4: Post-conviction proceedings, DNA and general topics.

Jennifer A. Bishop-Jenkins
Walter Hehner

Charles M. Schiedel
Arthur L. Turner

Discussion of the Capital Litigation Trust Bar and Capital Litigation Trust Fund.

6. Other business.



TPS
6/26/09

Subc. 1

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE

Police and Investigations Subcommittee #1

November 14, 2008 Meeting Minutes

The Police and Investigations Subcommittee (#1) of the Capital Punishment Reform Study Committee held a meeting on Friday, November 14, 2008 at 2:00 p.m. This meeting was conducted via phone conference. The following Subcommittee members participated in the meeting¹:

James Coldren, Chairperson, Subcommittee # 1
Geoffrey Stone, and
Richard Schwind.

1. Discussion of Subcommittee recommendation regarding blind administration of line ups – Rick Schwind began this discussion by explaining that he showed the meeting materials provided to the Subcommittee members (draft recommendation regarding line ups, North Carolina line up reform legislation, and Wisconsin Attorney General model policy regarding line ups) to the chief of investigations in the Illinois Attorney General's office (Kevin O'Connell, former police chief in Des Plaines, IL). Schwind reported that Mr. O'Connell's reaction suggests that local law enforcement representatives in Illinois (from the Illinois Chiefs' and Sheriffs' Associations) deserve a chance to react and comment on the issue of mandatory blind administration of lineups before this recommendation becomes formalized in the Committee report or in the law. Coldren and Stone agreed. Coldren suggested that the recommendation be moved up to the full Committee so that a broader discussion can be held, and so that all Committee members can hear the comments and reactions from law enforcement representatives. There was general agreement with this point.

¹ Subcommittee member Clint Hull could not attend this meeting. He sent his comments on the line up recommendations and related materials, and they are appended to these minutes.

Geof Stone pointed out that the issue of blind administration is essentially a matter of common sense and that the recommendation at issue here is consistent with decades of research. He noted that all the research evidence to date points to the benefits of blind administration of lineups, for everyone and for the entire justice system, and that there is no evidence against blind administration. The Subcommittee members agreed that the recommendation should address line ups in homicide investigations only, not all criminal cases. Stone noted that this should reduce the logistical burden on law enforcement, though Schwind was not so certain. The Subcommittee members also agreed that all Committee members should receive the materials provided to the subcommittee on this matter; Chip agreed to see that all Committee members received them before the December 4 meeting. Rick Schwind said he would consult with the Illinois Chiefs' Association, the Sheriffs' Association, and the Training and Standards Board to determine when their schedules will permit attendance at a full Committee meeting to discuss this matter, and that he will suggest that the next full Committee meeting (following the December 4 meeting) be held at a time that is convenient for individuals representing these organizations; this will provide an opportunity for full discussion of the line up recommendation. The recommendation follows below (with a slight modification to reflect the subcommittee's discussion at this meeting):

Legislation should be enacted that requires blind administration of lineups in all homicide investigations, and that permits several different administration options, such as: live lineups, photo-spread lineups using the 'folder' method, or computer-generated lineups. The double blind method should be the required method, so that the administrator of the lineup is not aware of which individual in a lineup array is the police suspect. When an independent administrator is not available, a photo array must be used (the folder method, or a computer-generated method), and the lineup procedure must insure that the lineup administrator does not know the point in the sequence of photos that the suspect's photo appears, and does not know which photo a witness is viewing at any time during the procedure.

2. Future Subcommittee meetings and topics – The subcommittee members present agreed to wait until after the full Committee meeting on December 4th, 2008 to set the next date and time for a subcommittee meeting. Chip reminded the other

subcommittee members that the Subcommittee had discussed paying Prof. Shari Diamond of Northwestern University to review several recent line up studies and submit a report, written in lay person's language, that summarizes the questions, research methods, and findings of contemporary research on police line ups. The subcommittee members present agreed with this, and that this suggestion should be made at the full Committee meeting on December 4th. Chip said he would recommend a stipend of \$1,000 for Professor Diamond, and if the full Committee agrees, will make the arrangements with her.

3. The Subcommittee meeting adjourned at approximately 2:30 p.m.

Comments provided by Subcommittee member Clint Hull:

From: **Error! Hyperlink reference not valid.** Sent: Fri 11/14/2008 6:56 AM
To: **Error! Hyperlink reference not valid.**
Cc:
Subject: RE: materials for Friday's subcommittee meeting

Chip,

I just wanted to remind you that I will not be able to attend the meeting today due to a previously scheduled meeting. I am sorry.

I have reviewed the materials that you distributed. I know the other issue that was discussed was recommending that legislation be enacted/recommended that the line-up procedure be audio taped/video taped. Is that still on the table?

First, as it relates to the line-up procedures, I always hesitate to "require" something. I think it is important to remember that the state consists of 102 counties with different resources, procedures, etc. Each police department has different set ups, different staffing levels, varying degrees of resources. For instance, just recently, DeKalb County needed to do a live line-up but couldn't do it at the DeKalb County Jail because 1) the jail doesn't have a place to do a live line-up and 2) they didn't have sufficient inmates to put in as fillers. If the rest of the committee believes the recommendation should be that the double blind method is required/mandatory, then I believe it is also important to put a catch all as they did in the mandatory taping statute in homicide cases that allow for the admissibility of the identification procedure even if the statute is not complied with as long as the court makes an independent assessment of the reliability of the procedure (of course taking into account the fact that the statute was not complied with.) This will give the police officers/prosecutors an opportunity to argue in court why they could not comply with the statute and to argue why, in absence of compliance, it should still be admitted.

Second, as it relates to the taping of the procedure, I would be in favor of such a recommendation again with the same catch all language. I think the biggest issue here is the different jurisdictions ability to tape this procedure. It sounds very easy but it is often much more difficult than it sounds because of the different set-ups etc.

Original recommended language:

Legislation should be enacted requiring that whenever practicable the administrator of an eyewitness lineup or photo spread should not be aware of which member of the array is the police suspect.

Chip's revised language (with one revision, from Geof Stone):

Legislation should be enacted that requires blind administration of lineups and that permits several different administration options, such as: live lineups, photo-spread lineups using the 'folder' method, or computer-generated lineups. The double blind method should be the preferred required method, so that the administrator of the lineup is not aware of which individual in a lineup array is the police suspect. When an independent administrator is not available, a photo array must be used (the folder method, or a computer-generated method), and the lineup procedure must insure that the lineup administrator does not know the point in the sequence of photos that the suspect's photo appears, and does not know which photo a witness is viewing at any time during the procedure.

As to the indictments themselves, Mr. Nora said that they will have to be obtained from the Clerk of the Criminal Court of Cook County, and that he will cooperate with the Committee in obtaining these documents. Mr. Schwind offered the assistance of one or two persons from his office to assist in the collection process.

Ms. Bienen said she will confer with Ms. Hayler regarding the collection of indictments from counties other than Cook. Ms. Hayler agreed to assist Ms. Bienen in this effort.

(3) Report of subcommittee 3 - Trial court proceedings.

Mr. Howard stated that the minutes of the subcommittee's meetings on April 7, June 12, and September 10, 2008 have been approved. The April 7 minutes are attached as Appendix 2 to the full Committee minutes of its meeting on June 12, 2008. The June 12 and September 10 minutes are attached as Appendices 5 and 6 containing Attachments 1 through 9.

Mr. Howard said that three members of the subcommittee have discussed pattern jury instructions and verdict forms for use in capital cases Appendix 6, Attachments 1 through 9, with the following results:

- Attachment 1, relating to the holding of the U.S. Supreme Court in *Maryland v. Mills*, was agreed to by all subcommittee members, with the observation that they believe the IPI Committee has considered and rejected this instruction.

- Attachment 2, relating to jurors' evaluation of the testimony of eyewitnesses. The subcommittee vote was one approved, and two believe it is unnecessary.

- Attachment 3, relating to jurors' evaluation of the testimony of in-custody informants, was agreed to by all subcommittee members.

- Attachment 4, relating to jurors' evaluation of statements attributed to the defendant resulting from custodial

interviews that were not recorded. The subcommittee vote was one approved, and two disapproved on the ground that it invades the province of the jury, and emphasizes this instruction over the other instructions.

- Attachment 5, relating to jurors' treatment of mitigating factors. The subcommittee vote was one approved, and two disapproved on the ground that the instruction is confusing and unnecessary.

- Attachments 6 through 9 have been approved by the subcommittee.

(4) Report of subcommittee 4 - Post-conviction proceedings, DNA and general topics.

Mr. Schiedel reported that he attended the meeting of the Illinois Laboratory Advisory Committee (ILAC) on September 8, 2008, and will prepare formal minutes of that meeting insofar as it relates to our work. His memorandum of the meeting is attached as Appendix 7.

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE
MINUTES OF SUBCOMMITTEE NO. 3 MEETING

June 12, 2008

Subcommittee 3 met at the Illinois Criminal Justice Authority, 300 W. Adams, Chicago, Illinois, on June 12, 2008. Attending were subcommittee members Jeffrey M. Howard, Edwin R. Parkinson (via teleconference), and Boyd Ingemunson (via teleconference).

The members approved the minutes from its last meeting held on 4/7/08.

The sub-committee discussed juror questionnaires. The sub-committee members decided to recommend that questionnaires be used in capital cases. However, due to the unique nature of capital cases, the sub-committee believes specific questions on a questionnaire need to be determined by the parties and judge on a case by case basis. The sub-committee believes certain topics need to be explored with whatever questions are included in the questionnaire. These topics include: personal info, employment, family, military, education, religion, political, physical/medical, views on capital punishment, criminal justice system/law enforcement, and case specifics.

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE
MINUTES OF SUBCOMMITTEE NO. 3 MEETING

January 9, 2009

Subcommittee 3 met at the Law Office of the Cook County Public Defender, Chicago, Illinois, on January 9, 2009. Attending were subcommittee members Jeffrey M. Howard, Edwin R. Parkinson (via teleconference), and Boyd J. Ingemunson (via teleconference).

Ed Parkinson brought to the subcommittee's attention that funding in the Capital Litigation Trust Fund (CLTF) for prosecution of capital uses outside of Cook County had been eliminated. The subcommittee voted to recommend restoring the funding in the CLTF for prosecution of capital cases outside of Cook County.

The subcommittee discussed any recommendations the subcommittee believes it should make for inclusion in the upcoming annual report. All the recommendations the subcommittee believes should be included in the annual report have been made throughout the year and now need to be discussed and voted upon by the entire Capital Punishment Reform Study Committee.

A jury instruction concerning cross-racial identification was discussed. This instruction is attached as Attachment 11. The subcommittee voted two to one that the cross racial instruction is not necessary. However, the subcommittee decided that this instruction should be submitted before the full CPRSC for its consideration.

ATTACHMENT - 11

In this case, the defendant, _____ (*insert name*), is of a different race than _____ (*insert name of identifying witness*), the witness who has identified [him] [her]. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]