Chapter 4 – Eligibility for Capital Punishment

Not every first degree murder case is eligible for the death penalty. This Chapter addresses the issue of how eligibility for the death penalty should be determined. The United States Supreme Court requires that States narrow the potential class of those eligible for capital punishment by adoption of statutes which apply the death penalty to some, but not all murders. The Commission recommends substantial revision to the factors which enable the state to seek the death penalty. Members of the Commission unanimously agreed that the list of 20 eligibility factors existing under Illinois law should be reduced, and a majority of members favor limiting death eligibility to just five well-defined factors. While Commission members believe that all murders are very serious, the death penalty should be reserved for only the most heinous of these crimes.

INTRODUCTION

In Illinois, as elsewhere, statutes imposing capital punishment identify certain factors related to the murder which make it death-eligible. The United States Supreme Court has found that sentencing schemes which do not channel the discretion of the sentencer violate the Constitution. The death penalty cannot be applied broadly to every murder case[1]. In the years following *Furman*, states with the death penalty adopted a variety of standards to distinguish between those murders deserving of a sentence of death and those deserving of a lesser punishment.

These standards are referred to in this Report as "eligibility factors." Some states refer to them as "aggravating factors". In Illinois, a person convicted of first degree murder cannot be sentenced to death unless one of the statutory eligibility factors is present. The purpose of these eligibility factors is to narrow the class of people upon whom the sentence of death may be imposed. *Zant v. Stephens*, 462 U.S. 872, 103 S. Ct. 2733 (1983) As the United States Supreme Court noted in *Zant*:

> . . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . Our cases indicate, then that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. 462 U.S. 862 at 878.

In Illinois, the death penalty is imposed in a bifurcated proceeding. The first step in the proceeding is to establish that the crime committed by the defendant fits into one of the defined factors that will make the defendant death eligible. It is the responsibility of the prosecution to prove beyond a reasonable doubt

that the defendant fits into one of the statutory eligibility factors. The prosecution is also required to prove that the defendant was 18 years of age or older at the time of the crime, as Illinois does not impose the death penalty on persons under the age of 18.[2] Once the defendant is found to be death eligible, the proceedings move on to the second stage, where the prosecution may present additional material in aggravation to establish why this particular defendant should receive the death penalty. The defendant is entitled to present mitigating evidence, that is, evidence which establishes why the death penalty should not be imposed.

Although Illinois has 20 eligibility factors, an analysis of the cases in which a death penalty has been imposed since 1977 reveals that only about half of those eligibility factors have ever been relied upon in reported opinions, and a relatively few of them are used regularly.[3] The vast majority of death penalty cases in Illinois are based either upon the multiple murder eligibility factor[4] or the "course of a felony" eligibility factor[5]. Other eligibility factors appear at much lower rates in reported decisions.[6]

SPECIFIC RECOMMENDATIONS

<u>Recommendation 27 :</u>
The current list of 20 eligibility factors should be reduced to a smaller number.

The Commission unanimously recommended that the current list of eligibility factors be reduced. The Illinois death penalty statute contains a list of twenty eligibility factors which can result in the imposition of the death penalty. The statute, in its entirety, is set forth in the Appendix to bound with this Report. The current list of eligibility factors contained in the statute covers a broad array of circumstances, including multiple murders, murder of a police officer, and murders occurring in correctional institutions (both inmates and staff). Some have suggested that due to the large number of eligibility factors, nearly every first degree murder in Illinois could be eligible for the death penalty under one theory or another.[7] There is no prohibition against basing death eligibility on more than one factor, and a number of cases in Illinois involving the death penalty rely upon allegations that the defendant is death eligible based upon two, and sometimes three, eligibility factors.[8]

The original post-*Furman* death penalty act in Illinois, subsequently found invalid in *Rice v. Cunningham*, 61 Ill. 2d 353 (1975), contained six eligibility factors.[9] The subsequent 1977 statute, when originally enacted, had only seven eligibility factors. The Act included as eligibility factors the murder of a peace officer or firefighter; a murder of a correctional officer or a murder at a correctional facility; multiple murders; murder occurring in the course of a hijacking; contract murder; murder in the course of one of nine enumerated felonies; and the murder of a witness.[10]

Aside from minor changes and some technical amendments to reflect recodifications of other laws, the basic framework for the death penalty statute remained unchanged through much of the 1980's. Major additions to the statute began to occur in the late 1980's, and in the early 1990's, which ultimately expanded the scope of the statute to its present structure with some 20 eligibility factors.[11] The

"course of a felony" eligibility factor has been amended to include some 15 qualifying felonies, which has also expanded the range of cases eligible for the death penalty.

It appeared to the members of the Commission that to the extent that the death penalty was to remain an effective statute in terms of achieving its constitutional objective of narrowing the class of cases to which the penalty should be applied, the number of eligibility factors should be reduced. There are other, very serious penalties available under Illinois law to punish those committing first degree murder. Illinois has among its sentencing options, the penalty of "natural life", which means that a defendant is never eligible for parole.[12] Leaving aside moral issues about retribution, the penalty of "natural life" represents a serious penalty which both punishes the perpetrator and protects society from further harm. The Commission members unanimously expressed the view that the current proliferation of eligibility factors, as found in the Illinois death penalty statute, was unwise.

In addition, although Illinois has a statute with some 20 eligibility factors, relatively few of them are actually used. An analysis of the more than 250 cases in which the death penalty has been imposed in Illinois since 1977 revealed that, although Illinois has some twenty separate factors which might make a first degree murder case eligible for the death penalty, only two eligibility factors account for the vast majority of cases in which capital punishment has been imposed.[13] Almost half of the cases in which the death penalty has been imposed have been based upon the multiple murder eligibility factor, (b)(3). A large number of cases also involve the "course of a felony" eligibility factor (b)(6).[14] These two eligibility factors occur together in roughly 17% of the cases.[15] After eliminating those cases in which the multiple murder factor and the "course of a felony" factor appear together, the "course of a felony" eligibility factor accounts for just over 40% of the cases in which the death penalty has been imposed. The other eligibility factors which appear in reported decisions of the Illinois Supreme Court, six eligibility factors altogether, appear at much lower rates in reported decisions.

Reducing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied in Illinois, and provide greater clarity in the statute, while retaining capital punishment for the most heinous of homicides. The scope of the statute should be narrowed.[16]

Recommendation 28 :
There should be only five eligibility factors:

(1) The murder of a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.

(2) The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
(3) The murder of two or more persons as set forth in 720 ILCS 5/9-l(b)(3), as that provision has been interpreted by the Illinois Supreme Court.

(4) The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.

(5) The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

A majority of Commission members supported this recommendation to reduce the eligibility factors under Illinois law to the five factors enumerated above. This recommendation represents, in the Commission majority's view, a list of eligibility factors which will serve to achieve the Constitutional requirement of appropriately limiting the class of those who are eligible for the death penalty in Illinois.

Making any recommendation of this type necessitates a determination about which murders should be eligible for the death penalty. Any comparison of the gravity of individual murders is inherently problematic. In every murder case, the loss to the victim, and to his or her surviving loved ones, is immeasurable. Consoling the surviving family members of homicide victims for such a loss is particularly difficult because the death has resulted not from illness or accident, but from the conscious act of another human being. Yet in reauthorizing the death penalty in several cases[17], the United States Supreme Court has said that execution is not permissible for all first-degree murders, and that a state must have a rational manner, free of arbitrariness, for choosing those deliberate killings to be punished capitally.

It was the considered and unanimous judgment of the Commission that the number of eligibility factors in the Illinois death penalty scheme needed to be reduced. The continued expansion of the list of eligibility factors has placed significant burdens upon the criminal justice system, as prosecutors and courts struggle to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system, and, more important, reflect a degree of arbitrariness, when decisions across the state are compared.

There are various policy rationales which are advanced in support of the death penalty. One rationale that is frequently mentioned is that the death penalty operates as a general deterrent to murder. The merits of this proposition have been debated for decades now. Clear statistical evidence that would support capital sentencing on this basis is lacking; indeed, many academics suggest that existing studies tend to show that capital punishment is *not* a general deterrent to murder. *See: Murder, Capital Punishment, and Deterrence: A review of the evidence and an examination of police killings,* by William C. Bailey and Ruth Peterson (50 Journal of Social Issues 53 (Summer 1994); *Deterrence and the Death Penalty: The Views of the Experts* by Michael L. Radelet and Ronald L. Akers (Journal

of Criminal Law and Criminology, Northwestern University, Vol. 87, No. 1, Fall 1996) and *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, by Craig J. Albert (60 U.Pitt.L.Rev.321, Winter, 1999). While there have been some studies which claim to have found a deterrent effect (Ehrlich, I, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, American Economic Review, Vol. 65, 397-17; Dezhbakhsh, H. et al, *Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, January 2001), the greater weight of the research finds no evidence that the death penalty is a measurable general deterrent to murder. It is the view of those Commission members in the majority on this point that general deterrence cannot be used to justify the death penalty.

Accordingly, the Commission members in the majority have recommended significantly reducing the number of factual circumstances qualifying a person convicted of murder for eligibility for the death penalty, limiting it to the most heinous homicides and to other circumstances widely regarded as presenting compelling public policy concerns in favor of execution. There are several principal policy rationales which seemed to provide compelling justification for capital punishment to those who do not reject the death penalty on moral or other grounds:

1. Certain crimes, even when compared to other first-degree murders, are so heinous and shocking that any other community response minimizes the magnitude of the offense, and

2. Incapacitating persons with a clearly demonstrated propensity to murder again, and

3. To provide punishment in factual situations where a capital sentence is the only form of meaningful punishment, such as where a person already sentenced to life imprisonment commits murder, and

4. Circumstances where paramount state interests have long been believed to exist, such as in the case of murdered law enforcement officers and firefighters whose lives are at risk every day for the sake of public safety.

If the death penalty continues to be applied in Illinois, a majority of Commission members believed that it should be tailored to further these objectives, while minimizing the opportunities for arbitrary application of this most severe form of punishment.

<u>Murders of peace officers, firefighters and of any person at a correctional institution</u>
There are some unique situations where a unique societal response is extremely important from a public policy point of view, and where paramount state interests have long been believed to exist. These proposed eligibility factors were included in the original death penalty scheme, subsequently held unconstitutional by the Illinois Supreme Court in *Rice*, and in the 1977 Act which replaced the 1973 Act . Police officers and firefighters are placed in dangerous situations on a daily basis, including the risks associated with potentially violent situations. The most severe penalties available should be imposed on someone convicted of the murder of a police officer or firefighter.

The context of a correctional institution also presents a unique situation requiring such a unique response. These institutions are responsible for the care and management of a population which is significantly more violent than the population outside. Correctional officers similarly place themselves, on a daily basis, in a job which exposes them to a significant risk of harm. It is also important that fellow inmates be protected from violent conduct and risk of death so that order can be maintained in correctional institutions. Furthermore, because many prisoners are already serving extended prison terms or life sentences, the death penalty serves as the only punishment for murder. Any defendant who is convicted of a murder occurring at a correctional institution of any person in the institution, such as a correctional officer, inmate or visitor, should be eligible for the death penalty.

Multiple murders

The Commission has also recommended retention of the multiple murder eligibility factor, as it has been construed by the Illinois Supreme Court. That eligibility factor provides as follows:

> (3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another;

The provisions of the multiple murder eligibility factor require either that the defendant commit two murders in a single incident, or that the defendant commit only one murder but has a prior conviction for first degree murder. The eligibility factor is already narrowly drawn to require that the defendant be convicted of either intentional murder, or of acts which he should know would result in death or great bodily harm.

The Illinois Supreme Court has construed this eligibility factor so as to require the State to show a specific mental state – either intentional murder or "knowing" murder, where the State establishes that the defendant knew that the activity would cause death or a strong probability of death.[18] Under this interpretation, a conviction for first degree murder based upon a felony murder theory would not, by itself, justify the imposition of the death penalty. The Supreme Court has held in a series of cases that the State *must* prove the requisite mental state. *See People v. Chapman*, 194 Ill. 2d 186 (2000), (jury's finding of guilt on two separate counts of intentional murder legally sufficient to sustain their subsequent finding of death eligibility under (b)(3)); *People v. Caballero* 102 Ill 2d 23 (1997) (intent required for felony murder is only that to commit underlying felony; (b)(3) requires separate intent to kill (as does (b)(6)), although defendant may be convicted on an accountability theory for conduct evidencing his intention to commit premeditated murder); *People v. West*, 187 Ill. 2d 418, (1999) (reversing death sentence on the ground that the State had failed to affirmatively prove that the defendant's prior murder conviction involved intentional or knowing murder).

Murder involving torture

This recommendation also suggests a revised statement of the eligibility factor concerning torture. Consistent with the view of the Commission's majority that a death penalty scheme should address the most aggravated and shocking murders, a recommendation has been made to clarify the terms under which a person committing a murder involving torture would be eligible for the death penalty. Illinois currently has an eligibility factor based on torture, which reads as follows:

> The murder was intentional and involved the infliction of torture. For the purpose of this section, torture means the infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the victim. 720 ILCS 5/9-1(b)14

The Commission recommends that the language be altered to provide as follows:

> The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.

A number of states include an eligibility factor within their death penalty schemes based upon circumstances of the death demonstrating brutal, heinous activity or activity involving wanton cruelty. The Commission examined provisions from several states with respect to definitions of torture, including Arkansas[19] and New York[20]. The recommendation advanced above is a combination of the provisions contained in the Arkansas and New York statutes.

Murder which impacts the judicial system

The final provision that the Commission majority recommends has to do with a murder that essentially obstructs justice or impedes the investigation or prosecution of a crime. Illinois has a provision relating to the murder of a witness, which provides as follows:

> the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another 720 ILCS 5/9-1(b)(8)

The Commission majority has recommended that a provision be retained substantially as follows:

> The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

The intention of the recommendation is to broaden the scope of (b)(8) somewhat by making a murder of anyone connected with the system, whether as a witness, juror, judge, prosecutor, defense attorney or investigator, eligible for the death penalty. This adjustment reflects an analysis of the eligibility factors from other states, and advances the goal of insuring the integrity of the judicial system. Murders which seek to obstruct justice or impede the investigation or prosecution of a crime affect the underlying integrity of the system in a serious way. As important, for a defendant or suspect facing the prospect of a prison term for much or all of his life, a death sentence will often represent the only significant enhancement in punishment beyond that which the offender already faces.

Exclusion of "course of a felony" eligibility factor

Commission members in the majority on this recommendation recognize that one of the more controversial issues with respect to the proposal for the new and severely curtailed death penalty scheme is the elimination of the "course of a felony" eligibility factor (9-1(b)(6)). The exclusion of this factor was not an oversight by the Commission, and there are a number of reasons for the recommendation.

The "course of a felony" eligibility factor, when originally enacted in the 1977 Act, enumerated nine felonies which resulted in the potential for death eligibility. The list of felonies contained in the "course of a felony" eligibility factor has now increased to fifteen.[21] Despite the fact that the eligibility factor is narrowly drawn in terms of its requirement for actual participation in the killing by the defendant and intent on the part of the defendant, the long list of felonies included within its scope could make almost any first degree murder eligible for the death penalty. While a majority of Americans both inside and outside Illinois support the concept of a death penalty, it is unlikely that support extends to making every murder death eligible. A statutory scheme which makes every murder death eligible would also run afoul of constitutional concerns.

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.

A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murderers, this eligibility factor

does not advance that goal. Under this eligibility factor, all that is required for death eligibility is that the defendant personally participate in (or be legally accountable for) conduct which he knows will cause death or which he should know will cause death, and that the activity is committed in the course of one of the enumerated felonies. This means that a defendant who robs a store, and who commits a single murder during the course of that robbery, can be sentenced to death even if this is a first offense and there is no substantial criminal record. While such a defendant *should* be subject to a serious punishment for the taking of a life, this type of offense differs substantially from a situation where the defendant has killed multiple times. Although making judgments which differentiate between murders may be difficult, it must be done in order to insure that the capital sentencing process sufficiently narrows the class of those eligible for the death penalty.

It is true that the "course of a felony" eligibility factor reaches some murders which are also heinous and brutal. However, it was the view of Commission members in the majority on this proposal that it invites the possibility of excessiveness in the death sentencing process and should therefore be eliminated as a factor making the defendant eligible for the death penalty. Other serious penalties exist which will serve the ends of justice sufficiently in this instance.

Research undertaken by the Commission with respect to eligibility factors revealed that although this eligibility factor is used frequently by Illinois prosecutors, it is also frequently combined with other eligibility factors.[22] In light of this, its elimination will not necessarily limit the prosecutor's ability to seek and obtain a death penalty in Illinois, including in many cases to which this factor had previously been applied.

Minority view - Limitation on eligibility factors

Commission members in the minority on this issue generally support the concept that the number of eligibility factors existing under Illinois law should be reduced. The legislature should undertake a serious debate on this issue, with the intention of addressing the problems presented by a proliferation of eligibility factors. Although Commission members unanimously support the concept of reducing the number of eligibility factors, there is a divergence of views about whether the eligibility factors enumerated by the Commission members in the majority represent the most appropriate framework.

Missing from this list is the provision which makes a defendant eligible for the death penalty for committing a murder in the course of a felony (9-1(b)(6)). The existing eligibility factor under Illinois law reads as follows:

> (6) the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual: (i) was actually killed by the defendant, or (ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally

accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act, streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act, or the attempt to commit any of the felonies listed in this subsection (c);

Nearly every state with a death penalty scheme has an eligibility factor based upon a murder occurring in the course of a felony. In Illinois, the eligibility factor has been narrowly crafted to require (i.) personal participation by the defendant in the killing, or (ii.) conduct for which the defendant is legally accountable which results in the death. It also requires that the defendant either have intended the killing, or have the knowledge that the actions create a strong probability of death or great bodily harm. Mere participation in a felony in which someone is inadvertently killed would not result in death eligibility. Eligible felonies under the statute are serious felonies involving the potential for serious bodily injury.

A version of the "course of a felony" eligibility factor was included in the original death penalty scheme passed following *Furman v. Georgia*. See *Rice v. Cunningham*, 61 Ill. 2d 353, 357 (1975). The "course of a felony" factor was included in the subsequent re-enactment of the death penalty scheme, following the Supreme Court's finding that the initial statute was unconstitutional in *Rice*.

It is the view of Commission members in the minority on this issue that there are sound policy reasons for including the "course of a felony" eligibility factor in the statute. This statutory provision permits the application of the death penalty to some murders which are, in fact, quite brutal and heinous. Regardless of whether it acts as a specific deterrent, it places the responsibility for the consequences of violent conduct squarely on the shoulders of those who choose to commit such acts. The Illinois legislature has generally supported the "course of a felony" eligibility factor as a means of seeking to deter violent crime.

As the Commission's research on the eligibility factors shows, the "course of a felony" eligibility factor is one that is frequently relied upon by prosecutors in Illinois to seek the death penalty. The fact that juries have been, and continue to be, willing to impose the death penalty in circumstances described by that eligibility factor displays a societal consensus that such crimes represent instances where death is an appropriate penalty.

Notes - Chapter 4

1. The mandatory application of the death penalty was held unconstitutional in *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001 (1976).

2. The statute provides: (b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: . . .”(the eligibility factors follow).

3. The Commission’s analysis identified eight of the twenty existing eligibility factors as having appeared in reported decisions of the Illinois Supreme Court in death penalty cases. Additional information regarding the eligibility factors appearing in reported decisions is contained in the Technical Appendix to this Report, published separately.

4. (b)(3) of the statute, which makes a defendant eligible for the death penalty where he or she has been convicted of two or more intentional murders. *See* 720 ILCS 5/9-1(b)(3).

5. (b)(6) of the statute, which makes a defendant eligible for the death penalty where he or she has committed an intentional murder, or committed acts which he or she knows should result in death or great bodily harm, in the course of one of the fifteen felonies enumerated in the statute. *See* 720 ILCS 5/9-1(b)(6).

6. Information about eligibility factors in reported decisions is contained in the Technical Appendix, published separately.

7. If this is in fact true, then the Illinois statute would run likely run afoul of constitutional requirements; *See*, for example, *Roberts v. Louisiana*, 428 U.S. 325 (1976) invalidating a Louisiana scheme which imposed a mandatory death sentence for murders falling into any one of five categories.

8. The eligibility factors which appear in reported decisions from the Illinois Supreme Court are described in the Technical Appendix, published separately.

9. Murder of a peace officer or fireman, murder of an employee of DOC or someone present at the institution, multiple murder, murder resulting from a hijacking, murder pursuant to a contract, murder in the course of one of five enumerated felonies. *Rice*, 61 Ill. 2d 356-7.

10. See P.A. 80-26.

11. The Appendix found at the end of this Report contains a chart displaying the various public acts which have revised the death penalty statute with respect to eligibility factors.

12. *See* 730 ILCS 5/3-3-(d) “No person serving a term of natural life imprisonment may be paroled or released except through executive clemency.”

13. The Commission's analysis reviewed cases in which the death penalty had been imposed and the Illinois Supreme Court had issued an opinion. The Appendix to this report contains summaries of the results of this research. Additional detail with respect to the method used to gather and analyze data, along with tables displaying the cases reviewed, is contained in the Technical Appendix to this Report, published separately.

14. Tables in the Technical Appendix to this Report display the number of cases in which a particular eligibility factor appears. The multiple murder factor appears in just over 46% of reported Illinois opinions, while the "course of a felony" factor appears in 60%. Of the other factors which appear in reported decisions, only one appears in more than 10% of the cases, and the others appear at rates that are substantially below 10%. (Note: figures will not add to 100%, as more than one factor may be present in a given case.)

15. As more than one eligibility factor may appear in a particular case, percentages used in this section will not equal 100 % As a result, statistics have been reported on the basis of the percentage of cases in which that eligibility factor appears, regardless of other eligibility factors which may also be present in the case.

16. At least one prosecutor has suggested that states can avoid problems by narrowing the scope of the eligibility factors in their sentencing schemes. DuPage County Prosecutor Joseph Birkett recommended that the State of Washington could improve its death penalty scheme by limiting the eligibility factors to the "most common reasons for putting someone on death row." *See*, special series on Washington's death penalty, Seattle Post-Intelligencer, August 7, 2001.

17. *See Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983), especially footnote 15.

18. Illinois has one first degree murder statute, but three types of first degree murder which may be proven. The first is an intentional form of murder, where the defendant actually intends to murder the person. The second is often referred to in the case law as "knowing" murder, where the defendant commits acts without the specific intent to kill someone, but in committing those acts the defendant should know that death or great bodily harm would result. The third form of 1st degree murder is "felony" murder, where a death results as a result of the commission of a felony by the defendant. Felony murder does not require an intent to kill. *See e.g.: People v. Brownell*, 79 Ill. 2d 508, 524 (1980) (No distinction in Illinois between capital and non-capital murder); *People v. Caballero*, 102 Ill. 2d 23, 44 (1984).

19. Arkansas, A.C.A.5-4-604 (8)(A).

20. New York Consolidated Penal Laws – 125.27, (x).

21. 720 ILCS 5/9-1(b)(6)(c) provides as follows: the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal

sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act, streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act, or the attempt to commit any of the felonies listed in this subsection (c).

22. These two eligibility factors appear together in roughly 17% of reported cases.