

Chapter 2 – Police and Pretrial Investigations

This Chapter recommends improvements to police practices and pretrial investigative efforts that would strengthen the confidence in the ultimate outcome of a capital case. Police agencies and prosecutors are the first to respond to homicides, and the recommendations in this section are intended to bolster early efforts to identify the right suspect and to insure that evidence is carefully preserved. Recommendations in this Chapter include improvements to the methods used to document evidence collected by law enforcement agencies, specific suggestions for documenting custodial interrogations by police, and changes to the methods used to conduct lineups in which suspects are identified by witnesses. The Commission has also recommended insuring that indigent defendants can obtain representation by public defenders during the custodial interrogation process, which should ameliorate some concerns about undue influence during those interrogations. Improving law enforcement training, especially in the area of notification of consular access rights, has also been suggested.

INTRODUCTION

Police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system. In the majority of cases, those efforts result in the apprehension of the person who committed the crime, and, ultimately, his or her conviction. There are a disturbing number of cases, however, where the system goes awry. Whether that is the result of inattention to detail, underfunded and overworked law enforcement personnel or intentional misconduct, the result is that innocent men and women are put at risk of conviction and guilty parties may go free. Neither the interests of the criminal justice system, nor of society at large, are served if the innocent are convicted of crimes which they did not commit, and disastrous consequences result if innocent parties are convicted of crimes which can result in the imposition of capital punishment. Most importantly, the person who actually committed the crime remains at large, free to commit other crimes.

This chapter contains recommendations in four major areas: general police practices, custodial interrogations, eyewitness identification procedures, and training suggestions. The section on custodial interrogations includes the recommendation that custodial interrogations in homicide cases be videotaped in their entirety.

While many of the recommendations in this chapter were unanimous, there were others where divergent views were expressed. Recommendations with respect to videotaping the interrogation process, and with respect to the eyewitness identification procedure, engendered spirited discussion. They also resulted in the expression of minority views, which are contained at the end of the section discussing the recommendation to which they pertain.

SPECIFIC RECOMMENDATIONS

Recommendation 1:

After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.

The Commission has unanimously recommended that law enforcement agencies take steps to avoid “tunnel vision,” where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty. Evidence of such “tunnel vision,” or “confirmatory bias,” is found in a number of the cases involving the thirteen men who were ultimately released from death row in Illinois.

Pressure always exists for a police department to solve a crime, particularly where that crime is a homicide. Law enforcement agencies very often undertake heroic efforts to bring the guilty to justice, and their efforts in this regard should be applauded and supported. In any investigation, the danger exists that rather than keeping an open and objective mind during the investigatory phase, one may leap to a conclusion that the person who is a suspect is in fact the guilty party. Once that conclusion is made, investigative efforts often center on marshaling facts and assembling evidence which will convict that suspect, rather than continuing with the objective investigation of other possible suspects. There is a fine line to be drawn in such circumstances, but where a homicide is concerned and the suspect may be exposed to the penalty of death, it is extraordinarily important that law enforcement agencies avoid “tunnel vision.”

The suggestions contained in this recommendation flow from an article by Professor Stanley Z. Fisher¹, who describes various provisions relating to the collection and disclosure of exculpatory evidence contained in the Criminal Procedure and Investigations Act of 1996² (hereinafter “CPIA”) adopted in England. Section 23 (1) (a) of the Act provides that a code of practice should be developed to require that “. . . where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued.”

This statement represents what is, or should be, good police practice. Articulating this duty in concrete form should serve as a reminder to police agencies that their role is to thoroughly investigate crime, rather than merely build a case against a specific individual who may appear to be a likely suspect. The British Act provides no sanctions for failure by the police to comply with this duty. Police personnel interviewed by Professor Fisher in England suggested that the existence of the statute produced at least some additional effort to investigate reasonable leads in order to avoid a potentially embarrassing cross-examination at trial.³ More importantly, the codification of this responsibility provided an opportunity for the training and education of officers.

The problem of confirmatory bias is not a problem associated with any one group of police officers or any one department. It is a potential problem in all investigatory agencies. In addition to the specific

provisions of the British Act mentioned above, several public inquiries in Canada into cases of wrongful convictions have pointed to this potential problem as well.

The Morin Inquiry in Ontario recommended training for both police and Crown Counsel how to avoid tunnel vision. Morin Recommendation 74.⁴ The Morin Inquiry also recommended that police forces in the province endeavor to foster a culture of policing which values honest and fair investigation of crime, and the protection of the rights of all suspects and the accused. Morin Recommendation 89.⁵ The Special Commissioner in the inquiry goes on to suggest that management must make an effort to foster such a culture, in part by not tolerating acts of misconduct. Departments in which a high value is placed upon the pursuit of justice, as opposed to merely clearing cases by arrest, are more likely to be able to admit to instances where errors inevitably occur.

The recent Manitoba inquiry involving Thomas Sophonow specifically identified “tunnel vision” as a serious problem. In the view of that Special Commissioner, “tunnel vision” caused the Winnipeg police to ignore a potential suspect who fit the composite sketch of the murderer much more closely than did Mr. Sophonow.⁶ The investigation in that case led the Special Commissioner to observe in his recommendations:

Tunnel Vision is insidious. It can affect an officer, or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer’s thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer’s thinking. Anyone, police officer, counsel or judge can become infected by this virus.⁷

That inquiry recommended mandatory, annual training in this area for police officers, as well as training in this area for lawyers and judges.

A concrete statement of this type is important, since, as Professor Fisher notes, prosecutors and trial judges have a limited ability to influence police investigatory practices. One tool that is available to a trial judge to control police behavior is a hearing on a motion to suppress evidence due to some impropriety in the way that evidence was collected. Neither the trial judge, nor, in large measure, the prosecutor, can order the police to manage an investigation in a particular way. As a result, some broader state-wide policy statement with respect to the responsibility of the police to fully investigate all reasonable leads is needed. In this specific instance, development of a standard of this type to guide police agencies represents a better way to achieve a desirable goal than use of a penalty, such as the suppression of evidence.

Recommendation 2 :

(a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location.

(b) Record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.

(c) The police must give copies of the schedules to the prosecution.

(d) The police must give the prosecutor access to all investigatory materials in their possession.

These recommendations also stem from the Fisher article, and were adopted by the Commission unanimously. They codify the responsibility of the police agency to document all relevant evidence, including exculpatory evidence, and the location of the evidence. The purpose of the documentation is to enable the prosecution to make a reliable judgment about disclosure. As noted in the preceding section, trial judges and prosecutors have a limited ability to control the actions of police agencies. In a number of cases reviewed, evidence was not fully disclosed to prosecutors. In other cases, evidence was discovered long after a prosecution was complete. As a result, some broader policy statement, which impacts upon all law enforcement agencies, is appropriate and necessary in this area.

These provisions were also developed as a part of the British Criminal Procedure and Investigations Act of 1996. The draft guidelines⁸ developed by the Attorney General in Great Britain to implement the disclosure provisions of the CPIA encourage close cooperation between police agencies and the prosecution to insure that the prosecution is fully informed about the evidence in the case. The British guidelines suggest that officers responsible for disclosure under the CPIA specifically draw to the attention of prosecutors material which might undermine the prosecution case or assist the defense. Officers are further encouraged by the guidelines to seek the advice and assistance of prosecutors when in doubt as to their responsibilities. Prosecutors are reminded to be alert for the possibility that material may exist which has not been disclosed to them.⁹

The Illinois Supreme Court has sought to address concerns about full disclosure of evidence through the adoption of new provisions which apply to capital cases. New Supreme Court Rule 416 (g), which requires the prosecution to file a certification with the court not less than 14 days prior to trial that all material information has been disclosed to the defense, places the responsibility on the prosecution to insure that disclosure to the defense has occurred. The prosecution is required to confer with law enforcement agencies to insure disclosure has been complete. The recommendations made by the Commission in this section are intended to place clearly defined responsibilities on police agencies to document, record and retain all relevant evidence, including exculpatory evidence, in order to improve communication between police agencies and the prosecutor.

INTERROGATIONS; VIDEOTAPING THE INTERROGATION PROCESS

Recommendation 3 :

In a death eligible case, representation by the public defender during a custodial interrogation should be authorized by the Illinois legislature when a suspect requests the advice of counsel, and where there is a reasonable belief that the suspect is indigent. To the extent that there is some doubt about the indigency of the suspect, police should resolve the doubt in favor of allowing the suspect to have access to the public defender.

This recommendation was supported by a majority of Commission members. The purpose of the rule is to facilitate access to counsel early in the interrogation process. The general rule, under *Miranda*¹⁰ and its progeny, is that a defendant has the right to be represented by counsel during police interrogation, and the defendant must be further informed that if he or she cannot afford counsel, one will be appointed for him/her. If the defendant requests counsel, questioning should cease.

In Cook County, in a substantial majority of the cases in which a defendant is charged with first degree murder and where the charge is death eligible, defense will likely be provided by the Public Defender, due to the indigency of the defendant. Both the U.S. Supreme Court and the Illinois Supreme Court have recognized the importance of access to counsel during this phase of a case.

In light of this, a majority of Commission members believed that the public defender should be notified when a defendant has requested counsel and there is a reasonable belief that the defendant is indigent. Enabling early intervention by defense counsel during a custodial interrogation process is consistent with the spirit of *Miranda*. The Illinois Supreme Court has recently clarified in its decision in *People v. Chapman* (194 Ill. 2d 186, 210-214; 2000) that defense counsel must be physically present in order to have access to the defendant (requesting access by telephone is insufficient). This recommendation would necessitate a change in the Illinois statutes governing the appointment of the public defender. State statutes currently provide that a public defender will be appointed by the court upon a finding of indigency at the first opportunity that the defendant has to appear before a judge.¹¹ The statutes should be revised to authorize the public defender to appear *prior to appointment by a judge* in death eligible cases.¹²

There are logistical problems associated with this recommendation. Clearly, there will be cases in which the police may not know for certain that a first degree murder is death eligible, nor whether the suspect is indigent. However, in such situations, the police should be encouraged to exercise their judgment in favor of allowing access to the public defender. The precise method by which public defenders in more populous counties could be placed on call for such activities should be developed by the agencies involved.

The Commission considered the impact of this requirement in suburban areas and in more rural parts of the state. In counties in which a full-time public defender office exists, some provision should be possible to enable such representation in capital cases. The volume of cases is considerably lower in other counties in the state than in Cook County, and the likelihood of extensive representation at suburban police stations correspondingly reduced. The most significant problem would likely be educating police agencies throughout the state of their responsibilities in this area.

At present, a defendant in custody at a police station who requests the public defender is most often advised that he or she will have to wait for a court appearance to secure the appointment of the public defender. Given the inherent coerciveness in stationhouse interrogations, which *Miranda* recognizes, early access to a competent lawyer may be critical to a defendant's ability to protect his or her rights. Authorizing public defenders to appear in response to a request from a defendant for a lawyer during questioning would protect the rights of the defendant and reduce the prospect of false confessions, while imposing relatively little additional financial burdens on the system. In many of these cases, the suspect is likely to actually be indigent, and will therefore be entitled to the appointment of a public defender in any case. In those situations where the person later proves not to be indigent, the representation by the public defender can be terminated at the very first court appearance by a finding by the trial judge that the defendant is not indigent.

Recommendation 4 :

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

A majority of Commission members supported the recommendation that custodial interrogations in a police facility should be videotaped in their entirety. Some Commission members who did not support this recommendation believed that while videotaping interrogations might be valuable, it should not be mandatory. The viewpoints of the Commission members in the minority on this issue are included at the end of this section.

There has been a great deal of debate in Illinois on the question of whether or not to videotape the entire interrogation process. The current practice in Cook County has been to videotape any final statements made by a suspect, but not the interrogation process. Media reports detailing the case of Corethian Bell, who gave a videotaped confession to the murder of his mother but was recently released when DNA tests linked someone else to the crime,¹³ demonstrate the limitations inherent in such a practice. Videotaping of the complete interrogation process is already the practice in some jurisdictions in Illinois, such as Kankakee, where it has been done since 1996.¹⁴ Tribune articles describing the Corethian Bell case suggest that Cook County State's Attorney Dick Devine would support a pilot program to videotape the interrogation process.

Commission members supported this recommendation in light of other cases in which it has been claimed that suspects confessed to a crime, and it was later established that the suspect was innocent. A notable example from the cases involving the thirteen men released from death row in Illinois is that of Gary Gauger, where others were subsequently convicted for the crime to which Mr. Gauger allegedly confessed.¹⁵ Academic literature is also replete with descriptions of confessions that were obtained under circumstances that provide significant doubt as to accuracy.¹⁶

There are reasons why people will confess to crimes they did not commit, and the academic literature on the subject details instances where suspects have confessed as a result of psychological coercion

and trickery.¹⁷ There are also examples from Illinois, such as the case involving Mr. Bell, who apparently confessed on videotape to having stabbed his mother, and the four men recently released from prison in connection with the 1986 murder of Laurie Roscetti.¹⁸ Instances of physical coercion in certain police stations under the direction of Lt. Ron Burge have also been well documented.¹⁹

There are many reasons why videotaping the entire interrogation process can be beneficial. In an article discussing safeguards to protect against questionable confessions,²⁰ Professor Welsh S. White has noted:

Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement. 32 Harv.C.R.-C.L.L.Rev.105 at 153-154

Indeed, there are a number of potential benefits to law enforcement to be derived from videotaping the entire interrogation process. A significant benefit which will be derived from the process is that it provides the very best evidence of what went on in the interrogation room – which will enable law enforcement agencies to establish that interrogation tactics did not include physical coercion or undue influence. Instead, as Professor Leo has noted²¹, police departments will be able to demonstrate to prosecutors, judges and juries “. . . both the fairness of police methods and the legality of any statements they obtain.” The Supreme Court Committee on Capital Cases²² noted that bills requiring the electronic recording of police interrogations were considered by the Illinois legislature during 1999, and is again under consideration in the 2002 legislative session. Electronic recording is already required in Alaska and Minnesota by court decision. The Committee observed:

While the committee believes adoption of a recording requirement is best dealt with by the voluntary action of individual executive agencies or by legislative enactment, the committee found that routine electronic recording of all custodial interrogations and confessions would be a major improvement in criminal procedure and should be encouraged by the courts.

Materials accompanying the Committee's Report²³ included a news report from August 1999 indicating that Illinois Attorney General Jim Ryan had written to the Illinois House of Representatives committee studying this issue, expressing his support for permissive videotaping of suspects' interrogatories and confessions.²⁴ Also included is a June 1999 news article²⁵ reporting that the DuPage County Sheriff's Department adopted a policy that, when feasible, investigators should video and audio tape in-house interrogations and confessions in serious violent crimes, including any case that may result in a death penalty. The article quotes the Sheriff as follows:

“‘Taping interviews is the only way to wipe away any doubt about what happens in that interview room,’ Sheriff John E. Zaruba said in a release Wednesday. ‘It protects my investigators, the suspects and the integrity of the evidence.’”

The Supreme Court Committee’s Supplemental Report²⁶ subsequently observed:

In its 1999 Report, the committee expressed its support for legislative action to require electronic recording of interrogations. The committee found that routine recording of all custodial interrogations and confessions would be a major improvement in criminal procedure. Legislation that would have required recording of custodial interrogation was introduced during the last session of the General Assembly, but failed to pass. The committee believes the General Assembly should be encouraged to revisit the issue.

Only a few other states have mandated this practice by judicial interpretation. The Supreme Court of Alaska has by decision required that interrogation of suspects be electronically recorded, and has placed restrictions on the use of unrecorded statements. In *Stephan v. Alaska*, 711 P. 2d 1156, 1162 (1985), the Alaska Supreme Court ruled that the Alaska Constitution Due Process Clause requires that all custodial interrogations in a place of detention must be electronically recorded, from beginning to end. The Court explained (711 P. 2d at 1161):

The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public’s interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

The Supreme Court of Minnesota, exercising its supervisory authority to ensure the fair administration of justice under the State Constitution, held that “all custodial interrogation including any information about rights, waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.” *State v. Scales*, 518 N. W. 2d 587, 592 (1994).

In Texas, legislation has been enacted which renders oral statements by accused who is in custody (with certain exceptions) inadmissible against them in criminal proceedings unless the statements are electronically recorded. Texas Code of Criminal Procedure, Art. 38.22 (1999).

Professors Richard J. Ofshe and Richard A. Leo²⁷ discuss at length how and why persons confess to crimes they did not commit. The article contains over 100 pages of examples and explanation of false confessions. The authors conclude (pp. 1122):

The protection of the innocent is paramount in a criminal justice system whose ideology and rules are predicated on the belief that there can be no worse harm than wrongful conviction and incarceration. Researchers have repeatedly documented the existence of numerous and inexcusable miscarriages of justice arising from police-induced false confession. We need not tolerate these injustices. If courts institutionalized a reasonable standard of confession reliability and required police to record the entirety of all felony interrogations, the suppression hearing would offer significant protection against the admission of false confessions into evidence and the number of miscarriages of justice attributable to false confession would be significantly reduced.

A majority of Commission members thus believed that videotaping of the entire interrogation process is crucial to the fair administration of justice.

There are a variety of objections which have been interposed to videotaping the interrogation process. It has been suggested that videotaping is not feasible, for example, because of space, personnel and funding limitations. The Commission has separately recommended that in conjunction with requiring videotaping of interrogations, the State should provide funding to address these concerns.²⁸ It is also worthwhile noting that many police officials questioned the practice of recording suspects statements, but have now found it workable.²⁹

Commission members were sensitive to these concerns, as well as concerns expressed by various police officials that videotaping the entire interrogation process might inhibit the police from vigorously pursuing interrogations, or reveal techniques. A 1993 study by the National Institute of Justice of police departments which employed videotaping in the interrogation process³⁰ revealed that once officers adjusted to the idea of being videotaped, they found the process useful. Allegations of misconduct against police officers dropped, and officers were able to adjust their interrogation process to accommodate the presence of the video. Few major problems were encountered. The study showed that videotaping confessions assisted prosecutors and defense lawyers in evaluating cases, helped in negotiations for pleas of guilty, and resulted in more guilty pleas.

The Commission has not suggested that confessions obtained during an untaped interrogation be automatically excluded. While the Commission believes that videotaping of the entire process should be required, the failure to videotape the interrogation session should not be the sole test of admissibility.

Minority view – Videotaping

The Commission members in the minority on this issue expressed the view that mandatory videotaping of suspects puts an unacceptable burden on law enforcement and would significantly lower the successful clearance rate in investigations of serious crimes. Often in the early stages of an investigation the police do not have a clear idea of what happened, let alone who the suspects are. To require that all questioning of suspects be videotaped would significantly slow the course of many investigations and create an unacceptable risk for public safety.

To require mandatory videotaping of suspects would also impose an unfunded mandate on law enforcement. Significant additional costs would be imposed on state, county, and municipal law enforcement agencies. In addition to the extra cost for equipment and remodeling interrogation rooms to be made suitable for videotaping, local law enforcement agencies would incur additional personnel costs. There are about 1,100 police departments in Illinois, about half of which have 10 or fewer members. There are 138 suburban police departments in Cook County. Requiring all of these departments to videotape interrogations would be extremely burdensome.

On the other hand, Commission members in the minority believed the use of videotaping should be strongly encouraged. In fact, law enforcement in Illinois has made increased use of videotaping in recent years. The Commission has recommended that the Illinois Eavesdropping Act should be amended to allow for audio-taping and videotaping of police station questioning of suspects and witnesses, without requiring permission of the witness or suspect. (*See Recommendation 7 of this Report*). This amendment would be necessary before any viable mandatory videotaping program could be implemented. In addition, the State of Illinois should provide funding so that all police agencies would have the capability to videotape questioning efficiently and economically. Should those steps be taken the videotaping of police questioning would increase dramatically, but at the same time public safety would not be compromised.

Recommendation 5 :

Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

This recommendation was favored by a majority of Commission members. Circumstances will arise where videotaping a suspect's statement is simply not practical. A suspect may make statements on the way to the police station, or the police and the suspect may be in a location distant from the station so that videotaping is not realistic. In such instances, a majority of the Commission has recommended that any such statements that are made should be repeated to the suspect on tape. If the suspect acknowledges having made the statements, the police will have established strong evidence of guilt and that evidence will be of a more reliable type than the officers' statements about what the suspect may or may not have said. If the suspect denies the statements, there will at least be a contemporaneous record showing that the officers claimed to have heard such a statement and at what point in the process that statement was heard. In both instances, law enforcement agencies will have provided the trial court with evidence that is helpful to an ultimate determination as to the reliability of any purported statements by the defendant.³¹

Recommendation 6 :

There are circumstances in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audiotaped.

This recommendation is a corollary of the earlier recommendation on videotaping, and a majority of Commission members supported the proposal. The Morin Inquiry similarly recommended that interviews of suspects in a station be either videotaped or audiotaped. The Special Commissioner also recommended that consideration be given to adopting the practice of carrying tape recorders to permit the recording of statements that may occur at some location outside the police station.³²

In circumstances where police may be in hot pursuit of a suspect or where a suspect is detained at a significant distance from the police station, particularly in rural counties, and the suspect makes a statement or is questioned by police, videotaping the interrogation is not practical. However, there should be some procedure established which requires a uniform approach to recording such interrogations by means that are reliable. A simple tape recording of the interrogation could be a useful means of insuring that an accurate record is made of the statements made by the suspect.

Recommendation 7 :

The Illinois Eavesdropping Act (720 ILCS 5/14) should be amended to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audiotaping of statements as recommended by the Commission. The amendment should apply only to homicide cases, where the suspect is aware that the person asking the questions is a police officer.

The recommendations made above clearly require an amendment to the Eavesdropping Act in order to be effectively implemented. A majority of Commission members support this proposal to modify the eavesdropping statute to permit video and audio taping of interrogations. The Act provides as follows:

Sec. 14-2. Elements of the offense; affirmative defense. (a) A person commits eavesdropping when he: (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended;

An eavesdropping device is defined as "any device capable of being used to hear or record oral conversation . . . whether such conversation . . . is conducted in person, by telephone, or by any other means." 720 ILCS 5/14-1(a). A conversation means "any communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." 720 ILCS 5/14-1(d).

Open and visible recording (audio or video) of a suspect, without the suspect's explicit consent, would probably be held to violate the Eavesdropping Act. See, for example, *In re Marriage of Almquist*, 299 Ill App. 3d 732,736 (3d Dist. 1998). Accordingly, the Commission has recommended the amendment of the Eavesdropping Act to permit police recording of suspects' statements without

knowledge or consent. The recommendation for the amendment has limited its application only to homicide cases, and to circumstances where the suspect knows that the person asking the questions is a police officer.

Recommendation 8 :

The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.

This recommendation was supported by a majority of Commission members. It is based upon Recommendation No. 98 of the Morin Inquiry. The Recommendation from that inquiry provides, in pertinent part:

The Durham Regional Police Service should implement a similar policy for interviews conducted of significant witnesses in serious cases where it is reasonably foreseeable that their testimony may be challenged at trial . . .

This practice is already in use in some departments in Illinois. Law enforcement agencies in Kankakee videotape the statements of witnesses who are thought likely to recant. This recommendation goes further.

Experience in Illinois teaches that the statements of certain witnesses ought to be recorded by police, so that, if the witness' account "evolves", the judge and jury can observe the original version. There are a number of examples in the cases involving the thirteen men released from death row of witnesses whose testimony was questionable. Resolution of questions related to their testimony might have been aided by the existence of a videotape of the initial interrogation.

This recommendation is purposefully stated in general terms. Its implementation will require further study and consultation with prosecutors and police officials.

Recommendation 9 :

Police should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty.

A majority of Commission members supported this recommendation, which would impose upon police a duty to make some reasonable attempt to determine whether a suspect has limited mental capacity before commencing their interrogation. Where the suspect appears vulnerable due to age or mental capacity, the court should carefully consider the length or duration of the interrogation as well as whether it involved non-leading questions in order to assess whether or not the resulting statement was voluntary.

As earlier sections of this report detailed, those who are innocent may ultimately confess to crimes they did not commit when interrogations become coercive. However, those with limited mental capacities may confess to crimes they did not commit³³ even when the interrogation process is not coercive. As Professor White notes with respect to mentally retarded suspects:

It is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions. It is not only that a retarded suspect may be abnormally “susceptible to coercion and pressure.” Even when no pressure is exerted, a retarded suspect “may be inclined to give a false confession out of a desire to please someone perceived to be an authority figure.” Mental health experts have long been aware of the risk that a mentally retarded suspect’s eagerness to please authority figures will lead him to confess falsely. 32 Harv. C.R. - C.L. Rev. 105, 123

Police need to take special care with interrogations of such persons because they may be inclined to agree with the police version of events in an effort to seek approval, or may be easily led. While the Commission does not believe that police officers will be able to make precise determinations in all instances of a suspect’s mental capacity, there are going to be obvious cases where the person’s mental capacity is so limited that the police should clearly be aware of the potential problems with an interrogation. The Commission has recommended a “reasonable attempt” on the part of police officers, and does not anticipate that a failure to comply with such a recommendation would result in automatic exclusion of the evidence.

LINEUPS AND PHOTOSPREADS

The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law. Concerns about eyewitness testimony have led to new recommendations relating the methods by which witnesses identify suspects through lineups and photospreads.

Generally speaking, the usual practice (at least in Illinois) involves presentation to the eyewitness of either a group of photos (referred to in this report as a photospread) or a live lineup of persons. The eyewitness is then asked if he or she recognizes the perpetrator. If an identification is made, the witness’ degree of confidence in the identification is sometimes recorded by police, but often is not recorded contemporaneously. Photospread procedures occur both within and outside the police station, while live lineups usually take place in the station. All are customarily handled by police officers, and the result (no identification or a positive identification) is recorded in writing. Often a still photograph is taken of live lineups. It is generally not the practice to record either live lineups or photospreads on audio or videotape. The suspect has no right to have a lawyer present during a pre-indictment photospread. *See People v. Bolden*, 197 Ill. 2d 166 (2001.)

Two major articles discussing the challenges presented by eyewitness testimony have contributed significantly to the Commission’s discussions in this area. The first, by Professor Gary Wells and

others,³⁴ “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” appears in *Law and Human Behavior*, Vol. 22, No. 6 (1998) beginning at page 603. Throughout the recommendations that follow, a reference to “Wells” will refer to this article. The second article, entitled “Eyewitness Evidence: A Guide For Law Enforcement,” was prepared by the Technical Working Group for Eyewitness Evidence, sponsored by the National Institute of Justice, U.S. Department of Justice (October 1999). The Technical Working Group included, among its members, prosecutors, legal experts, police officials (including members of the Chicago Police Department)³⁵, and academics. Professor Wells, author of the first article, was a member of the group’s Planning Panel. Throughout the recommendations that follow, this report will be referred to as the “NIJ study on Eyewitness Evidence.”

Recommendations 10 to 15 are intended to apply only to homicide cases.

Recommendation 10 :

When practicable, police departments should insure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect.

A majority of Commission members have recommended that this procedure should be adopted by police departments conducting lineups. The recommendation recognizes that academic literature has identified some ways in which lineup procedures can be improved, although these ideas have not yet been tested in a court of law. Commission members have proposed that these improved procedures be used by police departments when practicable, rather than mandating these procedures be adopted. The Commission has not recommended that a failure to comply with this requirement should result in an automatic suppression of an identification.

The reason for this recommendation is that if the person who administers the lineup or photospread knows the identity of the suspect, the administrator can consciously or unconsciously – for example, by eye contact, facial expression, tone of voice, pauses, verbal exchanges – signal his or her knowledge to the witness. Further, if the witness selects the person believed by the administrator to be the perpetrator, the administrator of the lineup may then confirm this to the witness, which may increase the witness’ degree of confidence in the identification, so that the witness’ confidence in his/her selection and resultant testimony are no longer based solely on the witness’ own observation and memory.³⁶

The New Jersey Attorney General has implemented new guidelines for lineups and photospreads which reflect the developing academic literature, including this proposal. Regarding this “double-blind” issue, the Attorney General states in his cover letter implementing the procedures:

Two procedural recommendations contained in these Guidelines are particularly significant and will represent the primary area of change for most law enforcement agencies. The first advises agencies to utilize, whenever practical, someone other than the primary investigator assigned to a case to conduct both photo and live lineup identifications. The individual conducting the

photo or live lineup identification should not know the identity of the actual suspect. This provision of the Guidelines is not intended to question the expertise, integrity or dedication of primary investigators working their cases. Rather, it acknowledges years of research which concludes that even when utilizing precautions to avoid any inadvertent body signals or cues to witnesses, these gestures do occur when the identity of the actual suspect is known to the individual conducting the identification procedure. This provision of the Guidelines eliminates unintentional verbal and body cues which may adversely impact a witness' ability to make a reliable identification.³⁷

A majority of Commission members believed that the so-called "double-blind" procedure (neither the witness nor the administrator knows in advance who in the lineup or photospread is the suspect) will improve the accuracy of identification procedures. The majority recommendation recognizes, however, that implementation of these procedures poses special challenges to law enforcement, particularly in smaller departments. In his cover letter implementing the new procedures, the Attorney General of New Jersey has conceded the difficulty in imposing this burden on departments:

I recognize that this is a significant change from current practice that will not be possible or practical in every case. When it is not possible in a given case to conduct a lineup or photo array with an independent investigator, the primary investigator must exercise extreme caution to avoid any inadvertent signaling to a witness of a 'correct' response which may provide a witness with a false sense of confidence if they have made an erroneous identification.³⁸

Minority view - Procedure should be mandatory

Improvements to lineup procedures identified by the academic literature should be implemented at this critical stage of the investigatory process. Members in the minority on this issue remain convinced that the "double-blind" procedure is critical to accurate identification procedures, and that the alternative carries an unacceptable risk of faulty identifications. As a result, imposition of a "double-blind" procedure on all police departments, large and small, is both justifiable and advisable. If required to do so, even the smallest departments will find a way to comply.

Recommendation 11 :

(a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore they should not feel that they must make an identification.

(b) Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

These recommendations were adopted by the Commission unanimously. The first recommendation is made in both the article by Professor Wells³⁹ and in the NIJ report on Eyewitness Evidence.⁴⁰ The purpose of such a statement is to avoid the risk that witnesses will make an inaccurate identification simply because they believe that someone in the lineup or photospread is the suspect and to avoid the possibility that the witness will make a “relative judgment” by picking the person who most resembles the person who committed the crime.

The second recommendation in this section reflects considered discussion by the Commission about how to address the situation where the police officer may, in fact, know who the suspect is, and mandatory procedures requiring “double-blind” lineups or photospreads are not implemented. If double-blind procedures are implemented, then Professor Wells recommends that the witnesses be told that the administrator does not know who the suspect is. However, in the event that the administrator *does* know who the suspect is, the members of the Commission felt that it would be a bad practice to make a misstatement to the witness. As a result, the Commission has advanced a recommendation which should fit with either circumstance, and which should discourage the witness from providing a positive identification merely because he or she believes it is expected.

Recommendation 12 :

If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

This recommendation was supported by a majority of Commission members. The idea behind a sequential procedure is to eliminate a “relative judgment” by which the eyewitness identifies the person in the lineup or photospread who looks the most like the perpetrator, rather than actually identifying the perpetrator. Since the “relative judgment” process may produce a higher incidence of mistaken identity, it is important to address this problem.

This position is based upon the research explained in the article by Professor Wells⁴¹ The authors state that experiments conducted by the six authors and by others in the United States, Canada, Germany and the United Kingdom have established the superiority of a sequential over a simultaneous procedure.⁴² The authors state, “. . . The sequential procedure produces a lower rate of mistaken

identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups). . . .” The reason is:

. . . the standard identification procedure, in which the eyewitness examines the full set of lineup members at once, allows for relative judgment processes in ways that a sequential procedure would not. A sequential procedure is one in which the eyewitness views one lineup member at a time, deciding whether or not that person is the culprit before seeing the remaining lineup members. Having not yet seen the remaining lineup members, the eyewitness is not in a position to make a relative judgment. Although the eyewitness could compare the person being viewed to those viewed previously, the eyewitness cannot be sure that the next person to be viewed will not be an even better likeness to the culprit. Hence, the eyewitness must rely more on an absolute judgment process. Wells, p. 617

The authors sound one cautionary note: “. . . the adoption of sequential lineups without the adoption of double-blind testing. . . might be worse than using simultaneous lineups without double-blind testing. Although we do not have specific empirical evidence to support this view, we fear that the influence of the lineup administrator who knows which person is the suspect would be greater with the sequential procedure because the administrator could more easily discern which photo or lineup member was being observed by the eyewitness at a given moment than is true of the simultaneous procedure.” Wells, p. 640.

The NIJ report on Eyewitness Evidence identifies similar concerns. The draft was reviewed and commented on by 95 organizations and individuals representing a broad spectrum of knowledgeable and interested persons and views⁴³. The report represents a consensus of its authors, but does not necessarily reflect the official position of the U.S. Department of Justice. In an introduction to the report, Attorney General Janet Reno states:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade. The National Institute of Justice convened a technical working group of law enforcement and legal practitioners, together with these researchers, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system. NIJ report on Eyewitness Evidence, p. iii.

The authors of the report set forth procedures for *both* simultaneous and sequential lineups and photospreads⁴⁴. In the Introduction, the authors explain in the section titled “Future Considerations”:

Advances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence. The following examples illustrate areas of potential change.

Scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially – one at a time – rather than simultaneously. Although some police agencies currently use sequential methods of presentation, there is not a consensus on any particular method or methods of sequential presentation that can be recommended as a *preferred* procedure; although sequential procedures are included in the *Guide*, it does not indicate a preference for sequential procedures. NIJ report on Eyewitness Evidence, p. 8-9.

Regarding sequential procedures, the New Jersey Attorney General states in his cover letter (p. 2):

The Guidelines also recommend that, when possible, ‘sequential lineups’ should be utilized for both photo and live lineup identifications. ‘Sequential lineups’ are conducted by displaying one photo or one person at a time to the witness. Scientific studies have also proven that witnesses have a tendency to compare one member of a lineup to another, making relative judgments about which individual looks most like the perpetrator. This relative judgment process explains why witnesses sometimes mistakenly pick someone out of a lineup when the actual perpetrator is not even present. Showing a witness one photo or one person at a time, rather than simultaneously, permits the witness to make an identification based on each person’s appearance before viewing another photo or lineup member. Scientific data has illustrated that this method produces a lower rate of mistaken identifications. If use of this method is not possible in a given case or department, the Guidelines also provide recommendations for conducting simultaneous photo and live lineup identifications.⁴⁵

While Professor Wells and his colleagues support the concept of sequential procedures, they do not include sequential procedures among the four recommendations⁴⁶ for immediate implementation by police agencies. The chief reason given is:

... we believe that the four rules we recommend are readily understandable to justice people in terms of how they work and why they are necessary. Because our recommendations are directed at the legal system, we think that each rule should have this ‘self-evident’ nature. The sequential procedure, however, relies on a more complex understanding of the problem based on the relative-judgment conceptualization that we do not think is a part of the intuitions of legal policy makers at this point. Fourth, the rules we recommend at this time do not require significant deviations from current police practices, which involve simultaneous presentations. The sequential procedure, on the other hand, calls for a set of operations that is quite different from the usual practices of police departments. Finally, the four rules that we recommend in no sense prevent police from using sequential procedures. If sequential procedures are used, the same four rules apply. Wells, p. 640.

Minority view -- sequential procedures:

Commission members who were in the minority on this issue expressed concern about implementing such a procedure which has not been tested or approved as yet in the courts. Even the NIJ guide

acknowledges that these procedures may not fit every jurisdiction and that they should provide opportunity for further study. It may be that these procedures will produce more reliable identifications in the long run, but this method does present a radical shift from the method traditionally employed to conduct lineups and photospreads, and thus should be approached with caution. The sequential lineup procedure varies considerably from present practice, and it is likely that defense attorneys would immediately attack such a procedure on various grounds.

While the New Jersey Attorney General has recommended implementation of these new procedures, he also acknowledges that they may not be suitable in every case, and that identification procedures conducted in the traditional manner should not be presumed invalid merely because he has now recommended a new procedure.

Recommendation 13 :

Suspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitnesses' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

This recommendation was adopted unanimously by the Commission, and comports with what is good police procedure. However, some lineups or photospreads are constructed so that the non-suspect “fillers” more or less resemble the person who has been identified as the potential suspect, rather than insuring that the “fillers” resemble the descriptions given by the witnesses. This is an important distinction.

Both the article by Professor Wells⁴⁷ and the NIJ report on Eyewitness Evidence suggest that it is important that the other members of the lineup resemble the suspect in terms of significant features. Professor Wells suggests that the non-suspect “fillers” in the lineup match the physical description provided by the witness, rather than being chosen so that they resemble the suspect. They should not, however, be chosen so as to emphasize any particular physical characteristic of the suspect.

Chicago Police Department General Order 88-18, Par. II G, is to the same general effect.⁴⁸

Recommendation 14 :

A clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

The Commission has unanimously recommended that witness statements at the time of the identification procedure be documented in writing. One of the significant issues that has arisen with respect to eyewitness testimony has to do with the degree to which the witness was confident in his or her identification of the suspect at the time of the first identification. Professor Wells points out in his article

that juries often pay more attention to the level of confidence expressed by the witness when testifying than to the actual circumstances under which the witness may have made the identification.⁴⁹ A witness making a hesitant or tentative identification at first may receive reinforcement for the identification as the case proceeds.

One way to address this problem is to insure that police officials make a contemporaneous record not only as to whether or not the eyewitness had identified the suspect, but also as to the level of confidence expressed by the witness *at the time of the initial identification*. This should include expressions of uncertainty on the part of the witness.

Guidelines issued by the Attorney General of New Jersey suggest that the lineup administrator should undertake the following actions when recording statements made by the witness: 1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is. 2. Ensure that the results are signed and dated by the witness. 3. Ensure that no materials indicating previous identification results are visible to the witness. 4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures. These suggested procedures make clear the importance of insuring that the information about the identification represents what the witness has actually said about the identification or nonidentification.

Eyewitness identification was of particular importance in the Sophonow public inquiry in Manitoba. A host of recommendations were made with respect to lineup and photospread procedures, including the recommendations that:

All statements of the witness on reviewing the lineup must be both noted and recorded verbatim and signed by the witness.

At the conclusion of the line-up, if there has been any identification, there should be a question posed to the witness as to the degree of certainty of the identification. The question and answer must be both noted and recorded verbatim and signed by the witness. It is important to have this report on record before there is any possibility of contamination or reinforcement of the witness.⁵⁰

The Sophonow inquiry also suggested that, at least with respect to photo spreads, police officers should not speak to eyewitnesses after the lineups regarding their identification or their inability to identify anyone, as it could raise concerns that a potentially questionable identification was somehow reinforced.

Recommendation 15 :

When practicable, the police should videotape lineup procedures, including the witness' confidence statement.

It was the unanimous view of Commission members that videotaping lineup procedures would also aid in resolution of disputes regarding the identification. Chicago Police Department rules currently require two photographs of any formal lineup which results in the identification of a suspect (General Order 88-18, par. II H). The Illinois Supreme Court has stated that judicial appraisal would be aided by photographs of the lineup. *People v. Pierce*, 53 Ill. 2d 130, 136, (1972). Also recommending photos or videos of the persons who are in the lineup, see ALI Model Code Section 160.4(2) (pp. 87 to 88, 449 to 450; DOJ Guide (10/99), Sec. III C, pp. 36 to 37 (live lineups to be documented by photo or video).

The Commission's recommendation goes beyond these procedures, so that the entire lineup process, from beginning to end, is to be recorded on video. Professor Wells and his colleagues hesitated to recommend videotaping of the entire lineup procedure⁵¹:

Although we encourage videotaping lineups, we are not willing to make videotaping one of the core rules at this time for several reasons. First, unlike the four rules we have proposed, videotaping is not, in and of itself, a procedure that lessens the chances of false eyewitness identifications. We know of no evidence that videotaping leads eyewitnesses to be less likely to make identification errors, for instance. Instead, videotaping falls into a category of record keeping for the purpose of post hoc review.

Second, we do not believe that videotaping will be nearly as effective in detecting problems in actual practice as it is in theory unless there are at least three cameras operating in synchrony. Videos are very limited in their visual scope, so there would have to be one camera focused on the eyewitness, one on the agent administering the lineup, and one on the lineup itself. In order to link any nonverbal behaviors of the agent or the lineup members to the reactions of the eyewitness, the cameras must be synchronized. In addition, the audio portion of a video is routinely very poor when nonprofessionals are making it.

Also, unlike the four rules we propose, there is additional cost to law enforcement in time, equipment, and materials associated with videotaping. In this sense, it violates a significant premise of our rules, namely that they are not associated with increased costs to law enforcement.

It is also important to note that we are uncertain at this time as to what effect videotaping might have on the behaviors of eyewitnesses. At least some in law enforcement have suggested to us that eyewitnesses would become even more anxious knowing that they were being videotaped, some would refuse to attempt an identification under such conditions, and so on. In the absence of empirical evidence one way or the other, we think it best to not make this one of our core rules at this time.

A final reason for not including the videotaping idea among the core rules is the fear that law enforcement would skirt Rule 1 (double-blind testing) on the excuse that video is available to the defense to see if there was any suggestiveness in the procedures. The existence of video, however, is no substitute for double-blind testing because of the limitations of video for capturing such influences.

We acknowledge that video might actually help prevent suggestive influence practices by lineup agents who might fear what a video could reveal to outside observers. However, we believe that adherence to Rule 1 (double-blind testing) is the only effective way to prevent systematic influence of this type from the lineup agent. We also agree that having some video, even if it is poorly done, might be better than having no video at all. Hence, we encourage the use of video, even while not making it one of the core rules.

The Sophonow inquiry similarly recommended that all proceedings in the witness room during the lineup should be recorded, preferably by videotape, but, if not, then by audiotape.

TRAINING AND OTHER RECOMMENDATIONS

Recommendation 16 :

All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

- 1. The risks of false testimony by in-custody informants ("jailhouse snitches").**
- 2. The risks of false testimony by accomplice witnesses.**
- 3. The dangers of tunnel vision or confirmatory bias.**
- 4. The risks of wrongful convictions in homicide cases.**
- 5. Police investigative and interrogation methods.**
- 6. Police investigating and reporting of exculpatory evidence.**
- 7. Forensic evidence.**
- 8. The risks of false confessions.**

Commission members were unanimously of the view that additional training for police officers in these areas was important. The recommendations for training outlined above are based primarily upon recommendations made in the report on the Morin Inquiry and to some extent on the Fisher article⁵². The Commission has unanimously recommended that all prosecutors and all defense lawyers who are members of the Capital Trial Bar, all judges who handle capital cases and police who work on homicide cases receive periodic training in these areas. The sources are:

1. In-custody informers: *Morin Inquiry Recommendations* 37-38, 53, 58, 60-61, 64
2. Risks of accomplice testimony *Cases involving the Ford Heights Four and Burrows*⁵³

3. Dangers of tunnel vision: *Morin Inquiry Recommendations 74; Article by Professor Fisher, p. 137; Sophonow Inquiry Recommendations*
4. Risks of wrongful convictions: *Morin Inquiry Recommendations 73 B, 93*
5. Police investigative/interrogation methods: *Morin Inquiry Recommendations 101-108*
6. Police investigating/reporting of exculpatory evidence: *Morin Inquiry Recommendation 94; Article by Professor Fisher*
7. Forensic evidence: *Morin Inquiry Recommendations 1-18*
8. Risks of false confessions: *Article by Professor White; the Gauger case,⁵⁴ Tribune series on confessions⁵⁵*

These areas are where the potential for systemic error is significant. A number of the cases involving the thirteen men released from death row in Illinois provide examples of problems in one or more of these categories. Particularized training should have the effect of improving the overall quality of justice, as well as diminishing the likelihood that errors will be made which result in wrongful conviction. Examination of those areas in the criminal justice system where errors have been made in the past should serve as a reminder how problems can be avoided in the future.

Recommendation 17 :

Police academies, police agencies and the Illinois Department of Corrections should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention of foreign nationals.

The Commission has unanimously recommended that training curricula be improved to reflect treaty obligations. Under the Vienna Convention on Consular Relations (VCCR), the United States is required to notify foreign nationals of their right to consular access upon arrest. The foreign national's consul may also arranged for legal representation for the person detained. Although both the Chicago Police Department and the Cook County State's Attorneys office have undertaken efforts to inform detainees of their right to consular access, more consistent efforts in this regard would serve to protect the rights of foreign nationals.

On June 27, 2001, the International Court of Justice found the United States in violation of the Vienna Convention for the Arizona execution of two German nationals, Walter and Karl LeGrand.⁵⁶ An August, 2001 report by Amnesty International found that there is widespread disregard for the consular rights of foreign nationals throughout the United States, even for those who are charged with capital crimes.⁵⁷

The Illinois Supreme Court has been presented with this issue in at least one case involving a Polish national. *See People v. Madej*, 193 Ill. 2d 395, 739 N.E. 2d 423 (2000). Although the Court disposed of the arguments in that case largely on procedural grounds, the case highlights the importance of insuring that proper training is provided to all those who are connected with the criminal justice system with respect to the rights of consular access and notification.⁵⁸

It is important that police agencies and other law enforcement agencies be fully informed about their responsibilities with respect to compliance with the VCCR. The U.S. State Department publishes a written guide for law enforcement agencies which explains in very simple terms the responsibilities related to consular notifications.

Recommendation 18 :

The Illinois Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake regular reviews of the measures taken by state and local police to ensure full compliance. This could include publication of a guide based on the U.S. State Department manual.

It was the unanimous view of the Commission that the Illinois Attorney General could provide improved leadership in this important area. In Texas, the office of the Attorney General has published a pamphlet entitled: "Magistrate's Guide to the Vienna Convention on Consular Notifications." The guide, based upon the State Department publication, provides advice on what steps should be taken to comply with the VCCR. While the Illinois Attorney General is not directly responsible for supervising all law enforcement agencies in the state, the Office of the Attorney General provides a valuable statewide resource for disseminating information of this kind throughout the 102 counties of Illinois. As the population of the state becomes more diverse, it becomes increasingly important that areas outside of the City of Chicago and Cook County understand the requirements of the VCCR in order to insure that the rights of detainees are fully protected.

Recommendation 19 :

The statute relating to the Illinois Law Enforcement Training and Standards Board, 50 ILCS 705/6.1a, should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

The Commission has unanimously recommended that police perjury, regardless of conviction, should be a basis upon which the certification of a police officer may be revoked. Illinois has a statute entitled "Illinois Police Training Act" which creates the Illinois Law Enforcement Training and Standards Board⁵⁹. The Act enables the Board to set training standards and certify police officers for employment. Police officers cannot be employed without being certified under the Act.

All police departments have rules against knowingly providing false testimony or submitting false reports. However, some concerns have been expressed about whether police agencies are sufficiently vigilant in enforcing these rules, or whether there are adequate sanctions for officers who try to obtain a conviction by lying under oath. The Commission recommends an amendment to the Illinois Law Enforcement Training and Standards Board Act (ILETSB) to add a provision that the ILETSB would have the authority to de-certify any police officer in Illinois who is found to have intentionally lied under oath in a criminal case. The ILETSB is currently mandated by law to de-certify police officers automatically upon conviction of any felony offense and certain misdemeanor offenses.⁶⁰ This

amendment would permit a similar de-certification for instances of perjury, regardless of whether the police officer has been convicted of that crime.

Difficult issues remain to be resolved in legislation effectuating this recommendation, including what would trigger an ILETSB decertification inquiry, staffing and funding for the ILETSB, the due process rights of the police officer, and what (if any) appeal rights would be afforded. These issues could be resolved, however, and this recommendation could provide an important avenue to correct improper conduct by police officers throughout the state.

Notes - Chapter 2

1. "The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England," 68 *Fordham Law Review* 101, April 2000.
2. A copy of the relevant portions of the CPIA is contained in the Appendix at the end of this Report. The Act is also available at <http://www.hmsa.gov.uk/acts/acts1996/96025-f.htm>.
3. *See*: Fisher, "The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England," 68 *Fordham Law Review* at 129-131 (April 2000).
4. Recommendation 74 provides: One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.
5. Recommendation 89 provides: Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.
6. The details regarding the Thomas Sophonow inquiry can be found on the website maintained by the Province of Manitoba devoted to this report: www.gov.mb.ca/justice/sophonow.
7. *See* Sophonow Inquiry recommendations.
8. The Attorney General's draft guidelines are also located in the Appendix at the end of this Report. The guidelines are available at <http://www.lslo.gov.uk/disclosure.htm>.
9. *See* Guidelines, Par. 11: "Prosecutors must be alert to the possibility that material may exist which has not been revealed to them and which they are required to disclose."
10. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602; *See also Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964).
11. *See* 725 ILCS 5/109-1, 725 ILCS 5/113-1 et seq.; *See also*: 55 ILCS 5/3-4006.
12. Funding should probably be identified to support the additional burdens placed upon the public defenders who will appear during the custodial interrogation phase for death eligible cases.
13. *See* "DNA voids murder confession", Chicago Tribune, January 5, 2002; "Cops urged to tape their interrogations", Chicago Tribune, January 6, 2002.

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14. See also *People v. Oaks* (169 Ill. 2d 409, 662 N.E. 2d 1328, 1334, 1996), describing the videotaping of statements in Iowa as “routinely done” by Iowa authorities.
15. Other instances where questionable confessions were used to convict men later released from death row include Rolando Cruz (the “vision” statement), Alex Hernandez (inculpatory statement obtained under questionable circumstances), Ronald Jones (alleged physical brutality), and Paula Gray (both grand jury testimony and courtroom testimony) in the cases involving Dennis Williams and Verneal Jimerson.
16. See: Drizin and Colgan, “Let the Cameras Roll: Mandatory Videotaping of Interrogations is the solution to Illinois’ Problem False Confessions” *Loyola University Chicago Law Journal*, Vol. 32, No. 2, Winter 2001, 339; especially 345-378; Johnson, “False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations,” *Boston University Public Law Journal*, Vol. 6, p. 719; especially at p. 721-726, Spring 1997); See also: *Actual Innocence* by Barry Scheck and Peter Neufeld, New York: Doubleday (2000).
17. See, for example, Leo, “The Impact of Miranda Revisited,” *Journal of Criminal Law and Criminology*, Vol. 86, p. 621 (1996), especially at 689-692 and notes 288 to 292; Johnson, 6 B.U.Pub.L.J 719; 726-735; Ofshe and Leo, “The Decision to Confess Falsely: Rational Choice and Irrational Action,” *Denver University Law Review*, Vol. 74, p. 979 (1997).
18. In both instances, individuals were cleared on the basis of DNA evidence.
19. See: “Due Process and the Death Penalty In Illinois”, Chicago Council of Lawyers, March 2000 pp. 26-32; Senate Task Force Report, 2000 pp. 9-12.
20. White, “False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 32, p. 105 (1997).
21. 86 *J. Crim. L. & Criminology* at 682.
22. Sup. Crt. Committee Report, Oct. 1999, pp. 60-61.
23. Tab 31.
24. Chicago Daily Law Bulletin, August 13, 1999, p. 20. In his letter, dated August 10, 1999, the Attorney General indicated that while he encouraged the use of video recording early in the custodial interrogation process as practicable, he favored permissive use of videotaping over “making its use mandatory.” The Attorney General noted also that “Police agencies that are already using videotape in Illinois report almost uniformly agreeable results, finding that videotaping provides the most accurate method of proving what was said, defeats claims of coercion or confusion and increases professionalism by allowing peer review of and training in methods of questioning after interviews are completed. Videotaping also clearly protects the rights of suspects as well.” Letter from Attorney General Jim Ryan to Representative Monique D. Davis and Representative Sara Feigenholtz, Chairpersons of the House Committee on Videotaping of Interrogations and Confessions, August 10,

1999, p. 2.

25. "DuPage County Sheriff to tape interrogations," Chicago Tribune, June 29, 1999, p. 20.

26. Sup. Ct. Committee Supplemental Report, October 2000, p. 103.

27. 74 *Denver U.L. Rev.* 979.

28. See Chapter 13 of this Report, Recommendation 82.

29. "Cops urged to tape their interrogations", Chicago Tribune, January 6, 2002.

30. Geller, "Videotaping Interrogations and Confessions," National Institute of Justice, March 1993

31. This recommendation has, as its source, a recommendation from the Morin Inquiry, 96 (c), which provides: "Where oral statements, which are not videotaped or audiotaped, are allegedly made by a suspect outside of the police station, the alleged statement should then be re-read to the suspect at the police station on videotape and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded and sign it, if it is regarded as accurate."

32. Morin Inquiry Recommendation No. 96 (b) provides: "The Durham Regional Police Service should investigate the feasibility of adopting the practice of the Australian Federal Police of carrying tape recorders on duty for use when interviewing in other locations or indeed, for use when executing search warrants or in analogous situations."

33. Recent media reports on the case involving Corethian Bell describe Bell as mildly mentally retarded and with a history of mental illness, which could account for his willingness to confess to a crime he did not commit. See "Cops Urged to Tape their Interrogations," Chicago Tribune, January 6, 2002.

34. The authors include Gary Wells, from Iowa State University; Mark Small, Southern Illinois University (Carbondale); Steven Penrod, University of Nebraska (Lincoln); Roy Malpass, University of Texas (El Paso), Solomon M. Fulero, Sinclair College and Wright State University School of Medicine (Dayton); and C.A.E. Brimacombe, University of Victoria, (Victoria, British Columbia).

35. The Planning Panel included Sgt. Paul Carroll from the Chicago Police Department, and Officer Patricia Marshall, also of the Chicago Police Department, served on the Technical Working Group.

36. See Wells, *supra*, at pages 627 to 629.

37. A copy of the cover letter and proposed guidelines is contained in the Appendix at the end of this Report.

38. A copy of the New Jersey Attorney General's letter of April 18, 2001 transmitting the new guidelines is contained in the Appendix attached to this Report.

39. See p. 629-30.
 40. See p. 32.
 41. Pages 639 to 640.
 42. Pages 616 to 617, and 640 to 641.
 43. NIJ report on Eyewitness Evidence, pp. 7-8.
 44. NIJ report on Eyewitness Evidence, pp. 33 to 37.
 45. A copy of the cover letter and proposed guidelines is contained in the Appendix at the end of this Report.
 46. Professor Wells and his colleagues recommend four rules that should be adopted: the person who conducts the lineup should not be aware of which member of the lineup is the suspect, eyewitnesses should be told that the person in question might not be in the lineup and they should not feel compelled to make an identification, suspects should not stand out in the lineup, and a clear statement should be taken at the time of the identification as to the confidence level of the witness about the identification. *See Wells*, p. 627-636.
 47. At p. 630 to 635.
 48. A copy of Chicago Police Department General Order 88-18 is contained in the Appendix at the end of this Report.
 49. See Wells Article, p. 635-36.
 50. *See* recommendations from the Sophonow Inquiry.
 51. pp. 640 - 641.
 52. Stanley Z. Fisher, 68 *Fordham L. R.* 101 (April 2000).
 53. The "Ford Heights Four" are the four men convicted of a double murder in 1978. The four defendants in that case were Kenneth Adams, Verneal Jimerson, William Rainge and Dennis Williams. Jimerson and Williams were sentenced to death. An alleged accomplice, Paula Gray, implicated Jimerson, Rainge and Williams in some of the trials in the case. In 1996, all four men were subsequently exonerated and released from prison based upon DNA evidence which excluded them as sources of semen from the victim and subsequent statements by others who confessed to the crime. Two of the men who confessed to the crime in 1996 pled guilty and were sentenced to life without parole.
- Joseph Burrows was convicted of murder in Iroquois County based largely upon the evidence of his supposed accomplice, Gayle Potter, who admitted her involvement in the murder and implicated

Burrows and another man. No physical evidence linked Burrows to the crime, and he provided alibi testimony. Potter subsequently recanted her testimony, and confessed that she had committed the murder. Physical evidence linked her to the scene. Burrows won a new trial, and the prosecutor dropped the charges.

54. Gary Gauger was charged with the double murder of his parents in McHenry County, despite no physical evidence actually linking him to the murders. His death sentence was subsequently reduced to life without parole by the trial judge; the Illinois Appellate Court reversed his conviction and suppressed his confession. The prosecutor did not retry Gauger. In 1998, two members of a Wisconsin motorcycle gang were indicted in the federal district court in Wisconsin for the murder of the Gaugers; one pled guilty in 1998 and the other was found guilty in 2000.

55. The Chicago Tribune ran a series of articles on problems with confessions obtained by the Chicago Police Department in criminal cases. The series included the following articles: “Coercive and illegal tactics torpedo scores of Cook County murder cases,” Chicago Tribune, December 16, 2001; “Illegal arrests yield false confessions,” Chicago Tribune, December 17, 2001; “Veteran detective’s murder cases unravel,” Chicago Tribune, December 17, 2002; “Officers ignore laws set up to guard kids,” Chicago Tribune, December 18, 2001; and “When jail is no alibi in murders,” Chicago Tribune, December 19, 2001.

56. A copy of the opinion can be obtained from the web site of the International Court of Justice, <http://www.icj-cji.org/>.

57. *See*: “United States of America: A time for action-Protecting the consular rights of foreign nationals facing the death penalty,” Amnesty International, August 2001 (AI Index 51/106/2001).

58. The dissenting opinions of Justice McMorrow and Justice Heiple comment upon the important reciprocal rights guaranteed by this treaty.

59. 50 ILCS 705/1 et. seq.

60. The decertification provisions of the Act are as follows:

Sec. 6.1. Decertification of full-time and part-time police officers.

(a) The Board must review police officer conduct and records to ensure that no police officer is certified or provided a valid waiver if that police officer has been convicted of a felony offense under the laws of this State or any other state which if committed in this State would be punishable as a felony. The Board must also ensure that no police officer is certified or provided a valid waiver if that police officer has been convicted on or after the effective date of this amendatory Act of 1999 of any misdemeanor specified in this Section or if committed in any other state would be an offense similar to Section 11-6, 11-9.1, 11-14, 11-17, 11-19, 12-2, 12-15, 16-1, 17-1, 17-2, 28-3, 29-1, 31-1, 31-6, 31-7, 32-4a, or 32-7 of the Criminal Code of 1961 or to Section 5 or 5.2 of the Cannabis Control Act. The Board must appoint investigators to enforce the duties conferred upon the Board by this Act.

