

Over a lengthy period of time, the defendant was physically abusive to Sylvia which included a domestic battery and a violation of an order of protection against her. By October 1999 the defendant's abusive behavior escalated because he detested the fact that Sylvia was making a serious effort to turn her life around. Sylvia joined Alcoholics Anonymous and began attending their meetings regularly. Furthermore, Sylvia wanted to shelter their 10-year-old son from the violence and drug addiction that was a way of life for the defendant. With this in mind, Sylvia had the defendant removed from the residence. However, this did not stop the defendant from continued harassment of Sylvia, who on October 22, 1999 obtained an Order of Protection against the defendant.

On Thanksgiving Day 1999, the defendant came to Sylvia's residence. Wisely, Sylvia refused to allow the defendant to enter. As Sylvia went to call the police, the defendant went to little Henry's window and attracted the boys attention. When little Henry got to the window, the defendant showed the stunned boy a gun and told him that he was going to kill his mother. With this, the defendant fled before the police arrived.

Later that day, the defendant was in the presence of several acquaintances, when he told these people of his intention to kill his wife.

Within twenty-four hours of Sylvia's murder, the defendant made numerous calls to her residence. Sylvia refused to answer the phone. As a result, the defendant left messages on her answering machine. These messages illustrate the depraved heart of a killer and show the terror that Sylvia was forced to endure as she lived the last moments of her life.

The following highlights the verbatim threats that the defendant uttered to Sylvia as captured on tape:

"I'm coming to get you. I'm gonna play this game real smart. You, the police, no other mother fucker ain't gonna catch up to me. Bitch, you talking about changing you best change your address. Cause you can't live there too much longer. Understand this. You fucking with a gangster that kill, bitch, always did and always will."

"Bitch, I'm coming. Then I'll pour gasoline on you and set you afire. You need to watch me. You understand? Don't laugh and play, bitch cause this ain't no game no more."

"Whore, you better get me before I get you."

"Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday, I know when you leave out that door, I know where you'll go. I'm coming, bitch. And when I come I'm gonna pour gasoline on you and shoot your brains out. Understand me, this ain't no game, bitch, this shit is serious. I'm coming, bitch, one of them days, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday. I'm gonna shoot you in the head at...[Message ends].

True to his promise, the defendant knew where Sylvia would be at on the evening of November 26, 1999, the Friday after Thanksgiving. He knew that Sylvia and their son would be at an AA meeting in Harvey. He knew this because he attended these meetings in the past at Sylvia's request.

With this in mind, the defendant armed himself with a loaded handgun and boarded a bus for the meeting hall. The defendant arrived at the hall at approximately 7:15 p.m.

At the time the defendant entered the meeting room, Sylvia was sitting at a table reading literature that was passed out. Her son was sitting behind her. There were about a dozen people in the room. These people knew the defendant from his attendance at previous meetings. Most of them were aware of the abuse that Sylvia had gone through at the hands of the defendant. So their interests were immediately perked when they saw the defendant take a seat next to Sylvia. They heard the defendant tell Sylvia to leave the meeting with him. Sylvia didn't say a word. She continued to read her book and completely ignored the defendant. This angered the defendant, who got out of his chair, pulled out his gun and positioned himself immediately behind Sylvia. Then, to the horror of his young son and the rest of the group, he aimed the gun at the back of Sylvia's head, and fired two shots into the back of her head, killing her instantly. As the stunned group fled, the defendant fired at them.

The defendant tried to make good his escape. Once outside the building the defendant observed a woman parking her car. The defendant approached the woman, who was coming to the meeting and also knew the defendant from his prior attendance. The defendant pulled the woman from the car at gunpoint and got inside her car. However, his escape was thwarted when police officers, who were converging on the scene, blocked the car that the defendant was driving. As the defendant got out of the car, the officers recovered the murder weapon from the passenger seat. The arrest was witnessed by a number of the persons who observed the

shooting. Other witnesses identified the defendant in separate line-ups the following day.

TRIAL:

On February 19, 2002 the defendant waived his right to a jury trial and elected to take a bench trial before Judge Edwin Gaussein.

During the course of the trial, the People called seven eyewitnesses, who testified how they sat in shocked horror as they saw the defendant fire two bullets into the back of Sylvia's head from point blank range as she sat there reading. All seven eye witnesses knew the defendant. One of the eyewitnesses was the defendant's ten year old son.

In addition, the woman who was pulled from her car at gunpoint, also testified. She also knew the defendant because of his attendance at previous meetings.

Identification was not an issue.

ELIGIBILITY PHASE:

Following a finding of Guilty on First Degree Murder and Aggravated Vehicular Hijacking, on February 25, 2002 the defendant waived a Jury for the Eligibility Phase. Following arguments, Judge Gaussein found that the defendant was eligible for the death penalty based upon Chapter 720 ILCS 5/9-1(b)(11) in that

the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom.

HEARING IN AGGRAVATION AND MITIGATION:

Following a finding of eligibility, the defendant waived the Jury for the Aggravation and Mitigation phase of the Death Penalty Hearing.

During the course of this hearing, the People brought various witnesses to the stand, who testified to the other criminal acts committed by the defendant. The testimony of these witnesses demonstrated that the defendant was a life long criminal. Through their testimony the following convictions were made part of the record:

Robbery - 1979
U.U.W. by a Felon - 1980
U.U.W. by a Felon - 1982
Robbery - 1986
U.U.W. by a Felon - 1986
Delivery of a Controlled Substance on School
Grounds - 1990
Domestic Battery - 1997
Violation of an Order of Protection - 1997

The defense presented mitigation. Included in the mitigation was a psychiatric evaluation of the defendant that was performed by a court appointed psychiatrist. Also included, was a report of a mitigation expert hired by the defendant.

The Court appointed psychiatrist found that the defendant was fit to proceed. Though the defendant was prescribed an anti-depressant medication, the defendant was to take it at bedtime in order to induce sleep. The Court appointed psychiatrist found that the defendant was not suffering from a debilitating mental illness or defect. On the contrary, she found that the defendant has a personality disorder with anti-social features. An anti-social personality disorder is defined by the Diagnostic And Statistical Manual of Mental Disorders as "a pervasive pattern of disregard, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.

Furthermore, this treatise, which is the foundation for forensic psychiatry, goes on to state that such individuals "fail to conform to social norms with respect to lawful behavior. They may repeatedly perform acts that are grounds for arrest. Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profits or pleasure." This diagnosis fits the defendant perfectly.

Both the Court appointed psychiatrist and the defendant's own mitigation expert conducted interviews with the defendant's family members in order to get a social background of the defendant's earlier years. The picture painted by the defendant's mother and siblings is not a pretty one.

According to family members, the defendant was a troublemaker from his earliest years. At the elementary school level, the defendant was transferred from school to school because of behavior problems. The defendant beat his fellow students, he physically abused teachers, he would destroy property, steal property and was frequently truant.

This abusive, criminal anti-social conduct continued and escalated as the defendant entered high school. At the high school level, the defendant became a member of the Disciples street gang and resorted to drug dealing and drug usage. Ultimately, he was expelled from high school in his freshman year for a battery that he committed on a female student.

The defendant was no better in his home life. He was regularly abusive to his sisters. He would beat them and tie them up. His sisters were forced to call the police and have the defendant arrested for their own safety. The defendant's mother indicated to the Court appointed psychiatrist and mitigation expert that many times when she came home from work she would have to go to the police station to pick up the defendant because of the trouble he caused. As a matter of fact, on one occasion the defendant took a gun and shot up his girlfriend's parents home because of a dispute that he had with their daughter.

The defendant was the recipient of tough discipline on the part of his father. However, it was the defendant's abusive conduct toward other family members that led to such discipline.

The defendant's mitigation brought out the fact that the defendant was a substance abuser for a lengthy period of time. However, this must be looked at in the light of the fact that at several junctures of his criminal career, courts have placed the defendant in drug and alcohol rehabilitation programs but the defendant failed miserably.

In one program the defendant had sex with a female patient, resulting in the birth of twins. This happened during his marriage to Sylvia. Despite this, Sylvia was the inspiration for getting the defendant to join AA. However, the defendant, whose only concern was his own gratification, had no motivation to succeed. As a matter of fact, it was Sylvia's intent to better herself by kicking substance abuse and her insistence that the defendant do the same, that became a major contributing factor to her execution style murder at the hands of the defendant.

At this phase of the proceedings, the Court gave the defendant an opportunity to address the Court, but the defendant elected to remain silent.

In addition, the Court appointed psychiatrist found that the defendant was not mentally retarded but had a borderline range of intellectual ability with an I.Q. of 73.

Following the completion of this hearing, on February 27, 2002, the Court sentenced the defendant to the death penalty. On March 22, 2002, the defendant presented the

Court with a Motion to Reconsider its Ruling. Arguments were held on this Motion with no new evidence being introduced. On May 1, 2002 the Court denied the defendant's Motion and signed a Judgement and Execution Order.

PEOPLE'S MOTION TO DISMISS DEFENDANT'S PETITION FOR EXECUTIVE CLEMENCY:

Because petitioner's death sentence has not yet been affirmed by the Illinois Supreme Court on direct appeal, this petition for executive clemency is premature. The Illinois Constitution of 1970 expressly provides that "Appeals from Judgments of Circuit Courts imposing a sentence of death shall be directly appealed to the Supreme Court as a matter of right." Article VI, section 4(b). Pursuant to this provision, the Supreme Court promulgated Supreme Court Rule 606(a) which states that "In cases in which a death sentence is imposed, an appeal is automatically perfected without any action by the defendant or his counsel." Therefore, it is clear that all convictions resulting in death sentences must be reviewed by the Court before the defendant may be executed.

Due to this constitutional restriction, it is clear that no convictions resulting in death sentences are final prior to the completion of the Illinois Supreme Court's review on direct appeal. As the Court has long recognized, the completion of the direct appeal is a necessary element of criminal prosecutions. See People v. Mazzone, 74 Ill.2d 44, 46, 383 N.E.2d 947 (1978) (holding that a defendant's death while his appeal is pending requires the convictions to be abated *ab initio*); O'Sullivan v. People, 144 Ill. 604, 32 N.E. 192 (1892)(same); People v. Robinson, 187 Ill.2d 461, 462, 719 N.E.2d 662 (1999)(same). Thus, it cannot be disputed that in capital cases, the Court's affirmance is an indispensable component of a "conviction." Accordingly, because the Governor's clemency power is expressly limited to situations "after conviction" (Article V, section 12)(and in fact the practice has always been to wait until the completion of the entire appellate and post-conviction process), neither this Board nor the Governor may consider a clemency petition from petitioner until the finding of guilty and death sentence are affirmed by the Illinois Supreme Court.

However, without waiving the grounds set forth in the People's Motion To Dismiss, the People are responding to each allegation in the defendant's petition.

PETITIONER ALLEGATIONS:

Videotaping and Recording

The defendant's petition alleges that the defendant's conviction was based upon statements made by witnesses to the police that were not electronically recorded, and "on the testimony of an eyewitness who viewed a line-up prior to an in court identification". For the defendant to make these allegations totally and completely ignores the facts of this case. This is not a case where identification of the perpetrator was an issue. The defendant committed this murder in front of a number of people. He was arrested outside the building where the murder occurred as he attempted to flee. Seven eyewitnesses, who knew the defendant, including the defendant's own son testified to the fact that they saw the defendant stand behind Sylvia, aim the gun and fire two shots into the back of her head. The defendant's allegations completely ignore the facts. Nor does he allege that the results would have been otherwise if the witness statements were electronically recorded and the line-ups videotaped. To make such allegations under these circumstances is ludicrous.

Independent Analysis of Forensic Evidence

The defendant alleges that the forensic evidence used against him was not submitted to an independent lab for analysis. This allegation completely ignores the fact that the defendant's conviction was not based upon forensic evidence. The only forensic evidence introduced at the trial were the bullets that were removed from Sylvia's head and various ballistic material found at the crime scene. These items were fired by the gun that was in the defendant's presence at the time of his arrest. This evidence was entered by an agreed Stipulation with the defendant, through his attorney. This means that the defense did not dispute the authenticity and reliability of the Illinois State Police Crime Lab finding. How could this forensic evidence be an issue in a case where eyewitnesses saw the defendant fire the gun? Eyewitnesses saw the defendant leave the building with the gun in hand. Eyewitnesses saw the defendant use the same gun in the commission of a vehicular hijacking immediately outside the building. And the police arrested the defendant inside the car he hijacked, right outside the building where he committed the murder, with the murder weapon on the passenger seat.

If the defendant wanted to contest the forensic evidence, he certainly had an opportunity to obtain his own analysis. Rather the defendant stipulated to the forensic evidence because it was not an issue. This fact is conveniently omitted from the defendant's petition. Nor does the defendant allege that the results would have been different if he decided to have the forensic evidence evaluated by an independent laboratory.

People's Decision to Seek Death

The defendant claims his sentence should be reduced because the State's Attorney's decision to seek death was made without uniform protocols to guide his discretion and was not approved by a state-wide review committee. However, "it has long been recognized by the Illinois Supreme Court that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all. A prosecutor's discretion extends to decisions about whether or not the death penalty should be sought." People v. Jamison, 197 Ill.2d 135, 161-62, 756 N.E.2d 788 (2001). Therefore, any attempt to mandate such a review would constitute an impermissible restriction on the independence of the various State's Attorneys under the Illinois Constitution. Moreover, the defendant does not even allege much less argue that the decision to seek death in his case was the result of an abuse of discretion. Accordingly, it must be rejected.

Medical Capacity

The defendant alleges that he suffered from a history of extreme emotional and physical abuse and that he suffered from a reduced mental capacity and was "possibly" mentally retarded. As was shown previously in this response, a hearing in aggravation and mitigation was held. Two documents that were introduced by the defendant were a psychiatric report produced by a Court appointed psychiatrist and a mitigation report drafted by a mitigation expert, who was selected by the defendant. The Court took these reports into consideration in determining whether any mitigating facts existed that would preclude the imposition of the death penalty.

Both reports contain a social history of the defendant. Both reports fail to support the defendant's allegation that he had a history of extreme emotional abuse. Both reports indicate that the defendant was physically disciplined as a child and as a young adolescent. Most of this was brought upon himself because he physically abused his sisters. Be that as it may, the defendant was 37 years old at the time of this murder and had been removed from his father's discipline for almost 25 years.

Nor was the defendant a person of "reduced mental capacity" or "possibly" mentally retarded. The report of the court reported psychiatrist repudiates these baseless allegations. In addition, the defendant's social history indicates that he took regular classes in grade school and was enrolled in regular classes in high school before he was expelled. The defendant's problem in school was not his mental capacity but his bad violent attitude.

Furthermore, in Atkins v. Virginia, 122 S.Ct. 2242 (2002) the United State's Supreme Court noted that mental retardation is characterized as having a significantly sub average general intellectual functioning and significant limitations in adaptive functioning in a least two skill areas with the onset prior to age 18 (122 S.Ct. at 2245 n.3), the Court expressly stated that it was not adopting a definition of mental retardation and left it to the various states to adopt a definition of mental retardation and delineate procedures for determining whether or not a particular defendant is mentally retarded. Id. at 2249-50. Because Illinois has not yet adopted a definition of mental retardation nor has it crafted appropriate procedures, the defendant's claim is premature and should not be considered by the board at this time.

Allocation

The defendant's petition alleges that he was not given the right of allocation at his sentencing hearing. Again, the defendant resorts to yet another misstatement of the facts. The defendant was given an opportunity to address the Court at his sentencing hearing, however, the defendant elected to remain mute. Which, of course, is his right. Rather, the defendant chose to rely upon his witnesses in mitigation and his attorney's closing argument. Therefore, he was given every opportunity to present himself to the trier of fact before he was sentenced.

Eligibility Factors

The defendant asserts that he is entitled to clemency because he was found eligible for the death penalty based upon an aggravating factor other than those factors which the Governor's Commission has recommended be retained. Specifically, the Commission concluded that the current list of 20 factors is overly expansive and therefore unconstitutional. Accordingly, it was suggested that the list be reduced to just five factors: (1) murder of a peace officer or fireman; (2) murder of any person in any correctional facility; (3) multiple murder; (4) murder accompanied by the intentional infliction of torture; and (5) murder of a witness, prosecutor, defense attorney, juror, judge or investigator.

However, the Illinois Supreme Court has expressly rejected the Commission's logic and held that Illinois' death penalty statute satisfied the constitutional mandate because it "genuinely narrows the class of individuals eligible for the death penalty and reasonably justifies imposition of a more severe sentence on those defendants compared to others found guilty of first degree murder." People v. Ballard, ___Ill.2d___, 2002 Ill. LEXIS 376 at 73

(No. 88885 August 29, 2002)(citing Zant v. Stevens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983)). As the Ballard court explained, "there are innumerable examples of first degree murders that do not fit within any of the statutes' eligibility factors" and "each provision is narrowly tailored to fit specific set of facts and circumstances." Id., 2002 Ill. LEXIS 376 at 74.

Moreover, each of the aggravating factors represents a determination by the General Assembly that certain types of murders are so deplorable that the death sentence may be imposed. Each one is intended to ensure that the most helpless members of our society (such as children, the elderly or disabled, abused spouses) are protected against violence or to provide a strong disincentive for the offender to kill the victim. For example, cold, calculated and premeditated murders are properly death eligible because they are limited to situations where the defendant has carefully planned the murder over an extended period of time, and the availability of the death penalty may be the only thing which prevents these defendants from deciding to actually kill their victims. As the Illinois Supreme Court stated "a defendant who contemplated a murder for a substantial period of time, yet still commits it, is set apart from other murder defendants in a meaningful way." People v. Williams, 193 Ill.2d 1, 36, 737 N.E.2d 230 (2000). Similarly, murders in the course of another felony such as rape or home invasion are properly death eligible to help deter the defendant from killing the victim. Given these important policy considerations, defendant's request must be rejected.

Representation of Counsel

The defendant alleges that he is entitled to clemency of his death sentence because he was represented by only one attorney. The issue is not whether the defendant was represented by one attorney or a battery of lawyers. The issue is whether the defendant received effective assistance of counsel. At no time, does the defendant allege that he was not given effective assistance of counsel. The defendant was represented by the Cook County Public Defender's Office, who assigned a member of their Office to handle the defendant's case. In order to handle a Capital Case, the Assistant Public Defender must have achieved a grade or rank which would allow for appointment in such a case. The Assistant Public Defender that was assigned to represent the defendant held such a grade or rank within the Cook County Public Defender's Office. Furthermore, this Attorney has a great deal of experience in handling such cases.

Disproportionate Sentence

The Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by defendants in Capital Cases (see People v. Emerson, 189 Ill.2d 436, 727 N.E.2d 302 (2000); People v. Palmer, 162 Ill.2d 465, 491, 643 N.E.2d 797 (1994) and will vacate a death sentence if it determines that it is excessive in light of the facts of the case and the defendant's background (see People v. Smith, 177 Ill.2d 53, 685 N.E.2d 880 (1997); People v. Blackwell, 171 Ill.2d 338, 665 N.E.2d 782 (1996)). However, the Illinois Supreme Court has yet to address this issue raised by the defendant. To do so prior to this issue being decided by the Illinois Supreme Court would invade the province of the judiciary. Furthermore, an evaluation without the benefit of a transcript of the entire proceedings would sacrifice the fundamental principles of our legal system and make an enlightened decision impossible.

CONCLUSION

The defendant asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment which were not available at the time of his trial, petitioner claims that his trial (as well as that of every other capital defendant in Illinois) was by definition fundamentally unfair. However, the Illinois Supreme Court has expressly rejected the claim "that every capital trial has been unreliable and that all appellate review has been haphazard" (People v. Hickey, ___Ill.2d___, 2001 Ill. LEXIS 1080 at 57 (No. 87286 September 27, 2001)). Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they "function solely as devices to further protect those rights given to defendants by the federal and state constitutions" and that "a violation of procedures designed to secure constitutional rights should not be equated with a denial of those constitutional rights." Id. at 63, 64.

Thus, the fact that the Court, the General Assembly and the Governor's Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to the defendant's case. Instead, a true injustice would only result if it were reflexively determined that defendant's trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that the defendant has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings.

RECOMMENDATION

For the reasons previously given, the People of the State of Illinois request Governor George Ryan to deny the defendant's Petition for Executive Clemency.

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