

**OCTOBER 2002 SESSION
PRISON REVIEW BOARD
STATE OF ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. \
)	
vs.)	Inmate No. \
)	
ANDREW JOHNSON,)	
)	

I

HISTORY OF THE CASE

On July 15, 1986, a jury convicted petitioner, Anthony Brown, of first-degree murder, two counts of attempt murder, and armed robbery. On August 6, 1986, the Honorable Judge Thomas A. Hett sentenced him to death for the murder William Feuling and imposed a sentence of thirty years for the attempt murder of Arthur Kozak and thirty years for the attempt murder of Brian Walkowiak.

Petitioner appealed his conviction to the Illinois Supreme Court, which affirmed petitioner's convictions and sentence on June 25, 1992. People v. Johnson, 149 Ill.2d 118, 594 N.E.2d 253 (1992). Petitioner's Petition for a Writ of Certiorari was denied by the United States Supreme Court on January 11, 1993. Johnson v. Illinois, 506 U.S. 1056, 122 L.Ed.2d 138, 113 S.Ct. 986 (1993).

Petitioner subsequently filed a Petition for Post-Conviction Relief which was denied by the trial court. The Illinois Supreme Court affirmed the dismissal of the Petition for Post

Conviction Relief in People v. Johnson, 183 Ill.2d 176, 700 N.E.2d 996 (1998). Petitioner's Petition for Rehearing was denied on October 5, 1998. People v. Johnson, Ill. LEXIS 940 (October 5, 1998). Petitioner's Petition for a Writ of Certiorari was denied by the United States Supreme Court on March 8, 1999 in Johnson v. Illinois, 526 U.S. 1009, 119 S.Ct. 1150, 143 L.Ed.2d 216 (1999).

Petitioner subsequently filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois. U.S. ex rel. Johnson v. Cowan, # 99C5031. Respondent has filed an answer and the case awaits a decision by Judge Joan H. Lefkow.

II

FACTS OF THE CASE

The Crime

This case arises out of the brutal slaying by the petitioner and his accomplices, of William Feuling, and the near slaying of Art Kozak and Brian Walkowiak on Superbowl Sunday, January 20, 1985, in a crime characterized by the trial court as:

“A vicious, vicious murder by a person who got kicks out of watching somebody die after slashing their throat from ear to ear and then ordering two other people to be killed in his presence.”

On January 20, 1985, petitioner, Andrew Johnson and his co-defendant's, Torry Sanders, and Michael Hill went to Bill Feuling's home. Sanders had been an employee at a convenience store that was managed by Bill and owned by Bill's brother, Edward.

Bill invited the three men into his apartment, at which time Sanders introduced Andrew Johnson as “Charlie,” and Michael Hill as “Mike.” Also in the apartment were two of Bill's friends, Art Kozak and Brian Walkowiak. Bill offered everyone a beer and Johnson accepted. Bill went to the kitchen, got the petitioner a beer and when he returned, "Mike" went to the bathroom. When "Mike" returned, both Mike and the petitioner drew guns and Johnson announced a this was a robbery.

Petitioner directed "Mike" and Sanders to tie and gag Bill, Art, and Brian. Sanders bound the victims with electrical cord and speaker wire. Once the victims were bound and gagged, the intruders removed money from the pockets of the three men. Johnson then struck Bill in the face with the barrel of the gun demanding, “Where's the gun, where's the money.”

Petitioner then demanded money from Art, who told him that there was no more.

Petitioner told Art, "Well then, you have to die." After seeing Art's gold watch, petitioner took it, stating, "Well, this will let you go for a while." Petitioner then smashed an egg in Art's face and began laughing.

Petitioner went back to Bill and proceeded to drag Bill through the apartment, looking for guns and money. The two ended up in the dining room, where petitioner demanded that Bill hand over store receipts. When Bill refused and told petitioner that he did not have any receipts, petitioner stabbed Bill with a butcher knife he had taken from the kitchen. He held Bill suspended by his arm, and laughed while he repeatedly stabbed and slashed Bill's neck and torso. Bill died as a result of these injuries.

When Johnson was finished with Bill he told Sanders and Hill, "Now you each have to kill one." Sanders attempted to kill Art by stabbing him in the stomach and trying to cut his throat. Sanders then smashed Art's head with the hammer with such force that it broke the handle off. Petitioner took Hill's gun and pointed it at Brian. When Brian ran out the door, trying to escape the mayhem the petitioner and his cohorts were reeking inside that apartment, Sanders hit him with a fireplace iron. Petitioner then shot Brian in the shoulder.

Realizing one of their captives had escaped, Johnson and his co-defendants ran out behind Walkowiak trying to recapture him, however, Walkowiak was able to elude them through the help of a passing motorist. After telling the motorist what happened Brian was taken to a nearby hospital.

Petitioner and Hill then approached a man named Oscar Smith several blocks from Bill's apartment and tried to take his car at gunpoint. Petitioner tried to get Smith in the car with them. A struggle ensued, and the gun was knocked from petitioner's hand. The petitioner fled leaving the gun behind.

In the meantime, Art Kozak, his throat cut, stomach slashed and his hands bound behind his back, was able to knock a phone to the floor and hit the "O" button. Upon hearing

Art's description of what transpired, police were dispatched to the scene. Bill Feuling was dead by this time, and Art Kozak's was critically injured. Despite his life threatening injuries, Art was able to describe two of the three assailants. Unbelievably, as Art Kozak was attempting to assist the police, in walks Sanders accompanied by two uniformed police officers.

Sanders had approached two police officers and told them that a terrible crime was committed by "two guys" from the Cabrini Green housing project. Sanders led the police back to the apartment, and upon seeing him, Art identified Sanders as one of the assailants. Sanders replied, "I thought you were dead."

Extensive evidence was recovered, including the hammer handle, the fireplace poker, a scarf, video cartridge boxes, electrical cords and speaker wire and a knife. The apartment and items located therein, including a beer can, were dusted for prints. Eight ridge impressions found matched those of petitioner.

The following day, a blue parka, containing a CTA bus transfer dated January 20, a Joliet Correctional Center card bearing the number 44051 and the name A. Johnson, and a prescription label were found by Bill's brother in a stairwell in the apartment complex.

Both surviving victims identified petitioner in a photographic array and a lineup. Oscar Smith also identified petitioner from a lineup. Art, Brian and Oscar further identified petitioner in open court at trial.

At trial, petitioner denied being present at, or participating in the incident. He claimed to have been with his girlfriend until late in the afternoon when he went to get a bottle of schnapps and was robbed by a "couple of guys" of his coat (a navy blue knee-length trench coat and the only one he claimed to own), which held his parole officer's card, a prescription for medicine and a birth certificate. Petitioner claimed to have returned to his girlfriend's apartment.

Petitioner's girlfriend corroborated his alibi, testifying that he left her place for about forty minutes and was not wearing his navy-blue coat when he returned. She testified that

petitioner told her he was robbed at the store. Assistant State's Attorney George Ellison and Detective Ronald Branum, testified in rebuttal, however, that petitioner told them he did not tell his girlfriend that he was robbed.

On July 15, 1986 , the jury found petitioner guilty based on the aforementioned evidence. Sentencing proceeded before the Honorable Judge Thomas A. Hett..

The Sentence

The trial court took judicial notice of the jury's guilty verdicts of the charges of first degree murder committed during the course of an armed robbery, and after the defendant stipulated to his age, the trial court found petitioner eligible for the death penalty. In aggravation, petitioner's background was presented. It consists of the following: (1) a robbery conviction from 1982, for which petitioner was sentenced to four years probation; (2) a robbery conviction from 1983, for which he received a three year sentence in the Illinois Department of Corrections; (3) a residential burglary conviction from 1983, for which he received a three year sentence in the Illinois Department of Corrections.

Additionally, Cook County Department of Corrections Officer James McAuliffe testified to an incident involving an escape attempt by defendant.

Mr. Vern Feuling, victim William Feuling's father testified that petitioner's crime had a devastating impact on his family. Mr. Feuling had to seek counseling, could not sleep or eat properly, and affected the family members ability to earn a living. The "spirit and happiness" of the entire Feuling family was destroyed on the day that petitioner killed his son.

III.

REASONS FOR DENYING THE PETITION

THE NON-EXISTENCE OF THE RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT AT THE TIME OF PETITIONER'S TRIAL IN NO WAY RENDERS HIS CONVICTION AND SENTENCE UNFAIR OR UNJUST AND DOES NOT SUPPORT THE GRANTING OF CLEMENCY IN THIS CASE.

General Overview

Petitioner 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 proposed in the Governor's Commission on Capital Punishment which were not available at the time of his trial, petitioner claims that his trial 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 Governor's Commission has endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to petitioner's case. Instead, a true injustice would only result if it were reflexively determined that petitioner's trial was fundamentally unfair without any examination of the proceedings themselves. Additionally, with the exception of two specified claims, petitioner just

generally avers that the existence of the recommendations warrant a commutation of his death sentence to an “appropriate term of years”, without even attempting to demonstrate how the recent changes would have affected the outcome of the proceedings

With respect to those specified claims, petitioner ignores the fact that every court which has examined the proceedings in his case determined that they were fundamentally fair and that he was not unduly prejudiced in any manner. A detailed discussion of these particular claims follows.

1. Mental Retardation

Petitioner alleges that his death sentence should be commuted in light of Atkins v. Virginia, 122 S. Ct. 2242 (2002), because he is mentally retarded and that, therefore, the imposition of the death sentence violates the Eighth Amendment’s prohibition against cruel and unusual punishment. Although the Court in Atkins noted that mental retardation is characterized as having a significantly subaverage general intellectual functioning and significant limitations in adaptive functioning in at 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 the appropriate procedures, petitioner’s claim is premature and should not be considered by the board at this time.

The impropriety of this Board considering this claim is further buttressed by the petitioner’s Petition, which bears the following flaws. First, it presumes that the cutoff I.Q. is 75, where there are differing opinions as to what the precise indicator of mental retardation is. DSMIV

uses the demarcation line of 70 while B. Saddock & V. Saddock, in their Comprehensive Textbook of Psychiatry, use 70 to 75 as the cutoff score. Id. In a case such as this, where petitioner says that his lowest I.Q. is 71, the as yet unannounced standard supports the People's position that this claim is premature.

In addition, it must be stressed that the particular facts of this case do not support petitioner's claim of mental retardation where, to date, no tribunal has ever adjudged Petitioner mentally retarded. Nor has petitioner established the existence of other factors referenced in Atkins traditionally relied on to establish a claim of mental retardation; namely, that the onset of the mental retardation occurred before the age of eighteen, and, that the individual is lacking in adaptive skills. In terms of I.Q., onset before age eighteen, and lack of adaptive skills, the evidence produced by petitioner does not support a claim of mental retardation, and moreover, the record from this case is replete with evidence that directly repudiates such claim.

A. Petitioner's So-Called "Evidence of Mental Retardation is Fundamentally and Fatally Flawed."

Respondent has continuously challenged the validity of the underlying testing procedures utilized by his expert, Michael Gelbort, a neuropsychologist who first examined Petitioner eight years after he killed Bill Feuling and nearly killed Art Kozak and Brian Walkowiak, after trial, and after direct appeal to the Illinois Supreme Court. Gelbort determined that Petitioner had a full scale I.Q. of 74, a performance I.Q. of 82 and a verbal I.Q. of 71. These findings were made despite the fact that the testing procedures involved were, by his own account, flawed. Gelbort's report indicated that Petitioner was not wearing his bilateral hearing aids at the time of testing, and that the findings from the MMPI-II "need to be interpreted cautiously as the

validity scales were inconsistent with typical or “normal” patterns of responding.” Furthermore, after initially finding Petitioner to be in the lower end of the borderline range, only in response to a request from the defense, Gelbort filed an addendum to his second report, suddenly diagnosing Petitioner as mildly mentally retarded.

Furthermore, petitioner’s “evidence” that he was mentally retarded prior to the age of eighteen is based on childhood scores that likewise fall outside the DSMIV standard for mental retardation (verbal I.Q. of 75, performance I.Q. of 76, and full-scale E.Q. of 73.)

B. Petitioner’s Claim of Mental Retardation is Further Undermined by the Reports of Four Mental Health Care Professionals Whose Findings Are Inconsistent With Gelbort’s

As Respondent has continuously argued, the validity of Gelbort’s diagnosis is further undermined by the reports of four other mental health care professionals, who examined Petitioner long before Gelbort did and whose findings are not consistent with Gelbort’s. None of these four doctors, Dr. Monte Williams, Dr. Tom Collins, Dr. Renato de los Santos, and Dr. Bradley Gordon, all of whom examined petitioner found the presence of mental retardation – at most, some found that petitioner had borderline intellectual functioning. Some of their findings consist of the following:

- possible borderline intellectual functioning and a well-developed antisocial personality disorder – petitioner is “a fairly street sophisticated individual with some possible intellectual deficit, but most likely able to function in the low-average range.
- petitioner has a behavioral problem rather than a psychiatric problem, with no indication of a formal thought disorder, rather, a passive/aggressive personality disorder
- petitioner is logical, oriented in all spheres, has a good memory, good attention and concentration, and a below average to average intellect.

- petitioner’s reasoning, insight, and judgment are not impaired
- petitioner is coherent, logical, oriented in all spheres, has a good memory, good attention, good concentration, and below average to average intellect.
- petitioner’s reasoning, insight and judgment are not impaired and there is no evidence of psychopathy
- petitioner does not have borderline intellectual functioning but does have an antisocial personality disorder
- petitioner is alert and oriented as to all four spheres, has no disorder of thought form, has a low level intellect for his stated age, fair reasoning, fair attention, and fair concentration.
- petitioner has borderline intellectual functioning and mixed personality disorder with paranoid and antisocial features.

C. Petitioner’s Claim of Mental Retardation is Further Undermined By His Own Testimony.

For sixty-six pages of the record in which Petitioner managed to give detailed and coherent testimony intended to extricate himself from involvement in these murders. They do not paint the portrait of a mentally retarded individual. Furthermore, as noted by the trial court, the particular facts of this crime reveal petitioner to be a vicious executioner who directed the actions of his co-offenders, tortured his victims, and reveled in the killings. The petitioner was the leader of this crime, not the follower he made himself out to be.

No question of mental retardation was raised by petitioner until the time that he filed a petition for post-conviction relief, despite the facts that: (1) he was previously charged and convicted of three other, unrelated crimes; (2) he was appointed a mitigation specialist at sentencing, who thoroughly investigated his background and interviewed family members; (3) his family/friends were afforded, and availed themselves of the opportunity to testify on his behalf at his sentencing hearing. Nevertheless, no one perceived the presence of a mental retardation issue until this case was in a post-conviction posture. There is simply not, as petitioner claims “substantial and credible” evidence that he

is mentally retarded.

2. Whether the Race of the Defendant or Victim Played a Role in the Death Sentencing Process

Petitioner asks this Board to revisit a claim decided adversely to him by the Illinois Supreme Court in People v. Johnson, 183 Ill.2d 176, 189, 700 N.E.2d 996 (1998) as a basis for the granting of executive clemency. Some factual background will be provided in order that the Board may see that this claim is wholly unsubstantiated by the record.

At trial, petitioner was represented by Gary Brownfield, then, an experienced and talented Assistant Public Defender, and presently a sitting circuit court judge in Cook County. Early in the course of voir dire, he said the following:

“Judge, I believe in that twenty-seven there has only been three blacks and the State has knocked off all three blacks.”

The People responded:

“That’s not true. That’s not true.”

Co-defense counsel then said:

“Two.”

The People replied:

“Maurice Miller is black, left on.”

Mr. Brownfield asked:

“What number is that?”

The People responded:

“Number thirteen.”

“Thirteen”

Mr. Brownfield then stated:

“I’m sorry. I withdraw my objection.”

Based on the foregoing, petitioner argued that he was denied effective assistance of counsel, because trial counsel should have requested a Batson hearing to determine whether the People were improperly exercising peremptory challenges. The only “evidence” corroborating his claim was two sets of handwritten notes which he alleged were taken by his defense attorneys contemporaneously with voir dire.

The Illinois Supreme Court rejected this claim in its entirety, based on the following:

1. The notes were not supported by affidavit or authenticated in any manner. This was in clear violation of Illinois law which, required an accompanying affidavit to identify with reasonable certainty the source, character, and availability of the alleged evidence.

People v. Johnson, 183 Ill.2d at 191.

2. Even if the notes were properly supported, their contents were too ambiguous to support petitioner’s claim, where:

- o the race of all of the venirepersons was not recorded
- o the two sets of notes contained disparities in the race recorded for several venirepersons

People v. Johnson, 183 Ill.2d at 191

3. The juror information cards contained absolutely no information indicative of the race of the stricken venirepersons.

People v. Johnson, 183 Ill.2d at 191.

Petitioner’s claim that his death penalty sentence should be commuted because members of the jury panel were stricken by reason of their race should be rejected outright, where no evidence exists to suggest that any individual was stricken as a result of race. Rather, the withdrawal of the objection by Mr. Brownfield and his continuing silence throughout the trial and to date counter any claim concerning the propriety of the People’s use of peremptory challenges.

CONCLUSION

For all these reasons, the People of the State of Illinois respectfully request that this Board and Governor Ryan deny executive clemency to Andrew Johnson.

Respectfully submitted,

RICHARD A DEVINE
State's Attorney of Cook County

PATRICIA SUDENDORF
MICHELLE KATZ

Dear Patti,

This is a revised version of the original draft. I am interoffice mailing you a diskette with this version as well as a hard copy. I'm working today and tomorrow from 6:00 to 2:00. I will not be back in the office until next Tuesday due to Yom Kippur.

Thanks,

Michelle

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RICHARD A DEVINE
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