





him for the Sims murder. (Appellant's Brief following Resentencing, Illinois Supreme Court at 41) Brown was wrong. Judge Strayhorn found that Brown was eligible for the death penalty for the Sims murder on the ground that he had committed multiple murders and that the murder of Curtis Sims was committed in a "cold, calculated and premeditated" manner. The judge found that there were no mitigating factors sufficient to preclude imposition of a death sentence.

While Brown's appeal from his first death sentence for the Sims case was pending, the appellate court reversed defendant's conviction of the Boelter murder for an error in the jury instructions, and remanded the cause for a new trial in an unpublished order. The Illinois Supreme Court affirmed Brown's first-degree murder conviction for the Sims murder but vacated the death sentence and remanded the cause for a new sentencing hearing on the ground that Brown's waiver of a jury for sentencing was invalid. People v. Brown, 169 Ill. 2d 132 (1996).

On February 24, 1997, following the remand, Brown was again convicted of murdering Delvin Boelter, this time in a bench trial before Judge James Schreier. Brown was found guilty of first-degree murder on the bases of felony murder and intentional murder under an accountability theory, and he was sentenced to thirty years' imprisonment. This is the murder for which Brown now seeks a pardon, and which forms the basis of eligibility for his death sentence for the Sims murder, under a multiple murder theory. The Appellate Court, First District, affirmed defendant's first-degree murder conviction on both bases -- noting that the judge properly found Brown guilty of first-degree murder of Delvin Boelter even if one of Brown's gang cohorts actually fired the fatal shot. "Defendant, armed with a .9

millimeter automatic handgun, conspired with a group of individuals bent on murder, with the knowledge that random rival gang members or police could be killed.” People v. Brown, 1-97-1342 at 15. The Appellate Court also found that Brown was properly held accountable for his companions’ actions that resulted in Boelter’s death-- “[l]ying in wait in an alley in an area full of rival gang members with loaded weapons, it is likely that someone other than the intended target would be hurt by defendant or one of his companions.” Id at 19.

After the Delvin Boelter case was retried and affirmed, in August 1999, Brown proceeded to a new sentencing hearing on the Sims murder before Judge Colleen McSweeney-Moore. A jury found Brown eligible for the death penalty based upon the multiple murder factor, and -- after listening to more than twenty mitigation witnesses for the defense -- unanimously concluded that there were no mitigating factors sufficient to preclude imposition of a death sentence. Brown’s appeal from his second death sentence is awaiting a decision from the Illinois Supreme Court; the case was argued in May 2002. Brown also filed a post conviction petition, which was denied as untimely in May 2001, and the denial is currently pending before the Illinois Appellate Court.

Brown reprises many of these claims in his petitions for executive clemency. For the reasons that follow, the People of the State of Illinois respectfully request that Governor Ryan and this Board reject Brown’s bid for executive clemency and pardon.

## II

### FACTS OF THE CASES

1990 was a big year for Cortez Brown as he rose up in the ranks of the Gangster

Disciples. Brown had risen from a "soldier" dealing drugs on the street up to an "enforcer" who was armed and entrusted to protect gang operations. (R. 943) As the year began, Brown was on felony probation for drug cases -- but on December 28, 1989, Brown was the triggerman in a drive-by attempt murder a rival gang member, seventeen-year-old Ramonde Sims, as he walked to his grandmother's house on a snowy morning. Brown shot him in the head, but Ramonde managed to survive. Brown was not arrested and Curtis Sims and Delvin Boelter would not be so fortunate.

In the early morning hours of June 8, 1990, Brown and his cohort, Dwayne Macklin, decided to go out hunting "Vice Lords." Curtis Sims, a father of four small children, was sitting on the porch with his friend, Christopher Posey. Sims' wife was nine months pregnant with their fifth baby, and his oldest, a son, was nine. Suddenly, without warning, two men appeared out of the darkness and started firing, and Posey fled into the house. Curtis Sims could not escape - he was shot three times in the back, buttocks and leg, by bullets fired from an Uzi and a .9 millimeter handgun. Curtis lived for a day after he was shot, but not long enough to see the birth of his youngest child. Cortez Brown's accomplice, Dwayne Macklin, was arrested, but Cortez and his Uzi were still on the loose.

Curtis Sims' death and Dwayne Macklin's arrest did not give Cortez Brown pause in his deadly war on behalf of the Gangster Disciples. The Gangster Disciples and Black Disciples were engaged in a brutal war, such that members of each group pledged to kill any members of the other group they encountered on the street. Cortez learned that a Black Disciple named "Zeb" purportedly had a "hit" out on him. Therefore, on the night of September 16, 1990, Cortez and three other Gangster Disciples armed themselves with an Uzi, a sawed-off shotgun, and two handguns with the stated purpose of killing Zeb. They secured an area surrounding an alley in

hopes of trapping Zeb; but, after the shots were fired, Cortez Brown and the others learned that a different Black Disciple, Delvin Boelter, was killed. Although he was a Black Disciple, Delvin Boelter was the brother of Gangster Disciple Dwayne Macklin, Cortez Brown's accomplice on the Curtis Sims murder.

Boelter's murder did not cause Cortez Brown to change his violent ways or prompt him to cooperate with authorities in stopping the bloodshed; Brown's summer of terror still was not complete. On September 18, 1990, two days after Boelter's murder, Brown and his cohorts accosted a man, Sylvester Taylor, shortly after he dropped his family members off at a home near 74<sup>th</sup> and Kenwood in Chicago. Brown climbed into Mr. Taylor's Toyota Four-Runner and his accomplices ordered Mr. Taylor, at gunpoint, to surrender his jewelry, his jacket, his prescription eyeglasses, and his shoes. Brown then drove Taylor forty blocks away and ordered him out of the car.

Two days later, on September 20, 1990, Cortez Brown was a passenger in the stolen Toyota when a Park Forest police officer attempted to detain the car in a traffic stop. The driver of the Toyota refused to stop, and the police gave chase. Cortez Brown jumped from the moving Toyota and ran into a wooded area. When he was finally apprehended, the nineteen-year-old Brown had turned his coat inside out and initially tried to tell the officers he was a fifteen-year-old suburban teen named Richard Mitchell. Fingerprints ultimately revealed his true identity as the individual who was wanted by the Chicago police for murder.

Brown gave court-reported statements to police which outlined the events surrounding the two murders. Brown confirmed that, when Sims was killed, he went with Dwayne Macklin to shoot some Vice Lords; but he claimed that Macklin carried the Uzi and he just held a .25

automatic handgun in his pocket as Macklin fired the shots. Regarding the killing of Delvin Boelter, Brown said that he and his three gang cohorts armed themselves and went out to kill Zeb, a rival Black Disciple; Brown initially claimed that he was just a lookout, but then he admitted that he was armed with a .9 mm handgun, while the three other men carried the Uzi and two other guns. Brown admitted that he was watching for the police and blocking the alley to see if Zeb came his way. He said he heard gunfire, and the other two men came and reported to him that they “got Pud.”

Cortez Brown has twice been adjudged guilty of the first-degree murder of Delvin Boelter; once by a jury, and once by a judge; the most recent conviction was affirmed by the appellate court in 1997. Cortez Brown’s conviction for the first-degree murder of Curtis Sims, imposed by Judge Strayhorn, was affirmed by the Supreme Court in 1996. During the decade this case has been pending, Cortez Brown has yet to express remorse or responsibility for his actions – he is sorry only for the consequences he has been required to bear.

### III

#### REASONS FOR DENYING THE PETITION

##### Brown is Guilty of Murdering Delvin Boelter

Cortez Brown's request for a "full pardon" for the Delvin Boelter murder simply strains credulity, and is just one more example of Brown's continuing refusal to take responsibility for his actions. Brown believes that he is not guilty of murdering Delvin Boelter because Boelter was not his victim of choice -- it was Zeb he was looking for. As Brown notes in his petition (Scheidel petition, p. 5), Delvin Boelter's brother, Dwayne Macklin, had been Brown's "companion on many occasions in the past" -- most notably, the murder of Curtis Sims. The fact that Brown liked many Black Disciples does not exculpate him from this murder.

Cortez Brown was adjudged guilty of first-degree murder of Delvin Boelter on two distinct grounds of accountability and felony murder. The People have never maintained that Brown fired the shot that killed Delvin Boelter. Brown does not -- and cannot -- deny that he armed himself and went to the alley that night with three armed cohorts, who had the stated goal of finding, capturing and killing Zebedee Thomas. By participating in this conspiracy, Brown was guilty of the felony of attempt murder. Illinois law has long been clear that a person is culpable for the acts of another which are foreseeable consequences of the crime and, as the Appellate Court observed, death of another rival gang member or police is certainly a reasonable consequence of these acts. The area was frequented by rival gang members and patrolled by the police. People v. Brown, 1-97-1342 (December 21, 1998) (p. 15). Similarly, Brown was accountable for the acts of the three gang members he was with. Although he claims to like some members of the Black Disciple street gang, and stresses his family connection with the organization, Brown does not

deny that he went to 58<sup>th</sup> and Union on September 20, 1990, with the intent to avenge a “hit” that was placed on him and to further the war against the Black Disciples. Brown was properly held accountable for Boelter’s murder because, “[l]ying in wait in an alley in an area full of rival gang members with loaded eapons, it is likely that someone other than the intended target would be hurt by [Brown] or one of his companions.” People v. Brown, 1-97-1342 (December 21, 1998) (p. 19)

It also bears noting that, despite his alleged love for Delvin Boelter and professed sorrow at his death, Brown fled the scene and made no effort to secure help for the murdered man. Days after the murder, Brown was out on the street committing an armed carjacking and robbery. Brown did not stop his summer of violence until he was forced to do so--after jumping from a moving car and running through a forest. Even when caught, Brown tried to wriggle away by lying about his identity and pretending to be a juvenile. As a felony probationer, Brown knew how to work the system. Brown did not alert the police to the identity of the gunmen who fired the shots that killed Delvin Boelter until he himself was being questioned as a suspect in the murder. Brown’s bold request for a “full pardon” for his role in Delvin Boelter’s murder is an insult to this Board and makes manifest his continuing refusal to accept responsibility or show remorse for the consequences of his actions.

#### The Ryan Commission Recommendations have No Impact Upon this Sentence

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 adopted, proposed or enacted. Indeed, Brown makes the bizarre, unsupported claim that, under the rules, “every piece of inculpatory evidence would have been excluded as unreliable.” (Stainthorp Petition at 8; Schiedel Petition at 6) This observation reflects a lack of understanding. 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 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. It is telling, however, that petitioner has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings -- besides claiming that his court-reported confessions should have been videotaped.

Petitioner also seeks clemency because his court-reported statements where he inculpated himself were admitted into evidence even though they were not videotaped, and points out that under the Governor's Commission's proposals both statements and the interrogations

leading up to them should be videotaped. What petitioner fails to recognize is that neither the Commission nor the governor himself call for the suppression of a statement simply because it was not videotaped. Rather, even under the Governor's proposed legislation (HB3717 & HB2058), such statements will still be admissible if the trial court finds that it was voluntarily made after considering the totality of the circumstances. Because the trial judge expressly found that petitioner's statement was voluntarily made when it denied his motion to suppress statements, it is clear that the failure to videotape his court-reported statements had absolutely no effect on the fairness of his proceedings. Moreover, because the jury was instructed pursuant to Illinois Pattern Instruction 3.06-3.07 to consider all the evidence when determining whether or not petitioner made the statement and how much weight it should be given, petitioner cannot complain that he was prevented from asserting at trial that his statement was unreliable and should not be considered.

Petitioner claims that he is entitled to clemency because he requested a lawyer while he was being interrogated but was not appointed an attorney until he appeared in court. He points out that under the Governor's Commission proposals, the public defender would be allowed to represent any suspect in a potentially capital case who requests to speak to a lawyer during an interrogation. However, petitioner fails to mention that the trial court expressly found that he did not unequivocally request an attorney during his interrogation. Judge Strayhorn heard Brown's testimony on this issue, and did not find it credible. People v. Brown, 169 Ill. 2d 132, 150 (1996). As the Supreme Court noted, in Brown's court reported statement, he said that he understood he had the right to have an attorney present but said that he nonetheless wanted to go on with his statement. *Id.* at 150. Therefore, even if this proposal had been in effect at the time of petitioner's arrest, it would not have applied to him.

Petitioner also claims -- for the first time -- that the lineup and photo array conducted in his case were unfair and could have resulted in a misidentification. (Stainthorp Petition at 9) This claim is very curious in light of the fact that Brown never has denied -- and still does not deny -- being present at the scenes of the murders. Moreover, police witnesses identified Brown as running from the Sims murder scene.

Petitioner 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, "[i]t has long been recognized by th[e Illinois Supreme C]ourt 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. Accordingly, it must be rejected.

Petitioner asserts that clemency is warranted because the statutory language and corresponding jury instruction that after considering all of the evidence that "there is no mitigating factor sufficient to preclude the imposition of a death sentence" led the jury to mistakenly believe that the death penalty is mandatory. However, both the Illinois Supreme Court and the federal courts have consistently rejected any claim that the statute is confusing and might lead a jury to believe that the death penalty is mandatory. See People v. Mitchell, 152 Ill. 2d 274, 346, 604 N.E.2d 877 (1992); Silagy v. Peters, 905 F.2d 986, 998-99 (7th Cir. 1990). Moreover, because both the prosecution and the defense argued to the jury about the appropriateness of the death

sentence in petitioner's case, any confusion in the language of the instruction was negated by the closing arguments.

Petitioner asserts that his sentence should be commuted because the judge was not given the opportunity to override the jury's decision to impose the death penalty. Petitioner is wrong, however, because Illinois judges have long had the inherent authority to grant a new trial or sentencing hearing (or even enter a judgment notwithstanding the verdict). Brown's first death sentence was imposed by Judge Strayhorn. Because Judge McSweeney-Moore, who presided over Brown's second death sentencing hearing, denied his post-sentencing motions, it is clear that the judge would not have overridden the jury's verdict.

#### Brown's Court-Reported Confessions Were Voluntary

Brown now claims that his court-reported statements were involuntary, because he claims that two detectives "repeatedly struck on him on the chest, hands and legs" until he agreed to make a statement. Brown does not identify which detectives purportedly committed these acts, and he does not attempt to point to any evidence which could support his claim. Also, Brown's approach to this claim has been decidedly inconsistent -- since the denial of his motion to suppress, this claim emerges only when it suits him, and only when it cannot be subject to scrutiny.

Brown raised this claim in the appeal of his death sentence in 1996; the Illinois Supreme Court rejected it, noting that Brown's claims of threats and coercion at Area Three police headquarters was "directly contradicted by all three of the detectives and the assistant state's attorney who questioned the defendant." Brown, 169 Ill. 2d at 147. Further, the Court noted, Brown's "claim of physical abuse was undercut by the paramedic's report indicating that, on September 22, 1990, the defendant had no health complaints and bore no signs of physical injury."

The Court observed also that, when Brown gave his court-reported statement, he “expressly stated that he had no complaints about the treatment he had received from the police.” Id. The Court affirmed Judge Strayhorn’s determination that Brown’s confessions were voluntary.

Brown did not raise this claim of involuntariness in his second death sentencing hearing, and it is not mentioned in his briefs before the Illinois Supreme Court. During his sentencing hearing, on August 26, 1999, before the detectives were called to testify, Brown’s defense lawyers said that they were not contesting the voluntariness of the court-reported statements or claiming coercion. (R. 605) In closing arguments in the eligibility phase, Brown’s lawyer attempted to characterize Brown as a callow youth who did not even request a lawyer before giving the court-reported statements. (R. 721) These conflicting approaches are just another example of Brown’s efforts to manipulate the facts and time his arguments to suit his purposes.

Brown also creates a misleading portrayal of the officers who questioned him. There is no allegation that Commander Jon Burge was involved in his investigation or questioning in any way. There is absolutely no support for his claim that any of the detectives involved in his questioning were ever found to have engaged in physical mistreatment of any suspect. In the case he cites, People v. Clemon, 259 Ill. App. 3d 5 (1<sup>st</sup> Dist 1994), the “oppressive” condition which formed the basis for suppressing a confession was the result of having eleven suspects held together on the station floor; not on the basis of any alleged beating. Judge Strayhorn was the trial judge who found the “oppressive” environment in the Clemon case; in contrast, he rejected Brown’s claims of brutality in this case as incredible. Brown is simply trying to mislead this Board and raise his claims in a forum where he believes they cannot be scrutinized by cross-

examination and need not be supported with evidence. Judge Strayhorn and the Supreme Court fairly considered these claims and rejected them as incredible; this Board should do the same.

#### The Order of the Docket Was Proper

Brown argues that the death sentence was imposed upon him because the People “manipulated” the docket to ensure that one case was tried before the other. (Stainthorp Petition at 11-12) For these purposes, Brown does not contest that he was adjudged guilty of two first-degree murders, he just believes that he should have been able to use appellate rulings and retrial rules to his advantage, to compel the courts to reverse the original order of trials and thus render a death sentence impossible. Brown ignores the crucial fact that the cases proceeded in exactly the same order as they were tried initially, before the appeals process. It is the fact of two convictions for first-degree murder -- not the order of the conduct involved -- that rendered Brown eligible for the death sentence under the multiple-murder factor.

Every court that has ruled on Brown’s claim of “docket manipulation” has rejected it; his claim on this issue is also pending before the Illinois Supreme Court. Judge McSweeney-Moore ruled that the “case law is crystal clear” that a prosecutor has the power and right to set the order in which cases are tried, and she found “as a matter of fact and as a matter of law that the State is not engaging in any professional impropriety, nor are they trying to manipulate the docket.” (R. 28) Judge McSweeney-Moore explained that the cases were simply proceeding in the same order as they were tried before the appeals process began. When Brown raised this issue in his appeal from his retrial on the Delvin Boelter case, the appellate court rejected his claim and held that “[t]here is no problem with the order of the cases brought, either on the grounds that the prosecutor acted arbitrarily and capriciously in manipulating court dockets or on grounds of

prosecutorial misconduct.” People v. Brown, 1-97-1342 (December 21, 1998) at p. 20-21.  
Brown’s claims of error are meritless.

#### Brown’s Death Sentence is Not Disproportionate -- He Killed Two People.

Brown’s lawyers would have this Board believe that the murder of Delvin Boelter is insignificant. Brown claims that his co-defendant (presumably Dwayne Macklin) , pled guilty to murder and received a 35 year prison term. Brown complains that Macklin was more culpable in the Sims murder, and apparently argues that he received a death sentence simply because he went to trial on the Sims case. (Stainthorp Petition, 12-13) Brown blithely brushes aside the murder of Delvin Boelter as if it did not exist. Brown was found eligible for the death penalty for the Sims case because -- unlike Dwayne Macklin -- he was convicted of two murders. Brown’s request for commutation to a sentence of 30 to 60 years’ imprisonment treats the Boelter murder as a nullity. The minimum sentence he could receive for two murders is natural life. Brown’s casual approach to his two convictions for first-degree murder is just another example of his unwillingness to take responsibility for his actions, and an arrogant belief that the rules do not apply to him.

#### Brown’s Sentencing Hearing Was Proper

Brown also tries to argue that he is entitled to clemency because he believes the People made improper closing arguments to the jury. Again, without support or specific example, Brown makes the bold and offensive allegation that the People attempted to attack his religion, his membership in the Nation of Islam. Of course the People did not at any time allege or imply that Brown should be perceived negatively because he is a member of the Nation of Islam. Brown is simply trying to make a dramatic claim without basis in actual fact. Tellingly, Brown did not raise this issue until long after his trial.

A review of the record quickly dispels Brown's claim that the People engaged in any improper actions. This issue was raised and argued before the Illinois Supreme Court in May 2002. While an opinion has not yet been issued, it was observed in oral argument that it was Brown's lawyer -- not the prosecutors -- who initiated questioning of defense witnesses concerning any racism or violence in connection with the Nation of Islam. The People did question Brown's expert witness, Dr. McCloud, regarding her evasive responses to defense questions concerning the history of the Nation of Islam, but the People did not in any way, shape or form attack the Nation of Islam or its adherents, and the People did not imply that Brown himself is violent because he is a member of the Nation of Islam. .By purporting to analogise his case to Christian and Moslem conflict, Brown makes a thinly-veiled attempt to capitalize on current world events in an effort to draw attention to his spurious argument.

Brown finally claims that his conduct in prison shows him to be deserving of mercy. In the decade this case has been pending, Cortez Brown has yet to express remorse for the family of Curtis Sims, or apologize to the five children he left without a father. Brown does not deny that he killed Curtis Sims, but he has never taken responsibility for his actions. While Cortez Brown claims to have been saddened that Delvin Boelter was shot, he has never acknowledged his responsibility for the events leading up to his murder. Cortez Brown stopped his violent attacks only when he was captured, and he has become reformed only when confronted with a death sentence.

**NOTE---** Samuel Bryant, high ranking Gangster Disciple leader, large scale narcotics distributor, attended Brown's trial in 1992 and came to visit him in Cook County Jail in 1996.

Cortez Brown was not sentenced to death because of the order of the proceedings or because he adheres to the Nation of Islam. Cortez Brown was sentenced to death because, while on felony probation, in the space of a several months, he committed an escalating, deadly series of crimes, beginning with a drive-by attack on Ramonde Sims and culminating in the separate killings of two unarmed men. Days after the Boelter murder, Brown hijacked Sylvester White's vehicle at gunpoint. Cortez Brown and his gang cohorts armed themselves and took to the streets, and he stopped only when he could run no farther. Cortez Brown has never expressed remorse for his actions – he is sorry only for the consequences he has been required to bear.

Over the past decade, Cortez Brown has been afforded every right due him under the state and federal constitutions. His most recent appeal is fully briefed and argued and awaiting decision by the Illinois Supreme Court. Cortez Brown is deserving of the death penalty, and the jury's verdict should stand.

### **CONCLUSION**

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

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