

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | Docket No. _____ |
| vs. |) | |
| |) | Inmate No. B-70088 |
| DAVID HARRIS |) | |
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SUBMITTED TO THE HONORABLE GEORGE RYAN, GOVERNOR
OF THE STATE OF ILLINOS

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**PEOPLE’S RESPONSE IN OPPOSITION TO PETITION
FOR EXECUTIVE CLEMENCY**

—————
HEARING REQUESTED

RICHARD A. DEVINE
STATE’S ATTORNEY OF COOK COUNTY

By: BRIAN SEXTON
RICHARD G. CENAR, JR.
WILLIAM D. CARROLL

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I.

PROCEDURAL HISTORY

On the night of June 7, 1993, while attempting his third carjacking at gunpoint in less than a week, Petitioner David Harris shot and killed 71-year-old Clifford Chase as Mr. Chase sat in his Chrysler New Yorker in the parking lot of a grocery store. Mr. Chase had been there simply to buy a gallon of milk for breakfast the next morning. Petitioner murdered Mr. Chase because, unlike the two previous carjackings where the victims surrendered their automobiles to Petitioner, Mr. Chase refused to give up his car to Petitioner and his three co-defendants.

Petitioner was charged by indictment with first degree murder and attempted armed robbery for the June 7, 1993 shooting death of Clifford Chase. A jury found petitioner guilty of the above charges. Petitioner waived a jury for the capital sentencing hearing. On August 30, 1995, following that hearing, the trial court sentenced petitioner to death. On direct appeal, the Illinois Supreme Court affirmed the judgment of the trial court. People v. Harris (Harris I), 182 Ill. 2d 114, 695 N.E.2d 447 (1998). Petitioner subsequently petitioned for relief under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq.). On April 24, 2000, in a

detailed written opinion, the trial court granted the People's motion to dismiss petitioner's petition and amended petitions for post-conviction relief. On appeal, the Illinois Supreme Court ordered that an evidentiary hearing be held on the issue of whether trial counsel was ineffective for failing to investigate and present mitigation at sentencing, but affirmed all other aspects of the trial court's decision dismissing the petition. People v. Harris (Harris II), ___ Ill. 2d ___, 2002 Ill. LEXIS 343 (No 89796, filed June 20, 2002).

II.

STATEMENT OF FACTS

The last time that the victim Clifford Chase and his wife, Bernice, would ever see a movie together was the night of June 7, 1993. the two were at their home at 7914 South Wentworth in Chicago that evening. (R. 281)¹ They ate dinner, and then watched a rental movie. (R. 281) Afterwards, the victim and Bernice talked and laughed about the movie, and then the victim decided to return the videotape. (R. 281) The victim left the house around twenty minutes to nine, driving his beige Chrysler New Yorker. (R. 281) Bernice became worried when the victim did not soon return. (R. 282) Her worst fears were justified when later that night a police officer came to her house and told that her husband of forty years had been shot and killed. (R. 282) According to Bernice, the victim would stop at the Chatham Food and Liquor store to purchase milk for his morning cereal. (R. 283)

On the evening of June 7, 1993, 27-year-old Theodore Traylor was standing at 67th and Ada in Chicago with Antoine Moore (age 16). (R. 351-52)² had met Moore about one and one-half months earlier through Traylor's nephew and because Moore lived down the street from

¹ The People will refer to the record in the following manner; the Report of the trial Proceedings as (R.____); the Common Law Record of the Trial as (R.C.____); the Post-Conviction of Proceedings as (PCR.____); and the Post-Conviction Common Law Record as (PCR.C.____).

² Traylor admitted having been convicted in 1992 of the felony offense of possession of a controlled substance with intent to delivery, and receiving a sentence of probation. (R.351)

Traylor. (R. 352) At approximately the same time the victim was leaving to return the video rental, a gray Mercedes Benz pulled up to Traylor and Moore. (R. 352) Inside the Mercedes were petitioner (age 18), Demetrius Daniels (age 16) and Howard McClinton (age 14) (whom Traylor knew as "Allen"). (R. 352, 353, 375-76, 377-78, R.C. 5-6) McClinton was the driver. (R. 354) Traylor had only known petitioner, Daniels and McClinton for one or two weeks. (R. 353-54) At that time, Traylor did not know that the others were teenagers. (R. 378-79) According to Traylor, "[t]hey carried themselves around as adults"; Traylor thought that McClinton was at least eighteen. (R. 379) The three got out of the Mercedes to talk to Moore. (R. 354) Moore then told Traylor that the three would drive Traylor to his home at 79th and Woodlawn. (R. 354)

While in the car, Traylor listened as the others talked about a movie "Menace to Society." (R. 355-56, 386) According to Traylor, the movie was about "carjacking," or taking a person's car at gunpoint. (R. 356-57) Traylor had never seen the movie, and told the others to take him home. (R. 357) When the group reached 79th and Calumet, McClinton saw some girls in the parking lot of Chatham Food and Liquor. (R. 357-58) McClinton pulled into the parking lot to talk to the girls, but the girls walked away. (R. 358-59) At about the same time, Traylor saw a well-dressed elderly man (the victim) exit the grocery store carrying milk, walk to and then enter his car. (R. 359-60)

When McClinton saw the victim in the lot, he said to Moore, "There go a jack move there." (R. 359-60) McClinton pulled the Mercedes near to the victim's car. (R. 360, 361) McClinton then handed Moore a small revolver (which Traylor did not know McClinton had (R. 389) and said, "Jack him." (R. 361-62, 389) Moore got out of the car, walked over to the victim's car, tapped on the driver's window with the gun and told the victim to get out of the car.

(R. 362) When Moore then tried to open the car door but could not, the victim looked at Moore and turned the ignition. (R. 362) Moore ran back into the Mercedes and said, "Shoot that mother, shoot that mother fucker, shoot that mark." (R. 362) At that point, petitioner jumped out of the car and pulled a .38 revolver from under his jacket. (R. 363) Petitioner ran over to the driver's side of the victim's car, pointed the gun at the victim and fired, shattering the driver's window. (R. 363-64)

Theresa Barnes was calling a friend from a pay phone in the parking lot of Chatham food and Liquor when she heard a gunshot. (R. 285, 298) Theresa turned and got a good look at petitioner as he pointed a gun at the victim's car. (R. 285, 286-87, 288, 292-94, 316) Theresa and Traylor then watched as petitioner fired a second shot at the victim, hitting the victim. (R. 285, 287, 347, 363, 365) After the second shot, the victim slumped over to the passenger side and his car started rolling in reverse. (R. 287-88, 365) The victim's car rolled toward Theresa until it hit a car parked in the lot. (R. 288, 302) Petitioner then got back into the Mercedes, and the Mercedes sped off with its tires screeching, heading south on Calumet. (R. 300-01, 365)

As the group in the Mercedes drove away, petitioner, Moore, McClinton and Daniels were laughing about the shooting. (R. 366) Traylor was not laughing; instead, he told them to take him home. (R. 366) Traylor had no idea that the others were going to try to take the victim's car at gunpoint. (R. 366-67) Traylor did not attempt to get out of the Mercedes while petitioner was shooting the victim because he was physically unable to due to gunshot injuries he received from a prior, unrelated incident. (R. 390-91, 394-95) As they dropped Traylor off at his home, Moore said to Traylor, "See you later, Goofy." (R. 367-68) According to Traylor, Moore called him "Goofy" because he did not approve of their shooting the victim. (R. 393-94) Because of his gunshot injuries, and because he believed that Moore's calling him "Goofy"

constituted a threat, Traylor was too frightened to call the police. (R. 394-95) In fact, three days after the victim's murder, Moore told Traylor: "Whoever say anything have the death penalty." (R. 403-04)

Back at the murder scene, Officer Ben Jones and Detective Don McGrath of the Chicago Police Department talked with Theresa Barnes for about one minute, obtaining from her a general description of the shooter: a male Black, 17 to 18 years of age, 5'11" and weighing 170 pounds, wearing a blue and peach jacket with a genie insignia from the Disney movie "Aladdin" on back, and blue baseball cap worn backwards. (R. 305, 307-08, 409, 412, 425-26) While Officer Jones was speaking to Theresa, he did not ask for, and Theresa did not volunteer, information regarding petitioner's hair or facial characteristics. (R. 412-14, 428) As Officer Jones explained, he was only trying to get a general description of the shooter from Theresa so that he could send out a flash message. (R. 412) When Detective McGrath interviewed Theresa at Area Two Violent Crimes, he did not ask Theresa about petitioner's hair at the time of the shooting because Theresa told the detective that petitioner had been wearing a hat. (R. 433)

Detective McGrath recovered from the victim's car two fired bullets. (R. 420) One bullet was on the rear floor of the car, and the second bullet was on the front seat. (R. 420, 422) It was stipulated that those expended bullets were fired from the same gun, that being a .38 caliber special revolver. (R. 435-36) It was also stipulated that the cause of the victim's death was a gunshot wound to the head. (R. 542-46)

On June 9, 1993, Chicago Police Detective William Egan received information from a fellow detective regarding the victim's murder. (R. 438) Acting on that information, Detective Egan talked to Delores Barnes (no relation to Theresa Barnes) of Evergreen Park. (R. 439, 441) The detective next went to show Theresa Barnes pictures of different models of Mercedes from a

Mercedes Benz brochure. (R. 291, 439-40) Theresa picked from the pictures a Mercedes 460 SEL. (R. 291, 440) As a result of Theresa's identification, Detective Egan issued an "all call" broadcast for a 1987 silver Mercedes Benz 560 SEL, license number YN8630, owned by Delores Barnes. (R. 440)

On the afternoon of June 12, 1993, Officer John Graham was on patrol when he received a radio message that a silver Mercedes Benz used in connection with a homicide was located in the area of 69th and Ashland. (R. 443-44) When the officer arrived in that area, he saw the vehicle (the Mercedes owned by Delores Barnes (R. 448)) in question pull in front of him. (R. 445) Officer Graham stopped the Mercedes and ordered the occupants out. (R. 445) Petitioner was not one of those occupants. (R. 448) It was stipulated that none of the 22 finger and palm prints lifted from the Mercedes matched petitioner, Moore, Daniels or McClinton. (R. 451-54)

On June 12, 1993, Detective Herman Cross spoke to the juveniles who had been stopped in the getaway Mercedes. (R. 456-57) After talking to those juveniles, Detective Cross spoke to a Chris Cannon. (R. 457-58) After speaking to Cannon, Detective Cross turned his investigation to Moore, Daniels, McClinton and petitioner. (R. 458-59) On June 15, 1993, Detective Cross and his partner, Detective Paul Bernatek, located petitioner and brought him to Area Two. (R. 459) At Area Two, Detective Cross put petitioner in an interview room, and went to secure five persons of similar age, weight, height and manner of dress to petitioner for a line-up. (R. 460-61, 476) Theresa Barnes viewed the line-up later that day, and identified petitioner as the shooter. (R. 291-92, 464) Theresa was permitted to take her time while viewing the line-up. (R. 333) During the line-up, the detective had each person step forward, extend their arms and point as though they were firing a gun. (R. 331, 463) According to Theresa, petitioner was the only individual in the line-up with long, "real wild" hair, frizzy and sticking up in all angles. (R. 335,

337, 340) However, according to Detective Cross, two other persons in the line-up may have had hair similar to petitioner's. (R. 476) Theresa stated that the only difference between the shooter's hair and petitioner's was that the shooter had a hat on pulled backwards with hair coming out from beneath the hat. (R. 336-37) But it was not just the hair that caught Theresa's attention. (R. 338-39, 347) What stood out most about petitioner as he shot at the victim was his wide nose and big lips. (R. 338-39, 347) As Theresa viewed the line-up, there was no doubt in her mind that the person whom she identified in the line-up, petitioner, was the same person that she witnessed shoot the victim. (R. 347)

Detectives Cross and Bernatek spoke with petitioner after the line-up. (R. 464-65, 487) After he was read his Miranda rights, petitioner told the detectives that on the night in question he and Moore got out of the Mercedes and walked over to the victim's car. (R. 465) While Moore was on the passenger's side of the victim's car, petitioner stood on the driver's side and pointed his gun at the window. (R. 465) When petitioner heard someone say, "Bust him, bust him," petitioner fired two times. (R. 465) The victim looked up at petitioner and then leaned over on to the passenger's side of the front seat. (R. 465) The detective's conversation with petitioner lasted from two to five minutes. (R. 466, 486) During the conversation, petitioner's demeanor was "cool, calm and collected"; "[j]ust as cold as you please." (R. 466, 487) At no time did Detective Cross or any other officer strike petitioner. (R. 486) Detective Cross then called Felony Review. (R. 466)

Cook County Assistant State's Attorney (ASA) Peggy Chiampas of the Felony Review Unit arrived at Area 2 during the early evening hours of June 15, 1993. (R. 492-94) Following discussions with Detectives Cross and Bernatek and Theresa Barnes, ASA Chiampas talked to

petitioner. (R. 494-96) Following this conversation, petitioner elected to give a court-reported statement. (R. 499-500)

According to petitioner's signed, court-reported statement, at about 6:00 PM on June 6, 1993, petitioner was at home when Moore, Daniels, McClinton and Traylor stopped by. (R. 518, Supp. IV R.C. 7-Statement page 4) At the time, petitioner had a .38 revolver that he had bought several months earlier from a "dope fiend." (R. 520, Supp. IV R.C. 7-Statement page 7) Petitioner knew that the gun worked because he had fired it twice to test it. (R. 520, Supp. IV R.C. 7-Statement page 7) Petitioner then went with McClinton, Moore, Daniels, and Traylor to 68th and Ada in a Mercedes, with McClinton driving. (R. 521, Supp. IV R.C. 7-Statement page 8) On the day of the victim's murder, petitioner had his gun with him. (R. 521, Supp. IV R.C. 7-Statement page 8) McClinton had a .25 automatic. (R. 522, Supp. IV R.C. 7-Statement page 9) As they drove, the group talked about a movie that McClinton, Daniels and Moore had seen, "Menace to Society." (R. 522, Supp. IV R.C. 7-Statement page 9) In pertinent part, Moore talked about the jacking, which was carjacking or taking a person's car at gunpoint, that occurred in the movie. (R. 522-23, Supp. IV R.C. 7-Statement page 9-10) Moore even mentioned how he had committed a carjacking of a person at a restaurant drive-through. (R. 525, Supp. IV R.C. 7-Statement page 11-12) Traylor did not say anything about the movie. (R. 523, Supp. IV R.C. 7-Statement page 10)

After the group left 68th and Ada, they were driving down Calumet when Moore began discussing "Menace to Society" and carjacking again. (R. 524, Supp. IV R.C. 7-Statement page 11) When the group reached 79th and Calumet, Moore said, "[L]et's jack that mark in the lot," meaning to take that person's car. (R. 525, Supp. IV R.C. 7-Statement page 12) McClinton told Moore not to because the person appeared young. (R. 525, Supp. IV R.C. 7-Statement page 12)

When Moore said, "[F]orget that man, come on," McClinton pulled into the lot. (R. 525, Supp. IV R.C. 7-Statement page 12) McClinton then explained that "jacking" older people is better because older people are less likely to possess guns. (R. 525-26, Supp. IV R.C. 7-Statement page 12) Moore replied, "[F]orget that," and got out of the car, holding a .25 automatic he obtained from McClinton. (R. 526, 529, Supp. IV R.C. 7-Statement page 12-13, 16)

Moore ran up to the car where the man (the victim) was sitting and tried to open the door. (R. 526, Supp. IV R.C. 7-Statement page 13) When the door would not open, Moore ordered the victim to get out of the car. (R. 526, Supp. IV R.C. 7-Statement page 13) The victim did not say anything and started to drive backwards. (R. 526, Supp. IV R.C. 7-Statement page 13) Moore ducked away and said, "Bust him," meaning to shoot the victim. (R. 527, Supp. IV R.C. 7-Statement page 13-14) Petitioner got out of the car, pulled his gun from his waistband and fired twice. (R. 527, Supp. IV R.C. 7-Statement page 14) The first shot shattered the driver's window of the victim's car. (R. 527-28, Supp. IV R.C. 7-Statement page 14) When petitioner shot at the victim a second time, petitioner saw the victim look up at him and saw the victim's head slump. (R. 528, Supp. IV R.C. 7-Statement page 15) Petitioner was standing there in a daze, when he heard someone yell, "Dave, get in the car, you got a murder." (R. 529, Supp. IV R.C. 7-Statement page 15) Petitioner got back in the Mercedes, and the group drove to Moore's house. (R. 529, Supp. IV R.C. 7-Statement page 15-16)

At Moore's house, Moore was laughing and joking about the shooting. (R. 529, Supp. IV R.C. 7-Statement page 16) Petitioner replied, "That was bogus, wrong for telling me to shoot an old man." (R. 529, Supp. IV R.C. 7-Statement page 16) The next day, McClinton, Moore and Daniels visited petitioner at his house. (R. 529, Supp. IV R.C. 7-Statement page 16) Moore laughed and joked about how the murder happened. (R. 530, Supp. IV R.C. 7-Statement page

16) Petitioner gave McClinton his gun after McClinton said that he would get rid of it. (R. 530, Supp. IV R.C. 7-Statement page 17)

According to ASA Chiampas, when she saw petitioner, he had no injuries to his head or lip. (R. 513) Petitioner never complained about the treatment he received from her or the police, and never mentioned that he had been struck. (R. 513-14)

After the People rested and the court denied petitioner's motion for a directed verdict, petitioner called Charles Moore, an investigator for the Public Defender's Office, to testify. (R. 548-49) According to Mr. Moore, on June 17, 1993, at the request of an assistant public defender, he took four photographs of petitioner as petitioner was in a courtroom holding cell awaiting an appearance in court. (R. 554) Mr. Moore admitted that he had heard of people being beaten in jail and of defendants trying to "get around their confessions." (R. 557-58)

After petitioner rested, it was stipulated that Officer Hughes would testify that he was the lockup officer for Area 2 Violent Crimes on June 16, 1993. (R. 558) Officer Hughes would testify that as a matter of Chicago Police Department policy he could not accept an injured prisoner. (R. 558) Officer Hughes would further testify that on June 16, 1993 at about 1:15 AM, when Detective Cross returned petitioner to the lockup, Officer Hughes did not see any injuries to petitioner. (R. 559) Officer Hughes would also testify that when asked, petitioner did not complain of any injuries. (R. 559)

Following closing arguments, the jury deliberated and returned a verdict of guilty to the charges of murder and attempt armed robbery. (R. 644, R.C. 85-86)

The Capital Sentencing Hearing

Following the denial of petitioner's motion for new trial, the cause proceeded to a capital sentencing hearing before the bench. (R. 142, 650-51, R.C. 63) For the eligibility stage, the

People introduced petitioner's birth certificate establishing that he was over 18 years of age at the time of the murder, and the signed jury verdict forms for first degree murder and attempt armed robbery. (R. 651) Petitioner stipulated to his eligibility. (R. 651) Consequently, the court entered a finding of eligibility "under the statute." (R. 651)

In aggravation, the People presented the following evidence. The widow of the victim, Bernice Chase, and their two daughters, Nona Ocloo and Olivia Chase, testified as to the impact that the murder of the victim had upon their lives. (R. 652-71) For Mrs. Chase, the loss of her husband meant the loss of her lifelong friend, someone who took care of her, such as shopping, handling legal matters, gardening and taking her to doctor's appointments for treatment for glaucoma. (R. 654-55) Her husband's death also meant the loss of a role model for children and a helping hand for her neighbors. (R. 656-57) Ms. Ocloo related her own suffering as well as her mother's suffering over the loss of her father. (R. 659) Ms. Chase explained that her father had been very active in the church and community organizations. (R. 663-64) Her father helped his neighbors, especially those who were homebound due to health problems. (R. 665) Ms. Chase related that following his retirement from the Board of Education, her father became a part-time employee at Sears. (R. 666) At one time, his department at Sears was targeted for layoffs. (R. 667) Her father approached his supervisor and asked that he be laid off so that a particular young employee could keep his full-time job in order to support his family. (R. 667)

Edwina Harrison testified that on June 5, 1993 at approximately 3:10 AM, she was in her car on the way home from work at a lounge when at 81st & King Drive, she saw a friend named Jerome Stallworth flashing the lights of his car to pull her over. (R. 672-73) Just as Ms. Harrison and Mr. Stallworth both pulled over, a Thunderbird with two men immediately pulled up. (R. 673-74) Petitioner, who was sitting on the passenger side, got out holding an automatic

rifle or a machine gun with a long clip and barrel. (R. 674-75) Pointing the gun in her face, petitioner ordered Ms. Harrison to get out of her car and to leave everything in the car. (R. 675-76) Ms. Harrison exited her car, and Mr. Stallworth also got out of his car. (R. 676-77) Petitioner told the pair to move away from Ms. Harrison's car; petitioner backed them up onto the grass, all the while holding the gun on them. (R. 677) Petitioner then ordered Mr. Stallworth to empty his pockets. (R. 677) During this, petitioner kept his gun on the pair and stared at them for a long time. (R. 677) To Ms. Harrison, it seemed as if petitioner could not decide whether to kill the two of them. (R. 677-78) Finally, petitioner entered Ms. Harrison's car and drove off with it. (R. 678)

Chicago Police Detective Michael McDermott had been assigned to investigate the carjacking of Kirschmar Norman, which happened on June 3, 1993 at about 1:50 AM. (R. 684-85) Mr. Norman related to the detective that he had pulled up in front of his home at 1120 East 82d St. when he saw a van with several males inside it. (R. 685) As Mr. Norman exited his car, petitioner got out of the van and approached Norman holding a Tech 9 mm. machine pistol. (R. 685) Petitioner pointed the gun at Mr. Norman, announced a robbery and told him to put his money and keys on the ground; Mr. Norman complied. (R. 685-86) As petitioner got into Mr. Norman's car, the van petitioner had been in drove off quickly and got into an accident. (R. 686) The driver of the van got out and entered Mr. Norman's car; petitioner and the co-assailant then drove off. (R. 686) Six months later, Mr. Norman identified petitioner in a lineup as the carjacker. (R. 686-87)

Officer Patrick Durkin testified that on March 5, 1992, he observed petitioner attempt to conduct what appeared to be a narcotics transaction, and found petitioner in possession of .2 grams of cocaine. (R. 695-97) Officer Willis Shannon testified that on March 22, 1992, he saw

petitioner drop a white napkin with five small bags of rock cocaine inside it. (R. 698-99) On June 24, 1992, petitioner pleaded guilty to possession of a controlled substance and was sentenced to 13 months' probation. (R. 700)

The following Cook County Department of Corrections (CCDOC) officers testified in aggravation. Corrections Officer Alonzo King testified that at 3:30 PM on November 11, 1993, he was working cellblock H checking to see that the inmates were in their cells for the daily 3:00 PM lockdown when he observed petitioner jumping from cell to cell. (R. 701-02) Petitioner was cited for two violations: being in an unauthorized area and interfering with the prisoner count. (R. 702-03) Officer James Brown testified that on May 11, 1994 at about 4:40 PM, he was conducting a search of cells for weapons. (R. 709) While searching petitioner's cell, Officer Brown found inside petitioner's mattress two 6" homemade knives. (R. 709) For this violation, petitioner received 20 days in isolation. (R. 710) Officer Brown also testified that on April 9, 1995, he discovered that petitioner was on tier C-4 when he was supposed to be on C-2. (R. 711) When Officer Brown asked petitioner why he was there, petitioner replied: "[F]uck you and fuck the hole, I'm not afraid of the hole." (R. 711) For this violation, petitioner received 10 days' isolation. (R. 711-12)

On August 17, 1994, Officer Robert Adorjan was doing a routine cell check when he found inside a milk crate an envelope. (R. 715-16) Inside the envelope were papers and a 9" long piece of metal, sharpened at one end and wrapped with strips of bed sheets around the other end for a handle. (R. 716) The milk crate was underneath petitioner's bed. (R. 716-17) When Officer Adorjan asked petitioner if the shank was his, petitioner asked what was the officer doing in an envelope containing his legal documents; the deputy realized that petitioner "knew exactly

where it was before we even mentioned it." (R. 717) Petitioner received 10 days isolation for this violation. (R. 718)

Lieutenant Ramon Torres received a radio call of a fight in progress in Division 1, tier A-2 on September 14, 1994. (R. 719-20) When Lieutenant Torres reached cell 6, he saw that petitioner had a seven-inch long shank in his hand. (R. 720) The lieutenant later learned that petitioner had jumped another inmate, and that the inmate's head was injured and bleeding as a result of the attack. (R. 722-23) Petitioner received the maximum sentence for this violation: 29 days in isolation. (R. 723-24) Officer Donnie Booker was in Division 1 on May 28, 1995 conducting cell searches, when in petitioner's cell he found a two-foot long homemade knife in petitioner's mattress. (R. 728-30) For this violation, petitioner was placed in isolation for 29 days. (R. 731)

The last witness in aggravation, ASA Peggy Chiampas, testified that while she was taking the court-reported statement from petitioner, petitioner never expressed remorse over murdering the victim. (R. 737) Petitioner's demeanor during the statement was "[c]ool, calm and collected." (R. 737) Petitioner admitted in his court-reported confession that he had been a member of the Gangster Disciples for five years. (R. 739) He was an assistant regent in the gang, and his job was to enforce discipline upon those gang members who violated the gang's rules by beating them. (R. 739-40) As an assistant regent, petitioner carried a gun, the same gun that he used to murder the victim. (R. 740-41)

In mitigation, petitioner presented 17 letters from petitioner's relatives, including his mother and siblings, as well as a local church pastor. (R.C. 87-107) These letters extolled petitioner's character and virtues, such as his kindness and generosity, and his desire to be a minister. The letters also discussed the hardships that petitioner endured, specifically the death

of his grandfather in 1991 and the loss of his father and uncle to AIDS the next year. (R.C. 95, 103)

Following closing arguments, the court allowed petitioner to give a statement in allocution. (R. 777) Petitioner expressed no remorse, but only denied committing the murder in question. (R. 777) The trial court subsequently found that because there had not been presented a sufficient mitigating factor to preclude the imposition of the death penalty, that petitioner be sentenced to death. (R. 784, R.C. 126-28)

III.

REASONS FOR DENYING THE PETITION

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. 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 petitioner 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. Moreover, petitioner ignores the fact that the Illinois Supreme Court, which carefully examined the proceedings in petitioner's case, with one exception, determined that they were fundamentally fair and that he was not unduly prejudiced in any manner. As to that exception, whether defense counsel was ineffective during the sentencing hearing, the Court has ordered an evidentiary hearing, demonstrating the great scrutiny to which the Court has subjected this case, and the lengths the Court will go to ensure the fairness of a death sentence. It is telling to note, however, that in ordering an evidentiary hearing, as opposed to a new sentencing hearing, the Court expressed its concern over the motivations of defense counsel, and wished to allow the State the opportunity to challenge the veracity of counsel's affidavit. As stated by the Court: "A court should be critical of conduct designed to disrupt the appropriate administration of justice." Harris II, 2002 Ill. LEXIS at *44.

The following are reasons to deny Petitioner's request for executive clemency.

Supreme Court Rules

Petitioner asserts at various times throughout the claims in his petition that he is entitled to clemency because the new Supreme Court Rules governing capital cases were not applicable to his proceedings. However, the Illinois Supreme Court has clearly held that the amendments to its rules are not retroactively applicable. Hickey, 2001 Ill. LEXIS 1080 at *65.

Videotaping Petitioner's Confession, Public Defender at the Police Station, and Petitioner's Lawful Removal from Cook County Jail to Area 2

Petitioner seeks clemency because his **court-reported** statement where he inculpated himself was admitted into evidence even though it was 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 statement 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. Therefore, even if this proposal had been in effect at the time of petitioner's arrest, it would not have applied to him.

Finally, petitioner claims that the overarching need to have had his statement videotaped and to have had a lawyer present at Area 2 is because he was illegally “writtten,” or taken, from a court proceeding on an unrelated charge to Area 2 to stand in a lineup, which resulted ultimately in his two confessions. However, the Illinois Supreme Court disposed of this issue, holding that petitioner did not have a right to counsel in regard (as here) to questioning on an uncharged crime that was unrelated to the charge he had been in court on, and that the police had legitimate reasons to transfer petitioner to Area 2 where the investigation was centered and where they could conduct the lineup. Harris I, 182 Ill. 2d at 150. The Court also noted that the trial court had rejected petitioner’s allegations that he had been abused while in police custody at Area 2. Harris I, 182 Ill. 2d at 150. And as discussed in the Statement of Facts, there is NO evidence whatsoever that petitioner was physically mistreated by the police. In fact, any claimed injury was rebutted by testimony from the Assistant State’s Attorney who took petitioner’s statement and the Area 2 lockup officer that petitioner was not injured while in the custody of the police. (R. 513-14, 558-59)

“Electronic Recording” of Interviews with Theresa Barnes, Videotaping the Line-up, Preservation of the Lineup Photographs

As ground for clemency, petitioner points to the “failure” of the police to “electronically record” their interviews with Theresa Barnes, or to videotape the line-up in which Theresa Barnes identified petitioner as the shooter (given the allegedly inconsistent description she gave the police on the night of the murder), and to have preserved the lineup photographs. Initially, Commission Recommendation 14, on which Petitioner relies in support of the failure to electronically record Theresa’s interviews with the police, does not call for such procedures. Recommendation 14 proposes that a “clear written statement” be made of any statements made by an eyewitness at the time of a lineup identification. In any event, at trial Theresa testified that

she got a good look at petitioner as he shot at the victim's car. (R. 285, 286-87, 288, 292-94, 316) Theresa also testified that at the lineup, what stood out most about petitioner as he shot at the victim was his wide nose and big lips. (R. 338-39, 347) As Theresa viewed the lineup, there was no doubt in her mind that the person whom she identified in the lineup, petitioner, was the same person that she witnessed shoot the victim. (R. 347) Further, the Illinois Supreme Court rejected any notion that the lineup was suggestive, ruling that Theresa's in-court identification of petitioner as the killer was not as a result of the lineup procedures but rather based on her observation of the crime as it happened before her eyes. Thus, invalidation of the lineup would not have resulted in the suppression of Theresa's identification of petitioner as the murderer. Harris I, 182 Ill. 2d at 146-47. The Court noted that even without Theresa's identification, the evidence against petitioner was overwhelming. Harris I, 182 Ill. 2d at 147.

As to the supposedly vague description that Theresa gave to Officer Ben Jones at the scene of the shooting, Officer Jones explained that he spoke to Theresa Barnes for a minute, obtaining from her only a general description of the shooter so that he could send out a flash message; the description however was fairly detailed: a male Black, 17 to 18 years of age, 5'11" and weighing 170 pounds, wearing a blue and peach jacket with a genie insignia from the Disney movie "Aladdin" on back, and blue baseball cap worn backwards. (R. 305, 307-08, 409, 412, 425-26) At trial, Theresa could not recall whether there was any emblem on the back of Petitioner's jacket. (R. 306) While Officer Jones was speaking to Theresa, he did not ask for, and Theresa did not volunteer, information regarding Petitioner's hair or facial characteristics. (R. 412-14, 428) As to the loss of the lineup photographs, the Supreme Court held that petitioner failed to show that the loss of the photos was anything but inadvertent, and that because a

suppression of the lineup itself would not have mattered the loss of the photographs had “no significant impact” on petitioner’s case. Harris I, 182 Ill. 2d at 147.

The Prosecution’s “Failure” to Disclose a Statement Made by Theodore Traylor and Petitioner’s Possession of a Shank

Petitioner asserts that he is entitled to clemency because the prosecution failed to disclose “favorable” evidence. First, any suggestion that the People did not disclose exculpatory evidence is a baseless accusation; the People at all times complied with their constitutional and statutory discovery duties. Second, as to the statement Theodore Traylor made to a probation officer, that he had some thoughts about harming persons whom he considered to be “foes” because of gang alliances, the Illinois Supreme Court held that the statement was not material to petitioner’s guilt as it failed to show a motive to testify against him. Harris II, 2002 Ill. LEXIS 343 at *25-26. Petitioner’s claim as to Traylor’s testimony, that a co-defendant threatened him if he spoke to the police, is hobbled for the same reason: it does not explain how it motivated Traylor to testify against petitioner. As to the existence of the shank found in petitioner’s possession by a correctional officer, first, the prosecution disclosed this information prior to the start of the sentencing hearing. Second, the Illinois Supreme Court held that that evidence was immaterial to the result of the sentencing hearing, seeing as though petitioner possessed numerous other shanks in county jail, and thus did not impact on the fairness of the trial. Harris II, 2002 Ill. LEXIS 343 at *32-33.³ On these grounds, petitioner has not demonstrated how his trial was unfair.

³ Petitioner astonishingly claims that this was the “largest shank ever recovered by a guard at Cook County Jail.” Suggesting that this 2’ shank was an all time record. However, this is grossly misleading, as there is no such testimony in the record. Officer Booker testified only that it was the biggest shank he had ever recovered. (R.734)

Eligibility Factors

Petitioner asserts that he is entitled to clemency because he was found eligible for the death penalty based upon an aggravating factor (here, murder in the course of a felony) 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 satisfies 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. Stephens, 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 statute's eligibility factors" and "[e]ach provision is narrowly tailored to fit a 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) 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 contemplates 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, petitioner’s request must be rejected.

Decision to Seek Death

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 (Commission Recommendations 29-31). 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. Moreover, petitioner does not even allege much less argue that the decision to seek death in his case was the

result of an abuse of discretion. As to the rule regarding 120-days notice of the prosecution's intent to seek death, that is governed by Supreme Court Rule 416(c), which the Supreme Court has not held to be retroactive. Hickey. Accordingly, it must be rejected.

Qualification and Training of Trial Judges

Petitioner contends that he should receive clemency because the Governor's Commission Recommendations 32-39, concerning qualification and training of trial judges for capital trial litigation, were not effect when petitioner was prosecuted. It must be noted that Illinois Supreme Court Rule 43 (effective March 1, 2001) now requires that trial judges undergo capital litigation training. As previously stated, the Illinois Supreme Court has clearly held that the amendments to its rules are not retroactively applicable. Hickey, 2001 Ill. LEXIS 1080 at *65. Finally, petitioner fails to explain how the trial judge in his case, the Honorable John D. Brady (a highly capable, experienced and respected jurist, who also was an assistant public defender before becoming an Assistant State's Attorney), was somehow wanting for his lack of "formal training" in capital litigation.

Qualifications of Trial Defense Attorneys

Petitioner argues that he should be entitled to clemency because the Governor's Commission Recommendations 40-45, concerning qualification of trial defense attorneys for capital trial litigation, were not effect when petitioner was prosecuted. It must be noted that Illinois Supreme Court Rules 416, 701(b) and 714 (effective March 1, 2001) now requires that trial defense attorneys undergo capital litigation training and be admitted to the Capital Litigation Bar. As previously stated, however, the Illinois Supreme Court has clearly held that the amendments to its rules are not retroactively applicable. Hickey, 2001 Ill. LEXIS 1080 at *65. As to whether defense counsel here was constitutionally ineffective here, the Supreme Court

only ruled that petitioner made a substantial showing that counsel was ineffective **ONLY** to warrant an evidentiary hearing. Harris II, 2002 Ill. LEXIS 343 at *43-44. Lastly, it must be pointed out that petitioner's trial attorney, Dennis Doherty (whose father was the Public Defender of Cook County), has been practicing law for over 20 years, primarily as a criminal defense attorney. Mr. Doherty is in good standing with the Attorney Registration and Disciplinary Committee and has never been disciplined by the ARDC for any matter whatsoever.

Statutory Mitigating Factors

Petitioner complains that his jury was not instructed to consider as statutory mitigating factors the fact that he had a history of extreme emotional or physical abuse and/or that he suffers from reduced mental capacity. However, in the Presentence Investigation Report (PSI) which was compiled **prior** to the imposition of the death sentence, petitioner **DENIED** "any physical or emotional abuse in the home." (R.C. 110) He also stated in the PSI that although he was depressed while in the county jail (and it stands to reason that he should be), he denied any previous psychiatric treatment. Further, there is no allegation in Mr. Doherty's affidavit that petitioner was unable to cooperate with him or assist in the defense. In any event, although the jury was not expressly instructed to consider these factors, it was instructed that mitigating factors include "any reason why the defendant should not be sentenced to death" and that it should consider all mitigating evidence even if it does not pertain to one of the enumerated factors. Illinois Pattern Jury Instruction 7C.06. In any event, this issue will be resolved at the evidentiary hearing ordered by the Supreme Court. Harris II, 2002 Ill. LEXIS 343 at *43-44.

Supreme Court Proportionality Review

Petitioner also claims that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate, excessive or otherwise

inappropriate. However, because 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)), it is clear that the only reason the Illinois Supreme Court did not review petitioner's sentence in such a manner is because he did not ask the Court to do so.

In any event, petitioner's claim is without any merit. Petitioner was the lone shooter, the other co-defendants, while accountable, did not shoot the victim. Further, two of the co-defendants, Daniels (22 years' incarceration) and McClinton (35 years' imprisonment) pleaded guilty. Moore's original sentence of natural life was reduced, because of Apprendi v. New Jersey; but on resentencing Moore still received the statutory maximum of 60 years for murder and a consecutive 15 year sentence for attempt armed robbery. Petitioner's sentence was not disproportionate, especially given his conduct while in the county jail. In fact, petitioner continues to amass disciplinary violations while on death row, and has a history of insolence towards all those in authority.

Actual Innocence

Petitioner contends that his conviction should be vacated because he is actually innocent. According to petitioner, Daniels and McClinton (in affidavits) claim that Daniels was the shooter and that they sought to frame petitioner, and that petitioner's brothers (also in affidavits) place him elsewhere at the time of the crime. However, the Illinois Supreme Court rejected this claim outright (Harris II, 2002 Ill. LEXIS 343 at *4-7, *13-17), and with good reason. First, assuming

purely for the sake of argument that co-defendant Daniels had been observed by a C.H.A. security guard in possession of a .38 caliber gun a few days after the murder (PCR.C. 243), the same model used by petitioner to kill the victim, it does not in any manner establish that Daniels, not petitioner, was the shooter. As the Court ruled, Daniels' and McClinton's affidavits would not change the outcome of the trial. Second, the reason the Supreme Court rejected the alibi claim was because the affidavits of petitioner's brothers were not newly discovered evidence; they failed to explain why petitioner did not tell his trial attorney of the existence of the alibi at trial. Petitioner cannot now complain that the Supreme Court erred in its holding when it is petitioner who is to blame for his dilemma. And as to the "alibi" itself, two witnesses saw petitioner shoot the victim, and petitioner confessed to the murder. The affidavits of Daniels and McClinton, that Daniels was the shooter and that they planned to pin the murder on petitioner, is not only rebutted by the evidence at trial but is also refuted by their prior admissions, both in and out of court, that petitioner was the shooter. (PCR.C. 1447-56 (Handwritten Statement of Demetrius Daniels), 1457-78 (Hearing on Guilty Plea of Demetrius Daniels), 1480-1502 (Court-Reported Confession of Howard McClinton)) Antoine Moore's court-reported statement also implicates petitioner as the shooter. In fact, in Harris II, the Supreme Court noted that the co-defendants' statements were "strikingly similar" in detail to petitioner's confessions. Harris II, 2002 Ill. LEXIS 343 at *7.

RECOMMENDATION

The People of the State of Illinois respectfully request that this Board and Governor Ryan deny executive clemency to petitioner David Harris.

Respectfully submitted,

RICHARD A DEVINE
STATE'S ATTORNEY OF COOK COUNTY

by: BRIAN SEXTON
RICHARD G. CENAR, JR.
WILLIAM D. CARROLL