

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No.
vs.)	
)	
DENNIS EMERSON,)	Inmate No. A-82768
)	
)	

SUBMITTED TO THE HONORABLE GEORGE RYAN, GOVERNOR
OF THE STATE OF ILLINOIS

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

HEARING REQUESTED

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I

HISTORY OF THE CASE

In People v. Emerson, 97 Ill. 2d 487 (1983), the Court granted defendant a new trial because of several errors which occurred during trial. His death sentence was vacated. Upon retrial, the defendant was again convicted of murder, armed robbery, attempt murder and arson, and he was sentenced to death. The Court affirmed all of defendant's convictions, save the one for arson, and also upheld his sentence of death. People v. Emerson, 122 Ill. 2d 411 (1987). The Court also upheld the dismissal of defendant's post-conviction petition. People v. Emerson, 153 Ill. 2d 100 (1992). Following federal habeas corpus review the United States Court of Appeals found that while defendant was not denied his Sixth Amendment right to the effective assistance of counsel at trial, that right was denied him at the sentencing phase. Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1998). At the resentencing hearing the defendant again received the death penalty. That decision was affirmed by our Supreme Court. People v. Emerson, 189 Ill. 2d 436 (2000). An appeal is pending from the denial of post-conviction relief in the Illinois Supreme Court, No.

92033.

II

FACTS OF THE CASE

In August of 1979, Robert Ray co-owned the Centaur Lounge, located at 69th and Racine in Chicago, with his cousin, Doris McCloud. The lounge had a two bedroom apartment with a kitchen and bath located in the rear of the building. This is where Mr. Ray lived. Upon entering the apartment one would be in the kitchen which doubled as Mr. Ray's office. Mr. Ray's bedroom was the eastern most of the two and its window opened into an air shaft. The other bedroom also had a window but it was boarded-up. (R. 480-84) At the time, Mr. Ray had known a person named Ricky Jackson for 3 to 4 years. Ricky had helped Mr. Ray build the bar and had continued to work for him at times by doing odd jobs around the bar. Mr. Ray met the defendant through Ricky, as the two were brothers. In August of 1979 he had known defendant, whom he identified in court, for approximately one year. (R. 485-86)

The 12th of August was a Sunday so the bar opened at noon. During the course of the day Mr. Ray received 3 or 4 phone calls from defendant. The defendant would ask Mr. Ray what he was doing and when he replied "nothing" the defendant said he was going to stop by. Because business was slow Mr. Ray decided to close the bar between midnight and 1:00 a.m., even though he had a 2:00 a.m. license. (R. 487-88, 485) The defendant had not yet stopped by the bar. Shortly before closing Mr. Ray received another phone call from defendant who told him that he was still going to stop by. Mr. Ray proceeded to close the bar when defendant showed up with another of his brothers, Richard Jackson. All three men went directly to the apartment. Then, the lounge's door bell rang again and it was Delinda Byrd, Mr. Ray's girlfriend. Ms. Byrd joined the others in the apartment where they

engaged in general conversation about how they all were doing and how business was. (R. 488-90, 553-56) Mr. Ray needed cigarettes and he went across the street to buy a pack because the bar's machine was out of his brand. When he returned he rejoined the others. Mr. Ray was not facing defendant but when he turned toward him defendant had a gun pointed at him and "He said this is a robbery, a stick-up or said something. And I, you know, I was just amazed, I thought it may have been a joke but he let me know right off that it wasn't." (R. 491-92)

Defendant then made Mr. Ray and Ms. Byrd lay down on the floor and asked for the keys to the cash register, which Mr. Ray gave to him. As the victims laid on the floor defendant tied them up with an electrical cord which he had torn from a nearby desk lamp. The victims were face down and defendant tied their hands behind them and then bound their legs. Defendant then searched each of them getting a little money from Mr. Ray and between \$600 and \$700 from Ms. Byrd, money she was going to use the next day as a security deposit on an apartment. (R. 492-95) Defendant then went into the lounge and Mr. Ray heard the cash register open. While defendant was able to open the register's top drawer he could not get the lower one open. He came back and asked Mr. Ray how to open it. Mr. Ray said he did not want to tell him how to open it but that defendant convinced him otherwise. Defendant then opened the lower drawer and took out the cash. The defendant asked Mr. Ray if he had any guns and Mr. Ray directed him to a closet which housed a shotgun and a .38 pistol, both of which defendant retrieved. Mr. Ray then heard defendant taking items from the apartment into the lounge. Throughout this time Richard was sitting on the desk, holding the gun which defendant had originally pointed at Mr. Ray. (R. 495-98)

When Mr. Ray heard Richard tell defendant to "use this" he did not know what "this" was. He then saw defendant with a pair of scissors which Mr. Ray used to open the door between the

apartment and lounge as the doorknob had come off. Mr. Ray was still lying on his stomach when defendant straddled him. Defendant then raised Mr. Ray's right shoulder up and stabbed him twice in the right upper chest which punctured his lungs. Defendant then straddled Ms. Byrd, who was also lying on her stomach. Seeing that defendant was about to stab her Mr. Ray begged him not to do it, that he should not hurt her. Defendant then gave Mr. Ray a look which he had never seen on anyone before, saying defendant "looked real evil, real evil." When he saw defendant coming down toward Delinda with the scissors, Mr. Ray turned his head and played dead. (R. 499-502)

Mr. Ray then heard defendant walk past him into the bedroom. He did not recall if Richard went with him. Defendant came out after a minute or two and he and Richard picked up Mr. Ray and threw him into the bedroom, which was on fire. Ms. Byrd was then thrown into the bedroom on top of him. The bedroom door was then closed and it sounded to Mr. Ray like they were fastening it shut. When he did not hear them anymore, Mr. Ray was able to free his hands. After trying in vain to open the door he went to the window and fell into the airshaft. Ms. Byrd was able to fall in after him. The fire and smoke were getting worse and Mr. Ray knew they had to get out. He untied his feet and then untied Delinda. Mr. Ray climbed back into the bedroom and again tried in vain to open the door, he then returned to the airshaft. He was able to climb up to the kitchen window and open it but he had to close it because of the heat and smoke that came pouring through it. The steel basement door leading into the shaft was locked from the other side. Delinda started screaming for help so Mr. Ray started screaming too. He then remembered that there was a boarded-up window between the airshaft and the lounge. Mr. Ray was able to climb up to this window and kick-in the plasterboard, he then tumbled into the lounge. He immediately went toward the front door of the lounge because he was not thinking, just reacting. When he made it outside he saw a neighbor kid and asked him to call the fire

department. (R. 503-09)

When Mr. Ray reentered the bar to save Delinda he was forced out because the black smoke prevented him from seeing anything. He then ran to the back of the building where he could talk to Delinda through a 2-3 inch crack between the building and the airshaft. She said it was getting harder to breathe and he told her not to worry, that he would save her. When he went back to the front he saw a fire truck and showed the firemen where Delinda was trapped. Mr. Ray could not get back into the airshaft after the firemen arrived because "you know, I couldn't make it. I failed, you know, because I lost blood from running around there." (R. 509-11) Mr. Ray was bleeding from the chest and he believes he then fell to the ground. He spoke to the police and then was taken to the hospital by paramedics. (R. 512)

Mr. Ray never saw Delinda Byrd again as he was hospitalized for nine days, where he was treated for his stab wounds which bled into his lungs. While in the hospital he identified defendant and Richard Jackson from photographs as the ones responsible. Mr. Ray testified, "No, I didn't tell them (the police) that they (defendant and Richard Jackson) was involved, I told them that they was the one who had did it." (R. 512-14)

Edward Barry, a Chicago Firefighter, responded to the fire at the Centaur Lounge shortly after 4:00 a.m. on August 13, 1979. He saw Robert Ray out front and he told them that a woman was trapped in the rear of the building. Barry saw the woman, later identified as Delinda Byrd, through a crack between the building and the airshaft. He was only inches away for her and he told her to remain calm. She did not respond. The firefighters initially tried to drop a ladder into the shaft from an adjacent building so that Barry could rescue Ms. Byrd, but they were unable to do so because the fire had intensified. Barry then got on the roof with two other firefighters so they could pour water onto

Ms. Byrd in an attempt to keep the fire from her. The other two firefighters had to leave the roof but Barry remained. As he continued pouring water into the shaft he could see the fire coming through the four windows which opened into it. Once the fire was extinguished Barry entered the lounge and told his chief about the victim in the airshaft. Barry entered the shaft through one of the windows and found that Ms. Byrd had fallen in a corner of the shaft where she was covered with water. When Barry lifted Ms. Byrd up she appeared to be dead, her eyes were dilated and fixed, she had no pulse and the skin was peeling from her. (R. 627-34)

Barry stated that the rear of the building, that being the apartment, was extensively damaged. Based upon his experience and expertise he opined that the fire started in the apartment as that area has been totally destroyed. The evidence of streaking showed that the fire then streaked towards the front of the building. Streaking appears when a fire is raging from its source. Once the source had been totally burned the fire reaches out for more things to burn. As the fire reaches out in this manner oxygen comes into the bottom of the fire and the fire then goes up and streaks down the top of the structure, such as the ceiling. Once the ceiling burns the fire then streaks down the walls. (R. 636-39)

Police Officer Gregory Stevenson and his partner arrived at the Centaur Lounge shortly after 4:00 a.m. He saw Robert Ray, who was bleeding from the chest and sitting on the curb. Mr. Ray told them that he had been robbed and that his girlfriend was still trapped inside. The officers went to the back of the building, but as the firemen were already there they returned to Mr. Ray. At that point Mr. Ray said that two guys had come in and robbed and stabbed him and then set the lounge on fire. Mr. Ray said one of them was defendant and the other was his brother, Richard Jackson. He also told the officers that the two lived at 67th and Sangamon, and while Mr. Ray could not give them a specific

address, he was able to describe the building. The officers proceeded to 6715 S. Sangamon but were unable to contact either defendant or his brother. (R. 461-67)

Officer Stevenson entered the building after the fire had been put out and he was able to recover a wire coat hanger, a doorknob assembly and two electrical wires. (R. 467) The coat hanger was wrapped around the doorknob, which was found in the hallway outside the bedroom. (R. 471, 477) Electrical wires used to bind the victims were recovered in the bedroom. (R. 173, 478) These were the only electrical wires found by the officer, as he did not look in the airshaft. (R. 477-78)

Dr. Edmund Donoghue of the Cook County Medical Examiner's Office testified from the record of the late Dr. Stein who performed the autopsy on Ms. Byrd. Over 90% of Ms. Byrd's body was covered by 2nd and 3rd degree burns. The internal examine revealed that the larynx and trachea had an extensive deposition of soot. Typically in housefires there is not enough oxygen to fuel the fire and this results in incomplete combustion which, in turn, produces two by-products: 1) soot or smoke; and 2) formation of carbon monoxide. Ms. Byrd's blood contained 19% carbon monoxide identify. The existence of an extensive deposition of shoot in the larynx and trachea and a 19% level of carbon monoxide in the blood shows that Ms. Byrd was alive and breathing when the fire started and that she was breathing during the course of the fire. (R. 577-82)

The autopsy also revealed five stab wounds to Ms. Byrd's back; four to the upper right back, the other to the upper left back. Each wound punctured the lungs and caused massive bleeding into both chest cavities. (R. 582-83) It is possible that the stab wounds were caused by a pair of scissors. (R. 596) The witness agreed with Dr. Stein's opinion that "Delinda Byrd died of multiple stab wounds of the back involving the lungs and that body burns or thermal burns over ninety percent of the body was a significant contributing condition." (R. 584)

The parties stipulated that defendant was 18 years or older at the time of the murder of Delinda Byrd, the defendant having been born on October 23, 1951. (R. 643-44) The certified copies of convictions for murder, attempt murder and two counts of armed robbery were then entered into the evidence. (R. 645) The People rested and defendant presented no evidence. After deliberating for two hours the jury found defendant eligible for the death penalty as the murder occurred during the course of another felony, armed robbery.

The following evidence was presented as aggravation by the People at the second phase of the sentencing hearing. David Heim was 19 years old in March, 1975, and working full-time as a sales clerk at Anchor Camera on 63rd and Western in Chicago. On March 13th defendant, whom Mr. Heim identified in court, came into the store and looked at some cameras. After finding one to his liking, defendant put \$50 down on lay-a-way and left the name of Emerson with an address. Defendant came back around noon and asked about putting more money down on the camera. Mr. Heim knelt down to get the camera and as he stood up the defendant pointed a gun at him, demanding all the money in the cash register. Mr. Heim complied. Defendant also took the piece of paper containing his name and address. He also took \$3 from Mr. Heim. Defendant then pushed Mr. Heim to the back of the store where the owner was working on a bank deposit. Defendant then took the money from the owner and fled through the back door. (R. 718-23)

On February 27, 1991, Ronald Parram was the assistant manager at the Regal Shore Store at 63rd and Cottage Grove. Around 5:00 p.m. there was one customer in the store when a man, whom Mr. Parram identified in court as the defendant, came into the store and asked to change a ten dollar bill. When Mr. Parram opened the register to make change defendant stuck a gun to his head and announced a stick-up. Mr. Parram backed away and defendant reached into the register and took all of

the money. Defendant then turned to the customer and took his money. Defendant left the store and got into a cab. Mr. Parram flagged down a passing car, told the driver what had happened and they followed the cab. When the cab stopped Mr. Parram ran up to it, opened the door and pulled defendant out of the cab. Following a struggle Mr. Parram was able to get control of defendant's gun and held him until the police arrived. (R. 725-30)

On April 13, 1971, Officer Thomas Duffy and his partner were working in the early morning hours when they saw a Cadillac in a parking lot with a young man behind the wheel near 26th and California. Duffy identified defendant as the man in the car. The car was on the officer's hot sheet, meaning it was stolen. The defendant was arrested. The car belonged to Harold Guberman who had reported it stolen on April 9, 1971. The keys to the car had been taken by defendant from Mr. Guberman during an armed robbery which occurred on January 30, 1971. Mr. Guberman was again robbed at gunpoint by the defendant on February 8, 1971. Defendant was identified by Mr. Guberman in a lineup. (R. 732-37)

On February 11, 1980, Chicago Police Lt. James Devereaux was working plainclothes with his partner when they received a call at 9:50 p.m. of a suspicious man at 3601 N. Broadway. The officers parked their car down the block and approached the address. They saw defendant standing on the corner and noticed that he had positioned himself on the corner in front of a drugstore, which closed at 10 p.m., so that he could look up and down both Broadway and Addison. Devereaux saw defendant move his head in all four directions. As they approached defendant, Devereaux's partner said he thought defendant was somehow armed. Devereaux saw a bulge in the right front portion of defendant's waistband. A pat down search revealed a fully loaded .38 caliber revolver. Upon his arrest defendant identified himself as Mickey Johnson. After booking, it was found out that this man was

defendant and that he was wanted for murder. (R. 738-43)

The People then presented seven certified copies of conviction for defendant: 1) two counts of armed robbery (1971) 4 to 8 years in the penitentiary; 2) armed robbery (1971) 4 to 8 years; 3) armed robbery (1971) 4 to 8 years; 4) armed robbery (1971) 4 to 8 years; 5) robbery (1971) 4 to 8 years; 6) federal bank robbery by use of a firearm (1975) 5 years; and 7) armed robbery (1976) 5 to 8 years.

III

REASONS FOR DENYING THE PETITION

The defendant is a career criminal. His extensive criminal background and the facts of his prior crimes are fully detailed in the Fact of the Case portion of this response. Suffice it to say that defendant was convicted in Illinois of five armed robberies and one robbery, and he was also convicted of federal bank robbery by use of a firearm. His weapon of choice is a firearm, which he also used in the present case along with a broken pair of scissors, which he used in stabbing each of his victims. The defendant is not only a career criminal but he is also a con man to boot. In several of his previous robberies he lulled his victims into a false sense of security (asking for change for a 10 dollar bill, asking to see a camera) before he pulled a gun on his unsuspecting victims and demanded money from them. He did the same in this case by taking advantage of his friendship with Mr. Ray and engaging him in conversation over drinks before embarking on his criminal enterprise.

The facts of this case, standing alone, are enough reason to deny defendant clemency, let alone defendant's request to have his sentence commuted to a term of 40 years. Robert Ray had know defendant for one year prior to this crime, having met him through defendant's brother, who worked part-time for Mr. Ray at the bar. After socializing with Mr. Ray and Ms. Byrd defendant pulled a gun and announced a robbery. The defendant tied up his victims and stabbed them before he set Mr. Ray's bedroom on fire. Defendant and his brother then threw their victims into the inferno and rigged the lock on the bedroom door. But for the grace of God, Mr. Ray survived. Ms. Byrd was no so lucky. She died in the air sharft. How frightening her last moments must have been. She was able to speak to both Mr. Ray and a fire-fighter. They were so close to rescuing her

but the smoke and fire barred their way. She fought desperately to stay alive but the combination of the stab wounds inflicted by the defendant and the carbon monoxide and soot which emanated from the fire that defendant set soon choked her lungs and proved to be too much for her to fight. The skin was peeling from her body when the fire-fighters finally reached her. Defendant's request that his sentence be commuted to 40 years is an insult to the memory of Ms. Byrd, her family and Mr. Ray.

The defendant has never accepted responsibility for his actions in this case. At his initial trial it was a theory of the defense that Mr. Ray set the fire and killed Ms. Byrd and framed defendant because of debts he owed to defendant. As time wore on the defendant's strategy changed and he tried to shift the blame to his brother. In rejecting defendant's claim that the jury erred in finding that defendant actually killed Delinda Byrd, our Supreme Court held,

Defendant challenges only the jury's finding that he actually killed Delinda Byrd. He argues that the evidence was insufficient to support a conclusion by the jury that he, rather than Jackson, stabbed Byrd or set the fire in the bedroom. With respect to Byrd's stab wounds, defendant notes that there was no physical or scientific evidence that showed that he stabbed Byrd. In addition, defendant asserts that Ray's testimony did not support a conclusion that defendant stabbed Byrd because Ray admitted that he looked away before she was stabbed. According to defendant, the evidence that Jackson suggested the scissors as a weapon by saying, "use this," indicates that he, rather than defendant, actually stabbed Byrd. As for the fire, defendant argues that Ray testified that he did not know who started the fire and that both defendant and Jackson were in the bedroom before Ray noticed it was on fire. Defendant concludes that, based on this evidence, no reasonable jury could have found beyond a reasonable doubt that he actually killed Byrd.

After reviewing the evidence in this case in the light most favorable to the prosecution, we cannot agree with defendant that there was an insufficient basis for the jury's

determination that he actually killed Byrd. First, we find that the evidence was sufficient to support a conclusion by the jury that defendant inflicted Byrd's stab wounds, which Donoghue testified were the immediate cause of her death. While there was no physical evidence connecting defendant to Byrd's stabbing, Ray's testimony was sufficient to support a conclusion that defendant stabbed her.

Ray's testimony indicated that it was defendant, not Jackson, who took the active role in the offenses against Ray and Byrd. Defendant was the one who called Ray to arrange the visit on the night of the murder. Defendant was the one who announced the armed robbery and first pointed a gun at Ray and Byrd. He was also the one who tied Ray and Byrd with electrical cord, emptied the cash register, removed items from the apartment, and stabbed Ray. During the robbery and stabbings, Jackson merely sat nearby and pointed a gun at Ray and Byrd.

Ray's testimony about the details of Byrd's stabbing also indicated that defendant himself inflicted her stab wounds. Ray testified that, immediately after defendant stood over him and stabbed him with a half pair of scissors, defendant straddled Byrd in such a way that Ray concluded that defendant was about to "do the same thing to her." When Ray begged defendant not to stab Byrd, defendant gave him an "evil" look. While Ray did not actually see defendant place the scissors into Byrd's back, Ray saw the hand in which defendant held the scissors move in a downward motion toward Byrd before Ray turned away. Donoghue testified that all of Byrd's wounds could have been made by the same instrument and that this instrument could have been a pair of scissors. It was reasonable to infer, based on this testimony, that defendant stabbed Byrd. See People v. Buss, 187 Ill. 2d 144, 211, 240 Ill. Dec. 520, 718 N.E.2d 1 (1999) (circumstantial evidence is sufficient to support a verdict of guilty where it satisfies the proof beyond a reasonable doubt standard).

By contrast, defendant's theory that Jackson stabbed Byrd is not reasonable based on the evidence. Defendant's suggestion that, just as Ray turned away, defendant stopped the downward motion of his hand and gave the scissors to Jackson to actually stab Byrd defies common sense and logic. The fact that defendant had just stabbed Ray and appeared to be preparing to stab Byrd in the same

manner strongly supports a conclusion that defendant, not his brother, stabbed Byrd. Moreover, Jackson's direction to defendant to "use this" does not indicate that Jackson stabbed Byrd. To the contrary, the fact that Jackson suggested a weapon for defendant to use rather than using it himself to stab Ray indicates that defendant stabbed Byrd.

The evidence was also sufficient to support a determination by the jury that defendant set the fire, which resulted in the burns that were a contributing cause of Byrd's death. Ray testified that, after defendant stabbed him, defendant went into Ray's bedroom for a few minutes. When defendant exited the room, defendant and Jackson carried Ray into this bedroom, which was now on fire. A reasonable inference from this description of events is that defendant set the fire in the bedroom. Contrary to defendant's assertion, Ray did not testify that Jackson accompanied defendant into the bedroom before helping defendant throw Ray and Byrd into the room. Instead, Ray testified that he did not recall whether Jackson went into the bedroom with defendant. Ray's testimony that the bedroom was on fire after defendant entered it for a few minutes, as well as his testimony describing defendant's primary role in the robbery and stabbings, permitted a reasonable inference by the jury that defendant, rather than Jackson, set the fire in the bedroom. Accordingly, we hold that, viewing the evidence in the light most favorable to the prosecution (Pasch, 152 Ill. 2d at 213-14), a reasonable jury could have found beyond a reasonable doubt that defendant killed Byrd and was eligible for the death penalty under section 9-1(b)(6).

People v. Emerson, 189 Ill. 2d 436, 475-79. In light of his holding, defendant's failure to accept responsibility for these brutal crimes is appalling and militates heavily against his request for clemency.

Defendant also 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, defendant 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 defendant's trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that defendant has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings.

Supreme Court Rules

Defendant asserts 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.

Eligibility Factors

Defendant asserts that he is entitled to clemency because he was found eligible for the death penalty based upon an aggravating factor, murder in the course of an armed robbery, 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 armed robbery, rape or home invasion are properly death eligible to help deter the defendant from killing the victim. Given these important policy considerations, defendant’s request must be rejected. As noted earlier our Supreme Court had held that the evidence established that defendant actually killed Delinda Byrd, attempted to murder Robert Ray and set fire to the bedroom where he left his victims to die. Moreover, this is not a “typical” felony-murder case, rather it was well-thought out in advance for “... the evidence that defendant waited until Ray closed the bar to visit, that defendant had a history of committing armed robberies of businesses at closing time, and that defendant brought a gun with him when he visited Ray indicates advanced planning.” People v. Emerson, 189 Ill. 2d at 495. Thus, it is clear that defendant’s primary intent was murder, not robbery.

Instruction on Alternative Sentences

Defendant believes that his death sentence should be commuted because the jury was not

instructed as to all the possible alternative sentences, including that he could have been sentenced to as little as 20 years imprisonment. However, except in cases where the only alternative is mandatory natural life, such a rule would actually serve to prejudice the defendant. If a jury is told that the defendant could be sentenced to as little as 20 years, the jury might determine that the death penalty is necessary to ensure that he is never released into society. It is for this reason that current Illinois law requires that juries be instructed not to concern themselves with sentencing issues. Illinois Pattern Jury Instructions 1.01 & 7C.05 The only exception to this rule is that the jury must be informed where natural life imprisonment is the only available option. People v. Gacho, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988). Accordingly, despite the Governor's Commission's recommendation, the fairness of defendant's sentencing hearing was ensured by not instructing the jury on the available sentencing options. Moreover, every court that has reviewed the instructions in defendant's case has found that they comport to constitutional norms.

Sufficient to Preclude

Defendant 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 defendant's case, any confusion in the language of the instruction was negated by the closing arguments. Additionally, every court that has visited this issue in the numerous appeals brought by defendant have found no error in this regard.

Mental Retardation

Defendant 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, defendant's claim is premature and should not be considered by the Board at this time.

Defendant claims, without citation to any reports, that his I.Q. is now near 70 or below. To say that his assertion is speculative would give it too much credit. It is a conclusion drawn from thin air and nothing more. The records in this case show that in 1965 defendant had a verbal I.Q. of 80, a performance I.Q. of 97 and a full scale I.Q. of 87. In December of 1971 defendant had a Beta I.Q. score of 89. Thus, it appears that when last tested defendant had an overall I.Q. of between 87 and 90. This is a far cry from the I.Q. score of 70 or below that defendant now

represents to this Board. As noted, this alleged score is not based on any accepted testing procedure, but is rather a speculative guess on the part of defendant. Moreover, defendant does not assert that his mental condition was evidenced prior to the age of 18, a factor required by Atkins. Defendant does not suffer from mental retardation, for, as our Supreme Court held, "...defendant's wife testified that she and defendant had communications involving her interest in philosophy and mathematics, and other individuals with whom defendant corresponded [while on death row] described him as articulate, well-read, and above average intelligence." People v. Emerson, 189 Ill. 2d at 497. Defendant's assertion of mental retardation is a sham which is refuted by the facts of the case.

Attorney's Experience

Defendant makes no attempt to show how any of the vast amount of attorneys who have represented him through his two trials, two of this three sentencing hearings, two post-convictions proceedings, four appeals to the Illinois Supreme Court, and his federal habeas proceedings in the district and Circuit Court of Appeals, have failed in their duty to provide him with the effective assistance of counsel at his trial proceedings. The Seventh Circuit found that counsel was ineffective at defendant's second death penalty proceeding and he was granted a new hearing. This shows that our system works. At that hearing he was represented by able attorneys, who had secured the new hearing on federal habeas review. In spite of their erstwhile efforts yet another jury found that defendant should be sentenced to death. The efforts of all of these attorneys and the fact that his case was remanded for either a new trial or sentencing hearing on several occasions clearly demonstrates that Illinois' system of justice works. Every court, state and federal, which

reviewed the question of competency of trial counsel has found that trial counsels' performance passed constitutional muster. As mentioned, despite the efforts of these various attorneys, 36 people who sat in judgment of defendant at three different sentencing hearings, and 24 people who sat in judgment of him at two trials, have spoken with one resounding voice: this defendant is guilty of the crimes charged and the appropriate sentence is death.

Guilt Based On Testimony Of A Single Eye Witness

There was only one eyewitness to this crime because the other witness, Delinda Byrd, was killed by the defendant. The crimes were committed in a closed bar during the early morning hours. Besides, the surviving witness, Robert Ray, had known defendant for one year prior to these crimes. He sat and talked with defendant and co-defendant for a long time before defendant pulled his gun and announced a robbery. From his initial identification of defendant to the police as the perpetrator ("no, I didn't tell them [the police] that they [defendant and Richard Jackson] was involved, I told them that they was the one who had did it." (R. 512-14) and throughout the years and the many proceedings that followed Mr. Ray has never waived in his identification of defendant as being the man: who pulled a gun and announced a robbery; who tied up Mr. Ray and Ms. Byrd; who took money from the cash register; who took items from Mr. Ray's apartment; who stabbed Mr. Ray and Ms. Byrd; who set fire to Mr. Ray's bedroom; who, with help of the co-defendant, threw Mr. Ray and Ms. Byrd into the blazing bedroom; and who locked the door and left them to die. Mr. Ray's identification of defendant has never been impeached or contradicted. Rather, his identification of defendant as the man who committed these crimes is so reliable that every jury and judge who has reviewed this case had found him to be a reliable, credible and

truthful eyewitness.

The People request that defendant's clemency petition be denied. The evidence established that defendant has led a life of crime since his juvenile years. His crimes escalated in seriousness as he grew older until he committed these crimes. The evidence established the brutal and senseless nature of defendant's murder of Ms. Byrd and attempted murder of Mr. Ray. Defendant's acts in this case were well thought out in advance. His sole purpose was not to commit robbery; that was a secondary consideration, for his real purpose was to murder. He is not deserving of clemency.

CONCLUSION

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

Respectfully submitted,

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