

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. \
vs.)	
)	
DERRICK KING,)	Inmate No. N12641
)	
)	

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

PEOPLE'S RESPONSE IN OPPOSITION TO PETITION
FROM COMMUTATION OF DEATH SENTENCE

HEARING REQUESTED

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In his direct appeal, petitioner raised twenty-one claims of error. On January 23, 1986, the Supreme Court rejected each of King's claims of error and affirmed both his convictions and sentence. People v. King, 109 Ill. 2d 514, 488 N.E.2d 949 (1986), (See Appendix G). King's petition for writ of certiorari was denied on October 6, 1986. Illinois v. King, 479 U.S. 872, 93 L.Ed.2d, 107 S.Ct. 249 (1986).

On May 15, 1987, King filed a *pro se* Post-Conviction Petition asserting 11 claims of error. On June 9, 1995, seven years, and four attorneys later, the court granted the People's Motion to Dismiss King's Post-Conviction Petition on every count.

King then appealed the dismissal of his Post-Conviction Petition, raising five claims of error. The Supreme Court affirmed the trial court's dismissal of King's Post-Conviction Petition on three claims of error, but remanded the case for an evidentiary hearing on two issues. People v. King, 192 Ill. 2d 189, 735 N.E.2d 569 (2000) (See Appendix G). First, the Court held that, in light of the new evidence included with the post-conviction petition regarding allegations of abuse by some police personnel at Area 2, King should be given an evidentiary hearing on the issue of the voluntariness of his confession. King, 192 Ill. 2d at 199. The Court, however, specifically declined King's invitation to relieve him of the burden to prove his allegations of abuse in a hearing, and simply award him a new suppression hearing. King, 192 Ill. 2d at 199. The Court also concluded that King should be allowed an opportunity to prove his attorney was ineffective for failing to present additional mitigation evidence. King, 192 Ill. 2d at 201. The evidentiary hearing has not yet been scheduled.

II

FACTS OF THE CASE

Facts of the Offense

During the early evening hours of December 19, 1979, Derrick King and Donald Ray Summage entered a record and candy shop known as Pleasures Unlimited, located at 1943 West 79th Street in Chicago. (Tr.R. 1011a, See Appendix A, King's court-reported confession, and Appendix B, crime scene photographs) Their intent was to rob the store's owner of narcotics, so they stationed their accomplice, Michael Coleman, to act as a lookout in front of the store. (Tr.R. 957, 1011(a), 1016a-1017a) The owner, however, was not at the store, and the shop was being minded by 17-year old Dwaine Miller², a high school student who had recently been hired to work in the store. (Tr.R. 749-751, 1012a) King then decided to rob the store of money. (Tr.R. 1012a)

Petitioner drew his loaded .38 caliber revolver, and ordered Dwaine Miller to hand over the money in the cash register. (Tr.R. 1012a) Miller obediently gave King the \$7.00 in the register. (Tr.R. 1012a) King then grabbed Miller by the hair and marched him to a second register at the back of the store. (Tr.R. 1013a) When young Dwaine Miller offered some resistance to petitioner, King "smacked" him in the head. (Tr.R. 1233)

At the rear register, King ordered Miller to his knees, and instructed him to open the register. (Tr.R. 1233) Dwaine Miller, however, made the fatal mistake of not moving quickly enough for petitioner's liking. King's response to what he perceived as bravery by Miller was to fire his revolver into the back of Dwaine Miller's head. (Tr.R. 1013a, 1233-34) King and his accomplices then ran out

² In previous filings the victim's name was spelled "Dwayne." However, the police reports reveal that the correct spelling is "Dwaine."

of the store, leaving Dwaine Miller to die in a pool of blood. (Tr.R. 690, 699, 706, 715, 865)

The Investigation

Dr. Tae An, of the Cook County Medical Examiner's Office, performed an autopsy on the body of Dwaine Miller, and recovered a large, copper-jacketed bullet from the victim's head. (Tr.R. 794) The bullet was then placed in a sealed evidence envelope and retained for later comparison. (Tr.R. 799) On December 20, 1979, Sergeant Vincent LaMoro, a ballistics expert with over 15 years of firearms examination experience, determined that the bullet removed from Dwaine Miller's skull was fired from a .38 caliber revolver with six lands and grooves in the barrel inclined to the right. (Tr.R. 889, 896, 1087-88)

On December 22, 1979, three days after the murder of Dwaine Miller, a Church's Fried Chicken restaurant, located just across the street from the Pleasures Unlimited store, was also the subject of an armed robbery. (Tr.R. 1014a) During that robbery, two men walked into the restaurant and announced a "stick-up." (Tr.R. 1014a) While the employees and customers were held at bay by the armed offender, the other robber jumped over the counter and took \$400.00 from the cash register. (Tr.R. 1014a) The armed offender fired a single shot into the ceiling of the restaurant as he left the store. (Tr.R. 1015a)

Investigators later recovered that bullet and sent it, in a sealed evidence envelope, to the Chicago Police Department's Crime Lab. (Tr.R. 1111-12) Later that day, Officer James Gainor, a firearms examiner with 12 years experience, determined that the bullet recovered from the Church's Fried Chicken restaurant had also been discharged from a .38 caliber revolver with six lands and grooves inclined to the right. (Tr.R. 1087) Further comparison was then made between the Church's bullet and other bullets in the crime lab's "open" file. This comparison revealed that the bullet

removed from Dwaine Miller's skull had been fired from the same weapon as that used in the Church's Fried Chicken robbery. (Tr.R. 898, 1089-90) On January 6, 1980, Officer Gainor notified Area 2 of the bullets' match. (Tr.R. 1089)

On that same day, as part of their continuing investigation into the Church's Fried Chicken robbery, investigators showed several photographs of suspects to eyewitnesses. (Tr.R. 206-07, 998, Tr.R.CL C59-61) From those photo arrays, King was identified as one of the robbers of the Church's Fried Chicken restaurant. (Tr.R. 844, 998, See Appendix C, Supplemental Police Report of 2/9/80, p.2, ¶ 4) Investigator Robert Dwyer, who had been assigned to investigate the armed robbery and murder at Pleasures Unlimited, later learned of King's identification as one of the robbers and the ballistics evidence linking the weapons used in the two crimes. As a result, Investigator Dwyer placed King's photograph in the Chicago Police Department's daily bulletin as a person wanted in connection with the homicide investigation. (Tr. R. 845, 1005-06)

The investigation into the homicide of Dwaine Miller also led the police to Timothy Cox, a convicted burglar and friend of King's. (Tr.R. 1196-97, 1202-03, See Appendix C, Supplemental Police Report of 2/9/80, p.2, ¶ 3, wherein suspects are reported as having been seen at a party at 7810 S. Damen, and then see p. 3 of same report where it identifies Timothy Cox as person seen fighting with manager of Church's Fried Chicken restaurant, and lists Cox's address as 7810 S. Damen.) On February 8, 1980, Cox testified before a Grand Jury regarding admissions King had made to him about both the Church's robbery and the robbery and murder at Pleasures Unlimited. (Tr.R. 1196-1250) King admitted to Cox that he committed both robberies, and that he murdered Dwaine Miller. (Tr.R. 1218-19, 1224-25, 1231, 1233-34) In addition, King showed Cox the silver-plated revolver used to commit the crimes. (Tr.R. 1220) Finally, King told Cox of his intent to rob every store on

79th Street, and his plan to "start shooting" if the people did not give him the money when he asked for it. (Tr.R. 1227, 1236, 1300) Although Cox recanted this testimony at trial, claiming that he had been forced to testify, an assistant state's attorney testified in rebuttal that Cox had affirmed his testimony in her presence only a week prior to trial. (Tr.R. 1288-1305)

Defendant's Arrest and Confession

On February 23, 1980, at approximately 7:30 p.m., King was arrested while walking with friends near the intersection of 79th St. and Wolcott. (Tr.R. 811-12) Although he was originally brought to the Sixth District police station, he was subsequently transferred to Area 2 headquarters. (Tr.R. 933) Upon his arrival at Area 2, sometime between 8:00 p.m. and 8:30 p.m., King was placed in an interview room. (Tr.R. 934)

After he was advised of his rights, King was briefly interviewed by Sergeant Burge, Investigator Corless and Investigator Basile regarding the Church's Fried Chicken restaurant robbery. (Tr.R. 191, 195, 933-36) During this twenty to thirty minute interview, King admitted his participation in the Church's robbery. Although no one had yet told petitioner what murder he was to be questioned about, King raised the subject of the Pleasures Unlimited case with these officers. (Tr. R. 937, 946-47)

When Investigator Dwyer and his partner, Investigator Joseph DiGiacomo, spoke with King immediately thereafter, Investigator Dwyer asked King if he had confessed his involvement in the Church's robbery to Investigator Corless. (Tr.R. 936-37) King acknowledged that he had. (Tr. R. 946) Investigator Dwyer then asked petitioner if he had also spoken to Investigator Corless about the Pleasures Unlimited store. Once again, King admitted that he had. (Tr. R. 946) Investigator Dwyer then asked King how he knew that this was the murder which Dwyer wanted to speak to him about,

when Dwyer had never mentioned anything to King that would lead him to this conclusion. (Tr. R.946) King replied that he simply thought that this was the murder that Dwyer would want to talk to him about. (Tr. R. 947)

Investigator Dwyer then told King that the bullet recovered from the ceiling panel of the Church's Fried Chicken restaurant had been compared to the bullet recovered from Dwaine Miller. That comparison proved that the bullets had been fired from the same weapon. (Tr.R. 953) As King had already admitted being present during the Church's Fried Chicken robbery, Investigator Dwyer asked petitioner if he was also involved in the robbery and murder at Pleasures Unlimited. (Tr.R. 953)

King immediately admitted to Investigator Dwyer that he knew something about the Pleasures Unlimited robbery, although he claimed not to have been responsible for the murder. (Tr.R. 953) Instead, King claimed that he was outside the store during the robbery, and that the shooting was actually done by someone named Donald Ray Summage. (Tr.R. 953-54) Investigator Dwyer asked King how he knew that Summage had shot the victim if he was outside the store at the time it happened. King replied that he saw Summage shoot Dwaine Miller. (Tr.R. 954) When asked if anyone else had also been involved with the robbery and murder, King named Michael Coleman as a third participant. (Tr.R. 954)

Investigator Dwyer asked King if Summage and Coleman would corroborate his story, or if they would identify him as the shooter. King indicated that they would probably name him as the shooter, but again insisted that he was outside the store at the time of the murder. Moments later, when asked again if he shot Dwaine Miller, King confessed, "Well, yeah, I shot him, but it was an accident." (Tr.R. 955) Subsequently, petitioner told the investigators the entire story. (Tr.R. 957)

The investigators then asked King if he was still in possession of the gun used in the robberies

and murder. (Tr.R. 957) King told them that after the murder he gave the gun to Summage, and that Summage later sold the gun to Coleman. King told Dwyer that he believed Coleman still had the gun because he had seen Coleman with it recently. (Tr.R. 957)

King was also asked if he could provide investigators with the addresses of Summage and Coleman. Defendant told police an approximate address for Summage, but explained that Summage was currently in Kankakee. (Tr.R. 954) He also told police that while he knew where Coleman lived, he could not give them an exact address. Petitioner only knew that Coleman lived near the park, somewhere in the vicinity of 64th, 65th or 66th and Loomis. (Tr.R. 958)

While Dwyer continued to interview King, he arranged for Investigators Corless and Basile to go to Summage's address. (Tr. R. 958-59, 1032) Summage could not be located, however, and the investigators returned to the station shortly after 9:00 p.m. (Tr. R. 1032) Dwyer then asked King if he could show the officers where Coleman lived and King agreed. (Tr. R. 959, 1032) Investigator Dwyer, Investigator DiGiacomo and King went in one car, while Sergeant Burge, and Investigators Corless and Basile went in another. (Tr. R. 959) After King identified Coleman's apartment building, the officers in Sergeant Burge's car set up surveillance of the building while Investigators Dwyer and DiGiacomo took King back to Area 2. After depositing King at the station, Dwyer and DiGiacomo returned to Coleman's apartment building. (Tr. R. 960-61)

The stake out of Coleman's apartment lasted over one hour. (Tr. R. 961-62) Coleman returned to his apartment at approximately 12:30 a.m. and was immediately arrested. (Tr.R. 224, 350-51) During the subsequent search of his apartment, the officers found a chrome or nickel-plated, snub-nosed, .38 caliber Rossi revolver. (Tr.R. 964) In all, the Coleman stake-out, arrest and search took more than an hour and a half. Thus, during the time King claims he was being abused, the very

detectives he accused of the abuse were not even in the police station.

Following the recovery of the weapon, but while still out of the station, Investigator Dwyer called for a Felony Review Assistant State's Attorney. (Tr.R. 964, 1034) It was shortly after midnight on February 24th when Assistant State's Attorney Margaret Stanton received the call, and she arrived at Area 2 sometime between 12:30 and 12:45 a.m.. (Tr.R. 1094) Over the next fifteen minutes she read the police reports regarding the investigation, and, at approximately 1:00 a.m., she began her first interview with King. (Tr.R. 1094) As Investigator Dwyer and the others had not yet returned to Area 2 headquarters, Assistant State's Attorney Stanton was alone with defendant in the interview room. (Tr.R. 1095) She introduced herself to him, informed him of her position and explained that she was not there to represent him. (Tr.R. 1095) While no officers were present, Assistant State's Attorney Stanton took the opportunity to ask King if he had been treated well by the police up to that point. (Tr.R. 1095) King told her that he had been well-treated. (Tr. R.1095) They then talked about the robbery of Pleasures Unlimited and the murder of Dwaine Miller. (Tr.R. 965, 1097) The information King related to her was substantially the same information he had earlier told Dwyer. (Tr.R. 965) When Investigator Dwyer arrived at the station, he spoke privately with the assistant state's attorney. They then spoke with King together. Dwyer showed King the gun recovered from Coleman's apartment, and King identified it as the murder weapon. (Tr. R. 965, 1098) At approximately 1:30 a.m., following her interview with King, Assistant State's Attorney Stanton spoke with co-defendant Coleman. Afterwards, King agreed to give a court-reported statement and a court reporter was called to the station. (Tr.R. 966, 1098)

The court-reported statement began at approximately 2:40 a.m. on February 24, 1980 and was completed at approximately 3:00 a.m. (Tr.R. 973-75, See Appendix A, King's court-reported

confession) After it was typed up, King reviewed the statement with Assistant State's Attorney Stanton and Investigator Dwyer. As he completed his review of each page, King initialed the bottom of the page and then signed the final page. Before signing it, however, King asked to add a single sentence to the statement, which was handwritten on the statement by Investigator Dwyer. The sentence read, "I did not mean to kill the boy." (Tr.R. 976-982, 1049a-51a) At approximately 4:55 a.m., when this process was complete, the court reporter took a Polaroid photograph of defendant. (Tr.R. 968-69, See Appendix B, pp. 7-8, There was only one photograph taken of King following his confession. There are two copies of this photograph included in the appendix because the exposures are slightly different.) The back of the photograph was marked with the date, time and place the photograph was taken, and it was initialed by the court-reporter, and signed by King, Investigator Dwyer and Assistant State's Attorney Stanton. (See Appendix B, p. 7)

The Motion to Suppress

Prior to trial, King filed Motions to Quash Arrest and to Suppress his Confession. (Tr.R. CL C1539, 1540-42, 1545-46, 1547-48) He alleged that his arrest was without probable cause and that his confession was the product of police brutality and coercion. An extensive hearing was held on the motions. (Tr. R. 2-443, Supp. R. 3-85) The defense presented four witnesses. Michael Berry, a friend of King's who was with him at the time of his arrest (Tr. R. 10-32); Darlene Harland, King's cousin (Tr. R. 36-54); King, himself (Tr. R. 55-101); and Leon White, the manager of the Church's Fried Chicken restaurant that defendant robbed. (Tr.R. 102-06)

Berry testified that he was with defendant and other friends the entire day of February 23, 1980, drinking and getting high. According to Berry, he, King and another friend later proceeded to the area of 79th and Wolcott, where they were arrested as they walked down the street. (Tr.R. 11-13)

At the time of his arrest, Berry testified, King was drunk. (Tr.R. 14)

King corroborated Berry's account of his arrest. (Tr.R. 57-62, See Appendix D, which contains the complete transcript of King's testimony at the hearing on his Motions to Quash and Suppress) He then testified to the events leading up to and the circumstances surrounding his confession. King stated that he was initially taken to Gresham station, but he was not spoken to nor questioned by anyone until he was taken to "homicide." (Tr.R. 63, 77-78)

At this other police station he was placed in a small room. (Tr. R.79) Two plain clothes officers entered the room and told him to cooperate, and to answer some questions. (Tr. R.79) He initially testified that he thought police told him his rights, and he thought he told police he wanted to remain silent, but that he was not sure because he was high at the time of his arrest and he did not really know what was going on. (Tr.R 63-64) He also stated that after they told him his rights "They said I didn't have no rights. Just answer the questions." (Tr.R 63) Nonetheless, King admitted that he was familiar with his rights based upon his prior arrests. (Tr.R. 65) And later, he unequivocally stated that the officers in homicide advised him of his rights after "they got to talking to [him]." (Tr.R. 79) King admitted that he had not made any statement before these rights were explained to him. (Tr. R 80)

According to King, the physical abuse began shortly after he arrived at the homicide station and continued on and off until he gave the statement more than seven hours later. (Tr.R. 67, 69, 83) He testified that he was told to "cooperate" by the investigators, and was beaten by them when he did not provide them with the statement they wanted. (Tr.R. 69) He claimed that he was beaten on the chest and knees with a baseball bat, and that he was hit on the side of his head and face with what he described as a "medium" sized, "police" book. (Tr.R. 67-71, 81-85, 91-92) He stated that five

officers were in the room during the beatings, although only one actually hit him with the bat. (Tr.R. 81) King testified that the bat was in the room when he was initially placed there. (Tr.R. 81)

Although he could not remember how many times he was struck in the chest, King testified that the officer hit him in the knees between 20 and 40 times, and hit him on the right side of his face with a book once or twice. (Tr.R. 82, 84) He stated that did not know whether the officer that hit him with the book was the same one that hit him with the bat because he “was sitting down in the chair.” (Tr.R. 85) King testified that he was not cut on the face as a result of being hit by the book, and he never claimed to have suffered any swelling or bruising as a result of the beatings. (Tr.R. 84-85) Nor did he testify as to any specific injuries that resulted from the alleged beatings of his knees and chest, other than to say his chest hurt as a result. (Tr.R.84) Further, petitioner testified that he was able to walk out of the interrogation room at the conclusion of his statement, and that he was given only aspirin upon his entrance into the jail. (Tr.R. 98)

King testified that, despite the repeated beatings, he did not provide the police with any information at all prior to the time the assistant state’s attorney was called to the station. (Tr. R. 85-86) He claimed that after several hours of beatings, a female assistant state’s attorney entered the room he was in, accompanied by a man with a court-reporter’s dictation machine. (Tr. R. 87) No officers were in the room at the time. (Tr. R. 87-88) He believed that the assistant state’s attorney informed him of his rights. (Tr.R. 88-89) Petitioner testified that he did not give any type of statement to the assistant state’s attorney at this time, other than to tell her that he “didn’t want to sign no statement.” (Tr.R. 90) King stated that the court reporter was not transcribing anything because he, King, was not saying anything. (Tr.R. 90) Then, King claimed, the assistant state’s attorney and the court reporter left the room and some officers returned.

King was not absolutely certain whether the officer who originally beat him was one of the officers who re-entered the interview room. (Tr.R. 91) Nor could he recall whether the officer carried the bat into the room with him, or if it was left in the room following the earlier beatings and was present there while the assistant state's attorney questioned him. (Tr.R. 91) The officers again told King to cooperate, and again beat him with the bat a "couple times" across his kneecaps. (Tr.R. 91-92) King claimed that after a few minutes the officers left the room and the "State's Attorney and the stud that was on the typewriter" came back in. (Tr. R. 92) King did not know where the officer who hit him with the bat went when the assistant state's attorney came back, nor did he know what happened to the bat. (Tr.R. 93-94) It was then, King testified, that he gave his statement. (Tr.R. 94)

King testified that he ultimately gave a statement "after [the officers] explained to [him] what they wanted [him] to say." (Tr.R. 69, 85-86) When asked why he signed the statement, King stated, "Because I was beaten. I couldn't take no more of the whipping." (Tr.R. 69, See also 71) King also testified that after signing an initial statement, the police came in and told him that they wanted him to give another statement because the original "probably wouldn't stand up." (Tr.R.70-71) According to King, he was then beaten again. (Tr. R.71) He reiterated that he would not have signed a statement had he not been physically abused. (Tr. R.71)

King was unable to name or provide a physical description of any of the officers involved in the alleged beatings. (Tr.R. 81, 99-100) He did, however, testify that he remembered the person who beat him, and he would recognize that person if he saw him again. (Tr.R. 81-82, 91) King did not identify any of the officers who testified at the hearing on his motion as the officers who allegedly abused him. These officers included Investigator Robert Dwyer (Tr.R. 210-90), Investigator Gerald Corless (Tr.R.181-209), Investigator George Basile (Tr.R. 295-308), Investigator Joseph DiGiacomo

(Tr.R. 321-60), Investigator Peter Dignan (Supp. Tr.R. 3-13), and Sergeant Jon Burge (Tr.R. 370-404) King admitted that he never told the assistant state's attorney of the beatings, even though he was alone with her, and she specifically asked him how he had been treated while in custody. (R. 88, 94-95, 97)

Darlene Harland testified as to King's appearance on the following day. She stated that she saw King at the Sixth District police station between 3:00 p.m. and 4:00 p.m. on the day after his arrest. (Tr.R. 36) According to her, King looked substantially different than he had on the previous Friday, when she had seen him at her sister's house. (Tr.R. 39, 49) While he had appeared normal on Friday, on Sunday afternoon King's "whole face" was swollen, especially around his eyes, and he had scratches on his arm. (Tr.R. 38, 40, 42, 43) He appeared to have been crying. (Tr.R. 52) Although she stated that King had no cuts on his face, and that his face was not black and blue, Ms. Harland testified that from the swelling on defendant's face she knew he had been beaten. (Tr.R. 40-41, 43, 49) She also claimed that the front of King's shirt was stained with small amounts of blood. (Tr.R. 43) Ms. Harland never testified regarding any injuries to King's knees or chest, nor did she indicate that King had difficulty walking.

Ms. Harland originally testified that when she asked King what was wrong with him, defendant only said, "Can't you see?" (Tr.R. 40, 45) She stated that he was unable to talk with her further because he became very upset and began crying. (Tr.R. 40, 45) However, Ms. Harland later changed her testimony and claimed that King told her that he had been beaten when he was arrested. (Tr.R. 46) King never told her specifically where he had been beaten, or that it was the police who beat him. (Tr.R. 46, 48)

When shown the lineup photograph taken of King on that same Sunday, Ms. Harland testified

that, in the picture, one side of defendant's face did appear "puffier" than the other. (Tr.R. 51, See Appendix B, pp 5-6) However, she claimed that King's face was much redder when she saw him than it appeared in the photograph. In addition, she stated that he appeared calmer in the photograph than when she saw him. She testified that when she was at the station King was much more upset, and appeared to have been crying. (Tr.R. 52)

Leon White, the manager of the Church's Fried Chicken restaurant that King robbed, testified as to King's appearance during the lineup he viewed on that same Sunday at approximately 6:00 p.m.. (Tr.R. 102-106) According to Mr. White, defendant's face was "sort of swollen" and, unlike Ms. Harland, Mr. White claimed defendant's eye was bruised. (Tr.R. 104-105) Contrary to Ms. Harland, Mr. White testified that the lineup photograph produced at trial did not show any swelling or bruising on defendant. (See Appendix B, pp 5-6) However, he claimed that the photograph did not accurately depict King as he appeared that day. (Tr.R. 104-06) In fact, Mr. White testified that the photograph he was shown at the hearing was not a photograph of the lineup he observed. (Tr.R. 105)

In response, the People introduced both physical and testimonial evidence to refute King's claims of brutality. It included the testimony of the various officers involved in King's arrest and questioning, and three photographs of defendant, one taken immediately following his confession and two others taken the following day.

Officer Gerald Corless testified as to his dealings with King on February 23, and 24, 1980. (Tr.R. 181-209) Officer Corless identified People's Exhibit 1 as a photograph of the lineup he conducted at approximately 5:45 p.m. on February 24, 1980. (Tr.R. 186, 198, 203, See Appendix B, pp. 5-6)) Officer Corless testified that both defendants Coleman and King participated in this lineup which was viewed by Leon White, and that the photograph truly and accurately depicted how

defendants looked on that date. (Tr.R. 186, 198)

Investigator Dwyer testified that he first met King on the evening of February 23, 1980, at the 6th District police station, and immediately noticed two things about him: first, that King was not properly dressed for the cold weather; and second, based upon the puffiness of his eyes, and perhaps the presence of tears on his face, that he appeared to have been crying. (Tr.R. 219, 248) He testified regarding King's transfer to Area 2, King's initial interview with Investigator Corless regarding the Church's Fried Chicken robbery, and King's subsequent interview with Dwyer and his partner regarding the murder of Dwaine Miller, which he believed occurred sometime between 9:00 and 9:30 p.m.. (Tr. R. 220-21, 248-49) Dwyer described King as "basically cooperative" during this time. (Tr.R.251)

Dwyer then recounted how King helped the investigators locate co-defendant Coleman. He testified that the stake-out, the arrest and the subsequent search involving Coleman took more than an hour and one half, and was not completed until somewhere between 12:30 and 1:15 a.m. of February 24th. (Tr.R.221-24) Dwyer explained that although King had already made certain admissions before they left Area 2 in search of Coleman, the investigator chose not to call for a felony review assistant state's attorney until after Coleman was arrested. (Tr.R 249-50) Dwyer stated that the felony review assistant first interviewed King at sometime between 1:30 and 2:30 a.m., after which King agreed to provide a court-reported statement. (Tr. R. 231-32) Dwyer stated that he was present during the taking of this statement, and he identified People's Exhibit 2 as the statement that was actually taken. (Tr. R. 232-34, See Appendix A)

Investigator Dwyer specifically stated that throughout his dealings with King he never touched him, except to handcuff and unhandcuff him, and to conduct a protective pat down search.

(Tr.R. 243) Investigator Dwyer also stated that he never observed any other officer touch either King or Coleman. (Tr.R. 244) Investigator Dwyer also identified the photograph taken of King, Coleman and the other two participants in the lineup conducted in the evening of the same day the confession was given. (Tr. R.241, see Appendix B, 5-6)

Investigator Joseph DiGiacomo corroborated Investigator Dwyer's testimony. Investigator DiGiacomo testified that when he first met King in the interview room at Area 2 headquarters defendant appeared to have been crying. (Tr.R. 324) He, too, denied that he ever hit King and denied ever seeing anyone hit him. (Tr.R. 324, 330) Finally, Sergeant Jon Burge, who questioned defendant for thirty minutes regarding the Church's Fried Chicken Restaurant robbery also testified that he never beat defendant. (Tr.R. 381)

The trial court denied King's motion to quash his arrest, finding that the police had sufficient probable cause to justify his arrest on the evening of February 23, 1980. (Supp.Tr.R. 85) Additionally, the court rejected King's claims of brutality, and found that his statement was given freely and voluntarily, and was not the result of any beatings. (Supp. Tr.R. 85)

The Trial

King was tried before a jury and continued to pursue his claims that his confession was the product of police coercion. Investigator Dwyer provided substantially the same testimony at trial as he had at petitioner's pre-trial motion. (Tr.R. 924-1076) In addition to his testimony, the People presented the testimony of Assistant State's Attorney Margaret Stanton, the felony review assistant who interviewed King on the night of his arrest and who took his court-reported confession. (Tr.R. 1092-1089a)

Assistant State's Attorney Stanton testified that she was called to Area 2 shortly after

midnight, before Investigator Dwyer and his associates returned from their arrest of co-defendant Coleman and the search of his apartment. (Tr.R. 964, 1094, 1081a) Upon her arrival sometime between 12:30 and 12:45 a.m., she spoke with one of the officers in homicide and reviewed some of the police reports related to the investigation. (Tr.R. 1094) At approximately 1:00 a.m., she met with King, who was alone in an interview room. (Tr.R. 1094-95, 1024a) For the next fifteen minutes, she was able to speak with him outside the presence of any police officers. (Tr.R. 1095, 1024a-25a, 1081a,) After providing him with the Miranda warnings, King willingly told her the same account of the robbery and murder he had earlier provided Investigator Dwyer. (Tr.R. 1095-98) Assistant State's Attorney Stanton testified that she specifically asked King during this private interview "if he had been treated okay so far" and King responded that he had been. (Tr.R. 1095, 1077a-78a) According to Stanton, King reaffirmed this during the court-reported statement, and added that he had been provided with drinks and cigarettes, had been allowed to use the restroom and had been offered, but declined, food. (Tr.R. 1017a) After a few minutes, Assistant State's Attorney Stanton testified, Investigator Dwyer came into the room. Her account of what followed was, in all material respects, identical to the account provided by Investigator Dwyer.

Assistant State's Attorney Stanton also testified regarding the photograph of King taken immediately upon his approval of his court-reported statement. (Tr.R. 1002a) The back of that photograph, which was taken by Joseph Szybist, the court-reporter who transcribed King's statement, was marked with the date and time of its taking and then signed by King, Investigator Dwyer, Joseph Szybist, and Assistant State's Attorney Stanton. (Tr.R. 1002a-03a) After identifying People's Exhibit 25 as the photograph taken after the confession, Assistant State's Attorney Stanton testified that, other than his hair, King looked the same in the photograph as he did at trial. (Tr.R. 1006a)

In his defense, King presented the testimony of his cousin, Darlene Harland, as well as the testimonies of Donald Ray Summage and Timothy Cox. At trial, Darlene Harland embellished the story she gave at the pre-trial hearing. She now stated that when she saw King at the 6th District station on the day after his arrest his face was swollen, his eyes were real puffy, he had spots of blood on his face, and he had scratches, cuts and bruises on his arm. (Tr. R. 1163-64) After examining People's Exhibit 25, the photograph taken of King immediately after he gave his court-reported confession, Harland testified that the area above King's eyes looked puffy in the photo and she claimed that she could see a bruise on his arm. (Tr.R.1169) She also claimed that his cheeks and both sides of his face were swollen in this photograph. (Tr.R.1170)

Donald Ray Summage testified as to his arrest on the same charges and his subsequent interrogation. (Tr. R. 1121-48) Summage claimed that after his arrest in the early morning hours of February 28, 1980, he was taken to the 6th District police station and questioned by three uniformed officers. (Tr.R.1122-24) At trial he was unable to provide the names of these officers, and was unable to describe them by size or age. (Tr. R.1124-25) The only identifying feature to which he could testify was that they were white. (Tr. R. 1125) Summage stated that he was then transported to Area 2, where he was questioned by three plain clothes officers who told him they were homicide detectives. (Tr.R. 1128-29)

Summage stated that these detectives told him that he was involved in the robbery and murder with King and Coleman and that if he did not tell them what went on, they would give him the same treatment that they had given King and Coleman. (Tr.R.1131) Summage testified that when he responded that he did not know anything about the crimes, one of the detectives grabbed him by the collar and told Summage he had better tell them the truth. (Tr. R. 1131) Again, Summage told the

detectives he could not tell them anything. According to Summage, they then showed him a photograph of Coleman, which depicted Coleman with a deep cut over his eye. The detectives told Summage that he would receive the same treatment as Coleman. (Tr. R. 1131) Summage insisted that he knew nothing about the robbery and murder, that on the day in question he was moving his “aunty.” (Tr. R. 1131-32)

Summage acknowledged on cross-examination that although the officer grabbed him and asked about the murder, no officer ever punched or kicked him. (Tr.R. 1135) Nor did they ever kick him or hit him with sticks or with a bat. (Tr. R. 1135) He also acknowledged that he did not know if Coleman’s face was cut and the cut stitched before Coleman was arrested. (Tr. R. 1136-37) Finally, he admitted that the detectives never forced him to sign or make any statement. (Tr. R.1143)

King also presented the testimony of Timothy Cox. (Tr. R. 1196-1250) At trial, Cox recanted his Grand Jury testimony, and denied that King had ever confessed to committing the armed robbery of Pleasures Unlimited and the murder of Dwaine Miller. (Tr.R. 1197, 1206) Cox, who was on probation for burglary at the time, testified that he lied before the Grand Jury because he was being pressured by police. He stated that the police told him that if he did not cooperate with them there could be other consequences, more than being harassed, picked up off the street, or locked up overnight. (Tr.R. 1202) He testified that after he was subpoenaed by the State's Attorney's Office for trial he went to see the Public Defender because he knew his Grand Jury testimony was a lie and he knew that he could not lie in court again. (Tr. R. 1203)

On July 12, 1981, the jury found defendant guilty of the robbery of the Pleasures Unlimited store and the murder of Dwaine Miller. (Tr.R. 1421, 1511) On June 28, 1981, following the hearing in aggravation and mitigation, King was sentenced to death. (Tr.R. 1497, 1502-1505)

The Direct Appeal

King appealed his convictions and sentence to the Illinois Supreme Court, and raised twenty one claims of error. King renewed his claims that his arrest was without probable cause and that his confession was the product of police coercion, and asserted that the trial court improperly denied his Motions to Quash and Suppress. He also alleged that numerous errors during trial required reversal of his convictions and sentence. King also raised a variety of challenges to the fairness of his sentencing hearing and the constitutionality of the death penalty. The Supreme Court rejected each and every one of defendant's claims of error and affirmed both his convictions and sentence.

The Post-Conviction Proceedings

On May 15, 1987, King filed his *pro se* Post-Conviction Petition. (R.CL C28-49) King raised eleven alleged errors by trial counsel which, he claimed, served to deprive him of the effective assistance of counsel. (R.CL C29-43) Several of these were the same claims of error raised substantively in defendant's direct appeal, but for post-conviction review, were couched in terms of effective assistance of counsel.

In 1990, the attorney originally appointed to represent King in these proceedings was allowed to withdraw and, on October 24, 1990, the court appointed two new attorneys from the Capital Resource Center to represent petitioner in the post-conviction proceedings. (R.CL C1-3, C57-59, 319-22, C336-37, C342) On April 5, 1994, after three and one half years of extensive discovery and investigation, King's second set of appointed attorneys filed an Amended Petition for Post-Conviction Relief, along with nearly 200 pages of affidavits and exhibits in support of the petition.(R.CL C450-659) The People's amended Motion to Dismiss was filed on December 21, 1994. (R.CL C722-72)

Six months later, on June 9, 1995, the case was again continued for the appointment of a new defense attorney. (R.CL C11) On July 5, 1995, another attorney accepted appointment to represent King, although she did not formally file her appearance until January 19, 1996. (R.CL C11, C810, C827, Supp. R. 42-45³) On September 5, 1997, following arguments and a painstaking review of every document in the voluminous court file, the court granted the People's Motion to Dismiss on every point. (R. N.3-62, R.N62-76)

The Post-Conviction Appeal

The Illinois Supreme Court affirmed the trial court's dismissal on all but two counts. In light of the evidence of other allegations of abuse at Area 2 which were included with King's Amended Post-Conviction Petition, especially the Office of Professional Standards report, the Court believed King should have an evidentiary hearing on the issue of the voluntariness of his confession. The Court, however, refused to relieve King of his obligation to prove his claims of abuse, and denied King's Motion to Remand the matter for a new suppression hearing. King, 192 Ill. 2d at 199. The Court also believed that an evidentiary hearing was warranted on King's claim that his attorney was ineffective for failing to introduce additional evidence of King's turbulent childhood in mitigation. No evidentiary hearing has yet been held.

³ The appearance is incorrectly file stamped January 19, 1995. However, it is clear from the memorandum of orders and the transcript of proceedings that Ms. Norwood's representation of King did not begin until January 19, 1996. (R. K, Affidavit of court reporter that no proceedings were conducted on January 19, 1995; Supp. R. 43; R.CL C11, Memorandum of Orders, entry for 1/19/96)

III

REASONS FOR DENYING THE PETITION

In a truly audacious move, Derrick King petitions not only for a reprieve from his death sentence, but for his immediate release from prison. Based on no specific facts, King asserts that his death sentence should be vacated, and he should instead be sentenced to 44 years. King presumes he is entitled to day for day good time⁴ and that, if given such a sentence, he would qualify for immediate release. (King's Petition for Clemency, hereinafter Petition, p. 4, 9) King does not present any new evidence to support the claims of police coercion which he has repeatedly advanced as grounds to reverse his convictions and which have repeatedly been rejected. Instead, he predicates this request on two factors.

First, King relies on the fact that the Supreme Court reversed the lower court's summary dismissal of his Post-Conviction Petition, and granted him the right to an evidentiary hearing on the issues of the voluntariness of his confession, and the effectiveness of his attorney at sentencing. King effectively likens this ruling to a determination by the Court that his confession was coerced and his lawyer was incompetent.

As the second basis for his bid for freedom, King relies on the fact that the suggested and/or enacted reforms for death penalty cases were not in place at the time of his conviction. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment that were not available at the time of his trial, King claims that his trial (as well as that of every other capital defendant in Illinois) was, by definition, fundamentally unfair. King could not be more wrong on both counts..

⁴ This seems highly unlikely given King's voluminous Inmate Discipline file. (See Appendix F)

Initially, in remanding King's post-conviction case for an evidentiary hearing, the Supreme Court did **NOT** "grant" King Post-Conviction Relief, as King boldly claims in his clemency petition. (Petition p. 2) In point of fact, the Supreme Court **explicitly rejected** King's request to simply grant him a new suppression hearing. People v. King, 192 Ill. 2d 189, 199, 735 N.E.2d 569, 576 (2000). Nor has the Supreme Court ever "recognized that Mr. King's conviction was flawed," as King's petition alleges. (Petition p. 3) To the contrary, the Court affirmed defendant's conviction and sentence on direct appeal. People v. King, 109 Ill. 2d 514, 488 N.E.2d 949 (1986).

In remanding for an evidentiary hearing the Supreme Court has only afforded defendant **an opportunity to prove** that his confession was coerced, and that his attorney's failure to introduce additional mitigating evidence at the sentencing hearing was both objectively unreasonable under the circumstances and actually served to prejudice him. King has attempted to prove this before, and has failed on each occasion. King's claim of police abuse was flatly rejected by the trial court at the pre-trial Motion to Suppress. It was also rejected by the jury at King's trial. The Supreme Court rejected it on direct appeal. And the post-conviction court rejected it after an exhaustive review of the evidence.

Given the indisputable facts of his case, King will fare no better at the evidentiary hearing, irrespective of the evidence of other claims of abuse at Area 2, which is the only additional evidence in support of his allegations he has ever produced . Unless it is to be presumed that every suspect at Area 2 was coerced into confessing, and an Area 2 arrestee need only make the allegation of abuse to prevail, the evidence which King has compiled does not strengthen his claim. The other allegations are not temporally proximate to King's arrest, nor are they similar in nature to those described by petitioner. Additionally, while Sergeant Burge, was involved in the related

investigation of the Church's Fried Chicken robbery, his interview with petitioner on that crime lasted less than thirty minutes and he was only in and out of the room during the interviews with King regarding the murder of Dwaine Miller. (Tr.R. 380-81) Moreover, although King insisted that he would recognize the person who hit him with the bat, he never identified Burge, or any of the other officers who testified, as his abuser. (Tr.R.81-82) Indeed, King never identified any of these officers as even being in the interrogation room during the beatings.

Further, there is no physical evidence which supports King's claim, and there is physical evidence which corroborates the testimony of the State's witnesses that King was not abused. Finally, the facts of record resoundingly demonstrate that King was cooperative from the moment the questioning began because of the evidence police had already collected against him. In fact, because of King's assistance in locating and identifying for police his co-defendant's home address, the officers involved in the investigation were not even in the police station at the time of the alleged abuse!

As to King's claim that his conviction cannot be fair because it was procured without the benefit of the newly passed or suggested reforms, simple logic demonstrates the fallacious nature of this argument. It is not contested that these new reforms were designed to provide greater accuracy in all capital trials and maximum fairness at both the trial and sentencing level. But King then seeks to proclaim the inverse is also true: that is, that unless these reforms are applied, no procedure can be deemed accurate nor guaranteed fair.

However, the fact that a law is amended to provide an increased assurance of its fairness and accuracy does not and cannot, in and of itself, conclusively establish that every case decided under the old law was unfair and inaccurate. In point of fact, a true injustice would only result if it

were reflexively determined that petitioner's trial was fundamentally unfair without any examination of the proceedings themselves. Additionally, such a holding should be rejected, for it would destroy all incentive to review and revise legislation, and would effectively vitiate any finality in criminal proceedings.

Thus, 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 has 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." What is more, the Court has concluded 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.

These same concepts apply with equal force to the Ryan Commission's recommendations. No trial should be deemed inherently unfair simply because it occurred prior to the Commission's review of the capital justice system, and prior to the adoption and implementation of the proposed reforms. Rather, the fairness of a given case must be determined on a case by case basis, and must be based on the facts of record and any other directly relevant and plainly reliable facts.

It is imperative that this Board decline King's invitation to gloss over the facts and to rely instead on generalities, unrelated claims and on petitioner's own self-serving perjured testimony. The facts of this case, both the gruesome facts of the crime and the facts surrounding King's confession, must remain at the forefront of any consideration of this request for clemency. A full review of the facts of this case, from immediately after defendant's arrest through his sentencing

hearing, clearly demonstrates that defendant's confession was voluntary, that his trial was fair, that his conviction was just, and that his sentence should stand. It demonstrates that King is not worthy of any change in his sentence, let alone his immediate release.

A. Ryan Commission Proposed Reform

1. The statement was not videotaped. (Ryan Commission Recommendation 4)

King initially contends that his conviction is unjust because his statement was not videotaped. The petition asserts, "Mr. King signed the statement, dictated to him by the Assistant State's Attorney, only after enduring six to eight hours of intimidation and torture by Chicago Police officers." (Petition p.10, citing petitioner's testimony from the Motion to Suppress.) It then goes on to aver that because the interrogation and confession were not videotaped, "the court had only the contradictory testimony of Chicago police officers and Mr. King to rely on in a case in which defendant's life is in jeopardy." It is "unacceptable" he asserts, to use a confession that was not videotaped or electronically recorded as a principal piece of evidence in a capital case.

Prior to addressing the legal aspects of this argument, it is necessary to discuss the factual inaccuracies and downright misstatements which appear therein. First, the timeline of events, beginning with King's arrest, clearly debunks the fable King spun in his testimony regarding the hours and hours of abuse that preceded his confession. The facts of record are that King was arrested somewhere around 7:30 p.m. on the night of February 23, 1980, and that his first interview began approximately an hour to an hour and one half later. It is indisputable that King made inculpatory statements at this interview, because based on those statements the officers left the station with King to locate King's accomplice Michael Coleman.

Further, there is not one scintilla of evidence in the record, or anywhere else for that matter, that King's confession was "dictated to him by the Assistant State's Attorney." (Petition, p. 10) King claimed in his testimony at the hearing on his pre-trial motions that the *police* told him what they wanted him to say. (Tr.R. 69) He **never** alleged that Assistant State's Attorney Stanton told him what to say, and the inclusion of this intentional misstatement in a public document is nothing short of slander. To state, as fact, that an attorney and officer of the court, who is now an Appellate Court Justice, fraudulently prepared a confession in a capital case so as to ensure a conviction, when absolutely no evidence exists to support such a claim, so far exceeds the boundaries of professionalism and legitimate advocacy that nothing short of official sanctions should be tolerated.

Moreover, there was more than just the contradictory testimony of the investigating officers and King regarding the voluntariness of King's statement. There was the compelling testimony of then Assistant State's Attorney Margaret Stanton which corroborated Investigator Dwyer's testimony. In addition, three separate photographs, the one of King immediately after his confession, the one of the lineup conducted the following day, and the one taken as part of the intake procedures at the jail, all demonstrate that petitioner was not abused. As the post-conviction court explicitly stated, these photographs of King "quite simply make a mockery of [King's] claim of police brutality." (R. N75)

As for the legal response to this argument, petitioner fails to address the fact that neither the Commission nor the governor, himself, calls 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.

The trial court in the instant case expressly rejected King's incredible claims of abuse. It found that petitioner's statement was voluntarily made, and thus denied his Motion to Suppress Statements. It is clear, therefore, that the failure to videotape his statement had absolutely no effect on the fairness of his proceedings.

Additionally, the jury also was given the opportunity to consider King's claim of abuse, and likewise rejected it. 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, King cannot complain that he was prevented from asserting at trial that his statement was unreliable and should not be considered.

2. The jury did not receive a cautionary instruction to the effect that electronic recording is probative of whether the statement was made and what was said. (Ryan Commission Recommendation 58)

King next alleges that his conviction was unfair because a non-electronically recorded confession was introduced against him and the jury did not receive a cautionary instruction advising them that recorded statements have greater reliability. Petitioner asserts that "[t]he jurors' evaluation of the reliability of Mr. King's statement and an assessment of how the statement was obtained would have been crucial to the outcome of Mr. King's case." (Petition, p. 11) What King does not address is the fact that this recommendation was not accepted by the Governor, and included in his amendatory veto to House Bill 2058. (See Appendix H)

Nor does it address the undeniable fact that King's confession was recorded, albeit not

“electronically.” King’s confession was transcribed by a court-reporter. Every question asked of him and every response given by him was taken down by a certified court reporter. It was then typed up and reviewed by petitioner, who made corrections and signed his name in recognition of the statement’s complete accuracy.

In addition, the jury did evaluate the reliability of King’s statement and they did make an assessment of the how the statement was obtained. They heard King’s defense attorney question Investigator Dwyer as to whether he recorded petitioner’s confession. (Tr. R. 1041, 1068) They heard Darlene Harland’s testimony regarding the injuries she saw on King on the day following his arrest, and which were not there when she saw him two days earlier. (Tr.R. 1161-63) They listened to the testimony of Summage and Cox regarding coercive techniques allegedly used by the police to obtain witness cooperation and statements of suspects. (Tr.R. 1131, 1137, 1238-40) Finally, they were instructed that they were to determine the weight, if any, to be accorded the confession. Therefore, the jury made the very determination petitioner claims they were not allowed to make.

In light of all of these **facts**, it is clear that King’s conviction based upon his confession was not unjust. This complaint is not a basis for the reduction of his sentence.

3. Petitioner’s bogus claim that he was denied an attorney after invoking his right to counsel.

(Ryan Commission Recommendation 3)

In the heading to this section of his petition, King 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. In the body of his argument, petitioner points out that under the Ryan Commission’s 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. He goes on to quote at length from his testimony at the hearing on his pre-trial motion. (Petition, pp. 12-15) Yet, contrary to the claims in his heading, no where in the four pages of quoted text does a request for counsel by King exist. Indeed, the People defy petitioner's counsel to find a statement by King **ANYWHERE** in the more than 50 pages of his testimony to the effect that he attempted to exercise his right to counsel during his interrogation. It cannot be found because it simply does not exist. (See Appendix D) In fact, much of King's cross-examination of the People's witnesses, especially Investigator Dwyer and Assistant State's Attorney Stanton revolved around the defense theory that King's waiver of his right to counsel was not made knowingly. (Tr. R 1019-20, 1029a-1044a)

King specifically testified that he knew he had the right to an attorney. (Tr.R. 65) In addition, he admitted that the police informed him that he had the right to an attorney. (Tr.R. 79) Finally, King testified that he thought, although he could not be sure, that after being told that he had the right to remain *silent*, he told the police, "I chose that right to remain silent." (Tr. R.63) However, as professors at a nationally renown law school, petitioner's attorneys are no doubt aware that the right to remain silent is **not synonymous** with the right to counsel. Invoking one's right to remain silent does not engender an obligation on the police or prosecution to provide a suspect with an attorney. Even accepting King's claimed attempt to invoke his right to remain silent as true, something the trial court did not do, and even assuming the Ryan Commission's recommendations had been in effect, King would not have been entitled to counsel as a result of that statement.

Also in this section of the petition, counsel again deliberately misstates the nature of the

Supreme Court order in King's post-conviction appeal. Contrary to petitioner's claims, the Supreme Court did not order "a hearing to determine where the modus operandi evidence of Area 2 torture would change the result of the trial judge's ruling denying King's motion to suppress." (Petition, p. 16) The Supreme Court's ruling was nothing more than a determination that King's rights to continue with a post-conviction proceeding were incorrectly terminated. In other words, the Court concluded that the trial court erred in dismissing King's Post-Conviction Petition on this issue. King has not won any relief other than the right to go to an evidentiary hearing, where he can present evidence on his claim that his confession was coerced by physical torture. In the two years since that opinion came down, King has not even attempted to go forward with this hearing.

The petition also mentions the Commission Report's comment regarding the "well documented" nature of "instances of physical coercion in certain police stations under the direction of Lt. Ron (sic) Burge." (Petition p. 16, citing Rep. p. 25) The petition proclaims that "[n]o death penalty should be imposed in a case such as this one where a defendant has alleged that his confession was coerced by Lt. Jon Burge and other Area 2 detectives who have been repeatedly identified by other defendants as having been engaged in the habit and practice of abusing suspects and eliciting coerced confessions from them." (Petition, p. 16)

Initially, it is of great significance that King has never identified Jon Burge or Robert Dwyer as the officer who beat him with a bat. In his testimony on the motion, King repeatedly stated that he remembered what the person who hit him with the bat looked like, and insisted that he could recognize this officer if he saw him again. (Tr.R. 81-82, 91) Both then Sergeant Burge and Investigator Dwyer also testified at King's pretrial hearing. (Tr.R. 210-93, 370-83) Yet, neither during the hearing nor at anytime since has King ever named Dwyer and/or Burge as the officer(s)

that beat him. Indeed, to date, King has not provided even so much as a description of his alleged attackers, let alone identified them by name. It is no wonder that the post-conviction court found that King had “woefully failed to establish any claim as to this issue.” (R. N75)

Further, as stated previously in this response, the documentation regarding other allegations of abuse at Area 2 does nothing to corroborate King’s claim, and thereby render King’s otherwise incredible testimony any more credible. Contrary to King’s claims in his Post-Conviction Petition and Clemency Petition, the allegations of abuse by other defendants questioned at Area 2 do not involve Investigator Dwyer. (R. 763-71). Although King alleged in his petition that Stanley Howard identified Robert Dwyer as one of three police officers who kicked and punched him, this is not true.

According to King’s Post-Conviction Exhibit 16, Stanley Howard identified pictures in the photo array in “lower left side of bottom line,” and “lower right side of bottom line.” These officers are further identified as Officer Boffo and Officer Lotito on the last page of Exhibit 16. Robert Dwyer’s picture did appear in that photo array, but appeared as the **middle picture on the first line**. He was not identified by Stanley Howard. (See People’s Amended Motion to Dismiss, filed 12/21/94 in King’s Post-Conviction proceeding. R. C765, See also King’s Exhibit 17, p. 0021, where it is abundantly clear that Howard’s allegations were against Officers Boffo, Lotito and Byrne, **not** Robert Dwyer.) What is more, the Office of Professional Standards Report, cited by the Supreme Court in King’s opinion on appeal, determined Stanley Howard’s claims to be “Not Sustained.” (R.CL C609, line 10, C615.)

Moreover, of the 50 case files spanning more than ten years that were studied by the Office of Professional Standard as of concern, King’s claims are no where to be found. Further, Robert

Dwyer's name appears only once in all of these files, in the case of Jesse Winston, from March 21, 1985. (R.CL C614) After years of study, the Office of Professional Standards determined the allegations made by Winston were **unfounded**. As for the general allegations of abuse at Area 2, King has not presented any that are close in time to his arrest, nor has he presented any that are similar in nature to the beatings he alleged he suffered.

Quite simply, King has not presented any direct or credible evidence that he was a victim of abuse at the hands of Jon Burge or any other officer at Area 2. For all these reasons, this claim must also be rejected as a basis for relief.

4. The alleged failure of police to continue to pursue “all reasonable lines of inquiry” after King was identified as a suspect.

King next attacks the police for failing to continue to investigate the case following his detailed confession to the murder and armed robbery. Despite the fact that the police had ballistics evidence which tied the gun used in the armed robbery of the Church's Fried Chicken restaurant to the weapon used in the murder of Dwaine Miller and the robbery of the Pleasures Unlimited store; despite the fact that an eyewitness to the Church's robbery identified King as one of the two perpetrators; despite the fact that one of King's friends told police that King confessed committing the crimes to him; despite the fact that King provided police with a detailed confession and directed police to another accomplice; despite the fact that this accomplice also confessed and provided police with the murder weapon, King now contends that the police should not have discontinued their investigation into the crime. King does not cite to any recommendation by the Ryan Commission on this issue, but rather simply quotes the reports concerning the dangers of

police focusing on a single suspect rather than pursuing all possible leads.

A review of the police reports appended to this response demonstrate that King's arrest was not based on "slim probable cause evidence." (Petition, p. 17, See Appendix C) Nor were the police affected by "tunnel vision." (Petition, p. 19) Petitioner's arrest was the result of nothing less than diligent police investigation and his conviction was based on reliable evidence which resulted therefrom. Accordingly, this claim of the clemency petition should be rejected.

5. The prosecutor's decision to seek death was made pursuant to process different than that recommended by the Ryan Commission. (Ryan Commission Recommendations 29 and 30)

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

6. The eligibility factor under which King was found eligible for the death penalty is not among those recommended under the proposed reforms. (Ryan Commission Recommendations 27 and 28)

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

However, the Illinois Supreme Court has expressly rejected the Commission's logic and held that Illinois' death penalty statute 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.

7. The absence of a cautionary instruction regarding defendant’s history of emotional or physical abuse, or his alleged reduced mental capacity. (Ryan Commission Recommendation 61)

Although he acknowledges that he was not sentenced by a jury, but was instead sentenced by the trial court, petitioner asserts that somehow his case would have benefited by the Ryan Commission’s recommendation that a sentencing jury should be 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. Interestingly, while this item appeared as a recommendation of the Ryan Commission, it was not deemed of sufficient import to be included in

Governor Ryan's proposed amendments to House Bill 2058. (See Appendix H)

Further, defendant was entitled to present such information to the trial court for its consideration at the sentencing hearing, and did in fact do so. Although the report now relied upon by petitioner as demonstrating his emotional and physical abuse was not tendered to the trial court, most of the information in it was before the court in some fashion. Both Geneva Jackson, King's aunt, and Juanita Rhymes, his mother, testified as to King's tumultuous childhood. (Tr. R 1468-83)

Furthermore, King detailed it in the Pre-Sentence Investigation Report. (Tr.R.CL 1595-97) The court heard testimony about King's mother's mental problems, as well as her alcohol and drug addictions. (Tr.R. 1471-73) The court heard of her neglect of petitioner, and the unstable family life which resulted from these problems. (Tr. R. 1471, 1475, 1482) In the Pre-Sentence Investigation Report King also talked about his use of drugs, although he admitted only to using marijuana and cocaine, not heroin as it is now contended. (Tr.R.CL 1596)

Moreover, King will have his opportunity to have the import of this additional evidence properly considered. The Supreme Court has remanded King's post-conviction case for an evidentiary hearing on the issue of whether his attorney was constitutionally deficient for failing to introduce the information contained in the "mitigation expert's" report and whether the inclusion of such evidence would have resulted in a sentence other than death. But a post-conviction evidentiary hearing on the issue of incompetence of counsel is not simply a re-consideration by the post-conviction court of the aggravation and mitigation evidence now presented. It affords a standard of deference to the trial court's determination that death was appropriate, and requires the petitioner to prove, by a preponderance of the evidence, that his attorney's failure to introduce the additional mitigation evidence was a deficiency of constitutional dimension and that had the

evidence been introduced it probably would have resulted in a different sentence.

This deferential standard is warranted by the superior position of the trial court to make the observations and weigh the factors a cold record simply does not reflect. In addition to hearing the testimony of the witnesses at the hearing in aggravation and mitigation, the trial court that sentenced defendant had opportunities which no new sentencing hearing can ever recapture. The trial court had the benefit of seeing King's demeanor throughout the trial. It was able to observe whether defendant accepted responsibility for his actions and whether he felt any type of remorse for his termination of Dwaine Miller's young life. Based on these intangible but critically important concerns, as well as the evidence presented at the sentencing hearing, the trial court determined that death was the appropriate sentence.

This board should not act in such a way to pre-empt this post-conviction evidentiary hearing and, in so doing, preclude any ability to factor in matters which the trial court clearly considered but which are not reflected in the cold record. Further, an evidentiary hearing will allow for cross-examination of petitioner's experts, thereby allowing for proper assessments of their credibility and the reliability of their conclusions. For all these reasons, clemency is not warranted on this basis.

8. The alleged failure of the Illinois Supreme Court on direct appeal to conduct proportionality review. (Ryan Commission Recommendation 70)

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, in his direct appeal King did argue that "death is an inappropriate

sentence here.” King, 109 Ill 2d at 546. After full review of the evidence in aggravation and mitigation, the Supreme Court disagreed with petitioner’s argument and declined to overrule the trial court’s determination that death was the appropriate sentence in this case. King, 109 Ill 2d at 546.

Moreover, 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)) Thus, 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. This decision not to raise the issue should not now serve as grounds to vacate King’s sentence.

**9. Forensic evidence introduced at King’s trial was not tested by an independent laboratory. .
(Ryan Commission Recommendation 20)**

King also seeks clemency based on the fact that the ballistic evidence was never examined by an independent crime lab. In over 22 years of litigation, King has never asserted a possible error in the ballistics evidence until now. He never requested the opportunity to conduct his own analysis on the bullets. He never even asked a single question of the firearms examiners on cross-examination. In short, King has never disputed that the gun used in the Church’s robbery was the same one used in the murder of Dwaine Miller. In this petition, he does not allege anything which

would cast doubt on the reliability of the expert's findings, nor does he present any claims regarding what additional relevant findings an independent laboratory might discover. There is simply no reason to conclude that the Illinois State Crime Lab was incompetent, unqualified, deceptive, dishonest, unreliable, or dishonorable, as petitioner's argument clearly implies. In his amendatory veto of House Bill 2058 Governor Ryan did not seek to address this recommendation. Under these circumstances, King's claim in this regard should be summarily rejected.

10. Defendant would have benefited from the new rules and recommendations regarding qualifications for counsel in capital cases. (Ryan Commission Recommendations 40-45, 78)

King claims that if his counsel had been qualified under the new Supreme Court Rules, they would not have presented only two witnesses at his sentencing hearing. First, petitioner has not yet established that counsel's performance was constitutionally deficient. That will be his burden at the evidentiary hearing, if he ever goes forward with it.

Second, Eugene O'Malley and Dennis Tobin, King's assistant public defenders at his trial, were two of the most experienced trial lawyers in the Cook County Public Defender's Office when they represented King. Both of them had tried death penalty cases prior to King's and had defended a number of other defendants charged with murder. Their performance in King's trial was stellar, and the fact that no official organization existed at that time to review their qualifications simply is irrelevant.

Moreover, petitioner's claimed deficiency in his attorneys' performance at the mitigation hearing ignores the fact that many reasons might exist for counsels' decision, not simply incompetence. First, much of the evidence currently compiled by the "mitigation expert" has been

held in previous opinions of the Illinois Supreme Court to be not necessarily mitigating. People v. Coleman, 183 Ill. 2d 366,404, 701 N.E.2d 1063 (1998)(drug use not necessarily mitigating); People v. Sanchez, 169 Ill. 2d 472, 491, 662 N.E.2d 1199 (1996) (exposure to violence not inherently mitigating). Thus, trial counsel could have decided not to play up defendant's drug addiction or his exposure to violence because they believed it to be more damaging than helpful. This is not constitutionally deficient performance, as it is based upon a reasonable trial strategy.

Similarly, the concept of built in reversible error should not be discounted. The assistant public defenders presented the testimony of King's aunt and mother in a very compelling manner. In closing, King's attorney argued eloquently that King's tumultuous childhood, his age and his lack of serious criminal background all militated in favor of a sentence other than death. (Tr.R. 1468-94) Counsels' performance quite possibly could have resulted in a sentence other than death. But by not introducing numerous witnesses to testify to these same events and circumstances, King's defense counsel quite possibly have provided him with a proverbial second bite at the sentencing apple. If petitioner prevails at his evidentiary hearing, he will obtain a new sentencing hearing before a different judge who did not observe defendant's demeanor at the time of trial, and who did not see defendant testify at the pre-trial hearing. The new judge will not only get to hear the "mitigation expert's" report, but can also receive evidence of King's behavior over the past twenty two years, his current mental state and other information. Had original trial counsel introduced substantial mitigation evidence and had defendant been sentenced to death in spite of this evidence, defendant would not have to opportunity to introduce this new evidence.

Finally, there is simply no evidence of record that King's attorneys were unable to competently represent King because of a lack of proper funding, as his current petition suggests.

(Petition, p. 25) Had King’s attorneys needed, they could have requested the court to order funding for additional investigation. They did not ask for such funding, presumably because they did not feel such was necessary. That others, in hindsight, might disagree with their conclusion does not demonstrate that their decision was in error, or that they were constitutionally ineffective.

Thus, it is far from clear that King was deprived of the effective assistance of trial counsel, or that he would have benefited from any new provisions regarding the qualifications for attorneys in capital cases. Therefore, his request for clemency on this basis should be rejected.

B. Additional Grounds for Clemency

In this section, King again raises his allegations of police coercion and the alleged ineffectiveness of counsel for failure to introduce sufficient mitigation evidence. These issues have been dealt with sufficiently throughout this response, and it is not necessary for them to be rehashed again. In addition, however, King now raises a new claim, that he should be granted clemency because he “appears to be suffering from an underlying medical disorder.” (Petition, p. 29) Petitioner bases this claim on the allegations in the mitigation report.

Initially, it must be noted that King was examined by Dr. Phillip Pan, a Staff Psychiatrist with Forensic Clinical Services in May of this year on order of Judge Wasilewski. (See Appendix E) Dr. Pan indicated that King “does not meet diagnostic criteria for any major mental illness.” (Appendix E, p. 1) He also determined that King was fit to continue with the post-conviction proceedings. Dr. Pan stated that King “understands the nature of the charge against him, and the possible consequences if found guilty. He demonstrates an adequate understanding of the basic procedures of the court, and the roles of the various members of the court. He is alert, oriented,

and able to assist counsel in his own defense.” (Appendix E, p. 1) Finally, he indicated that no psychotropic medication was prescribed, as it was not necessary, nor desired by King.

Clearly then, a clemency proceeding is not the proper forum for this new allegation. As is evidenced by this recent fitness hearing, both the State and the courts will ensure that all of King’s constitutional rights will be protected, including his right not to be executed unless he is competent to understand the proceedings. The court will surely order a fitness hearing prior to his execution should there be any question of King’s fitness at that time. King can then be evaluated by professionals for both sides, and those professionals can be questioned regarding the bases of their professional opinions.

Moreover, as King has not even begun to pursue his federal remedies, it is clear that he will not be executed any time soon. Thus, there is no need to now grant clemency on this basis.

CONCLUSION

Although Derrick King has repeatedly claimed his confession was coerced, he has never even come close to proving it. Nor has he ever once alleged that his confession was untrue, and that he is actually innocent of the armed robbery and murder of which he stands convicted. The facts of record unequivocally demonstrate that Derrick King entered the Pleasures Unlimited store intending to steal drugs from the store's owner. When that plan failed, King decided to do the next best thing, rob the store of money. In the process, King murdered a 17- year old high school student and athlete, who worked in the store part-time. He coldly executed Dwaine Miller for no reason other than Miller's failure to promptly comply with his orders. King's arrest was legal, his confession was voluntary, his trial was fair and his sentence was appropriate.

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

Respectfully submitted,

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