

DOCKET NO. \_\_\_\_\_

BEFORE THE ILLINOIS PRISONER REVIEW BOARD

AUTUMN TERM, 2002

ADVISING THE HONORABLE GEORGE RYAN, GOVERNOR

IN THE MATTER OF GREGORY MADEJ

PETITION FOR EXECUTIVE CLEMENCY

---

---

**RESPONSE IN OPPOSITION TO  
PETITION FOR EXECUTIVE CLEMENCY**

---

---

RICHARD A. DEVINE,  
State's Attorney  
County of Cook

Attorney for the People of the State of Illinois

ARLEEN C. ANDERSON  
JAMES BYRNE  
CELESTE STACK  
Assistant State's Attorneys

DOCKET NO. \_\_\_\_\_

BEFORE THE ILLINOIS PRISONER REVIEW BOARD

AUTUMN TERM, 2002

ADVISING THE HONORABLE GEORGE RYAN, GOVERNOR

IN THE MATTER OF GREGORY MADEJ

PETITION FOR EXECUTIVE CLEMENCY

---

---

**RESPONSE IN OPPOSITION TO  
PETITION FOR EXECUTIVE CLEMENCY**

---

---

**I.**

**INTRODUCTION**

Following a bench trial , petitioner was convicted of murder, rape, deviate sexual assault and armed robbery in 1982. The trial judge sentenced petitioner to death on the murder.<sup>1</sup> The judge also merged petitioner's conviction for deviate sexual assault into his rape conviction and sentenced petitioner to 30 years on the rape and 30 years on the armed robbery, both sentences to run concurrently. The Illinois Supreme Court affirmed petitioner's convictions and sentences on direct appeal in *People v. Madej*, 106 Ill. 2d 201, 478 N.E.2d 392 (1985). The United States Supreme Court denied petitioner's petition for writ of certiorari in *Madej v. Illinois*, 474 U.S., 106 S.Ct. 268 (1985), *reh'g denied*, 474 U.S. 1038, 106 S.Ct. 608 (1985). Subsequently, the Circuit Court of Cook

---

<sup>1</sup> Although petitioner claims that the State offered him a plea offer of 80 years, neither former prosecutor remembers such an offer and have submitted affidavits so indicating.

County denied Petitioner's amended petition for relief filed pursuant to the Post-Conviction Hearing Act. The Illinois Supreme Court affirmed the denial of post-conviction relief in *People v. Madej*, 177 Ill. 2d 116, 685 N.E. 2d 908 (1997), and the United States Supreme Court denied petitioner's petition for writ of certiorari in *Madej v. Illinois*, 523 U.S. 1098; 118 S. Ct. 1565 (1998).

In May of 1998, petitioner filed in the Illinois Supreme Court a motion for leave to file a petition for an original writ of mandamus on the claim that the State of Illinois violated Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [the "Vienna Convention"] and Article 29 of the Consular Convention, May 31, 1972, U.S. – Pol., 24 U.S.T. 1231, T.I.A.S. No. 7642. The Court denied petitioner's motion on June 17, 1998.

After the Illinois Supreme Court denied petitioner's motion, he then filed a petition for post-judgment relief, pursuant to 735 ILCS 5/2-1401, in the Criminal Division of the Circuit Court of Cook County, as well as a petition for writ of mandamus pursuant to 735 ILCS 5/14-101 in the Chancery Division of the Circuit Court of Cook County. The Chancery judge transferred the case to the Criminal Division for consolidation with the criminal case after granting the Polish Consul General's motion for intervention.

In the consolidated matter, then-Presiding Judge Thomas Fitzgerald entered judgment denying both petitions on procedural grounds. In 2000, the Illinois Supreme Court affirmed the judgment of then-Judge Fitzgerald, finding that because the Vienna Convention provides that the rights under the Convention are to be exercised in conformity with the laws of the receiving state, (Illinois), petitioner was not entitled to relief because he had not filed within the applicable time limitation for a § 2-1401 petition, and had failed to demonstrate that he had an affirmative right to relief to justify the issuance of a writ of mandamus under state law. *People v. Madej*, 193 Ill.2d 395,

739 N.E. 2d 423 (2000). The United States Supreme Court then denied petitioner's petition for writ of certiorari in *Consul Gen. of the Republic of Pol. v. Illinois*, 533 U.S. 911, 121 S. Ct. 2262 (2001), *reh'g denied*, *Consul Gen. of the Republic of Pol. v. Illinois*, 122 S. Ct. 32 (2001).

In 1998, petitioner also filed a petition under 28 U.S.C. § 2254 in the United States District Court for Northern District of Illinois. In March 2002, United States District Court Judge David E. Coar entered an order denying most of petitioner's § 2254 claims, but granting him relief in the form of a new sentencing hearing on the basis of ineffective assistance of trial counsel at sentencing. The judge found that counsel failed to investigate and introduce "mitigating evidence" of petitioner's substance abuse and troubled childhood, and failed to inform petitioner that a jury must be unanimous to impose the death penalty. United States ex rel. Madej v. Gilmore, 2002 U.S. Dist. LEXIS 3807, \*22-24 (N.D. Ill. Mar. 7, 2002). The State, however, has filed a motion to reconsider based on a new United States Supreme Court case, Bell v. Cone, 122 S.Ct. 1843 (2002), which it believes is dispositive of the matter. Petitioner has also filed his own motion to reconsider. The court ordered briefing on the motions, which are currently pending before the court.

Finally, in December of 2000, petitioner filed in the Circuit Court of Cook County, a second petition for § 1401 or, in the alternative, a successive petition for post-conviction relief under the Illinois Post-Conviction Relief Act. In that petition, Madej argues that although recent DNA testing done in this case conclusively establishes that he is the source of sperm from vaginal and rectal swabs taken from the victim, he is actually innocent of the deviate sexual assault charge. Petitioner also argues in the petition that his trial counsel labored under a conflict of interest because counsel, at that time, was also employed with the Illinois Secretary of State as a "Technical Advisor III." The petition is currently pending before Presiding Judge Paul P. Biebel.

For the reasons that follow, the People of the State of Illinois urges Governor Ryan and this Board to reject Gregory Madej's bid for executive clemency.

## II.

### **STATEMENT OF FACTS**

#### 1. The Savage Murder of Barbara Doyle

The naked body of the victim, Barbara Doyle, was found in an alley on the north side of Chicago in the early morning hours of August 23, 1981. She had been stabbed and slashed 34 times. A post-mortem examination revealed the presence of numerous abrasions over various parts of her body. Most of the more serious wounds were located on her head, face and chest. The post-mortem also revealed semen in the victim's vagina and rectum. The results of DNA testing completed just last year, by an independent forensics lab, established that petitioner was the source of the sperm present in the victim's vagina and rectum.

Petitioner was arrested in Ms. Doyle's automobile after a high-speed chase by police. Police initially spotted petitioner at about 5:00 am, driving through a posted stop sign. When police signaled for petitioner to pull over, he instead accelerated, speeding away and driving through red lights in excess of 80 miles per hour. Police finally apprehended petitioner after he drove into an alley and tried unsuccessfully to escape on foot.

When police officers arrested petitioner, his hands, head, shirt, pants and undershorts were splattered with blood, as was Ms. Doyle's car, mostly in the area of the passenger's seat. Upon searching the vehicle, police recovered a large knife as well as Ms. Doyle's jeans and blouse, both of which were saturated in blood.

At the police station, petitioner told police the following implausible story:

He had been drinking in a tavern until about 2:20 am. After being thrown out, petitioner met a friend named “Hojamoto,” who was driving the victim’s car. When petitioner got into the car, he noticed that Hojamoto was wearing a bloody shirt. Hojamoto told petitioner that he had been in a gang fight. Petitioner then changed seats with Hojamoto, who jumped from the car during the high-speed chase with the police.

James Bunker, who knew petitioner socially, testified at trial that he was at a party with petitioner on the night before Barbara Doyle was murdered. He stated that petitioner had taken a “Buck-type knife” from another person at the party. He identified the knife, which police recovered from the victim’s car, as the knife petitioner had taken. Bunker also testified that “Hojamoto” was a fictitious name commonly used by petitioner and friends as a form of greeting. In fact, petitioner had in the past referred to Bunker as “Hojamoto,” and vice versa. When asked why the group used the name, Bunker responded, “[It was] just like a greeting, you know .... How are you doing? Moto.”

Petitioner testified on his own behalf at trial. In contrast to his original statement to police, at trial, petitioner claimed that he killed Ms. Doyle in her car only after they had stopped twice for consensual sex and when she drew a knife on him during a drug deal that had gone bad. Petitioner claimed that during the struggle, he gained control of the knife and began stabbing the victim. Petitioner stated that he realized what he was doing only after he saw the victim bleeding from her chest. He then removed her body from the car and drove to friend’s house. Petitioner stated that he next recalled being chased by police, but could not remember anything else other than being taken into custody.

In petitioner’s Statement of the Facts of the Offense in his clemency petition, he fixates on a

911 tape, recording the voice of one of the arresting officers while pursuing petitioner, which purportedly refers to a second white suspect being in the victim's car prior to petitioner's arrest. (Clem. Pet. at 9, 11, 12, 13, 16). In the Illinois Supreme Court, petitioner argued that introduction of the 911 tape at trial would have raised a reasonable doubt as to his guilt. The court, however, held that petitioner had waived the issue because he failed to raise the argument, either on direct appeal or in his amended petition for post-conviction relief, and further found no reason to excuse the waiver under the court's exception for plain error. People v. Madej, 177 Ill. 2d at 156.

In his § 2254 petition in federal court, petitioner asked the district court judge to forgive his state procedural waiver and to examine the merits of the claim involving the 911 tape. In analyzing the argument, Judge Coar stated:

There is no evidentiary support for Madej's [911 tape/reasonable doubt] claim. The results of the DNA tests, which this Court ordered, showed that petitioner is the source of the sperm found in Barbara Doyle's vagina and rectum. Trial counsel was not ineffective for failing to pursue a reasonable doubt theory and relief is denied on this ground. ***Any claim Madej attempts to assert on actual innocence grounds similarly fails.***

United States ex rel. Madej v. Gilmore, 2002 U.S. Dist. LEXIS 3807, \*37 (emphasis added).

## **B. Petitioner's Personal History**

Petitioner was a year and a half old when he came to the United States from Poland. Although neither petitioner nor his parents ever became naturalized American citizens, at the time of his arrest, petitioner was classified in this country as a lawful permanent resident alien.

At his first post-conviction proceedings, petitioner presented evidence that, here in Chicago, at school and in the community, petitioner was part of the mainstream American culture. Indeed, literature of second generation Poles addresses their need to eschew their own culture and identify

with the American culture.

Petitioner attended various local grade schools as a child in Chicago. Through the eleventh grade, until he enlisted in the United States Army, he attended Foreman High School, where he participated in ROTC. While in the U.S. Army, he spent time in Korea and earned his GED. In 1977, he was granted an honorable discharge and returned home to Chicago. In June, 1977, petitioner enrolled at Triton College, but withdrew in late fall of that year, citing financial difficulties. Petitioner's rap sheet indicates that this time period marked the beginning of a long string of arrests and convictions that culminated in his arrest for Barbara's Doyle's murder in 1981. (See tables containing petitioner's convictions and arrests on pages 50-51 of the clemency petition)..

Petitioner left Chicago in late summer, 1978, and traveled around the United States for several months. He spent a couple months in California where he worked part-time, doing odd jobs. He returned to Chicago for a while in late 1978, and was then arrested for theft and sentenced to one year probation. Petitioner then went back to California, but in February 1979, returned to Chicago. Shortly thereafter, he was arrested again, found to be in violation of probation, and sentenced to 18 months in the Illinois Department of Corrections. Petitioner had only been on parole for approximately eleven months when he was arrested for the murder of Barbara Doyle.

### III.

#### **REASONS FOR DENYING CLEMENCY**

- A. Because Petitioner is Still Litigating in Both the State and Federal Courts, Issues Involving the Reliability of His Convictions and Sentence, and, As it Stands Now, Will Get A New Sentencing Hearing, Petitioner Is Not One for Whom the Clemency Process Is Intended.**

Section 13 of article 5 of the Illinois constitution gives the Governor the "power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as

may be provided by law relative to the manner of applying therefor.” Indeed, “clemency proceedings are not part of trial – or even the adjudicatory process.” Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 284 (1998). Clemency procedures are not intended to determine the guilt or innocence of the defendant. Id. Nor are they intended primarily to enhance the reliability of convictions or sentences as are direct appeal and collateral relief proceedings Id. Instead, clemency is an executive function independent of trial, direct appeal and collateral relief proceedings. Id. It was established to “prevent[] miscarriages of justice where judicial process has been exhausted.” Herrera v. Collins, 506 U.S. 390, 412 (1993). It is traditionally available to capital defendants as “a final and alternative avenue of relief,” “exist[ing] to provide relief from harshness or mistake in the judicial system.” Woodward, 523 U.S. at 284-85. It is the “final stage of the decisional process that precedes an official deprivation of life.” Id. at 292 (Stevens, J., concurring in part and dissenting in part). Executive clemency provides the “fail safe” in our criminal justice system. Herrera, 506 U.S. at 415.

Petitioner readily concedes in his clemency petition that he still has cases pending both in the federal and state courts. (Clem. Pet. at 19). In fact, petitioner specifically requests in his petition that, if “*the Governor is not prepared to exercise his clemency and other executive powers to grant Gregory Madej any of the relief sought [ ], Gregory Madej respectfully requests that the Governor grant him no relief at all.*” (Clem. Pet. at 6, 20) (emphasis in original). Petitioner makes this request because he “believes that the judicial process *will afford a more fitting disposition of this matter* in the event the Governor is not prepared to grant any of the relief sought [in the clemency petition].” (Id.) (emphasis added).

Clearly petitioner is not one for whom the clemency process is intended. Instead of using the

process as a final avenue of relief, or the “fail safe” in our criminal justice system after exhaustion of the judicial process, Madej is simply petitioning for clemency in hopes of benefitting from a well-publicized potential blanket commutation issued by the Governor before he leaves office<sup>2</sup> Petitioner should not be allowed to simply abandon the adjudicatory process during which the reliability of his convictions and sentence, and, as it stands now, even his ultimate sentence, will be determined.

2. Aside From His Request for “no relief at all,” All of Petitioner’s Pleas for “specific, tailored, relief” Should Be Denied.

In addition to seeking “no relief at all” in his clemency petition, Madej seeks what he refers to as “specific, tailored, relief.” (Clem Pet. at 4). Specifically, he first requests that the Governor “order that [he] be repatriated to Poland.” (Clem. Pet. at 5). He seeks a commutation of his sentence to a term of years, so he can be repatriated to Poland, as well as the State of Illinois’ consent to his transfer to Poland. (*Id.* at 5, 20). In the alternative, petitioner requests that the Governor enter an order prohibiting imposition of a sentence of death or natural life upon him during the course of any further proceedings in his case, and, to ensure that such an order is given effect, he suggests that “the Governor may wish to pardon [him] of the death eligibility factors of armed robbery, deviate sexual assault and rape, for purposes of precluding the State’s Attorney from relying upon these factors on resentencing.” (*Id.* at 5-6).

Repatriation to Poland

Petitioner cites to a state statute which provides that if a treaty in effect between the

---

2. Even staunch opponents of capital punishment view a potential blanket commutation as a “vain gesture[.]” which, in the long run, “will be no victory for justice.” See Eric Zorn, *Take Death Row Cases One by One or Risk Backlash*, CHI. TRIB., Sept. 17, 2002, at § 2, at 1.

United States and a foreign country provides for the transfer of convicted offenders to the country of which they are citizens or nationals, the Governor may authorize the Director of Corrections to consent to the transfer of a convicted offender to his or her native country. 730 ILCS 5/3-2-3.1. (Clem. Pet. at 20, n. 18). Petitioner argues that his transfer would be accomplished under the terms of the Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867, T.I.A.S. No. 10824. (Id.).

One of petitioner's problems, however, is that the treaty does not apply to prisoners under a sentence of death. See Article 1 - Definitions: "'sentence' means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence."(emphasis added). Also, the order or judgment imposing sentence must be "final." Since petitioner was recently granted a new sentencing hearing by a federal district court judge, and that order has not yet been vacated or altered, petitioner would have trouble meeting that condition of the treaty as well. See Article 3 - Conditions for transfer.

To avoid these barriers, petitioner is asking Governor Ryan to commute his death sentence to a term of years with the condition that he be repatriated to Poland. Before the Governor acts to comply with such a request, however, the People of the State of Illinois ask him to consider two crucial factors.

First, petitioner was convicted of a vicious, senseless crime. Just as he gave Barbara Doyle no further chance at life, he now gives no sufficient reason to the Board or the Governor to justify the lightening of his punishment to a term of years. That notwithstanding, petitioner has already been awarded a new sentencing hearing which, if upheld, could result in a sentence of a term of years. There is no sufficient reason why petitioner should not be forced to wait out the result of the

adjudicatory process in his case, like any other criminal defendant in this country.

Second, the Convention on the Transfer of Sentenced Persons was intended to apply to true “foreign prisoners,” not persons who have spent virtually their entire lives in the United States and are simply looking for a way to escape the justice meted out to them in the country where they committed their crimes. In explaining the general considerations behind the convention, the Council of Europe stated:

In facilitating the transfer of foreign prisoners, the convention takes account of modern trends in crime and penal policy.... As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the state where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.

Council of Europe, Explanatory Report on the Convention on the Transfer of Sentenced Persons at 6-7, P 9 (1983) (hereinafter "Explanatory Report"), cited in Bishop v. Reno, 210 F.3d 1295, 1300, n. 9 (11<sup>th</sup> Cir. 2000)

Petitioner was brought to this country as baby. He was schooled here; he traveled here; his family is here, he even joined the United States Army. Petitioner was also no stranger to this country’s criminal justice system, having spent time on probation and in the Illinois Department of Corrections before his conviction for the murder of Barbara Doyle. (See also petitioner’s other arrests and charges which did not result in convictions on pages 50-51 of the clemency petition). In summary, the treaty of which petitioner tries to avail himself was not intended to apply to *de facto* United States citizens like him. Governor Ryan should not facilitate petitioner’s attempt to obtain a windfall from an instrument never meant to apply to him.

Order Prohibiting Imposition of a Sentence of Death or Natural Life On Petitioner During the Course of any Further Proceedings in his Case and a Pardon of the Death Eligibility

Factors of Armed Robbery, Deviate Sexual Assault and Rape.

Clearly, the Governor's issuance of an order barring imposition of a sentence of death or natural life upon petitioner would exceed the authority granted to him under the Illinois Constitution, as would the granting of a pardon of any death eligibility factor. To reiterate, the state constitution gives the Governor the "power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor." (Emphasis added). Except where power is given him by that instrument, he has no authority. People ex rel. Smith v. Jenkins, 325 Ill. 372, 374 (1927). Moreover, if, purporting to act in the exercise of the power to pardon or commute, the Governor makes an order attempting to interfere with, control, modify or annul any judgment of a court, his order is void and the officers charged with the execution of the judgment may be required by mandamus to disregard the order." Id. at 374-75, citing People v. Jenkins, 322 Ill. 33 (1926).

In this case, the United States District Court for the Northern District of Illinois ordered habeas corpus relief in the form of a new capital sentencing hearing. Although cross motions to reconsider the court's order have been filed by both parties, and the court has ordered briefing on those motions, the motions are still pending before the court. An order from the Governor now barring imposition of a future death sentence on petitioner would be an attempt to "interfere with, control, modify or annul the judgment" of the federal district court in this case. Accordingly, such an order would be void.

Finally, in that the state constitution only confers authority on the Governor "to grant reprieves, commutations and pardons, after conviction, for all offenses" (emphasis added), any order pardoning petitioner of a death eligibility factor would be a perversion of the power accorded the

executive branch under that instrument. Therefore, any such order would also be void.

**C. Petitioner Is Not Entitled to Clemency Relief on the Basis of a Vienna Convention Violation.**

Petitioner next argues that he is entitled to clemency because Illinois failed to abide by the Vienna Convention. In other words, he asserts that he was not properly notified of his rights to contact the Polish Consulate after his arrest, and that Illinois was required to notify consular authorities that petitioner had been arrested. The Vienna Convention, not unlike the Convention on the Transfer of Sentenced Persons, was intended to protect foreigners arrested or detained in an unfamiliar country, who are disadvantaged because they may be ignorant about the country's criminal justice system, the practices of and limitations on police activity, rights accorded the accused, and the basic legal framework for ascertaining guilt. See Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERK. J. INT'L LAW 147, 163 (1999). However, as the federal district court noted in rejecting petitioner's treaty claim, petitioner was brought to this country as an infant. 2002 U.S. Dist. 3807, \*29. Moreover, being no stranger to this country's criminal justice system, petitioner obviously does not fit into the class of defendants mentioned above.

Furthermore, as noted above, the Illinois Supreme Court found in petitioner's case that the Vienna Convention itself provides that the rights under the convention are to be exercised in conformity with the laws of the receiving state -- in this case, Illinois. The court concluded that petitioner was not entitled to relief on his treaty claims because, under state law, he had not filed within the applicable statutory time limitation for a § 2-1401 petition -- he filed approximately 14 years too late -- and he had failed to demonstrate that he had an affirmative right to relief justifying the issuance of a writ of mandamus under state law.

Moreover, the federal district court judge refused to excuse petitioner's state procedural

defaults, finding that petitioner could not show actual prejudice. 2002 U.S. Dist. LEXIS 3807, \*31-32. Indeed, both state and federal appellate courts have held that neither suppression of evidence nor the dismissal of an indictment are appropriate remedies for a Vienna convention violation. See, for example, United States v. Li, 206 F.3d 56, 63 (1<sup>st</sup> Cir. 2000) (noting that the State Department believes that the only remedies for failure of consular notification under the treaty are diplomatic, political or those that exist between states under the international law).

For all of these reasons, petitioner is not entitled to clemency relief on the basis of a Vienna Convention violation.

1. Petitioner Is Not Entitled to Clemency Relief on the Basis of Any Conflict of Interest on the Part of His Trial Counsel.

Petitioner next argues that the Governor is required to grant him clemency because, at the time that trial counsel was representing petitioner, counsel was also employed with the Illinois Secretary of State's Office as a "Technical Advisor III." (Clem Pet. at 32). As petitioner concedes, this claim is currently pending in the circuit court of Cook County. Again, instead of using the clemency process as a final avenue of relief, or the "fail safe" in the criminal justice system after exhaustion of the judicial process, petitioner attempts to forego the adjudicatory process in favor of the remedy of last resort. He should not be allowed to do so.

Moreover, although all the factual specifics of trial counsel's duties as a "Technical Advisor III," have yet to be fully flushed out – and that is the reason the matter is still pending state court – suffice it to say that the notion of someone acting as a Secretary of State hearing officer or prosecutor, in cases involving driver's licenses, driving schools and automobile dealerships, acting in "collaboration" with Cook County assistant state's attorneys prosecuting capital cases, is preposterous. The two functions could not be more distinct and separate.

Furthermore, trial counsel's position prosecuting or hearing the cases he did for the Secretary of State's Office could have had no effect on the choices counsel made during petitioner's trial. Without making a showing that counsel's other job had an adverse effect on his representation of petitioner, petitioner cannot succeed on his claim. (Petitioner's assertion, which he makes in footnote 29 of his petition, that he is entitled to an automatic reversal of his conviction is simply an incorrect statement of the applicable law). This was recently made clear by the United States Supreme Court in Mickens v. Taylor, 122 S. Ct. 1237 (2002). There the Court held that even where it is shown that counsel was laboring under an "active" conflict of interest, defendant must still show that the conflict adversely affected counsel's representation. The only possible connection petitioner tries to draw between trial counsel's position at the Secretary of State's Office and the choices counsel made during petitioner's trial is that, "[p]erhaps" counsel "never properly challenged police officers for omitting references to a second suspect they identified on the 911 Tape" because counsel would have had to rely on the cooperation of law enforcement officials to carry out his duties for the Secretary of State's Office. (Clem. Pet. at 36-37). Such an assertion is not only unsubstantiated, it is a stretch of the imagination. As noted earlier by the People, even the district court judge in this case found that there was no evidentiary support for petitioner's 911 tape/reasonable doubt claim, especially since petitioner was recently found to be the source of semen found inside the victim. Moreover, the federal district court judge also noted, it was clearly within the realm of trial strategy for counsel to pursue a diminished capacity defense over a reasonable doubt theory involving a second suspect. 2002 U.S. Dist. 3807, \*36-37. This is especially true in that petitioner's "Hojamoto" story, which he told police immediately after he was arrested, was refuted at trial not only by a State witness, but by petitioner himself.

Petitioner should not be granted clemency on the basis of this claim.

2. Petitioner Must Not Be Allowed to Use Recent DNA Testing, Which Established His Rightfully Convictions of the Rape and Murder of Barbara Doyle, As a Means To Avoid Responsibility for His Acts.

Petitioner next has the audacity to characterize the case against him, on the charges of rape, deviate sexual assault and armed robbery, as “flimsy” and “weak.” (Clem. Pet. at 37, 41). He does this while conceding that recent DNA testing, done in an independent forensics lab, could not eliminate him as the source of sperm recovered from the victim’s vagina and rectum. Shockingly, he tries to use this fact to his advantage, arguing that it confirms his trial testimony that he had “consensual sexual relations with the decedent.” (Clem. Pet. at 38). But what petitioner overlooks is that consensual sexual partners do not usually turn up murdered, bearing 34 stab and slash wounds, as well as numerous abrasions over various parts of her body. Moreover, the trial judge, who did not even have the benefit of the recent DNA testing, heard all the evidence, including petitioner’s testimony that he and Barbara Doyle had consensual sex, and determined that petitioner was in fact guilty of rape and deviate sexual assault.

Undeterred, petitioner argues that he must receive clemency relief because his deviate sexual assault conviction rested on false evidence. He is referring to the fact that the State’s expert during the recent DNA testing, Pamela Newall, was of the opinion that the spermatozoa in Ms. Doyle’s rectum had drained there from her vagina, the basis of a claim presently pending in the Circuit Court of Cook County. (Clem. Pet. at 39, 40). However, petitioner himself even concedes that Ms. Newall was unable to completely rule out the possibility that anal intercourse in fact occurred in this case. (Clem. Pet. at 39).

It is indeed ironic that even after DNA testing established that petitioner was rightfully

convicted of the rape and murder of Barbara Doyle, he now relies on that same testing in an attempt to avoid responsibility for his acts. Just as the circuit court judge before whom petitioner's case is currently pending should not allow petitioner to do so, nor should the Board or Governor Ryan.

3. Clemency is a Remedy of Last Resort and, Accordingly, Petitioner Must First be Required to See Out the Cases He Himself Initiated in the State and Federal Courts, Including the Case in Which the Effectiveness of his Trial Counsel Will Ultimately Be Resolved.

The State contends that the Illinois Supreme Court was correct when it held that petitioner was not entitled relief on the basis of trial counsel's performance at petitioner's sentencing hearing. The state high court noted that petitioner's post-conviction petition, where the ineffectiveness claim was initially raised, was ruled upon by the same judge who presided over petitioner's trial and had sentenced petitioner to death. It further noted that after its own review of the record, it did not believe that the trial judge had abused his discretion in denying post-conviction relief without an evidentiary hearing. Id. The high court found that:

[a]t the time of the sentencing, defendant stood convicted of the brutal rape and murder of Barbara Doyle. Medical evidence presented at trial revealed the presence of semen in Barbara's vagina and rectum. The report of the post-mortem examination further indicated that defendant had stabbed and slashed Barbara 34 times over various parts of her body. Most of the more serious wounds were located on her head, face and chest. The medical examiner also found several abrasions at the bridge of her nose and on her chin. In addition to the rape, sodomy and repeated stabbing of the victim, the State also introduced defendant's criminal record into evidence. Defendant had been convicted of robbery, possession of a stolen motor vehicle, and two separate incidents of criminal trespass to a vehicle. Based on the foregoing evidence, the circuit court determined that the only appropriate sentence was death. As the court noted at the original sentencing hearing, '[t]he repeated acts of savagery perpetrated on the middle-aged woman requires a sentence to meet the severity of the crime against her. Any less, or term of years in the penitentiary[,] would encourage other criminals to repeat this kind of behavior on innocent victims in our society.'

177 Ill. 2d at 138.

The state high court further recognized that "chronic use of drugs and alcohol \*\*\* [and the] negative effects that such abuse had on [petitioner's] psychological and neurological health," is a "double-edged sword at the aggravation/mitigation phase of the penalty hearing." 177 Ill. 2d at 138. Citing to its own precedent, the court stated that "'simply because the defendant views his drug abuse history as mitigating does not require the sentencer to do so.'" *Id.* (quoting People v. Shatner, 174 Ill. 2d 133, 159, (1996)).

With regard to the alleged impairment of petitioner's neurological functions, the court noted that "information about a defendant's mental or psychological impairments is not inherently mitigating." 177 Ill. 2d at 139. The court stated:

[a]s we explained in Tenner, '[a]t sentencing, a judge or jury considering evidence of this nature might view the information as either mitigating or aggravating, depending, of course, on whether the individual hearing the evidence finds that it evokes compassion or demonstrates possible future dangerousness.' (*Id.* (quoting People v. Tenner, 175 Ill. 2d 372, 382, 677 N.E.2d 859 (1997), *habeas corpus denied*, United States ex rel. Tenner v. Gilmore, 1998 U.S. Dist. LEXIS 16188 (N.D. Ill. Oct. 8, 1998))). Even if we were to consider defendant's alleged psychological and neurological impairments as mitigating factors, '[m]itigation evidence of a defendant's cognitive abilities and mental health does not preclude imposition of a death sentence when that evidence is outweighed by aggravating evidence.' (*Id.* at 139-40 (quoting People v. Pulliam, 176 Ill. 2d 261, 286, 680 N.E.2d 343 (1997))).

As to the additional mitigating evidence petitioner claims should have been investigated and presented by his trial counsel, the state high court found that such evidence "carries little, if any weight in terms of mitigation." 177 Ill. 2d at 140. The court noted that petitioner "never held a job for very long, often being fired as a result of his arrests for various crimes." *Id.* With regard to his "somewhat troubled childhood," the court noted that the trial court was "free to conclude `that it simply had no

mitigating value but may have been, in fact, actually aggravating.” Id. (quoting People v. Ward, 154 Ill. 2d 272, 337, (1992)). As to the alleged physical abuse inflicted by petitioner's father, the court reiterated that “evidence that a defendant has been physically or sexually abused \*\*\* does not invalidate a death sentence when outweighed by aggravating evidence.” Id. (quoting Pulliam, 176 Ill. 2d at 286)). Finally, the state court noted that although petitioner’s good behavior during incarceration may be viewed as a mitigating circumstance, it did not consider that evidence “sufficiently offsetting in light of the aggravating circumstances in this case.” Id.

With respect to petitioner’s unsubstantiated claim that his trial counsel “forced” him to testify, petitioner himself has already admitted that his testimony “established nothing that could not have already been reasonably argued from the State’s evidence.” Moreover, the record in this case shows that instead of affording petitioner’s testimony the extensive weight petitioner claims, the trial judge found his testimony to be unbelievable and discounted it accordingly. The judge then commented on how he actually could not believe Petitioner’s testimony. (Based on petitioner’s testimony that he had consumed over two cases of beer, Southern Comfort and drugs on the night of the murder, but, given the evidence that he had participated in a chase with police, hid a car in an alley, jumped a fence, run through a lot and then hid under another car—all which would require lucid thinking on petitioner’s part—the court found the testimony to be incredible. (R. 685)).

Petitioner also argues that trial counsel improperly failed to inform him of the “one juror” rule. On direct appeal in this case, however, the state high court stated that it had declined to adopt a requirement that trial courts must inform a defendant of the jury unanimity requirement before accepting jury waivers at capital sentencing hearings. 106 Ill. 2d at 220 (citing People v. Albanese, 104 Ill. 2d 504, 535-36, (1984)). “[T]here is no precise catechism required under the sixth amendment to

determine whether a jury waiver has been knowingly and intelligently made and each case will be decided on its own facts." Id. In applying that law to the facts of this case, the state high court found that it was clear from the colloquy and the written waivers that petitioner intelligently and voluntarily waived his right to have a jury determine his sentence. Id. As the court stated:

The defendant discussed with his attorney the question of having the court or a jury consider the matter of sentence, and acknowledged that he understood he was deciding to waive a jury and have sentence imposed by the trial court. Also, the trial judge fully advised the defendant of the right concerned, and again the defendant stated his wish to have the court sentence him.

Id.

Furthermore, for the reasons stated above, petitioner's claim that trial counsel was ineffective for failing to investigate the possibility of second suspect is equally baseless. That claim is easily dismissed.

In short, the Illinois Supreme Court's decision on petitioner's ineffective assistance of counsel claim was inherently reasonable and, accordingly, the State believes that it will ultimately prevail on that issue pursuant to binding United States Supreme Court case law. In the meantime, however, United States District Court Judge Coar has ordered habeas corpus relief in the form of a new sentencing hearing in petitioner's case. However, according to petitioner, a new sentencing hearing is simply not good enough. (Clem. Pet. at 43).

Petitioner instead asks Governor Ryan to allow him to skip any new sentencing hearing and simply commute his sentence to a term of years. He wants this because "[t]wenty-one years after the offense, it grows more difficult, day by day, for [him] to mount an adequate defense at a capital sentencing hearing." (clem. pet. at 43). Specifically, petitioner claims that his mother is ill and a character witness, Father Philipski, who already submitted an affidavit on petitioner's behalf, has died,

rendering any future sentencing hearing not a “fair contest.” (Clem. Pet. at 44). However, it is unfathomable that petitioner would be unable to now find any witnesses who would testify to the evidence he considers mitigating, such as his troubled childhood; his history of substance abuse; and the physical abuse his mother suffered. In fact, petitioner argues in his clemency petition that his character has changed for the better over the last 21 years he has been imprisoned. (Claim V, Clem. Pet. at 44). He also claims that he is now a devoted husband and no longer suffers from drug addiction, although the State notes that as recently as 1995, petitioner was disciplined for possession of drugs and drug paraphernalia while in the prison. (See attached Disciplinary Record). The drug offense notwithstanding, if petitioner’s character has indeed improved, then it necessarily follows that he has much more potential mitigating evidence to work with now than he ever did at the time of his original sentencing hearing.

Petitioner should not be given a sentence of a term of years, pursuant to the Governor’s clemency powers, simply because he doesn’t wish to go through another sentencing hearing. As argued above, clemency is a remedy of last resort. Petitioner must be required to see out the cases he himself initiated in the state and federal courts.

4. The Board and Governor Should Not be Swayed by Empty Claims of Rehabilitation.

Stating that “many things have chanced in the twenty-one years [petitioner] has been imprisoned,” the clemency petition states that petitioner “is no longer a reckless youth who suffered from drug addiction.” (Clem. Pet. at 44) The State maintains that if petitioner is truly a changed man, it is because he lives in the confines of the condemned unit where he can do relatively little harm, and because he knows he has been sentenced to death -- typically an impetus for repentance and remorse or, in some cases, denial of guilt altogether.

Moreover, as much as petitioner claims that he is now a changed man, his prison records indicate that he is still prone to setbacks, even behind prison walls. As noted above, petitioner's disciplinary record shows that in 1995, petitioner was disciplined for possession of drugs and drug paraphernalia while in prison.

Rehabilitated? Doubtful. The Board and the Governor, however, should not wait for a conclusive answer.

5. Petitioner Is Not Entitled to Clemency Relief on the Basis of Any of the Ryan Commission's Recommended Reforms Listed Below.

Eligibility Factor

Petitioner also asserts that he is entitled to clemency relief because he was found eligible for the death penalty based on an aggravating factor – murder in the course of another felony – other than those factors which the Ryan Commission has recommended be retained. The Illinois Supreme Court, however, has expressly rejected the Ryan Commission's reasoning and has 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, 2002 Ill. LEXIS 376 at \*73 (Aug. 29, 2002), citing Zant v. Stephens, 462 U.S. 862 (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. at \*74.

Moreover, each of the aggravating factors represents a determination by the General Assembly that certain types of murders justify imposition of the death penalty. For example, murders in the course of another felony such as rape, the case here, are properly death eligible to deter defendants who

commit such an atrocious crime from taking the added step of killing their victim. Other aggravating factors are intended to protect the most helpless members of our society (such as children, the elderly or disabled), or to protect those who, in the course of their jobs, protect the public (police officers, firefighters, etc.). Given these important policy considerations, as well as the Illinois Supreme Court's decision in Ballard, petitioner's claim must be rejected.

#### Pre-Trial Discovery

With no elaboration, petitioner argues simply that if pre-trial discovery had been available to him, he might have been able "to mount an effective defense at trial and sentencing," Therefore, he argues that the State must be prohibited from putting him to death. Since petitioner does not give any specific reason why this might be true, his claim must fail.

#### Uniform Protocols to Guide Prosecutors' Decision in Seeking Death

Petitioner claims he is entitled to clemency because the prosecutors' decision to seek death in his case was made without uniform protocols to guide their discretion and was not approved by a state-wide review committee. However, "[i]t has long been recognized by th[e Illinois Supreme C]ourt that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all. A prosecutor's discretion extends to decisions about whether or not the death penalty should be sought." People v. Jamison, 197 Ill. 2d 135, 161-62, 756 N.E. 2d 788 (2001). Therefore, any attempt to mandate such a review would constitute an impermissible restriction on the independence of the various State's Attorneys under the Illinois constitution. Moreover, petitioner does not even allege, much less argue, that any decision to seek death in his case might have been the result of an abuse of discretion. Accordingly, the claim must be denied.

#### Review by the Illinois Supreme Court for an Arbitrary or Disproportionate Death Sentence

Petitioner next argues that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate or arbitrary. However, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by defendants in capital cases (see e.g., 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 e.g., People v. Smith, 177 Ill. 2d 53, 685 N.E. 2d 880 (1997); People v. Blackwell, 171 Ill. 2d 338, 665 N.E. 2d 782 (1996)), it is clear that the only reason the Illinois Supreme Court did not review petitioner's sentence in such a manner is because he did not ask the Court to do so. For that reason, he cannot succeed on his present claim.

IV.

**CONCLUSION**

For all of the above reasons, the People of the State of Illinois asks this Honorable Board and the Honorable Governor of this State to deny executive clemency to Gregory Madej.

Respectfully submitted,

RICHARD A. DEVINE

State's Attorney  
County of Cook

ARLEEN C. ANDERSON  
JAMES BYRNE  
CELESTE STACK  
Assistant State's Attorneys