OCTOBER 2002 SESSION
PRISONERREVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	**Docket No. **
Vs.	)	
	)	**Inmate No. A-72531**
HECTOR NIEVES	)	
	)	
	)	

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

PEOPLE'S RESPONSE IN OPPOSITION TO PETITION FOR EXECUTIVE CLEMENCY

HEARING REQUESTED

RICHARD A. DEVINE
STATE'S ATTORNEY OF COOK COUNTY

By: MAUREEN FEERICK
ROSEMARY HIGGINS
MICHELLE KATZ

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	**Docket No. **
	)	
Vs.	)	**Inmate No. **
	)	
HECTOR NIEVES,	)	
	)	

I

HISTORY OF THE CASE

Hector Nieves murders homeless people. In a crime spree involving three separate victims on three separate occasions, Hector Nieves targeted three unfortunate men and murdered them. He then fled to New York where he murdered a fourth homeless man in Central Park, and then nearly killed a fifth man in a homeless shelter. He gave a videotaped confession to the New York District Attorney, and also confessed to local authorities regarding the Chicago cases. His history, aside from this "spree," is one of violence from the time that he was a youth in Puerto Rico, and includes a vicious attack that almost resulted in the death of another inmate during a prior incarceration in the Illinois Department of Corrections.

This case concerns the murder of Rafael Cuevas, for which a jury convicted petitioner on August 27, 1997. They subsequently sentenced him to death. Petitioner appealed his conviction to the Illinois Supreme Court, which affirmed his conviction on July 6, 2000. People v. Nieves, 192 Ill.2d 487, 737 N.E.2d 150 (2000). Petitioner's Petition for Rehearing was denied on

October 2, 2000. People v. Nieves, 2000 Ill. LEXIS 243 (10/2/00).

II

FACTS OF THE CASE

The Crime

According to his own court-reported confession, which was taken in May 1994 by Assistant State's Attorney John Muldoon in New York City, on May 9, 1992 at 2452 West North Avenue in Chicago, petitioner, Hector Nieves, murdered victim Rafael Cuevas. Petitioner had known Rafael Cuevas from the streets for about three months. Petitioner was with Rafael Cuevas at about 10:00 on the evening of the murder. According to petitioner, while they were talking, Rafael mentioned that he wanted to die. After the two spoke for about ten minutes, Rafael went to sleep.

Petitioner admitted that he then decided to "help" Rafael by killing him. Petitioner went outside to find a weapon, and returned ten minutes later armed with a two-by-four wooden board. Intending to kill Rafael, petitioner struck Rafael in the head with the board a "bunch of times" until his objective was accomplished. After the murder petitioner threw the board somewhere inside the building so that "the police never find it", and left the abandoned building. Rafael's body was found at about 4:30 p.m. the following day on a mattress in the abandoned building. He had suffered obvious blunt and severe trauma to his head. Blood was splattered around his body and stained the mattress underneath his head. (See Attachments A and B.)

The evidence further established that it was likely that at the time of his death the victim was in possession of money which was stolen by petitioner. The day before petitioner killed her brother, Blanca Nater went with Rafael to cash his $155.00 welfare check, and then, to pay $55.00 towards his share of the rent for his apartment. When Blanca left, Rafael had $100.00 in his possession. The $100.00 was nowhere to be found at the time that Rafael's body was discovered.

A postmortem examination of Rafael Cuevas revealed the presence of numerous injuries, including: (1) two lacerations over his forehead; (2) two lacerations over the right side of the head; (3) a depressed skull fracture over the right side of the head which was about four inches in diameter and extended to the front of the head; (4) one laceration over the face area; and, (5) bruising over the right cheek area.

The internal examination revealed the following: (1) multiple skull fractures over the frontal bone of the skull, the right parietal bone of the skull, and the right temporal bone of the skull; (2) the skull fractures extended to the anterior cranial fossa of the skull (the base of the skull and below the right eye); (3) diffuse subgaleal hemorrhage (bleeding beneath the scalp but over the skull) over the right side of the head; (4) bleeding in the leptomeninges (the thin layer covering the brain); and, (5) a contusion hemorrhage over the brain.

Toxicology tests indicated that Rafael Cuevas consumed alcohol prior to his death, and a cross-section of the victim's liver showed signs of hepatic parenchyma. The victim tested negative for all other drugs and narcotics. Rafael tested positive for the AIDS virus, but had no signs of "terminal state of HIV" and lacked symptoms associated with its later stages.

The manner of death was determined to be homicide, and Rafael's injuries indicated the use of extensive force. At least six blows were struck to Rafael's head with a blunt instrument. In all likelihood, Rafael experienced "quite extensive pain."

Blanca Nater had occasion to see her brother on the afternoon that he was murdered by petitioner. Rafael, was clean, responsive to her questions, and showed no signs of depression. Blanca, who knew that her brother had AIDS, testified that her brother had accepted his illness and was "a happy man" despite his health concerns. He was cooperative with medical professionals at various facilities where he received care, and recognized that he could enjoy more of his life by complying with his doctor's directives. Blanca had accompanied her brother to the hospital on numerous occasions for his treatment and noted his positive attitude and

response to treatment. He never told her that he wanted to die. In fact, her brother was very excited about getting together with the rest of his family for a Mother's day dinner planned for the day after his untimely death. His family grieved his absence from the long anticipated reunion.

Following deliberations the jury found petitioner guilty as charged. (R. 1704; CLR. C86)

The Sentencing Hearing - Eligibility

Eligibility was established after evidence was produced to show that petitioner was over 18 years of age and that he had a prior conviction for the murder of Louis Vargas in Case # 96-2728. The facts of the Vargas case, which occurred a mere four months after petitioner murdered Rafael Cuevas, bear on the appropriateness of granting petitioner's request for executive clemency, and are set forth below.

The Murder of Louis Vargas

At about 6:30 p.m. on September 13, 1992, a homeless man named Alexander Laboy was sitting on a bench in the Humboldt Park area of Chicago drinking a beer. While he was drinking his beer, Alexander saw "Tony" (later identified as the victim, Louis Vargas), "Papo" (later identified as the petitioner, Hector Nieves), "Butch" and a few other guys sitting about twenty five feet away from him. Louis Vargas was seventy -three years old. Witness Laboy knew "Tony" prior to this date and knew that his nickname was "Mariposa." Witness Laboy had also seen petitioner before, about three times in the previous week, in the park, on North Avenue and around the neighborhood using a cane and walking with a limp. At the time, Alexander did not know petitioner's true name, but later learned that "Papo's" name was Hector Nieves. Petitioner, at the time of his arrest, had a cane and walked with a limp.

While Laboy watched, petitioner and Mariposa argued about who was going to put up

more money to buy some more liquor. Petitioner took out an object that looked like a screwdriver or an ice pick. Mariposa took the item away from petitioner and threw it to the ground. He then took petitioner's cane, threw it on the ground and slammed petitioner to the ground. Shortly thereafter, the group walked away.

At 11:10 p.m. on September 13, 1992, Officer Darryl Daley and his partner, Officer Charlotte Roldan, received an assignment to go to 2808 West North Avenue. When they arrived at that location, they were directed by citizens to a large white truck located near a restaurant where they saw the victim, Louis Vargas lying face down on a piece of cardboard. Part of his body was under the truck, and he was not wearing any shoes. His head was covered with what appeared to be fresh, running blood. Officer Frank DeMarco, with the mobile crime lab unit of the Chicago Police Department, observed that Louis Vargas was beaten about the face and head, had blood all over his face and body, and was lying in a pool of blood on some large pieces of cardboard with his pants pocket turned inside out. He photographed the scene, the area, and the victim, and searched the area for weapons. No weapon was recovered. No fingerprints were found either. Louis Vargas was transported to the hospital to be pronounced dead.

Upon becoming involved in the investigation of this case, Detective Victor Gutierrez learned that the victim was Louis Vargas whose nickname was Tony Mariposa and that a suspect named "Papo" or "Viejo" who was small in stature should be sought for questioning. Detective Gutierrez was unable to locate "Papo," now known to be petitioner. Thus, this crime remained unsolved until petitioner confessed his culpability to Assistant State's Attorney John Muldoon, during their May of 1994 conversation in New York.

In his court-reported statement, petitioner recounted the events surrounding the death of Louis Vargas on September 13, 1992. Petitioner said that he knew Mariposa from the streets for about three months and was with Mariposa in Humboldt Park on the day of the murder. Petitioner had a walking cane because he had surgery on his leg. According to petitioner, when

he refused to give Mariposa a dollar to buy some wine, Mariposa became upset, took his cane and threw it away. Petitioner, angered by the incident, decided to kill Mariposa "the easy way ... easy way for me, you know, he can do nothing to me." He planned to wait for Mariposa to go to sleep and then kill him.

Petitioner knew that Mariposa slept under the truck behind the restaurant at California and North Avenues. He went to the truck and waited inside until Mariposa arrived. When Mariposa went to sleep under the truck, he struck Mariposa in the head with a pipe that he found in the alley numerous times -- at least ten times. When he was done, petitioner threw the pipe away.

Post mortem examination by Dr. Edmond Donoghue revealed the presence of ten external injuries to Mr. Vargas, including: (1) a deep laceration to the bridge of the nose and fractures to the underlying bones; (2) two deep lacerations on the left side of his face; (3) multiple superficial and deep abrasions to the left side of his face; (4) swelling and bruising on the left side of his face from his cheek bone to his jaw bone; (5) a laceration of his left ear; (6) bruising on his left upper and lower eyelids; (6) a through and through laceration to his left lower lip; (7) two lacerations to the right side of the back of his head; (8) a laceration to the left side of the back of his head which extended through scalp tissue down to the level of his skull. Based on the physical examination of Louis Vargas, Dr. Donoghue concluded that the victim was struck a minimum of eight times.

Internal examination revealed the following: (1) a subgaleal hemorrhage beneath the scalp; (2) multiple fractures of the victim's facial bones including his left cheek and left upper jaw; (3) a very large basal skull fracture; (4) a depressed skull fracture to the left side of the victim's skull, which Dr. Donoghue noted was usually the result of a blow being struck to the head by an object; (5) a curved linear skull fracture; (6) a subdural hematoma on the right surface of the brain; (7) bleeding on the left side of the brain beneath a very thin delicate membrane

called the arachnoid; (8) multiple contusions of the brain.

Toxicological analysis revealed that Louis Vargas consumed alcohol prior to his death, but tested negative for cocaine, opiates, heroin, and morphine. There was no evidence of any life threatening medical condition from which the victim suffered, and the alcohol in his system did not contribute to his death. As Dr. Donoghue testified, this "beating would have killed anyone." Louis' head injuries indicated that a great deal of force had been exercised. He testified that the injuries were indicative of the victim having been struck with a blunt instrument. The shape and design of the injuries would be consistent with a weapon like a lead pipe. In Dr. Donoghue's opinion Louis Vargas died of cranial cerebral injuries which were consistent with being beaten with a pipe.

A jury convicted petitioner of the murder of Louis Vargas and sentenced him to death. On appeal to the Illinois Supreme Court, his conviction was affirmed, but his death sentence was reversed due to the fact that the court found that eligibility was not established where premised on a New York conviction for manslaughter in the second degree, which was not proven to be substantially similar to Illinois' first-degree murder statute. People v. Nieves, 193 Ill.2d 573, 739 N.E.2d 1277 (2000).

The Sentencing Hearing - Aggravation

After finding petitioner eligible for the death penalty, a hearing in aggravation and mitigation commenced. Extensive evidence was presented in aggravation.

Petitioner committed a burglary on July 26, 1976. Frank Ryan, who resided at 1658 North Leavitt, heard noises in his house and found the petitioner going through his personal things. Mr. Ryan held the petitioner for the police. Petitioner was convicted of this offense, and committed to the Illinois Department of Corrections for six years.

On March 18, 1978, petitioner committed an armed robbery. In the early morning hours, sixty-three year old Rafael Correa, and his sister, Julia Mulivae, were cleaning the family restaurant at 2035 West Cermak. Petitioner robbed the elderly victim at gunpoint, striking, Mr. Correa in the head with the gun, and then locking him in a bathroom with his sister. On June 5, 1978, petitioner pled guilty to charges of armed robbery, unlawful use of a weapon, aggravated battery, and unlawful restraint, arising out of this incident. On June 16, 1978, petitioner was sentenced to eight years for armed robbery and two years concurrent for the unlawful use of a weapon.

While serving his time, petitioner committed numerous disciplinary infractions in the Illinois Department of Corrections. Nineteen of these infractions were major violations, including: creating a dangerous disturbance, intimidation and giving false information. In addition to his chronic pattern of disruptive and violent conduct even while incarcerated, petitioner acted as the chief of the Latin Kings street gang in the prison facility to which he was assigned. In connection with his gang related activities in the jail, on February 21, 1983, a correctional officer observed petitioner hit another inmate in the back of the head with a broomstick.

Petitioner was also involved in two incidents that served as the basis for criminal prosecutions. On June 9, 1979, petitioner stabbed a fellow inmate named Daniel Maher at Menard Correctional Facility. He was convicted and sentenced in connection with that violent attack. A few years later, on August 5, 1982, petitioner helped to instigate a jail riot at Menard involving the Latin Kings and a rival gang, the Gangster Disciples. During this riot, petitioner sat on another inmate's chest, and stabbed him repeatedly with a knife. Each time that petitioner

stabbed his victim, he pulled the knife out of his chest, kissed the blade, said "G.D. blood" plunging the knife back. In this same incident, petitioner also stabbed two other individuals. With respect to this incident, petitioner was criminally prosecuted in Randolph County, convicted of aggravated battery and sentenced to an additional ten years incarceration, to run consecutively to his existent sentence at that time.

After being released from prison, petitioner continued to commit crimes of violence in the community. Keith Miller testified that, on November 8, 1991, he was at his place of business when he witnessed the petitioner attempting to steal his car. Mr. Miller's employees managed to catch the petitioner just a block from the shop and upon being caught, petitioner tried to stab Henry Vasquez, one of the employee. Once again, petitioner was convicted of a violent crime.

Finally, evidence that petitioner was responsible for two other murders was presented in aggravation. Petitioner’s court reported statement to Assistant State's Attorney John Muldoon included his admission that he killed Lonnie Jackson on August 4, 1991. Petitioner stated that he had known Lonnie Jackson for about five months prior to the incident, and the two lived in a cardboard box in the park. Apparently, the petitioner was supposed to buy beer for Jackson, but instead, pocketed the money. Jackson was angry and got a broomstick. According to petitioner, Jackson tried to hit him with the broomstick at which time he stabbed Jackson in the chest multiple times. With his last breath Jackson asked the petitioner to call the police and get help for him. Petitioner responded, "… yeah, okay, stupid." Petitioner never got help for Jackson, waited until the following day, took a shower and threw the knife and his bloody clothes in the river. Petitioner was ultimately indicted and found guilty of the murder of Lonnie Jackson.

In yet another murder prosecution of petitioner, Detective Eugene Heghmann, from the

New York City Police Department, testified about a murder that petitioner committed in Central Park on June 28, 1993. Petitioner told the detective that he was in the park with a man named Cano, whom he had known for a couple of weeks. The two had a disagreement because Cano would not share his drugs with petitioner. According to petitioner, while armed with a knife, Cano told petitioner to leave or he would kill him. After Cano put the knife down and injected himself with drugs, petitioner picked up the knife and stabbed Cano in the neck.

Petitioner's statement to Detective Heghmann was repeated to Assistant District Attorney Cynthia Sittnick. As is customary in New York, the statement was videotaped. Petitioner pled guilty to a charge of manslaughter in the first degree.

Assistant District Attorney Sittnick further testified that petitioner confessed another crime in his videotaped conversation with her. Petitioner admitted severely beating sixty-seven- year-old Harry Hartinger, who was his roommate in a homeless shelter, while he slept. After the beating, petitioner left Mr. Hartinger near death. Fortunately, another resident of the shelter discovered Hartinger and his life was saved. The motive for the attempted murder of Mr. Hartinger was theft of his few meager belongings.

The jury found that there were no mitigating factors sufficient to preclude imposition of the death penalty.

III

REASONS FOR DENYING THE PETITION

THE NON-EXISTENCE OF THE NEW ILLINOIS SUPREME COURT RULES, A CAPITAL LITIGATION TRUST FUND, AND, THE RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT AT THE TIME OF PETITIONER'S TRIAL IN NO WAY RENDERS HIS CONVICTION AND SENTENCE UNFAIR OR UNJUST AND DOES NOT SUPPORT THE GRANTING OF CLEMENCY IN THIS CASE.

Prefatory Note

As an initial matter, respondent maintain that this Petition for Executive Clemency is not properly considered in that it flagrantly violates 730 ILCS Section 5/3-3-13(c), which in pertinent part, provides:

> Application for executive clemency under this Section **may not** be commenced on behalf of a person who has been sentenced to death **without the written consent of the petitioner**, unless the petitioner, because of a mental or physical condition, is incapable of asserting his or her own claim.
> (Emphasis supplied)

Rob Warden of the Center on Wrongful Conviction, and Sherry Silvern, an Assistant Public Defender have filed pending petitions before this Board without an agreement to act as counsel for Hector Nieves, and without obtaining his consent to file such petitions on his behalf. There is no evidence to even suggest that petitioner is incapable of asserting his own claim because of a mental or physical condition. Neither Mr. Warden or Ms. Silvern have even asserted that petitioner lacks the capacity to consent. As such, these petitions offend Section 5/3-3-13 and

should be denied outright.

General Overview

Defense counsel asserts that petitioner is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system that have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment that were not available at the time of his trial, petitioner claims that his trial (as well as that of every other capital petitioner in Illinois) was, by definition, fundamentally unfair. Such claim fails, however, where the Illinois Supreme Court has expressly rejected the claim "that every capital trial has been unreliable and that all appellate review has been haphazard." (People v. Hickey, ___ Ill. 2d ___, 2001 Ill. LEXIS 1080 at *57 (No. 87286 September 27, 2001)) Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they "function solely as devices to further protect those rights given to petitioners by the federal and state constitutions" and that "[a] violation of procedures designed to secure constitutional rights should not be equated with a denial of those constitutional rights." Id. at *63, 64.

Thus, the fact that the Supreme Court, the General Assembly and the Governor's Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to petitioner's case. Instead, a true injustice would only result if it were reflexively determined that petitioner's trial was fundamentally unfair without any examination of the proceedings themselves. Defense counsel ignores the fact that the Illinois Supreme Court has previously examined the proceedings in this case and determined that they were fundamentally fair and that he was not unduly prejudiced in

any manner.

Supreme Court Rule 714 - Minimum Qualifications for Attorneys Seeking to Represent Capital Petitioners

Defense counsel asserts that petitioner is entitled to clemency because the new Supreme Court Rules governing capital cases were not applicable to his proceedings. However, the Illinois Supreme Court has clearly held that the amendments to its rules do not apply retroactively. Hickey, 2001 Ill. LEXIS 1080 at *65.

With respect to defense counsel's claim that petitioner suffered because "he was represented by an inexperienced defense counsel or his case was prosecuted by an inexperienced prosecutor " in violation of Supreme Court Rule 714, respondent vehemently denies the veracity of such allegation. Petitioner was represented by Assistant Public Defender Woodward Jordan, a veteran public defender of many years experience, and a member of the Murder Task Force. Similarly, Assistant State's Attorneys Rosemary Higgins and Maureen Feerick, both veteran prosecutors with significant experience in all aspects of criminal litigation, prosecuted the case.

Defense counsel relies on Exhibit 2, a wholly speculative memorandum from a Dr. Randall and a generalized claim of ineffective assistance of counsel in that trial counsel allegedly proceeded with a defense that was "dubious, at best." Petitioner's claim fails to acknowledge that the Illinois Supreme Court decided this issue adversely to him. Rather, counsel insinuates that the Illinois Supreme Court found incompetence. In fact, the Illinois Supreme Court determined that petitioner's attorney did not render substandard representation where:

> the petitioner had confessed to the crime, and his attorney was trying to come up with something where his client had no defense. Further, petitioner's attorney thoroughly cross-examined the State's witnesses, presented a witness in support of his defense, and vigorously argued that the petitioner should not be found guilty.

> Moreover, we cannot find that a reasonable probability exists that, had counsel not pursued the invalid mercy killing strategy, petitioner would have been acquitted. The evidence against petitioner was overwhelming. Petitioner gave a detailed confession to the crime, and the physical evidence corroborated his account of the crime." 192 Il.2d at 499.

<u>Governor's Commission on Capital Punishment Recommendations</u>

As a general matter, the recommendations of the Governor's Commission on Capital Punishment provide no greater justification for granting executive clemency than the new Supreme Court Rules, where, at present, they are just that – recommendations, and where, as is true with respect to the new Rules, wholesale retroactive application would result in a true injustice.

Accordingly, defense counsel's reliance on Recommendations 29, 30, 61, 62, 65, 66, and 70 should be rejected outright where he fails to provide this Board with any inkling of how such recommendations would have had any actual impact on his trial, sentencing hearing, or its ultimate outcome. Defense counsel asks this Board to engage in wholesale speculation as to what might have been in the absence of a scintilla of evidence to support his claim.

<u>Governor's Commission on Capital Punishment Recommendation Nos. 29 & 30</u>

In both petitions, defense counsel claim petitioner's sentence should be reduced because the State's Attorney's decision to seek death was made without uniform protocols to guide his discretion and was not approved by a state-wide review committee. However, it 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 States' 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.

Governor's Commission on Capital Punishment Recommendation No. 61

Defense counsel simply avers that two mitigating factors: (1) history of emotional or physical abuse, and (2) reduced mental capacity were not specifically listed in the statute at the time of his sentencing hearing. The fact of the matter is that, listed or not, the jury heard extensive testimony as to both factors. Specifically, Dr. Edward Blumstein testified that petitioner had an unspecified type depression and a mixed personality disorder. Nevertheless, petitioner did not display any indication of cognitive deficit, was not taking any psychotropic medication, and did not display any indication that he was suffering from any mental disease or defect at the time of the alleged offense that impaired his functioning to the degree that it would render him insane, substantially impaired, or substantially impaired his capacity to appreciate the criminal nature of his behavior. Petitioner was of dull but average intelligence.

Dr. Larry Heinrich, another licensed clinical psychologist, determined that petitioner did not suffer from any major psychopathology. He ruled out any overt psychosis that was ongoing or that would have interfered with petitioner's ability to stand trial. He did, however, receive the impression that petitioner had a severe personality disturbance and at least a number of adjustment problems that needed to be further evaluated.

Subsequently, Dr. Heinrich determined that petitioner had a mixed type personality disorder where there were indicia of several different personality disorders, including paranoid ideation, schizoid personality, depression, and borderline personality disorder. Petitioner's I.Q. placed him in the low average range of 80-90. Dr. Heinrich concluded that petitioner suffered a severe personality disorder, characterized by an ongoing long-term depression, and an underlying form of organic brain disturbance or impairment. With respect to the organic brain impairment, Dr. Heinrich testified on cross examination that there was a "hint of organic impairment." He admitted, however, that a neurological examination would have been necessary to formulate this diagnosis with any certainty. No examination was ever conducted, however, because when petitioner was sent to the hospital for a neurological examination, he refused to cooperate.

Petitioner's brother, Enrique Nieves testified about petitioner's childhood. Enrique testified that his father drank on the weekends. Their father was a strict disciplinarian, and on many occasions beat petitioner. The beatings began at age 14 or 15, after petitioner became involved in criminal activities. The father beat petitioner for what Enrique admitted was his inappropriate behavior. Petitioner first went to prison while the family was still living in Puerto Rico after a conviction for burglary. When petitioner was paroled, the family moved to the United States. Petitioner used drugs at an early age including heroin and cocaine which he injected .

For a time, petitioner lived with a woman named Anna and her two children but Anna ultimately left petitioner due to his drug use and criminal behavior. During those periods when petitioner was not in prison his family tried to help him, but petitioner refused help and continued in his life of crime. Neither petitioner's sisters nor his mother visited him while he was in jail.

Finally, Dr. David Randall, a clinical psychologist retained by the defense to testify on

petitioner's behalf testified about alleged child abuse but his testimony was not supported by the testimony of petitioner's family members. Dr. Randall also testified that petitioner's mother recalled an incident during which petitioner at age nine hit his head on a playground swing. A complete neurological evaluation was done of petitioner at the University of Illinois, and any neurological damage that could have impacted petitioner's behavior was ruled out.

The jury heard and considered all of the foregoing mitigating evidence. The spirit of Recommendation #61 was fully complied with and petitioner cannot establish that the fact that the recommendation was not specifically enumerated in the statute as a mitigating factor would have made any difference in this case.

Governor's Commission on Capital Punishment Recommendation No. 62

In both petitions filed on petitioner's behalf, defense counsel claims that clemency is appropriate because he was denied the opportunity to make a statement in allocution at his sentencing hearing. However, as the Illinois Supreme Court stated long ago, "an unsworn statement to the sentencing jury [to be] consider[ed] along with testimony given under oath and the arguments of counsel would at the least confuse the jurors, and might also impair their ability to weigh the aggravating and mitigating factors." People v. Gaines, 988 Ill. 2d 342, 380, 430 N.E.2d 1046 (1981). Moreover, petitioner was free to testify under oath at his sentencing hearing to explain why he should not be sentenced to death, but chose instead to rely upon his witnesses in mitigation and his attorney's closing argument. Therefore, he was given every opportunity to present himself to the trier of fact before he was sentenced.

Governor's Commission on Capital Punishment Recommendation No. 65

In both petitions filed on petitioner's behalf, defense counsel asserts that clemency is warranted because the standard Illinois Pattern Instruction (undisclosed number) was given concerning the weighing of aggravation and mitigation. Both the Illinois Supreme Court and the federal courts have consistently rejected any claim that the statute is confusing and might lead a jury to believe that the death penalty is mandatory. See People v. Mitchell, 152 Ill. 2d 274, 346, 604 N.E.2d 877 (1992); Silagy v. Peters, 905 F.2d 986, 998-99 (7th Cir. 1990). Moreover, because both the prosecution and the defense argued to the jury about the appropriateness of the death sentence in petitioner's case, any confusion in the language of the instruction was negated by the closing arguments.

Governor's Commission on Capital Punishment Recommendation No. 66

In both petitions filed on petitioner's behalf, defense counsel claims that clemency is warranted because the judge was not given the opportunity to override and impose a natural life sentence. Petitioner is wrong, however, because Illinois judges have long had the inherent authority to grant a new trial or sentencing hearing (or even enter a judgment notwithstanding the verdict). Because the trial judge at petitioner's trial denied his post-trial motions, it is clear that the judge would not have overridden the jury's verdict.

Governor's Commission on Capital Punishment Recommendation No. 70

Finally, defense counsel seeks executive clemency because the Illinois Supreme Court did not consider whether petitioner's sentence was disproportionate to other sentences or was the result of an arbitrary factor and did not independently weigh the aggravation and mitigation. The

Illinois Supreme Court has consistently demonstrated that it will address comparative sentencing arguments whenever they are raised by petitioners 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)). Where, as here, the Supreme Court did not review the question of disparate sentencing on direct appeal, it is because petitioner could not establish that his sentence was disparate, and thus, did not raise the issue. Petitioner has killed three individuals in Illinois, one in New York, and attempted to kill several other individuals both while incarcerated and while at large in the community. The evidence during the sentencing established beyond doubt that petitioner was a cold-blooded, ruthless, recidivist with no respect for the community, the law, his friends or even his own family. Wherever he is or whatever his life circumstances, he finds ways to kill.

CONCLUSION

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

Respectfully submitted,

RICHARD A DEVINE
State's Attorney of Cook County

____
One of the Attorneys for Respondent

MAUREEN FERRICK
ROSEMARY HIGGINS
MICHELLE KATZ
2650 SOUTH CALIFORNIA
CHICAGO, ILLINOIS 60608
(312) 603-4385