

OCTOBER 2202 SESSION
PRISON REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. \
vs.)	
)	Inmate No. K68421
JUAN CORTEZ,)	
)	
)	

I

HISTORY OF THE CASE

On February 2, 1991, Petitioner Juan Cortez shot and killed victims Ajax and Rafael Gama in their home and stole various items of their property. A jury convicted Cortez of first degree murder and armed robbery. (Case No. 91 CR 7568) Pursuant to a bench sentencing hearing before the Honorable Michael Bolan, Cortez was found eligible for the death penalty because he had murdered two people and because the victims were murdered during the course of another felony. The trial court sentenced Cortez to death. On direct appeal, the Illinois Supreme Court affirmed Cortez' first degree murder convictions and death sentence. People v. Cortes, 181 Ill.2d 249, 692 N.E.2d 1129 (1998).

II

FACTS OF THE CASE

Petitioner was charged by indictment with ten counts of first degree murder, two counts of armed robbery, four counts of home invasion and six counts of residential burglary. The charges stemmed from the February 2, 1991, fatal shooting of the victims, Ajax and Raphael Gama.

Pretrial Proceedings

On January 29, 1993, in a pretrial hearing before the Honorable Michael Bolan, Petitioner's attorney, Mr. Michael King, requested that Petitioner undergo a fitness evaluation. The trial court granted Petitioner's request. On July 6, 1993, counsel requested another fitness evaluation. The trial court again granted Petitioner's request, ordering the examination to be completed by August 9. On August 9, the trial court noted that the results of the second fitness evaluation indicated that Petitioner was "fit to stand trial with medication." Defense counsel nevertheless requested a fitness hearing. The trial court granted counsel's request for a fitness hearing. On the next court date, August 23, 1993, defense counsel withdrew his request for a fitness hearing, noting that a second doctor had opined that Petitioner was "fit for trial with medication."

On October 21, 1993 the trial court denied Petitioner's motion to quash his arrest. On January 13, 1994, Petitioner's motion to suppress his statement, in which Petitioner claimed that he had been unable to understand English, was also denied. Petitioner then hired a new attorney, Mr. Richard Mottweiler, who entered his appearance on January 25, 1994 and represented Petitioner through the time of Petitioner's trial.

Trial

On October 24, 1994, Petitioner proceeded to a jury trial. Martin Diaz, Eddie Munoz, Alex Torres, Arlyn Torres, Anna Cruz, Lisette Torres, Ralph Santiago, Michael Cusak, Bill Johnston, Joseph Moran, Stanley Mocaldo, Officer Chenow, Robert Kirschner, Ernest Halvorsen, William Carroll, Melissa Foss and Pradeep Roy-Singh testified for the People at trial. Donald Navarro, Edwin Rodriguez, Nancy Almodovar and Ann Collins testified for Petitioner. The testimony of these witnesses is summarized below.

Martin Diaz testified that he was a friend of Ajax and Rafael Gama, the victims in the instant case, and had visited their apartment on Spaulding Avenue on several occasions. Mr. Diaz knew that both victims were homosexual. According to Mr. Diaz, the brothers normally wore bracelets, rings and chains, some of which they stored in a glass container located on a shelving unit which also housed their 19-inch television set. Ajax Gama owned a portable compact disc player, also normally stored in the aforementioned shelving unit. In open court, Mr. Diaz identified the glass jar, the compact disc player, three compact discs and a photograph of the television belonging to the Gama brothers. Mr. Diaz testified that when he visited the Gamas' apartment between 11:00 a.m. and 12:00 noon on February 2, 1991, the jar and television set were in their customary positions on the shelving unit. Mr. Diaz stated that the last time he saw either of the Gama brothers was when he dropped off Raphael Gama at his apartment at approximately five or six on the evening of February 2. He noted no damage to the Gamas' front door that day. The next day, Mr. Diaz unsuccessfully attempted to contact the Gama brothers. He later learned that they had been killed.

The parties stipulated that if Eddie Munoz were to testify, he would state that on February 2, 1991, at approximately 7:00 p.m., he spoke with and invited the Gama brothers to his apartment,

but was informed that they would be staying in for the evening.

Alex Torres initially testified that he had been convicted of burglary in 1993, an offense for which he had received a sentence of four years' imprisonment and two years' probation. Torres stated that he knew Petitioner in February of 1991 and had known him for nine or ten months prior to that time by various names, including "Boriqua," "Ivan Torres" and "Ivan Flores." Petitioner spoke both Spanish and English during his acquaintanceship with Torres.

On February 2, 1991, at approximately 9:00 or 9:15 p.m., Petitioner stopped by Torres' apartment on North Lawndale Avenue, where the latter was visiting with his cousin. Petitioner was "drugged up," and "hyper." Petitioner also had with him a bag of "weed" as well as a bag of heroin, which Petitioner, Torres and Torres' cousin proceeded to consume. Petitioner announced that he "had a big guizo," meaning, that he was going to stick someone up. Specifically, Petitioner claimed that he was going to stick up "the Mexican faggots." Torres knew that Petitioner was referring to two homosexuals who lived at Fullerton and Spaulding, to whose apartment Petitioner had taken him two or three weeks earlier to get high. On that occasion, Torres had declined to participate after learning that the men were homosexuals. Petitioner asked Torres to participate in the stickup of the "Mexican faggots," but Torres refused. Accordingly, between 9:30 and 9:45 p.m., Petitioner left Torres' apartment. Shortly thereafter, at approximately 10 p.m., Torres' girlfriend, Arlene Torres, arrived at the apartment with her daughter. Alex and Arlene stayed in the remainder of the evening watching movies.

The following morning, at approximately 11 o'clock, Petitioner returned to Torres' apartment and began to bang on the back door. Petitioner was "more hyper" and "drugged up" and had on his person several articles that he did not have in his possession the night before. Among

these articles were various gold chains, rings, a box with a watch in it, a compact disc player and some "CD cassettes." One of the chains bore a name plate on it similar to that worn by one of the two homosexuals Petitioner had previously introduced Torres to. Petitioner also flashed some money, claiming that it totaled seven hundred dollars.

Loudly and in a "hyper" manner, Petitioner began to relate what had happened. Petitioner stated that he "did the fagots (sic) in," that he ran up to them, saying, "Do you like women? Do you like pussy or do you like dick?" Petitioner then shot one of the men, then began "messaging" with the other in a similar manner before he shot him as well. Petitioner also demonstrated to Torres the manner in which he had committed the murders, a demonstration Torres repeated in open court. Petitioner bragged that he had done the "Mexican fagots (sic) in" and that he "got paid." Petitioner also told Torres that he had been with "Bobby," "Alex" and "Tony," associates of both Petitioner and Torres. At one point, Petitioner pulled up his shirt, revealing a two-shot .38 caliber derringer tucked into his pants.

Petitioner offered to sell the CD player to Torres, who purchased it for thirty dollars. Petitioner also asked Torres whether he knew anyone who would be interested in buying a television set. At this, Torres called his sister, who informed him that she would buy the television if it worked. Accordingly, when a mutual acquaintance, Jason Rivera, subsequently arrived at the apartment, Petitioner, Torres and Rivera drove in Rivera's car to an alley behind the Gamas' apartment building at Fullerton and Spaulding. There, "he" retrieved a television set from behind a dumpster and placed it in the trunk. From there, the three proceeded to Torres' sister's apartment and plugged the television into the room of a relative, Anna Cruz. Cruz paid Petitioner \$150.00 for the television, after being assured by Petitioner that its dirty condition was attributable to the fact that it had been

stored in a garage. Petitioner, Torres and Rivera then drove back to Torres' apartment in order to drive Torres' girlfriend Arlene back to her residence. On the way to Arlene's residence, Petitioner continued to brag about how he had killed the "fagots" (sic) and "got paid."

After dropping off Torres' girlfriend, Petitioner, Torres and Rivera drove back to "the neighborhood." Petitioner instructed Rivera to stop at Petitioner's residence. There, Petitioner briefly exited the vehicle, then returned with another gun, this one a .38 special revolver. On two subsequent occasions, Petitioner exited the vehicle after directing Rivera to stop. On each occasion, Petitioner announced after reentering the vehicle that he had sold a gun. According to Torres, Petitioner stated that he sold the .38 special and derringer for \$125 and \$75 or \$100 respectively. After selling the weapons, Petitioner bought Rivera and Torres food and narcotics. Rivera and Torres then dropped off Petitioner near his home.

On either the following day or the next, Torres was not sure which, Petitioner invited Torres to accompany him and his girlfriend to "Liberty's Gold," a pawnshop on Irving and Damen. There, Petitioner sold the various chains and rings he was wearing. Approximately two to three weeks later, on February 20, Torres was arrested on a burglary charge. At that time, Torres initiated a conversation with the police wherein he told them about what he had heard Petitioner say about the murders. As he did not wish to get into trouble, Torres omitted mention of the fact that he had accompanied Petitioner to retrieve the television set. Torres admitted that his motive in telling the police about Petitioner's crime was to extricate himself from his then current predicament. Torres also admitted that he was held in custody for approximately 12 hours, during which time the police offered to "try to help him out" on his burglary case should he give them new information. After two or three days, Torres bonded out on the burglary charge. On February 26, Torres gave a written

statement to an assistant State's Attorney. Torres admitted that his written statement was untruthful to the extent that it omitted mention of his accompanying Petitioner to retrieve the television set. Torres testified that he had given testimony before a grand jury regarding the instant case. On cross-examination, Torres was confronted with various purported inconsistencies between that testimony, his written statement and his trial testimony. Two actual inconsistencies, albeit by omission, were Torres' admitted failure to mention the roles of Jason Rivera and Anna Cruz. As to these omissions, Torres explained that he did not want to involve the former and sought to protect the latter from a stolen property charge. Torres admitted that the burglary charge he had been arrested for on February 20, 1991 was later dropped, but denied that there were any deals made in exchange for his trial testimony.

Arlyn Torres testified that she was Alex Torres' girlfriend in February of 1991. On February 2, 1991, at approximately 10 p.m., Arlyn and her three-year-old daughter visited Alex's apartment at 1841 N. Lawndale. The couple remained continuously in the apartment for the rest of the night.

The following morning, Petitioner, whom Arlyn had seen a few times before and knew as "Boriqua," came to the apartment. Petitioner was "loud" and "hyper." He also wore several gold rings and chains. Petitioner began telling Alex, in English, about how he "did the Mexicans" and how he had shot them in the head. Petitioner laughed as he described how he had made the Mexicans "beg for their lives like bitches" before killing them. After Alex bought the CD player and three compact discs from Petitioner for thirty dollars, a friend of Alex's, Jason Rivera, arrived. Alex, Petitioner and Rivera then left the apartment, returning approximately one half hour later. Arlyn then got into Rivera's car in order to be driven home. On the way, Petitioner continued to talk over and over about

how he "did the Mexicans, the fagots (sic)." Petitioner added that he was not scared of anyone; that he would "take down" anyone who "messed" with him, and; that he did not care about anything. From the conversation, Arlyn also learned something about a television having been stolen. Arlyn admitted that she did not take Petitioner seriously regarding his statements.

Anna Cruz testified that on February 3, 1991, she paid a man named "Boriqua" \$150.00 for a television that he had brought to her house on that date. Ms. Cruz was unable to identify "Boriqua" in open court. In late February of 1991, the police confiscated the television, a photograph of which Ms. Cruz was able to identify.

Lizette Torres testified that she knew Petitioner, also known as "Boriqua," through her brother Alex Torres. In February of 1991, Petitioner spoke both English and Spanish, and Lizette had spoken to him in these languages. On February 4, 1991, Alex Torres, Jason Rivera and Petitioner arrived at her apartment at 1809 N. Lawndale pursuant to her expressed interest in buying a television set. After the television, a dirty, 19-inch color model, was revealed to be in working condition, Anna Cruz, the mother of Lizette's boyfriend, paid Petitioner \$150.00 for it. Torres admitted that when the police later came to confiscate the set, she initially gave them a smaller 13-inch set, so as not to involve Anna Cruz. Later, Torres admitted to the police that she had given them the wrong set and turned over the one sold to her by Petitioner.

Ralph Santiago testified that he was the president of Liberty Gold and Coin and was working at that pawnshop in February of 1991. In open court, Mr. Santiago identified four receipts relating to business transactions that had been conducted in his store. The first receipt was dated January 30, 1991 and bore the name "Ivan Torres" upon it. The second receipt was dated February 2, 1991, listed the pawned items as seven gold rings, an Iris charm and bracelet and also bore the name

"Ivan Torres." The address of Ivan Torres was listed as 1917 N. Pulaski, an address Petitioner had upon his arrest previously informed the police was his. The third receipt, dated February 5, 1991, also bore the name of "Ivan Torres" but did not describe the items pawned. The fourth receipt, also dated February 5, 1991, described certain items of fourteen-carat gold and bore the name "Ivan Flores."

Chicago Police Officer Michael Cusak testified that in the late evening of February 4, 1991, he and his partner entered an apartment building at 2326 1/2 North Spaulding in search of a subject on an unrelated case. After ascending one or two sets of stairs, the officers encountered a doorway that was partially ajar. What appeared to be recent damage was also present to the door. Upon entering the apartment, which was in disarray, the officers discovered the bodies of Ajax and Raphael Gama. Ajax Gama lay in a pool of blood, most of which was drying.

Chicago Police Detective Bill Johnston testified that each of the victims had sustained gunshot wounds to the head. Ajax Gama's wallet, containing \$82, was recovered from the crotch area of his underwear. Further, although the lock plate on the Gamas' front door had been knocked out, the deadbolt itself was not in the lock position. Based upon the damage to the door, Detective Johnston believed that entry to the apartment had been gained by the application of brute force, as by shouldering the door. The detective noted that a shelving unit in the apartment contained dust, except for two dust-free areas, indicating that something had formerly been present there. A television remote control device--but no television--was also discovered.

Chicago Police Officer Joseph Moran, a forensics investigator, processed the Gamas' apartment for evidence on February 4, 1991. Officer Moran collected several items for subsequent fingerprint analysis, including a telephone, beer bottle, drinking glass and candy jar. The top half of

the candy jar was found in an entertainment section, the bottom in a closet under various articles of clothing. A fired bullet was also recovered. Ridged fingerprint impressions were recovered from the above items, save for the bullet, as well as from the apartment's front door.

The parties stipulated that the articles recovered by Officer Moran, along with the fingerprint cards of Petitioner, both victims, Alex Torres and Jason Rivera were submitted to and later analyzed by an evidence technician.

Chicago Police Officer Stanley Mocaldo, a latent print examiner, testified that the bottom of the aforementioned candy jar was revealed to contain the prints of Petitioner's right thumb, index and middle fingers. "Open prints," defined as prints not identified as those of Petitioner, Alex Torres, Jason Rivera or the victims were also present. Neither Torres' or Rivera's prints matched any latent prints recovered.

The parties stipulated that if Officer Chenow, a firearms examiner for the Chicago Police Department were to testify, he would state that he examined the fired bullet recovered from the Gamas' apartment as well as three fired bullets and a bullet fragment recovered from the bodies of the victims. According to Officer Chenow, all of the bullets were .38 specials and shared the same class characteristics. However, because the bullets were unsuitable for comparison of individual characteristics, Officer Chenow was unable to conclude whether they had all been fired from the same gun.

The parties also stipulated to the testimony of forensic pathologist Robert Kirschner. Dr. Kirschner's examination of Ayax Gama revealed that Ayax had received and died as a result of two close-range gunshot wounds, to the back of the head and neck, respectively. Stippling to Ayax's left wrist was indicative of close range firing. Raphael Gama received and died as a result of two gunshot

wounds, one close range wound to the head and one gunshot wound to the face.

Chicago Police Detective Ernest Halvorsen testified regarding the various steps of his investigation of the murders. On February 24, 1991, Detective Halvorsen received information that a person named "Ivan Flores" or "Juan Cortez" may have been involved in the crime. A check with the Crime Lab the following day revealed that Juan Cortez's prints had been recovered from a candy jar located within the Gamas' apartment. Detective Halvorsen arrested Petitioner shortly after midnight on February 26 and transported him to the police station. At the police station, Detective Halvorsen advised Petitioner of his Miranda rights in English, each of which Petitioner stated he understood. Next, the detective informed Petitioner that his fingerprints had been discovered on a candy jar belonging to the victims and that Alex, Arlyn and Lizette Torres had all given statements implicating him in the crime. When asked whether he wished to answer questions, Petitioner exclaimed, "Fucken (sic) Alex gave me up. Well, you got me, but if I'm going to go down for these murders, I'm going to tell you about something that Alex did."

After Petitioner told the detective what he wanted to say about Alex Torres, he gave a statement relating to the murder of the Gama brothers. In that statement, Petitioner related that he had known the Gama brothers, whom he referred to as "faggots," for about a year and had "partied" with them in the past. Petitioner stated that "Alex" (sic) Gama used to pay Petitioner for anal intercourse and that Gama paid "good." On Saturday, February 2, 1991, Petitioner told Alex Torres and "Luis Paderos" that he was going to "go by the Mexicans, get high with them and do them up." Armed with a .38 caliber Smith & Wesson revolver, Petitioner arrived at the Gamas' apartment at approximately 10 p.m., rang the doorbell and was admitted. For the next few hours, Petitioner and

the Gama brothers drank beer and smoked marihuana and PCP. After a while, "Alex" (sic) Gama began to caress Petitioner, rubbing his "ass" and "dick." Petitioner told Alex (sic) to leave him alone. Alex (sic) called Raphael over, and the two brothers began to touch Petitioner. Stating, "I'm not fooling; leave me alone. I will kill you," Petitioner drew his gun. When Raphael began to laugh at him, Petitioner shot and killed him. Alex (sic) began crying and grabbed for the gun. In the struggle, Petitioner shot Alex (sic) twice in the back of the head.

After killing the two men, Petitioner removed rings, chains and money from Alex's (sic) body. Petitioner then left the building and fell asleep in his car. Petitioner woke up the following morning at about 9:00 a.m., realizing that he had killed the Gama brothers. Petitioner stopped by Alex Torres' apartment, told him what he had done and suggested that they return to the apartment in order to take the television, compact disc player, money and anything else of value. Torres called a third man named Jason and the three returned to the Gamas' apartment, where they retrieved the television set and compact disc player. The group then proceeded to Torres' sister's house, where they sold the television to Anna Cruz, Lizette's mother-in-law, for \$150. Alex Torres kept the compact disc player. Petitioner disposed of the jewelry taken from the Gamas at "Liberty Brothers Pawnshop" at Ashland and Irving.

When informed by the detective that the police had the 13-inch television set, Petitioner laughed, stating that Lizette Torres had "pulled a fast one" on the police by giving them the wrong television set. Petitioner stated that Lizette's mother-in-law Anna Cruz still had the set taken from the Gamas. Based upon Petitioner's representations, the police later recovered the correct set. Detective Halvorsen testified that his entire conversation with Petitioner, which lasted 20 to 30 minutes, was in English. At no time did Petitioner claim not to understand what was said or request an explanation.

Assistant Cook County State's Attorney William Carroll testified that on February 20, 1991, he spoke to Petitioner at the Area 5 police station. After introducing himself, A.S.A. Carroll advised Petitioner of his Miranda rights in English. After stating that he understood each right that was read to him, Petitioner agreed to speak with Carroll regarding the instant case. Petitioner then gave a narrative in English of what had occurred. After being explained the differences between a court reported and written statement, Petitioner elected the latter and his oral admissions to A.S.A. Carroll were subsequently reduced to writing.

Petitioner's written statement, which was published to the jury, was essentially consistent with the statement he had previously given to Detective Halvorsen with the exception that Petitioner made no mention of pawning the victim's jewelry. Petitioner admitted in his statement that he understood written and spoken English.

A.S.A. Carroll testified that he had Petitioner read one paragraph of the completed statement aloud, then watched as Petitioner read each page to himself. After making his desired corrections, Petitioner signed each page.

After presenting the above evidence, the People rested.

In his defense, Petitioner called four witnesses, the substance of whose testimony related to Petitioner's facility with the English language.

Donald Navarro testified that he lived next door to Petitioner and his girlfriend, Nancy Almodovar in 1989 and 1990. Navarro's testimony was that during the time of their acquaintanceship, during which he saw Petitioner three or four times per week, he never observed Petitioner speak a word of English. On cross-examination, Navarro added that he was grandfather to

Almodovar's brother and further, that his two godchildren lived at Petitioner's address at the relevant time. The parties later stipulated that Navarro had testified before the grand jury that he usually encountered Petitioner only once a week.

Edwin Rodriguez testified that he worked with Petitioner in 1988 in a shipping department for eight hours a day, five days per week. During that time, Rodriguez, who himself spoke little English, never observed Petitioner speaking any language other than Spanish. On cross-examination, Rodriguez admitted that he had testified before the grand jury in English; that he was Donald Navarro's son-in-law; that he lived next to Petitioner's girlfriend Nancy Almodovar in 1990 and had known her family from 1988 to the time of trial.

Nancy Almodovar, Petitioner's live-in girlfriend from 1990 to 1991 and present wife, testified that she had known Petitioner as early as 1989. Petitioner, who occasionally went by the name of "Ivan Flores," "barely" spoke English and the two never held an entire conversation in that language. Nor did Almodovar ever see Petitioner hold an entire conversation with anyone else in English, except about "small things" and "basic stuff." On cross-examination, Almodovar admitted that she had previously testified on an earlier date that she had never observed Petitioner speak English. The parties later stipulated that Almodovar had recently been quite ill and had been released from a hospital.

Ann Collins, an assistant Public Defender, testified that she knew Petitioner from late September of 1991 to January 1993, when she was assigned to Judge Bolan's call and represented him during that time. During that period of time, Collins had eight or nine conversations with Petitioner in the lockup, all of which were conducted with the assistance of an interpreter. Collins never spoke to Petitioner in English. On cross-examination, Collins volunteered that she "did not

represent [Petitioner] on the elected case" and did not recall whether Petitioner made a statement in English in that case, despite being shown a copy of a police report. Collins volunteered several other comments regarding the other case she had represented Petitioner on and was at one point admonished by the trial court to confine her answers to the questions asked.

After presenting the above evidence, Petitioner rested.

In rebuttal, Cook County Probation Officer Melissa Foss testified that she spoke to Petitioner in February of 1990 in a Skokie courtroom. When asked what her purpose was in speaking to Petitioner at that time, Foss stated, "He had just been sentenced--" before being cut off and admonished by the prosecutor not to mention specifics. Foss did not recall whether she spoke to Petitioner in English, but stated that she did not speak Spanish and did not accept probationers who did not speak English. On this particular occasion, Foss accepted Petitioner for assignment.

Assistant Cook County State's Attorney Pradeep Roy-Singh testified that he had an hour-long conversation in English with Petitioner on February 26, 1991 at the Area 5 police station. A.S.A. Roy-Singh stated that he had no difficulty understanding Petitioner's English, nor did Petitioner appear to have any difficulty understanding Roy-Singh. A.S.A. Roy-Singh also reviewed an eight-page document, written in English, with Petitioner. The only word contained in the document that Petitioner did not understand was the word, "verbatim."

No additional evidence was offered by either side.

After instructions and closing arguments the jury began deliberations. At approximately 9:30 p.m., the jury sent a note inquiring whether, for purposes of the armed robbery charges, the intent to take property had to be present prior to the shooting. The trial court responded that the jurors had been instructed fully on the law and would receive no further instructions. The jurors were

subsequently sequestered for the evening.

The following morning, the jury foreman advised the trial court that the question had not entirely been answered. The trial court broke for lunch and indicated its intention to formulate an appropriate response. After giving both sides an opportunity to submit case law on the issue, the trial court subsequently instructed the jurors over Petitioner's objection as follows:

"It is not imperative that the State prove beyond a reasonable doubt that the Petitioner formed the criminal intent to commit armed robbery before committing murder. It is sufficient that the State prove the elements of the crime and the felony was part of the same criminal episode."

At 6:10 p.m. that evening, the jury returned its verdict. As to each victim, the jury found Petitioner guilty of both first degree murder and armed robbery.

Eligibility Phase

(1) Jury waiver.

On November 9, 1994, the eligibility phase of Petitioner's sentencing hearing began. The trial court initially advised Petitioner that he had the right to have a jury make the determination whether or not to impose a death sentence. The trial court advised Petitioner that the jurors must first unanimously find that the eligibility factors had been proven. In phrasing the issue, the trial court stated, "The jury must unanimously decide whether or not you are eligible." After explaining the eligibility factors, the trial court advised Petitioner that if the jury found him eligible, it must then decide that there were no mitigating factors that would preclude imposition of the death sentence. Throughout the trial court's admonishments, Petitioner repeatedly stated that he understood.

When asked why he did not want to have the jury decide the above questions, Petitioner expressed dissatisfaction with the jury's performance at trial, maintaining in essence that it should not have convicted him. Petitioner contended that there were no witnesses to the killings and that the jury had accordingly based his guilt upon "papers" that he had signed. Petitioner stated that, "If that's the reason why they should give me the death penalty, I would rather have you do it." Petitioner further expressed his belief that the trial court would not impose the death penalty "just because I signed my name on a piece of paper..." Petitioner confirmed that he had arrived at his decision after conferring with his attorney. Upon further examination by defense counsel, Petitioner admitted that he had initiated the conversation wherein he had advised counsel of his decision; that it was his decision alone; that counsel had not in any way caused him to arrive at it, and; that it was voluntarily made. Based upon the foregoing, the trial court found that Petitioner's decision was knowing and intelligent and accepted Petitioner's jury waiver.

(2) Eligibility determination.

For purposes of eligibility, Petitioner stipulated that he had been born on July 26, 1966 and further stipulated to all of the testimony, exhibits and stipulations at trial. After hearing argument from both sides the trial court found that: (1) Petitioner had attained the requisite age; (2) that he had been convicted of killing two people and that he had the intent to kill more than one person and knew that his acts were likely to cause death or great bodily harm; and (3) that the victims were each killed during the commission of the felony offense of armed robbery. Accordingly, the trial court found Petitioner eligible to receive the death penalty.

Sentencing Phase

In aggravation, the People presented various witnesses and evidence as follows.

Daniel Gehrke, an executive with the Balmor Manufacturing Company, testified that Petitioner had been employed by his company in 1989, until shortly before the time of three break-ins, during which two computers were stolen and vandalism inflicted. The parties stipulated that Petitioner was convicted of felony theft relating to one of the incidents.

Chicago Police Officer Thomas Lynch testified that in 1989, he arrested Petitioner pursuant to a call of a burglary in progress at a school. Petitioner later pleaded guilty to the misdemeanor offense of criminal damage to property and was sentenced to 13 days in jail. Jacinto Galveras testified to a 1989 incident wherein, while both men were at the latter's house drinking, Petitioner suddenly struck Galveras in the head, rendering him unconscious. When Galveras awakened, his money and car were gone. (R. 1778-1779) Galveras' head wound required 12 stitches. The parties stipulated that a judicial finding of no probable cause was later entered as to this incident.

Chicago Police Officer Michael Skorodynski testified to a 1990 incident wherein Petitioner, while a passenger in a car that fled from the police, threw a loaded gun out the car's window.

Chicago Police Officers Dojutrik and Baranski testified regarding Petitioner's arrest for an armed robbery occurring in 1990 in which the victim received a head wound. Assistant State's Attorney Laura Lambur testified that the preliminary hearing, which resulted in a finding of probable cause, revealed Petitioner to have employed a gun in the commission of the offense.

Chicago Police Detective Richard Curley and Assistant State's Attorney Pradeep Roy-Singh testified regarding another murder with which Petitioner had been charged and was currently awaiting trial. Detective Curley testified that in January of 1991, he discovered the body of one Jesus

Gonzales in a junkyard. Gonzales' hands and feet were bound and he had received gunshot wounds to the head, neck and thigh. A.S.A. Roy-Singh testified that on February 20, 1991, Petitioner gave a handwritten statement regarding Gonzales' murder.

In the statement, Petitioner stated that he first met Gonzales while the two were in jail together. Afterwards, the two kept in touch, with Gonzales occasionally visiting Petitioner's house. One day, Gonzales brought a friend named "Gomez" to Petitioner's house. Petitioner began buying drugs from Gomez and visiting him. Several months later, in early January of 1991, Gomez informed Petitioner that Gonzales had stolen drugs from him and that Gomez would give Petitioner two pounds of marihuana if Petitioner found Gomez for him. Noting that he could make over three thousand dollars from the amount of marihuana offered him by Gomez, Petitioner indicated that he would attempt to locate Gonzales. On January 8, 1991, Petitioner located Gonzales and asked him to step out with him. As the two drove around town, Petitioner periodically attempted to call Gomez, all the while assuring Gonzales that he was simply trying to contact his girlfriend. Petitioner stopped at Alex Torres' house, promising him a pound of marihuana if he helped with Gonzales. With Torres aboard, Petitioner finally succeeded in contacting Gomez, who instructed him to "hold" Gonzales for him and to take him to a garage behind his house.

Petitioner and Torres drove Gonzales to the garage, where Petitioner shot Gonzales in the leg. Petitioner and Torres tied Gonzales' arms and legs with an extension cord. At one point, Petitioner enlisted the aid of a 13-year-old nephew to bring him more cord. When Gomez finally arrived at the garage, Petitioner told him that he would kill Gonzales if Gomez would give him another two pounds of marihuana. Gomez accepted the offer and Petitioner agreed to kill Gonzales under these new terms. Petitioner and Torres loaded Gonzales into a car and transported him at

gunpoint to a scrap yard.

At the scrap yard, Petitioner and Torres unloaded Gonzales and set him on the ground. Petitioner told Torres to "do what has to be done" and each man then shot Gonzales. The following day, Petitioner cleaned the garage of blood and also received partial payment of the marihuana from Gomez. Petitioner disposed of the murder weapon by selling it.

Johnnie DeBergh, a guard at the Cook County Jail, testified that in July of 1994, while Petitioner was an inmate, he was involved in a disturbance wherein he was discovered to be in possession of a pen knife as well as approximately 66 grams of marihuana. On that occasion, the attention of the guards had been drawn to a "day room" in which Petitioner had begun "ranting and raving." Petitioner was discovered to have upended and strewn about various tables and chairs in that room, broken the television set into pieces and the ripped telephones from their wall mountings. In September of 1994, while still an inmate, Petitioner was discovered with approximately 94 grams of marihuana in his possession. When taken into custody for the offense, Petitioner threatened DeBergh, stating, "I'll get you." Several weeks later, Petitioner confronted DeBergh, stating, "Come into the cell, we'll take care of this now."

In mitigation, Petitioner's wife, Nancy Almodovar testified that she had contracted AIDS from Petitioner and required hospitalization for this illness. Despite his drug problem, Petitioner had always treated her well. Because he was unable to fill out job applications by himself, Petitioner could not find work, thus, he worked in a tavern owned by Almodovar's mother. Petitioner was hurt by his mother's death and by the fact that he was not close with the rest of the members of his family. According to his wife, Petitioner was not a bad person.

Petitioner then offered his own testimony in mitigation. Petitioner testified that he arrived

in the United States in 1987 upon the death of his mother, electing not to remain with his father, who did not "prefer" him. Petitioner stayed with an aunt for three months, but, apparently not wanted there either, took to the street, where he became a drug user and heroin addict. Petitioner's life had no meaning. He wanted to die from an overdose of drugs. He turned to a life of crime in which Alex Torres was his mentor. Petitioner began visiting the Gama brothers, whom he referred to as "fags," on a nearly every-day basis in order to obtain food and drugs, but apparently not sex. Petitioner went to the Gamas' apartment on February 3, 1991--he was not sure of the date--but no one answered. Petitioner continued his crime spree with Alex Torres through the remainder of that month. Petitioner contended that he did not kill the victims, that he did not understand "some English" when he signed the papers that were the sole reason for his current presence before the court. Petitioner stated that he was going to die in two or three years and requested that he be sent to the penitentiary for his remaining days.

During cross-examination, Petitioner again maintained that he had not killed the victims. Petitioner was then asked whether he was sorry that he killed Jesus Gonzales. "Who's Jesus Gonzales?," Petitioner asked. Petitioner was then reminded, and acknowledged, that Gonzales was his friend.

After hearing argument, the trial court discussed its findings of fact and conclusions of law. The trial court initially cited the fact that Petitioner had killed two people and further, that the murders had occurred during the commission of a felony. The trial court also cited the Gonzales murder, which had been pursuant to a preconceived plan and for which Petitioner had agreed to receive money. The trial court stated that Petitioner was an intelligent person "not without cleverness in his answers, not with facility in his words" and stated that it believed that Petitioner understood

what he had been saying at the time he was interviewed by the assistant State's Attorneys. The trial court characterized Petitioner as one who used women, such as his mother and aunt, and noted that human life held no value to Petitioner, as evidenced by the circumstances of the Gonzales murder and the fact that the Gama brothers were simply "faggots" to him. The trial court also cited Petitioner's dangerous conduct while in prison and characterized Petitioner as a sociopath. In the trial court's opinion, Petitioner's wife, Nancy Almodovar, "knew how to shade her testimony" and stated its belief that Petitioner's voluntary drug usage was not a mitigating factor sufficient to preclude a death sentence. Based upon the foregoing, the trial court sentenced Petitioner to death.

Post-Trial Proceedings

On May 2, 1995, the trial court denied two of Petitioner's post-trial motions, the first, a motion for a new trial, the second a motion for "arrested judgment." Defense counsel Richard Mottweiler, who had previously filed the above motions, was then given leave to withdraw. Upon Mottweiler's withdrawal, the trial court re-appointed assistant Public Defender Michael King, who had represented Petitioner during some of the pretrial proceedings. King promptly filed a motion to vacate the imposition of the death penalty, the essence of which averred that Petitioner's decisions to have the jury act as trier of fact during the guilt phase of his trial and that the trial court preside over the sentencing phase were motivated by his attempts to bribe the trial judge. Both William Tock, an investigator for the Cook County State's Office and Petitioner testified during the hearing on the motion.

Investigator Tock testified that he became involved in the investigation of a woman named Angelica Alvarado¹ in March of 1994, in connection with an allegation that Petitioner's cellmate, one

¹ Alvarado, a probation officer, testified in Petitioner's behalf in the instant case pursuant to Petitioner's pre-trial motion to suppress his

Edward Ramirez, had paid her three thousand dollars to influence the outcome of Ramirez's case. Alvarado was subsequently arrested and later pled guilty to charges of bribery and official misconduct in this unrelated case.

Petitioner testified that he first met Alvarado when she was a teacher in one of his classes. During subsequent conversations, Alvarado told Petitioner that she had "power over judges." Accordingly, when the trial judge--Judge Bolan--was assigned to the instant case, Petitioner spoke to Alvarado about trying to influence his case. Alvarado told Petitioner that she had worked for Judge Bolan for ten years; that she believed that Judge Bolan loved her and that, in exchange for money, specifically, twenty-five thousand dollars, she could influence the judge to help him. Using his wife Nancy Almodovar as a conduit, Petitioner ultimately paid Alvarado a total of approximately six thousand dollars pursuant to this scheme.² Alvarado told Petitioner that she had spoken to the trial judge, who assured her that ultimately Petitioner would go free.

During the summer of 1994 however, Alvarado informed Petitioner that he should elect a jury trial, as the trial judge was under investigation, and would find Petitioner guilty at a bench trial "to cover his ass." For this reason, Petitioner elected to be tried before a jury during the guilt phase of his trial. Also for this reason Petitioner retained attorney Richard Mottweiler, for Petitioner could no longer count on the judge. Petitioner subsequently waived a jury for the sentencing phase however, in specific reliance upon Alvarado's assurances that in the event the jury found him guilty, the trial judge would spare Petitioner the death penalty and impose the "least possible" sentence. Thus, when Petitioner informed the trial judge that he desired him to preside at the death penalty hearing, it

statement. The substance of her testimony related to Petitioner's difficulty with the English language.

² Petitioner identified in open court a copy of a loan contract entered into by his wife in the amount of twenty-one hundred dollars , as well as a

was his understanding that he would receive the minimum sentence of life imprisonment.

Petitioner provided reasons for why, despite his understanding that he would not receive the death penalty, he had testified at the hearing in mitigation. Petitioner admitted that he did not have to testify at the hearing, but maintained that, "one has to make it look pretty, no?" Petitioner further explained that "if [the trial court] wasn't going to give the death sentence to me I had to embellish it a little bit."

The trial court noted that Petitioner could not have retained attorney Mottweiler on Alvarado's representation in the summer of 1994 that the trial court was under investigation, as Mottweiler had appeared on Petitioner's behalf in January of that same year. Accordingly, the trial court denied Petitioner's motion, characterizing it as totally devoid of merit. The trial court then entered judgment and entered an execution order.

On May 23, 1995, the trial court acknowledged that defense counsel had tendered copies of this Court's decision in People v. Brandon and the appellate court's decision in People v. Gutierrez. The trial court noted the August 1993 reports of Drs. Fautek and Henry of the Psychiatric Institute, each of whom had declared Petitioner fit to stand trial with medication, but stated that it did not know whether Petitioner had been on medication at the time of trial. The trial court determined that it would conduct a fitness hearing to determine whether Petitioner had been fit during the proceedings. Preparatory to that hearing, the trial court ordered a behavioral clinical examination of Petitioner and instructed defense counsel to attempt to determine the particulars of Petitioner's use of medication. On September 28, 1995, the results of the behavioral clinical examination were received. The trial court noted that the relevant report, authored two days earlier by Dr. Kishore

Thampy of the Psychiatric Institute, stated that Petitioner: (1) was not suffering from a serious psychiatric disorder; (2) was not presently receiving any medication, and; (3) understood the nature of the proceedings against him and should be able to cooperate with counsel. The report further concluded that Petitioner was fit for trial during the period from October 1993 to January of 1994 and was also fit during the month of November, 1994. Because the report did not express an opinion as to whether Petitioner was fit in October of 1994, the trial court continued the matter for Dr. Thampy's appearance for purposes of conducting a fitness hearing.

On October 20, 1995, a fitness hearing was conducted. The hearing related to the issue of Petitioner's fitness for trial in the instant case, as well as in Petitioner's unrelated pending murder case. The only witness to testify at the hearing was Dr. Kishore Thampy, a staff psychiatrist at the Cook County Psychiatric Institute. Defense counsel informed the trial court that he intended to call no witnesses because he had no professional witness who was of the opinion that Petitioner was unfit.

Dr. Kishore Thampy testified that he examined Petitioner for fitness on three occasions, in May of 1993 and in September and October, 1995. The examinations totaled approximately three hours. To assist him in arriving at his conclusions, Dr. Thampy reviewed the prior psychological and psychiatric evaluations of Petitioner, including the reports of Drs. Fautek and Henry, Petitioner's health records, his testimony at the death penalty hearing, his social history and police reports of the incidents.

A review of Petitioner's testimony at the death penalty hearing revealed that Petitioner seemed to understand the nature of the proceedings against him. Although Dr. Fautek had concluded in May of 1993 that Petitioner was too depressed to cooperate with counsel, he concluded in August of that year that Petitioner was fit with medication and that he was capable of cooperating with

counsel and following the proceedings. Further, Dr. Henry's report, dated July, 1993, indicated that Petitioner had a "very sophisticated" understandings of the workings of the criminal justice system, that he understood the nature of the charges against him and that he demonstrated a willingness and capacity to cooperate with his lawyer.

Petitioner's health records revealed that in October and November of 1994, he had been receiving 100 milligrams of the psychotropic drug Doxepin, also known as Sinequan, at bedtime. Dr. Thampy stated that although the drug was an antidepressant, it had been prescribed in Petitioner's case to help him sleep. Dr. Thampy stated that 100 milligrams was considered a low to moderate dosage of the drug, which approximately three quarters of the jail population was ingesting at a given time. Dr. Thampy stated that the above dosage could remain in the body in varying degrees of therapeutic effectiveness for several hours or several days. In a person of Petitioner's height and weight, the prescribed dosage would have no adverse effect, save for mild persisting drowsiness. In Dr. Thampy's opinion, the Sinequan prescribed would not significantly affect Petitioner's ability to relate to others except by improving his interpersonal communication. It would have no significant adverse impact upon Petitioner's ability to understand the nature of the proceedings against him or the role of the parties. Further, any lack of cooperation by Petitioner with his counsel was purely volitional; no mental illness prevented Petitioner from such cooperation. Dr. Thampy opined that to a reasonable degree of medical certainty, Petitioner was fit for trial in October and November of 1994 with or without the Sinequan medication and was similarly fit at the present time.

On cross-examination, Dr. Thampy noted that he did not recall speaking to Petitioner's previous attorney Richard Mottweiler regarding Petitioner's fitness, but noted that this step was unnecessary to his determination because of Petitioner's selective lack of cooperation. Dr. Thampy

did not speak to Petitioner's present counsel, Michael King, nor did King volunteer any information regarding Petitioner's ability to cooperate.

At the conclusion of Dr. Thampy's testimony, the trial court found that Petitioner was fit for trial with or without medication in the instant case, as well as in his pending murder case.

Pursuant to notice filed on November 9, 1995, Petitioner filed his appeal to the Illinois Supreme Court. The Supreme Court subsequently affirmed Petitioner's first degree murder convictions and death sentence.

III

REASONS FOR DENYING THE PETITION

The Amended Petition for Executive Clemency filed on behalf of Petitioner Juan Cortez is an improperly filed Petition, and should be returned by both the Governor and the Prison Review Board as improperly filed. 730 ILCS 5/3-3-13(a) permits petitions to be filed only if signed by the defendant seeking clemency or "a person on his behalf." There is no statement whatsoever that Petitioner Cortez has acknowledged that this petition could or should be filed on his behalf. There is no such affidavit and in fact the Petition itself specifically states that Petitioner Cortez has not filed his own verified Petition in accordance with the Prison Review Board's guidelines. There is nothing to suggest that Petitioner is incapable of signing this Petition or deciding whether or not to seek clemency.

The clemency application statute does contain a general provision that states that nothing in section 5/3-3-13(a) shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence or pardon. However, this provision cannot and should not be read to permit consideration of unsigned petitions in capital cases. It is the constitution itself that provides both the Governor's power to grant clemency and the legislature's power to regulate the manner in which clemency must be applied for. Thus, subsection 13(e) specifically contemplates that the Governor will act only "under the constitution," *i.e.*, that the Governor's power would be cabined by any restrictions upon the application process that are constitutionally enacted by the legislature. To read subsection 13(e) to permit the Prison Review Board or the Governor to act on an unsigned petition would render meaningless all the previous subsections of 5/3-3-13, as well as the language in Article

5, section 12 of the Constitution authorizing legislative regulation of the manner of applying for clemency.

The signing requirement for capital cases was plainly enacted under the constitutional power of the legislature to regulate the manner of applying for clemency. It represents a requirement that is entirely concerned with that procedure and does not attempt to limit the Governor's power to grant clemency to any inmate or category of inmates based upon any substantive distinction, or even any procedural distinction other than one of form. More importantly the requirement of a signature does not attempt to implicate the real subject of subsection 13(e), which was the preservation of a governor's discretion to decide whether and to what extent to grant clemency to a person who qualifies for it and has complied with proper application procedures.

For these reasons, Petitioner's petition should be rejected. However, should the Prison Review Board or the Governor nevertheless choose to consider the substance of the arguments made on Petitioner Cortez' behalf by individuals who were apparently not instructed by Cortez to do so, responses to those arguments follow.

Introduction

Petitioner asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment which were not available at the time of his trial, Petitioner claims that his trial (as well as that of every other capital Petitioner in Illinois) was by definition fundamentally unfair. However, the Illinois Supreme Court has expressly

rejected the claim “that every capital trial has been unreliable and that all appellate review has been haphazard” (People v. Hickey, ___ Ill. 2d ___, 2001 Ill. LEXIS 1080 at *57 (No. 87286 September 27, 2001)). Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they “function solely as devices to further protect those rights given to 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 Court, the General Assembly and the Governor’s Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to Petitioner’s case. Instead, a true injustice would only result if it were reflexively determined that Petitioner’s trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that Petitioner has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings. Moreover, Petitioner ignores the fact that the Illinois Supreme Court, which has examined the proceedings in his case, determined that they were fundamentally fair and that he was not unduly prejudiced in any manner.

Supreme Court Rules

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

Adequate Funding

Petitioner asserts that he is entitled to clemency because he was denied adequate funding to investigate the case and/or to retain the necessary expert witnesses. However, despite the creation of the Capital Litigation Trust Fund, there is no indication that any capital Petitioner in Illinois, particularly those prosecuted in Cook County has ever been deprived of the necessary funds to investigate or retain appropriate experts. Rather, courts have denied various requests which are deemed unreasonable or unnecessary, the same standard which applies for funds under the Capital Litigation Trust Fund. 725 ILCS 124/15(c). Also, the Cook County Public Defender has significant resources available for capital litigation. Therefore, the mere fact that the Capital Litigation Trust Fund was not created until 2000 is irrelevant.

In the instant case, Petitioner was represented not only by the Public Defender's Office, but by private counsel as well. In fact, private attorney Richard Mottweiler represented Petitioner throughout the pendency of Petitioner's trial. In addition to having enough money to hire a private attorney, Petitioner had access to at least six thousand dollars, with which he admitted he used in an attempt to bribe the trial judge into sparing him a death sentence. Based upon the foregoing, Petitioner should not now be heard to complain that he lacked the funds to mount an effective defense.

Videotaping

Petitioner also seeks clemency because his statement where he inculpated himself was admitted into evidence even though it was not videotaped, and points out that under the Governor's Commission's proposals both statements and the interrogations leading up to them should be videotaped. What Petitioner fails to recognize is that neither the Commission nor the governor himself call for the suppression of a statement simply because it was not videotaped. Rather, even

under the Governor's proposed legislation (HB3717 & HB2058), such statements will still be admissible if the trial court finds that it was voluntarily made after considering the totality of the circumstances. Because the trial judge expressly found that Petitioner's statement was voluntarily made when it denied his motion to suppress statements, it is clear that the failure to videotape his statement had absolutely no effect on the fairness of his proceedings. Moreover, because the jury was instructed pursuant to Illinois Pattern Instruction 3.06-3.07 to consider all the evidence when determining whether or not Petitioner made the statement and how much weight it should be given, Petitioner cannot complain that he was prevented from asserting at trial that his statement was unreliable and should not be considered.

Petitioner adds that "a serious issue on appeal was the skill [he] had with the English language" and that videotaping his statement would have permitted the trial and reviewing courts a better opportunity to ascertain whether his statement was accurate. On this issue, it is important to recall that no fewer than five witnesses testified during Petitioner's trial that they held conversations with him in English. One conversation lasted an entire hour. Even Petitioner's wife admitted at trial that Petitioner spoke some English. Contrary to Petitioner's assertion, the evidence of Petitioner's facility with the English language was amply presented to the trial court and Supreme Court.

Decision to Seek Death

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, A[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.

Allocution

Petitioner also 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 and in fact did so. Therefore, he was given every opportunity to present himself to the trier of fact before he was sentenced.

Judicial Override

Petitioner asserts that his sentence should be commuted because the judge was not given the opportunity to override the jury’s decision to impose the death penalty. 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.

Supreme Court Review

Petitioner also claims that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate, excessive or otherwise inappropriate. However, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by 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)) and will vacate a death sentence if it determines that it is excessive in light of the facts of the case and the Petitioner's background (see People v. Smith, 177 Ill. 2d 53, 685 N.E.2d 880 (1997); People v. Blackwell, 171 Ill. 2d 338, 665 N.E.2d 782 (1996)), it is clear that the only reason the Illinois Supreme Court did not review Petitioner's sentence in such a manner is because he did not ask the Court to do so.

Psychotropic Drugs

Petitioner contends that the Illinois Supreme Court's decision in People v. Burgess, 176 Ill.2d 289, 680 N.E.2d 357 (1997) constituted an arbitrary reversal of its previous decision in People v. Brandon, 162 Ill.2d 450, 643 N.E.2d 712 (1994), in which the Supreme Court held that a defendant who receives psychotropic drugs at the time of his trial and does not receive a fitness hearing at that time is automatically entitled to a new trial. In Petitioner's case, a retrospective fitness hearing was conducted at which it was determined that Petitioner had not been unfit for trial. The Burgess decision, which was the law in effect at the time Petitioner's appeal was decided, explicitly permitted such retrospective fitness hearings. In announcing its

decision not to follow its earlier decision in Brandon, the Burgess court stated that "a rule of automatic reversal is not always appropriate." Noting that the evidence adduced at the retrospective fitness hearing in that case revealed that the defendant had not been impaired as a result of his ingestion of psychotropic drugs, the Burgess court further stated as follows: "[W]e should not automatically assume that every psychotropic drug will inevitably render the person taking it unfit for purposes of trial or sentencing, and we therefore conclude that retrospective hearings are sometimes proper." (Emphasis added)

In Petitioner's case, a fitness hearing was conducted approximately five and one-half months after Petitioner's sentencing hearing. Evidence presented by the People indicated that Petitioner had been fit for trial and sentencing. This evidence was based upon the findings of three doctors, who had already concluded prior to trial (pursuant to behavioral clinical examinations) that Petitioner was fit. Petitioner's attorney called no witnesses at the fitness hearing because, as he informed the trial court, he did not have any witnesses who were of the opinion that Petitioner had been unfit.

Petitioner notes that the dissenting justices in Burgess were unhappy with the majority's decision. However, as discussed above, the majority clearly articulated the reasons for the departure from Brandon's "automatic reversal" rule. It should be noted that Petitioner has never presented any argument, whether to the Supreme Court or in this Petition, that he was unfit for trial. Prior to his trial, Petitioner asked for a fitness hearing and then withdrew his request. Shortly after trial, without any request by Petitioner, the trial court conducted a legally permitted retrospective fitness hearing wherein Petitioner was found fit. His constitutional rights having been well-protected, Petitioner's claim should be rejected.

CONCLUSION

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

Respectfully submitted,

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