OCTOBER 2002 SESSION
PRISON REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
vs.	)	Docket No. \
	)	
JULIUS KUNTU,	)	Inmate No. K55534
	)	
	)	
	)	

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

PEOPLE'S RESPONSE IN OPPOSITION TO PETITION FOR EXECUTIVE CLEMENCY

HEARING REQUESTED
(IF PETITION IS CONSIDERED)

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Assistant State's Attorneys

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I

HISTORY OF THE CASE

Defendant Julius Kuntu poured and ignited over a gallon of gasoline in a wooden stairwell of a crowded apartment building on a Sunday afternoon in March, 1994, killing four children and three adults. He was charged with the murders of John McKinney, Gary Lopez, Jacqueline Vargas, Rolando Frausto, Karen Frausto, Gladys Lopez, and Gary Frausto, all of whom were killed in the fire at 917 West Dakin, Chicago, Illinois, on March 20, 1994. He was also charged with aggravated arson, individual counts of which were premised upon his knowledge of the presence of persons in the building at the time he set the fire, injuries suffered by Firefighter Kenneth Dorsen, and injuries suffered by various tenants other than the murder victims. He was also charged with one count of simple arson. He was tried to a jury in the court of the Honorable Joseph Urso, and convicted of seven counts of murder, and, in a general verdict, of one count of aggravated arson. The People requested that defendant be sentenced to death, and he was found eligible under the felony murder provision. (720 ILCS 5/9-1(b)(6). After a

hearing in aggravation and mitigation the jury unanimously found that there was no mitigating factor sufficient to preclude the imposition of the death sentence, and defendant was sentenced to death. Petitioner's conviction and finding of eligibility for the death sentence was affirmed on direct appeal to the Illinois Supreme Court; however, his death sentence was reversed and remanded for resentencing. People v. Kuntu, 196 Ill. 2d 105 (2001). That sentencing hearing is still pending.

II

FACTS OF THE CASE

In March of 1994, petitioner lived with his girl friend and infant child at 917 West Dakin, in Chicago, Illinois. On the 19th of that month Edward Adler, a managing partner for the owners of the building, and the building manager, Judge DeLeon, informed petitioner that he was several months in arrears on his rent and that he would have to vacate the apartment. If he did, they told him, they would forgive the debt. If he did not leave voluntarily he would be evicted.

At about seven the next morning, a Sunday, petitioner told Edward Stacy, a friend he met at the nearby CTA station that he needed to borrow some money. Defendant then made a telephone call that lasted three or four minutes. Mr. Stacy also needed to make a call, and his lasted 15 or 20 minutes. Defendant left the station and returned with his girlfriend and child while Mr. Stacy was still on the telephone. He was carrying a black garbage bag and a duffel bag. He told Mr. Stacy that he had been "locked out," and that he was going to "burn their ass out." Stacy told him not to do anything stupid. Defendant and his girlfriend then went up to the elevated platform.

Later that morning, at about 11:30 or 12 o'clock, petitioner came to Stacy's apartment. He told Stacy, "I am going to set the mother fucker on fire either after work or sometime this week." Defendant was jumping and giggling as he was saying this. Stacy again told him not to do anything stupid.

Defendant then went to a dollar store nearby and bought a bucket. He took

the bucket to a gas station and asked the attendant, Jose Bautista, whom he knew, to fill it with gasoline. Bautista told him he could not sell him gas in such a container. Defendant then bought a red gas can and filled it with gasoline, about two gallons.

Defendant was seen entering the building carrying the red gas can, and a few minutes later he was seen hurrying from the building without it. When he was a couple of blocks from the building he met another resident, who saw the smoke. That individual, Larry Weaver, said, “I hope that’s not our building.” Defendant replied, “Probably not.”

On Sunday, March 20, at about 12:40 in the afternoon, Mr. DeLeon, the building manager, who was working two jobs, was asleep. (R. 1430) His daughter, Anita, who was "16 or 17" years of age, was also home. (R. 1431) At about 12:40, he was awakened by a loud kick to the door. Thirty or forty seconds later he heard defendant say, "Fuck you." (R. 1431) Mr. DeLeon got up and looked through the peep hole in his door, but he could see only darkness. He opened the door and found a lot of smoke in the hall. There were people in the hall, yelling and screaming. (R. 1432) He slammed shut the door to his apartment, roused his daughter and told her to put something on and get out. He grabbed his cordless phone, and they ran back out into the corridor. (R. 1433) Once outside of the building, he gave Anita the phone and went back in to help an old lady. (R. 1434) He went back in again with some others to help more people find their way out. After the second time he was coughing, and the smoke made it impossible to see, so he did not go back in. (R. 1435) He saw a lot of smoke coming from the fourth floor windows. (R. 1435) People were hanging out, yelling and screaming. He saw one man, Armando Tapia, jump from his window. (R. 1436) He saw a woman on the west side of the building

dropping her children from a window, and he caught one himself. (R. 1436-1437) Catching a second child caused Mr. DeLeon to hurt his arm. A third child dropped onto a mattress. (R. 1437-1438)

Persephone Estes testified that in March of 1994, she was living at 917 West Dakin, in a one-bedroom, third floor apartment. (R. 1243) She lived with her fiance, Kevin Warfield, and two children, Tavores and Tierra, who were six and four years of age at that time, as well as her niece Constance, who was also six. On March 20, 1994, at about 12:30 or 12:45 in the afternoon, Kevin was at work. She was in the kitchen preparing dinner, and the three children were in the bedroom, playing. (R. 1244)

At about 12:45 she heard a loud thump, and she thought it was her children jumping off the bed. She started back to the bedroom to tell them to stop jumping. As she was walking down the hallway she saw black smoke coming in from the top and sides of the apartment's front door. As it came in, the smoke was sucked right back out. Ms. Estes went straight to the bedroom and explained to the children that there was a fire and that they knew what to do. They had had family fire drills. (R. 1245) They went to the kitchen window, which was nearest the bedroom. (R. 1245-1246) As she opened the window she saw someone jump from a fourth floor window. (R. 1246) She could see thick smoke from the fourth floor. When she got the window open she began to call to people below to catch her children. She ran back to the bedroom to get a mattress, and she threw it from the window. She then grabbed her children one at a time, and dropped them out. (R. 1247)

She dropped six-year-old Tavores first. As she testified, "I had a hard time because he didn't want to let me go. He was scared, but I finally got a chance to wiggle his hands

away from me and let him go." (R. 1248) He fell, and two people on the ground caught him. Tierra went next, landing on the mattress. Finally, Ms. Estes dropped Constance, who struck her back and head against the ledge as she fell. (R. 1219)

Once she saw that the children were safe Ms. Estes was able to telephone her mother, who lived nearby, to come and get them. Then she crawled out on the ledge and waited for firefighters to get her down. As she waited, she could see smoke coming from the fourth floor, and she could hear people screaming. (R. 1249-1251) Tavores and Tierra suffered bumps and bruises, and Constance had a knot on the back of her head and a bruise on her back. (R. 1252)

On March 20, 1994, Armando Tapia Rodriguez lived on the fourth floor of the building at 917 West Dakin. It was a one bedroom apartment, number 402, which he shared with his nephews Ismael, Antonio, and Francisco. (R. 1386-1387) That afternoon he was home watching television with his nephews Antonio and Ismael, and friends Jose Guzman, Ephran Lopez, and Regaburto Gomez. At about 12:30 the front door of the apartment suddenly opened by itself, and a strong wind came in. There was no one there, so Ephran closed the door. Then some white smoke began coming under the door. (R. 1388) Ismael opened the door to find out why, but when he did a lot of black smoke began to fill the apartment. In less that two minutes the room was full of smoke, and the five men had to hang themselves out of the window to be able to breathe. (R. 1389) Mr. Rodriguez fell to the ground and broke his leg in two places. He was taken to the hospital, where he was given oxygen. The next day doctors operated on his leg. The others were able to get down safely. (R. 1391-1393)

William Vargas, who was 13 years of age in March of 1994, lived in apartment 411

with his mother, his sister, Jacqueline, who was 15, and their little brother, Rueben. (R. 1397-1399) It was a studio apartment with a bathroom. (R. 1400) At about 10:30 that morning William's mother left for work, taking Rueben. (R. 1399) At about 12:40 William and Jacqueline were getting ready to go out, and William was running water for a bath. (R. 1401) As William went to a closet to get his clothes he noticed his sister looking at the door "like weird." (R. 1401) He looked and saw smoke coming through the top of the door. (R. 1401) He opened the door and saw smoke and fire from the stairs, which were just past the apartment next door. (R. 1402) He closed the door, and they went to the window and began to scream for help. The room was filling with smoke, so they went to their knees and crawled to the bathroom. They closed the bathroom door, but smoke was already coming in there as well. (R. 1403-1404) There was so much smoke that they could not breathe, so Jackie opened the window. It was a small window. (R. 1404) She put her head through and drew a deep breath, and then she told William to get out. Although the bathroom window was small William was able to get through because he was "real skinny," and because his sister was pushing him out. (R. 1404-1405) He crawled through and tried to move to the next window because the heat from the smoke was burning his hands. He was able to hang from the ledge and yell for someone to help his sister. When the firefighters came they put up a ladder. One of them climbed up to bring William down and then went back up to help Jackie. (R. 1406-1407) William had suffered some minor burns from the smoke, and was taken to the hospital. (R. 1407-1408)

As the various fire companies responded to the alarms that came in, first the original, then two additional alarms, the firefighters began to perform their various assignments. (R. 1952-1963, 1970) Some of the firefighters climbed to the roof to cut holes so as to

ventilate the fire, some began the search and rescue of people in the building, and others began to fight the fire with water. Some of the people were rescued by firefighters with ladders through the windows because the heat and smoke made it impossible for them to go into the corridors. Other firefighters entered the building and immediately went to the third floor, where the fire was. Three of these firemen, Van Swearingen, Dorsen, and Connelly, began opening apartment doors on the third floor with sledge hammers and leading the people to the front stairs. (R. 1859-1861) They also found bodies of some of the victims, and began to bring them out as well. (R. 1862) After clearing the third floor, the firefighters went to the fourth, where more bodies were found. (R. 1862-1863) There was a great deal of fire in the fourth floor corridor, and Firefighter Dorsen suffered some burns on the back of his neck from falling debris. (R. 1864)

When firefighter Jeffrey Heinz reached the building with Tower Ladder 21 he and his partner, Curt Nelson, began to execute their duty of primary search and rescue. They noticed flames, heavy smoke, and trapped people on one side of the building in particular, and they carried a 35 foot extension ladder to that area. (R.R. 1981-1984) As they proceeded along the side of the building a body fell from above and landed about five feet from Firefighter Heinz. (R. 1985) When they had placed the ladder against the wall Heinz started up toward the fourth floor, where there was a young boy crouched on a window ledge. (R. 1987-1988) When Heinz reached him he grabbed the boy and swung him around to his partner behind him on the ladder. (R. 1988) The boy said that his sister was trapped in the apartment. (R. 1988) Placing his breathing apparatus over his face, Firefighter Heinz went in through the window. (R. 1989)

Inside, the visibility was zero because of the smoke. Toxic gasses were extremely

high, and the temperature in the room was "probably approaching 1700 degrees." (R. 1989) Flames were beginning to come into the apartment. (R. 1990) The boy had told him that his sister was in the bathroom, so, moving to his right, Heinz began to search by feeling for the bathroom. When he found it, the conditions inside were "tolerable." The girl was in the bathtub. She reached out for him, and Heinz took off his air bottle and placed the mask over her face. He grabbed her and tried to get out the same way he had entered, but when he got to the bathroom door to the living room, the living room "flashed over," meaning that everything in the room ignited simultaneously. (R. 1991)

Heinz retreated back into the bathroom, and told the girl that he was going to put her out the window. She was still wearing his breathing mask. He told her that she would have to "dive out this window and grab that 35-foot ladder and ride it down. That's the only way we're going to get out of here." (R. 1992-1993) The window, however, was too small, and he could not get her through. (R. 1993) He brought her back in, and put the mask back on her. Knowing that the bathroom was seconds from flashing over, he radioed that he was trapped there. When other firefighters heard the SOS, they were able to vent the roof directly above, and the flames and gases were drawn up and away from him. Although Heinz was able to make his way back to the ladder, the alarm on his breathing apparatus had already indicated that it was depleted. (R. 1995) At this time firefighter Heinz saw that the girl was dead. His partner was able to pass a hose through the window and they were able to "redirect" the fire into the hall and away from the room Heinz was in. (R. 1996-1998). He continued to fight the fire from this position until it was struck, and he remained until the chaplain came to give the girl the Last Rites, and then helped remove her body. (R. 1999)

Doctor Edmund Donoghue, of the Cook County Medical Examiner's Office, performed the post-mortem examinations of four of the victims, and Doctor Cynthia Porterfield performed the other three. (R. 1596) John McKinney, age 43, was found to have died from internal injuries caused by a fall from a height, and were consistent with injuries that would be sustained by someone jumping from a four story building. (R. 1215, 1602-1603) Gary Lopez, age 15, was found to have thermal burns over 75 percent of his body, and had died of carbon monoxide and smoke inhalation. (R. 1234, 1605-1607) Rolando Frausto had thermal burns over nearly 100 percent of his body, and had died of carbon monoxide and smoke inhalation. (R. 1614, 1616) Gladys Lopez also had thermal burns over 100 percent of her body, and had died of smoke and carbon monoxide inhalation. (R. 1234, 1617-1618) Gary Frausto, age three, had burns over 70 percent of his body, and had died of smoke and carbon monoxide poisoning. (R. 1237, 1618-1622) Jacqueline Vargas, age 15, was found to have burns over 25 percent of her body, and had died of smoke and carbon monoxide poisoning. (R. 1226, 1628) Karen Frausto, age five, had been burned over 90 percent of her body, and had died of smoke and carbon monoxide poisoning.[1] (R. 1237, 1630) Doctor Donoghue testified that the severe burns suffered by the various victims had probably occurred after death. (R. 1635)

Officer Dennis Connelly was a tactical officer assigned to the 23rd District, at

[1] Rolando and Gladys were husband and wife, Gary and Karen Frausto were their children, and Gary Lopez was Gladys' brother. They all lived in the same apartment, number 403, in the 917 West Dakin building. (R. 1233-1241, People's Exhibit number 22)

Addison and Halsted. (R. 1301) Officer Connelly and his partner, Officer Moyer, assisted at the fire, and also spoke to the building manager, Judge DeLeon, and two other citizens: Larry Weaver, who first mentioned defendant's name, and Edward Stacy. (R. 1304, 1323) At about 3 o'clock, the officers left the scene, and arrested defendant at the Popeye's Chicken restaurant located at 1959 West Howard Street. (R. 1304-1308) At that time Connelly noticed that the hair on the top rear of defendant's head had been singed, and he also detected an odor of gasoline on defendant's person. (R. 1308) As they arrested defendant, Connelly read him his Miranda warnings from a preprinted card, and defendant indicated that he understood them. (R. 1309-1311) As they drove defendant back to the district defendant spoke to the officers. (R. 1312) Defendant told them that he had had an argument with his landlord over the rent, and that he had wanted to get even with him. The landlord had told him that he was going to have the sheriff throw him out and have him locked up by the sheriff. This had made defendant angry, so he went over to the Shell Gas station at Irving and Sheridan, where he purchased a can of gasoline. He then went back to the building, went up to the third floor rear landing, poured the gasoline onto the floor, struck a match, and threw it onto the gasoline. Then he ran out the front door. (R. 1314-1315) He had paid seven dollars for the gas can, but could not remember what he had paid for the gas itself. (R. 1316) Defendant's pants, which had about them a strong odor of gasoline, were inventoried into evidence. (R. 1317)

Detective John Schmitz of the Chicago Police Bomb and Arson Section was called out to the Dakin Street fire at about 1:25 that afternoon. (R. 1718, 1730) After the fire was extinguished he and Battalion Chief Burns of the Office of Fire Investigations began an examination of the building to determine the cause and origin of the fire. (R. 1732)

Detective Schmitz determined that the fire had started at the third floor level of the rear stairs, and had spread upward to the fourth floor. (R. 1736-1737) He also determined that a liquid accelerant had been poured onto the third floor landing and ignited. (R. 1738) He recovered a piece of charred carpeting that smelled strongly of gasoline and sent it to the crime lab. (R. 1740) He was able to eliminate all accidental causes for the fire, and determined it to be consistent with someone pouring more than a gallon of gasoline on the landing and igniting it. (R. 1742-4)

Detective Kendzior, also of the Chicago Police Bomb and Arson Section, assisted Detective Schmitz by recovering from defendant the clothing he had been wearing at the time of his arrest. (R. 1799, 1809)

Francis Burns, the Commander of the Office of Fire Investigations, also participated in the investigation of the fire on Dakin Street. He actually began his investigation while the fire was still burning, and on the fourth floor he found evidence of "an inordinate amount of heat." The extent of the damage indicated that there had been high heat in a very short period of time. (R. 1885) As a result of his investigation he reached the same conclusion as had Detective Schmitz, that the fire was incendiary in origin, intentionally set by use of an accelerant. (R. 1887-1888)

Detective William Baldree of Area Three Violent Crimes was assigned to investigate the arson fire and the deaths that resulted from that fire at 2:15 p.m. of the day it occurred. (R. 2035-2036) He and his partner, Detective Keenan, first went to the scene and spoke to various individuals and witnesses. (R. 2036) When they returned to the Violent Crimes offices they learned that defendant was in custody, and at about 4:30 p.m. they had a conversation with him. (R. 2039-2020) Detective Baldree first informed defendant of his

rights by reading them from his Fraternal Order Of Police book, and defendant indicated that he understood them. (R. 2040-2042) After speaking with defendant for 10 or 15 minutes, Baldree contacted the Felony Review Unit of the State's Attorney's Office. (R. 1043)

Assistant State's Attorney Diane Gordon Cannon of the Arson Task Force of the State's Attorney's Office arrived at the Violent Crimes Office at about 5:30 p.m., and after speaking to the detectives she had a conversation with defendant. (R. 2092-2093) After introducing herself and explaining her function she read him his Miranda rights, and defendant indicated that he understood them and wanted to talk to her. (R. 2094-2095) Eventually he agreed to give a court-reported statement.(R. 2096)

In that statement defendant again acknowledged and waived his rights. He stated further that he was 26 years old, and that he had gone in school "almost as far" as his second year of college. He was working at Popeye's Chicken on Howard Street. He had lived at 917 West Dakin until that day, in an apartment house comprised of four floors, with 10 to 15 apartments on each floor. He had lived there with his girlfriend and his baby, who was 10 months old. He stated further that he had been having problems with his landlord since the time they had moved in, more than a year earlier. He stated that on the day before there had been a bolt on his door, and he had been told that the sheriff was supposed to come and put a lock on it because the landlord wanted him out. The electricity was turned off that night.

The morning of the fire defendant took his family to his aunt's house in Riverdale. He left at about 7:30 a.m., and had returned to the building at about one o'clock. He spoke to a friend, Edward Stacy, and he told Stacy that he, defendant, should "burn the building

down." He then was on his way to work when he came back and set the top floor back porch on fire. He used gasoline to set the fire, which he had purchased at a gas station at Sheridan and Irving Park. He had carried the gasoline in a gasoline container that he had bought at the station. Prior to that he had gone to a dollar store and had bought a bucket, but the gas station attendant would not sell him gasoline in a bucket. Defendant gave the bucket to the attendant and bought a container for gasoline. He bought less than three dollars worth of gas.

Defendant then walked to the 917 Dakin building, less than a block away. He went in through the front door, and went up to the third floor. He went to the back porch, poured the gasoline, and ignited it with a match. He went back out the front door. He did not think that "very many" people lived in the building because the manager was irresponsible in taking care of it. (R. 2137-2146)

After giving the statement, defendant read it over, reading the first few pages out loud. He made some corrections as he did so, and he signed each page. (R. 2099-2100)

On March 25, 1994, Detective George Barzydlo, of the Chicago Police Bomb and Arson Squad, went to the building at 917 West Dakin, where he met Commander Pat Burns, as well as an inspector from a private insurance investigation firm. The building was deserted but for a security person, as it had suffered extensive fire damage. (R. 1408-1412) During the course of the inspection, while on the third floor of the building, Detective Barzydlo recovered a melted piece of red plastic that smelled strongly of gasoline. (R. 1412) He found it in the rear near the heavily damaged porch. He inventoried the plastic into evidence and hand carried it to the crime laboratory. (R. 1413) The detective recognized it as the bottom portion of a plastic gasoline can. (R. 1416)

Allan Osoba, a trace chemist at the Illinois State Police Forensic Science Center, analyzed evidence submitted to him from the Dakin Street fire, including defendant's clothing and a jacket. (R. 1821-1830) Analysis revealed gasoline on both of defendant's boots, while his jacket and shirt were negative for the presence of accelerant. (R. 1834) He was unable to determine whether the pair of pants submitted had any trace of accelerant. (R. 1835) He also examined a charred and melted piece of a plastic gasoline can, and found that it had contained gasoline. (R. 1841-1842) Forensic scientists at the crime lab also analyzed pieces of debris submitted by the investigators from the fire scene, specifically a piece of charred carpet and various pieces of charred wood. (R. 1942) The carpet remnant was found to have residue of gasoline. (R. 1944)

The jury found petitioner guilty of murder and aggravated arson and at sentencing found eligibility for the death sentence premised on felony-murder.

III

REASONS FOR DENYING THE PETITION

Although petitioner seeks executive clemency to prevent him from being executed, it is clear that such a claim is premature since he is not currently subject to a sentence of death. Article V, section 12 of the Illinois Constitution of 1970 expressly provides that "(t)he Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper" (emphasis added) and Illinois law has long required the imposition of a valid sentence as a necessary precondition to the existence of any conviction. See e.g. People v. Hager, __Ill. 2d__, 2002 Ill. LEXIS 374, at *8 (No. 90115 August 29, 2002) ("the word 'conviction' is a term of art which means a final judgment that includes both a conviction *and* a sentence") (emphasis in original). Similarly, in Faunce v. People, 51 Ill. 311, 313 (1869), the Illinois Supreme Court expressly rejected the claim that under the Illinois Constitution of 1848, the Governor had the authority to grant clemency even though no sentence had been imposed.

Moreover, it is clear that such a limitation on the Governor's clemency powers is necessary because any grant of clemency prior to the imposition of sentence in a particular case would violate the clear separation of powers under the Illinois Constitution. Article II, section 1, of the Illinois Constitution of 1970 expressly provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." However, as the Illinois Supreme Court has long held, "the power to impose sentence is exclusively a function

of the judiciary." People v. Davis, 93 Ill.2d 155, 161,442 N.E.2d 855 (1982) (emphasis added). See also People v. Phillips, 66 Ill.2d 412,415, 362 N.E.2d 1037 (1977); People v. Montana, 380 Ill.596,608, 44 N.E.2d 569 (1942). Therefore, any attempt by the Governor to preclude the courts of this State from considering a particular sentence which has been authorized by the legislature would be an unconstitutional infringement of the judicial power which was "exclusively and exhaustively" granted to the courts bv Article VI, section 1. People v. Cox, 82 Ill. 2d 268, 274, 412 N.E.2d 541 (1980); See also People v. Jackson, 69 Ill. 2d 252, 256, 371 N.E.2d 602 (1977) (stating that "(a)lthough the Constitution of 1970 does not define judicial power, it is an exclusive grant of all such power to the courts.").

Petitioner first argues that he should be granted clemency because he is mentally retarded. If he is indeed retarded then clemency is unnecessary because the United States Supreme Court has recently held that the execution of the mentally retarded violates the Eighth Amendment of the United States Constitution. Atkins v. Virginia, 122 S. Ct. 2242 (2002). On September 6, 2002, our Supreme Court entered an order on its own motion directing the Circuit Court of Cook County to hold a hearing to determine if petitioner is mentally retarded in the event he is resentenced to death. If at that hearing petitioner is found to be retarded, clemency will not be necessary. If he is found not to be retarded it would be inappropriate to grant clemency on these grounds.

Petitioner asserts that he is entitled to clemency because he was found eligible for the death penalty based upon an aggravating factor other than those factors which the Governor's Commission has recommended be retained. Specifically, the Commission

concluded that the current list of 20 factors is overly expansive and therefore unconstitutional. Accordingly, it was suggested that the list be reduced to just five factors: (1) murder of a peace officer or fireman; (2) murder of any person in any correctional facility; (3) multiple murder; (4) murder accompanied by the intentional infliction of torture; and (5) murder of a witness, prosecutor, defense attorney, juror, judge or investigator.

However, the Illinois Supreme Court has expressly rejected the Commission's logic and held that Illinois' death penalty statute satisfies the constitutional mandate because it "genuinely narrows the class of individuals eligible for the death penalty and reasonably justifies imposition of a more severe sentence on those defendants compared to others found guilty of first degree murder." People v. Ballard, ___ Ill. 2d ___, 2002 Ill. LEXIS 376 at *73 (No. 88885 August 29, 2002) (citing Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983)). As the Ballard court explained, "there are innumerable examples of first degree murders that do not fit within any of the statute's eligibility factors" and [e]ach provision is narrowly tailored to fit a specific set of facts and circumstances." Id., 2002 Ill. LEXIS 376 at *74.

Moreover, each of the aggravating factors represents a determination by the General Assembly that certain types of murders are so deplorable that the death sentence may be imposed. Each one is intended to ensure that the most helpless members of our society (such as children, the elderly or disabled) are protected against violence or to provide a strong disincentive for the offender to kill the victim. For example, cold, calculated and premeditated murders are properly death-eligible because they are limited to situations where the defendant has carefully planned the murder over an extended period of time, and the availability of the death penalty may be the only thing which

prevents these defendants from deciding to actually kill their victims. As the Illinois Supreme Court stated "a defendant who contemplates a murder for a substantial period of time, yet still commits it, is set apart from other murder defendants in a meaningful way." People v. Williams, 193 Ill. 2d 1, 36, 737 N.E.2d 230 (2000). Similarly, murders in the course of another felony such as rape or home invasion are properly death eligible to help deter the defendant from killing the victim.

In the case of aggravated arson, death is an appropriate eligibility factor because of the danger of a great number of deaths resulting from the crime, as occurred here. (See, New York v. Mendez, 430 N.Y.S. 57 (1980), in which an arson fire set in a social club killed 25 people). Given these important policy considerations, petitioner's request must be rejected.

Petitioner next claims that he should receive clemency because the death sentence in this case would be excessive punishment. Although the absence of a significant criminal history is mitigating, it is not dispositive but is simply one of the various circumstances that the sentencing authority must consider in determining whether to sentence a particular defendant to death. The death penalty statute is not limited in its application to career criminals or to those with significant histories of violent crimes. Cases in which the defendant was sentenced to death without having any or minimal criminal background include People v. Cole, 172 Ill. 2d 85 (1996), People v. Tenner,157 Ill. 2d 341 (1993), People v. Gosier, 145 Ill. 2d 127 (1991), People v. Hobley, 152 Ill. 2d 272 (1994), and People v. Tye, 141 Ill. 2d 1 (1990). Although our supreme court has reduced death sentences in cases where it has found that the defendant had been acting under extreme mental disturbance because of the loss of employment or because of problems in marital

or romantic relationships it has affirmed others of the same description. People v. Cole, supra, People v. Gosier, supra.

Certain things become apparent from a reading of the facts of this case. They show that this was not a crime impulsively committed. Defendant announced his intentions more that five hours before, to Mr. Stacy at the CTA station. He reiterated his plan after he returned from Riverdale later that morning, between four and five hours later. Not only is there no sign of any great emotional duress, he was "jumping" and "giggling" as he stated his intent. He methodically went out and purchased a bucket in which to carry the gas. When told he could not carry gas in a pail he purchased a gas can, and he paid for the gasoline with the change from a ten dollar bill. He did not use a small amount of gas, nor did he start the fire in the basement or in his vacated apartment. Rather, he poured more than a gallon of gasoline onto the stairs, so that it would run down the stairwell, and so it would block that exit. After lighting the fire, he left. He warned no one. He did not cry "fire." He did not pull a fire alarm. He did not even tell Mr. Weaver that it was in fact their building -- where Weaver's wife was waiting for her husband -- that was burning. He showed no concern for any of the people in the building, people he referred to at sentencing as his "friends." He left them to fend for themselves, to jump from the windows, to cling to the ledges, to throw their children to people below, and to die in the smoke. Neither did he direct his anger narrowly to the individuals who had evicted him, but to everyone in the building, scores of people -- men, women, and children -- who had done him no harm: Jacqueline Vargas, age 15, who pushed her brother Willie to safety through a window she herself could not fit through; John McKinney, who was driven by the heat and the smoke to jump from his fourth story window to his death; the five

members of the Frausto family who died: Rolando Frausto, Gladys Lopez, Gary Lopez, Karen Frausto, age five, Gary Frausto, age three. What defendant describes as the acts of “one day in 26 years” was the last day of life for seven people.

In addition, defendants acts resulted in Armando Tapia Rodriguez falling from the fourth floor window, breaking his leg; Persephone Estes dropping her two children and her niece from the third floor window, then crawling out onto the ledge to wait for rescue. The jury also heard from firefighter Heinz, who was trapped by the fire in the bathroom with Jackie Vargas, seconds from the room flashing over, watching helplessly as she died when his breathing apparatus ran out of air.

Thus the jury heard that defendant chose a response out of all proportion to the provocation, killing seven people who had nothing to do with his being asked to move out of the building, and putting at least scores of others, tenants and firefighters, in mortal danger. The amount of gasoline he used -- about two gallons -- and the fact that he poured it all on the back stairwell, closing off completely that exit, gives rise to the inference that defendant intended through his actions to kill people, to kill as many as possible, and to kill people who had no part in his current problems. Whatever his IQ, defendant was capable of formulating a plan to commit murder, which he carried out with malicious glee, and for which he expressed no remorse whatsoever.

The jury also heard defendant on the witness stand, and the judge heard defendant at the sentencing proceeding after the death sentence had already been returned by the jury. They heard defendant say he was sad for his "friends" but deny, in the face of overwhelming evidence, that he set the fire that killed them. Even as his counsel was trying to convince the jury that defendant was suffering from mitigating mental and

emotional problems, defendant continued to refuse to express any remorse for his actions, or even admit to having committed them. Although defendant does not forfeit his right to maintain his innocence and need not incriminate himself, defendant did not merely remain silent. He took the stand to lie to the judge and to the jury, telling them that he had not committed the crime. Although defendant recounts at length the facts of his life, he has failed to show how they relate to the commission of the offense. The mitigating circumstance upon which he principally relied at trial was that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . , " 720 ILCS 5/9-1(c)(2).

Mitigation evidence of a defendant's cognitive abilities and mental health does not preclude imposition of a death sentence when that evidence is outweighed by aggravating evidence. Doctor Green testified at trial that he diagnosed defendant as having schizo-affective disorder, antisocial disorder, and mental retardation. This testimony was rebutted by Dr. Roni Seltzberg, a staff psychiatrist with Forensic Clinical Services of the Circuit Court of Cook County, and Dr. Paul Fauteck, a psychologist with Forensic Clinical Services. Both of these doctors found that defendant was NOT mentally retarded, but rather was a malingerer who purposely did not perform as well as he could have on I.Q. tests. Dr. Seltzberg also found that defendant’s reports of psychotic symptoms were “exaggerated quite a bit.”

The bulk of the remainder of Dr. Green’s testimony, both at trial and sentencing, was about how he had arrived at that diagnosis, and the testing and evaluating procedures he used. What is missing from Doctor Green's assessment, however, is any connection between his diagnosis of defendant's mental state and the commission of the offense.

Doctor Green's diagnosis was that defendant suffered chronically from these conditions. He did not testify that defendant's extreme mental or emotional disturbance or illness was attributable to or exacerbated by defendant's immediate financial or housing difficulties. The People submit that there is a difference between a defendant being put into an extreme mental or emotional disturbance because of something that has happened or an extremely stressful event or period in his life, and a defendant simply being made angry by something done to him by another person. The first may well provide sufficient mitigation to preclude the imposition of the death penalty, the latter will not.

The factual crux of defendant's argument is that when told that his family would lose their home and be put out on the street within two days, Julius Kuntu's impaired intellectual capacity prevented him from responding to this extremely distressing news in a rational manner. There is, however, no real evidence of this from any expert witness, or that defendant in fact found this to be "extremely distressing." His petition continues: "Instead, filled with anger, Julius childishly decided to strike back at his landlord by damaging the landlord's building." (Pet. At 17) There is no evidence to support the assumption that his target was the building rather than any of the persons inside. "With no thought to the potentially tragic consequences, Julius set a fire in the building." There is no evidence that defendant was not cognizant of the potential consequences of his actions. To the contrary, defendant's actions of removing his girlfriend and child and sending them far away from the area that morning show clearly that he knew the potentially dangerous consequences of igniting gasoline in a wooden stairwell of a crowded apartment building. Defendant, after he started the fire, shouted no warning to

his "friends," did not pull a fire alarm, did not tell Mr. Weaver when he met him on the street and whose wife was inside the building that it was indeed their building that was burning.

Although a certain amount of stress and trauma may have arisen from being evicted, defendant's family was not rendered utterly homeless. He was able to make a telephone call and take his girlfriend and their child to the home of a relative. They were never without shelter. More importantly, as stated above, he did not direct his anger at those who evicted him, but rather at people who had done him no harm at all. When compared to their deaths and the manner in which he killed them, the mitigation that arises from his being evicted pales into insignificance.

Thus, the evidence was that defendant showed no great stress, that his crime was out of all proportion to its cause, that it was directed at people who had done him no injury, and that it was carried out in a cold-blooded manner, demonstrating complete indifference to their fate. Although defendant had no prior history of criminal activity, it cannot be inferred from that fact that the crime he committed on March 20, 1994, was truly "aberrant behavior, unlikely to recur." There is in the record no basis for such a conclusion. More importantly, no one can predict, much less guarantee, defendant's future acts. If, on March 19, 1994, an observer had predicted that defendant would never in his life have killed anyone, much less seven people, he would have been wrong. Anyone claiming that this conduct is "unlikely to recur" bears a burden of proof that cannot possibly be met.

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 defendant in Illinois) was by definition fundamentally unfair. However, the Illinois Supreme Court has expressly rejected the claim "that every capital trial has been unreliable and that all appellate review has been haphazard" (People v. Hickey, ___ Ill. 2d ___, 2001 Ill. LEXIS 1080 at *57 (No. 87286 September 27, 2001)). Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they "function solely as devices to further protect those rights given to defendants by the federal and state constitutions" and that "[a] violation of procedures designed to secure constitutional rights should not be equated with a denial of those constitutional rights." Id. at *63, 64.

Thus, the fact that the 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. 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 WILL have the benefit of the new rules regarding capital cases at his sentencing hearing, which has yet to occur.

Sufficient to Preclude

Petitioner asserts that clemency is warranted because the statutory language and corresponding jury instruction that after considering all of the evidence "there is no mitigating factor sufficient to preclude the imposition of a death sentence" led the jury to mistakenly believe that the death penalty is mandatory. However, both the Illinois Supreme Court and the federal courts have consistently rejected any claim that the statute is confusing and might lead a jury to believe that the death penalty is mandatory. See People v. Mitchell, 152 Ill. 2d 274, 346, 604 N.E.2d 877 (1992); Silagy v. Peters, 905 F.2d 986, 998-99 (7th Cir. 1990). Moreover, because both the prosecution and the defense argued to the jury about the appropriateness of the death sentence in petitioner's case, any confusion in the language of the instruction was negated by the closing arguments.

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. Moreover, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by defendants in capital cases (see People v. Emerson, 189 Ill. 2d 436, 727 N.E.2d 302 (2000); People v. Palmer, 162 Ill. 2d 465, 491, 643 N.E.2d 797 (1994)) and will vacate a death sentence if it determines that it is

excessive in light of the facts of the case and the defendant's background (see People v. Smith, 177 Ill. 2d 53, 685 N.E.2d 880 (1997); People v. Blackwell, 171 Ill. 2d 338, 665 N.E.2d 782 (1996)), it is clear that a judicial override mechanism does exist.

CONCLUSION

Petitioner Julius Kuntu murdered seven people, people he referred to as his "friends," because he was forced to move his family from his apartment. Under these circumstances, clemency to this defendant would be an affront to his victims and to the People of the State of Illinois.

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

Respectfully submitted,

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