

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. \
vs.)	
)	
KEITH SHUM,)	Inmate No. N44016
)	
)	

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

PEOPLE'S RESPONSE IN OPPOSITION TO PETITION
FOR EXECUTIVE CLEMENCY

HEARING REQUESTED

RICHARD A. DEVINE
STATE'S ATTORNEY OF COOK COUNTY

By: CELESTE STEWART STACK,
WILLIAM L. TOFFENETTI,
Assistant State's Attorneys

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INTRODUCTION

1] Keith Shum committed violent atrocities against helpless women and children, and he made the victim's last moments of life frightening, humiliating, and painful. Chilling, shocking, and repugnant, Shum's crimes include: raping a woman who was in the onset of labor and carrying a healthy 9-month-old fetus; raping the pregnant victim's roommate and threatening to kill her child as well. Ultimately, Shum killed the pregnant victim, her unborn child, and shot the other mother three times, leaving her for dead.

2] Before inflicting the fatal wounds, Shum inflicted everyone's worst nightmare on the frightened women. Shum tortured the women by holding a gun to one's temple while raping the other and putting the gun to the temple of one of three children in the apartment who happened to wake up during the rapes. When Shum finished torturing the women sexually, he pointed the gun at one victim and then the other, back and forth, taunting them , stating : "I'm going to kill you." He did. Shum killed Gwendolyn

Whipple and her unborn child and shot Teresa Conway three times.

3] These victims suffered a horrific fate. It is nightmarish to even attempt to imagine the emotional pain and horrific fear that these woman experienced. Their anguish undoubtedly compounded by fear for their children.

4] One outrageous aspect of these crimes is that the motive for the senseless waste of life was simply, petty self-gratification. Shum cruelly destroyed three, innocent young lives, never once showing a hint of remorse

5] Shum's recently-conjured claims of various and sundry mental defects [procured from paid "experts" who routinely issue such opinions for criminal defendants] simply highlight the precedence of his criminal self-serving nature. defects.

6] Shum's crimes are ghastly and horrific, committed with no provocation. Shum does not even attempt to mitigate the heinousness of his acts. Commuting Shum's death sentence would constitute a true travesty of justice. The People strenuously object to the commutation where the above inmate has enjoyed the full protection of constitutional rights and was righteously sentenced to death. Shum's death sentence was issued by a jury of Illinois citizens, sanctioned by the trial judge, and affirmed by the Supreme Court of the State of Illinois. The People vigorously oppose commutation:

I HISTORY OF THE CASE

Petitioner Keith Shum was charged under indictment number 82 C 6130 with the

murder of Gwendolyn Whipple, the feticide of her unborn child, the rape and deviate sexual assault of both Gwendolyn Whipple and Theresa Conway, and the attempted murder of Theresa Conway. He was tried to a jury in the court of the Honorable James J. Heyda and found guilty of all of the above charges. He waived a jury for the purposes of the sentencing hearing, and was sentenced to death by Judge Heyda. He was sentenced to 60 years for the rape of Gwendolyn Whipple and Theresa Conway respectively, 60 years for feticide, and 60 years for attempted murder of Theresa Conway. His conviction and death sentence was affirmed on direct appeal by the Illinois Supreme Court. People v. Shum, 117 Ill. 2d 317 (1987).

Petitioner's amended post-conviction petition was filed on September 24, 1997, and was denied by the Circuit court Judge on December 24, 1997. After petitioner filed a notice of appeal to the Illinois Supreme Court, the court remanded the matter for an examination into petitioner's fitness for post-conviction proceedings. After hearings, the judge found petitioner fit. Petitioner's appeal from the denial of post-conviction relief and the finding of fitness is currently under advisement in the supreme court.

II

FACTS OF THE CASE

The murder of Gwendolyn Whipple and her unborn child occurred late on the evening of July 6 and the early morning of July 7 of 1982. (R. 470, 681, 729, 740) Whipple lived with Theresa Conway in a one-room apartment at 6617 South Racine in Chicago. (R. 457) It was in their apartment that the two women were raped and shot by Petitioner in the presence of Theresa's three young children. (R. 480-81, 583)

On July 6, 1982, Gwendolyn Whipple made an early morning visit to her obstetrician at the University of Illinois Medical Center. (R. 626, 645) The doctor determined that Gwendolyn, who was 9 months pregnant, was in good health except for a bladder infection. (R. 638) Gwendolyn told the doctor that she was having contractions approximately 15 minutes apart. The doctor diagnosed that she was probably in the early part of labor. (R. 659-60)

An ultrasound was taken of the full-term fetus, whose heart tones were found to be strong and normal. (R. 637-38, 645)

Later that day Gwendolyn and Theresa took Theresa's three children to the park. When they returned to their apartment that evening, they put the children to bed. (R. 463-64) All three children slept in one twin-size bed. Another bed was in front of the apartment located beneath the room's one window. (R. 459-62) The one room apartment was approximately 10 feet by 15 feet. (R. 741, Ill. Supp.R. 9, 11)

After the children went to sleep, Theresa and Gwendolyn played cards. (R. 465-66) At 11:15 or 11:30 p.m. there was a knock on the door. (R. 466) When the women asked who it was, the person responded "Keith." Without hesitation, Keith (Petitioner) was invited into the apartment. (R. 467)

Petitioner was well-acquainted with his two victims. He was a friend of Theresa Conway's boyfriend, Mark Aytchan. He had accompanied Mark on his visits to Theresa's apartment several times. (R. 470, 892-93) Petitioner continued to visit Theresa and Gwendolyn even after Mark was arrested and sent to Cook County Jail. (R. 893)

Petitioner offered the women some marijuana and they accepted. (R. 472) Then Petitioner remarked that Theresa's boyfriend, Mark, had told him to keep an eye on her and Gwendolyn while Mark was in jail. Theresa told Petitioner he was a liar because she had talked to Mark that same day and Petitioner had neither talked to nor seen Mark. (R. 473) Petitioner angrily called Theresa a "bitch" and a "whore". He pointed the tip of the black umbrella he was carrying at her left jaw until she could feel the sharp point. (R. 474-75) Theresa knocked the umbrella away, ran across the room and grabbed a knife off the top of the dresser. (R. 475-76) Petitioner opened up his jacket and pulled out a gun. Theresa thought it was only a toy gun, until Petitioner showed her the bullets. Then Theresa dropped the knife she was holding. (R. 477-78)

While pointing the gun at Theresa and Gwendolyn, Petitioner ordered them to lay face down on the bed by the window. (R. 478-79) While this was happening, Theresa's 7-year old son was awakened by the commotion. Petitioner put the gun against the boy's forehead. Theresa immediately intervened by pleading with Petitioner to shoot her instead of her son. Petitioner ordered her back to the bed. Theresa told her son to go back to sleep. (R. 480-81)

Keeping his gun pointed at Gwendolyn's head, Petitioner pulled down Theresa's pants and underwear, spread her legs apart and had sexual intercourse with her for 3 to 5 minutes. Theresa cried throughout the assault, while at the same time Petitioner had an orgasm. (R. 482-83) After raping Theresa, Petitioner turned to Gwendolyn who was laying face down on the same bed. He pulled down her shorts and underwear. When he told her to spread her legs apart, Gwendolyn cooperated as best she could in her condition. (R. 484) Petitioner had intercourse with Gwendolyn despite her pleas that Petitioner was hurting her. (R. 491) Then Petitioner forced each woman, at gunpoint, to perform fellatio on him with this threat: "If you don't, I'm going to kill you." (R. 492)

After raping each woman and forcing them to perform fellatio on him, he opened the window and sat on the ledge. He pointed the gun at each victim and said, "I'm going to kill you." (R. 493-95) The next thing Theresa heard was "a bang, and then I heard another bang and then I heard 3 more bangs." (R. 496) Petitioner was gone. Theresa discovered that she was shot in the arm and had pains in her neck. (R. 496) She turned to see blood on the side of Gwendolyn's head. (R. 496-97)

Theresa managed to run to her neighbors' apartment. Gus and Marquita Wilson had been friends as well as neighbors of the two women. (R. 497) In fact Mrs. Wilson had been helping Gwendolyn learn the Lamaze method in preparation for childbirth. (R. 578)

Theresa pounded on the Wilsons' door and Gus Wilson opened his door to find Theresa Conway standing there with blood all over her neck, chest and hands, saying she had been shot. (R. 580) Gus led her to his bed and, with help from his wife, laid her down and covered her. (R. 498, 580) He asked her who had shot her and her immediate reply was "Keith." (R. 580)

Gus then went to their apartment to see about Gwendolyn. He found her on the bed, covered with blood. He was unable to feel Gwendolyn's pulse. (R. 581) Theresa's three young children were "huddled together" on the other bed against the wall. (R. 583) When the paramedics arrived at 6617 South Racine, they checked Gwendolyn Whipple for any sign of a pulse or breathing. (R. 681) The victim was not breathing. After removing her to the ambulance, the paramedics initiated advance life support systems to no avail. (R. 682) Gwendolyn Whipple showed no vital signs prior to transport and no fetal heart tones were heard. (R.683)

The deputy medical examiner for Cook County determined that there were five gunshot wounds on or in the body of Gwendolyn Whipple. (R. 709) Gunshot wounds 1 and 2 were to the left side of her forehead. (R. 709, 710) The third shot entered the skull and lacerated her brain. A bullet was recovered from the victim's brain. (R. 711) The fourth wound was in the victim's left shoulder and a bullet was recovered from the muscles in her left upper arm. The fifth shot grazed the back of the victim's left shoulder. (R. 713-14)

An internal examination revealed hemorrhage in the victim's scalp due to severe lacerations of the brain caused by gunshot number 3. That was the shot which killed Gwendolyn Whipple. (R. 716-17)

An x-ray of Gwendolyn Whipple's uterus revealed a full-term fetus with the head of the fetus engaged in the pelvis. (R. 717) An examination of the deceased's uterus found a normal fetus, almost full-term with a normal placenta and umbilical cord attached. (R. 718) There was no evidence of placenta previa. (R. 719) Placenta previa is a physical condition in which the fetus's passage is blocked by an abnormally low placenta. (R. 649) The medical examiner determined that the fetus died of intrauterine asphyxia, which meant that "there was no circulation from mother to baby. II (R. 731)

Theresa Conway was admitted to St. Bernard's Hospital at 1:15 a.m. on July 7, 1982. She told the attending doctor that she had been shot and sexually assaulted. (R. 614) The doctor's examination confirmed her assertions. He discovered that she had been shot in the right mandible, right neck and right arm. Vaginal swabs and smears taken from the victim revealed the presence of spermatozoa. (R. 614-15) Dr. Bruce Dillon performed exploratory surgery on the victim which confirmed the two gunshot wounds to the right side of her neck, one wound on the left back side of her head and one wound to the right forearm. (R. 627-30) Theresa's initial stay in the hospital was for one week, and since that time she has been rehospitalized several times. (R. 630, 1148)

Detective Richard Bedran was assigned to investigate the shooting of Theresa Conway and Gwendolyn Whipple. (R. 740) On July 7, 1982, at St. Bernard's Hospital, he talked to Theresa Conway who gave a physical description of the person who shot her and Gwendolyn. The description was as follows:

male black, about 20 years old, 5'711. He had a medium, brown complexion and. . . his hair was sort of a jerry curls (sic) (R. 742)

Theresa also told police that the offender's name was Keith, but that she did not know his last name. She sent the police to her boyfriend Mark Aytchan, imprisoned in Cook County Jail, to get Petitioner's full name and address. (R. 742)

The police informed Aytchan about the shooting. They also told him that Theresa Conway had described a man named "Keith." (R. 773) Aytchan told police that "the only person that I could think of who she could be talking about was Keith Shum who stayed at 6418 South Sangamon." (R. 773-74)

Detective Bedran and his partner proceeded to Petitioner's home at 6418 South Sangamon, which is located about 5 blocks from the victims' apartment. Petitioner's aunt, Bernice Shum, let the police in. Petitioner was asleep on the couch. (R. 747) After the detectives identified themselves, they told Petitioner why they were there. Petitioner was advised of his rights and then allowed to dress. When asked about the shooting incident, Petitioner claimed to know nothing. (R. 747)

Petitioner was taken to St. Bernard's Hospital, where Theresa Conway immediately identified Petitioner as the man that raped and shot her and Gwendolyn in their apartment. (R. 748)

At Petitioner's jury trial, the above facts were testified to by: Theresa Conway, Gus Wilson, Mark Aytchan, the responding paramedics, attending physicians, the deputy medical examiner and the investigating detectives. (R. 454, 577, 617, 679, 702, 739, 769)

Gwendolyn Whipple's obstetrician who examined her on the morning before her death also testified. (R. 635)

The defense presented the testimony of Sherman Randle, a freelance investigator hired by Petitioner to interview persons connected with his case. (R. 854) Randle interviewed Theresa Conway on two separate occasions. (R. 856) He admitted that Theresa told him that she made no mistakes in identifying Petitioner as the offender, although she did not know his last name or where he lived at the time of the incident. (R. 877)

Petitioner took the stand in his own defense against the advice of his attorneys. (R. 882) Petitioner admitted that he had been to Theresa and Gwendolyn's apartment several times. (R. 893) However, Petitioner denied being at their apartment on July 6th and 7th. (R. 894) He also denied telling police or the assistant state's attorney that he had been at the apartment on those dates. (R. 896, 898)

According to Petitioner, he arrived at his aunt's house between 11:15 and 11:30 on the night of July 6, 1982. (R. 899) Petitioner claims to have been at McDonald's located at 64th and Ashland. His aunt's house is located at 64th and Sangamon, which is nine or ten city blocks away from the McDonald's. Yet Petitioner maintained that it took him an hour and a half to get from McDonald's to his aunt's house riding a 10-speed bicycle. (R. 899-900) Petitioner then admitted that he never told the police or the assistant state's attorney that he went to McDonald's on July 6th. (R. 901)

In rebuttal, Detective Bedran testified that Petitioner at first denied being with the victims, but in further conversation, Petitioner admitted that he had been at their

apartment from 10:00 to 10:30 p.m. and arrived home before midnight. (R. 926) When asked where he had been between 10:30 and mid- night, Petitioner claimed he had gone to a friend's home and that the friend was not at home. However, Petitioner was unable to remember his friend's name or address. (R. 926-27) Petitioner also claimed he had met two other friends on the street while on his way home. He was unable to remember those friends' names either. (R. 926-27) Petitioner also failed to mention going to McDonald's and the hour and a half bike ride home. (R. 927)

Assistant State's Attorney Rimas Cernius, assigned to the felony review division, interviewed Petitioner on July 7, 1982 at 6:30 a.m. (R. 933) After being advised of his rights, Petitioner admitted that he was at Conway's apartment, but said he left before midnight. He also admitted having an argument with Conway. (R. 934-36) Petitioner told the assistant state's attorney the same story he told police about meeting two friends on the street. Again he gave no names to support his claim. (R. 936) Petitioner did not tell the assistant state's attorney that he went to McDonald's or about the bike ride home. (R.937)

After hearing all of the evidence and being instructed by the court, the jury found Petitioner guilty of murder, attempt murder, feticide and two counts of rape. (R. 1029-1030)

Petitioner executed a jury waiver as to the penalty phase of these proceedings. (R. 1034) At the hearing to determine Petitioner's eligibility for the death penalty, the People relied on Petitioner's conviction for felony murder as the basis of his eligibility -- the murder of Gwendolyn Whipple committed in the course of the felony of rape, under

chapter 38, section 9-1(b)(6)(c). (R. 1061) The trial court found Petitioner eligible to receive the death penalty. (R.1066)

At the October 17, 1984 hearing in aggravation and mitigation, the People introduced the testimony of two St. Louis, Missouri residents. (R. 1075, 1077, 1080, 1096) Both witnesses testified that Petitioner used a gun to rob their purses in separate incidents. (R. 1085-86, 1101-2) Certified copies of the convictions for these incidents were introduced. (R. 1164) Petitioner was sentenced to one year imprisonment on each offense. (R. 1164) Another St. Louis resident testified that she saw Petitioner shot and killed her brother during an argument concerning a crap game. (R. 1125-28) She also testified that Petitioner held a gun on her and threatened to shoot her. (R. 1129)

Theresa Conway, the surviving victim in the instant case, testified about her periodic hospitalization and severe physical and mental afflictions caused by the shooting. (R. 1148-52) Theresa's mother's testimony also attested to the devastating effect of the shooting on her daughter and her daughter's children. (R. 1154-59)

In mitigation, the defense called no witnesses, other than defense counsel Gwendolyn Anderson. Ms. Anderson testified as to her extensive but unsuccessful efforts to present Petitioner's mother and aunt as witnesses - there were no witnesses in mitigation. (R. 1165-71) The defense offered no evidence in mitigation, but did refer the trial court to the presentence investigation report. (R. 1234) After thoroughly outlining factors in aggravation and mitigation as set out in chapter 38, section 9-1, the trial court sentenced Petitioner to death.

III

REASONS FOR DENYING THE PETITION

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 every 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.

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.

In particular, petitioner claims invokes Rule 416(h), which provides that no less than 14 days prior to trial counsel must certify that they are ready for trial and sentencing. He claims further that in his case “counsel would clearly not have certified themselves ready in the instant case were it being tried under the current rules. His claim of ineffective assistance at sentencing was raised and rejected in his direct appeal, and was raised and rejected again in his post-conviction petition. That issue is currently under advisement in the supreme court. This is a purely legal issue, and this panel does not exist to make legal determinations.

Petitioner submitted to the post-conviction court five affidavits from family members on his behalf. None of them describe any act of kindness or charity. None of his family members describe him as “loving” or “valued” — not even his own mother or father. Rather they describe him as “weird,” “hyper,” “angry,” and “different.” No one describes him as a “good person.” There is no evidence anywhere that he ever performed one good deed in his entire life. None of these people--his mother, his father, his brother, two aunts—have one good thing to say about him.

Petitioner also notes that Supreme court Rules 701 and 714 create the Capital Litigation Trial Bar, and claims that his trial counsel would not have qualified for this Bar. However, the Illinois Supreme Court noted in its opinion: “Petitioner’s co-counsel in the present case . . . both had experience in this type of case. Also, they were not at a loss as to what evidence to attempt to obtain; the problem was in obtaining the evidence they wanted.” 117 Ill. 2d at 371.

Petitioner claims that “considerable evidence” exists that the true perpetrator of this crime was an individual named Stanley Thompson, also known as Keith Earl. In point of fact *no* evidence exists of this except petitioner’s own claim. There was no reason for the police to continue to investigate this crime after Theresa Conway, who knew petitioner, identified him at her bedside.

In his amended post-conviction petition petitioner claim actual innocence and asked the court to order DNA testing of the Vitullo Kit swabs taken from the victims. He premised request in part on the then-pending statute authorizing such tests. Petitioner filed a motion to reconsider the denial of post-conviction relief after the statute became effective, but he did not ask the court to reconsider this part of its ruling. Rather, petitioner raised the issue in his appeal to the supreme court.

On April 6, 2002, the People filed their brief responding to the issues petitioner raised on appeal, and in that brief the People stated: “The People agree that this is an “identity” case, and, indeed, *when and if petitioner makes a motion premised upon section 116-3 to test the DNA material on the swabs taken from the victim, the People will not oppose it.*” (Appellee’s Br. at page 42, emphasis added)

Since that date, however, petitioner steadfastly refuses to file his motion. The

People find it absolutely astonishing that convicted murderer, or his counsel, would delay one day to have DNA testing done if that evidence could truly prove his innocence. The fact that they refuse to do so speaks volumes.

The People further submit that the possibility—indeed, the eventual certainty—of DNA testing makes this a completely unsuitable case for clemency. If the test result exonerates petitioner no clemency will be necessary. If it confirms his guilt, clemency would be inappropriate.

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 Petitioners 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 A[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 Petitioner 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 Petitioners from deciding to actually kill their victims. As the Illinois Supreme Court stated “a Petitioner who contemplates a murder for a substantial period of time, yet still commits it, is set apart from other murder Petitioners 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 Petitioner from killing the victim. Given these important policy considerations, petitioner’s request must be rejected.

Petitioner claims his sentenced should be reduced because the State’s Attorney’s decision to seek death was made without uniform protocols to guide his discretion and was not approved by a state-wide review committee. However, [i]t has long been recognized by th[e Illinois Supreme C]ourt that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all. A prosecutor's discretion extends to decisions about whether

or not the death penalty should be sought.” People v. Jamison, 197 Ill. 2d 135, 161-62, 756 N.E.2d 788 (2001). Therefore, any attempt to mandate such a review would constitute an impermissible restriction on the independence of the various State’s Attorneys under the Illinois Constitution. Moreover, petitioner does not even allege much less argue that the decision to seek death in his case was the result of an abuse of discretion. Accordingly, it must be rejected.

Petitioner states that the Governor’s Commission Recommendations 32-39 “are directed to the qualification and training of judges for death penalty trial litigation.” (Petition at page 11) He does not, however, explain even minimally how this applies to his case. In actual fact, Judge Heyda was at the time of petitioner's trial one of the more experienced trial judges in the Criminal Division.

Petitioner complains that at the time of his trial there did not exist as statutory mitigating factors the fact that he had a history of extreme emotional or physical abuse and/or that he suffers from reduced mental capacity. However, petitioner was sentenced by a judge, who is presumed to know the law, including the law that mitigating factors include “any reason why the Petitioner should not be sentenced to death” and that he should consider all mitigating evidence even if it does not pertain to one of the enumerated factors. The judge actually said before pronouncing sentence that he had listened very carefully for “some mitigating factor . . . that would allow me to sentence the Petitioner to a life sentence rather than a death sentence.” (R. 1281) The judge understood quite clearly what petitioner does not: that not just any mitigation will suffice. The judge continued, “ As I sit here right now I still try to think of some mitigating factor that would preclude the imposition of the death sentence against the Petitioner in this

case. I cannot come up with any.” (R. 1282) The judge’s statement is not a condemnation of counsel’s actions or inaction at sentencing; rather it reflects his search of the evidence at both trial and sentencing which would allow him to consider life imprisonment. He found none. Petitioner claims that he suffers from serious neurological brain damage. The evidence for this is the four-page report of Doctor Jonathon L. Hess appended to his post-conviction petition. (PCS 285-289) The report indicates “definite frontal lobe impairment,” but refers to it as a “mild problem.” (PCC 286) In an addendum to his report Doctor Hess notes that he had been asked to comment specifically on “the relationship between impaired frontal lobe function and emotional control.” (PCC 289) He notes that when the frontal lobes are underfunctioning or structurally damaged,

. . . inhibitory control over emotions can be substantially compromised. The condition is described in several ways: Rage attacks, episodic dyscontrol, disinhibition syndromes, etc. The intensity of rage that occurs under circumstances of impaired frontal lobe inhibitory structures is beyond what an intact individual would ever experience. (PCC 289)

The record does indicate that when Theresa Conway called him a liar petitioner became angry and stabbed at her jaw with the point of his umbrella. What is missing from the report of Doctor Hess, however, is any opinion that this frontal lobe condition had anything to do with the cold-blooded rape and murder of Gwendolyn Whipple, the rape and attempted murder of Theresa Conway, or petitioner’s pointing his gun at the head of Conway’s son. His actions rather demonstrate a man in control of his actions and emotions – a man who in all probability came to the apartment with the intent to commit the rape and murder, and with a plan to so already in his mind.

What is remarkable is how little emotion petitioner shows during the course of

this crime. Indeed, the murder of Gwendolyn Whipple, the attempted murder of Theresa Conway, the rape and deviate sexual assaults of both women, and the feticide were utterly and completely cold-blooded in their commission. Petitioner was calm enough that when Theresa Conway told him that the gun he was carrying was a toy he broke it open and showed her the bullets. After he had finished sexually assaulting them each twice he sat on the window ledge and pointed the gun at first one woman and then the other, and said to them, "I am going to kill you." (R. 495) Thus, it would appear that frontal lobe disorder, as it was defined and described by Doctor Hess, has nothing to do with this murder, and this mitigation evidence ceases to be mitigating.

Petitioner claim also that he suffers from a delusional disorder. This was disputed at the fitness hearing by witnesses testifying on behalf of the People, and in any case is only based upon his refusal to cooperate with his attorneys and his fixation upon the idea that the prosecution is withholding evidence of his innocence. He had never explained it's relevance to the crimes for which he was sentenced to death.

There is no evidence that he had been physically abused as a child. And while it is hardly surprising that a young man from a dysfunctional home with a mentally ill mother and raised in a dangerous neighborhood would grow up to be a criminal, it does not show him to be less "bad" than the sentencer might have been led to believe, only how he got to be as bad as he is. He is not being punished for his life, but for certain actions that he alone committed -- actions that he did not need to commit and which were not forced upon him either by the circumstances of his upbringing or the immediate circumstances of the crime itself. It has been often observed that happy well-adjusted people from warm nurturing families rarely, if ever, grow up to be killers. That this particular killer came from

a gravely dysfunctional family is hardly unexpected — indeed, it would be a good deal more surprising if he had not come from such a family. As mitigation, however, it applies to an entire class of persons, most of whom do not go on to become killers. His history, then, did not compel him to become a murderer, and his history does not immunize him from the death sentence.

He also claims to suffer from “personality disorders.” This hardly needs stating: he is a killer.

Petitioner claims that the jury was not instructed to weigh the factors in aggravation and mitigation and to determine whether death is an appropriate sentence. He claims also that at the time of his trial there was no requirement that the judge concur in a jury’s passing of the death sentence. Petitioner was not sentenced by a jury, but by the judge. These issues are irrelevant to petitioner’s case for clemency.

Petitioner notes that he was convicted by the testimony of a single-eye witness, and notes also that the recommendation of the Governor’s Commission would prohibit the death sentence in such cases. The commission’s recommendation, however, is directed more at erroneous identifications than deliberately dishonest ones, as petitioner claims is the case in this cause. The People submit that petitioner can put forward no credible reason for Theresa Conway to have framed a man she knew did not commit the crime. In any event, the DNA testing that petitioner to want will satisfy the need for corroboration.

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.

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 defendant 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.

CONCLUSION

Petitioner's acts resulted in the death of Gwendolyn Whipple and her unborn child and the severe gunshot wound to Theresa Conway – inflicted after petitioner had raped and sodomized both women. The crime he committed was calculated, premeditated, and utterly cold. (“At this point, the Petitioner walked to the window, opened it, and sat on the ledge. The Petitioner pointed the gun back and forth from left to right, aiming alternately at each of the women while telling them ‘I’m going to kill you.’” People v. Shum, 117 Ill. 2d at 334.) Petitioner has yet to demonstrate that he deserves any more compassion or consideration than he gave to Gwendolyn Whipple, her unborn child, or Theresa Conway.

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

Respectfully submitted,

RICHARD A DEVINE
State's attorney of Cook County

Celeste Stewart,
William L. Toffenetti,
Assistant State's Attorneys