OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Docket No.
vs.	)	
	)	
MARIO FLORES,	)	Inmate No. N-62349
	)	
	)	

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

PEOPLE'S RESPONSE IN OPPOSITION TO PETITION FOR EXECUTIVE CLEMENCY

HEARING REQUESTED

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I

HISTORY OF THE CASE

The defendant was convicted of murder and armed robbery in the Circuit Court of Cook County. The same jury found that defendant was eligible for the death penalty because defendant had actually killed the victim, Gilbert Perez, and the victim's death had occurred during the course of an armed robbery. The jury then returned a death sentence. Defendant's convictions and sentence of death, as well as the denial of his first post-conviction petition, were affirmed on direct appeal. People v. Flores, 128 Ill. 2d 66 (1989). The denial of defendant's successive petition for post-conviction relief was also affirmed. People v. Flores, 153 Ill. 2d 66 (1992). Defendant's federal habeas corpus petition is pending in United States District Court.

II

FACTS OF THE CASE

Defendant, Mario Flores, was indicted for murder, armed robbery, and armed violence; all charges arising out of the January 1, 1984, shotgun murder of Gilbert Perez. (R. 706-711) At the conclusion of a jury trial in the Circuit Court of Cook County, defendant was found guilty of murder and of armed robbery. (R. 541-542) Following a sentencing hearing held before the same jury, Flores was sentenced to death for the murder of Gilbert Perez. (R. 678-682)

Gilbert Perez met his death as the result of multiple shotgun wounds inflicted upon him during the early morning hours of January 1, 1984. The basic question presented to the jury as trier of fact here was whether the defendant was the person who had inflicted those fatal wounds.

Anna Rodriguez was the mother of the victim, Gilbert Perez. (R. 209-210) She last saw him alive shortly after midnight on January 1, 1984, when he left her home. (R. 210-211) When she next saw her son, in a hospital, he was dead. (R. 211)

On the morning of January 1, 1984, Willie Collins was driving from his home to a church at Van Buren and Sacramento in Chicago. (R. 212-213) As he made a right turn onto St. Paul Street, the headlights of his automobile illuminated the body of a man lying in the snow on St. Paul Street. (R. 213-214) He saw a police officer who appeared to be investigating an accident on Western Avenue, drove to Western, and told the officer what he had seen. (R.214-215)

The policeman summoned by Mr. Collins was Patrolman Herbert Matthews. (R. 215-216) At approximately 6:50 a.m. on January 1, 1984, he was investigating an accident on Western Avenue when Mr. Collins approached him. (R. 215-217) He went to the scene and observed the body of a man lying near the mouth of an alley on St. Paul Street. (R. 217) He observed that the

man had been shot, and called other officers to the scene to investigate. (R. 217) He observed spent shotgun shells on the ground near the body, but did not know how many shells were lying in the snow. (R. 218)

Detective Lawrence Poll, a Chicago Police Officer assigned to Area Five Violent Crimes, arrived on the shooting scene at about 7:00 a.m. (R. 222-224) He observed the body of the victim lying near the mouth of an alley at 2259 North St. Paul Street. (R. 224) The body was lying on its left side, face down in the snow. There were pools of blood around the body itself, and blood spattered on a nearby wall. (R. 225) Five spent shotgun shells were recovered from the area of the victim's body by crime laboratory personnel. (R. 225) The area was industrial, with no private dwellings but only warehouses in the area. (R. 225-226) The weather was cold and the victim's face and the left side of his body were frozen to the ground. (R. 225, 232-233) The witness subsequently learned that the victim was Gilbert Perez (R. 229), and that he was a member of the Latin Stylers street gang. (R. 231-232)

Nineteen year old Victor Flores, who was not related to the defendant but who had known him for about three years (R. 349-350), testified concerning what took place on the morning of January 1, 1984. He testified that both he and Mario Flores were members of the Latin Brothers street gang. (R. 350-351) Shortly after midnight on January 1, 1984, defendant telephoned the witness and asked if he wanted to go out. (R. 351) The witness told defendant he would have to get back to him but, when defendant called back and said he would pick Victor up, Victor agreed to go. (R.351-352) The defendant picked the witness up driving defendant's sister's automobile, a burgundy, 1982 Buick Regal. (R. 352) They decided to go downtown and to that end drove east on North Avenue. However, weather conditions became worse and, at a point between Damen and

Ashland Avenues, they turned back. (R.352-353) As defendant drove west on North Avenue, another automobile passed them at a high rate of speed, forcing them to move to the side to get out of the way. (R. 353) They saw this same automobile again at the intersection of North and Western Avenues, where it had become involved in an accident with another vehicle. Defendant pulled the car he was driving to the side of the road. At that juncture, another automobile arrived and stopped beside them; this automobile being driven by Harry Gomez. (R. 354-355) Gomez and defendant discussed how each of them had almost been struck by the automobile involved in the accident at the intersection.

Gomez, defendant and the witness then got out of their respective automobiles. (R. 356-357) The man involved in the accident was the victim, Gilbert Perez. (R. 356) Defendant and Gomez started toward the victim, who was standing in the intersection with the woman whose car Perez had struck. (R.356) The victim was threatening the woman, and when defendant and Gomez approached, he threatened them also, although he had no weapon. (R. 357-358) The victim made a pitchfork sign, indicating membership in a street gang known as the Latin Stylers. (R. 358) This gang is one of a group of gangs known as "Folks." (R. 358-359) The Latin Brothers, to which defendant and the witness belong, is a gang related to another group known as "People." (R. 359) At this juncture, defendant returned to the automobile he was driving and took a shotgun from the trunk. (R. 359) The witness described this weapon as a sawed-off, single barreled, 12 gauge shotgun with a pump action. (R. 359-360) Harry Gomez said something to the defendant, then went back to the victim and put an arm around his shoulder. (R. 359-360) Gomez brought the victim to defendant's automobile and told the witness to slide over into the driver's seat. The victim then got into the front passenger seat, while defendant sat in the back seat with the shotgun still in his

possession. Gomez returned to his own automobile, and defendant instructed Victor Flores to drive and to follow Gomez. (R.360-361) Defendant told the victim that Harry was "Mousey" from the "Ds," a gang associated with the "Folks," as was the victim. In reality, defendant and the witness were members of the Latin Brothers, "People," and rivals of the "Folks." (R. 362)

The two automobiles drove on Western Avenue to St. Paul Street, turned right, and drove half a block; stopping in a factory area. (R.362) Harry Gomez got out of his automobile, as did defendant and the victim. (R. 363) At this time, defendant was holding the shotgun he had earlier taken from the trunk of the burgundy automobile. (R. 363) Defendant took the victim toward Gomez at which time the witness began to turn the car around. (R. 363-364) As he was doing this, Victor Flores heard "four or more" shots fired. (R. 364) He looked in the rear-view mirror and saw defendant holding the shotgun, the victim lying on the ground, and Gomez bending over the victim. (R. 364) The witness drove off at a high rate of speed. (R. 355) Defendant and Gomez, in Gomez's car, caught up with him on Western Avenue and directed him to drive to Gomez's house. (R. 365-366) There, defendant told him not to worry about what had happened on St. Paul Street. (R. 368)

Gomez was holding a handfull of chains which had been taken from the victim. (R. 367-368) Defendant then drove the witness home. (R. 368-369) On November 10, 1984, the witnesses and defendant were arrested as they parked the burgundy automobile behind defendant's house. (R. 369) Victor Flores subsequently gave a statement to an Assistant State's Attorney at the police station. (R. 370-371) The witness was arrested in connection with the instant murder. (R. 374)

On cross-examination the witness stated that he had made no "deal" with the prosecution, but that he was hoping for consideration in return for his truthful testimony at

defendant's trial. (R. 374-395) He further stated that the prosecutors had told him to tell the truth (R. 399), and that he was hoping that by doing so he might help himself as to the charges against him. (R. 400-401)

The beginning of events leading to the death of the victim was witnessed by Nancy Lebron. (R. 273) On the morning of the murder, she lived in a second floor apartment overlooking the intersection of North and Western Avenue in Chicago. (R.273-274) At about two a.m., she was awakened by the sound of an automobile accident in the intersection. (R. 274-275) From her window she saw one of the cars involved stopped near the electrical pole. As she watched, a "wine" colored automobile arrived on the scene. (R. 275-276) Shortly, another automobile arrived from a different direction. (R. 276) At this juncture she saw the victim, Gilbert Perez, get out of the automobile near the electrical pole. (R. 276-277) She then saw men getting out of the cars which had just arrived on the scene. She saw defendant, Mario Flores, go to the trunk of the wine colored car and remove a shotgun, which he pointed in the direction of the victim. (R. 277-278) One of defendant's companions then said something to him, and defendant put the shotgun into the rear seat of the wine colored car. (R. 278-279) The victim was eventually led to the wine colored automobile, where he sat in the front passenger seat. (R. 279) Another person got into the driver's seat and defendant got into the rear seat where he had previously placed the shotgun. (R. 279) The witness wrote down the license number of the wine colored automobile. (R. 279-280) As other evidence in the case shows, one digit of the number was left out when it was passed on to police. The two automobiles then drove off. (R. 280) Her husband telephoned police with the license number, but did not leave his name. (R. 280) A few days later she learned that the victim had been murdered. (R. 280)

Shortly thereafter, she was contacted by Officer Guevara of the Chicago Police Department. (R. 281) She testified that she told him that she did not wish to get involved since she feared for the safety of her children. (R. 281-282) However, in November, 1984, she contacted the officer and told him what she had seen. (R. 282) On November 9, 1984, she looked through six books of photographs at the police station and identified photographs of Mario Flores and Sammy Ramos. (R. 282-283) On the following day, November 10th, she viewed a lineup in which she identified Mario Flores as the man with the shotgun and Victor Flores as the driver of the wine colored car. (R. 283-284) She also stated that on the night of the murder, Mario Flores had been wearing a green jacket. (R. 287)

On cross-examination, Ms. Lebron stated that she had decided to go to the police since people were coming to her home threatening her children. (R. 292-294) When she told the police what she knew, those visits stopped.

Detective Jerome Bogucki conducted a six man lineup on November 10, 1984, for Nancy Lebron. (R. 300) There she identified Mario Flores and Victor Flores. (R. 300-302) Sammy Ramos was also in the lineup, but Ms. Lebron did not identify him as involved in this crime. (R. 302) She also identified a maroon automobile parked in front of the police station bearing the license number AA 9559. (R. 303) She also identified a green jacket as resembling one warn by defendant on the night of the murder. (R. 303-304)

Rinaldo Guevara was a gang crimes specialist with the Chicago Police Department. (R. 237-238) On the day following the murder, he became involved in the investigation when he received an anonymous telephone call about the killing. (R. 238-239) As a result of that call he sought out Nancy Lebron who he knew. (R. 239-241) Several days later he met Ms. Lebron and

her daughter on the street and spoke to them about the murder of Gilbert Perez. (R. 241) Following this, a second anonymous telephone call was received concerning the license number of an automobile seen at North and Western Avenues on the night of the murder. (R. 241-242) The number, as he received it, was AA 959. Investigation of the automobile bearing these plates showed it not to fit the description they had of the automobile involved in the murder. The description which police had was of a 1982 Buick Regal, maroon in color, with "smoked" windows. (R. 242-243)

On November 9, 1984, he received a telephone call from Nancy Lebron and subsequently met with her in his office. (R. 243-245) She stated that she could identify the men involved in the incident at Western and North Avenues. She looked through six books of photographs, definitely identifying Mario Flores and tentatively identifying Sammy Ramos. (R. 245-246) Sammy Ramos was located and brought into the police station. (R. 246) After a conversation with him, it was determined that the actual license number of the wine or maroon automobile involved was AA 9559, an automobile registered to Lena Flores, sister of the defendant. (R. 246-247)

On the following day, November 10th, Mario Flores and Victor Flores were arrested while driving this automobile. (R. 248-249) Subsequently, pursuant to a search warrant, a green jacket was obtained from the Flores residence. (R. 249-250)

Sammy Ramos was called as a witness by the People after having been granted immunity. (R. 317-319) He stated that he knew Mario Flores and that both he and defendant were members of the Latin Brothers. (R. 321, 342) He stated that he did not recall a conversation with Mario Flores in January, 1984 (R. 321-322), and that although he did remember being arrested in

connection with this offense and taken before the Grand Jury, he did not recall his testimony there. (R. 322-323) After reading over the Grand Jury transcript, the witness stated that it did contain the content of a conversation had between himself and defendant on January 7, 1984. (R. 323-324) However, the witness insisted that he did not independently recall what he said before the Grand Jury. He did recall that the conversation took place right in front of his house. (R. 325)

The Grand Jury testimony was then gone over with the witness. It indicated that Ramos had a conversation with defendant in which defendant described the incident in which he, Victor Flores and Harry Gomez came upon the victim at the scene of an accident; that they told the victim that they were "Folks" and he accompanied them in their car; and that defendant shot the victim with a shotgun on St. Paul Street. (R. 325-331) The witness was also told that jewelry was taken from the victim.

Ramos further testified at trial that he did not believe any of what defendant told him since defendant would not have done anything like that. (R. 340-341, 344-345)

Assistant State's Attorney Jack Quirk testified that he questioned Sammy Ramos before the Grand Jury on November 13, 1984, and that the transcript accurately reflected the testimony given by Ramos at that time. (R. 346-347) It was stipulated that the cause of death of the victim was multiple shotgun wounds, involving massive injuries to the head, chest, and internal organs. (R. 410-414) It was further stipulated that Lina Flores, sister of the defendant, was the owner of the wine or maroon automobile involved in the murder. (R. 414) Thirdly, it was stipulated that defendant was twenty years of age at the time of the instant trial. (R. 414)

Vincent Lamora, was a Chicago Police Department firearm expert. (R. 438- 439) He testified that on January 3, 1984, he examined a number of shotgun pellets received from the

medical examiner in connection with the murder of Gilbert Perez. (R. 439-440) Subsequently, he examined five spent 12 gauge shotgun shells in connection with this case. He was able to definitely determine that three of these had been fired from the same shotgun, but could not make a definate determination as to the other two shells. (R. 442- 443) The nature of the weapon involved appeared to be a pump action or auto-load 12 gauge shotgun. (R. 444-446) All five shells could have been fired from the same shotgun; reduced pressure in the shells can cause them not to "slam" back against the breach face as hard as others so that the same markings would not be left on them. (R. 446-447) All five shells bore similar firing pin markings. (R. 447)

Following closing arguments and instructions to the jury, the jury returned verdicts finding defendant guilty of murder and of armed robbery. (R. 541-543)

At the first phase of the subsequent sentencing hearing before the same jury, Officer Renaldo Guevara testified that on November 10, 1984, subsequent to Mario Flores' arrest, he spoke to Flores in the police station. (R. 559-560) Defendant told him that his date of birth was July 26, 1965, which meant that on January 1, 1984, defendant had already passed his eighteenth birthday. (R. 560)

Larry Zadlo testified that he was an employee of the Cook County Clerk, that he was present in the courtroom when the jury returned the guilty verdicts in the instant case, and that judgment had been entered on those verdicts. (R. 561-562)

Following closing arguments and jury instructions at this first phase of the sentencing hearing, the jury returned a verdict finding defendant eligible to receive the penalty of death. (R. 572-573)

At the second phase of the sentencing hearing, it was stipulated that defendant, as a juvenile, had been adjudged guilty of criminal trespass to a vehicle, retail theft, and on two occasions of possession of a stolen. motor vehicle. (R. 582-583) Each of these adjudications had resulted in defendant being placed on probation.

Officer Renaldo Guevara testified that he had been acquainted with defendant for five years and that Mario Flores was an active, hard-core member of the gang known as the Latin Brothers. (R. 583-585)

Chicago Police Officer Roger Hodge testified that on November 22, 1983, the police had under surveillance a garage housing stolen automobiles. (R. 588-589) At about 9:30 that evening, he saw the defendant. (R. 588) A black automobile pulled up to the garage, its passenger began to flee on foot, and defendant, who was driving, got out and began to walk away. (R. 589-590) The witness caught up with defendant and placed a hand on his shoulder. When another officer shouted that the black automobile was stolen, defendant ran and the witness lost him. (R.590-591) Since the officer remembered seeing defendant somewhere before, he checked his files and was able to identify the person as Mario Flores. (R. 591) He went to defendant's home, and then to a high school where he found out that defendant had been suspended. (R. 591-592) This same witness arrested defendant again in 1984, in connection with the shooting of Louis Rosero. (R. 592)

Louis Rosero testified that he was 25 years of age. (R. 594) On August 5, 1984, at about 12:30 a.m., he was driving in the area of Lockwood and North Avenues when he was stopped by the defendant. (R. 595) Flores told the witness that he was going to give him some tires in lieu of the money which he owed him, and told him to drive to a particular alley. (R. 596-597) Defendant instructed him to wait while defendant opened the garage. When defendant returned without

opening the garage, the witness got out of his automobile. (R. 597-598) The defendant was now holding a .38 caliber pistol and opened fire on Rosero. Rosero was struck five times in the chest, and by two other bullets in the back, these severing his spinal cord. (R. 598) The witness now has sections of artificial intestines in his body, and a colostomy bag. (R. 598-599) He will never walk again. (R. 599) As a result of this shooting, the witness spent six months in the hospital and underwent a number of surgeries. (R. 600-601) He still must visit his doctor every two weeks. Mr. Rosero testified that while firing the shots at him, defendant was smiling. (R. 599)

III

REASONS FOR DENYING THE PETITION

The facts of this case alone are sufficient to deny defendant's request for clemency. The defendant and his cohorts lured Gilbert Perez into a false sense of security by telling him that they all belonged to the same nation of gangs. After gaining Gilbert Perez's trust they took him from the scene of his car accident and drove away. While in the car they reassured him of their good intentions. However, they drove to an industrial area during those early morning hours of New Year's Day, got him out of the car and then defendant used a shot gun to kill him. The attack was so vicious that the shotgun wounds resulted in massive injuries to Gilbert's head, chest and internal organs. Indeed, a portion of Gilbert's head was blown away as a result of defendant's attack. When the body was found it was frozen to ground, and when Gilbert's body was rolled over his intestines flowed onto the ground. Given the brutal, heinous and vicious nature of the crime it is clear that defendant does not deserve clemency.

Defendant presents one overriding reason in support of his plea for clemency, that he was found eligible for the death penalty pursuant to a flawed factor – the death occurred during the course of an armed robbery. This claim was emphatically rejected by our Supreme Court when it held,

The defendant also contends there was error in his sentencing proceeding. The defendant's first argument is that since the armed robbery conviction is not before this court for review, and the armed robbery served as the predicate making him subject to the death penalty under section 9 -- l(b)(6) of the Criminal Code (Ill. Rev. Stat. 1985, ch. 38, par. 9 -- l(b)(6)), the death sentence must be vacated. We disagree.

Section 9 -- 1 (b)(6) provides:
"A defendant * * * who has been found guilty of murder may be sentenced to death if:

* * *

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual:

(i) was actually killed by the defendant * * *

* * * and

(b) in performing the acts which caused the death of the murdered individual * * * the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: * * * armed robbery * * *." Ill. Rev. Stat. 1985, ch. 38, par. 9-1 (b)(6).

The defendant's argument fails to consider that it is the evidence at trial and at sentencing establishing that the murder was committed in the course of an armed robbery that subjects the defendant to the death penalty under section 9 -- l(b)(6), and not the conviction itself. Indeed, the armed robbery need not have been completed to make the defendant subject to the death penalty under the statute. See People v. Ramirez (1983), 98 Ill. 2d 439, 458.

The defendant also contends that the evidence was

> insufficient to subject him to the death penalty under section 9 -- l(b)(6) in that it did not show that the victim was murdered in the course of armed robbery. The defendant says because the record shows that the victim was killed instantly from a shotgun blast and that the victim's possessions were taken thereafter, that no "force" was involved in taking the victim's possessions. He argues also that there is nothing in the record suggesting an intent to rob the victim before he was killed. The defendant says the intent to rob was simply an unrelated afterthought.
>
> It is true that armed robbery is the taking of property from the person or presence of another by the use of force or by threatening the imminent use of force while armed with a dangerous weapon. (Ill. Rev. Stat. 1985, . ch. 38, par. 18 -- 2.) It is of no significance here, however, that the armed robbery did not commence prior to the fatal gunshots to subject the defendant to the death penalty under section 9 -- l(b)(6). As this court stated in People v. Richardson (1988), 123 Ill. 2d 322,359:
>
> "Just as the phrase 'in the course of does' not require that defendant complete one of the other felonies in order to be eligible for the death sentence [citation], we also believe that it does not require that the armed robbery commence prior to the fatal gunshot, since the precise timing of the offenses is not necessarily indicative of defendant's intent. The jury concluded , beyond a reasonable doubt that defendant committed both a murder and an armed robbery, which offenses occurred essentially simultaneously. The trial testimony and verdicts sufficiently support the court's finding that the murder occurred 'in the course of an armed robbery.'"

People v. Flores, 128 Ill. 2d at 97-98. The Supreme Court's ruling is not seriously challenged by defendant, as he is merely seeking to have another forum weigh the evidence. The evidence that defendant actually killed Gilbert and that when he performed the acts which killed Gilbert the defendant acted with the intent to kill him was overwhelming. As the Supreme Court said "...from the record it can be seen that the evidence was not complicated..." Id. at 94. Defendant also asserts that he did not commit the robbery, that that was done by this cohort. The jury found

defendant guilty of armed robbery. The question of who did the actual taking is of no moment because defendant was present at the time and held and fired the gun which resulted in Gilbert's death. Defendant did nothing to disassociate himself from these crimes, rather he was the lead actor in the chain of events which culminated in Gilbert's death.

Defendant also claims that since he has been a model prisoner and become an artist since his incarceration he should be granted clemency. Being a model prisoner means one thing only and that is that defendant functions well in a controlled environment. Defendant's criminal history tells more of his true character. Defendant had previously shot an individual numerous times leaving him paralyzed for life. The victim said that defendant was smiling as he shot him. Defendant was a young man when he committed this murder, that is why his criminal history is not more lengthy. But make no mistake about it, this defendant took advantage of his time as a free man and started his criminal career at an early age. That career escalated in seriousness as he got older and progressed to the point where he committed a brutal, heinous and vicious murder.

Defendant also relies on an affidavit by an "expert" in an attempt to demonstrate alleged flaws in the investigation and trial of his case. The People submit that our Supreme Court is a better judge of the facts of this case and a better interpreter of the law applied to the case than is defendant's "expert". The Illinois Supreme Court has twice reviewed this case and in each instance has found that defendant's right to a fair trial was observed.

Defendant 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, defendant 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 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 defendant's case. Instead, a true injustice would only result if it were reflexively determined that defendant's trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that defendant has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings. Moreover, defendant 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. Although defendant cites to no specific rule, statute or proposal in support of his petition, the People feel the following may apply to his petition.

Supreme Court Rules

Defendant 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

Defendant 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.

Eligibility Factors

Defendant 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 armed robbery, rape or home invasion are properly death eligible to help deter the defendant from killing the victim. Given these important policy considerations, defendant's request must be rejected.

Decision to Seek Death

Defendant 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, defendant 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.

Statutory Mitigating Factors

Defendant complains that his jury was not instructed to consider 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, although the jury was not expressly instructed to consider these factors, it was instructed that mitigating factors include "any reason why the

defendant should not be sentenced to death" and that it should consider all mitigating evidence even if it does not pertain to one of the enumerated factors. Illinois Pattern Jury Instruction 7C.06.

Allocution

Defendant 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, defendant testified under oath at his sentencing hearing to explain why he should not be sentenced to death. Therefore, he was given every opportunity to present himself to the trier of fact before he was sentenced.

Instruction on Alternative Sentences

Defendant believes that his death sentence should be commuted because the jury was not instructed as to all the possible alternative sentences, including that he could have been sentenced to as little as 20 years imprisonment. However, except in cases where the only alternative is mandatory natural life, such a rule would actually serve to prejudice the defendant. If a jury is told that the defendant could be sentenced to as little as 20 years (even though such a sentence is highly unlikely), the jury might determine that the death penalty is necessary to ensure that he is never released into society. It is for this reason that current Illinois law requires that juries be instructed

not to concern themselves with sentencing issues. Illinois Pattern Jury Instructions 1.01 & 7C.05 The only exception to this rule is that the jury must be informed where natural life imprisonment is the only available option. People v. Gacho, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988). Accordingly, despite the Governor's Commission's recommendation, the fairness of defendant's sentencing hearing was ensured by not instructing the jury on the available sentencing options.

Sufficient to Preclude

Defendant asserts that clemency is warranted because the statutory language and corresponding jury instruction that after considering all of the evidence that "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 defendant's case, any confusion in the language of the instruction was negated by the closing arguments.

Judicial Override

Defendant 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. Defendant 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 defendant's trial denied his post-trial motions, it is clear that the judge would not have overridden the jury's verdict.

Vienna Convention

Defendant asserts that he is entitled to clemency because he is a foreign national and he was not properly notified of his rights to contact his consulate pursuant to the Vienna Convention. However, every court which has examined such has determined that a violation of the treaty does not warrant suppression of evidence or dismissal of the indictment as a remedy. People v. Kim, 318 Ill. App. 3d 1078, 1080, 743 N.E.2d 656 (1st Dist. 2001); People v. Villagomez, 313 Ill. App. 3d 799, 812, 730 N.E.2d 1173 (2000); United States v. Li, 206 F.3d 56, 63 (1st Cir. 2000) (noting that the State Department believed that the only remedies for failure of consulate notification under the Vienna Convention are diplomatic, political or those that exist between states under international law and that the Vienna Convention does not create individual rights).

Moreover, a party seeking relief under the Convention must show actual prejudice in order to be entitled to that relief. Villagomez, 313 Ill. App. 3d at 811. To establish prejudice, a defendant must show that: (1) he did not know of his right to contact the consulate for assistance; (2) he would have availed himself of the right; and. (3) there was a likelihood that the consulate would have assisted defendant. Id. Because defendant does not even allege that he was prejudiced, it is clear that he is not entitled to have his sentence commuted.

In conclusion, defendant does not deserve clemency. As our Supreme Court held,

> The record shows that the victim was brutally, and in cold blood, shot repeatedly at point-blank range. The

> defendant was not without a significant criminal history, as shown by his juvenile adjudications and the testimony of Louis Rosero. Though there is evidence that the defendant is an accomplished athlete and has shown willingness to help other inmates while in prison, factors such as those do not preclude imposition of the death penalty. (People v. Sanchez (1986), 115 Ill. 2d 238, 275; People v. Brownell (1980), 79 Ill. 2d 508, 538.) Given the record of extreme aggravation and the scant evidence in mitigation, it cannot be said that the imposition of the death penalty here is not commensurate with the gravity of the offense and the character of the defendant. People v. Sanchez (1986), 115 Ill. 2d 238, 274; People v. Free (1983), 94 Ill. 2d 378, 428-29.

Flores, 128 Ill. 2d at 101-02. For these reasons, defendant's request for clemency must be denied.

CONCLUSION

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

Respectfully submitted,

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