

OCTOBER 2202 SESSION
PRISON REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
vs.)	Docket No. \
)	
MARK JOHNSON,)	Inmate No. N-02213
)	

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

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**PEOPLE’S RESPONSE IN OPPOSITION TO PETITION
FOR EXECUTIVE CLEMENCY**

—————
HEARING REQUESTED

RICHARD A. DEVINE
STATE’S ATTORNEY OF COOK COUNTY

By: LINDA WOLOSHIN
SHAUNA BOLIKER
MARY LOU NORWELL

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I

HISTORY OF THE CASE

Petitioner was arrested on December 5, 1985 for the murder of Willie Robinson and the rape of Cynthia Love. On March 11, 1988, the jury returned verdicts of guilty of both offenses. On March 15, 1988, the same jury found petitioner eligible for the death penalty. On March 17, 1988, the jury found no mitigating factors sufficient to preclude a sentence of death.

Petitioner's convictions and sentence were affirmed by the Illinois Supreme Court. People v. Johnson, 146 Ill. 2d 109, 585 N.E.2d 78 (1991) On April 5, 1993, petitioner filed a post-conviction petition. On October 12, 1994, petitioner filed two supplemental petitions. On November 23, 1994, petitioner filed the first of two additional supplemental petitions. His third supplemental petition was refused by the court on May 15, 1995. On November 21, 1994, the People filed a motion to dismiss petitioner's post-conviction petition. On May 15, 1995, petitioner filed a memorandum in opposition to the People's Motion to Dismiss. The People's reply and supplemental motion to dismiss were filed on July 21, 1995. On August 4, 1995, petitioner filed a memorandum in opposition to the People's supplemental motion to dismiss.

On June 11, July 16 and August 19, 1997, a hearing was held on the People's motion to dismiss, petitioner's fitness to proceed with the post-conviction petition or his fitness at the time of the filing of his post-conviction petition and a hearing to determine whether petitioner took psychotropic drugs at the time of his trial and if so, whether he was fit at that time. On August 19, 1997, the court held that petitioner was fit to proceed with the post-conviction petition. On August 21, 1997, the court ruled that petition was fit at the time of trial. On September 10, 1997, the court dismissed petitioner's post-conviction petitioners. The court denied petitioner's motion to reconsider on September 17, 1997.

The Illinois Supreme Court vacated the denial of petitioner's petition for post-conviction relief, finding that the trial court had erred in allocating the burden of proof at the hearing. The Supreme Court remanded for further proceedings to determine petitioner's fitness to proceed with post-conviction proceedings. People v. Johnson, 191 Ill. 2d 257, 730 N.E.2d 1107 (2000)

II

FACTS OF THE CASE

The Trial

On November 26, 1985, Cynthia Love was introduced to defendant by her uncle, Willie Robinson, whom she called Pete. (R. 261, 262, 263) The name given for defendant was Allen. (R. 262, 288) Approximately 1:30 in the afternoon of that day, the three went to the apartment at 3921 West Huron. (R. 261, 265, 289) Cynthia was preparing to move to California and once inside the apartment, she began sorting clothing. (R. 266)

As Cynthia worked, defendant asked Willie Robinson to go to the liquor store. (R. 266-267) Willie Robinson left, returning approximately fifteen minutes later. (R. 267) Defendant and Robinson talked and drank. (R. 267) Approximately one-half hour later, Willie Robinson left for the liquor store for the second time. (R. 267-268, 294) Defendant and Cynthia were alone in the apartment. (R. 267)

Defendant told Cynthia that he wanted to have sex with her -- that he wanted her body. (R. 268, 295) Cynthia told him that it was her body and that she had a right to say "no" about her own body. (R. 268) Defendant stood in front of her and said, "what if I say your no means no and my yes means yes." (R. 268)

As defendant spoke those words, he put gloves on his hands and punched a fist into an open hand. (R. 268-269) He told Cynthia, "bitch, take off them clothes because I'm king and whatever I say go. And take 'em off now." (R. 269, 296) Defendant reached behind his pockets and held his hand behind his back as though he had something. (R. 269) Cynthia took off her dress and bra. (R. 269) Defendant ordered her to remove everything. (R. 269) As she undressed, Cynthia saw the knife in defendant's hands.

(R. 269) After Cynthia's clothing was off, defendant tied her hands behind her back and tied her feet. (R. 270)

Willie Robinson knocked on the door. (R. 270) Defendant stepped back a couple of inches, put his finger to his lips and said, "sh." (R. 270) He was waving the knife in his hand. (R. 270) When Robinson knocked a second time, defendant pointed the knife at Cynthia and told her to crawl behind him. (R. 270-271, 272)

Defendant went to the kitchen porch and Robinson entered, asking what was going on. (R. 272) Defendant grabbed the 40-year-old, 5'6", 127-pound man from behind. (R. 272, 307) With his left hand, he held Willie Robinson's head. (R. 272) With his right hand, he cut Willie Robinson's throat. (R. 272) Defendant continued to stab Robinson as Robinson struggled to get up. (R. 272) When the struggle was over, Willie Robinson lay on the floor near the kitchen door. (R. 273)

Defendant ordered Cynthia to crawl to the sun porch. (R. 273) There he compelled her to perform oral intercourse on him and told her that the only reason he was keeping her alive was because he always wanted to write a book. (R. 273) Defendant then returned to Willie Robinson and began cutting his throat. (R. 273)

Defendant took a kitchen chair and moved it into a bedroom. (R. 273) He forced Cynthia to crawl behind him, ordering her to hurry up. (R. 274) He again thrust his penis into her mouth. (R. 274) Again he returned to Willie Robinson and again he cut him. (R. 274)

Defendant moved the chair back into the kitchen and once again thrust his penis into Cynthia's throat, warning her, "you better not throw up on me or I'll kill you right now, I'll cut off one of your titties." (R. 274)

Defendant forced Cynthia to turn around and bend over and tried to force his penis into her

rectum. (R. 275) Unable to accomplish that, he had vaginal intercourse with her. (R. 275) Once again he ordered Cynthia to crawl behind him, telling her to hurry up and do as he said and calling her his slave and his dog. (R. 275)

Defendant told Cynthia that he had to use the bathroom and to hurry up and crawl behind him. (R. 275) Instead, he called her to a corner of the living room where he urinated on her. (R. 275)

Defendant ordered Cynthia back to the kitchen, waving the knife at her as he had each time he forced her to crawl. (R. 276) Defendant put the chair in the pantry and began to have oral intercourse with her there. (R. 276) Defendant told Cynthia she had better not start crying "because you see what I did to your uncle, same motherfucking way I do you." (R. 276) He told Cynthia she'd better do it right if she wanted her daughter to see her alive. (R. 276) He told her that she was to answer "yes, sir" to everything he said. (R. 276, 300)

Defendant went to Willie Robinson and cut him again. (R. 276) He returned to the pantry and told Cynthia to lick the blood off the knife and to lick it all off or he would kill her. Cynthia licked the blood off the knife. (R. 277)

Defendant went to the window, checking to see that no one from upstairs knew what was going on in Cynthia's apartment. (R. 277) Defendant then had Cynthia crawl to her uncle. (R. 277) Defendant took Willie Robinson's penis from his pants and ordered Cynthia to suck it. (R. 277) When Cynthia bent her head over, defendant bent down to her and, with the knife over her, said, "you better do it or I'll kill your goddamn ass, and I, I -- I have the knife right over you if you make a move." (R. 277) Cynthia took her uncle's penis into her mouth. (R. 277)

When defendant told Cynthia to stop, he placed Willie Robinson's penis back into his pants. (R. 278) He then searched him. (R. 278)

Defendant untied Cynthia and told her to move Robinson's body. (R. 278, 286) Cynthia pulled her uncle by his feet toward the living room. (R. 278, 285-286)

Defendant began having oral intercourse with Cynthia once again, telling her "I could stay here all night and one, two, three days don't make me no motherfucking difference as long as you get me off." (R. 278, 300) Defendant never ejaculated. (R. 278, 298, 300)

After completing the last act, defendant went looking for something with which to tie Cynthia up. (R. 278) He tied her hands together and her feet together, and as she lay on her stomach, defendant pulled the rope from her feet to her hands. (R. 279) He put a piece of clothing in her mouth. (R. 279)

Defendant told her, "don't make me no motherfucking difference, I'm used to this kind of shit, you telling ain't do no good, I did this many times. If I have to I run state to state." (R. 279, 301) Defendant left. (R. 279, 299)

Approximately one-half hour later, defendant returned. (R. 279, 299) He kicked Cynthia in the side to make sure she hadn't gotten loose. (R. 279, 299) Cynthia heard paper rattling and matches striking. (R. 279-280) Defendant checked on the body of Willie Robinson. (R. 280) He left for the second time. (R. 280)

Cynthia lay in the apartment for a long time, hoping defendant would not return. (R. 280) After a period of time, she attempted to work her way out of the ropes. (R. 280) The knots loosened. (R. 280) Once out of her bonds, Cynthia ran into the bedroom, grabbed a coat and ran to the people upstairs. (R. 280) They had no telephone. (R. 280) Cynthia went around the corner and telephoned her aunt and the police. (R. 280)

Approximately 10:50 p.m., Officer Michael Rose responded to 3921 West Huron. (R. 246, 252) Officer Rose entered the apartment where he found Willie Robinson dead. (R. 247) He secured the

apartment and called for Area Four Violent Crime personnel. (R. 248)

Officer Rose spoke with Cynthia Love for a few minutes until the arrival of Area Four Violent Crime detectives. (R. 248, 281) She was shaky, almost panicky. (R. 249) She had been crying and was very hard to communicate with. (R. 249, 281)

Detective Thomas Sherry arrived at the scene shortly after 11:00 p.m. (R. 326) He saw Cynthia Love, dressed in a wool overcoat, seated on some lawn furniture in a storage area. (R. 328) He entered the apartment. (R. 328)

Clothing was strewn about the kitchen area. (R. 329) In the entranceway was the body of Willie Robinson. (R. 329) He was lying on his back and bleeding from several wounds of the head. (R. 330) There were two large gaping wounds of the throat, one so deep you could see back to the trachea, almost to the vertebrae. (R. 330) In that wound was a burnt cardboard match. (R. 330) The top of his pants waistband and the zipper were open, exposing his underwear. (R. 330)

Also in the kitchen were a portion of a venetian blind cord and portions of electrical cords which were knotted. (R. 331)

Detective Sherry attempted to interview Cynthia Love. (R. 281, 334, 348-349) She was withdrawn, almost in a reclusive state. (R. 334) When she did respond to questions, she would mumble and stare at the floor. (R. 334)

Cynthia was taken to Area Four Headquarters and then to the hospital. (R. 281, 293, 337) From the hospital, Cynthia was returned to the police station where she picked out a photograph of defendant. (R. 282, 283)

Detective Sherry went to the area of 3400 Jackson Boulevard. (R. 335) At 3341-1/2 West Jackson, he spoke to a Donna Randolph who identified Allen as Allen Johnson. (R. 336) A business card

was left with her with the request that if she heard from defendant, she have him contact Area Four detectives. (R. 336)

The next day, November 27, 1985, Dr. Robert Kirschner, deputy chief medical examiner, performed an autopsy on the body of Willie Robinson. (R. 306) The external examination revealed approximately fifteen cutting and stabbing wounds of the head and neck, as well as the chest, back and extremities. (R. 307-308, 310)

The internal examination revealed that two of the stab wounds of the skull penetrated into the brain. (R. 312, 320) The slashing wounds of the neck had cut through the voice box or larynx, the vocal cords and the windpipe or trachea. (R. 309-310, 312) The stab wounds of the chest had penetrated into the left lung and the liver. (R. 312) Stab wounds of the back and thighs extended into the musculature. (R. 310, 311) A stab wound of the left palm went entirely through the palm. (R. 312) Defense wounds were also present. (R. 311)

The cause of death was multiple stab wounds and incised wounds of the body, any several of which alone could have cause death. (R. 313, 317) The fact that there was bleeding to all these wounds indicated that Willie Robinson was alive at the time each of the wounds was inflicted. (R. 316)

On December 5, 1985, at approximately 7:30 p.m., Eleventh District Officer Thomas Tiano received a call to go to 3441 West Jackson. (R. 353) At that location, he had a conversation with two people who directed him toward an apartment. (R. 353) He met another officer coming down the stairs with defendant. (R. 354) Defendant was placed under arrest and searched. (R. 354) Recovered from defendant by Officer Tiano were two knives. (R. 354, 358) One of those knives was consistent with having inflicted the wounds which caused the death of Willie Robinson. (R. 316-317, 355-356)

At Area Four, Detective Sherry advised defendant of his Constitutional rights. (R. 339-340)

Defendant spoke to the detective about the murder. (R. 340) Detective Sherry telephoned the Felony Review Unit of the State's Attorney's Office and, shortly after midnight, assistant state's attorney Frank Edwards arrived. (R. 341, S.R. 6)

Frank Edwards introduced himself to defendant, told him that he was assigned to the State's Attorney's Office, that he was not defendant's lawyer and that he was a lawyer who worked with the police. (S.R. 7) Edwards asked the officers if they had given defendant his rights. (S.R. 7) They said they had. (S.R. 7) The assistant state's attorney then advised defendant of his rights again. (S.R. 7) Defendant was asked if he understood the rights that had just been given to him. (S.R. 8) He said he did. (S.R. 8) Defendant told the assistant state's attorney that he wanted to tell him about a murder. (S.R. 8) They conversed for somewhere between 30 and 45 minutes. (S.R. 8, 23)

Frank Edwards left the interview room and spoke with the detectives. (S.R. 8) He then returned to the room and asked defendant if he would like to reduce the statement to writing and sign it. (S.R. 9) Defendant told the assistant state's attorney that he did not want him to put words in his mouth and that he would only sign a statement if the assistant state's attorney would write it down exactly as he said it and not summarize anything. (S.R. 9, 21) Defendant said he would have to check each sentence that Edwards wrote before he would sign it. (S.R. 9, 22) Edwards agreed. (S.R. 9)

Frank Edwards read the rights on the State's Attorney's form to defendant and defendant signed the form stating that he understood his rights and wished to make a statement. (S.R. 10) The assistant state's attorney then wrote each sentence as defendant said he should write it and defendant checked each sentence as it was written. (S.R. 9, 10, 22) Edwards showed defendant each written sentence, read it to him and then retrieved the paper to start on the next portion. (S.R. 10) The process took approximately one hour. (S.R. 10, 24)

Defendant told Frank Edwards that he went to Willie Robinson's sister Cynthia Love's house. (S.R. 13-14) He referred to Willie Robinson as Pete and to Cynthia Love as Slim. (S.R. 13-14) He stated they then went to another relative's house. (S.R. 14) They were supposed to move Cynthia's clothes. (S.R. 14) Defendant said he and Pete went to get a drink and then to a currency exchange where defendant cashed his check from his job. (S.R. 14) Continuing defendant's verbatim statement:

"We walked back to the house to get Slim. We all left, Pete, Slim and I walked to Slim's house. We couldn't get in. She didn't have the keys. We went around to the back and then the side door. Pete kicked the door in, both doors.

"Pete wanted something to drink. 5 to 10 minutes later Pete went to the store. Me and Slim were fucking, and then when Pete came back, Slim tried to go into my pocket. I commenced to kicking that bitch's ass. Pete tried to intervene into my conversation. I stopped whipping Slim's ass and grabbed him by the head with my left hand and cut his throat with my pocket knife. I cut him twice.

"He fell to the floor, bleeding. I went back to fucking Slim some more. Before Pete died, he was gurgling, and I made her give Pete some head. I had the knife in my hand. She came back and gave me some head in the room, then I fucked her some more, about a half an hour. I went back to Pete when he started moving. I stabbed him in his fucking head about 3 or 4 times. His head was real hard. I went and fucked Slim like a dog. I heard Pete moving again. (S.R. 14-15)

"We went back over to him and tried to take his fucking head off. I was sawing back and forth on his neck. I went and made Slim give me some more head. I tied her up. I told her the reason I was going to leave her alive was so that she could write the story. I was going to call it the King of the Leo's, because I am the king. Then I turned on the space heater and left. I came back 30 to 40 minutes later, because I had forgot my telephone book. I came in and struck matches and looked around. I lit my lighter

and found my phone book. I stuck her drawers in her mouth, then I left.

"I have been treated well by the police and the state's attorney." (S.R. 15)

When the statement was completed, the assistant state's attorney asked defendant to check the statement over and make sure there were no corrections or mistakes made. (S.R. 11) Defendant checked the statement over. (S.R. 11) Defendant then signed the statement and made a notation under his signature. (S.R. 11, R. 343) Defendant added the words, "I want the death penalty." (S.R. 15) The People rested. (S.R. 28)

Dr. Robert Reifman, director of the Psychiatric Institute of the Circuit Court of Cook County, was called by the defense. (R. 362) He testified that he examined defendant in March of 1987 after defendant had been charged with the rape of his girlfriend's sister, the murder on trial and the murder of a woman with whom he was sexually involved. (R. 364-365) Prior to Dr. Reifman's examination, defendant was interviewed by psychologist Dr. Lisa Grossman. (R. 365)

Both Dr. Reifman and Dr. Grossman found defendant to be legally sane. (R. 412, 417, 426) It was Dr. Reifman's opinion that defendant did not suffer from any mental disease or defect. (R. 418) He found that defendant could conform his conduct to the requirements of the law if he wished to. (R. 412)

Prior to formulating that opinion, Dr. Reifman examined the facts from the police reports, the statement and the social history and he interviewed defendant. (R. 368) The social history was taken from defendant's mother by Miss Healy, a psychiatric social worker. (R. 365)

Defendant's mother related that defendant was one of seven children by seven different fathers. (R. 384) She described headaches defendant had had since childhood and an incident in which he was struck on the head, after which he seemed to change. (R. 384) Defendant's mother said defendant had no history of mental illness and she was surprised that defendant was put into a section of the jail reserved for

mentally disturbed patients. (R. 414-415)

The social worker found defendant's mother to be an illiterate, of estimated below average intelligence with a flat affect (i.e., no modulation of feeling). (R. 389-390) She appeared to the psychiatric social worker to be an unreliable informant. (R. 390) In considering any disorders defendant might have, Dr. Reifman took into consideration defendant's mother's personality and effect on defendant. (R. 390-391)

Dr. Reifman learned that defendant's father was an alcoholic, that several other members of the family were alcoholics and that one of defendant's brothers was in a mental institution. (R. 391)

Dr. Reifman learned that the other murder with which defendant was charged occurred after consensual sex. (R. 403-404) According to defendant, he went into the bathroom to clean up and something just said, "Kill her, man." (R. 403-404) Defendant said he got excited feeling the blood and sawed her throat. (R. 403-404)

Defendant told Dr. Reifman that immediately before committing the crimes on trial, he watched the movie "Texas Chainsaw Massacre" on television. (R. 381) He said that he saw someone cut off someone's finger and suck the blood. (R. 381) Defendant spoke of torturing animals as a child and sucking blood from animals and said he sucked blood from the victim in this case. (R. 381)

Defendant told Dr. Reifman that he thought of committing suicide many times. (R. 416) Dr. Reifman found the desire to kill himself was consistent with defendant's personality. (R. 378) He found defendant's self esteem to be dependent upon the perpetration of violence. (R. 378) The predominant way defendant gets pleasure and sexual pleasure and feels good is by doing violent things to others, inflicting pain and causing physical harm. (R. 378, 380, 413) Defendant told Dr. Reifman a number of times that his purpose in life is to kill and that if he should get out again, he will kill. (R. 378, 413-414)

Defendant told Dr. Grossman that little voices told him to kill. (R. 415) Defendant said that voices also told him to put his finger into an electrical socket but he wouldn't do it because he knew it would hurt him. (R. 415) Dr. Reifman did not believe that defendant heard little voices. (R. 415-416) He believed defendant had a tendency to lie. (R. 405) It was his opinion that defendant is a malingerer and was trying to fake mental illness. (R. 413, 416, 420) Dr. Grossman also found a question of malingering. (R. 418-419)

Dr. Reifman knew of defendant's previous examination in 1978 after having been charged with the stabbing of his sister's boyfriend. (R. 366, 367) Defendant had been at his sister's apartment, took a butcher knife from next to a birthday cake and stabbed his brother-in-law. (R. 367) Reports were that defendant went back to his apartment with his mother and when confronted by his sister, laughed and then stared off into space. (R. 367-368) In 1978, Dr. Gonzalez diagnosed defendant as schizophrenic, paranoid type with mental retardation and drug abuse. (R. 366, 368, 405, 408) Dr. Reifman did not concur in that diagnosis and did not agree with it. (R. 366, 410)

Dr. Reifman reached several diagnoses concerning defendant. (R. 368) He found defendant to be a chronic alcoholic and poly drug abuser. (R. 369) He described defendant as having an antisocial personality disorder and as a sadist, neither of which is a mental defect. (R. 370, 421) Whether sadism is a mental illness would be debated upon by psychiatrists. (R. 422)

In describing defendant, Dr. Grossman used the term mixed personality disorder with antisocial borderline features as well as explosive episodes. (R. 375) A person with an antisocial personality disorder is defined as someone who acts contrary to the norms of society and has since childhood. (R. 375) It does not amount to insanity. (R. 425) A borderline personality was defined as one which is characterized by a person who is addicted to drugs and acts in self-destructive ways. (R. 375) A person

who has a borderline personality and antisocial personality has violence as part of that personality. (R. 376) Explosive episodes were described as sudden but not out of character. (R. 376) They are not something that comes over the person which the person is unable to control. (R. 376-377)

Dr. Reifman stated that defendant has a hostile attitude and that anger is within him all of the time. (R. 392) Dr. Reifman testified that defendant does not have a compulsion to do what he does. (R. 392-393) He defined compulsion as something a person does that he doesn't want to do, that may even make him feel bad but that he cannot control. (R. 393) What defendant does, said Dr. Reifman, is a satisfaction of urges. (R. 393-394) He is doing something he enjoys doing. (R. 393)

It was Dr. Reifman's opinion that defendant could control his acts if he wanted to and that the controls which exist to stop the behavior are the same in defendant as in anyone else. (R. 396) Defendant does not want to control himself. (R. 425) If he wanted to give up the pleasure, he could. (R. 425)

Defendant's mother, Sinnie May Johnson, testified that defendant was one of seven children, the oldest of whom died. (R. 428) According to Ms. Johnson, defendant would have headaches all the time and she once took him to Mt. Sinai Hospital for his headaches. (R. 436-437)

Ms. Johnson testified that she would send defendant to school but half the time, he wouldn't go into the schoolhouse. (R. 435) After phone calls from the teacher, she would ask defendant why he didn't go to school. (R. 435) Defendant would say he had gone to school. (R. 435) When Ms. Johnson would talk to defendant, he would act like he didn't hear her. (R. 435)

Ms. Johnson testified that she would see defendant laugh when nothing was funny. (R. 436) He would "mess with" her other children and start laughing. (R. 436, 442)

Ms. Johnson related that on the night her daughter Marilyn's boyfriend Rick was stabbed, defendant was at her house drunk on Gordon's gin. (R. 429-430) She said that after the stabbing,

defendant came into her house and told her that Marilyn wanted him to babysit. (R. 431-432) He was sitting at the table when a knock came on the door. (R. 432) Marilyn ran in the house, asking defendant where her butcher knife was. (R. 433) When defendant denied knowing what she was talking about, Marilyn accused defendant of stabbing Ricky. (R. 433) Again defendant denied it and sat at the table laughing. (R. 433) Ms. Johnson testified that when she returned from the hospital, defendant was still sitting at the table, staring. (R. 434) According to Ms. Johnson, defendant doesn't remember things he does. (R. 434)

According to Detective Robert Shanahan, who testified in rebuttal, defendant stated that the reason he stabbed Ricky Lee was that Lee had beaten his sister and slapped his four-year-old nephew. (R. 458)

The jury returned verdicts of guilty of murder and guilty of aggravated criminal sexual assault. (R. 574)

Sentencing

Stipulations were entered to defendant's convictions, to defendant's date of birth as July 24, 1958, and to defendant's age at the time of the crimes as 27. (R. 603-604)

The jury returned a verdict finding defendant eligible for the death penalty. (R. 619)

Shirley Randolph testified in aggravation that on December 5, 1985, at approximately 11:45 a.m., she went to the apartment of her sister Donna at 3341 West Jackson. (R. 635) Defendant let her in. (R. 635, 638) Ms. Randolph asked for her sister and her daughter and was told they had gone to the store and would return shortly. (R. 636) Defendant invited her to have a seat in the living room. (R. 636)

Ms. Randolph was watching television when defendant announced he had to use the washroom.

(R. 636) Shortly thereafter, defendant came out of the washroom, went up to Ms. Randolph and struck her in the face. (R. 636) Defendant then told her he was about to rape her. (R. 636) Defendant tore off her clothing. (R. 637) Ms. Randolph's daughter's Christmas money, \$165.00, fell out of the clothing, and defendant took it. (R. 637)

Defendant inserted his penis into Ms. Randolph's vagina and then tied her up and gagged her. (R. 637) Defendant left. (R. 637) When he returned, he put his penis into her vagina again, forced her to have oral sex with him and tied her up again. (R. 637) Defendant then beat her in the face. (R. 637) During this time, he also threatened her with a knife. (R. 639)

Defendant, who was sober when Ms. Randolph arrived, began to drink. (R. 637, 640) He forced Ms. Randolph into the washroom to look at how badly he had beaten her face. (R. 637) He then forced her to engage in oral sex again while he continued hitting her in the face. (R. 637) Once again he put his penis into her vagina. (R. 637) Finally, defendant fell asleep. (R. 637, 640-641)

Ms. Randolph ran naked from the apartment to a neighbor across the street. (R. 638) The neighbor would not let her in. (R. 638) She ran to another building where the person who permitted her to enter telephoned the police. (R. 638, 641) Ms. Randolph was taken to a hospital. (R. 643) She had a fractured jaw. (R. 643, 647)

Assistant state's attorney Michael Gerber saw Ms. Randolph in the emergency room of the hospital. (R. 647) Her head appeared to be swollen to three or four times its normal size and she had abrasions on her forehead. (R. 647) She had great difficulty in talking. (R. 647)

In the 13 years Ms. Randolph had known defendant, she had never seen him act in an aggressive or bizarre manner. (R. 639)

At Area Four, assistant state's attorney Gerber spoke with defendant. (R. 650) Defendant

waived his Miranda rights and told the assistant state's attorney that Ms. Randolph was the sister of his girlfriend and that earlier that day, he had called her to come over to the apartment to get some clothes. (R. 651, 652) Defendant stated that when she arrived at the apartment, he said he was tired of her complaining and nagging and started beating on her. (R. 652) Defendant told the assistant state's attorney that he took a rubber type hose, tied her up and "I broke the motherfucking bitch's jaw, and then I raped the bitch." (R. 652) Defendant also bragged that he "fucked the hell out of her." (R. 653)

On May 8, 1984, Detective Thomas Blomstrand was assigned to conduct a homicide investigation at 3554 West Franklin Boulevard in Chicago. (R. 654, 655) Across a double bed in Apartment 1E was the naked body of Cherry Wilson. (R. 655) Her ankles were tied together with plastic tubing and her wrists were tied behind her back. (R. 655-656) She had slash wounds across her left breast, across her abdomen and across her left thigh. (R. 656) She had a massive stab wound or gash across her throat. (R. 656) A washcloth was stuffed in her mouth. (R. 656) The mattress under her head was saturated with blood and on the floor underneath the mattress was a large puddle of blood. (R. 658) Fingerprints were recovered from a beer bottle found in a trash basket next to the bed. (R. 657) Two water or douche bags were found in the bathroom. (R. 657, 659) The bottom of the bags and tubing had been cut off. (R. 657)

Detective Michael O'Sullivan received information from defendant concerning this homicide. (R. 661) A fingerprint comparison request was made. (R. 662) The fingerprints found at the scene were identical to defendant's. (R. 663)

Assistant state's attorney Peter Vikelis spoke with defendant concerning that homicide. (R. 685) Defendant gave a handwritten statement in which he said he knew the victim as Jan. (R. 688) He identified a photograph of her. (R. 689) Defendant told the assistant state's attorney that he picked her up

as she was coming out of a store at approximately 7:30 p.m. (R. 688) She asked defendant how he was doing, addressing him as Allen. (R. 688) Defendant explained that Allen was his middle name. (R. 689)

Defendant related that Jan went and got a couple of pints of wine which they drank under a tree. (R. 689) Jan asked what defendant was doing that night and when defendant said "nothing," Jan invited him to her house. (R. 689) Defendant told her he had no money and Jan told him not to worry about it. (R. 689) She got another pint of wine. (R. 689)

As they walked to Jan's house, defendant asked if she really liked him. (R. 689) According to defendant, Jan said she liked him as a friend and told him they could get high together and have sex. (R. 689)

Defendant stated they talked for a while and ended up making love. (R. 689) Defendant went to the bathroom to clean up and on the inside door saw a douche bag. (R. 689) Defendant told the assistant state's attorney that something just said, "kill her, man." (R. 689) Defendant said he removed the three foot long plastic cord from the douche bag and went into the kitchen to get some water. (R. 689-690) That was when he saw the butcher knife. (R. 690) Defendant picked up the butcher knife and went to where Jan lay in bed. (R. 690) He told her, "I'm fittin' to kill you, I'm gonna kill you." (R. 666-667, 690) Jan told defendant she was going to tell his father. (R. 666-667, 690) Defendant said, "no you are not. I'm gonna kill you." (R. 667, 690) Jan told him to quit joking. (R. 667, 690) Defendant told her to turn over. (R. 690) She did. (R. 690)

Defendant cut the cord in half with the butcher knife. (R. 690) With half of the cord he tied her hands and with the other half, he tied her feet. (R. 690) He took a rag or a sock, he couldn't be sure which, and stuck it in her mouth. (R. 690) Defendant then got on top of her from behind, straddled her, picked up her head and cut her throat. (R. 667, 690) Following that, he turned her over and cut under her left breast,

across her legs and across her stomach. (R. 667, 690) Defendant said he got excited feeling the blood and got into sawing her throat. (R. 690) Defendant then left. (R. 690) He related that he felt better having told the assistant state's attorney all about the murder. (R. 690)

In answering questions put to him, defendant did not seem either proud or ashamed of what he had done. (R. 668) He neither laughed nor cried. (R. 692, 693) He had normal speech inflections and did not appear to be emotionally disturbed. (R. 693) He was very matter of fact. (R. 668, 692) Defendant also spoke to other officers of several other murders. (R. 669) Defendant had previously been convicted of rape in 1980 and of unlawful use of weapons in 1984. (R. 695-696)

Deborah Wilson met defendant on July 2, 1980, following his rape conviction, in her employment as a counselor with the Joliet Correctional Center for the Illinois Department of Corrections. (R. 673) She was to interview defendant and determine what placement within the Department of Corrections was the most appropriate for him. (R. 674, 679) She spoke with defendant for one-half to one hour concerning the official statement of his rape conviction, his criminal history and his juvenile background. (R. 674-675) She also prepared a social history. (R. 676)

Defendant initially denied any substance abuse to her but later indicated he used marijuana, tic and alcohol in a social type of usage. (R. 676-677) Defendant denied any psychiatric care or hospitalization. (R. 677)

Ms. Wilson also prepared a report based on her impressions of defendant and based on the psychological report with which she was furnished. (R. 674, 677) On a reading test administered as part of the psychological interview, defendant scored below a fifth grade reading level. (R. 680-682)

Ms. Wilson found defendant to be evasive and manipulative. (R. 677) The psychological report contained the conclusion that defendant was volatile and would do whatever he had to do to get

along within the prison system. (R. 678) Ms. Wilson concluded that defendant needed maximum security incarceration. (R. 678)

Defendant testified in mitigation that his earliest memory was from about the age of nine. (R. 699) He was the next to the last of seven brothers and sisters. (R. 702-703) He had lived with his mother his whole life off and on. (R. 703)

Defendant testified that when he was a child, beginning when he was about five or six years old, his mother would make him get out of all of his clothes and beat him with extension cords. (R. 703, 704) According to his sisters, Marilyn was beaten the most and then came defendant. (R. 770, 786) According to defendant's sister Ann, their mother would also use belts and her hand and once, she whopped defendant with a stick. (R. 786, 787) Those whoppings occurred if they did something wrong or when other people said they did bad things. (R. 775, 776, 777, 785) Their mother never asked if they did those things. (R. 775, 777, 785) They were also whopped when they didn't come right home after school or when she would catch them sneaking out. (R. 786) There were no other reasons defendant was beaten. (R. 778)

Ann testified that she never had the urge to go out and kill someone because of the beatings she received but when she grew up, she brought it up to her mother. (R. 787, 789) She hollered and cursed her and asked why she whopped her. (R. 787) She found out that her mother was trying to tell her right -- that she needed an education and shouldn't be bad to people. (R. 787)

Defendant testified that after the beatings, his mother would sit down and talk to him and rub him with alcohol and tell him if he was not bad and if she didn't love him, she wouldn't have to whip him like that. (R. 704)

Defendant testified that on one occasion, when he was eight or nine years old, his mother picked him up and slammed him on the kitchen table. (R. 708, 709) She was beating him with her hands and then reached and got the butcher knife. (R. 708) She hit him with the blade and was beating him in the face. (R. 708) He was not cut as far as he could remember. (R. 708) He was never hospitalized as a result of any of the beatings. (R. 732)

Defendant testified that the beatings stopped when he was fourteen or fifteen years old. (R. 709) Defendant never told Dr. Reifman or Dr. Grossman or Dr. Gonzalez or Ms. Wilson about the beatings or about his mother slapping him with a butcher knife. (R. 724, 766)

Defendant testified that the only one he felt really loved him was his sister Marilyn, who would protect him from his mother. (R. 708) Sometimes she would tell her mother to stop whopping defendant and sometimes she would just look at their mother and she would stop. (R. 772)

Marilyn would also give defendant Anacin when he got migraine headaches or defendant would lay down and go to sleep and the headache would be gone. (R. 773) According to Marilyn, defendant would bump his head up against the wall because he said it hurt so bad. (R. 773)

Defendant and his sister Ann testified that they had a brother named Billy Johnson who spent time in Madden and who is now dead. (R. 706, 780-781) Whenever Billy was drinking he would rape Ann. (R. 706, 780-781) That began when she was five or six and continued until she was thirteen. (R. 781-782) Defendant used to hear Billy call her and Ann told him and another brother what was going on. (R. 706, 782) Dr. Reifman testified that if defendant knew of an older brother sexually abusing his sister, that would tend to flaw his character and would not enhance normal sexual development. (R. 765-766)

Defendant and another brother talked Ann into telling their mother about the rape. (R. 706) Their mother told Ann that Billy wouldn't do that and that she was lying. (R. 707, 784) Defendant did not

tell Dr. Reifman or Dr. Grossman or Dr. Gonzalez or Deborah Wilson about the rape of his sister. (R. 727-728) Dr. Reifman testified that while it is not common to speak about it in early life, as life progresses people do tell about sexual abuse. (R. 767)

Defendant attended school in Chicago but, from the age of nine, he remembered not going to school the majority of the time. (R. 709-711) He was unable to remember any of his teachers or courses until he reached upper grade center. (R. 709-712) He did not pass any of those courses. (R. 712-713) It was stipulated that Defendant's Group Exhibit constituted all of defendant's available school records. (R. 795) Although he never graduated from eighth grade, defendant did attend Marshall High School for two years before dropping out. (R. 713, 726) After he dropped out, he didn't do anything. (R. 713)

Defendant said that, off and on, he would catch a stray cat and would cut it up. (R. 714) He said he would play in their blood and he would hang dogs. (R. 714) He said he didn't know why he did that. (R. 714) According to Dr. Reifman, defendant has a sadistic personality disorder, which is a severe disorder of the personality. (R. 765) A person who murders for pleasure is extremely emotionally disturbed. (R. 764) It does not, however, constitute insanity and it can be controlled by defendant. (R. 765, 766)

Defendant testified that at age eleven, he began drinking alcohol on weekends, pooling his money with that of his friends and sending a wino to make the purchase. (R. 699) He had used marijuana, TIC or TAC, Demerol and Valium, beginning his usage in the seventh grade. (R. 699-700, 713) When he dropped out of high school, he was drinking every day, "doing happy sticks" about twice a week and smoking "reefer" and doing THC off and on. (R. 713, 726) Dr. Reifman testified that addiction to drugs and alcohol leads to an extenuation of a flawed personality. (R. 765) Defendant remembered telling Deborah Wilson that he didn't use drugs or occasionally used them. (R. 726)

Defendant testified that he trained at Goodwill Industries for 39 weeks to become an assistant cook and also worked as a punch presser. (R. 700, 727) He could not remember the name of the company he worked for. (R. 727) He also worked as a laborer for Turner Brothers. (R. 727)

Defendant admitted committing the crimes of which he was convicted. (R. 701) He also admitted murdering Cherry Wilson, raping Shirley Randolph and stabbing Ricky Lee. (R. 701, 715)

Concerning the stabbing of Ricky Lee, defendant remembered going up to his sister's house to tell her that her baby's father wanted her. (R. 701) She told defendant to go into the kitchen and get some cake. (R. 701) Defendant went into the kitchen, got a butcher knife and stabbed her husband. (R. 701) Defendant went downstairs and told his sister that her husband was bleeding. (R. 702) Defendant testified that he did not know what happened or why he did what he did but he remembered that he had been drinking and taking pills when it happened. (R. 702) Defendant thought he probably told police that he stabbed Ricky Lee because Ricky was beating up his sister and hit his nephew with a two by four. (R. 729)

Marilyn testified that defendant was very protective of her. (R. 773) He would protect her when Ricky would beat her up. (R. 776)

Following this incident in 1977, Dr. Jose Gonzalez, a psychiatrist then employed by the Psychiatric Institute, saw defendant. (R. 737, 738) He concluded, in 1978, that defendant was very hostile and very dangerous to himself and others. (R. 742, 743, 746) He found that defendant would be unable to cooperate with his attorney in his own defense and was unfit to stand trial. (R. 742) Dr. Gonzalez diagnosed defendant as schizophrenic, paranoid type, and mentally retarded. (R. 744, 745) He found defendant to be psychotic with very poor contact with reality. (R. 743) He believed that defendant's bizarre behavior was the result of delusions and hallucinations and he was afraid of him. (R. 743, 744) Dr. Gonzalez recommended immediate hospitalization. (R. 742)

At the time he rendered this opinion, Dr. Gonzalez did not have the police reports. (R. 746) He did not believe he was told by defendant that he stabbed his brother-in-law because his brother-in-law beat his sister. (R. 747) Defendant's version did not make any sense. (R. 747)

Dr. Gonzalez emphasized that his opinion and diagnosis of defendant were history and had nothing to do with the case on trial. (R. 741, 749) He never read Dr. Reifman's or Dr. Grossman's reports in the current case and had no opinion as to defendant's present fitness to stand trial or his sanity in 1985. (R. 747-749)

Defendant had been to the penitentiary one time, which he said was for the rape of his son's mother. (R. 700) Defendant testified that during the time he was in the penitentiary for rape, he spent approximately one year in segregation. (R. 718) He wanted to be by himself and would refuse to leave. (R. 718) Defendant testified that if he spent the rest of his life in jail, he would stay in segregation. (R. 721)

During the time defendant was in the penitentiary, he requested a psychiatric examination. (R. 791) It was stipulated that Marianne Quan, a records keeper at Pontiac Correctional Center, found a record dated December 17, 1980 wherein defendant cited lapses of memory, mental confusion and doing things which he could not remember doing as reasons for his request to see a psychiatrist. (R. 791)

It was further stipulated that Dr. Yong S. Ha, a psychiatrist, interviewed defendant on January 2, 1981. (R. 791) Defendant expressed his main concern as his previous numerous acts of physical aggression and violence followed by no recollection or memory of the incidents. (R. 791)

Defendant told Dr. Ha that when he was arrested the day after the rape and beating of his son's mother, it was hard for him to believe but he admitted that he did rape her. (R. 792) Defendant told Dr. Ha he doubted he could have done such a terrible thing to his son's mother and expressed suspicion that he

might have been set up by his girlfriend or family who wanted to entrap and get rid of him. (R. 793) Defendant did remember that two days prior to the rape and beating, he had an altercation with the victim's boyfriend. (R. 792)

Defendant told Dr. Ha that when he was younger, he would hang his pets. (R. 792) He did this because they scratched or bit him. (R. 792)

Defendant told Dr. Ha that in 1973 or 1974, he hit a man with a brick but had no memory of the incident later. (R. 792)

Defendant told Dr. Ha that in 1973, he stabbed his brother in the head with a fork but could not remember whether he was provoked or how he got "rageful" at that time. (R. 792) Defendant testified in mitigation that he stabbed his brother in an argument over waffles his brother took from him. (R. 716-717)

According to Dr. Ha's report, defendant stabbed his sister or her husband six or seven times with a butcher knife. (R. 792) Defendant could not recall to Dr. Ha why he got so angry and "allegedly he developed amnesia." (R. 792) Defendant remembered, when testifying in mitigation, a couple of days preceding this incident seeing his nephew who had been hit in the head with a two by four by his sister's husband. (R. 702)

Defendant related to the doctor that approximately two weeks prior to the rape, he beat his older brother with a baseball bat causing severe facial and head injuries. (R. 793) Defendant claimed to remember only realizing what a terrible thing he was doing and finding himself holding his brother with one hand and a bat in the other hand and seeing his brother bleeding badly from the face. (R. 793)

Defendant told Dr. Ha that he could not recall any significant precipitant event or provocation by others prior to these violent episodes. (R. 793) Defendant wanted to know if he could really have been so violent and aggressive and if something could be done to keep similar instances from happening after

his release. (R. 793)

Defendant gave a history of migraine headaches. (R. 793) There was no previous history of mental illness or psychiatric hospitalization and no previous medical or neurological check-up to find out the etiology of defendant's behavior problem. (R. 794) Defendant denied any auditory or visual hallucinations to Dr. Ha but stated that prior to getting a rage reaction, something seemed to be taking over and changing him into a different person. (R. 794)

Defendant denied any instances of physical aggression since his incarceration, stating that when something told him to go off, something else told him to keep cool and restrain himself. (R. 794)

Dr. Ha found defendant to be rather aggressive but fairly cooperative, although somewhat guarded, and articulate in speech with an intact memory. (R. 794) He found defendant to have a high motivation for treatment. (R. 794) Dr. Ha recommended neurological consultation, EEGS, both asleep and awake, and nasopharyngeal for the purpose of ruling out psychomotor epilepsy and explosive personality disorder. (R. 794-795) His diagnostic impression was amnesic syndrome of unknown etiology. (R. 794) Dr. Ha requested a follow-up evaluation in four weeks. (R. 795)

It was stipulated that Marianne Quan would testify that no report was available concerning a follow-up examination. (R. 795)

Defendant stated that he was arrested for the murder of Willie Robinson and the rape of Cynthia Love at 3441-1/2 West Jackson, the same location where he raped Ms. Randolph. (R. 719) He was sleeping when the police came. (R. 719) Since that time, he has been in Cook County Jail where he has only had a problem with the authorities one time. (R. 719) Some "hooch" was made and they were drunk and "went to fighting." (R. 720) He got one ticket for having Tylenol and another aspirin-type drug in his cell. (R. 720) All other infractions were, according to defendant, very minor things. (R. 721)

Officer Thomas Hansen of the Cook County Sheriff's Department, whose function is the security and safety of the inmates in the psychiatric holding facility and who underwent training in dealing with psychiatric individuals, saw defendant five days a week for approximately the previous two years. (R. 752, 753)

The inmates in the unit have been judged by the psychiatric staff to be functionally stable. (R. 753) Defendant was originally placed in the psychiatric holding facility because he was depressed. (R. 758)

Other than one altercation that involved almost the entire tier, defendant had not caused any problems for the staff that he was aware of. (R. 755) Within the department, defendant has been helpful. (R. 757) They used defendant to do a lot of maintenance work and cleans floors. (R. 757) He has also brought the staff's attention to inmates who seem to be having trouble. (R. 757) Defendant tries to talk to them and get them to talk to the staff. (R. 757)

Officer Hansen testified that defendant is still considered an active psychiatric patient by the Department of Corrections and that he received medication on a daily basis. (R. 756) As long as defendant takes his medication, he functions pretty well on his own. (R. 757) The medication is sleeping pills that defendant takes at night. (R. 757)

Defendant apologized to the jury for the two murders he committed. (R. 702) He said he didn't know why he was like that. (R. 722) Defendant told the jury that he wanted the death penalty because if you take a life, you must be willing to give your own, but he would like to live because he has children. (R. 717)

Defendant testified that in addition to his child by the woman he raped, he also had two children by Donna Randolph, whom he had supported with the money he got from working as a

punch press operator and from General Assistance. (R. 715)

Defendant thought it was possible that he might be able to tell one of his children not to do the things he had done. (R. 717) Defendant also wanted to live for the sake of his parents and sisters, who said they would be hurt if he got the death penalty, and his brothers, about whom he was concerned. (R. 717, 774, 778) Defendant had considered the effect that his being killed by the State would have on them. (R. 717-718)

The jury returned a verdict finding no mitigating factors sufficient to preclude the imposition of the death penalty. (R. 849)

III

REASONS FOR DENYING THE PETITION

(ADJUST FOR YOUR OWN CASE)

Introduction

Petitioner asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment which were not available at the time of his trial, petitioner claims that his trial (as well as that of every other capital 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 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. **[NEED TO TAILOR THIS TO THE PRECISE POSTURE OF THE INDIVIDUAL CASE]**

Supreme Court Rules

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

Adequate Funding

Petitioner asserts that he is entitled to clemency because he was denied adequate funding to investigate the case and/or to retain the necessary expert witnesses. However, despite the creation of the Capital Litigation Trust Fund, there is no indication that any capital 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.

Videotaping

Petitioner also seeks clemency because his statement where he inculpated himself was admitted into evidence even though it was not videotaped, and points out that under the Governor's Commission's proposals both statements and the interrogations leading up to them should be videotaped. What petitioner fails to recognize is that neither the Commission nor the governor himself call for the suppression of a statement simply because it was not videotaped. Rather, even under the Governor's proposed legislation (HB3717 & HB2058), such statements will still be admissible if the trial court finds that it was voluntarily made after considering the totality of the circumstances. Because the trial judge expressly found that petitioner's statement was voluntarily made when it denied his motion to suppress statements, it is clear that the failure to videotape his statement had absolutely no effect on the fairness of his proceedings. Moreover, because the jury was instructed pursuant to Illinois Pattern Instruction 3.06-3.07 to consider all the evidence when determining whether or not petitioner made the statement and how much weight it should be given, petitioner cannot complain that he was prevented from asserting at trial that his statement was unreliable and should not be considered.

Public Defender at the Police Station

Petitioner claims that he is entitled to clemency because he requested a lawyer while he was being interrogated but was not appointed an attorney until he appeared in court. He points out that under the Governor's Commission proposals, the public defender would be allowed to represent any suspect in a potentially capital case who requests to speak to a lawyer during an interrogation. However, petitioner fails to mention that the trial court expressly found that he did not unequivocally request an attorney during his interrogation. Therefore, even if this proposal had been in effect at the time of petitioner's arrest, it would not have applied to him.

Eligibility Factors

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 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 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. Given these important policy considerations, petitioner’s request must be rejected.

Decision to Seek Death

Petitioner claims his sentenced should be reduced because the State's Attorney's decision to seek death was made without uniform protocols to guide his discretion and was not approved by a state-wide review committee. However, A[i]t has long been recognized by 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.

Informant testimony

Petitioner alleges that clemency should be granted because a jailhouse informant testified at his trial even though there was no pre-trial hearing to determine the reliability of such a witness. However, such a claim ignores the fact that both the trial court (and the Illinois Supreme Court) determined that the evidence was relevant and probative before admitting the testimony into evidence. Petitioner also ignores the fact that the trier of fact heard the evidence, and after considering the credibility of the witness and all the attendant circumstances deemed the testimony reliable.

Statutory Mitigating Factors

Petitioner 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

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

Instruction on Alternative Sentences

Petitioner 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 petitioner's sentencing hearing was ensured by not instruction the jury on the available sentencing options.

Sufficient to Preclude

Petitioner 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 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.

Supreme Court Review

Petitioner also claims that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate, excessive or otherwise inappropriate. However, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by 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 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.

Mental Retardation

Petitioner alleges that his death sentence should be commuted in light of Atkins v. Virginia, 122 S. Ct. 2242 (2002), because he is mentally retarded and that, therefore, the imposition of the death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Although the Court in Atkins noted that mental retardation is characterized as having a significantly subaverage general intellectual functioning and significant limitations in adaptive functioning in at least two skill areas with the onset prior to age 18 (122 S.Ct. at 2245 n.3), the Court expressly stated that it was not adopting a definition of mental retardation and left it to the various states to adopt a definition of mental retardation and delineate procedures for determining whether or not a particular defendant is mentally retarded. Id. at 2249-50. Because Illinois has not yet adopted a definition of mental retardation nor has it crafted the appropriate procedures, petitioner's claim is premature and should not be considered by the board at this time.

Vienna Convention

Petitioner 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 to 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 petitioner does not even allege that he was prejudiced, it is clear that he is not entitled to have his sentence commuted.

CONCLUSION

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

Respectfully submitted,

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