

OCTOBER 2002 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

Defendant was arrested on December 5, 1985 on a charge of aggravated criminal sexual assault. While in custody, he confessed to the murder described herein as well as to the murder addressed in the People's second response to petitioner's petition for clemency. He proceeded to a bench trial before the Honorable James Bailey and was convicted of first degree murder and armed violence. He waived a jury for sentencing and was found eligible for the death penalty. Judge Bailey further found that there were no mitigating factors sufficient to preclude the death penalty. On April 16, 1998, the Illinois Supreme Court affirmed petitioner's convictions and sentence. People v. Johnson, 182 Ill. 2d 96, 695 N.E.2d 435 (1998).

II

FACTS OF THE CASE

The Trial

On or about May 7, 1984, the victim Cherry Wilson was brutally murdered by defendant. (R. CL12-13)

At about 5:00 p.m., on May 8, 1984, Officer Jim Sanders, an evidence technician with the Chicago Police Department, was assigned along with his partner George Wilson to go to 3554 West Wilson to investigate a homicide. (R. 1278-79) When they first arrived they found a naked female body tied up on a bed and the apartment was in disarray. (R. 1280-81) It was the body of Cherry Wilson. The body was bloody and there were numerous stab wounds and cut wounds about the body. (R. 1281) The victim's hands and legs were bound behind her back. (R. 1281)

On December 5, 1985, Officer Tiano was assigned to go to 3441 West Jackson. (R. 1295) When Officer Tiano arrived at that building he assisted in the arrest of defendant. (R. 1293) On December 6, 1985 at approximately 8:30 a.m. Detectives O'Sullivan and his partner Detective McCarthy were assigned to follow-up on the investigation of the murder of Cherry Wilson. (R. 1263-64) Detectives O'Sullivan and McCarthy had received information that defendant had confessed to two additional crimes. (R. 1264, 1271) Detectives O'Sullivan and McCarthy first went to the 11th District police station, because there was supposed to be a hold placed on defendant by Area 4 detectives. (R. 1264, 1271) They did not find defendant at the 11th District and then learned that defendant had been mistakenly sent to Branch 66 at 26th and California. (R. 1264)

The detectives went to 26th and California and secured defendant from the Branch 66 lockup and returned him to Area 4 before defendant ever got into the courtroom. (R. 1265) After

finally speaking to defendant, the detectives called the State's Attorney's Office. (R. 1265)

At Area Four, at approximately 1:00 p.m. on December 6, 1985, Assistant State's Attorney Vilkelis conducted an interview with defendant in one of the interview rooms while Detective McCarthy was present. (R. 1322)

People's Exhibit No. 15 is the statement that Assistant State's Attorney Vilkelis reduced to writing at about 2:00 p.m. (R. 1326) Defendant signed the statement on top by the Miranda warnings and at the bottom of the writing on each of pages 1 through 3. (R. 1326-27)

At trial Assistant State's Attorney Vilkelis published the statement which states as follows:

I picked up Jan, that's the name I know her by, on Kedzie and Maypole at about 7:30 p.m. She was coming out of the store there. She said, "How are you doin', Allen." That's my middle name. My name is Mark Allen Johnson. I know the woman by Jan. The picture marked exhibit Number 1 by the state's attorney is of Jan and a man she said is her brother. She showed me the picture the same night as the murder. I don't know the other dude in the picture.

After she said "hi", we spoke and she went and got a couple pints of wine; a pint of White Port for her and one for me. We stood up under a tree and drunk 'em. Then she asked me what I was doin' that night. I said Nothin'. She said did I want to go to her house. I said I didn't have no money. She said, don't worry about it, and went and got another bottle, a pint of wine.

Then we walked from Kedzie and Maypole over to her house. We started to talk for a while. I asked her, "Jan, do you really like me?" She said, "yes, as a friend. We can get high together and can have sex."

We talked for awhile and ended up making love. I got up, went into the bathroom to clean up. I looked up at the door in the bathroom, inside the bathroom. I closed the door.

On a nail or something behind the door, in the door, there was a douche bag. Something just said, "kill her, man."

So I took the plastic cord off of the douche bag. It was

about three feet long. I walked into the kitchen to get me some water. That's when I saw the butcher knife. I picked the butcher knife up and went to where she was still laying in bed. I said, "I'm fittin' to kill you, I'm gonna kill you." She said, "I'm gonna tell your father." I said, "no, you are not, I'm gonna kill you." I told her to turn over and she did. She said, "quit joking" before I told her to turn over.

I cut the cord in half with the butcher knife and I tied her hands with one half of the cord and with the other half I tied her feet. I took a rag or a sock, I'm not sure, and stuck it in her mouth. I cut her throat. I got on top of her from behind, straddled her, picked her head up from behind and cut her throat. I then turned her over, and I cut her under her left breast. Then I cut her across her legs. I cut her across her stomach, too. I got excited feeling the blood and got into sawing her throat.

Then I left.

(R. 1327-32)

After the statement had already been reduced to writing and signed, Assistant State's Attorney Vilkelis had the opportunity to be in the room alone with defendant for about 15-20 minutes. (R. 1337-38) During this time, Assistant State's Attorney Vilkelis asked defendant how he had been treated at the police station and defendant told him he had been treated fine, and defendant did not at all look fearful. (R. 1338)

On December 6, 1985, Officer Albert Francis fingerprinted defendant. (R. 1302) On December 13, 1985, Theatrice Patterson, a Chicago police officer and a latent print examiner, received a request to make a comparison between latent prints found in this case and a card with an inked impression of defendant's fingerprints. (R. 1307-1308)

Officer Patterson found that the number one and seven fingerprints from the card were also found on the glass jar, which was found in the victim's bedroom on a chair near the victim's bed. (R. 1309-1312) The number three fingerprints on the card were found on the Miller's quart beer bottle, which was found in a trashcan at the murder scene. (R. 1310-12)

Dr. Robert Kirschner, an Assistant Medical Examiner, conducted an autopsy on the

body of Cherry Wilson. (R. 1342) He observed multiple slashing and stab wounds present on the neck, chest, abdomen, and legs of Cherry Wilson. (R. 1342-43) He observed a pink wash cloth stuffed in her mouth as a gag, and her hands and feet were bound. (R. 1343)

During his external examination and his internal examination of Cherry Wilson, he observed first a deep slashing wound of the neck that measured approximately 14 centimeters in length. (R. 1343-44) That wound completely transected the right jugular vein and the right common carotid artery just below a bifurcation. (R. 1344) It completely transected the esophagus posteriorly to this region and that he observed extensive hemorrhage associated with that injury. (R. 1344)

Second, he observed a deep curving incise wound of the left breast region extending from the upper inner quadrant of the breast laterally and downward to the lower outer quadrant of the breast. (R. 1344) The wound measured 20 centimeters in length and extended deep into the fat tissue of the breast. (R. 1344)

Thirdly, he observed a 29-centimeter superficial incise wound that extended from the right upper quadrant of the abdomen ending at the umbilicus. (R. 1344)

Fourth, he observed a 16-centimeter deep incise wound extending from the lateral aspect of the left thigh to the posterior thigh. (R. 1344) That wound was 4.5 centimeters deep, cut through the subcutaneous tissue and into the underlying musculature. (R. 1344-45)

Fifth, there was a 9 centimeter incise wound extending in a horizontal direction along the medial aspect of the right thigh. (R. 1345) That wound extended into the subcutaneous tissue. (R. 1345)

Sixth, was a 6.5 centimeter incise wound extending in a horizontal direction across the upper third of the right shin region. (R. 1345) That lesion also went into subcutaneous tissue. (R. 1345)

Seven, directly across on the left shin there was a 7.5 centimeter incise wound that

extended into the musculature of the interior compartment of the leg. (R. 1345) That wound extended to a depth of approximately 2.5 centimeters. (R. 1345)

Eight, there was a vertical superficial incise scratch type wound in the left lower quadrant of the abdomen extending into the inguinal region. (R. 1345) That lesion measured 4.5 centimeters in length. (R. 1345) Finally, there was a superficial six centimeter vertical scratch type incise wound of the left flank region. (R. 1345) Based upon his examination of the body of Cherry Wilson, based upon his internal and external examination conducted pursuant to his autopsy, based upon his experience in the field of forensic pathology, in Dr. Kirchner's opinion the cause of Cherry Wilson's death was multiple slashing and incise wounds of the body. (R. 1346)

The defense then proceeded by way of stipulation. The defendant did not want to testify and he told the trial court that there were no witnesses that he wanted his attorney to call. (R. 1349-50) The defense then rested its case. (R. 1348)

The trial judge found defendant guilty beyond a reasonable doubt. (R. 1353) The State asked for a death penalty hearing, and defendant waived a jury for both phases of the sentencing procedure. (R. 1354-55)

Defendant's trial attorney asked the trial judge to reject defendant's jury waiver for sentencing. (R. 1355) The trial court stated that based on the fact that all the examinations that had been given to defendant said that he was competent for trial, that he was not insane at the time of the commission of any of the crimes, and thus there was nothing to support rejection of defendant's waiver. (R. 1355-56) Defense counsel also asked that any waiver be in writing. (R. 1356) Defense counsel requested a behavioral clinical examination and the trial court said it would be held the next morning. (R. 1356)

The case was continued to February 27, 1990, and again continued to February 28, 1990, where defendant again waived his right to jury for sentencing. (R. 1364) Furthermore,

defendant was examined by Dr. Stipes and Dr. Stipes was of the opinion that defendant was fit and competent for sentencing. (R. 1358)

Sentencing

First Stage--Eligibility for a Sentence of Death

At defendant's eligibility hearing the People began by presenting People's Exhibit No. 1, a certified copy of conviction which showed that under indictment 86-205 the defendant was charged with murder. (R. 1365-66) On March 14, 1988 after a jury trial, defendant was found guilty of that murder as well as aggravated criminal sexual assault, and Judge Bailey sentenced defendant to death for those crimes. (R. 1365-66)

The prosecutor also asked the trial judge to take judicial notice of the murder conviction from the previous day, February 26, 1990, where defendant was found guilty by Judge Bailey for the murder of Cherry Wilson. (R. 1365-66)

The court was asked to take judicial notice that during the course of those proceedings, Officer Tiano testified that the defendant told him his date of birth was July 24, 1958. (R. 1298, 1365-66) The Cherry Wilson murder (Indictment No. 86-204), according to the evidence heard, was committed on May 7, 1984. (R. 1365-66) The murder of Willie Robinson (Indictment No. 86-205), took place on November 26, 1985. (R. 1365-66)

The prosecutor asked the court to take judicial notice of the facts of the trial that was heard before him with a jury in March of 1988 where the defendant was convicted of the murder of Willie Robinson (Indictment No. 86-205). (R. 1365-66)

The defense did not put on any evidence in the eligibility phase. (R. 1366)

The trial court found that defendant was eligible for the death penalty. (R. 1367)

Second Stage--Aggravation

Evidence regarding defendant's murder of Willie Robinson and the rape of Cynthia Love

The State began its presentation of aggravation with the murder of Willie Robinson and rape of Cynthia Love, for which defendant had already been convicted and sentenced to death. The State's first witness was Cynthia Love whom defendant sexually assaulted, brutalized, and then forced to watch the brutal murder of her uncle. (R. 1374-92)¹

On November 26, 1985 Cynthia lived at 3921 West Huron, and she, defendant, and her uncle Pete went to Cynthia's home, where she began putting her clothes together for her move to California. (R. 1375) Defendant and Pete were talking and then Pete went to the liquor store and was gone for about 30 minutes. (R. 1375-76) When Pete came back he and defendant sat, drank and talked while Cynthia was still gathering her things. (R. 1376)

Pete left again to go to the liquor store and defendant was generally talking. Then he approached Cynthia about having sex, and Cynthia told defendant that it was her body and that she had a right to say no. (R. 1377) Defendant said "What if I say your no mean no, and my yes mean yes? (R.1378) Defendant was standing with his legs apart and Cynthia could tell that he had something behind his back. (R. 1378) That was when defendant said "Bitch, take off your motherfucking clothes." (R. 1378) Cynthia took off her dress and defendant said, "Take off that bra, and take off them panty hose too." (R. 1378) Cynthia did as defendant told her. (R. 1378)

Then defendant got something and tied up both her feet and arms. (R. 1379) Cynthia's arms were tied behind her back. (R. 1379)

After defendant had tied up Cynthia, Pete came back from the liquor store and knocked on the door, and defendant told Cynthia to be quiet. (R. 1379-80) When Pete knocked again,

¹ Cynthia's uncle's real name was Willie Robinson, but she called him Pete. (R. 1375)

defendant pointed the knife at Cynthia and had her crawl behind him sort of to the side of the kitchen door. (R. 1379-80)

Defendant opened the door for Pete and when Pete began to enter he saw Cynthia, and said "What the hell going on?" (R. 1380) Before Pete barely got into the door, defendant grabbed Pete with his left arm and cut his throat with his right hand. (R. 1380) They began fighting, and defendant kept stabbing and cutting Pete. (R. 1381) Cynthia said that at that time Pete was just laying dead. (R. 1382)

Defendant subsequently had Cynthia perform oral sex on him. (R. 1382) Defendant then said "Only reason I'm keeping you alive is because I have always wanted someone to write -- I was always wanting to write a book," and that Cynthia would be the one to tell the story. (R. 1382) Defendant again forced Cynthia to perform oral sex on him. (R. 1328) Defendant tried to have sex with Cynthia in her rectum and did in fact have vaginal sex with Cynthia. (R. 1383) Cynthia testified that she was at the apartment with defendant from about 2:00 p.m. until 10:00 p.m. (R. 1383) During that time, defendant was continually sexually assaulting her. (R. 1384)

Initially, the assaults were in the kitchen, but then defendant took Cynthia into the pantry because people lived upstairs and while Cynthia was performing oral sex on defendant, he could peek out the window to see if anyone was coming down the stairs or could hear him. (R. 1384) While Cynthia was in the pantry, defendant told her that if she did not do it right, she might end up like Pete, because he said "You see I didn't give a motherfuck about your uncle; I'll do you the same motherfucking way." (R. 1384) It was also at this time that defendant forced Cynthia to lick the blood off of the knife which defendant used to kill her uncle. (R. 1384-85) Defendant also forced Cynthia to have oral sex with her Uncle Pete as he lay dead or dying. (R. 1385-86)

Defendant then took Cynthia into the living room because he had to use the bathroom, but before he got to the bathroom, he put Cynthia in the corner of the living room and he urinated all over her. (R. 1386)

After defendant was finished, he left the apartment, but prior to leaving he tied Cynthia up by tying her hands and her feet together, so that she was lying on her stomach. (R. 1388-89) Defendant put a rag in Cynthia's mouth and then left the apartment. (R. 1389) Defendant was gone about an hour but then returned and kicked Cynthia. (R. 1389-90) Cynthia could see that he went by the kitchen sink and started a fire or something. (R. 1390) She determined that he was starting a fire because she could hear her stove, and defendant probably did this so that he could see, because there was no electricity in the apartment at that time. (R. 1391) This time defendant stayed in the apartment for only about 15 minutes. (R. 1391) He went over by Pete and then left. (R. 1391-92)

Cynthia waited to make sure that defendant was not coming back and she began working until she got the rope untied. (R. 1392) Cynthia went into her daughter's bedroom to make sure that she did not see anything. (R. 1392) She put on a coat and went upstairs to try to use a telephone. (R. 1392) There was no phone upstairs so she went to the people who were right next door to her and called her aunt and the police. (R. 1392)

On December 5, 1985, Detective Tom Sherry had a conversation with Detective Michael McNulty. (R. 1402) Detective McNulty told Detective Sherry that he had a suspect in custody on a sex offense -- Mark Johnson.

After learning that defendant was in custody, Detective Sherry conducted an interview with defendant. (R. 1403) At the beginning of the interview Detective Sherry introduced himself, told defendant that he was investigating the murder of Willie Robinson, and advised defendant of his Constitutional rights. (R. 1403-1404) Defendant indicated that he understood those rights and then proceeded to speak to the detectives. (R. 1404) After this approximately 20 minute conversation, Detective Sherry called the felony review unit of the State's Attorney's Office. (R. 1404)

Assistant State's Attorney Frank Edwards arrived at Area 4 at about midnight on

December 6, 1985. He spoke to the detectives and then went with them into the interview room and conducted an interview with defendant. (R. 1405) Assistant State's Attorney Edwards then took another statement from defendant, which he reduced to writing as defendant related it to him. (R. 1405) Defendant signed the statement and then made the notation "I want the death penalty." (R. 1406)

The statement first sets out the Miranda warnings followed by defendant's signature, and the rest of the statement reads as follows:

I explained to the defendant, that I was an Assistant State's Attorney, that I was not his lawyer. He stated he understood his rights, and wished to tell us about the incident.

He stated in summary: I went to Willie Robinson's (Pete's) sister's house. Pete, Slim (Cynthia Love), and I then went to another relative's house. We were supposed to move Cynthia's clothes.

Pete and I went to get a drink, and then we went to the currency exchange and cashed my check from my job. 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 keys. We went around to the back and then the side door. Pete kicked the door in, both doors. Pete wanted something to drink.

Five to ten minutes later, Pete went to the store. Me and Slim were fucking then when Pete came back. Slim tried to go into my pocket. I commenced to kick that bitch's ass. Pete tried to intervene in my conversation. I stopped whipping Slim's ass, and grabbed him by the head with the left hand, and cut his throat with his 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, and then I fucked her some more, about a half hour.

I went back to Pete when he started moving, and I stabbed him in his fucking head about three to four times.

His head was real hard. I went and fucked Slim like a dog. I heard Pete moving again. I 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 I made Slim give me some more head. I tied her up, and I told her that the reason I was going to leave her alive was so that she could write the story. I was going to be called King of Leos 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. So I came in, and I struck matches and looked around. I lit my lighter, and I found my phone book. I stuck her drawers in her mouth, and then I left.

And I have been treated well by the police and State's Attorney.

(R. 1410-12)

The statement is followed by the signature of defendant and a sentence, stating "I want the death penalty." (R. 1412) The statement was witnessed by Assistant State's Attorney Frank Edwards and Detectives Sherry and Rave. (R. 1412)

Evidence regarding defendant's 1979 rape and beating of a previous girlfriend.

Next the State presented evidence of another rape which defendant committed. On September 11, 1979, in the evening, Geraldine Perry, a lieutenant with the Chicago Police Department, was assigned to investigate a rape at 3700 West West End. (R. 1425-26) After receiving the assignment, Officer Perry proceeded to Cook County Hospital with Assistant State's Attorney Steve Lushing, to interview the victim. (R. 1426-27) Officer Perry went to the Trauma Unit to speak to the victim, but the victim was neither able to speak nor hear. (R. 1427) However, the victim was able to communicate because she had been trained in sign language. (R. 1427) Her home, at that time, was located directly across from Garfield Park, and she had been standing in

front of her home with defendant, having a conversation with him, when he began to drag her across the street into the park. (R. 1429, 1432-33) During the officer's previous conversation with the victim she had indicated that she had previously known defendant. (R. 1429-30) The victim told the officer that at one time, but not at that time, defendant had been her boyfriend. (R. 1430) The victim further told the officer that the evening before, defendant took her across the street into the park, by force, he began hitting her, grabbed her around the shoulders, and around her neck, around her head area. (R. 1430) He hit her repeatedly and dragged her into an area behind a bush, in an area where there was a lot of grass and dirty water. (R. 1430) He continued to hit her. He tore her blouse and clothing off, bit her repeatedly, removed her slacks and proceeded to have vaginal and anal intercourse with her against her will. (R. 1430)

When she conducted this interview with the victim, the officer observed injuries to the victim. (R. 1430) Specifically, both of her eyes were swollen, and she had injuries to her face and neck. (R. 1430) She also had visible bite marks on her left ear and her left arm. (R. 1431) The victim told Officer Perry that defendant had inflicted those injuries. (R. 1431)

Evidence of the rape and beating of Shirley Randolph

On December 5, 1985, at about 11:15 a.m. Shirley Randolph went to her sister's house at 3441 West Jackson to pick up her daughter. (R. 1435) Shirley got into the apartment because defendant, who was her sister's boyfriend, let her in. (R. 1430) Shirley sat down and waited for her sister and daughter to arrive and within about 5 minutes, defendant said he had to use the

bathroom. (R. 1436) After about 5 minutes defendant came out of the bathroom, went over to Shirley, hit her, and told her he was about to rape her. (R. 1437) Defendant tied her up behind her back, tore off her clothes and put a rag in her mouth. (R. 1437-1438) As defendant tore off her clothes, her daughter's Christmas money fell out of her pocket. (R. 1437) There was \$165.00. (R. 1438) Then defendant raped Shirley. (R. 1438)

Defendant went to the store and brought back a tall jar of Old Granddad. (R. 1439) When he returned he raped Shirley again, steadily beating on her. (R. 1439) Then defendant compelled her to perform oral sex on him. (R. 1439) Defendant took Shirley to the washroom telling her to look at her face, because he said that was what made him do it. (R. 1439-40) At that time, her face was all swollen and her jaw was fractured. (R. 1440)

After all of this, defendant took Shirley into the living room, raped her again and tied her up again. (R. 1440) Then defendant started drinking and he fell asleep. (R. 1440) Shirley stayed there for about 10 minutes to be sure defendant was really asleep and then she sneaked out the back door. (R. 1441) She was somehow able to untie herself. (R. 1441) First Shirley ran naked across the street but no one would let her in so she went next door to where she had been raped and they called the police. (R. 1441-42)

Shirley had previously known defendant for about 13 years and she had never seen him act bizarrely or aggressively before. (R. 1442) Shirley had also seen defendant drunk before and he had not acted aggressively toward her. (R. 1443) In Shirley's opinion defendant was sane during this incident. (R. 1442)

Defendant had a knife during this incident, with which he threatened her. (R. 1442-43) Shirley saw the knife after he raped her the first time. (R. 1443) Defendant threatened to cut off

her right breast and actually punctured it. (R. 1443) Shirley's injuries also included a swollen face, bloodshot eye and fractured jaw. (R. 1444)

Detective Nuccio was assigned to investigate the aggravated assault of Shirley Randolph on December 5, 1995. (R. 1449) He was told that a suspect was in custody. (R. 1449) From a search of defendant, arresting Officer Tiano recovered 2 folding knives and \$150.00. (R. 1454) Detective Nuccio's partner was present for the interview with defendant, which began by Detective Nuccio advising defendant of his Miranda rights. (R. 1450) Defendant indicated that he understood his rights and wanted to speak to them. (R. 1450)

Detective Nuccio asked defendant about this crime and defendant said that he had sent his children away, that Shirley was the sister of his girlfriend, that he said she had interfered in his family business, and that he wanted to kill her [meaning Shirley]. (R. 1451) "So, she came over to his apartment under some guise. And there he said that he kicked her fucking ass and beat her, and that he whipped her like she stole something." (R. 1451)

While talking about the rape of Shirley Randolph, defendant also told Detective Nuccio that he had killed a person about a week or two before. (R. 1452) Defendant said he stabbed a man called Pete who lived in his building. (R. 1452)

The detectives continued talking to defendant who told them that in fact he had killed ten people, and then asked Detective Nuccio if he believed him. (R. 1452) Detective Nuccio told defendant he believed anything defendant told him, and they continued to talk about other incidents. (R. 1452) Detective Nuccio informed Detectives Rave and Sherry who were working on the Willie Randolph murder as to what defendant had said. (R. 1452)

While they were at Mount Sinai hospital Assistant State's Attorney Mike Gerber

arrived. (R. 1454) They interviewed the victim in one of the examining rooms. (R. 1455) Shirley Randolph's face was extremely distorted. In fact, because of the size of her head, Detective Nuccio believed that the victim weighed 185-200 pounds. (R. 1455) Her eye was just about shut, both of her cheeks and jaw were extremely distorted, and it was hard to tell what her true facial resemblance was. (R. 1455) Although she was not able to speak well the victim identified defendant as the man who did this to her. (R. 1455)

During a search of defendant's apartment, detectives observed some white tubing, commonly used for feminine hygiene, which was attached to a hot water bottle. (R. 1456) They also observed, a large serrated-edged butcher knife and a bottle of Old Grandad on the floor. (R. 1456)

The detectives returned to Area 4, where Detective Nuccio and Assistant State's Attorney Gerber went in to talk to defendant. (R. 1456) Assistant State's Attorney Gerber conducted the interview, beginning by advising defendant of his Miranda warnings. (R. 1457) Defendant stated that he understood those rights and proceeded to talk to them. (R. 1457) Again, defendant stated that he wanted to kill Shirley Randolph, and that he did in fact perform and have her perform numerous sex acts on him, including oral, vaginal and anal intercourse, and he beat her and broke her jaw. (R. 1457) Defendant gave a handwritten statement but did not sign it. (R. 1457-62)

Detective Nuccio interviewed defendant on 2 separate occasions during the evening of December 5, 1995. During the course of these interviews defendant appeared to be coherent and sober. (R. 1460) Defendant did not slur his words or have an odor of alcohol on his breath. (R. 1460) He was answering questions in a rational manner. (R. 1460)

At this time the State rested its case in aggravation. (R. 1467)

Second Stage-Mitigation

Defendant's first witness was Officer Thomas Hanson who was a Cook County Sheriff working at the Department of Corrections, Division 1, tier B4, the psychiatric unit. (R. 1470-71) Defendant was in Hanson's custody for about 2 years, for 5 days a week, and 8 hours a day. (R. 1472) Hanson stated that defendant was well behaved, and he could only think of one incident in which defendant was involved. (R. 1472) The whole tier was involved then. (R. 1472) Hanson said that defendant tended to diffuse potentially dangerous situations and that he was not a disciplinary problem. (R. 1473)

The period of incarceration that Officer Hanson saw defendant was 1985, 1986, and 1987. (R. 1471-74) During that period of incarceration, Hanson stated that defendant was given medicine. (R. 1473-74) Specifically, defendant was given Sinequan to sleep. (R. 1474) Other than several occasions with the staff psyche workers, defendant did not receive psychiatric treatment or therapy. (R. 1474) He only saw a psychiatrist or psychologist when he went to get his medication. (R. 1474) Hanson stated that he believed that defendant would have no problems in jail, based on the two years Hanson saw defendant. (R. 1475)

Tier B-4 is a maximum security tier and at the time defendant was there, there were only three inmates on the tier. (R. 1476) ABO, is generally for inmates who have received the death penalty or sentences such as 300 years. (R. 1477) They are closely scrutinized. (R. 1477) ABO had 23 hour a day lockdown. (R. 1477) The security or confinement is less intense in tier B-4 than it is in ABO. (R. 1478)

Sergeant Gerald L. Smith, also an employee of the Cook County Department of Corrections testified that defendant had been in ABO for about one year and to Smith's knowledge defendant had not had any disciplinary problems. (R. 1480-1482) Sergeant Smith stated that defendant seemed adjusted although he said it was hard for him to tell because he only saw defendant for a few minutes each day. (R. 1483-84)

Marilyn Lee, defendant's sister, testified that she and defendant were beaten by their mother quite often, sometimes 2-3 times a week. (R. 1487-1488) Marilyn stated that she and defendant got the most beatings, although Marilyn was beaten more than defendant. (R. 1489-90, 1496) They were hit with extension cords, belts, or a stick. (R. 1490)

Prior to defendant being arrested, Lee would see defendant sometimes three times each week. (R. 1491) As children they were together a lot. (R. 1490-91) Defendant never acted up or was violent around Lee. (R. 1491)

Their brother Bill also beat defendant when their mother would leave. (R. 1493) This happened about twice a week when their mother was gone in the evening. (R. 1493) Bill would kick and hit defendant. (R. 1493-94)

Lee never saw their mother hug or kiss defendant. (R. 1494) She didn't have time to take him out to the park to play because she worked all the time. (R. 1494-95) She did not take him to school, he went himself. (R. 1495) Defendant never received birthday parties or presents although their mother would buy him clothes for school. (R. 1495)

Lee also stated that defendant had serious headache problems when he was young, and when he would get these headaches he would bump his head against the wall. (R. 1492) Lee said she would get him aspirin, tell him to lay down and he would go to sleep. (R. 1492) Lee would

feel bad if her brother got the death penalty, because her brother would not be around for her to talk about things. (R. 1492)

However, Lee had visited her brother in jail only 3-4 times since 1985, and defendant's trial in this case took place in 1990. (R. 1498) Defendant would ask Lee why she didn't come out there. (R. 1499) He never told her that he didn't want her to come out. (R. 1499) Lee also admitted that she knew nothing about the crimes her brother committed and did not know the victims. (R. 1497)

The parties stipulated that if he were called to testify, Mr. John Morris would testify that he was defendant's father. (R. 1504-1505) During defendant's formative years until the time that defendant grew into adulthood, Morris was not present in the family home. (R. 1504-1505) Morris would further testify that he did not support the family in any way and that he gave no parental guidance or emotional support or instructions to defendant. (R. 1504-1505)

The parties further stipulated that if called to testify, Miss Marianne Kuas would testify that she was employed at the Pontiac Correctional Center as a records keeper and that she searched the records pertaining to defendant. (R. 1505) She would testify that she found a record dated December 17, 1980, wherein, defendant, inmate number N 02213, requested a psychiatric examination. (R. 1505-1506) At defendant's time defendant was serving a 7 year sentence for rape. (R. 1507) The reason listed for that request was lapses of memory and mental confusion. (R. 1506) The records showed that the physician who approved the psychiatric exam said that defendant then appeared rational but very worried about his inability to account for his actions. (R. 1505-1506)

The parties further stipulated that if called to testify, Dr. Yong Ha, a medical doctor

and psychiatrist examined defendant on January 2, 1981, and that the results of that examination were contained in Doctor Ha's report. (R. 1506) Defendant, was a 22 year old black resident, who was referred by Doctor Lowenthal, and expressed his main concern of previous numerous acts of physical aggression and violence, which would be followed by a lack of recognition or memory of these incidents. (R. 1506)

Defendant was sentenced to death by the trial court.

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

RICHARD A DEVINE
State's attorney of Cook County

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