



OCTOBER 2002 SESSION

PRISON REVIEW BOARD  
STATE OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Docket No. \
vs.	)	
	)	Inmate No. B-17963
RANDY BANKS,	)	
	)	
	)	

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**I**

**HISTORY OF THE CASE**

Randy Banks murdered 16-month-old Veronica Hurley by systematically depriving her of food and warmth for a period of four months. Petitioner purposefully kept food from Veronica, often snatching it away from the starving child because she ate too noisily. He kept Veronica in a room with no heat and no blanket or cover of any kind, clothed only in a thin T-shirt. He opened the window for hours in subfreezing temperatures several days a week. He deprived her of medical care. At her death of a massive infection brought on by starvation and hypothermia, Veronica weighed 17 pounds.

Petitioner was charged under indictment number 88 CR-8611 with two counts of murder for her death. He was tried in the court of the Honorable Barbara J. Disko before a jury and found guilty. The same jury found Petitioner eligible for the death penalty and a sentence of death was imposed.

Petitioner's conviction and death sentence were affirmed on direct appeal to the Illinois Supreme Court in People v. Randy Banks, 161 Ill. 2d 119 (1995). The United States

Supreme Court denied certiorari. 513 U.S. 1177 (1995). In 1995 Petitioner's appointed counsel filed a Petition for Post-Conviction relief, and that petition is still pending in the Circuit Court of Cook County. Petitioner's counsel has filed a motion to determine Petitioner's fitness for post-conviction relief, premised entirely on Petitioner's refusal to talk to his attorneys. That matter is also presently pending in the Circuit Court.

## II

### FACTS OF THE CASE

On December 22, 1986, Doctor Kenneth Greer was on duty as the senior pediatric resident for the emergency department at the University of Illinois Hospital in Chicago. (R. 656) At approximately 7:50 P.M. that evening he was called to the triage desk of the emergency room. (R. 656) Upon arrival he saw Veronica Hurley wrapped in a blanket. (R. 657-658) The child was frigid to the touch. (R. 658) No blood pressure reading could be ascertained, and only distant heart sounds were audible. (R. 658) The child appeared very emaciated. (R. 658)

When Doctor Greer took off the child's wool cap he found that the pad of fat located over the temporal region of the head was completely down to the bone. (R. 658) Her arms and legs had no fat on them, and her hands and feet were swollen, a sign of severe malnutrition. (R. 658) Her skin was extremely "doughy," a sign of severe dehydration and a lack of protein in the body, and was cyanotic; that is, it did not have adequate oxygen or profusion of blood from the heart. (R. 658-659) Doctor Greer stated that the child's temperature could not be measured because the thermometer could not read below 76 degrees (F), indicating a profound hypothermia. (R. 659-660) After an hour he was able to get a core temperature of 76 degrees, indicating that the child's temperature upon arrival had been about 74 degrees. (R. 660-661) Her heartbeat was about 40 to 60 beats per minute, or about one third the normal pulse rate. (R. 662)

It was also discovered that the child had an extremely low white blood cell count, and was suffering from a rampant blood infection. (R.665) As a result she was in a state of "dissimilated intravascular coagulopathy" and was unable to form blood clots. (R. 666) She was

so dehydrated that her blood vessels had collapsed and had no significant fluid in them. (R. 662)

Doctor Greer and his team worked for six hours to save Veronica, but were ultimately unsuccessful. (R. 667) She died at 1:50 in the morning of December 23, 1986. (R. 667) Doctor Greer stated that the immediate cause of death was a hemorrhage in her lungs, caused by her blood's inability to form clots. (R. 66-8) This in turn had been caused by the collapse of her immunization system because of the severe malnutrition and hypothermia. (R. 667) The doctor stated that the extreme hypothermia was consistent with the child having been kept in a room with the window open with the outside temperatures between 20 and 40 degrees for several days. (R. 672) He also stated that Veronica's malnourishment was consistent with her not being fed or being fed very little over a long period of time. (R. 673) Doctor Greer testified that because of concern for other children who might still be in the home, law enforcement officials were notified. (R. 666-667)

Theresa Robinson testified that at about midnight on the night of December 22, 1986, she was at home at 2037 West Adams with her husband and three children when Petitioner, who was her first cousin, came to the door. (R. 684-685) He had two children with him, whom Theresa knew to be his son, Victor, age two, and his daughter Victoria, age five. (R. 686) Petitioner asked Theresa if she would care for the children for a few days. (R. 687) At first Theresa said no, because it was too close to Christmas, but then she saw that Victoria was limping and in pain, and she changed her mind. (R. 687-688) She testified that the children looked terrified, like they were in a lot of pain, and that Victor as well as Victoria was limping. (R. 687) Victor wore a coat and shoes that were too small. Victoria was barefoot, and Theresa could not remember her wearing a coat. (R. 687) She told Petitioner that he had to come back

for them, but that they could stay for a while. She also noticed that although it was very cold outside Petitioner was sweating profusely. (R. 688-689)

Theresa told her own daughter to prepare a bath for Victor and Victoria, and she told them they could eat after they had bathed. (R. 689-690) While Theresa was preparing something for them to eat she heard her oldest daughter, Tonika, call to her to come to the bathroom. (R. 691) In the bathroom Theresa saw Victoria, now undressed, with scars, fresh wounds, and burns on her legs and buttocks. (R. 691) Theresa immediately called the police. (R. 692) When Officer Sam Mostacchio and his partner arrived at the scene they checked Victor for similar injuries, and then took both children to Cook County Hospital. (R. 692-693) Theresa told the police that Petitioner had told her that he would be back the next day. (R. 694)

Petitioner did return the next day, December 23, 1986. (R. 694) He had a large bag with him. (R. 698) When he learned that the children had been taken to the hospital he started to leave, but Theresa's husband told Petitioner to sit down, and that Petitioner "wasn't going anywhere." (R. 697) Theresa called the police, who came and arrested Petitioner. (R. 698) When the arresting officer opened Petitioner's bag Theresa saw that it contained a large amount of money. (R. 699) The officers found no weapon in the bag, but they did find \$4,427 in United States currency. It was neatly stacked in order of denomination, as well as in order of serial number. (R. 986-987)

Doctor Robert Stein, the chief medical examiner of Cook County, performed the autopsy on Veronica Hurley on December 24, 1986. (R. 938-941) He found that the 16-month-old infant weighed 17 pounds and was 28 inches in length. (R. 941) He found her to be markedly emaciated and dehydrated. (R. 942) Consistent with this condition he found edemal swelling of the upper and lower eyelids. (R. 842) He found a number of needle marks and

incisions from the treatment given her at the emergency room. (R. 942-943) There were some healed scars on the back of her leg and an ulcerated area on her back, either a pressure sore from being left unturned for extended periods of time or a result of trauma. (R. 942-943)

Upon making an incision, Doctor Stein found an almost complete absence of fat, which was consistent with starvation. (R. 944) There was 25 c.c. of fluid in the chest cavity and another 25 c.c. of fluid in the abdominal cavity, indicating congestive heart failure. (R. 944-945) The ribs were very prominent. (R. 944) The lungs were red and hemorrhagic. (R. 945) There was a complete absence of food in her gastrointestinal tract, and the fecal matter in her lower bowel was greenish and mushy, rather than well-formed, indicating that no solid food had passed through that area. (R. 945-946) On her head he found a localized hemorrhage in the subgaleal tissue, which binds the scalp to the skull. (R. 946) He stated that the large head size was not consistent with the child's age, but was consistent with emacia. (R. 948)

Doctor Stein stated that the immediate cause of death was hypothermia, due to neglect, as a result of child abuse. (R. 949)

Elaine Hurley, Veronica's mother, testified that at the time of the trial she was 25 years of age. (S.R. 38) She had grown up in Indianapolis and had gotten as far as the 10th grade in school. (S.R. 39) She had met Petitioner, then known as Waldo Peck, in September, 1979, and eventually bore him two children: Victoria, born on October 2, 1981, and Victor, born on March 28, two years later. (S.R. 40-41) Elaine did not actually live with Petitioner until 1984 when she and the two children followed him to Chicago. (S.R. 42) Veronica, born on August 21, 1985, was fathered by another man, Ray Wells, a fact known to Petitioner. (S.R. 42-43; R. 717)

In September of 1986, Petitioner, Elaine, and the three children moved from an apartment on Maxwell Street to a flat at 2757 West Harrison. (R. 717) The apartment consisted

of a living room, four bedrooms, a kitchen and a bathroom. (R. 721) Elaine worked full-time at a Church's Chicken as a cashier. (R. 721) At this time Victor was two, Victoria was five, and Veronica was 13 months old. (R. 721) Petitioner controlled the money, although he did not work. (R. 722) Sometimes Elaine worked from 8 a.m to 4 p.m.; at other times she worked from 4 p.m. to 10 p.m. (R. 722) During September and October it was mostly the morning shift. (R. 723)

During this time Petitioner and Elaine slept in the living room. The three children were kept in one small bedroom. (R. 723) In this room there was a mattress, a potty chair, and a crate. (R. 724) There was no t.v., and there were no toys. (R. 724) There were no blankets. (R. 725)

Victor and Victoria were fed two or three times a week, usually sandwiches of lunch meat or peanut butter and jelly. (R. 727) There were days when they got nothing. (R. 727) Petitioner would decide when the children would eat. (R. 727) Before leaving for work Elaine would prepare Similac with iron (a baby formula) and leave it for Petitioner to feed Veronica. (R. 728) Three or four times per week she would come home and find most of it where she had left it. (R. 729) Sometimes Elaine would try and sneak food to the children, but if Petitioner caught her he would beat her. (R. 729-730) He told her, "These are my kids, I know what I am doing." (R. 731) During this time Victoria was let out only to go to the bathroom; Victor was never allowed out of the bedroom. Veronica remained on the mattress. (R. 729-730)

Veronica wore only a thin t-shirt and pampers. (R. 725) Victor sometimes wore a t-shirt, but otherwise went naked about 90 per cent of the time. (R. 726) Victoria also went naked nearly all of the time. (R. 726) Throughout this time the only heat in the apartment was supplied by a single space heater which Petitioner kept in the living room. (R. 726) Elaine testified that

when the weather grew cold she could see her breath in the children's unheated bedroom. (R. 731) Still the children never wore more than t-shirts. They never had shoes or socks on their feet. They never had blankets or comforters. (R. 732) Even then Petitioner, complaining of the smell in the little bedroom, would open the window during the day three or four times a week. (R. 733) Even in December he would open the window 14 to 18 inches for four to six hours at a time. (R. 734)

Victoria never went to school; Petitioner said he would teach her himself. (R. 734) He never did. (R. 734) Victor was made to sit on the potty chair all day and all night. (R. 735) The crate was for him to put his head on when he slept on the chair at night. (R. 734-735) If Victor got off the potty chair Petitioner would whip him. (R. 735) He would hold Victor up by one arm and hit him with a belt. (R. 736) The pamper Victor sometimes wore came off, and the belt hit his penis, which then started bleeding. (R. 736) Elaine described Victor's penis and testicles as bleeding, pussy, and swollen. (R. 744) The average beating consisted of over 10 blows. (R. 736) Victoria, however, was beaten about three times per week, Petitioner using a belt or stick. (R. 737) This "stick" was a 2x4. (R. 1243) Petitioner would hold the board with both hands and hit her legs, her arms, back, and buttocks. (R. 739) Three times he also struck her in the face with his hands, one time knocking her unconscious. (R. 739-740) Victoria had a burn mark on her buttocks, but Elaine did not know how she got it. (R. 743)

Every day Victor and Victoria would ask for food and clothes. (R. 741) Elaine would get them food. (R. 741) They never got any food or clothes from Petitioner. (R. 741) Petitioner did not want them to have clothes. (R. 742) Elaine would sleep with them, but she would wear a coat because of the cold in their bedroom. (R. 742) There was no light in the children's room; Elaine recalled perhaps one time the light was turned on in the evening. (R. 743)

Elaine stated that when she found that Petitioner had not given Veronica any of the Similac she had left out she would feed the baby herself. (R. 746) The baby would "gobble" it down, and when Petitioner saw this he would take the food from her, saying "she's acting like an animal." (R. 746) By December Veronica would not move, but would just lie still on the mattress. (R. 746) Petitioner would not let Elaine take Veronica or either or the other two children to a doctor. (R. 747) When they argued about it Petitioner struck Elaine, and he threatened to kill her. (R. 747) She did not tell any one at work because she was afraid of Petitioner; he had threatened to kill her mother and the children. When Elaine got paid she gave the money to Petitioner, and though he had her purchase food he always kept it for himself. (R. 750) The rest of the money he would hide. (R. 750) He referred to the children as "motherfucking animals." (R. 753-754)

On December 22, 1986, Elaine arrived home at about 6:35 p.m. (R. 748) She went into look at Veronica, and found her lying still and unable to eat. (R. 752) When Elaine dressed her to take her to the hospital, Petitioner told her to tell the doctor that Veronica had stopped eating just that day. (R. 752-753) He told her to say nothing of the other two children or himself. (R. 753) She took Veronica to the University of Illinois Hospital emergency room. (R. 754) The nurse took the infant from her, and Elaine never saw Veronica again. (R. 754) When asked if there were other children at home she said that there were. (R. 755)

After the police were called to University of Illinois Medical Center emergency room, Detective Dennis Keane and his partner Greg Baiocchi of Area Four Violent Crimes were assigned to the investigation. (R. 1003) They interviewed various witnesses, and on December 23, 1986, they interviewed Elaine Hurley. (R. 1009) At the time she was charged with child endangerment. (R. 1009) She continued to state that Veronica had stopped eating around

Thanksgiving. (R. 1011) They then went to the apartment on Harrison and found it to be moderately warm, with plastic nailed over the windows. (R. 1011)

Detective Keane interviewed Elaine Hurley a total of three times. (R. 1021) During the first two interviews, she refused to incriminate anyone. (R. 1021) In the third interview, she asked if Petitioner was in custody, and being informed that he was, she told the detectives what had happened. (R. 1022, 1033) Up to then she had been too afraid of Petitioner to tell the truth. (R. 756)

Doctor Demetra Soter was the acting head of the child abuse team at Cook County Hospital when Victor and Victoria were admitted in December of 1986, and she examined them on December 23rd. (R.1071) When she testified to her initial observations of Victor, Doctor Soter stated:

He had whip marks going up and down his legs. You could see the linear and the curved marks from whip marks on his legs. He had--both his feet were swollen and peeling from frostbite. He had cuts all over his genitals, over his entire penis, extending from the front down underneath, into the back. He had a roundish cigarette-type burn next to his rectum. He had discoloration of his buttock that looked like an old burn or old trauma with some peeling of some kind over his buttocks. He also had two curvilinear marks of discoloration around the backs of his thighs. (R. 1073-1074)

She defined a curvilinear mark as an injury produced by an object that can wrap around whatever it hits, such as an extension cord or belt. (R.1075) Victor's legs also showed linear marks, wounds produced by a straight object, such as a board, ruler, or plank. (R.1075) She stated that Victor had 12 separate marks of both kinds, as well as bruises on his legs. (R.1075) She described his buttocks as being very red and scarred, with a very dark curved discoloration around the upper thighs. (R.1077) This was consistent with Victor having to sit on the potty chair for prolonged periods of time. (R.1081) She stated further that Victor suffered from frostbite of both feet, with peeling and swelling of the feet. (R.1075) This was consistent with his having been kept in an unheated room, on an uncarpeted floor, in Chicago in December. (R.1082)

When asked about her observations of Victoria Doctor Soter stated:

Well, first I spoke to her. Victor couldn't speak at all. So, I went and tried to talk to Victoria. She was a very, very talkative child, but she--her vocabulary was what you would expect from somebody who was three or four years old. She didn't know her last name. She didn't know her colors. She couldn't give us very much of a history about what had happened to her. She could talk as if she was three years old. She was very cooperative.

Santa Claus had come around and delivered presents to the children, and she wouldn't release a little music box that Santa had given her. She wouldn't let go of it for anything. It is full of photographs. She would hoard food. She would get food, and

when she would be done eating hers, she would then take the other patients' food off their trays. She would take care of Victor. She would watch out for him, kind of look out for him.

She was incredibly emaciated. Her belly stuck out like a child that has been chronically starved. She had skinny little legs and very skinny arms. She had cuts and bruises over her head. She had whip marks up and down her legs, much more severe than Victor's. She had the swollen hands and feet from frostbite. . . .(R.1082-1083)

. . . She was awake and alert. So, it was long term starvation, where her body had time to readjust to pulling the fat, to keep her bring (sic) going, to keep her alive. If you just take a child and totally starve them for a short period of time, they will die immediately. If you slowly starve them over a long period of time, your body will adjust. You will lose your body fat. You will still be able to walk, talk and play and slowly get skinnier and skinnier. So it appears that she starved for a prolonged period of time. (R.1097-1098)

Doctor Soter also testified as to the large scars on Victoria's buttocks. (R.1095) There was keloid formation, which is a permanent deformation caused by second and third degree burns. (R.1095) They could have been caused by a flame, scalding water, or being sat on a hot

skillet. (R.1095)

According to United States Department of Commerce National Climatic Records the temperatures recorded in Chicago at Midway Airport were as follows for the months of November and December of 1986, as was read into the record by the People:

On November 1, 1986, the low temperature recorded at Midway Airport was 43 degrees. On the 2nd, it was 30. On the 3rd, it was 30. On the 4th, it was 40. On the 5th, it was 38 degrees. On the 6th, it was 33 degrees. On the 7th, it was 48 degrees. On the 8th, 44 degrees. On the 9th, 28; on the 10th, 24; on the 11th, 22; on the 12th, 10; on the 13th, 7 degrees; and on the 14th, 15, degrees; on the 15th, 30 degrees, 16th, 30 degrees; 17th, 31 degrees; 18th, 33 degrees; the 19th, 24 degrees; 20th, 33 degrees; 21st, 30 degrees; 22nd, 30 degrees, 23rd, 30 degrees, 24th, 27 degrees; 25th, 31 degrees, 26th 30 degrees, 27th, 27 degrees; 28th, 32 degrees 29th, 31 degrees; and November 30th, 36 degrees.

The month of December, 1986, the low temperature recorded each date in the month of December were as follows:

December 1st, 33 degrees; 2nd, 24 degrees; on the 3rd, 30 degrees; on the 4th, 21 degrees; on the 5th, 17 degrees; on the 6th, 29 degrees; on the 7th, 33 degrees; on the 8th, 35 degrees; on the 9th, 16 degrees; on the 19th, 12 degrees; on the 11th, 13 degrees; on the 12th, 50 degrees; on the 13th, 40 degrees; on the

14th, 24 degrees; on the 15th, 24 degrees; on the 16th, 35 degrees; on the 17th, 34 degrees; on the 18th, 28 degrees; on the 19th, 26 degrees, on the 20th, 26 degrees. On December 21, the low at Midway Airport was 22 degrees. (R. 1122-1123)

Victoria Hurley was nine years old at the time of trial. (R. 1124) She testified that Victor was her brother, and Veronica had been her sister. (R. 1124-1125) When she was living with her parents, they lived in an apartment. (R. 1126) She and Victor and Veronica stayed in a room with a potty, a pillow, and a window. (R. 1126) There were no toys and no T.V. (R. 1126) Her mother worked in the afternoon, and Petitioner did not work at all. (R. 1127) Victoria could only leave the room to go to the bathroom. (R. 1127) They were never allowed to go out to play. (R. 1127) Veronica stayed on the pillow. (R. 1128) She never crawled around, and although she cried a lot when they first moved into the apartment, she did not cry a lot when they left. (R. 1128) Victoria never had clothes on. (R. 1129) Victor wore a shirt. (R. 1129) The room was so cold they could see their breath. (R. 1129) Victoria asked Petitioner for clothes, but he did not say anything. (R. 1130) She also asked her mother, Elaine Hurley, for clothes, and although Elaine would try to give them clothes, Petitioner would not let her. (R. 1131) To keep warm Victoria, Victor and Veronica would "curl up." (R. 1131) The window in the room had frost on it, and it was open. (R. 1131) Petitioner would open it. (R. 1131)

They were not fed every day. (R. 1132) At night after Petitioner and Elaine were asleep, Victoria would sneak into the kitchen for something to eat. (R. 1133) She would bring it back into the bedroom to give Victor some. (R. 1133)

She stated further that Petitioner, but not her mother, would do "mean things." (R.

1133) Petitioner would whip Victoria when she asked for "some cover" or for something to eat. (R. 1134) He beat her while she was naked with a belt. (R. 1134) He slapped her "a lot." (R. 1135) He would hit her with it repeatedly. (R. 1134) He would also hit Victor with the belt, and Victor was naked also. (R. 1134) Elaine tried to give them food or cover but Petitioner would not allow it, and one time, according to Victoria, Petitioner pointed a gun at Elaine. (R. 1135)

One time Petitioner put Victoria "on the stove," and burned her. (R. 1136) She stated that he held her down on the stove. (R. 1157) Following Petitioner's cross-examination of Victoria the People rested their case-in-chief.

Petitioner acted pro se throughout the trial. His case-in-chief consisted of calling Elaine Hurley and Theresa Robinson back to the stand. Theresa Robinson, contrary to her prior testimony, admitted that she had been convicted for possession of marijuana, and had been arrested for possession of an unregistered pistol. (R. 1211, 1215-1216) Elaine Hurley, upon being questioned, denied having made a deal with the State's Attorney's Office wherein she would testify in exchange for custody of Victor and Victoria. (R. 1224-1231)

The jury returned a verdict of guilty against Petitioner. (R. 1314) A death penalty hearing was conducted before the same jury. Eligibility was based on Veronica's age being under 12 years, and that her death resulted from exceptionally brutal and heinous behavior indicative of wanton cruelty. (R. 1329) The jury found Petitioner to be eligible, and the second phase of the death penalty hearing proceeded before the same jury. (R. 1349)

Evidence was adduced that on October 6, 1983, Ms. Barbara Hutchinson was at the Holidome in Indianapolis with her husband. (R. 1381) As they were leaving to go to dinner Mr. Hutchins was stopped by some other gentlemen, and, as they conversed, Ms. Hutchins went into the parking lot to get their car. (R. 1381) As she did so, two males and one female

accosted her, forcing her into her car at the point of a shotgun. (R. 1381) They drove for about five minutes and took her jewelry and cash. (R. 1382) They drove her to a field on the edge of the city and ordered her to undress. (R. 1383) One of the individuals molested her, and she was then ordered from the car. (R. 1383) They tied her up, still at the point of two shot guns, and threatened to kill her. (R. 1384-1385)

The three individuals left her naked, tied up in the field as they drove away in her car. (R. 1385) Ms. Hutchins was able to get up and hop, still tied, to a nearby apartment complex for help where a security guard assisted her and called police. (R. 1385-1386)

That same evening Officer Casey Forestal of the Marion County, Indiana, Sheriff's Police was working as a security guard at a convenience store. (R. 1414-1415) While he was there he heard a Sheriff's radio broadcast concerning the kidnapping of Ms. Hutchins and a description of the car taken by the three offenders. (R. 1416) Sometime later the same car pulled into the parking lot where he worked. (R. 1416) As the vehicle backed out of its parking place Officer Forestal drew his weapon, announced his office, and told the driver to stop and turn off the car. (R. 1418) In open court he identified the driver of that car as Randy Banks. (R. 1418) As Forestal radioed for assistance, Petitioner restarted the car and sped off. (R. 1420) Forestal fired a flurry of shots, wounding a female accomplice of Petitioner's. (R. 1421) This woman, along with one of the male offenders, was arrested within a short time. (R. 1394) Petitioner escaped and although his identity had been established, he was not taken into custody until he was arrested in Chicago for the aggravated battery of Victor and Victoria Hurley. He was extradited to Indiana where he was convicted of kidnapping, dealing with sawed-off shotguns, resisting law enforcement, and robbery, and sentenced to 75 years in prison. (R. 1413) Certified copies of these convictions, as well as for two convictions for felony theft, were

introduced into evidence. (R. 1412-1413)

Petitioner, still acting pro se, chose to present no evidence or argument (R. 1429, 1438), and the jury returned the sentence of death.

### III

#### REASONS FOR DENYING THE PETITION

Petitioner's primary claim is that he was allowed to represent himself at his own fitness hearing and trial. He claims further that the "propriety" of his being allowed to do has never been determined by any court. This issue has been raised in Petitioner's post-conviction petition, and must be addressed and ruled on before Petitioner can be executed. As such, it is not a reason to grant clemency.

The record also demonstrates that petitioner received repeated and extensive admonitions from the judge on the hazards of self-representation. Nonetheless, petitioner refused not just the representation of counsel, but the assistance of standby counsel as well.

A Petitioner in a criminal case has the right under the Constitution of the United States to act as his own attorney. Farretta v. California, 422 U.S. 832, 95 S.Ct. 2525 (1975). Thus, the issue is not one of "propriety" but of constitutional right. Our supreme court has held that it cannot force one who has elected to represent himself to accept the representation of counsel, even under the new guidelines of the Governor's Commission. People v. Hickey, \_\_\_ Ill. 2d \_\_\_, 2001 Ill. LEXIS 1080 at \*66-67 (No. 87286 September 27, 2001)

Petitioner next asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment

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

Thus, the fact that the Court, the General Assembly and the Governor’s Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to petitioner’s case. Instead, a true injustice would only result if it were reflexively determined that petitioner’s trial was fundamentally unfair without any examination of the proceedings themselves. Moreover, petitioner ignores the fact that the Illinois Supreme Court has examined the proceedings in his case and has determined that they were fundamentally fair and that he was not unduly prejudiced in any manner.

### 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.

### 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 Petitioners compared to others found guilty of first degree murder." People v. Ballard, \_\_\_ Ill. 2d \_\_\_, 2002 Ill. LEXIS 376 at \*73 (No. 88885 August 29, 2002) (citing Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983)). As the Ballard court explained, "there are innumerable examples of first degree murders that do not fit within any of the statute's eligibility factors" and A[e]ach provision is narrowly tailored to fit a specific set of facts and circumstances." Id., 2002 Ill. LEXIS 376 at \*74.

Moreover, each of the aggravating factors represents a determination by the General Assembly that certain types of murders are so deplorable that the death sentence

may be imposed. Each one is intended to ensure that the most helpless members of our society (such as children, the elderly or disabled) are protected against violence or to provide a strong disincentive for the offender to kill the victim.

In any case the People submit that the murder of Veronica Hurley meets the definition of the eligibility factor based upon torture. Our supreme court has stated that cases involving exceptionally brutal and heinous behavior indicative of wanton cruelty have generally involved “prolonged pain, torture or premeditation.” People v. Lucas, 132 Ill. 2d 399, 445 (1989). Petitioner’s actions in this case clearly meet that standard. It was Petitioner who purposefully kept food from Veronica, often snatching it away from the starving child because she ate too noisily. He purposely kept Veronica in a room with no heat and no blanket or cover of any kind, clothed only in a thin T-shirt. He opened the window for hours in subfreezing temperatures several days a week. He deprived her of medical care she desperately needed. The People submit that this is torture in the clearest sense, and that petitioner would have been found eligible for the death sentence under the new eligibility factors.

#### 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, [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.

### Allocution

Petitioner also claims that clemency is appropriate because he was denied the opportunity to make a statement in allocution at his sentencing hearing. Petitioner represented himself at trial and at the sentencing proceeding. At the sentencing hearing he had the right to make an opening statement, to call witnesses, testify under oath and subject to cross-examination, and make a closing argument to the jury. He chose to do none of these things. In light of this, Petitioner’s claim that he was denied his right to allocution defies comprehension.

### 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.

#### 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 Petitioner. If a jury is told that the Petitioner 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 (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.

#### 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.

### Single Eye-Witness

Petitioner's claim that he was convicted as the result of the testimony of a single eye-witness does not survive even casual scrutiny of the record. Both Elaine Hurley and Victoria Hurley testified in great detail of the abuse suffered by the three children at the hands of the petitioner over a four-month period. Their testimony was amply corroborated by the testimony of medical personnel who treated them. There is no doubt of petitioner's guilt.

### 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 Petitioners in capital cases (see People v. Emerson, 189 Ill. 2d 436 (2000); People v. Palmer, 162 Ill. 2d 465, 491 (1994)) and will vacate a death sentence if it determines that it is excessive in light of the facts of the case and the Petitioner's background (see People v. Smith, 177 Ill. 2d 53 (1997); People v. Blackwell, 171 Ill. 2d

338 (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.

#### 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 Petitioner in Illinois, particularly those prosecuted in Cook County has ever been deprived of the necessary funds to investigate or retain appropriate experts. Rather, courts have denied various requests which are deemed unreasonable or unnecessary, the same standard which applies for funds under the Capital Litigation Trust Fund. 725 ILCS 124/15(c). Also, the Cook County Public Defender has significant resources available for capital litigation. Therefore, the mere fact that the Capital Litigation Trust Fund was not created until 2000 is irrelevant.

## CONCLUSION

Petitioner Randy Banks murdered Veronica Hurley by depriving her of food, clothing, and shelter – the basic requirements of life -- for a period of four months. During this same period of time he inflicted terrible torture on Veronica's brother and sister, Victor and Victoria. It is a pattern of deliberate cruelty that defies comprehension, and it is devoid of mitigating circumstance. Petitioner is not on death row today because he lacked the protections of the Governor's Commission's guidelines, but because of the malignancy of his heart.

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

Respectfully submitted,

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