

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | Docket No. |
| vs. |) | |
| |) | |
| ROBERT SIMPSON, |) | Inmate No. A-63227 |
| |) | |
| |) | |

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

—
**PEOPLE'S RESPONSE IN OPPOSITION TO PETITION
FOR EXECUTIVE CLEMENCY**

—
HEARING REQUESTED

RICHARD A. DEVINE
STATE'S ATTORNEY OF COOK COUNTY

By: SCOTT CASSIDY
JAMES E. FITZGERALD
Assistant State's Attorneys

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I

HISTORY OF THE CASE

Following a jury trial in the circuit court of Cook County, defendant was convicted of armed robbery and first degree murder. At the sentencing hearing, the same jury found defendant eligible for the death penalty and further determined that there were no mitigating factors sufficient to preclude imposition of that sentence. Defendant was sentenced to death on the murder conviction and to 30 years' imprisonment on the armed robbery conviction. Defendant's convictions and sentences were affirmed on direct appeal. People v. Simpson, 172 Ill. 2d 117 (1996). Defendant's petition for post-conviction relief was denied by the circuit court judge. That decision was affirmed. People v. Simpson, 2001 Ill. Lexis 1081 (2001).

II

FACTS OF THE CASE

Defendant was charged by indictment with three counts of first-degree murder, one count of armed robbery, two counts of armed violence and two counts of aggravated battery arising from the May 20, 1992 fatal shooting of the victim, Barbara Lindich, during the course of a robbery of a Fairway Foods grocery store in Glenwood, Illinois.¹ (C.R. 21-30) The People nolleed the armed violence and aggravated battery counts prior to trial, electing to proceed on the three first-degree murder counts and the single count of armed robbery. (R. 1041) On June 7, 1993, defendant proceeded to a jury trial before the Honorable John A. Wasilewski. (C.R. 34, R. 1733)

A. Pretrial Issues

(1) Waiver of Right to Counsel

At his first recorded court appearance, defendant was held in contempt of court and removed from the room when he directed obscenities at the trial court. (R. 3-4) The trial court appointed the Public Defender's Office to represent defendant. (R. 5) In defendant's absence, an Assistant Public Defender informed the trial court that she had spoken to defendant, who had informed her that he wished to enter a demand for trial. (R. 7) Counsel further informed the trial court that defendant had stated that if the trial court or his attorney were not inclined to proceed to immediate trial, defendant would consider representing himself pro se. (R. 7-8) Counsel emphasized, however, that because no discovery had as yet been tendered, the demand for trial was

¹ Co-defendants Carolyn LaGrone and Lurlam Young each pleaded guilty to first degree murder prior to trial and were sentenced to terms of 25 and 20 years' imprisonment in the Illinois Department of Corrections, respectively. (S.R. II, 2-17, 25, (People v. LaGrone), 4-18, 50, (People v. Young))

being made by defendant and not by the Public Defender's Office. (R. 7) The matter was subsequently continued by agreement for tendering of discovery. (R. 10) Prior to continuing the case, the trial court tendered to defense counsel a copy of the case of People v. Myles, 86 Ill.2d 260, 427 N.E.2d 59 (1981), with instructions to allow defendant to read it. (R. 10)

On the next court date, defendant announced to the trial court that he was representing himself. (R. 16) The trial court advised defendant that in its opinion, he would be making a mistake if he chose to represent himself and informed defendant that the Public Defender's Office would continue to represent him until a determination was made upon the issue of whether he would be permitted to represent himself. (R. 17) The trial court stated that in the event that defendant exercised his constitutional right to represent himself, it would appoint Mr. Frank Rago, an Assistant Public Defender, to act as standby counsel. (R. 18) Defendant informed the court that he was demanding immediate trial. (R. 22) The matter was subsequently continued by agreement for a hearing to determine whether defendant would proceed pro se or retain counsel. (R. 36)

At the hearing, held on August 12, 1992, the trial court noted that it had previously appointed the Public Defender's Office and asked defendant if he understood that it was his right to proceed pro se or retain counsel. (R. 36) Defendant stated that he understood and that he was ready for trial. (R. 36) The trial court cautioned defendant that it would be unwise for him to represent himself, noting that the case against him appeared complex and that there was a possibility that defendant could receive the death penalty. (R. 37) The trial court advised defendant that in the event he elected to represent himself, the law would treat him as an attorney and he would receive no special consideration. (R. 37) The trial court inquired whether defendant had spoken to Assistant Public Defender Rago about the case and if defendant wished to see him before making a decision.

(R. 37) Defendant responded that he was ready for trial. (R. 37) The trial court then asked defendant whether he wanted to be represented by an attorney. (R. 37) Defendant again stated that he was ready for trial. (R. 37)

Defendant explained his dissatisfaction with the fact that there were different attorneys constantly appearing on his case on various court dates who were unfamiliar with what was happening. (R. 37-38) Accordingly, defendant demanded an immediate jury trial. (R. 38-39) The trial court responded that the gathering of discovery materials was time consuming and pointed out that defendant would not be heard to complain if a trial was held and defendant did not like the result. (R. 39) Defendant stated he understood and again stated that he was ready for trial. (R. 39-40) The trial court recommended that defendant first speak with his appointed counsel, Assistant Public Defender Rago, and the matter was passed. (R. 40)

When the case was recalled, Mr. Rago informed the trial court that defendant was persisting in his demand for trial, but that, because of the incomplete status of discovery, the Public Defender's Office was not ready for trial and could not assist defendant at the present time. (R. 40-41) The trial court summarized the situation, explaining to defendant that although he had a right to effective assistance of counsel, the Public Defender's Office was unable to render such assistance without first asking for a continuance which, in turn, would toll the speedy trial term. (R. 41) Noting that defendant was answering ready for trial, the trial court informed defendant that the choice was his--he could hire his own lawyer, if he believed that lawyer could effectively represent him and that lawyer could demand trial on defendant's behalf, or he could represent himself. (R. 42) The trial court then asked defendant what he wished to do. (R. 42) Defendant stated that he wanted an immediate trial and would represent himself. (R. 42) Twice more the trial court asked defendant if

he wanted to represent himself and defendant responded each time that he was ready for trial. (R. 42)

The trial court advised defendant that it would inform him of the charges he faced, the potential penalties involved and his rights under the law. (R. 42-43) Accordingly, the trial court read to defendant each of the eight counts he was charged with and explained the possible penalties for each of the offenses. (R. 43-51) The trial court specifically advised defendant that if it were proven that defendant committed first degree murder during the course of a felony, the People could request that defendant receive the death penalty. (R. 47) The trial court explained in detail the two phases of the death penalty hearing, and advised defendant that in the absence of mitigating factors, the court would be required to impose a death sentence. (R. 47) The trial court asked defendant if he understood the charges against him and the possible penalties involved, and defendant replied that he did. (R. 45-46, 51) The trial court asked defendant whether he still wished to give up his right to a lawyer and defendant replied that he did, "if that's what it takes to go to trial." (R. 46, 51)

Defendant again expressed his dissatisfaction with the fact that each time he was in court, a different attorney appeared who was not sufficiently familiar with his case. (R. 52) The trial court replied that Assistant Public Defender Rago, who had handled many serious cases such as defendant's, was well-versed in the law, knowledgeable as to the appropriate motions to be filed and would represent defendant throughout the pendency of the case as lead counsel. (R. 52-53) The trial court stated that defendant's attorney was willing to represent him to the best of his ability but that defendant's counsel was asking for a continuance in order to assess the case. (R. 54-55) In short, the trial court summarized, defendant's attorneys were informing the court that they could not effectively represent defendant without further investigating the case, and the trial court would not compel them

to proceed. (R. 53) The trial court advised defendant that if he wished to disregard his attorney's advice and wished to represent himself, the court would permit him to do so. (R. 54) Once again, the trial court asked defendant if he wished to represent himself. (R. 54) Noting that his counsel was not ready for trial, defendant stated that he wished to represent himself. (R. 54)

Explaining that defendant was not entitled both to represent himself and have an attorney represent him, the trial court explained the role of standby counsel. (R. 53-54) The trial court stated that standby counsel was an observer, who would undertake the role of representing defendant should it ever become necessary to remove defendant from the courtroom. (R. 53-54) The trial court stated that it did not wish to convey to defendant a false sense of security in the concept of standby counsel, however, because defendant would still be considered to be representing himself. (R. 54-55) "Sounds fine," defendant replied. (R. 54) The trial court asked defendant if he understood that he had a legal right to have a lawyer represent him and that this right could not be taken away without his consent. (R. 55) Defendant stated that he understood. (R. 55)

The trial court advised defendant that he had the right to hire his own lawyer and that if he did not have the funds to do so, the court would appoint a lawyer to represent him without cost. (R. 56) Defendant stated that he understood. (R. 56) The trial court explained that an attorney would advise defendant about such matters as what plea to enter, whether to elect a bench or jury trial and the presentation of witnesses. (R. 55) The attorney would work with defendant in the preparation of a defense, would question witnesses, argue to the court or jury as well as discover and present the applicable law. (R. 55-56) Again, defendant stated he understood. (R. 56) The trial court asked defendant whether he had any questions about anything the court had told him and defendant replied that he did not. (R. 56) The trial court inquired whether, knowing everything that the court had said,

defendant still wished to give up his right to an attorney. (R. 56) Defendant stated that he did. (R. 56) The trial court inquired as to defendant's level of education and whether he would have any problem researching the law. (R. 56-57) Defendant replied that he believed he was competent and that he was ready for trial. (R. 57) The trial court asked whether defendant wished to represent himself, and defendant replied that he did, further stating that he wanted a jury trial and a date. (R. 57) Accordingly, the trial court appointed Assistant Public Defender Rago as standby counsel pursuant to People v. Myles, supra, and advised defendant that he could consult with him.² (R. 57)

The trial court stated its belief that defendant understood his rights under the law and the penalties involved. (R. 57) Defendant confirmed that he understood what he was giving up. (R. 57) The trial court then expressed its belief that defendant had freely and voluntarily entered into his decision, and defendant confirmed that this was true. (R. 58) Defendant stated, however, that he was "forced" into proceeding pro se because no one was taking the time to inform him of "what was going on." This way, defendant stated, he would know what was going on and, accordingly, demanded a trial date. The trial court stated that it was simply attempting to determine whether defendant's decision to represent himself was, in fact, his decision and again asked whether he wished to represent himself. Defendant replied that he did. The trial court found that defendant's decision was freely and voluntarily entered into, and, accordingly, allowed defendant to exercise his right of self-representation. (R. 61)

The case was continued to the following day, at which time the trial court again inquired whether defendant still wished to represent himself. (R. 89) The trial court advised defendant to

² On a subsequent court date, at defendant's request and in order to facilitate discovery, the trial court entered an order directing Mr. Rago and the Public Defender's Office to act as investigators on defendant's behalf, provided that defendant's requests were not unreasonable. (R. 211)

reconsider his decision, a decision the trial court stated was unwise. (R. 90) The trial court noted that, although defendant had a constitutional right to represent himself, it had never personally observed a pro se defendant achieve a favorable result at trial. (R. 91) The case was subsequently passed in order for defendant to confer with standby counsel Rago. (R. 92) When the case was recalled, defendant stated that he wished to continue to represent himself. (R. 95) The case was thereafter continued.³

On the next court date, the trial court stated that it had previously advised defendant against representing himself and inquired whether defendant had changed his mind. (R. 103) Defendant confirmed that he still wished to represent himself. (R. 103) The trial court informed defendant that it was still willing to appoint counsel to represent defendant and cautioned him that it may not be inclined to do so in the future if defendant requested an attorney on the eve of trial as part of a strategy. (R. 103) Defendant stated, "yes sir," and subsequently requested a trial date. (R. 103, 124) Accordingly, the case was continued for trial. (R. 124, 128)

(2). Motion to Suppress Identification

On November 30, 1992, defendant filed a motion to suppress identification. (C.R. 149-153) A hearing on the motion was held on May 20, 1993. (R. 587) In his motion, defendant essentially contended that his pre-trial identification by witnesses had been impermissibly tainted by the fact that the witnesses had seen his picture in television news media reports prior to identifying him in a lineup. (C.R. 149, R. 591-592) Defendant also contended that the lineup was impermissibly

³ On a subsequent court date, at defendant's request, the trial court ordered standby counsel Rago to conduct interviews with certain identification witnesses pursuant to discovery (R. 202-203), and further ordered the Public Defender's Office to act in an investigatory capacity on behalf of defendant and at defendant's direction. (R. 210-211)

suggestive for various reasons (C.R. 152), including the fact that he was the only subject with a curl in his hair. (R. 703)

Sergeant DiMare testified that he had been assigned to investigate the instant offense which had resulted in the death of the victim, Barbara Lindich. (R. 595-596) Pursuant to his assignment, Sergeant DiMare contacted several witnesses in the early morning hours of May 26, 1992, and asked them to come to the Glenwood Police Department in order to view a lineup. (R. 595-596) Sergeant DiMare informed the witnesses that the purpose of the lineup was to determine whether the witnesses could identify anyone who had been present in the Fairway store on May 20, 1992, the date of the offense. (R. 595) An officer was stationed at the front lobby of the police station and instructed to ensure that, as each witness arrived, he or she was not to speak with any other witness. (R. 597) Sergeant DiMare stated that, to his knowledge, the witnesses did not have contact with each other prior to their viewing the lineup. (R. 603, 605, 607, 608)

Just prior to the witnesses' arrival at the police station, Sergeant DiMare had a conversation with defendant in the room in which the lineup was to take place. (R. 597-598) Sergeant DiMare informed defendant that he did not have the right to refuse to be in a lineup, but that he did have the right to have an attorney present for the same. (R. 598) Sergeant DiMare further informed defendant that he could choose to stand in any of the five positions in the lineup. (R. 598-599) Defendant chose the third position and told Sergeant DiMare that the other men could be positioned in any manner. Defendant did not request that an attorney be present for the lineup. (R. 599) By 1:30 a.m., the contacted witnesses, Kathryn Koszut, Ruth Morford, Angela Fields, Helen Gair and Kimberly Knight, had arrived at the police station. (R. 596) Sergeant DiMare testified that the following procedure was employed with respect to the witnesses viewing the lineup. First, each witness was

individually escorted from the lobby area of the police station to an office adjoining the room containing the five men participating in the lineup. (R. 600, 601, 603, 605, 607, 608) Next, the witness viewed the lineup through a glass window separating the two rooms and attempted to make an identification. (R. 600) After viewing the lineup, the witness was escorted into a separate office, away from the witnesses waiting in the lobby who had yet to view the lineup. (R. 602-603, 605, 606-607, 608) Before each new witness viewed the lineup, Sergeant DiMare advised defendant that he could elect to change his position in the lineup and that he had the right to have an attorney present. (R. 604, 606, 607, 608-609) Each time, however, defendant elected to remain in the third position and declined to have an attorney present. (R. 604, 606, 607, 608-609) All five witnesses who viewed the lineup identified defendant. (R. 602, 605, 606, 608, 609) Sergeant DiMare testified that, to his knowledge, none of the witnesses had been shown photographs of defendant, had seen his likeness on television or in the media, or seen him in a one-on-one show up prior to their viewing the lineup. (R. 614-615) Sergeant DiMare further testified that neither he nor any other officer ever suggested to any of the witnesses whom they should identify in the lineup. (R. 615)

The lineup photograph was introduced into evidence at the hearing. (R. 693, S.R. Vol. 1) Referring to a lineup report he had previously filled out, Sergeant DiMare testified as to the physical characteristics of the men portrayed in the photograph. (R. 609-612) According to the information listed in the lineup report, the men ranged in height from five-foot-nine to six-foot-one and in weight from 144 to 225 pounds. (R. 609-612) Defendant himself stood five-feet-eleven inches tall and weighed 179 pounds. (R. 611-612)

The parties stipulated that if the witnesses listed in certain police reports were called to testify at the hearing, they would testify consistently with those reports. (R. 649-650, 687) The first

report was an incident report containing a narrative describing the general manner in which the murder occurred. The next 12 reports were interview summary reports dated May 20, 1992, the date of the offense, containing summaries of observations of the shooting and the offenders made by various witnesses, including those who identified defendant at the lineup. In these reports, defendant is described as a black male ranging in age from 30 to early 40's and in height from six feet tall to six-foot-two.⁴ The final set of reports reflected the fact that defendant was identified without hesitation in the lineup held on May 26, 1992 by witnesses Kathryn Koszut, Ruth Morford, Angela Fields and Kimberly Knight.

The trial court found that there was no evidence that any of the witnesses who identified defendant had seen defendant's likeness in media reports prior to viewing the lineup and characterized as speculative defendant's contention to the contrary. (R. 708-709) Regarding defendant's contention that the lineup was unnecessarily suggestive because he was the only subject with a curl in his hair, the trial court examined the lineup photograph and noted that the other men also appeared to have curls in their hair although not as large as defendant's. (R. 709) The trial court found that any argument regarding the curl would go to the weight of the lineup identification but that the lineup itself was fair. (R. 710) Accordingly, the trial court denied defendant's motion to suppress identification. (R. 710)

Defendant then filed a motion for appointment of standby counsel other than the Public Defender. (R. 727) In support of his motion, defendant contended essentially that the Public Defender's Office, standby counsel Rago in particular, were not providing him with sufficient assistance in obtaining discovery. (R. 727-735) Defendant further contended, inter alia, that the

⁴ Sergeant Dimare testified that defendant was 39 years old. (R. 612)

Public Defender's Office was not doing enough to obtain evidence and prepare a defense on his behalf. (R. 730)

The trial court reminded defendant that he could not legally represent himself and yet be simultaneously represented by counsel. (R. 738) The trial court further reminded defendant that it had previously informed him that if he chose to represent himself, he would be acting as his own lawyer and would have the responsibility for making his own decisions. (R. 739) The trial court recalled that when it appointed Mr. Rago as standby counsel, it advised defendant that the only reason for the appointment was in the event that defendant did not conduct himself properly and had to be removed from the courtroom. (R. 739) Noting that it had admonished defendant pursuant to Supreme Court Rule 401 and that defendant was now acting as his own lawyer, the trial court stated that it was not required to appoint standby counsel at all, but had done so for its previously stated reasons. (R. 741) The trial court advised defendant that he was free to consult with Mr. Rago should he so desire but that he was not required to do so and could conduct his own case as he had been doing. (R. 741) However, the trial court stated, not having observed any misconduct on the part of Mr. Rago, it would not remove him as standby counsel. (R. 740-741) Accordingly, the trial court denied defendant's motion for appointment of alternative standby counsel. (R. 742) Upon denial of the motion, defendant demanded trial. (R. 743) The case was continued for trial. (R. 747)

(3). Motion to Quash Arrest

On May 27, 1993, a hearing was commenced on defendant's motion to quash arrest. (C.R. 182-185, R. 803) Before the hearing, standby counsel Rago informed the trial court that defendant had filed a complaint against him with the Attorney Registration and Disciplinary Commission. (C.R. 256-260, R. 750) Defendant again renewed his motion for appointment of alternative standby

counsel, claiming that Mr. Rago was not performing an adequate investigation in the case. (C.R. 258, R. 759, 763) The trial court reminded defendant that he had demanded trial, an indication that he was ready to proceed. (R. 759) However, the trial court noted, defendant was now informing the court that he was not ready to proceed, an indication that he had misrepresented his position and was attempting to inject error into the record. (R. 759-760) The trial court stated that it would address the issue presently and asked defendant whether he had any additional motions. (R. 767) Defendant then filed a motion for substitution of judges, citing the trial court's "prejudice and racism attitude." (R. 767-768) Defendant's motion was transferred to and denied by the Honorable Thomas J. Condon. (R. 783) The trial court then again denied defendant's motion for the appointment of alternative standby counsel and the matter proceeded to a hearing on defendant's motion to quash arrest. (R. 797, 801)

Prior to proceeding on the motion, defendant clarified that his contentions were that there was no valid consent given to search the apartment in which he was arrested and that there was no probable cause for his warrantless arrest. (C.R. 182-185, R. 801) Defendant later confirmed that he was also requesting suppression of any evidence recovered as a result of the alleged illegal arrest and search. (R. 1524)

Alexander DiMare and Barbara Schmidt testified for the People on defendant's motion. Defendant called Rich Goode, Thomas Schilling, Van DiCarlo, Thomas Rowan and Robert Sliwa.

Glenwood Police Sergeant Alexander DiMare testified that on May 25, 1992, pursuant to his murder investigation, he learned that fingerprints taken from the crime scene had been established to belong to a woman named Carolyn LaGrone.⁵ (R. 804-805) Because LaGrone's physical

⁵ One of defendant's co-defendants.

description on file was consistent with the description given by witnesses of one of the offenders in the store at the time of the shooting, the police interviewed LaGroan later that same day. (R. 805)

LaGroan told police that on May 20, 1992, she, defendant and a woman named Lurlarn Young⁶ went to the Fairway store for the purpose of committing an armed robbery. Young remained outside in the car while defendant and LaGroan went inside the store. The two announced a holdup and defendant, who was armed, struck the cashier in the head with his pistol. While removing money, defendant shot the victim, Mrs. Lindich, in the neck. LaGroan and defendant then fled the store with the robbery proceeds, consisting of cash and checks, and drove off in Young's car. (R. 806) As the three drove through the city, they ripped up the checks and threw them out of the car window. Defendant and Young dropped LaGroan off at her home, giving her \$40.00 for her participation in the robbery. (R. 807)

Sergeant DiMare testified that an alert was put out for Young's vehicle and, also later that day, she was taken into custody. (R. 824-825, 831) After being advising of her Miranda rights, Young informed the police that she knew both defendant and LaGroan and that she believed the two had been involved in an armed robbery. (R. 807, 809) Young informed the police that she lived at an apartment located at 14015 Stewart, in Riverdale, Illinois with her daughter and, on occasion, defendant. (R. 811, 823) Young's personal identification confirmed that she resided at the above address. (R. 841) Young further informed the police that the lease to the apartment was in her name and that she paid the rent.⁷ (R. 823) Young then gave police permission to search the

⁶ Defendant's other co-defendant

⁷ One of defendant's witnesses, Robert Sliwa, testified that he was the owner of the building located at 14015 Stewart and that on May 25, 1992, the apartment in question was leased to defendant and Lurlarn Young. (R. 1646) When shown a copy of a lease to the apartment by defendant, Mr. Sliwa identified the signatures of defendant and Young affixed thereto. (R. 1650)

aforementioned apartment and executed a written consent to search form. (R. 810-11) The form was published and admitted into evidence. (C.R. 284, R. 813-814) Young also gave police her house keys. (R. 816)

Sergeant DiMare testified that defendant's physical description, obtained from defendant's criminal history, was consistent with information he had previously obtained. (R. 808) According to sergeant DiMare, defendant's criminal record included a previous conviction for attempted murder involving the shooting of a Chicago Police Officer and his criminal history sheet contained a notation that he was extremely dangerous and should be approached with caution. (R. 808, 816)

Employing the assistance of Carolyn LaGroan, the police placed three telephone calls to the apartment at 14015 Stewart on the afternoon on May 25. (R. 851) With Sergeant DiMare listening in, LaGroan made the first call, and a man she identified as defendant answered the phone. (R. 851-852) LaGroan attempted to convince defendant to meet her at a disclosed location, but defendant failed to keep the appointment. (R. 852) Two subsequent telephone calls to the apartment went unanswered. (R. 852)

Riverdale Police Commander David Schilling testified that the Riverdale and Glenwood Police Departments concluded that there would be a high risk involved in entering the apartment at 14015 Stewart and jointly decided upon the tactics that would be used to gain entry. (R. 946, 951-952) Glenwood Police Chief Thomas Rowan testified that because defendant's criminal history revealed a previous use of weapons and a tendency for violence, it was decided that the services of the South Suburban Emergency Response Team (SSERT) would be employed. (R. 1009) Glenwood Police Sergeant Van DiCarlo testified that he assembled the team. (R. 901)

Tinley Park Police Officer Barbara Schmidt, a member of the South Suburban Emergency Response Team (SSERT), testified that, at the direction of the Glenwood Police Department, she went to the apartment at 14015 Stewart as part of a four-man team in the late evening hours of May 25. (R. 870-871) The Glenwood Police informed Officer Schmidt that they had obtained a consent to search the apartment and provided her with the keys to the same. (R. 870) Officer Schmidt was shown defendant's picture, informed of defendant's violent background and of the fact that the Glenwood Police were unsure whether defendant would be on the premises. (R. 871, 882)

The SSERT officers gained entry to the apartment by unlocking the rear door. As the officers opened the door and looked inside, Officer Schmidt observed a person run from directly in front of her to an area out of her view. With the aid of a diversionary device,⁸ the officers entered the apartment, discovered defendant and placed him into custody.⁹ (R. 872-874)

The next day, May 26, Glenwood Police Sergeant DiMare had another conversation with Lurlarn Young in the presence of an Assistant State's Attorney. Sergeant DiMare testified that this time, Young gave police permission to search a storage locker located in the basement of her building and executed a second written consent to search form. (R. 816-817) The form was published and admitted into evidence. (C.R. 285, R. 818-820) Young told police that the storage locker had been assigned to her by the landlord, that she had control over it and kept her personal lock on it. (R. 816-817) Young accompanied the police to the building and unlocked the storage locker with her key.

⁸ Also known as a "flash-bang" device, a small object giving off a loud noise and flash, having a disorienting effect on the subject on which it is used so that the response team can safely enter the premises. (R. 873)

⁹ South Holland Police Officer Rich Goode, a member of the SSERT team which apprehended defendant, testified that he believed that the danger involved in entering an apartment where a known dangerous felon was possibly present justified the use of the diversionary device. (R. 891-892)

(R. 820) Young directed the officers' attention to various bags inside the locker which she claimed contained guns that had been employed in the robbery. (R. 820)

Defendant stipulated to the contents of an inventory slip, introduced into evidence, listing the items recovered by police from the storage locker. (R. 1700, 1704) The recovered items included a .380 caliber pistol, a .25 caliber pistol, empty gun boxes for the pistols, assorted clips, bullets, a box containing theatrical makeup, a beige purse, a khaki trenchcoat and a brown baseball cap. (C.R. 288) Defendant confirmed to the trial court that these were the items he wanted suppressed. (R. 1704-1705)

The trial court found that the evidence established at the hearing on the motion revealed a rapidly developing situation--a violent crime involving a person with violent tendencies. (R. 1715-1716) The trial court noted that the weapons used in the commission of the offense had not yet been recovered and that a co-defendant who had admitted her involvement had contacted defendant in an attempt to draw him out of the apartment. The trial court further noted that another co-defendant was arrested, had given police consent to search the apartment, as well as the storage area, and in fact had actual authority to do so. (R. 1716-1717) The trial court found that police had reason to believe that defendant might be present inside the apartment and stated that, based upon the totality of the circumstances presented, there was a strong showing of probable cause as well as the presence of exigent circumstances. (R. 1716) The trial court noted that the police officers' method of entry into the apartment was made by use of a key and was not initially forcible. The court found that the diversionary device was employed only when defendant was observed inside the apartment and held that based upon the totality of the circumstances, the officers' method of entry was reasonable. (R.

1717) Accordingly, the trial court denied defendant's motion to quash arrest and suppress evidence.

(R. 1719)

B. Trial

For the People, Kathryn Koszut testified that on May 20, 1992, she was working at the service counter of the Fairway store. (R. 2006-2007) At approximately 10:15 a.m., defendant approached the service counter with a gun partially covered by a newspaper and announced a stickup. (R. 2007-2008) Ms. Koszut stated, "you've got to be kidding," and called out to another store employee, Kimberly Knight. Defendant struck Ms. Koszut on the back of the head and threw her to the floor. (R. 2009) Stunned, Ms. Koszut heard defendant going through the cash drawer demanding to know where the money was. There was a sound of mumbling, then a pop. (R. 2010) Ms. Koszut pushed an alarm button to notify police and heard another woman exclaim, "they shot that woman." (R. 2011) Ms. Koszut then saw the victim, Mrs. Lindich, lying on the ground. (R. 2012)

Kimberly Knight, a Fairway employee, testified that she was filling a candy display near the first checkout register when defendant and a woman approached her. (R. 2079) Ms. Knight asked if she could be of assistance, but neither defendant or the woman said anything. Eventually, the woman, who had been holding a bag of licorice, threw the bag down, stating "I don't need anything," and the pair walked out. (R. 2080) Ms. Knight testified that the encounter seemed unusual. Approximately five minutes later, Ms. Knight heard Kitty Koszut, who was working at the service counter, call her name three times. Ms. Knight heard stress in Ms. Koszut's voice and turned to see that she had a panicked look on her face. (R. 2081) Ms. Knight also saw defendant and his female companion in the service office. (R. 2081) Ms. Knight started to walk to the closest telephone, located in the store's back room. As she did so, Barbara Lindich approached and asked her if the store was being robbed. Ms. Knight told Mrs. Lindich to leave the store and, believing that Mrs. Lindich had heeded her advice, continued walking to the back room. (R. 2083) When Ms. Knight

was only a few feet from the door, she heard a shot. (R. 2084) Ms. Knight ran to the phone and called the police. When Ms. Knight returned from the back room, she saw Mrs. Lindich lying face down on the floor. (R. 2085) Ms. Knight went to the service office where Ms. Koszut told her that they had been robbed. (R. 2086) Ms. Knight testified that several checks were missing as well as approximately one thousand dollars in cash. (R. 2088)

Angela Fields testified that she was working as a cashier in the Fairway store. (R. 1772) At approximately 10:15 a.m., Ms. Fields heard Ms. Koszut, who was working behind the service desk, say, "you've got to be kidding." (R. 1773) Ms. Fields turned and saw defendant holding a gun to Ms. Koszut's head. (R. 1775) As Ms. Fields ran towards the exit, she heard a gunshot. (R. 1776) Ms. Fields ran out of the store and to a nearby apartment building. (R. 1776, 1795) By the time Ms. Fields returned to the store, the paramedics had arrived. (R. 1777)

Ruth Morford, a customer in the store, testified that she was in the checkout line when she heard someone announce a stickup. Ms. Morford heard Ms. Koszut say, "you must be kidding," and then heard a very loud pop, similar to a gunshot. Ms. Morford crouched down, pulling another elderly customer down beside her. (R. 1811-12) Ms. Morford heard footsteps and saw defendant walk past her, holding a gun. (R. 1813-14) After defendant left the store, Ms. Morford got up and saw Mrs. Lindich lying on the floor near the service counter. (R. 1816-18)

Carolyn LaGroan testified that she had known defendant since March of 1992. Ms. LaGroan admitted that she had been charged with first degree murder and armed robbery in the instant case. Ms. LaGroan testified that she had already pleaded guilty to first degree murder in exchange for the State's Attorney's recommendation of a sentence of no more than 30 years' imprisonment and was to be sentenced later in the month. (R. 1884-85)

Ms. LaGroan stated that on May 20, 1992, defendant picked her up at her residence in Harvey, Illinois. With defendant was a woman whom Ms. LaGroan now knew as Lurlarn Young. (R. 1887-88) The three drove to a Jewel Food store that defendant suggested they rob. (R. 1888) Instead, the three drove to the Fairway store. (R. 1889) Defendant and Ms. LaGroan initially went inside, spoke briefly to a store employee, then left. (R. 1890-91) Back outside, defendant announced a plan to rob the Fairway store. Defendant instructed Ms. LaGroan to put the robbery proceeds in her purse and that if anything happened, he would "pop" somebody. Young was to remain in the car and act as getaway driver. (R. 1891)

Ms. LaGroan stated that, once inside the store, defendant approached the service desk and either showed the female employee a gun or announced a stickup. The employee stated, "you've got to be kidding," and defendant knocked her down. Defendant then went behind the service desk and began to put money into Ms. LaGroan's purse. (R. 1892) After a time, Ms. LaGroan noticed that Mrs. Lindich was beside her, looking over her shoulder. Stating, "oh, you want to help,"¹⁰ defendant shot her. Defendant asked Ms. LaGroan to check the safe, which she discovered was locked. Defendant checked the safe himself before the two left the store. (R. 1893-94) As they were leaving, Ms. LaGroan saw Mrs. Lindich lying in front of the service counter, bleeding. The two walked to the car and drove off. (R. 1894) While defendant drove the car, Young counted the cash and ripped up the checks, throwing them out the window. (R. 1895-97) Defendant drove into an alley where he wiped his face, which, according to Ms. LaGroan, contained either dirt or makeup, with his shirt. (R. 1897-1898) Defendant discarded his shirt in a garbage can. (R. 1897) Ms. LaGroan testified that she

¹⁰ Or words to that effect. (R. 1893)

was given \$40.00 for her participation in the robbery and was dropped off in front of her house. (R. 1899)

Each of the above witnesses identified defendant in open court and, with the exception of Carolyn LaGroan, testified that they identified defendant in a lineup. (R. 2008, 2014, 2079, 2089, 1774-1775, 1781-1782, 1820, 1821) Furthermore, each of the above witnesses, with the exception of Kimberly Knight, identified in open court the .380 caliber pistol defendant had in his possession (2016, 1785, 1825, 1916), and, with the exception of Ruth Morford, the tan-colored jacket defendant was wearing at the time of the murder. (R. 2015, 2101, 1784, 1917)

Dr. Mitra Kalelkar, a pathologist for the Cook County Medical Examiner's Office, testified that Mrs. Lindich died of a single gunshot wound to the neck, suffering a perforated left lung and jugular vein from a bullet which passed completely through her body. (R. 2300-2301)

The testimony of Robert Hunton, a forensic scientist for the Illinois State Police, established that a spent bullet and shell casing found at the murder scene had been fired from the .380 caliber pistol recovered from the storage locker at 14015 Stewart.¹¹ (R. 2351, 2360-2362)

After the People rested, defendant called several witnesses who were present in the Fairway store at the time of the murder, including Gerald Geneen, Michael Putney, Elmer Roach, Ann Turner and Donna Opasinski.

Gerald Geneen described the offender as a black male with curly hair, six feet tall, in his late 30's or early 40's, wearing a tan jacket. (R. 2639-2640, 2664) Mr. Geneen testified, however, that he was never able to see the offender's face and was unable to identify him. (R. 2642, 2659)

¹¹ Glenwood Police Chief Thomas Rowan testified that one of the items police recovered from the storage locker at 14015 Stewart was a .380 caliber pistol which he subsequently transferred to the crime lab. (R. 2537-2542)

Michael Putney testified that he heard shots and saw a woman fall to the floor. (R. 2707) Assuming that a robbery was in progress, Mr. Putney looked towards the service counter and saw a black male, approximately six-foot-one, a little over 200 pounds and wearing a khaki jacket, rummaging through drawers. (R. 2707-2708, 2710)

Ann Turner testified that she heard a stickup announced and was pulled to the floor by another customer. (R. 2727) Ms. Turner stated that she heard a shot, but did not see the offenders except from behind, believing them to be two black men. (R. 2727)

Elmer Roach testified that he heard a shot, but did not see the incident, and was told there was a holdup. (R. 2666-2667, 2671) Similarly, Donna Opasinski testified that she was unaware of what had occurred, save that she heard a loud popping noise. (R. 2730)

Against the trial court's advice,¹² defendant requested that the statements of Lurlarn Young and Carolyn LaGroan be published to the jury and they were so published. (R. 3053-3083) Young's first statement was exculpatory. (R. 3053-3064) Young's second statement acknowledged that she had initially lied to the police about her involvement and described her participation in the robbery as a getaway driver for defendant and Carolyn LaGroan. (R. 3065-3074) In both of her statements, however, Young described defendant as stating that he had shot, or "popped," a woman inside the store. (R. 3062, 3071) Carolyn LaGroan's statement (R. 3075-3083) was essentially consistent with her testimony at trial.

Defendant declined to testify in his own behalf and the People introduced no evidence in rebuttal. (R. 3033, 3040)

¹² Outside the presence of the jury. (R. 3037-3038)

After deliberating less than two hours, the jury returned verdicts of guilty on the charges of first degree murder and armed robbery. (R. 3167-3168, 3172, 3174) The People requested a separate death penalty hearing. (R. 3176) Defendant requested that the hearing take place before the jury. (R. 3177)

C. Death Penalty Hearing

At the eligibility phase of the death penalty hearing, the People introduced into evidence the signed jury verdict forms reflecting defendant's guilt on the charges of first degree murder and armed robbery. (R. 3198-3199) The People also introduced evidence that defendant was over the age of 18. (R. 3195) Defendant presented no evidence. (R. 3200) The jury found that defendant was eligible to receive the death penalty.¹³ (R. 3229)

During the penalty phase of the hearing, the People presented the testimony of various Chicago Police Officers as well as that of an Assistant State's Attorney. The testimony of the above witnesses described defendant's previous criminal history, which included arrests for attempted murder, wherein defendant shot a police officer and fired at other officers during a gunfight stemming from an attempted traffic stop (R. 3245-3247, 3270), battery, wherein it was alleged that defendant struck a 16-year-old girl in the head with a baseball bat (R. 3332), possession of a stolen motor vehicle (R. 3303, 3425), burglary (R. 3323, 3387-3388), escape (R. 3469, 3390), fleeing at high speed from police in an automobile (R. 3404-3405) and unlawful use of a weapon by a felon. (R. 3484) During four of the above incidents, defendant had been armed with a gun. (R. 3247, 3303, 3332, 3485)

¹³ The jury's eligibility determination was based upon the fact that defendant committed the murder during the course of another felony. (R. 3222, 3230)

Certified copies of defendant's prior convictions were then introduced into evidence. (R. 3520-3524) This evidence established that defendant had previously received sentences of five years' imprisonment for a 1986 offense of unlawful use of a weapon by a felon (R. 3523); five-to-ten years' imprisonment, as well as a concurrent three-to-nine year sentence of imprisonment, for the 1976 offenses of attempted murder, aggravated battery, unlawful use of weapon and possession of a stolen motor vehicle (R. 3521-3522); imprisonment of one year and one day for a 1975 burglary (R. 3522); one-to-three years' imprisonment for a 1973 burglary (R. 3523); eight months imprisonment for a 1971 case of grand theft, later reduced to criminal trespass to vehicle (R. 3524), and; 90 days' imprisonment for a 1971 contempt of court citation. (R. 3524) Defendant also received sentences of one year probation and six months probation for 1970 and 1969 offenses of theft and damage to property, respectively. (R. 3524)

Characterizing the death penalty hearing as a "little stupid game" and informing the trial court that the jury's decision was unimportant as he would in any event appeal to the Illinois Supreme Court, defendant, against the trial court's advice, presented no evidence in mitigation. (R. 3313, 3358-3359, 3526-3527) During closing argument, defendant twice referred to the judicial review process and informed the jurors that he did not care if they voted to impose the death penalty.¹⁴ (R. 3557, 3559)

The jury found no mitigating factors sufficient to preclude the imposition of the death penalty. (R. 3592) The trial court did not immediately enter judgment, however, but continued the case for a hearing on post-trial motions.¹⁵ (R. 3599)

¹⁴ The trial court instructed the jury that it was not to consider the possibility of a review process in reaching its decision. (R. 3558)

¹⁵ On the date set for the hearing, however, defendant was removed from the courtroom for directing obscenities at the

At the sentencing hearing, the trial court heard arguments on defendant's motion for a new trial. (R. 3689-3730) On the issue of defendant's self-representation, the trial court initially noted that it had asked defendant numerous times whether he wished to represent himself and that defendant had consistently responded in the affirmative. (R. 3732) The trial court found that defendant was familiar with the courts, had asked questions, cited caselaw, made many proper legal arguments and, in short, had rendered himself a level of representation superior to that occasionally rendered by attorneys. (R. 3732-3734) Characterizing defendant as a cunning individual, who had used many of his legal protections as weapons in attempts to frustrate the court, the trial court stated that it had no doubt that defendant knew what he was doing and found that it would have been error to deny him his right of self-representation. (R. 3732-3733)

The trial court found that the evidence both at trial and at the death penalty hearing was overwhelming. (R. 3738, 3742) The trial court stated its belief that no rational fact finder could have returned a verdict of not guilty and that, based upon the evidence introduced at trial, no attorney could have obtained an acquittal. (R. 3738) In its opinion, the trial court stated, the only defense defendant would have had available to him was to have pleaded guilty and asked to be spared the death penalty. (R. 3733) The trial court stated, however, that it believed that defendant had invited the jury to vote for the death penalty as part of his trial strategy and that he had deliberately attempted to inject error into the proceedings by referring to the appeal process. (R. 3736-3737) Stating that defendant had received as fair a trial as it could have given him, the trial court denied defendant's motion for a new trial. (R. 3741)

prosecutor and the case was again continued. (R. 3640-3645)

The trial court asked defendant whether he had anything to say before it imposed sentence. (R. 3759) Defendant accused the trial court of acting as an advocate for the People and turning the case into a "personal legal vendetta." (R. 3759-3760)

The trial court sentenced defendant to death on his conviction for first degree murder and to a term of 30 years' imprisonment on his conviction for armed robbery. (C.R. 37, 524-525, R. 3761-3761)

III

REASONS FOR DENYING THE PETITION

The facts of this case alone are sufficient reason to deny defendant's request for clemency. The facts demonstrate that defendant had planned this armed robbery and that he was willing to commit murder in order to achieve that goal. Prior to the armed robbery defendant laid out the plan for his co-defendants. Defendant and his accomplice, LaGroan, entered the store, spoke briefly to an employee and then returned to the car. Obviously, the purpose of this first visit to the store was to case it and see where the service counter was. Defendant then told his accomplices that he intended to rob the store and that if anything happened, he would "pop" someone. Defendant told LaGroan that she was to take the money and put it in her purse. Young was to remain in the car and act as the getaway driver.

When LaGroan and defendant reentered the store, defendant approached the service desk, showed his gun to an employee and announced a stickup. When the employee stated, "you've got to be kidding", defendant knocked her to the ground. As defendant was putting money into LaGroan's purse, Mrs. Lindich approached. Defendant turned to the victim and said "oh, you want to help." He then shot Mrs. Lindich in the throat, killing her. At trial, three store employees identified defendant as the man who was behind the service desk holding a gun. A store customer identified defendant as the man she saw passing in the lane next to her, after she heard a man say, "This is a stick-up" and heard a loud "pop." Two of the store employees and the customer identified one of the guns recovered from defendant's storage locker as the weapon they saw defendant holding at the time of the offense. Defendant was identified as the culprit by several witnesses at a lineup and at trial.

Defendant's callous disregard for human life is amply demonstrated by the above facts. His victim, Barbara Lindich, was shot down in cold blood for no other reason than that she was in the wrong place at the wrong time. Prior to the robbery defendant had announced to his cohorts his intention to "pop" someone if anything happened. Defendant was true to his word, for he killed Mrs. Lindich in cold-blood. Because of these actions alone, defendant is not entitled to clemency.

As detailed in the facts section of this response, defendant has an extensive criminal history. He had been convicted of unlawful use of a weapon by a felon, attempt murder, aggravated battery, unlawful use of a weapon, possession of a stolen motor vehicle, two separate burglaries, criminal trespass to vehicle, contempt of court, theft and damage to property. Given this extensive history of criminal conduct it is clear that defendant has nothing but contempt for society and is therefore undeserving of clemency.

Defendant also asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment which were not available at the time of his trial, defendant claims that his trial (as well as that of every other capital defendant in Illinois) was by definition fundamentally unfair. However, the Illinois Supreme Court has expressly rejected the claim "that every capital trial has been unreliable and that all appellate review has been haphazard" (People v. Hickey, ___ Ill. 2d ___, 2001 Ill. LEXIS 1080 at *57 (No. 87286 September 27, 2001)). Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they "function solely as devices to further protect those rights given to defendants by the federal and state constitutions"

and that “[a] violation of procedures designed to secure constitutional rights should not be equated with a denial of those constitutional rights.” Id. at *63, 64.

Thus, the fact that the Court, the General Assembly and the Governor’s Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to defendant’s case. Instead, a true injustice would only result if it were reflexively determined that defendant’s trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that defendant has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings. Moreover, defendant ignores the fact that every court which has examined the proceedings in his case determined that they were fundamentally fair and that he was not unduly prejudiced in any manner.

Supreme Court Rules

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

Adequate Funding

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

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

Videotaping

No statement made by defendant was utilized at trial or the sentencing hearing. Indeed, the record is silent on whether defendant ever gave a statement to authorities.

Defendant also asserts that there was no electronic recording of statements by witnesses. However, defendant points to no instance where such recording would have benefited him at his trial or sentencing hearing. Defendant had every opportunity to cross-examine the witnesses against him and he made every use of that technique.

Decision to Seek Death

Defendant 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, defendant does not even allege much less argue that the decision to seek death in his case was the result of an abuse of discretion. Accordingly, it must be rejected.

Statutory Mitigating Factors

Defendant complains that his jury was not instructed to consider as statutory mitigating factors the fact that he had a history of extreme emotional or physical abuse and/or that he suffers from reduced mental capacity. However, although the jury was not expressly instructed to consider these factors, it was instructed that mitigating factors include “any reason why the defendant should not be sentenced to death” and that it should consider all mitigating evidence even if it does not pertain to one of the enumerated factors. Illinois Pattern Jury Instruction 7C.06.

Allocution

Defendant also claims that clemency is appropriate because he was denied the opportunity to make a statement in allocution at his sentencing hearing. However, as the Illinois Supreme Court stated long ago, “an unsworn statement to the sentencing jury [to be] consider[ed] along with testimony given under oath and the arguments of counsel would at the least confuse the jurors, and might also impair their ability to weigh the aggravating and mitigating factors.” People v. Gaines, 988 Ill. 2d 342, 380, 430 N.E.2d 1046 (1981). Moreover, defendant 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 closing argument. Defendant represented himself at his trial and sentencing hearing. Thus, he gave opening statements and closing arguments to the jury on three occasions: at trial; at the eligibility phase; and at the sentencing phase. These statements were not given under oath and were not subject to cross-examination by the People. Thus, it is clear that defendant had these occasions to give what was the equivalent of a statement in allocution. Given this fact, defendant cannot now complain that he was not allowed to make a statement in allocution. Besides, before entering the sentences imposed, the trial judge asked defendant if he had anything to say. Defendant responded by stating that the judge acted as an advocate for the State and had turned the case into a “personal vendetta.” Therefore, he was given every opportunity to present himself to the trier of fact and the court before he was sentenced.

Instruction on Alternative Sentences

Defendant believes that his death sentence should be commuted because the jury was not instructed as to all the possible alternative sentences, including that he could have been sentenced to as little as 20 years imprisonment. However, except in cases where the only alternative is mandatory natural life, such a rule would actually serve to prejudice the defendant. If a jury is told that the defendant could be sentenced to as little as 20 years (even though such a sentence is highly unlikely), the jury might determine that the death penalty is necessary to ensure that he is never released into society. It is for this reason that current Illinois law requires that juries be instructed not to concern themselves with sentencing issues. Illinois Pattern Jury Instructions 1.01 & 7C.05 The only exception to this rule is that the jury must be informed where natural life imprisonment is

the only available option. People v. Gacho, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988). Accordingly, despite the Governor's Commission's recommendation, the fairness of defendant's sentencing hearing was ensured by not instructing the jury on the available sentencing options.

Sufficient to Preclude

Defendant asserts that clemency is warranted because the statutory language and corresponding jury instruction that after considering all of the evidence that "there is no mitigating factor sufficient to preclude the imposition of a death sentence" led the jury to mistakenly believe that the death penalty is mandatory. However, both the Illinois Supreme Court and the federal courts have consistently rejected any claim that the statute is confusing and might lead a jury to believe that the death penalty is mandatory. See People v. Mitchell, 152 Ill. 2d 274, 346, 604 N.E.2d 877 (1992); Silagy v. Peters, 905 F.2d 986, 998-99 (7th Cir. 1990).

Supreme Court Review

Defendant 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 defendant's sentence in such a manner is because he did not ask the Court to do so.

The Ryan Commission Report and the recently adapted Illinois Supreme Court Rules both speak to the qualifications and training of trial judges, prosecutors and defense attorneys in capital trials. Defendant says he is entitled to clemency because he was tried without the benefit of these recommendations and changes. The People submit that despite these recommendations and changes, defendant is not entitled to clemency. As noted previously, the Illinois Supreme Court has held that its recent Rules concerning capital cases have no retroactive application. People v. Hickey, No. 87286, September 27, 2001, 2001 Ill. Lexis at 57, 63, 64. Besides, the defendant represented himself at his trial and sentencing hearing. Defendant was only allowed to do so after the trial judge determined after an extensive hearing that he was competent to do so, and then further determined that defendant understood he had a right to have counsel represent him and that his waiver of this right was done freely and voluntarily. The Illinois Supreme Court has twice visited this issue and twice rejected it; first on the direct appeal of defendant's convictions and sentences and then on review of the denial of post-conviction relief. The defendant presents no argument whatsoever challenging the findings of the circuit court and Supreme Court in this regard. Moreover, a defendant has a federal constitutional right to represent himself, and as long as he is able to knowingly and voluntarily waive that right, then no state statute or state constitutional amendment or state court rule can take away that fundamentally guaranteed federal right. Defendant cannot point to any flaws on the part of his trial judge or the prosecutors in support of his argument, because none exist. Defendant cannot rely on this point in his request for clemency.

Defendant also maintains that he should be granted clemency because he did not have the benefit of the commission's recommendations concerning the weight to be given eyewitness testimony. The courts have held that the line-up identification procedure utilized in this case conformed to constitutional standards. The record establishes that the line-up identification of defendant as the person who shot and killed Barbara Lindrich was free of any suggestiveness whatsoever. The defendant was identified without hesitation in the line-up held on May 26, 1992, by witnesses Kathryn Koszut, Ruth Morford, Angela Fields and Kimberly Knight. Each of these witnesses viewed the line-up separately and were not allowed to speak with each other either before or after each viewed the line-up. The eyewitness testimony in this case was strong and it was never controverted. As the Supreme Court stated,

At trial, three employees present in the Fairway Food store on the day of the offenses identified defendant as the man who was behind the service desk holding a gun. A customer in the store on the day of the offenses also identified defendant at trial as the man she saw passing in the lane next to her, after she heard a male say, "This is a stick-up," and heard a loud "pop." At trial two of the same three employees and the customer identified one of the guns recovered from defendant's storage locker as the weapon they saw defendant holding at the time of the offenses.

People v. Simpson, 172 Ill. 2d at 126. Given the number of eyewitnesses and the strength of their identifications of defendant as the killer leave no doubt that defendant would not have benefited from the commission's recommendation in this regard.

Finally, defendant asserts that an independent lab did not test the forensic evidence in his case. Again, he points to no flaw in the testing procedures employed in his case. This is so because no such flaws exist. Defendant cannot seek clemency on this ground.

In conclusion, defendant is not entitled to clemency. Defendant planned an armed robbery of a grocery. Just before the armed robbery he boasted to his cohorts that he would “pop” somebody if anything went wrong. The defendant, killer that he is, was true to his word as he shot an innocent victim, Barbara Lindrich, as she approached the service counter. Her murder was premeditated and it was in cold-blood. The defendant has a long history of committing serious crimes. His adjustment to prison life is less than admirable. His contempt for our criminal justice system is blatant. This defendant deserved the death sentence. His is not entitled to clemency.

CONCLUSION

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

Respectfully submitted,

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