

DOCKET NO. _____

BEFORE THE ILLINOIS PRISONER REVIEW BOARD

AUTUMN TERM, 2002

ADVISING THE HONORABLE GEORGE RYAN, GOVERNOR

IN THE MATTER OF SAMUEL MORGAN

PETITION FOR EXECUTIVE CLEMENCY

**RESPONSE IN OPPOSITION TO
PETITION FOR EXECUTIVE CLEMENCY**

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I.

INTRODUCTION

In 1982, petitioner, Samuel Morgan, was indicted for two counts of murder, aggravated kidnaping and rape. He was then tried by a jury and found guilty of all charges. Petitioner was found eligible for the death penalty pursuant to *Ill. Rev. Stat.* 1983, ch. 38, sec. 9-1(3), in that he was convicted of murdering two individuals. He waived his right to be sentenced by a jury. After hearing the evidence, the court found no mitigating factors sufficient to preclude imposition of the death penalty and sentenced petitioner to death. On direct appeal, the Illinois Supreme Court affirmed petitioner's convictions and death sentence, but reduced the sentences imposed for rape and aggravated kidnaping. People v. Morgan, 112 Ill.2d 111, 492 N.E.2d 1303 (1986). The United States Supreme Court then denied Morgan's petition for writ of certiorari. Morgan v. Illinois, 479 U.S. 1101 (1987).

Petitioner then filed a petition for post-conviction relief. The circuit court dismissed all claims without an evidentiary hearing with the exception of the allegation that petitioner's trial counsel had been ineffective in failing to investigate and present certain mitigating evidence during sentencing. After the evidentiary hearing, the circuit court denied relief on that claim as well. On appeal, the Illinois Supreme Court again affirmed petitioner's convictions, but vacated his death sentence. In a 5-to-2 decision, the court found that trial counsel had failed to investigate and present certain evidence which had been presented at the evidentiary hearing, including evidence from defense-hired experts indicating that although petitioner was of near normal intellect, he showed signs of a learning disability as well as brain impairments which caused him to have "intermittent periods of difficulty in problem sequencing of events," as well as "deficit" "rule governed behavior," resulting in "aggressive and violent behavior" on his part throughout his lifetime. The majority ruled that there was a reasonable probability that had trial counsel presented such evidence at petitioner's sentencing hearing, the trial court would have concluded that the balance of aggravating and mitigating evidence did not warrant the death penalty. Consequently, the court vacated petitioner's death sentence and ordered a new sentencing hearing. Morgan then filed a petition for writ of certiorari raising another claim. That petition was denied by the United States Supreme Court in Morgan v. Illinois, 529 U.S. 1023 (2000).

In 2000, before the new sentencing hearing was commenced on remand, Morgan filed a "Successor Petition for Post-Conviction Relief from Judgment" in the Circuit Court of Cook County, alleging actual innocence of the crimes of which he was convicted based on the recantation of one of the State's witnesses, Elijah Prater. After a three-day evidentiary hearing on Morgan's claims, the Honorable Mary Ellen Coghlan denied the successor petition. Morgan's appeal from the circuit

court's denial of the petition is now pending in the Illinois Supreme Court. He has yet to be resentenced.

For the reasons that follow, the People of the State of Illinois urge that Governor Ryan and this Board reject Samuel Morgan's bid for executive clemency.

II.

STATEMENT OF FACTS

1. The Murders and Rape

On January 27, 1982, petitioner, along with murder victims William Motley and Kenneth Merkson, visited Morgan's friend of 12 years, Prater, at Prater's apartment. Prater's girlfriend, Phyllis Gregson, later arrived at the apartment. The next morning, petitioner awakened Prater, shotgun in hand, at about 11:30 am. Prater went into the front room and saw Motley sitting on the love seat talking on the telephone, looking through his black telephone book with a .357 magnum tucked under his leg. Gregson was also in the front room sitting on the rocking chair. Prater went into the kitchen where Merkson was. Merkson said to Prater, "Haasan [Morgan] took some mushrooms, he getting ready to catch a murder beef."

At about 11:45 am, petitioner told Gregson to take off her shirt and dance. Gregson refused and, at this point, Motley made a comment. In response, petitioner aimed his shotgun at Motley's chest and fired, causing the left side of Motley's chest to be blown away. Petitioner removed Motley's .357 Magnum from his dead body and told Prater and Merkson to "clean up the body." Merkson removed a black telephone book from Motley's clothes and gave it to petitioner. Petitioner looked at the names in the book, asked if anyone knew any of the listed individuals, and then put the book in his pocket.

Petitioner told Prater and Merkson to pull the drawers out of a dresser to determine whether the dead body would fit inside. Because the body was too large, Prater and Merkson stuffed it into a laundry bag, pulled a mattress out of the closet, and wrapped the mattress around the body. Petitioner ordered Gregson to clean the blood off the floor. Approximately one hour later, petitioner sent Prater to the liquor store and told him to fill up petitioner's car with gas and park it at the rear of the apartment building.

When Prater returned, petitioner was sitting in the dining room with the shotgun in his lap and the .357 Magnum in the waistband of his pants. Merkson was walking around the apartment making jokes. Petitioner told Merkson to stop making jokes and to get Motley's body out of the apartment. At about 1:15 or 1:30 pm, as Merkson and Prater were moving Motley's body, Merkson made another "crack." Petitioner chased Merkson into the front room of the apartment, repeatedly hit Merkson in the head with the .357 Magnum, and then said, "Now let's get body out of here." When Merkson made another comment, petitioner told him to get down on his knees and face the floor. Merkson got down on his knees, and petitioner pointed the .357 Magnum at Merkson's head and fired. Petitioner then said to Prater, "It's just us now and you got to get up the body." As Prater began to tie up Merkson's body, petitioner began shooting at Prater. When Prater heard the shot and felt the bullet pass by his head, he immediately "broke and ran through the kitchen into the back door," with petitioner firing at him.

Frank Blume, Prater's downstairs neighbor, had heard several loud shattering sounds emanating from Prater's apartment beginning at approximately 11:00 am and ending at about 1:15 pm., as well as the sound of footsteps running down the back stairs. The last loud blast Blume heard at about 1:15 pm., which marked the shooting of petitioner's second victim, Merkson, also caused a

hole in the ceiling in Blume's front hallway. At that point, Blume called the police.

In the meantime, petitioner ordered Gregson to go into the bathroom and lock the door behind her, which she did for about five to ten minutes before petitioner ordered her to come out or he would shoot the door down. When Gregson opened the door, petitioner grabbed her by the arm and said, "You're going with me." Petitioner put Gregson in the car and drove to the South Shore Hotel. Once at the hotel, petitioner grabbed Gregson by the arm and took her out of the car with the .357 under his coat, and checked into the hotel using the name of Joseph Thurston, an alias he had used before. Once they were in the room, Gregson went to the bathroom and, when she came out, defendant was emptying his pockets of marijuana, some money and Motley's black telephone book. Later, defendant pushed Gregson onto the bed and raped her. After the rape, petitioner got up, said he was hungry and "let's go get something to eat." As petitioner and Gregson were walking to petitioner's car, a motel employee saw petitioner holding a gun to Gregson's head. When petitioner saw the employee, he aimed his gun at the employee and began to chase him. As the employee ran toward the motel lobby, petitioner stopped chasing him and took Gregson by the arm and pushed her into his car. When petitioner later dropped Gregson off, he told her not to tell anyone what he had done or he would come find her.

2. Petitioner's Capture

The following day, petitioner was arrested on the South Side when the arresting officers received a radio call to look for a man who was accused of pointing a gun at several people, telling them to stand up against the wall, and then firing shots. When the officers encountered petitioner, they called to him to stop, but he continued walking. When the officers identified themselves as police, petitioner dropped a plastic bag to the ground and continued walking. The officers pursued

petitioner on foot and when they were within about 15 to 20 feet of him, petitioner turned toward the officers and pulled a revolver from his coat pocket. When petitioner saw the officers' guns, he dropped the revolver.

Expert testimony showed that the revolver, recovered from petitioner upon his arrest, had fired the bullets recovered at Prater's apartment. The plastic bag that petitioner dropped prior to his arrest was found to contain a black notebook identified by Prater and Gregson as being the one Merkson had given to petitioner after removing it from Motley's body.

3. Morgan's Criminal History

The State's evidence in aggravation at the petitioner's sentencing hearing established the following "highlights" of petitioner's long criminal career:

Petitioner's known criminal history as an adult extended back to 1965 when he was arrested for the armed robbery of Ernest Powell. On November 24, 1965, Mr. Powell was an Assistant State's Attorney assigned to a branch court at 11th and State Streets. He left work that day between approximately 6:30 and 7:00 pm., and it was getting dark. Powell walked to his car, which was parked across the street in a well-lit parking lot, and as he unlocked his car, he heard someone behind him, turned around and saw a young man (later identified as petitioner) with a gun in his hand. Powell quickly jumped into his car and locked the door, but petitioner walked up to the window, pointed the gun at Powell and told him to get out of the car. Powell got out of the car and, as petitioner held a gun on him, another man searched through his pockets and took his wallet which contained approximately \$65. Petitioner and his accomplice also took Powell's car keys, car and some personal items in the car. Petitioner was convicted of armed robbery and sentenced to three months' imprisonment and five years' probation.

While petitioner was still on probation for armed robbery, he was arrested for aggravated battery. In May of 1967, a young man, Joseph Smoot, was playing softball in Washington Park. Petitioner, who Smoot did not know, walked up behind Smoot with a baseball bat and beat him very hard over the head with it. As a result of the unprovoked attack, Smoot spent two weeks in Jackson Park Hospital. Petitioner pled guilty to this offense and was sentenced to three to five years in the Illinois Department of Corrections. Because petitioner had been admitted to bail after his arrest, and failed to appear, he was also sentenced to a concurrent term of three to five years' imprisonment for jumping bail. Petitioner was also sentenced to another concurrent term of three to eight years' imprisonment for violating the terms of his original probation for the previous armed robbery conviction.

Also testifying for the State in aggravation was James Czernak. On October 20, 1967, both Czernak and petitioner were assigned to Tier No. 2 in the Cook County Jail. Petitioner and another inmate made all the white inmates go into the day room and stand in a circle. Petitioner and the other inmate were armed with big sticks used to clean out the jail toilets and buckets of scalding hot water. Petitioner ordered the white inmates to get down on their knees and told them he was going to hang them. At this point, Czernak stood up and petitioner smashed him in the throat with the big stick. Czernak was also punched in the jaw. As a result of this beating, Czernak required medical attention and his tooth was chipped. Petitioner was convicted of aggravated battery, intimidation and mob action, and was sentenced to a term of three to five years' in the Illinois Department of Corrections, to run concurrently with the above-mentioned sentences.

Chicago Police Officer John Gallagher also testified in aggravation. He stated that on October 6, 1976, he was assigned to investigate an armed robbery and shooting at 1539 West 90th

Street. Pursuant to the investigation, Officer Gallagher went to that address—petitioner’s apartment— and learned that petitioner had shot two black females there with a sawed-off shotgun. The State later moved to strike, with leave to reinstate, subsequent aggravated battery and unlawful use of weapon charges stemming from the incident.

Chicago Police Officer Paul Zacharias also testified. On November 11, 1981, he stopped petitioner for failure to have a state vehicle registration sticker. The officer and his partner, John Schultz, asked petitioner (who was using the name, Joseph Thurston) for a driver’s license, but petitioner did not have one. Zacharias informed petitioner that he was under arrest and told petitioner to turn around so he could be handcuffed. As Zacharias began to handcuff petitioner, Officer Schultz started to reach into petitioner’s car in order to turn the motor off. Schultz saw a scale and two bags containing a white powdered substance on the front seat. At that point, petitioner punched Officer Zacharias in the face with his fist and knocked him off balance. Schultz came to Zacharias’ aid, but petitioner also hit Schultz and shoved him out of the way. Petitioner was then able to get into his car, which was still running, and pulled away “within inches” of the officers. With the officers in pursuit, petitioner drove six blocks, hit five cars and disabled his own vehicle, whereupon he fled from the car. The officers chased petitioner on foot for approximately one and one half to two blocks and eventually found him hiding in a basement. It took a total of four officers to apprehend petitioner, in addition to approximately eight to ten squad cars which had been called to assist. Petitioner was placed under arrest for possession of a controlled substance, possession with intent to deliver, battery and resisting a police officer. The case was still pending at the time of the sentencing hearing, but once petitioner was sentenced to death, the State moved to *nolle* the case.

III.

REASONS FOR DENYING CLEMENCY

- A. Because Petitioner Has Not Yet Been Resentenced for Murder, He Does Not Stand Convicted of that Offense and, therefore, the Governor Does Not Have the Authority to Grant Him a Pardon Under the Illinois Constitution. Moreover, Because Petitioner is Still Litigating in the Courts Issues Involving His Guilt, and Has Not Yet Been Resentenced, Petitioner Is Not One for Whom the Clemency Process Is Intended.**

Section 13 of article 5 of the Illinois constitution gives the Governor the “power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.” (Emphasis added). Indeed, “clemency proceedings are not part of trial – or even the adjudicatory process.” Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 284 (1998) (holding that a state death row inmate does not have a protected life interest in state clemency procedures, aside from not being summarily executed by prison guards, since that interest has already been extinguished by his conviction and sentence). Clemency procedures are not intended to determine the guilt or innocence of the defendant. Id. Nor are they intended primarily to enhance the reliability of convictions or sentences existing as a result of the trial process. Id. Clemency is an executive function independent of trial, direct appeal and collateral relief proceedings. Id. It was established to “prevent[] miscarriages of justice where judicial process has been exhausted.” Herrera v. Collins, 506 U.S. 390, 412 (1993). It is traditionally available to capital defendants as “a final and alternative avenue of relief,” “exist[ing] to provide relief from harshness or mistake in the judicial system.” Woodward, 523 U.S. at 284-85. It is the “final stage of the decisional process that precedes an official deprivation of life.” Id. at 292 (Stevens, J., concurring in part and dissenting in part). Executive clemency provides the “fail safe” in our criminal justice system. Herrera, 506 U.S. at 415. “A death row inmate’s petition for clemency is also a ‘unilateral hope’ The defendant in effect accepts the finality of the death sentence

for purposes of adjudication, and appeals for clemency as a matter of grace.” Woodward, 523 U.S. at 282.

Petitioner readily concedes that in 2000, the Illinois Supreme Court “vacat[ed] Mr. Morgan’s sentence of death and direct[ed] the circuit court to conduct a new sentencing hearing.” (Clem. Pet. at 6). But that sentencing hearing has yet to occur. “Morgan is not currently under a death sentence[.]” (Clem Pet. at 8). Petitioner also concedes that one of the main bases for his pardon request – “newly-discovered evidence” that he is innocent of the two murders of which he was convicted – is an issue “now being litigated in the courts and is in fact presently pending before the Illinois Supreme Court.” (Clem. Pet. at 1).

Clearly petitioner is not one for whom the clemency process is intended. Instead of using the process as a final avenue of relief, or the “fail safe” in our criminal justice system after final adjudication of his guilt or innocence and his sentence, Morgan is simply petitioning for clemency in hopes of benefitting from a well-publicized potential blanket commutation issued by the Governor before he leaves office. Petitioner should not be allowed to simply forego the adjudicatory process during which his sentence, as well as the reliability of his convictions and future sentence, were meant to be, and will be, determined.

Moreover, the language of the Illinois constitution itself gives the Governor the power to grant reprieves, commutations and pardons only after conviction. The question then becomes: when does a clemency petitioner stand convicted of an offense under state law? In 2000, the Illinois Supreme Court equated the term, “conviction,” in section 122-1(c) of the Illinois Post-Conviction Hearing Act – which sets forth the time limitations for the filing of a petition under the Act -- with the “date of sentence.” People v. Woods, 193 Ill. 2d 483, 488, 739

N.E.2d 493 (2000). The court found such an interpretation consistent with the purposes underlying the Post-Conviction Hearing Act, which is intended to provide a remedy for constitutional violations that occur at trial or sentencing. Id. at 488-89. Construing the term, “conviction,” in our constitution’s clemency provision as occurring at the time of entry of the sentencing order is likewise consistent with the purposes underlying the clemency function, which as noted above, was intended to be a final and alternative avenue of relief. It necessarily follows that if, as in this case, a clemency petitioner has not yet been resentenced after the *vacatur* of his original sentence, it cannot be said that he stands convicted of the offense for which he must be resentenced. Under the state constitution, the power to grant a commutation, pardon or reprieve only after a petitioner has been convicted. Clearly then, the Governor has no authority to grant such relief before the prisoner stands legally convicted of the offense with which he was charged. See also People v. Robinson, 89 Ill. 2d 469, 433 N.E.2d 674 (1982), where the Illinois Supreme Court also equated the date of conviction with the date of sentencing where the issue was the interpretation of section 5-5-3.2(b)(1) of the Unified Code of Corrections, which allowed extended-term sentencing when " 'a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years.' " Robinson, 89 Ill. 2d at 472, quoting Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(1). The court held that, for purposes of determining when the 10-year period began to run, "the date of a conviction is the date of entry of the sentencing order." Robinson, 89 Ill. 2d at 477. This holding was also recently followed in People v. Lemons, 191 Ill. 2d 155, 159, 729 N.E.2d 489 (2000).

2. An Order from the Governor “barring imposition of a death sentence upon petitioner,” as Petitioner Now Requests, Would Exceed the Governor’s Authority Under the State Constitution’s Clemency Provision and Would Be an Attempt to “interfere with, control, modify or annul the judgment” of the Illinois Supreme Court in Petitioner’s Case.

In the alternative, petitioner argues that, at a minimum, Governor Ryan should at least enter an order barring imposition of a death sentence upon petitioner and commuting his sentence to a sentence of imprisonment. (Clem. Pet. at 9). Clearly, the Governor’s issuance of an order barring imposition of a death sentence upon petitioner would exceed the authority granted to him under the Illinois Constitution, which is only to grant a commutation, pardon or reprieve after a petitioner has been convicted. Except where power is given him by that instrument, he has no authority. People ex rel. Smith v. Jenkins, 325 Ill. 372, 374 (1927). If, purporting to act in the exercise of the power to pardon or commute, the Governor makes an order attempting to interfere with, control, modify or annul any judgment of a court, his order is void and the officers charged with the execution of the judgment may be required by mandamus to disregard the order.” Id. at 374-75, citing People v. Jenkins, 322 Ill. 33 (1926).

In this case, on appeal of the denial of post-conviction relief, the Illinois Supreme Court ordered the *vacatur* of petitioner’s death sentence and remanded the cause for a new capital sentencing hearing. People v. Morgan, 187 Ill. 2d at 557. An order from the Governor “barring imposition of a death sentence upon petitioner,” as petitioner now requests, would exceed the Governor’s authority under the constitution’s clemency provision and would be an attempt to “interfere with, control, modify or annul the judgment” of the Illinois Supreme Court in petitioner’s case. Accordingly, such an order would be void.

3. Prater’s Newly-Concocted Version of the Events of Late January 1982 Give this Board and

Governor Ryan No Reason to Pardon Petitioner. Even if Prater's New Story Were Not So Incredible, It Would Now Be Up to the Illinois Supreme Court, Before Whom This Matter Is Legally Pending, to Determine the Merits of Petitioner's Claim.

Petitioner states that he is seeking a pardon "because he is innocent." (Clem. Pet. at 23). Petitioner bases this on the fact that Elijah Prater, while being interviewed by a defense investigator in preparation for the new sentencing hearing, told the investigator that he and Phyllis Gregson had both lied during trial. (Clem. Pet. at 16). Petitioner also argues that Prater was coerced by police into naming petitioner as a cold-blooded murderer. (Clem. Pet. at 19). These assertions are preposterous and must not be the basis for a grant of clemency.

First, as the petitioner readily concedes, these issues are still being litigated in the courts – presently, the Illinois Supreme Court. As the State has argued above, Petitioner should not be allowed to simply skip over the adjudicatory process, during which his sentence as well as the reliability of his convictions and future sentence, were meant to be, and will be, determined. He must not be allowed to proceed directly to the avenue of last resort: executive clemency.

Second, the Illinois Supreme Court has made it clear that the recantation of testimony is generally regarded as unreliable, and it is for the trier of fact during the judicial process to determine the credibility of such recantation testimony. People v. Brooks, 187 Ill. 2d 91, 132, 718 N.E.2d 88 (1999); People v. Fields, 135 Ill. 2d 18, 43, 142 Ill. Dec. 200, 552 N.E.2d 791 (1990). The reasoning behind this case law is clear when it comes to cases such as the one presently before this Board and the Governor. In her ruling after the evidentiary hearing on Prater's recantation, Judge Coghlan stated:

[A]fter having observed his demeanor while testifying, the Court holds Prater's testimony that Samuel Morgan did not shoot Kenneth Merkson is not credible. Equally incredible is Prater's present claim that Morgan shot Mottley in defense of himself and others in the apartment.

* * *

Prater would have this Court believe that he lied before a Cook County grand jury in 1982, and that he lied at Morgan's trial in 1983 because quote, he has no more fear of what can be done, and that he's not worried about the same tactics that the police used on him then, and that the fear is gone.

This Court expressly holds that his reasons for allegedly lying in sworn testimony given in 1982 and 1983 were both vague and incredible.

See Transcript of October 29, 2001 at 669 (attached hereto as Exhibit A).

It's no wonder Judge Coghlan held as she did. The circumstances of Prater's recantation are indeed suspicious. As recent as 1995, in an affidavit filed with petitioner's petition for post-conviction relief, Prater was adhering to his story that petitioner coldly gunned down both Merkson and Motley, adding only that throughout the night and morning of January 27 and 28, 1982, petitioner snapped in and out of periods of extreme paranoia and defensiveness, allegedly causing petitioner to be extremely threatened by the two murder victims. It was not until after Phyllis Gregson died in 1995, leaving no living eyewitness, that Prater felt he could safely denounce his and Gregson's trial testimony. However, Prater has apparently forgotten about his downstairs neighbor Frank Blume, who testified at trial that he heard several loud shattering sounds emanating from Prater's apartment beginning at approximately 11:00 am and ending at about 1:15 pm., as well as the sound of footsteps running down the back stairs. Blume also testified that the last loud blast he heard at about 1:15 pm., which could only have marked the shooting of Merkson, who was forced to get down on his knees and face the floor while petitioner pointed the .357 Magnum at his head and fired, caused a hole in the ceiling in Blume's front hallway.

Prater has apparently forgotten about Blume's testimony because, during a tape-recorded statement to one of petitioner's present attorneys, made on September 9, 2000, Prater stated that at

about 9:30 or 10:00 am on January 27, 1982, Motley shot Merkson in the area between the living room and the dining room. Prater also told petitioner's attorney that, within "seconds," petitioner then shot Motley in self-defense and in defense of the others in the apartment. When reminded by petitioner's attorney that at trial Prater had testified that petitioner made him go out for liquor and gas between about 12:45 or 1:00 pm, Prater stated that "that did happen," after both Motley and Merkson had been shot. He stated that when he got back to the apartment, while he was tying up Merkson, he was standing up by the entrance to his kitchen. The kitchen is at the back of the apartment, separated from the front room and front hallway by the dining room. Prater stated that as he stood up, petitioner shot at him from the middle of the front room. Prater further stated that the bullet from that shot landed right above the shotgun, which was sitting on a pillow in the dining room. Prater also stated that he could almost still feel that bullet go past him. Prater failed to mention any bullet at that time having pierced the floor of his apartment, which would have caused the hole in the ceiling of Mr. Blume's front hall.

Petitioner also relies on evidence elicited at the recent evidentiary hearing showing that he was in custody at Area 6 during the early morning hours of January 30. He argues that the evidence is "newly-discovered" and allegedly establishes that Prater was in fact coerced by police into stating that petitioner cold-bloodedly murdered Motley and Merkson. Petitioner now claims that the testimony of then-Detective Thomas Whalen and former Assistant State's Attorney Thomas Epach – that Prater wanted to stay in police custody because he feared petitioner – cannot be true because this "new" evidence shows that petitioner was already in custody. (Clem. Pet. at 20). However, at trial, almost 20 years ago, former Assistant State's Attorney Epach testified that even after defendant had been taken into custody, Prater refused to leave the police station, stating he feared for

his life, and was still there when Assistant State's Attorney Epach left the station approximately four hours later. Moreover, after hearing the testimony and observing the credibility of the witnesses at the evidentiary hearing, Judge Coghlan rightfully made short work of petitioner's coercion claim.

She stated:

In contrast, the testimony of Detectives Thomas Whalen, Michael Flynn, and former assistant state's attorney Thomas Epach was compelling, credible, convincing and unimpeached on any material point. Accordingly, ***there is no credible evidence that Elijah Prater was ever coerced by anyone to give false testimony against Samuel Morgan at any time.***

See Transcript of October 29, 2001 at 670 (attached hereto).

In short, Prater's newly-concocted version of the events of late January 1982 give this Board and Governor Ryan no reason to pardon petitioner. Moreover, even if Prater's new story were not so incredible, it would now be up to the Illinois Supreme Court, before whom this matter is legally pending, to determine the merits of petitioner's claims.

4. Petitioner Is Not Entitled to Clemency Relief on the Basis of the Promulgation of the New Supreme Court Rules Governing Capital Cases. Nor Is He Entitled to Such Relief Based on the Ryan Commission's Recommended Reforms or on Any of the Other Reasons Which He Argues Below.

New Supreme Court Rules Governing Capital Cases.

Petitioner first argues that he is entitled to clemency because he did not have the benefit of the new Supreme Court Rules governing capital cases at this trial and sentencing hearing. The absurdity of this assertion is clear with respect to petitioner's prior sentencing hearing because he is going to get a new sentencing hearing to which the new rules will apply. With regard to petitioner's trial, the Illinois Supreme Court has clearly held that retroactive application of its new rules governing capital cases is not required. People v. Hickey, 2001 Ill. LEXIS 1080 at *65 (Ill. Sup. Ct.,

Sept. 27, 2001).

Adequate Funding

Petitioner asserts that he is entitled to clemency because he was denied adequate funding for investigation, expert witnesses, mitigation specialists and to compensate court-appointed attorneys. 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. Indeed, in the case presently before the Board and Governor Ryan, petitioner's post-conviction counsel enlisted the services of such experts as the Chairman of the Department of Neurology at Georgetown University, a clinical psychologist and a social worker – all to evaluate petitioner and the effects of his alleged brain damage and social history, rendering petitioner's present claim preposterous. (Clem. Pet. at 14, n. 3).

Prior Statements by Prater and Gregson Were Not Transcribed or Electronically Recorded

Petitioner states that the Ryan Commission has recommended electronically recording the interviews of significant witnesses in order to help resolve any questions at their testimony. Petitioner additionally claims that he has presented evidence that both Prater and Gregson committed perjury by implicating petitioner at trial, and that if their pre-trial statements had been transcribed or recorded, "coercion employed by the State" in eliciting that perjured testimony would have been revealed. However, as the State argued above, petitioner's "evidence" that Prater and Gregson committed perjury at trial and were coerced by the State is anything but convincing, as indicated by Judge Coghlan's ruling after hearing it. Moreover, both Prater and Gregson were subject to lengthy cross-examinations at trial, which served the purpose of helping resolve any questions jurors might

have had as to their testimony.

Lineup and Photo Spread Measures

Petitioner next argues that the Ryan Commission has recommended a variety of measures to ensure the reliability of lineups and the viewing of photo spreads by eyewitnesses which, because they were not employed in his case, should result in the grant of clemency. Again, this assertion is absurd in the matter presently pending before the Board and Governor Ryan. The identity of the perpetrator of the crimes in this case was not an issue at trial because Prater, a long-time friend of petitioner's, and Gregson both knew petitioner. The reliability of any lineup or photo array is irrelevant in this case.

Testimony of an In-Custody Informant

Petitioner next argues that because Prater was in police custody when he gave the statement implicating petitioner and testified before the Grand Jury, he should have been considered a jailhouse informant and the trial court should have held an evidentiary hearing to determine the reliability and admissibility of the his testimony at trial. This claim is also ludicrous. Prater was not a jailhouse informant – he was an eyewitness to two murders. Petitioner also ignores the fact that the jury heard the evidence, and after considering Prater's credibility and all other attendant circumstances, deemed his testimony reliable. This was after the jury was even given an accomplice instruction which instructed the jury that, “[w]hen a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered . . . with caution [and] . . . carefully examined in light of the other evidence in the case.” Petitioner has no room to complain about the treatment of Prater's testimony at trial.

Evidence Analyzed by the Chicago Police Department

Petitioner also claims that clemency is appropriate in this case because the Chicago Police Department, rather than an independent laboratory, analyzed the forensic evidence. However, there is absolutely no evidence that Chicago Police failed to do a competent job in analyzing such evidence and that analysis by an independent laboratory would have resulted in a different verdict at trial.

Uniform Protocols to Guide Prosecutors' Decision in Seeking Death

Petitioner claim he is entitled to clemency because the prosecutors' decision to again seek death in his case was made without uniform protocols to guide their 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 any decision to seek death in his case might be the result of an abuse of discretion. Accordingly, the claim must be denied.

Review by the Illinois Supreme Court for an Arbitrary or Disproportionate Death Sentence

Petitioner next argues that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate or arbitrary. Once again, the claim is preposterous. Not only did the Illinois Supreme Court review the circumstances underlying the imposition of the death penalty upon petitioner, but it went so far as to vacate that death

sentence. Petitioner is hardly in a position to complain about the Illinois Supreme Court's actions in his case.

Brain Damage and Child Abuse

Relying on Atkins v. Virginia, 122 S. Ct 2242 (2002), petitioner argues that he should not be subjected to the death penalty because he suffers from brain damage. However, the Court in Atkins held only that the imposition of the death penalty on a mentally retarded defendant violates the Eighth Amendment. The Court noted that mental retardation is characterized as having significantly sub-average general intellectual functioning and significant limitations in adaptive functioning in at least two skill areas with the onset prior to age 18. Even assuming that petitioner indeed suffers from some brain damage, he does not meet the Supreme Court's definition of "mentally retarded." One of petitioner's own experts has stated that petitioner is "of near normal intellect."

With respect to petitioner's allegation that he deserves clemency because he is "brain damaged," at the evidentiary hearing on post-conviction review in this case, petitioner's defense attorney testified that, during his preparation of petitioner's case, leading up to and including sentencing, he recalled receiving no information from petitioner that he was suffering from any mental illness or having psychiatric difficulties. (P.C. R. 472). Nothing in his conversations with petitioner led counsel to even suspect that petitioner had any mental illnesses or deficits. (P.C. R. 474) He never saw petitioner blank out or lose his train of thought during any of the time he spent with him. (P.C. R. 474) Nor did counsel recall any aberrations in behavior on petitioner's part, nor petitioner ever mumbling, appearing angry or impulsive, or having any epileptic seizures. (P.C. R. 475, 480) Counsel stated that he was able to converse with petitioner without difficulty. (P.C. R. 472). He further stated that the 1983 presentence report indicated no mental problems, nor made any

reference to petitioner having seen a mental health professional for any type of mental impairment. (P.C. R. 473) Indeed, under the subheading, “Physical Health History,” the 1983 report indicated only that, “The defendant stated he has high blood pressure and takes medication,” and, under the subheading, “Mental Health History,” stated only, “The defendant stated he has never been interviewed by a psychiatrist. (R. 1721) Counsel also stated at the hearing that the 1978 presentence report indicated that petitioner was said to have been of normal birth with no complications; was quite healthy until he bumped his head at age eight and began having seizures; suffered occasional seizures in later years; and had good relationships with relatives and developed a number of friends. (P.C. R 473-73) The 1978 report also indicated, however, that petitioner “claims no *present* health problems....” (C. 613) (emphasis added).

After hearing all the evidence, with an opportunity to observe and listen to all the witnesses, the post-conviction court failed to find enough evidence to indicate that petitioner’s trial counsel should have known about any prior or current mental conditions, and that any evidence that did exist which might have shown the presence of a medical condition, indicated that it was merely a *prior* condition. (R. 516-17) (emphasis added).

Essentially, all that petitioner’s post-conviction counsel has turned up is that petitioner had suffered occasional seizures since a young boy; may have some brain damage, though not enough to push him below the average or low average level of intelligence; is possibly learning disabled; suffered some accidents as a child and teenager; that his mother may have beaten him when he was growing up and that he fought some with his father; and that he might be an alcoholic. See Thomas v. Gramley, 144 F.3d 513, 516-17 (7th Cir. 1998) (and cases cited therein) (where Seventh Circuit found that almost identical evidence was “unimpressive ... in comparison with the evidence in cases

in which the failure to obtain psychological evidence for presentation at the sentencing hearing was the basis for ordering a new hearing,” and “actually weaker than evidence in cases in which courts have upheld the denial of such relief”).

It should also be noted that Dr. Rybicki, who testified for petitioner at the evidentiary hearing in this case, was effectively impeached on cross-examination when he acknowledged that petitioner scored higher on several of the tests administered by Dr. Morris, a specialist in neuropsychology, than he did when Rybicki administered the same tests. (P.C. R. 416-22) There was also conflicting evidence as to the extent of petitioner’s mental impairment. Specifically, Dr. Morris stated in her affidavit that her findings were consistent with an impairment affecting the left hemisphere of petitioner’s brain, but made no mention of any frontal lobe damage, and indicated that petitioner’s right hemisphere function is considerably better. (P.C. R. 423-24) Dr. Rybicki, on the other hand, stated that he found evidence of frontal lobe damage affecting petitioner’s brain (P.C. R. 389-90), but conceded that if petitioner’s were hearing impaired, that could have some effect on the accuracy of the results of the two tests necessary in order to diagnose frontal lobe damage. (P.C. R. 431) Although Rybicki stated he saw nothing in any of his testing that suggested petitioner was hearing impaired (P.C. R. 451), Dr. Pincus, another of petitioner’s experts, stated that he suspected petitioner may be hearing impaired, and that petitioner himself believes he could be hearing impaired, causing him to have had his ears checked several times in prison. (C. 323) Moreover, Dr. Morris indicated that her evaluations of petitioner showed “severe deficits to memory for verbal information presented auditorily,” also suggesting petitioner may be hearing impaired. (C. 431)

Furthermore, as the Illinois Supreme Court has repeatedly held, “information about a defendant’s mental or psychological impairment is not inherently mitigating.” People v. Tenner,

175 Ill. 2d 372, 382 (1996). As the Court has explained:

at sentencing, a judge or jury considering evidence of this nature might view the information as either mitigating or aggravating, depending, of course, on whether the individual hearing the evidence finds that it evokes compassion or demonstrates possible future dangerous.

Id. at 382). See also People v. Johnson, 183 Ill. 2d 176, 203 (1998) (finding that “although evidence of defendant’s psychological or educational disabilities may have evoked compassion from the sentencer, it also could have demonstrated defendant’s continued dangerousness”); People v. Thomas, 164 Ill. 2d 410, 426-27 (1995) (holding that while the defendant’s records contain mitigating evidence such as defendant’s low intelligence, “they also portray defendant as a belligerent, dangerous person...”);

Finally, once again, petitioner has no room to complain about his situation. A new sentencing hearing was ordered so that a new sentencing body could be made aware of his alleged brain damage and childhood abuse. That new sentencing body will determine whether the evidence petitioner presents in that regard precludes imposition of the death penalty in his case. That issue is clearly a question for the trier of fact.

Model Prisoner

Citing a “mere” 29 disciplinary infractions since 1985, petitioner argues that he is a “rehabilitated model prisoner” worthy of clemency. Not that 29 disciplinary tickets is not enough to prohibit clemency on the basis of “good behavior” in prison, but petitioner conveniently fails to mention how, in 1967, while in Cook County Jail, 1967, he and another inmate, while armed with big sticks used to clean out the jail toilets and buckets of scalding hot water, made all the white inmates go into the day room and stand in a circle. Petitioner then ordered the white inmates to get

down on their knees and told them he was going to hang them. At this point, one inmate stood up and petitioner smashed him in the throat with the big stick. As a result, the inmate required medical attention and his tooth was chipped. Petitioner was convicted for aggravated battery, intimidation and mob action, and was sentenced to a term of three to five years' in the Illinois Department of Corrections. Any argument that petitioner should be rewarded for his "positive behavior while in prison" (clem. pet. at 36) must be summarily rejected.

Right to Allocution

Finally, petitioner argues that he was not allowed to make any statement at the conclusion of the mitigation phase of his sentencing hearing. On several occasions, the Illinois Supreme Court has held that a defendant has no statutory or constitutional right to allocution in a capital sentencing hearing. People v. Hall, 195 Ill. 2d 1, 743 N.E.2d 126 (2000); People v. Simms, 192 Ill. 2d 348, 736 N.E.2d 1092 (2000); People v. Gilliam, 172 Ill. 2d 484, 670 N.E.2d 606 (1996). That fact notwithstanding, petitioner has not yet been disallowed the opportunity to make a statement at the conclusion of the mitigation phase of his new sentencing hearing. Therefore, he has no cause to complain.

IV.

CONCLUSION

For all of the above reasons, the People of the State of Illinois asks this Honorable Board and the Honorable Governor of this State to deny executive clemency to Samuel Morgan.

Respectfully submitted,

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