

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. \
vs.)	
)	Inmate No. B-43198
TYRONE FULLER,)	
)	
)	
)	
)	

I

HISTORY OF THE CASE

Petitioner, Tyrone Fuller, was charged by indictment with two counts of first degree murder, one count of felony murder, two counts of armed robbery and one count of attempt first degree murder, all arising from the December 18, 1997, armed robbery of a jewelry store, the murder of the store's 36-year old owner, and the attempted murder of a 76-year old salesman. On December 1, 1999, following 402 conferences and "extensive conversations" with his attorney, Fuller entered a blind plea of guilty on all counts. (R.CL C31-37, R.345-69) Fuller's plea came only after the Motion to Suppress his court-reported confession was denied, and the other 11 of his pre-trial motions were fully litigated.

A jury was then empanelled for the death penalty hearing. (R. 376-628) Fuller was found eligible for the death penalty based on his commission of a murder during the course of an armed robbery. (R. 787) Following an extensive hearing in aggravation and mitigation, the jury unanimously concluded that there were no mitigating circumstances sufficient to preclude the

imposition of the death penalty. (R. 806-974)

On January 4, 2000, the trial court heard and denied both Fuller's *pro se* Motion to Withdraw Plea and Vacate Judgement, and his attorney's Motion to Vacate Sentence of Death and For a New Sentencing Hearing. (R. CL C243-45, C246-47; R. 981-82, 997) Following arguments, the trial court sentenced Fuller to death. (R. 1013) Fuller's Motion to Reconsider Sentence was denied on February 1, 2000.

On February 22, 2002, the Illinois Supreme Court affirmed Fuller's convictions for attempt murder, and both armed robberies. However, as there was but a single murder victim, the Court affirmed only the most culpable of Fuller's murder convictions, the one for intentional murder. Fuller's convictions for knowing murder and felony murder were vacated. His death sentence was also vacated due to an error in the jury instructions at the eligibility phase and the matter was remanded for resentencing. People v. Fuller, ___ Ill. 2d ___, 2002 Ill. Lexis 287 (No. 89220, February 22, 2002). (See Appendix E)

In January 2001, Fuller filed a "*pro se* Post-Conviction Petition." (See Appendix F) In March, 2002, Fuller's attorney requested that the petition be taken off the court's active call pending the outcome of the resentencing hearing.

Fuller's new sentencing hearing has not yet begun. Thus, at present, Fuller has not been sentenced at all, let alone sentenced to death, and this clemency petition is, at best, pre-mature.

II

FACTS OF THE CASE

On December 18, 1997, Tyrone Fuller robbed a small jewelry store and pawnshop, brutally murdered its 36-year old owner and tried to murder the 76-year old salesman. (R. 368, 719) The robbery had been planned for approximately two weeks, and involved Fuller, his girlfriend Kimberly Britt, and a get-away driver, Eric Hughes. (R. 719, 735) Fuller and Britt were heroin addicts who needed large amounts of money to support their drug habit, and who obtained that money by committing armed robberies. (R. 811-16, 881-82) In fact, at the time of the instant robbery and murder, they were both on mandatory supervised release for a December, 1992 armed robbery of a mother and her eight-year-old daughter. (R. 11, 811-16, 819-20)

American Jewelers, the shop Fuller and Britt picked as their next source of drug money, was owned and operated by Marc Feldman. (R. 646, See Appendix B, People's Exs.1, 6) After working in other pawnshops, Mr. Feldman and his father purchased American Jewelers in July of 1997. (R. 646, 836) It was a dream come true for Marc Feldman, and seemed to mark the end of many difficult years of struggle for him. From age eleven through his mid-twenties Marc Feldman had suffered through a serious brain injury, two high-risk brain surgeries, years of epilepsy and a near fatal stroke. (R. 835-36) But by 1997, Marc Feldman's life was on the upswing. He had his own business, he was in love with Melissa Peterson, a girl he had met while working in a pawnshop, and they were planning to be married in February, 1998.

Mr. Feldman's co-worker at American Jewelers was 76-year old Aaron Smith, a 50-year veteran of the pawnshop business. (R. 647) The two had met several years earlier while working at another pawnshop, and they often talked about working together if Marc ever bought his own shop.

(R. 646) Shortly after he bought the store, Marc called his old friend and offered him the job. (R. 645-47) Aaron agreed, and they had been working together ever since. December of 1997 was the shop's first Christmas season and Aaron and Marc were working six days a week. (R. 647)

During their years together Aaron and Marc had also talked about the risks inherent in the pawn business. They knew that robbery was always a possibility, and had long agreed that should they be robbed no resistance should be shown. Rather, the robber should simply be given anything and everything he wanted. (R. 663) As Aaron Smith testified, they both believed that "jewelry isn't worth your life." (R. 663)

At approximately 9:00 a.m. on the morning of December 18, 1997, Marc Feldman, who was alone in the store at the time, buzzed Fuller and Britt into American Jewelers. (R. 720-21) Fuller had with him a fully loaded and cocked Raven Arms .25 caliber semi-automatic chrome pistol, a pair of latex surgical gloves, and a black knapsack. (R. 364, 720, 749) He was familiar with American Jewelers, as he had several items on pawn there at the time, and had had dealings with Mr. Feldman on several occasions. (R. 653, 721, 884-85; See also Appendix A, Fuller's confession, p. 6-7) Thus, Fuller clearly knew that most of the jewelry and other valuables were kept in a safe or in the offices in the back of the store and that access to that area was restricted by two doors which locked electronically. (R. 648, 673-74, 676, See Appendix B, People's Exs. 7, 9, 10, 11) He also knew that Mr. Feldman could identify him, and had his name and address on file at the store. (R. 653, 672, 755-56, People's Ex. 39)

Upon his arrival, Fuller spoke to Mr. Feldman about the four items he had on pawn. (R. 721, 736, See Appendix B, People's Ex. 39) Afterward, he and Britt asked to see some wedding rings. Marc Feldman obliged, bringing one set at a time from the back office area into the

showroom for their inspection. (R. 650, 723) At approximately 9:30 a.m., Aaron Smith entered the store, and immediately proceeded to the back to make coffee. (R. 645, 649, 670, 721)

Shortly thereafter, a blind woman, and regular customer, entered the store to purchase some earrings. (R. 650-51, 722-23) Aaron Smith waited on her for 10 to 15 minutes. (R. 650-51) During that time she selected a pair of earrings, paid for them, and left. (R. 651) Kimberly Britt then expressed an interest in seeing a pair of diamond earrings she had noticed on the earring tree Mr. Smith brought out when waiting on the blind woman. (R. 652, 723) It was somewhere between 9:45 a.m. and 10:00 a.m., and Fuller and Britt had been in the store approximately 45 minutes to 1 hour. (R. 652, 671, 673) Their lengthy stay in the store aroused Aaron Smith's suspicion.

As Marc Feldman entered the back of the store to retrieve the desired earrings, Aaron Smith told him that something was wrong. Mr. Smith, who had never seen Fuller before that day, insisted that it should not take someone nearly an hour to buy something if it was, in fact, his intention to buy. (R. 652-53, 657) Marc, however, assured his friend that everything was fine, and that he knew Fuller from prior dealings in the store. (R. 653, 672) As Marc stepped through the door from the back room into the show room area, Fuller pulled the loaded and cocked, semi-automatic gun from his pocket, raised the gun to shoulder height, and immediately fired one shot directly into the middle of Marc Feldman's forehead. (R.653, 724, See Appendix B, People's Exs. 44, 45, 46) Fuller did not announce the robbery, or give the victim any opportunity to willingly relinquish his valuables. (R. 664, 672-73) Rather, Fuller instantly shot Marc Feldman so as to insure that when the victim fell, the position of his body prevented the door leading to the back office from closing. (R. 653-54, 724 See Appendix B, People's Exs. 8, 10)

Aaron Smith tried to close the door to the offices but was unable to do so because of Marc's body. When it became clear that he could not keep Fuller from the back area, Aaron Smith ran for the store's rear door that led to the parking lot. (R. 649, 654) The 76-year old man tripped, however, and Fuller, who had quickly vaulted over the showroom counter and entered the offices, was immediately on top of him. (R. 654, 724-25, See Appendix B, People's Exs. 9-10) Aaron Smith begged for his life. (R. 654-55) Fuller responded to Mr. Smith's pleas by putting the gun to Aaron's head, and pulling the trigger twice. (R. 655, 674-75) Despite Fuller's best efforts, the gun did not fire. (R. 655) After the second attempt to fire the gun failed, Fuller commanded Mr. Smith to "Get under the desk you mother fucker." (R. 655, 725, See Appendix B, People's Ex.11) Mr. Smith immediately complied, hoping that his cooperation would convince Fuller not to kill him. (R. 655).

As Aaron Smith hid under the desk, Fuller let Britt into the back room via a second door. (R.656, 725;See Appendix B, People's Ex. 7) After putting on the latex gloves, the two began emptying the safe of all the jewelry which had been pledged to the shop. (R.656, 725) Pledged jewelry was kept in envelopes, and Fuller and Britt loaded these envelopes into the backpack Fuller had brought from home, as well as into a shopping bag. (R. 657, 725-26) While loading the jewelry the paper bag broke, so the two grabbed a yellow garbage can from the back room and loaded the jewelry into that. (R. 726, See Appendix B, People's Ex.24) In all, Fuller and Britt took more than \$500,000.00 worth of jewelry. (R. 664) Fuller also grabbed cash from the cash drawer, and in doing so, tore off two fingertips of the glove on the springs of the cash drawer. (R. 366, 712, 725, 738, 746)

After they had emptied the safe and cash drawer, Fuller ordered Aaron Smith to get out from under the desk and to lie down in the utility room. (R. 657, See Appendix B, People's Ex. 15) Again, Mr. Smith begged for his life. He implored Fuller, "Please. Take what you want, just don't hurt me. " He also impressed upon Fuller that he did not know what Fuller looked like. (R. 657) Fuller then told Mr. Smith, "I am not going to kill you because you are black like I am. I'm going to shoot you in your leg." (R. 657-58) From his position in the doorway about five feet away from Aaron Smith, Fuller raised the gun and attempted to fire it. (R. 658) Once again, the gun did not fire. (R. 658-59)

Fuller and Britt then grabbed the garbage can and knapsack, and buzzed themselves out of the store using the buzzer they took from the office desk. (R. 674, 726) As they ran out of the store, Hughes pulled the late model turquoise/green car into the adjacent parking lot. (R. 719-20, 726) Fuller threw the backpack and garbage can into the back seat and got in, and Britt got into the front passenger seat. (R. 727, See Appendix B, People's Ex. 26) After pulling out of the parking lot, Hughes drove north on Harlem. (R. 727)

The next thing Aaron Smith realized was that the store was silent. (R. 658) He remained on the floor for three or four minutes. (R. 659) When he was certain that there was no movement from inside the back room, he got up, turned on the floor alarm and phoned 911 to report the murder and armed robbery. (R. 659) Although police and fire department paramedics arrived within minutes, they were not able to save Marc Feldman. (R. 660, 740-42, 768, See Appendix B, People's Ex. 46)

After receiving a radio dispatch regarding the robbery and murder, which included a description of the get-away car, Officer Joseph Moran of the Oak Park Police Department entered into a high-speed car chase with the fleeing felons. (R. 676-79) Within a few minutes, Hughes

crashed the car into a concrete support pillar for the elevated train. (R. 680, See Appendix B, People's Exs. 19-23) Fuller, Britt and Hughes all exited the vehicle and attempted to flee on foot. (R. 683-8) As they ran, Fuller and Britt discarded their jackets and Fuller dropped the gun. (R. 683-84, See Appendix B, People's Exs.19, 25) Both the jackets and the gun were subsequently recovered. Inside Fuller's jacket pockets were a single latex glove, and numerous pledge envelopes containing jewelry. (R. 688-89) Ballistics tests later conducted on the gun positively identified it as the murder weapon. (R. 765)

Chicago police officers also joined in the efforts to apprehend Fuller, Britt and Hughes. Fuller, who tried to hide under the front porch of a single family home, was ultimately apprehended by Officer Dean Hatzis, a tactical officer with the Chicago Police Department. When pulled from under the porch by Officer Hatzis, Fuller was out of breath and very sweaty. (R. 702) His pants' pockets and sweatshirt were stuffed with jewelry. On his right hand Fuller wore a latex glove that was missing two fingertips. (R. 365, 702) Officer Hatzis removed the glove, recovered the jewelry, and turned both Fuller and the recovered evidence over to the Oak Park Police. (R. 703-04) Fuller was subsequently transported to the Oak Park Police Station and placed in an interview room. (R. 210, 217)

At 12:10 p.m., after being advised of and waiving his Miranda rights, Detectives Carl Brader and Ray Jones interviewed Fuller. (R. 257) During this interview Fuller denied any involvement in the murder/armed robbery. (R. 260) Shortly after 2:00 p.m., after Fuller had been given lunch, he was briefly interviewed by Detective Brader alone. (R. 261) At this time, Fuller admitted to Detective Brader that he was involved in the murder/armed robbery. (R. 260-61)

Detective Brader then arranged for Fuller to be interviewed by Assistant State's Attorney Colin Simpson, the supervisor of the State's Attorney's Office in the Fourth District. (R. 261, 709-710)

This interview began at approximately 5:00 p.m., but ended shortly thereafter when Fuller told the assistant state's attorney that Aaron Smith, the 76-year old store employee who Fuller had unsuccessfully tried to eliminate as a witness, had planned the robbery. (R. 261-62, 714-16) Assistant State's Attorney Simpson knew that Fuller's accusation did not correspond with any of the information he had learned during his visit to the murder scene, his discussions with the Oak Park police officers regarding their investigation, and his interview with Aaron Smith. (R. 262, 713, 716) As a result, Assistant State's Attorney Simpson told Fuller that he did not believe Fuller, and left the room. (R. 716) Assistant State's Attorney Simpson then became involved with Kimberly Britt and Eric Hughes, who had since been arrested and brought to the police station. (R. 716-17)

At approximately 7:45 p.m., Fuller was placed in a lineup. (R. 262, 717, See Appendix B, People's Exs. 16, 18) At that lineup, Aaron Smith positively identified Fuller as the man who shot and killed Marc Feldman and who tried to kill Smith. (R. 262, 669, 717) He was also identified by Officer Moran as the person he'd seen drop the gun and run from the get-away car. (R. 364) Fifteen minutes later, Detective Brader told Fuller that he had been identified by an eyewitness as the shooter. (R. 262, 717, 734) Fuller then admitted his involvement to the detective. (R. 263) Sometime between 10:00 and 11:00 p.m., Assistant State's Attorney Simpson again interviewed Fuller. (R. 264, 717)

Assistant State's Attorney Simpson carefully explained to Fuller that he was not Fuller's lawyer, but was a lawyer working with the police, and fully informed Fuller of his Miranda rights.

(R. 718, See Appendix A, Miranda Rights Waiver Form) He then asked Fuller if Fuller wanted to talk with him about the murder and armed robbery. Fuller responded affirmatively, and told the assistant in detail of the robbery and murder. (R. 264, 719-728) At 11:57 p.m., Fuller gave a 36-page court-reported statement, which again recounted his involvement in the murder and armed robbery. (R. 265, 730-31, Appendix A¹) Fuller then reviewed the court-reported statement with Assistant State's Attorney Simpson, made and initialed any corrections that were necessary and, along with the assistant state's attorney and Detective Brader, signed the statement. (R. 265-66, 731)

The Guilt Phase

In January 1998, Fuller was charged by Indictment with two counts of first-degree murder, one count of felony murder, two counts of armed robbery and one count of attempt first-degree murder. (R.CL C31-37) In October of 1998, Fuller's initial attorney sought to withdraw from his representation of Fuller due to a conflict of interest. (R. 104-109) Although the Public Defender's Office represented Fuller for a few appearances, on January 14, 1999, attorney Raymond Prusak filed his appearance on behalf of Fuller. (R. CL C94, 140) However, nine months later, Mr. Prusak also sought to withdraw as Fuller's counsel. (R. 191) Mr. Prusak represented to the court that Fuller wished to secure different counsel, that Fuller was refusing to speak or cooperate with counsel, and that Fuller's family now indicated that they were unable to pay Mr. Prusak as

¹Fuller's court reported statement was not numbered by the clerk's office when the record was prepared. Therefore, the pages are identified by the page numbers appearing on the top right hand corner of each page of the statement. The initial page, the Miranda Rights waiver form signed and initialed by Fuller, is not numbered.

originally agreed. (R. 191-92) Given the stage of the proceedings, the length of time the case had been on the court's call, and the court's belief that Fuller's motives were dilatory in nature, the court denied the motion to withdraw and appointed Mr. Prusak to represent Fuller. (R. 191, 321-27)

A Motion to Suppress was litigated and denied on October 13, 1999. (R. 208-309) At the hearing on the motion, Fuller testified that his 36-page court reported confession was not voluntarily given because, despite the fact that it was given 12 hours after his arrest, he was high on heroin at the time he gave it. (R. 214, 219, 226, 230) Fuller also insisted that he was intimidated into giving the statement by the police officers' threats that if he did not cooperate with them he would get the death penalty, and that his kids would be taken away. (R. 224-25, 226-29) Finally, Fuller testified that he was coerced into confessing by Assistant State's Attorney Simpson's comment that if Fuller confessed he would not get the death penalty. (R. 233) All of defendant's allegations were denied by both Detective Brader and Assistant State's Attorney Simpson. (R. 256-69, 281-95)

The trial court, in denying defendant's motion, noted that both Detective Brader and Assistant State's Attorney Simpson testified that Fuller appeared alert during the several conversations they had with him following his arrest and that he did not appear intoxicated. They also testified that he was not threatened nor was he promised anything in return for his statement. Further, the Court noted that Fuller admitted that during the time from his arrest until he gave the court-reported confession he was given food and drink, was allowed to go to the bathroom, was allowed to smoke, and was not physically mistreated. The court ruled that defendant's statement

was freely and voluntarily given, and accordingly denied defendant's Motion to Suppress. (R. 308-09)

Also litigated on that date were counsel's 11 pretrial motions concerning jury selection procedures, the constitutionality of the death penalty, and various aspects of the death penalty hearing. (R. 311-21) On November 29, 1999, the day Fuller's case was set for trial, Fuller sought a one-day continuance. (R. 342) A second single day continuance was requested on the following day for the purpose of conducting a 402 conference. (R. 345-46) On December 1, 1999, after "extensive conversations" between Fuller and his attorney, Fuller waived his right to a jury trial, and entered a plea of guilty to all charges. (R. 349-69) No agreed upon disposition existed between the prosecution and Fuller at the time the plea was entered, and no charges were reduced or dropped in exchange for the plea. (R. 349)

At the plea proceeding the court initially determined that Fuller was not operating under any impairment due to drugs or alcohol. (R. 349) Next, the court informed Fuller that if, at any point during the proceedings, he did not understand the proceedings he needed only to raise his hand and the court would stop to further explain the proceedings to him. (R. 350) Fuller was then informed of the charges against him, the minimum and maximum penalties for each charge, his eligibility for death on the charge of felony murder and the procedures entailed in a death penalty hearing before a jury. (R. 350-57) Following these admonishments, the court verified that Fuller was knowingly and willingly relinquishing his right to a jury trial on the question of guilt, and that his plea was induced neither by threats nor promises. (R. 358) Following stipulations as to Fuller's age, venue, jurisdiction and the sufficiency of the charges, a factual basis for the plea was presented to the court. (R. 359-68) The court then entered a finding of guilty as to all charges, and

admonished Fuller as to his right to appeal, including the need to file, within 30 days, a Motion to Vacate the plea. (R. 369-71)

The Sentencing Hearing

A jury was subsequently empanelled for the death penalty hearing. (R. 376-628) The jury found Fuller eligible for the death penalty based on Fuller's murder of Marc Feldman during the commission of an armed robbery of the jewelry store. (R. 787) At the hearing in aggravation and mitigation which followed, the People presented the testimony of five witnesses. First, the jury heard of Fuller's 1992 conviction for unlawful possession of a weapon. (R. 806-09, See Appendix D) Next, the jury heard from Sandra Cooper, who testified that in December of 1992, Fuller and Britt robbed her at knifepoint while Ms. Cooper and her eight-year old daughter were trying to leave a local mall after some Christmas shopping. (R. 810-20, See Appendix D) Fuller was convicted of this armed robbery and was on parole at the time of the instant offense. (R. 817, 820 See Appendix D) Finally, the People presented three witnesses who told the jury of the impact of the murder on their lives: Melissa Peterson, Marc Feldman's fiancé (R.820-33, See Appendix C); Audrey Cohen, the victim's sister (R. 833-39, See Appendix C); and Barbara Feldman, the victim's mother. (R. 840-44, See Appendix C)

In mitigation, Fuller presented the testimony of six witnesses: Timothy Fuller, Fuller's brother and a sheriff with the Cook County Correctional Department, (R. 847-49); Kimberly Fuller, Fuller's younger cousin, (R. 850-53); Geraldine Fuller, Fuller's mother, (R. 854-60); Shonetta Holden, the mother of Fuller's oldest son, (R. 861-66); Marzel Holden, Fuller's 10-year old son, (R. 866-70); and Fuller, himself. (R. 875-916) Fuller's family all described Fuller as a

good person whose life deteriorated drastically once he met Kimberly Britt. They blamed her for Fuller's heroin addiction and the resulting change in his personality. They testified that, when sober, Fuller was a loving person who could be a positive role model to other young men if allowed to live. (R. 846-48, 851-53, 855-60, 861-66, 866-70)

In his testimony, Fuller apologized to the victim's family and acknowledged before the jury that killing Marc Feldman was wrong. (R. 875) Fuller, like his family, also blamed drugs for the mental and physical changes that occurred in him in the months leading up to the murder but explained that for the last two years he had been free of his addiction to heroin. (R. 875) Fuller told the jury that following his release from the penitentiary for his 1992 armed robbery conviction he got a job with a law firm, but was later laid off when they discovered his criminal record. (R. 877) Many problems followed this job loss and ultimately it resulted in his return to heroin abuse. (R. 879) Fuller stated that, at the time of the instant offense, he was using as much as one gram of heroin a day, which he would snort five or six times throughout the day. (R. 881)

Fuller also testified that the night before the murder he had no sleep, but rather, spent the entire night snorting heroin and drinking cognac. (R. 882-83) He indicated that while he and his friends had mentioned the possibility of robbing the store some days before, it was not something they carefully planned or even significantly discussed that morning. (R. 884) Although Fuller admitted that he brought a loaded semi-automatic weapon with him that morning, he claimed that at the time he entered the store he simply intended to talk to the victim about the jewelry Fuller then had on pawn at the store. (R. 885) This discussion, however, quickly became heated and Fuller pulled his gun. (R. 885) In a departure from his post-arrest confession, Fuller now

contended that “Marc Feldman made a move, I don’t know what exactly what (sic) he was trying to do, and the gun went off.” (R. 885)

Although he acknowledged that he may not show it, Fuller insisted that he was remorseful for the murder, and asserted that his guilty plea was a result of his remorse. (R. 886, 888) He claimed to pray each night for both the Feldman family and his own, and stated that he had asked God’s forgiveness. (R. 886) He told the jury that he wanted to live for his children, and that he believed that he could be a useful member of society, even if he were to live it locked up. (R. 887-89)

On cross-examination, Fuller admitted that he was not thinking of his children and was not setting a good example for them when he robbed Sandra Cooper at knifepoint in 1992, or when he robbed and killed Marc Feldman. These thoughts had only become a concern to him now that he was facing the death penalty. (R. 889-90) Fuller reiterated his claims made on direct examination that, at the time he entered American Jewelers on December 17, 1997, he did not intend to rob the store, or to kill Marc Feldman. (R. 890, 892) He was then asked if it was his customary practice at that time to carry surgical gloves with him where ever he went. (R. 890-91) Only after this questioning did Fuller finally admit that he did, in fact, go to the store that morning with the intention of robbing it. (R. 893)

Despite the uncontroverted evidence that Marc Feldman knew Fuller based upon Fuller’s previous dealings with the store, that Mr. Feldman had a customer file card containing Fuller’s name, address and driver’s license number, and in spite of the fact that Fuller knew he would be sent back to prison for violating his parole if apprehended for the robbery, Fuller continued to insist that he never intended to kill Marc Feldman or Aaron Smith. (R. 896-899, 910, See

Appendix B, People's Ex. 39) He maintained that the killing was an accident, but that he had accepted responsibility for it because the victim had died at his hands. (R. 911) In addition, Fuller now contended that Aaron Smith's testimony was a lie, and that he never placed a gun to Smith's head and never tried to shoot him. (R. 900-02) He stated that he had only pleaded guilty to the attempt murder of Aaron Smith because that was a condition of his pleading guilty to the murder and armed robbery. (R. 909)

Following deliberations, the jury unanimously determined that there were no mitigating factors sufficient to preclude the imposition of the death penalty. (R. 974)

On January 4, 2000, with the assistance of counsel, Fuller filed a *pro se* Motion to Withdraw Plea and Vacate Judgment. (R. CL C246-47; R. 981-82) This motion alleged that, "at the time of his plea, the Fuller was not aware of all the ramifications of his plea." (R. CL C246) In addition, Fuller claimed to have a meritorious defense to the charges and that, should he be given a trial, he would likely prevail. (R. CL C246) Fuller did not assert, either in his motion or in arguments to the court, what that meritorious defense might have been. (R. 981-84)

At the hearing on the motions, counsel related that Fuller felt that he did not make the right decision in deciding to plead guilty, that he followed the bad advice of counsel and that he did not think the sentencing hearing was fair. (R. 983) When asked by the court if he wanted to state anything for the record Fuller stated, "I don't feel that the trial was fair and the Counsel that you appointed to represent me, I mean he was forced to do so by the Court. I mean, our communication wasn't together." (R. 983) The trial court denied Fuller's motion. (R. 990)

Defense counsel then presented a Motion to Vacate Sentence of Death and For New Sentencing Hearing. (R. CL 243-45) Counsel's motion alleged that the trial court erred in the

admission of several of the victim impact statements, which counsel alleged contained irrelevant, inflammatory and highly prejudicial material. (R. CL C243-44) Additionally, counsel alleged that the prosecutor's closing argument was so inflammatory as to deny Fuller due process of law. (R. CL C244) Counsel asserted that the cumulative effect of these errors denied Fuller due process of law, and that had the jury not heard this evidence and argument, they would not have sentenced Fuller to death. (R. CL C244) The court also denied this motion. (R. 997)

Following denial of these motions, arguments were heard as to the appropriate sentence to be imposed. (R. 1000-10) At the conclusion of these arguments, the trial court declined defense counsel's eloquent plea to reject the jury's recommendation of death and sentence Fuller to a lesser sentence. Fuller was then sentenced to death. Fuller's Motion to Reconsider Sentence was denied on February 1, 2000. (R. 1026)

The Direct Appeal

On appeal to the Illinois Supreme Court, Fuller raised ten claims of error. He alleged that his plea was involuntary because the court failed to inform him that the maximum sentence he could receive on his pleas to first degree murder was the death penalty and that the court neglected to inform him that by pleading guilty to those counts he was admitting an essential element for death eligibility. In addition, he claimed that his attorney failed to provide him constitutionally guaranteed assistance both during the plea proceedings and the sentencing hearing, because the attorney failed to inform him of the impact of his pleas to first degree murder and failed to object to the absence of the mental state from the jury instructions at the eligibility phase. Fuller further argued that the omission of the mental state from the instructions at the eligibility phase served to deny him due process of law; that irrelevant and inflammatory testimony from the victim's fiancé

and family members rendered his sentencing hearing fundamentally unfair; and that the trial court improperly failed to inform defense counsel of two notes from the jury. Fuller also argued that his convictions for knowing and felony murder had to be vacated and that only his conviction for intentional murder could stand where there was but one victim. Finally, Fuller presented two arguments to the constitutionality of the death penalty statute.

The Illinois Supreme Court rejected defendant's claims that his plea was not knowingly and intelligently entered. (See Appendix E, People v. Fuller, 2002 Ill. Lexis 287 (No. 89220, February 22, 2002) The Court concluded that defendant was fully aware that he was death eligible for the murder of Marc Feldman; that his attorney clearly understood the importance and effect of defendant's pleas to knowing and intentional murder; and that defendant's decision to plead guilty to all charges despite those effects was part of defendant's overall strategy to accept responsibility for his crimes and to thereby demonstrate to the jury that he was a changed person whose life should be spared. Fuller, 2002 Ill. Lexis 287, at *27-28. Accordingly, the Court affirmed defendant's convictions for the intentional murder of Marc Feldman, the attempt murder of Aaron Smith, and the two armed robbery convictions based upon the robberies from both Mr. Feldman and Mr. Smith. The Court vacated defendant's convictions for knowing and felony murder, as there could only be one murder conviction where there was only one victim. Fuller, 2002 Ill. Lexis 287, at *61-63.

Further, the Court vacated Fuller's death sentence and remanded the case for a new sentencing hearing. The Court held that, although Fuller's guilty pleas to intentional or knowing murder were "significant evidence of the defendant's eligibility", Fuller was entitled to have the jury make the essential eligibility finding that the murder was intentional or knowing. Fuller, 2002

Ill. Lexis 287, at *55-61. Accordingly, because the jury instructions and verdict forms from the eligibility phase failed to include any language regarding the requisite mental state, the jury had never made the finding and defendant was entitled to a new sentencing hearing. Given that defendant was to receive a new sentencing hearing, the Court declined to address the remaining issues. Fuller, 2002 Ill. Lexis 287, at *62-63.

Post- Appeal Proceedings

Although Fuller initiated Post-Conviction proceedings in January of 2001, this petition has been taken off the court's call pending resentencing. (See Appendix F) Fuller's new sentencing hearing has not been scheduled. On July 22, 2002, Assistant Public Defender Amy F. Thompson, a registered member of the Capital Litigation Trial Bar, was appointed to represent Fuller during the sentencing proceedings.

III

REASONS FOR DENYING THE PETITION

Introduction

The MacArthur Justice Center, on behalf of Tyrone Fuller, asserts that Fuller 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, it is alleged that Fuller's trial (as well as that of every other capital defendant in Illinois) was, by definition, fundamentally unfair.

Prior to responding to these claims, however, it is essential to note that, for a variety of reasons, the instant case should not be considered for clemency at this time.

Reasons the Petition Should Not Even Be Considered

Initially, the fact that this petition has not been filed by, nor consented to by Tyrone Fuller presents a compelling reason not to consider or grant it. The Illinois Constitution grants the governor the right to grant "reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper." Illinois Constitution, Article 5, § 12. However, that same provision also provides that, "The manner of **applying** therefore may be regulated by law." Illinois Constitution, Article 5, § 12, emphasis added.

The legislature has elected to regulate such procedures. The pertinent statute provides that an “[a]pplication for executive clemency under this Section may not be commenced on behalf of a person who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is incapable of asserting his or her own claim.” 730 ILCS 5/3-3-13 (c) (West 2002). The petition filed on Fuller’s behalf by the MacArthur Justice Center does not allege, let alone attempt to prove, that Fuller is currently operating under a mental or physical condition which renders him incapable of asserting his own claim. Accordingly, this application has not been filed in accordance with the procedures legitimately prescribed by the legislature, and should not be considered.

This, however, is not the only reason that this petition should not be considered. The most compelling reason for denying this petition is the fact that Fuller is not currently under a sentence of death. Indeed, at the present time, he is not under any sentence. While Fuller’s convictions were affirmed on appeal in all pertinent respects, the Illinois Supreme Court vacated his death sentence due to omission of the requisite mental state from the jury instructions at the eligibility phase. Fuller, 2002 Ill. Lexis 287 at *60-61.

That Fuller is currently not under any sentence is relevant for two reasons. First, without the imposition of sentence, Fuller’s case is not in the posture of being “after conviction” as contemplated by the constitutional grant of authority regarding clemency. Illinois Constitution, Article 5, § 12. Nor is Fuller a person “under conviction” as that term is used in the statute regarding applying for clemency. 730 ILCS 5/3-3-13 (c) (West 2002). Faunee v. People, 51 Ill. 311, 313 (1869) As with the Post-Conviction Hearing Act, the word “conviction” in both the Illinois Constitution and the relevant statute is a term of art which means a final judgement that

includes both a conviction and a sentence. See, People v. Woods, 193 Ill. 2d 483, 488, 739 N.E.2d 493 (2000); *as affirmed in* People v. Hager, ___ Ill. 2d ___, ___ N.E. 2d ___, 2002 Ill. Lexis 374, at *8 (August 29, 2002). Absent a sentence, Fuller has not been convicted and, therefore, is not eligible for a grant of executive clemency.

Additionally, the fact that the original sentence has been vacated and that Fuller remains without a sentence is also relevant because it cannot be said that Fuller has suffered any prejudice from the alleged flaws in the capital punishment system as outlined in the petition filed on his behalf. The sentence which was imposed prior to the suggested reforms and new Supreme Court Rules no longer exists. Although in the amended petition the MacArthur Justice Center alleges that any new death sentence “would be as tainted as the one that has been overturned,” they provide no factual or legal allegations to explain why this would be so. At the present time, there is not even a legal finding that Fuller is death eligible. Further, it is not known when Fuller’s sentencing hearing will be held and, thus, it is not known what reforms will be in place at the time he is sentenced. Fuller may, in fact, be sentenced under a system which incorporates the proposed reforms. Under these circumstances, it would be highly inappropriate for the Governor to usurp the judicial function of sentencing, and to preclude possible future imposition of a legally valid and constitutionally sound sentence.

Reasons the Petition Should Be Denied

The MacArthur Justice Center’s generic petition blanketly alleges that the convictions of all the named defendants, including Tyrone Fuller, were unfair. The petition makes this claim without any real examination of any of the facts surrounding defendant’s arrest, the plea proceedings or the

sentencing proceedings. The facts of record unquestionably demonstrate that from the time of his arrest through the taking of his detailed 36-page court-reported statement, Fuller's rights were scrupulously honored. The uncontroverted evidence introduced during defendant's Motion to Suppress his Statement shows that Fuller was repeatedly informed of his constitutional rights, that he was not physically abused or threatened, that he was provided both food and drink, was allowed to smoke and was allowed to use the bathroom throughout his time in the police station.

Fuller's confession was not the product of coercion but, rather, was the result of the fact that defendant had been caught red-handed. He was apprehended immediately after the robbery and murder with the proceeds of the robbery on his person and the torn latex glove on his hand which matched exactly the two fingertips left behind in the store's cash drawer. During his attempt to avoid capture, he was seen dropping a gun which was subsequently recovered and identified as the murder weapon. Shortly after his arrest he was positively identified by the surviving store employee as the robber and murderer. Faced with these facts, and the arrest of his two accomplices, defendant confessed.

Similarly, the plea proceedings were also fair and just. The trial court thoroughly admonished defendant regarding the effect of his guilty pleas and took extra care to ensure that Fuller understood every aspect of the proceedings. The Supreme Court found, on direct review, that Fuller's pleas were knowingly, intelligently and voluntarily entered. Fuller, 2002 Ill. Lexis 287, at *27-28.

Moreover, Fuller received outstanding legal representation throughout the prosecution of his case. Raymond Prusak, defendant's attorney, was a 19-year veteran of the criminal defense bar who had previously tried other capital cases and who had never had lost one before defendant's

case. (R. 1001) The strategy he pursued was eminently reasonable given the overwhelming evidence of guilt, and counsel's presentation was masterful. Counsel spoke honestly and openly to the sentencing jury. He strengthened his credibility by not contesting that which was clearly the case: that defendant's actions rendered him eligible for the death penalty. (R. 637-40) Nonetheless, counsel movingly asked the jury not to let the evidence presented at the eligibility phase harden their hearts and close their minds for the next day's deliberations. (R. 777-78, 805) During the aggravation and mitigation phase, counsel conceded the horrific nature of defendant's crime but deftly presented a compelling case for mercy. (R. 798-805) Counsel skillfully guided his client through direct examination, and worked zealously to rehabilitate him following a damaging cross-examination. (R. 875-89, 912-17) He argued eloquently to both the jury, prior to deliberations, and to the trial court during his post-trial motions. (R. 934-51, 1000-06)

In short, a review of the record leads unquestionably to the conclusion that defendant's sentence was wholly unrelated to the caliber of defense counsel's representation. Instead, Fuller's death sentence was warranted because of the cold and calculated way in which he shot Marc Feldman once in the head before announcing the robbery and did so without providing the victim any opportunity to willingly give defendant the jewelry he desired. It was warranted because the evidence made it clear that Mr. Feldman was executed so that he could not identify Fuller to authorities, and so that his body would block the door to the rear offices from closing, and provide defendant and his accomplice with access to the area where most of the valuables were stored. It was warranted because the only reason defendant was not eligible for death under the multiple murder eligibility requirement was because, despite repeated efforts to execute 76-year old Aaron Smith, Fuller could not get his gun to fire a second time. Further, the death sentence was

warranted because of defendant's criminal background, including his previous armed robbery conviction. Finally, defendant could not blame his criminal propensity on a bad family life. Defendant was born into a loving family, whose mother worked tirelessly to provide her four children with a good and stable life. (See the testimony of Geraldine Fuller, R. 854-860) She had a job, and successfully raised defendant's three older siblings to be well-educated, productive members of society. (R. 854-856) Despite his strong family life, defendant chose a life of drug addiction and crime not once, but twice, with his violent nature escalating as his criminal activity progressed.

For all these reasons it is unquestionably the case that defendant was arrested, entered his pleas and was found guilty in a fair and just manner. The implementation of the reforms herein at issue would have, in no way, altered the outcome of defendant's case nor provided him with any additional protections. Further, 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 Fuller's case. Instead, a true injustice would only

result if it were reflexively determined that the proceedings which resulted in Fuller's guilty pleas were fundamentally unfair without any examination of the proceedings themselves. It is telling that the MacArthur Justice Center has not even attempted to demonstrate how the recent changes would have affected the outcome of the instant proceedings. A review of these reforms under the facts of this case, clearly demonstrates that clemency is not warranted.

Decision to Seek Death

The MacArthur Justice Center next claims Fuller's 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. (Petition p. 2-3, Amended Petition p. 2) However, "[i]t has long been recognized by the Illinois Supreme Court 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, the petition does not even allege much less argue that the decision to seek death in his case was the result of an abuse of discretion. Accordingly, it must be rejected.

Allocution

The MacArthur Justice Center also claims that clemency is appropriate because Fuller was

denied the opportunity to make a statement in allocution at his sentencing hearing. (Petition p. 3, Amended Petition p. 2) Being a seasoned and experienced capital defense attorney, Raymond Prusak actually presented and argued a pre-trial motion on this very issue. (R. CL C109, C151, R. 316) Although the trial court denied this motion before trial, the court told defendant in open court that it would give defendant a chance to renew all eleven of his pretrial motions before trial, and specifically highlighted his willingness to reconsider the motion regarding the right of allocution. (R. 316) Fuller opted not to renew this motion at the appropriate time. Perhaps it was because he chose to testify at the mitigation hearing and, therefore, had more than ample opportunity to speak to the sentencing jury. Regardless of the reasons for his chosen strategy, that Fuller did not speak to the jury in allocution does not warrant clemency. As the Illinois Supreme Court long ago recognized, “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).

Supreme Court Review

Petitioner also claims that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate, excessive or otherwise inappropriate. (Petition p. 3, Amended Petition p. 2) However, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by defendants in capital cases (see People v. Emerson, 189 Ill. 2d 436, 727 N.E.2d 302 (2000);

People v. Palmer, 162 Ill. 2d 465, 491, 643 N.E.2d 797 (1994)) and will vacate a death sentence if it determines that it is excessive in light of the facts of the case and the defendant's background (see People v. Smith, 177 Ill. 2d 53, 685 N.E.2d 880 (1997); People v. Blackwell, 171 Ill. 2d 338, 665 N.E.2d 782 (1996)), it is clear that the only reason the Illinois Supreme Court did not review petitioner's sentence in such a manner is because he did not ask the Court to do so.

Confusing Jury Instruction – Sufficient to Preclude

The petition also asserts that the jury that imposed sentence was given a confusing jury instruction, and not the instruction unanimously recommended by the Governor's Commission. (Petition p. 3, Amended Petition p. 2) The petition asserts that clemency is warranted because the statutory language and corresponding jury instruction concerning the absence of any "mitigating factor sufficient to preclude the imposition of a death sentence" led the jury to mistakenly believe that the death penalty is mandatory. Initially, as no jury verdict of death exists in this case, this argument is moot.

Moreover, 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). Finally, even assuming this argument could relate to the now vacated death sentence, it is clear that no confusion existed in the case at bar. Both the prosecution and the defense argued to the jury about the appropriateness of the death sentence in Fuller's case. Therefore, any possible confusion caused by the language of the instruction was negated by the closing arguments.

Judicial Override

The petition next asserts that Fuller's sentence should be commuted because the judge was not given the opportunity to override the jury's decision to impose the death penalty. (Petition p. 3, Amended Petition p. 3) This claim, along with the claim regarding his possible acquittal (Petition p. 17, Amended Petition p. 17, see People's response, *infra*), irrefutably demonstrates that MacArthur Justice Center is so unfamiliar with the facts of Fuller's case that it cannot be representing his true or best interests. Fuller's trial attorney did urge the judge to override the jury's verdict in his Motion to Vacate Sentence of Death and For New Sentencing Hearing, and argued this motion most eloquently on defendant's behalf. (R. CL 243-45, R. 1000-06) Mr. Prusak obviously knew what the MacArthur Justice Center does not, that Illinois judges have long had the inherent authority to grant a new trial or sentencing hearing or even enter a judgment notwithstanding the verdict. The judge in this case chose not to exercise this authority. This is not a basis for clemency.

Supreme Court Rules

The petition next asserts that Fuller is entitled to clemency because the new Supreme Court Rules governing capital cases were not applicable to his proceedings. (Petition p. 3, Amended Petition p. 2) 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. In addition, as Fuller will receive a new death sentencing hearing sometime in the future, he will clearly benefit from

many of the reforms herein discussed. His failure to reap their benefit at his initial sentencing hearing does not present a compelling reason to grant clemency given that the sentence therein handed down has been vacated.

Videotaping

The petition also seeks clemency because Fuller's detailed confession was admitted into evidence even though it was not videotaped and, under the Governor's Commission's proposals, both statements and the interrogations leading up to them should be videotaped. (Petition p. 3, Amended Petition p. 3) What the MacArthur Justice Center fails to recognize is that neither the Commission nor the governor himself calls for the suppression of a statement simply because it was not videotaped. Rather, even under the Governor's proposed legislation (HB3717 & HB2058), such statements will still be admissible if the trial court finds that they were voluntarily made after considering the totality of the circumstances.

The trial judge in the case at bar conducted a lengthy hearing on this issue and expressly found that Fuller's statement was voluntarily made. (R. 209-309) In reaching this determination, the court found most convincing defendant's own testimony that he had not been physically harmed or threatened during his stay in police custody, that he was well fed throughout this time, that he was given drinks, was allowed to smoke and was allowed to go to the bathroom. (R. 309) Accordingly, it denied his Motion to Suppress. Thus, it is clear that the failure to videotape Fuller's statement had absolutely no effect on the fairness of his proceedings. Further, defendant's guilty plea renders any challenge to the circumstances of his confession of no consequence.

Qualifications of Prosecutors, Defense Counsel and Judges to try Capital Cases

The petition also includes a general allegation that in “a number of cases” covered by the petition, the “prosecutors and defense counsel seriously lacked the knowledge, skill, experience and or courtroom ethics that the Capital Litigation Trial Bar rules address, and the performance of trial judges reflected a lack of experience in handling capital cases.” (Petition, p 3) Fuller’s name is never explicitly mentioned as one of these cases, and even a cursory review of the record demonstrates that no such claim could be made in his case.

As stated previously, Mr. Prusak, Fuller’s attorney, was a highly experienced, exceptionally competent defense attorney who had successfully litigated a number of earlier capital cases. (R. 1001-02) Even though this case was litigated years before the current reforms were even proposed, he presented defendant’s case in such a way as to raise many of the very issues addressed by the current reforms. He filed ten pre-trial motions relating to the death penalty in general and the procedures to be followed during the sentencing hearing. (R.CL C104-05, 106-08, 110, 115-18, 119-21, 122-24, 125, 126-28, 129-32) Among these was a motion to allow defendant the right of allocution. (R.CL C109) His post-trial motions also demonstrate his keen awareness of the significant issues facing the capital litigation bar. He presented an impressive argument on the errors committed by the prosecution during the sentencing hearing, and forcefully argued that they required reversal of defendant’s sentence. Two of his arguments were subsequently advanced on appeal, and conceded as error by the State. (Introduction of unnecessary life and death testimony of the victim’s fiancé during the eligibility phase and the introduction of multiple victim impact statements.) Following the jury’s unanimous verdict that there were no mitigating factors

sufficient to preclude the imposition of the death penalty, Mr. Prusak argued to the court that it, not the jury, was the sentencing body and that it was not bound by the jury's finding regarding lack of mitigation. He urged the judge to reject the jury's finding, and implored him to sentence Fuller to a term of years. (R. 1000-06)

Also eminently well-qualified were the prosecuting attorneys. Both Steven Krueger and Russell Baker are certified members of the Capital Litigation Bar.

Finally, it is clear that Judge Prendergast, who presided over defendant's trial, was not an inexperienced judge. Judge Prendergast presided over a felony trial courtroom for over a decade, trying countless murder trials in his 24 years on the bench. Clearly then, defendant cannot establish that his case involved attorneys not qualified to litigate a capital case.

Eligibility Factors

The petition also asserts that Fuller is entitled to clemency because he was found eligible for the death penalty based upon an aggravating factor other than those factors which the Governor's Commission has recommended be retained. Specifically, the Commission concluded that the current list of 20 factors is overly expansive and, therefore, unconstitutional. Accordingly, it was suggested that the list be reduced to just five factors: (1) murder of a peace officer or fireman; (2) murder of any person in any correctional facility; (3) multiple murder; (4) murder accompanied by the intentional infliction of torture; and (5) murder of a witness, prosecutor, defense attorney, juror, judge or investigator.

However, in the instant case, there has not yet been a finding that defendant is death-

eligible. The Supreme Court vacated defendant's death sentence and remanded the case for a new sentencing hearing. This hearing has not yet begun, and it is not known when it will do so. There is no way to know what the eligibility factors will be at that time. That Fuller was previously sentenced to death under an eligibility factor which may or may not be included in the statute following the proposed reformation of the capital sentencing process simply is irrelevant to the issue of whether clemency is appropriate at this juncture. Therefore, this argument is without merit.

What is more, the Illinois Supreme Court has expressly rejected the Commission's logic and held that Illinois' death penalty statute satisfies the constitutional mandate because it "genuinely narrows the class of individuals eligible for the death penalty and reasonably justifies imposition of a more severe sentence on those defendants compared to others found guilty of first degree murder." People v. Ballard, ___ Ill. 2d ___, 2002 Ill. LEXIS 376 at *73 (No. 88885 August 29, 2002) (citing Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983)). As the Ballard court explained, "there are innumerable examples of first degree murders that do not fit within any of the statute's eligibility factors" and "[e]ach provision is narrowly tailored to fit a specific set of facts and circumstances." Id., 2002 Ill. LEXIS 376 at *74.

In addition, each of the aggravating factors represents a determination by the General Assembly that certain types of murders are so deplorable that the death sentence may be imposed. Each one is intended to ensure that the most helpless members of our society (such as children, the elderly or disabled) are protected against violence or to provide a strong disincentive for the offender to kill the victim. For example, cold, calculated and premeditated murders are properly death-eligible because they are limited to situations where the defendant has carefully planned the murder over an extended period of time, and the availability of the death penalty may be the only

thing which prevents these defendants from deciding to actually kill their victims. As the Illinois Supreme Court stated, “a defendant who contemplates a murder for a substantial period of time, yet still commits it, is set apart from other murder defendants in a meaningful way.” People v. Williams, 193 Ill. 2d 1, 36, 737 N.E.2d 230 (2000). Similarly, murders in the course of another felony, such as rape or home invasion, are properly death eligible to help deter the defendant from killing the victim. Given these important policy considerations, the MacArthur Justice Center’s request must be rejected.

Allegedly Improper Jury Instruction

The most ludicrous argument in the petition is raised by the final paragraph of the section which specifically pertains to Tyrone Fuller. The petition postulates, “There is also a serious question as to whether Mr. Fuller would have been **convicted** of the murder if the jury had received the correct jury instruction as to the required mental state for this crime.” (Petition p. 17, Amended Petition p. 17) As stated previously, defendant’s death sentence was vacated by the Illinois Supreme Court on direct appeal because the eligibility instruction failed to include the required mental state. At the hearing in aggravation and mitigation, Fuller insisted that the shooting was an accident.

The petition, however, seems to assert that had the jury at trial received the correct instruction, one that included the mental state, it might not have **convicted** defendant of murder at all, given his testimony that the shooting was an accident. This argument is preposterous. Defendant **pled guilty**. There was no jury finding at trial, no incorrect trial instruction and there is no issue as to whether any jury would have convicted him had they been properly instructed.

As the Supreme Court recognized, Fuller's guilty plea was an integral part of his strategy to take responsibility for his crime, to thereby show remorse for his actions and to demonstrate that he was now a changed man, and as such, to seek mercy from the jury. Despite his claim at sentencing that the shooting was accidental, it would have been contrary to defendant's strategy to go to trial on the issue of guilt and assert this defense. Accordingly, the MacArthur Justice Center's attempt to speculate as to what might have been had defendant gone to trial, presented his claim of accident and had a jury instructed as to intent is simply ridiculous.

CONCLUSION

There is not one scintilla of doubt that Tyrone Fuller is guilty of the brutal murder of Marc Feldman, the attempted murder of Aaron Smith and the armed robberies of both Feldman and Smith. The evidence of defendant's guilt was overwhelming, and for this reason, defendant pled guilty to all charges. One sentencing jury determined that defendant was both eligible for death, and that there were no mitigating circumstances to preclude the imposition of that sentence. Despite defendant's willingness at the sentencing hearing to stipulate to his eligibility, he was able to secure the vacation of his death sentence on appeal because of the omission of the mental state from the eligibility instructions. That new sentencing hearing has not yet begun. It is unknown what procedures or eligibility factors will apply to that hearing. It is not known what sentence will be imposed as a result of it. It is not known what the appeal of that sentence will entail. What is known is that Tyrone Fuller's rights were scrupulously honored at every stage of this case. It is also undeniable that his conviction was the result of a fair proceeding. Further, it is indisputable that Tyrone Fuller will unquestionably benefit from many of the proposed and recently passed reforms discussed in this petition during his upcoming sentencing hearing. And finally, it is clear that death was wholly appropriate under the facts and circumstances of this case.

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

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