

OCTOBER 2002 SESSION
PRISONER REVIEW BOARD
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
)	Docket No. _____
vs.)	
)	Inmate No. N-10071
WILLIAM FRANKLIN)	
)	
)	
)	

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

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

HEARING REQUESTED

RICHARD A. DEVINE
STATE'S ATTORNEY OF COOK COUNTY

By: CHARLES BOSKEY
WILLIAM D. CARROLL

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I.

PROCEDURAL HISTORY

It is important to note that this is not the first time that Petitioner William Franklin has committed murder. During the sentencing hearing in this second murder case, it was established that on December 6, 1982, Petitioner was convicted of the May 14, 1976 murder of James Roland. At that time, petitioner was staying with his sister and her son, Kelvin Williams, who was also the nephew of James Roland. On that date, Kelvin Williams, was at a park near his home when he saw his uncle James running through the park, being chased by petitioner. Kelvin watched as petitioner pulled a gun and shot at James several times, hitting him in the chest and killing him. When Kelvin arrived home later that day, he saw petitioner packing clothes into a suitcase. Petitioner told Kelvin that he had to leave town because he had just taken a man to dinner and then took him to a park and killed him. About two weeks later, petitioner was stopped by the police. At that time, the police recovered from petitioner the gun he had used to murder James Roland.

In regard to Petitioner's second murder, following a jury trial in the Circuit Court of Cook County, Petitioner was convicted of the murder of Elgin Evans, Jr. That same jury found Petitioner eligible for the death penalty and further sentenced Petitioner to death after concluding that there were no mitigating factors sufficient to preclude a sentence of death. People v. Franklin (Franklin

D, 135 Ill.2d 78, 552 N.E.2d 743 (1990). On January 24, 1990, in a unanimous opinion, the Illinois Supreme Court rejected all of Petitioner's claims on the merits or on the basis of default and, alternatively, on the merits. Franklin I, 135 Ill. 2d at 121. Petitioner's petition for writ of certiorari to the United States Supreme Court was also denied. See Franklin v. Illinois, 498 U.S. 881, 111 S.Ct. 228 (1990).

Petitioner subsequently sought state post-conviction relief pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq.). People v. Franklin (Franklin II), 169 Ill.2d 1, 656 N.E.2d 750 (1995). The trial court denied all of petitioner's claims for relief. Franklin II, 167 Ill. 2d at 8. On June 22, 1995, the Illinois Supreme Court, with one justice dissenting on a single issue, affirmed the judgment of the circuit court denying the post-conviction petitions and rejected petitioner's claims on the merits or on the alternative bases of state default and the merits. Franklin II, 167 Ill. 2d at 30. The United States Supreme Court thereafter denied petitioner's petition for writ of certiorari. Franklin v. Illinois, 517 U.S. 1122, 116 S.Ct. 1357 (1996).

Petitioner next filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254. United States ex rel. Franklin v. Gilmore (Franklin III), 993 F.Supp. 1162, 1165-66 (N.D. Ill. 1998). The district court subsequently denied the petition. Franklin III, 993 F.Supp. at 1180-81. On April 20, 1998, the district court denied petitioner's timely motion to alter or amend the district court's denial of the habeas corpus petition pursuant to Fed. R. Civ. P. 59(e). On August 18, 1999, the United States Circuit Court of Appeals, Seventh Circuit, affirmed the decision of the district court to deny habeas corpus relief. Franklin v. Gilmore (Franklin IV), 188 F.3d 877 (7th Cir. 1999). On March 27, 2000, the United States Supreme Court denied petitioner's petition for writ of certiorari. Franklin v. Illinois, 517 U.S. 1122, 116 S.Ct. 1357 (1996).

There are no further proceedings pending before any court. Petitioner's avenues of appeals are exhausted.

II.

STATEMENT OF FACTS

In this case, on February 6, 1980, at approximately 8:00 a.m., Mose Evans left his home in Chicago Heights, Illinois, and drove two of his foster children to school. On the way back, Mr. Evans stopped at a liquor store located at 16th and Hanover, one block away from his home. While Mr. Evans was parking his car, he saw his grandson, Elgin Evans. Mr. Evans called to his grandson, and he came over and sat in the car. A short time later, Mr. Evans saw another car pull up in front of a drug store also located at 16th and Hanover. Mr. Evans described this car as big, with four doors, and dirty blue or gray in color. Mr. Evans saw his grandson walk over to the car and enter it. Mr. Evans entered his own vehicle, drove to the intersection of 16th and Hanover and turned east. As he passed the vehicle in which his grandson was a passenger, he saw the driver of the car and immediately recognized him petitioner, William Franklin. Mr. Evans saw petitioner's face for only a second, and while Mr. Evans was looking at him, petitioner turned his head leaving Mr. Evans with a side view. Mr. Evans was nevertheless certain as to petitioner's identity as the driver of the car, due to the fact that he had seen petitioner three or four times at a nearby tavern.

Ulrich "Buddy" Williams testified that on February 6, 1980, at about 9:00 a.m., his friend Marion Holmes came over to his house in Harvey, Illinois. Holmes asked Williams to help get his car started. The two men returned to Holmes' house, also located in Harvey, and Holmes went inside while Williams stayed outside to work on the disabled car. After about ten minutes, a 1975 4-door Ford LTD, gray in color, pulled up in front of Holmes' house. The driver of this vehicle exited the car and Buddy Williams recognized him as petitioner. Williams had known petitioner for about five years, and had seen him five or six times during that time period.

Williams testified that he had seen petitioner a few days before February 6, 1980. On that particular day, Williams, Holmes, and petitioner had been out looking for the victim, Elgin Evans. Petitioner had told Williams that the victim had "set up" a robbery of a gambling game of a friend of

petitioner's. When petitioner exited his vehicle out in front of Holmes' house, he asked Williams about Holmes' whereabouts. Williams responded that Holmes was in the house. Williams noticed that another person was in the vehicle, although he did not recognize this person. Petitioner then said to Williams, "You see who I got in the car?" Williams asked the identity of the person in the car and petitioner replied, "Elgin." Williams then asked petitioner why Elgin was in the car, and petitioner said that the victim was going to "front him" some cocaine to sell. Petitioner then entered Holmes' house and remained inside for about ten minutes. Elgin Evans stayed in the car.

Holmes and petitioner exited the house and told Williams that they were going to take a ride and that Williams was going to do the driving. They all entered the petitioner's vehicle and Williams sat in the driver's seat, Holmes sat in the front passenger's seat, petitioner sat in the rear passenger's seat, and the victim moved over the rear driver's seat. Williams started driving and Holmes told him where to drive. While he was driving, Williams heard Holmes ask petitioner about some stolen car parts that were in the trunk. Holmes then directed Williams to drive to a wooded area behind the Coca-Cola Bottling Plant near 165th Street and Dixie Highway in Markham, Illinois, which he did. As they approached this area, they saw a Markham squad car parked there, so Williams backed the car up and drove away. Holmes then stated, "That's okay. We'll dump these parts in the Heights." Williams continued to drive at Holmes' direction and eventually they arrived in Chicago Heights on 16th Street. Holmes told Williams to drive into a fenced-in area that was adjacent to the Ford Motor Company Plant on 16th Street. Once inside this area, Williams backed the car into an even more secluded spot near the loading dock, again at Holmes' direction. Williams then turned the car off.

Holmes took the ignition key away from Williams, and then Holmes and petitioner exited the car. When Williams started to open his door, Holmes said, "We don't need you for this." Petitioner then said to Elgin Evans, "Elgin, give us a hand with this," and Evans exited the car. Holmes, Evans and petitioner walked to the rear of the car and Williams was able to see them in the rear-view mirror. The victim was standing in between petitioner and Holmes. Williams then heard the trunk of the car pop open, and watched Holmes and petitioner turn their heads around as if to see

if anyone was watching. The victim looked around in the same manner. Williams then saw petitioner remove a small pistol from his right-side jacket pocket, turn toward Elgin Evans and shoot him. Petitioner held the gun twelve or fourteen inches from the right side of Evans' head. The victim dropped to the ground. Williams heard the trunk slam shut and then Holmes said, "One more time for good measure." Williams saw petitioner bend over and he heard a second shot. As Williams drove away from the scene of the murder, he could see the victim's body lying in the snow.

After the shooting, Holmes continued to tell Williams where to drive. Eventually they were heading northbound on the Calumet Expressway. Williams looked in the rear-view mirror and saw petitioner disassembling the gun and wiping it off. When they were nearing the bridge over the Cal-Sag Channel, Holmes told Williams to slow down, which he did. At approximately the middle of the bridge, petitioner threw the gun out the window and the gun cleared the bridge. Williams did not see the gun hit the water. Williams continued to drive to Holmes' house in Harvey. When they arrived there petitioner exited the car and that was the last time that Williams saw him until he testified at petitioner's preliminary hearing.

Williams never went to the police to report the murder. In November 1981, he was in custody in Lake County, Indiana, for the investigation of an attempt armed robbery. Marion Holmes was in custody at the same facility at the same time. Williams had learned from another inmate at the Lake County Jail that Holmes was planning to kill him. After Williams learned about this threat on his life, he spoke to some Indiana law enforcement personnel. Shortly thereafter, on November 13, 1981, Williams was contacted by two Illinois State Police special agents, James Collier and Thomas Pritchett.

Williams told Agents Pritchett and Collier about the murder of Elgin Evans. Williams also told them about an armed robbery of a McDonald's restaurant in which he was an active participant. Between November 13, 1981, and January of 1982, Williams spoke to these same two agents five or six times about these same incidents. Williams was eventually charged with the murder of Elgin Evans, and on March 19, 1982, he had a preliminary hearing on this charge. After

listening to the State's evidence against Williams, the judge found no probable cause and this charge was dismissed.

Williams was formally charged with the armed robbery of the McDonald's restaurant. In exchange for Williams' plea of guilty to this charge and for his truthful testimony in the murder case against Holmes and Franklin, the State agreed to recommend a six-year sentence on the armed robbery. The State also agreed to relocate Williams' family and to relocate Williams to be with his family once he was released from the penitentiary. At the time Williams testified at petitioner's trial, he had been released from the penitentiary and had been relocated with his family.

Williams also testified about his other felony convictions. In July 1980, helped guilty to a charge of possession of a stolen motor vehicle and was placed on probation. In August 1980, he was convicted of two counts of possession of a controlled substance and was sentenced to eighteen months in the Illinois Department of Corrections. In June 1981, Williams was convicted of mail fraud, and was fined and placed on work release. In December 1984, Williams pled guilty to the armed robbery of the McDonald's restaurant and was sentenced to six years in the penitentiary, pursuant to the plea agreement with the State.

On cross-examination, Williams stated that he was surprised by the killing of Elgin Evans because he did not expect it. After the killing, Williams was afraid for his own life. He also testified that the victim never seemed to be afraid while he was in the car, and Williams surmised that the victim had no idea that petitioner and Holmes were going to kill him. Finally, in response to defense counsel's leading question, Williams testified that the murder of Elgin Evans was a "hit."

Detective Sergeant Anthony Murphy of the Chicago Heights Police Department testified that on February 6, 1980, at approximately 12:00 p.m., he was dispatched to 555 East 16th Street on a call of a "man down" at that location. The Vulcan Tube factory is located at this address. Upon arrival, Detective Murphy recognized the "man down" as Elgin Evans because he knew him. Detective Murphy saw a hole in the victim's chest area and blood oozing out of his right ear and out of his nose. The victim's body was located approximately 100 feet west of a fenced area that

separates Vulcan Tube from the Ford Motor Company Plant. The victim was taken to St. James Hospital where he was pronounced dead.

Doctor Tae An performed the post-mortem examination on the victim. His external examination revealed two gunshot wounds, one on the right side of the head and one on the left side of the front chest. Both bullets were recovered from the victim's body. The cause of the victim's death was multiple gunshot wounds which damaged the brain, spinal cord, heart, and liver.

Special Agent James Collier and Thomas Pritchett from the Illinois State Police Division of Criminal Investigations (DCI), testified that on November 13, 1981, he met Buddy Williams for the first time at the Lake County Sheriff's Office in Indiana. During their conversation, Buddy Williams told Collier and Pritchett about the murder of Elgin Evans and an armed robbery of a McDonald's restaurant in Chicago Heights. Prior to this conversation, Collier and Pritchett knew nothing about either of these incidents. Subsequent to this conversation, the DCI agents obtained Chicago Heights police reports relating to these incidents and verified that they, in fact, occurred.

Collier also testified about a photo lineup he conducted at Mose Evans' home in January 1982. On January 27, 1982, Collier showed Mr. Evans a group of six black and white photos, and asked him if among this group there was a picture of the driver of the vehicle that Mr. Evans' grandson entered the day he was murdered. Mr. Evans looked at the photos for a few minutes and then selected William Franklin's photograph as the driver of the vehicle.

Collier also testified that he ran a search through the Secretary of State's Office for any vehicles that may have been owned by petitioner at the time of the murder. This search revealed that from October 9, 1979 until July 27, 1980, a 1975 Ford LTD was registered to an individual named William L. Franklin. The certified chain of title on this vehicle was entered into evidence.

Petitioner presented no defense at trial. Based on all of the testimony and evidence that was adduced at trial, the jury found petitioner guilty of the murder of Elgin Evans.

At the eligibility phase of petitioner's sentencing hearing, it was established that petitioner was born on September 4, 1939. In addition, Assistant State's Attorney Terrence Burns testified that on December 6, 1982, petitioner was convicted of the May 14, 1976 murder of James

Roland. The fact of petitioner's conviction in the instant case was also entered into evidence by way of stipulation. Based on all of this evidence, the jury found petitioner eligible for the death sentence.

During the second phase of the sentencing hearing, in aggravation, the State presented a certified statement of conviction, which indicated that on June 29, 1965, in Cook County, Illinois, petitioner pled guilty to the offense of possession of a narcotic drug and was sentenced to three years felony probation. The State also presented a certified statement of conviction, which indicated that on October 22, 1965, petitioner pled guilty to the offense of bank robbery in the United States District Court for the Northern District of Indiana, Hammond Division, and was sentenced to 15 years in the federal penitentiary.

Cook County Sheriff's Police Officer Barry Jackson testified in aggravation that pursuant to his assignment as an investigator for the State's Attorney's Office, he obtained petitioner's federal penitentiary records. These records indicated that petitioner was paroled on his bank robbery conviction on December 7, 1970. On January 7, 1975, a parole violation warrant was issued for petitioner. Petitioner's parole was subsequently revoked on February 28, 1977. Parole was granted to petitioner for a second time on August 17, 1979, a parole violation warrant was issued on March 31, 1980, and petitioner was arrested on this warrant on June 5, 1980. Petitioner's parole was again revoked on September 10, 1980. Petitioner served an additional ten months in custody and was released.

Harvey police officer Joseph Jones testified that on October 21, 1974, he arrested petitioner for the offense of burglary and armed violence. The charges arose out of an incident in which petitioner burglarized a motel room and stole a television set, while armed with a handgun. Petitioner was indicted for the offenses charged, and jumped bail during the pendency of the case. On December 15, 1980, petitioner was convicted of burglary and violation of bail bond.

Markham Police Sergeant Henry Wilson testified that on May 14, 1976, he responded to a call of a man shot in Martin Luther King Park in Markham, Illinois. Upon arrival there, Sgt. Wilson discovered the body of James Roland lying in a pool of blood.

Assistant State's Attorney Terrence Burns testified that on December 6, 1982, he was assigned to Judge Dwight McKay's courtroom as a felony trial assistant. On that day, Mr. Burns observed petitioner's entire trial for the murder of James Roland. Mr. Burns then gave an account of the evidence adduced at that trial. Mr. Burns also identified various photographs of James Roland's body, which had been admitted into evidence at the trial. Finally, Mr. Burns testified that petitioner was convicted of the murder of James Roland by Judge McKay, and was subsequently sentenced to a period of 100-300 years in the Illinois Department of Corrections.

In mitigation, petitioner called his seven children as witnesses. All seven of the children testified that petitioner had been a good influence on their lives, he had stressed the importance of education and athletics, and he wanted them to be the best at whatever they chose to do with their lives. All seven of the children had completed high school, several had attended college, and all were gainfully employed. Following all of the evidence and arguments in aggravation and mitigation, the jury returned a verdict indicating that there were no mitigating factors sufficient to preclude imposition of the death penalty. On January 14, 1987, petitioner was sentenced to death.

III.

REASONS TO DENY CLEMENCY

INTRODUCTION

Petitioner asserts that he is entitled to clemency because he did not receive the benefit of the changes to the Illinois capital sentencing system, which have recently been adopted, proposed or enacted. By relying upon a laundry list of new Supreme Court Rules, statutes and proposals from the Governor's Commission on Capital Punishment, which were not available at the time of his trial, petitioner claims that his trial (as well as that of every other capital defendant in Illinois) was by definition fundamentally unfair. However, the Illinois Supreme

Court has expressly rejected the claim “that every capital trial has been unreliable and that all appellate review has been haphazard” (People v. Hickey, ___ Ill. 2d ___, 2001 Ill. LEXIS 1080 at *57 (No. 87286 September 27, 2001)). Rather, the Court held that the additional safeguards included in its rules governing capital cases are not retroactively applicable because they “function solely as devices to further protect those rights given to defendants by the federal and state constitutions” and that “[a] violation of procedures designed to secure constitutional rights should not be equated with a denial of those constitutional rights.” Id. at *63, 64.

Thus, the fact that the Court, the General Assembly and the Governor’s Commission have endeavored to improve the process does not mean that an injustice would result simply because the recent changes were not applied retroactively to petitioner’s case. Instead, a true injustice would only result if it were reflexively determined that petitioner’s trial was fundamentally unfair without any examination of the proceedings themselves. It is telling, however, that petitioner has not even attempted to demonstrate how the recent changes would have affected the outcome of the proceedings. Moreover, petitioner ignores the fact that every court which has examined the proceedings (the Illinois Supreme Court (2 reviews), the United States District Court, and the United States Seventh Circuit Court of Appeals) in his case determined that they were fundamentally fair and that he was not unduly prejudiced in any manner.

The following are reasons to deny Petitioner’s request for executive clemency.

Supreme Court Rules

Petitioner asserts that he is entitled to clemency because certain new Supreme Court Rules governing capital cases (Rules 412(c), 416, 701 and 714) were not applicable to his

proceedings. However, the Illinois Supreme Court has clearly held that the amendments to its rules are not retroactively applicable. Hickey, 2001 Ill. LEXIS 1080 at *65.

Further, on direct appeal the Illinois Supreme Court reviewed the redacted portion of Buddy Williams' statement to the Will County authorities and determined that the excised portion was privileged because it contained the names of government informants. Franklin I, 135 Ill. 2d at 93-94. Thus, given the extreme scrutiny to which the Court subjects capital cases, it is highly unlikely that the Court would have failed to disclose that the redacted portion contained incriminating information relating to Williams. Additionally, the unredacted part of the Will County statement, which the People tendered to petitioner, contains the entirety of Williams' account of the murder; thus, petitioner had during trial Williams' supposedly incriminating statements. (Trial Record 704-18, 1464-65, 1479-81, 1491-92) The Will County Statement and Williams' testimony at trial are very similar. In both versions, Williams admitted that he knew that Holmes was looking for the victim because the victim had set up a robbery of a friend of Holmes. Williams also admitted in both versions that he knew that Holmes wanted to harm the victim, either by "beating his ass good" or by "breaking his legs."

As to the issue regarding the incompetency of trial counsel for failing to tender an accomplice witness instruction as to Buddy Williams, this was raised in petitioner's very first appeal. There, the Illinois Supreme Court held that because murder charges against Williams had been dismissed after a finding of no probable cause at his preliminary hearing, suggests to a reasonably competent attorney that Williams did not act as an accomplice, and that tendering an accomplice witness instruction would likely be futile. Franklin I, 135 Ill. 2d at 104. Undeterred, petitioner presented this same claim three more times; each time it was resoundingly rejected. Franklin II, 167 Ill. 2d at 22; Franklin III, 993 F.Supp. at 1176; Franklin IV, 188 F.3d at 885.

Photographic Lineups

Petitioner contends that he is entitled to clemency because the Governor's Commission's recommendations concerning photographic lineups (Recommendations 1-14) would have cast doubt on Mose Evans's identification of petitioner in a photo line-up, given his ability to see petitioner in his car on the day of the murder and his failure to tell the police that he had seen petitioner on earlier occasions. However, on direct appeal, the Illinois Supreme Court essentially rejected this claim, holding that trial counsel had extensively questioned Mose Evans about his identification and that those inconsistencies were thus brought to the jury's attention. Franklin I, 135 Ill. 2d at 96-97. Whether Mose Evans did not tell a police officer that he had seen petitioner at the tavern prior to the murder is collateral and would not have created a reasonable doubt as to petitioner's guilt. Mr. Evans identified petitioner in a photo lineup two years after the murder, and again in court almost seven years after the murder. (R. 1358, 1361-1362) Furthermore, Mose Evans' identification of petitioner as the driver of the car into which the victim entered on the day he was murdered was corroborated by Buddy Williams' testimony, and by the certified vehicle records which were admitted into evidence.

Decision to Seek Death

Petitioner claims his sentence should be reduced because the State's Attorney's decision to seek death was made without uniform protocols to guide his discretion and was not approved by a state-wide review committee (Commission Recommendations 29-31). 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 States’ Attorneys under the Illinois Constitution. Moreover, petitioner does not even allege much less argue that the decision to seek death in his case was the result of an abuse of discretion. Accordingly, it must be rejected.

Qualification and Training of Trial Judges

Petitioner contends that he should receive clemency because the Governor’s Commission Recommendations 32-39, concerning qualification and training of trial judges for capital trial litigation, were not effect when petitioner was prosecuted. It must be noted that Illinois Supreme Court Rule 43 (effective March 1, 2001) now requires that trial judges undergo capital litigation training. As previously stated, the Illinois Supreme Court has clearly held that the amendments to its rules are not retroactively applicable. Hickey, 2001 Ill. LEXIS 1080 at *65. Finally, petitioner fails to explain how the trial judge in his case, the Honorable Frank Meekins (a highly capable, experienced and respected jurist), was somehow wanting for his lack of “formal training” in capital litigation.

Qualifications of Trial Defense Attorneys

Petitioner argues that he should be entitled to clemency because the Governor’s Commission Recommendations 40-45, concerning qualification of trial defense attorneys for capital trial litigation, were not effect when petitioner was prosecuted. It must be noted that Illinois Supreme Court Rules 416, 701(b) and 714 (effective March 1, 2001) now requires that trial defense attorneys undergo capital litigation training and be admitted to the Capital Litigation

Bar. As previously stated, 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.

Discovery

Petitioner argues that he should be entitled to clemency because the Governor's Commission Recommendations 46-50, concerning pretrial discovery in capital cases were not effect when petitioner was prosecuted. According to petitioner, had Recommendation 50, which mandates that all plea agreements (including benefits received) be reduced to writing, been in effect, Buddy Williams could not have denied his agreement with the prosecution for his testimony. At the trial in question, the People presented evidence concerning only the truth of Williams' role in Evans' murder (an unknowing and unwitting spectator) and the deal offered to Williams for his testimony (six years for a guilty plea on the armed robbery charge and relocation of his family). Contrary to petitioner's blatant and total misrepresentation, the People **NEVER** agreed as part of that deal to drop murder charges against Williams for the victim's murder. When petitioner raised this identical claim regarding murder charges on appeal, the Illinois Supreme Court rejected it in no uncertain terms. Franklin II, 167 Ill. 2d at 16. Therefore, Williams could not have denied a deal that did not exist.

Reliability of Eyewitness Testimony

Petitioner contends that he should receive clemency because the Governor's Commission Recommendations 55 and 56, concerning the reliability of eyewitness testimony. However, these recommendations go to the reliability of eyewitness **IDENTIFICATION** testimony. The "reliability" of the identification of petitioner by Buddy Williams as the murderer (in other

words, whether Williams could see petitioner as he committed the shooting) was NOT an issue at trial; the issue was whether Williams was fabricating his testimony. And any question regarding the unreliability of Mose Evans' identification of petitioner has been resolved in his favor. Franklin I, 135 Ill. 2d at 96-97.

Allocution

Petitioner also claims that clemency is appropriate because he was denied the opportunity to make a statement in allocution at his sentencing hearing. However, as the Illinois Supreme Court stated long ago, "an unsworn statement to the sentencing jury [to be] consider[ed] along with testimony given under oath and the arguments of counsel would at the least confuse the jurors, and might also impair their ability to weigh the aggravating and mitigating factors." People v. Gaines, 988 Ill. 2d 342, 380, 430 N.E.2d 1046 (1981). Moreover, petitioner was free to testify under oath at his sentencing hearing to explain why he should not be sentenced to death, but chose instead to rely upon his witnesses in mitigation and his attorney's closing argument. Therefore, he was given every opportunity to present himself to the trier of fact before he was sentenced.

Instruction on Alternative Sentences

Petitioner believes that his death sentence should be commuted because the jury was not instructed as to all the possible alternative sentences, including that he could have been sentenced to as little as 20 years imprisonment. However, except in cases where the only alternative is mandatory natural life (as petitioner's case here), such a rule would actually serve to prejudice the defendant. If a jury is told that the defendant could be sentenced to as little as 20

years (even though such a sentence is highly unlikely), the jury might determine that the death penalty is necessary to ensure that he is never released into society. It is for this reason that current Illinois law requires that juries be instructed not to concern themselves with sentencing issues. Illinois Pattern Jury Instructions 1.01 & 7C.05 The only exception to this rule is that the jury must be informed where natural life imprisonment is the only available option. People v. Gacho, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988). Accordingly, despite the Governor's Commission's recommendation, the fairness of petitioner's sentencing hearing was ensured by not instruction the jury on the available sentencing options.

Instruction to Weigh Aggravation and Mitigation Factors

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

Judicial Override

Petitioner asserts that his sentence should be commuted because the judge was not given the opportunity to override the jury's decision to impose the death penalty. Petitioner is wrong,

however, because Illinois judges have long had the inherent authority to grant a new trial or sentencing hearing (or even enter a judgment notwithstanding the verdict). Because the trial judge at petitioner's trial denied his post-trial motions, it is clear that the judge would not have overridden the jury's verdict.

Single Eyewitness Testimony

Petitioner alleges that clemency should be granted because his conviction was based on the testimony of a single eyewitness, Buddy Williams. However, the credibility and reliability of Williams' testimony has been thoroughly scrutinized since 1982 (the date of indictment) by not only the jury, but by no less than **FIVE** courts of review: the post-conviction trial court, the Illinois Supreme Court (direct review), the Illinois Supreme Court (post-conviction review), the United States District Court and the Seventh Circuit Court of Appeals.

Supreme Court Review

Petitioner also claims that he is entitled to clemency because the Illinois Supreme Court failed to consider whether his death sentence was disproportionate, excessive or otherwise inappropriate. However, because the Illinois Supreme Court has demonstrated that it will address comparative sentencing arguments whenever they are raised by defendants in capital cases (see People v. Emerson, 189 Ill. 2d 436, 727 N.E.2d 302 (2000); People v. Palmer, 162 Ill. 2d 465, 491, 643 N.E.2d 797 (1994)) and will vacate a death sentence if it determines that it is excessive in light of the facts of the case and the defendant's background (see People v. Smith, 177 Ill. 2d 53, 685 N.E.2d 880 (1997); People v. Blackwell, 171 Ill. 2d 338, 665 N.E.2d 782

(1996)), it is clear that the only reason the Illinois Supreme Court did not review petitioner's sentence in such a manner is because he did not ask the Court to do so.

Adequate Funding

Petitioner asserts that he is entitled to clemency because he was denied adequate funding to investigate the case and/or to retain the necessary expert witnesses. However, despite the creation of the Capital Litigation Trust Fund, there is no indication that any capital defendant in Illinois, particularly those prosecuted in Cook County has ever been deprived of the necessary funds to investigate or retain appropriate experts. Rather, courts have denied various requests which are deemed unreasonable or unnecessary, the same standard which applies for funds under the Capital Litigation Trust Fund. 725 ILCS 124/15(c). Also, the Cook County Public Defender has significant resources available for capital litigation. Therefore, the mere fact that the Capital Litigation Trust Fund was not created until 2000 is irrelevant.

Defense Counsel's Ineffectiveness Because He Was Under Criminal Investigation At Trial

Petitioner contends that in the final months before his trial in December of 1986, a federal grand jury was convened to investigate judicial corruption, the investigation named Operation Greylord. According to petitioner, in November of 1986 the investigation became public through a series of newspaper articles linking Joseph McDermott to the Greylord corruption investigation. On December 10, 1986, the first day of petitioner's trial, an article appeared in the press reporting that McDermott agreed to cooperate with the federal investigation. (At this point, it should be noted that contrary to petitioner's grossly incorrect characterization of the news article, nowhere in the article did it so much as imply that McDermott was going to name petitioner's counsel as being one of the

corrupt attorneys.) Petitioner's counsel did in fact at a later date plead guilty to federal counts of bribery and mail fraud and was subsequently disbarred in Illinois. (PCR.C. 261, 293) According to petitioner, his trial counsel ability to adequately represent petitioner at trial was "crippled." Petitioner urges that as a consequence, he should be granted clemency.

However, when confronted with this **identical** claim, the Illinois Supreme Court rejected it on all grounds. Franklin II, 167 Ill. 2d at 18-19.

Petitioner's Conviction Is Entirely Proper And Has Been Thoroughly Reviewed. Co-Defendant Marion Holmes Ultimate Acquittal Based On The Same Facts Is Solely Because Of A Terribly Reasoned and Mistaken Decision By The Illinois Appellate Court.

Petitioner asserts as grounds for clemency that because the conviction of his co-defendant, Marion Holmes, was reversed by the appellate court, based on the testimony of Buddy Holmes, his sentence of death is arbitrary and unfair. The underpinning for petitioner's argument is the opinion of People v. Holmes, 238 Ill. App. 3d 480, 606 N.E.2d 439 (1st Dist. 1992), leave to appeal denied, 149 Ill. 2d 655, 612 N.E.2d 518 (1993), wherein the appellate court reversed co-defendant Marion Holmes' conviction, holding that the People misrepresented to Holmes' jury both that Buddy Williams was an innocent bystander to the murder of Elgin Evans and that Williams testified in exchange for prosecutorial leniency regarding his part in the murder. However, the reasoning of the Holmes court in regard to the role of Buddy Williams in this murder and the deal he received from the People for his testimony has been completely rebuffed by the Illinois Supreme Court. Franklin II, 167 Ill. 2d at 15-16. In fact, the true miscarriage of justice here is that a truly guilty person, co-defendant Marion Holmes, was allowed to go free because of a badly flawed decision of the appellate court.

Petitioner contends that there is a reason that Holmes received a new trial and he did not: the Holmes court had before it documents (the joint preliminary hearing transcript and Williams' Will County Statement) which were unavailable to the Illinois Supreme Court in petitioner's case, because they had not been admitted at trial and therefore pursuant to Supreme Court Rule could not be a part of the record on appeal. However, as the Illinois Supreme Court noted, although Holmes did not enter these documents into evidence he successfully had the documents made a part of his appellate record in support of his claim, something that petitioner could have done himself but failed to do. Franklin II, 167 Ill. 2d at 15; Franklin III, 993 F.Supp. at 1171. In other words, Illinois law did not prevent petitioner from bringing this claim to the Illinois Supreme Court. Franklin III, 993 F.Supp. at 1172.

RECOMMENDATION

The People of the State of Illinois respectfully request that the Prisoner Review Board recommend to the Governor that Petitioner's petition for executive clemency be rejected.

Respectfully submitted,

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STATE'S ATTORNEY OF COOK COUNTY

By: CHARLES BOSKEY
WILLIAM D. CARROLL