

No. 88663

IN THE
ILLINOIS SUPREME COURT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

DOROTHY WILLIAMS

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
Nos. 89-CR-20869

**BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT**

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BRIEF OF DEFENDANT-APPELLANT

I. INTRODUCTION

This is an appeal from an order dismissing defendant's post-conviction petition.

The question raised on the pleadings is whether the trial court erred in dismissing the post-conviction petition without an evidentiary hearing.

II. JURISDICTION

The jurisdiction of this Court is invoked under Supreme Court Rule 651.

III. STATEMENT OF FACTS

A. The Homicide and Defendant's Arrest

On July 25, 1989, a 97 year old woman named Mary Harris was found strangled in her apartment. *People v. Williams*, 164 Ill.2d 1, 6 (1994). A small stereo system was missing from the apartment. 164 Ill.2d at 22. At about 6:30 p.m. on July 25, 1989, Hubert Carmichael observed defendant "leaving the building alone and carrying a box large enough to hold the stereo set found to be missing from the victim's apartment." 164 Ill.2d at 22.

Carmichael pointed the defendant out to Chicago Police Officer Betty Woods at about noon on September 6, 1989. 164 Ill.2d at 7. Defendant and a companion accompanied Woods to the police station, where defendant signed a form consenting to the search of her apartment. 164 Ill.2d at 9-10. The search of defendant's apartment turned up the same brand and model of the stereo set that had been taken from Harris' home. 164 Ill.2d at 10. Defendant told the police that she had purchased the stereo as stolen property about a month before. *Id.* Defendant was formally charged with the murder of Mary Harris at about 8:30 p.m. *Id.*

Defendant was held overnight at the police station and interrogated from about 9:00 a.m. on September 7, 1989 (Trial Record 224-25) until about 2:20 p.m. that day, when a court reported inculpatory statement was taken. (Trial Record 229-30.) Interrogation resumed at about 8:00 p.m., when defendant was questioned about another homicide. (Trial Record 263.) This interrogation resulted in a second court reported inculpatory statement that was taken shortly before 4:00 a.m. on September 8, 1989. (Trial Record 268.)

B. Psychotropic Medication at the Cook County Jail

Defendant remained in custody at the Cook County Jail from September 8, 1989 until several months after she was sentenced in April 18, 1991. Starting on January 1, 1990 and continuing through September 13, 1990, defendant received sinequan, a psychotropic medication, at a dosage of 150 milligrams per day; the dosage was increased to 200 milligrams per day on September 14, 1990 and continued at that level through July 5, 1991. (Supplemental Record 348, par. 1.) The Public Defender did not know that psychotropic medication had been prescribed for defendant before, during, and after trial. (C54.)

C. Trial Proceedings: Guilt-Innocence

Defendant was represented by the Cook County Public Defender at trial. In advance of trial, the public defender moved to quash defendant's arrest and to suppress her written and oral inculpatory statements. At the hearing on the motion to suppress, and again at trial, the prosecution presented testimony that petitioner had read and approved her inculpatory statements:

- Detective Cassidy testified that the felony review state's attorney, Michael Jacobs, asked defendant to read out loud the first page of the statement, that defendant read the first page, and then "read the rest of the statement." (Motion to Suppress, Testimony of James Cassidy, Trial Transcript 230-31.)
- Detective Bilyk testified that defendant "read the statement out loud." (Motion to Suppress, Testimony of Thomas Bilyk, R. 321.) Bilyk repeated this testimony at trial. (Trial Testimony, Thomas Bilyk, Trial Transcript 1005.)

- Felony Review State's Attorney Michael Jacobs testified that defendant read "out loud to me" the first page of her statement. (Motion to Suppress, Testimony of Michael Jacobs, Trial Transcript 332.) Jacobs also repeated this testimony at trial. (Trial Testimony, Michael Jacobs, Trial Transcript 1044.)

Defendant did not testify in her own behalf. The jury found defendant guilty.

D. Trial Proceedings: Sentencing

Defendant waived jury sentencing. (Trial Transcript 455-61.) The trial judge found defendant eligible for the death penalty on the finding that the homicide had been motivated by robbery. 164 Ill.2d at 24.

A presentence investigation report was filed on April 8, 1991. (Trial Record C100.) The PSI stated that petitioner had graduated from "Forrestville Grade School," had completed the eleventh grade at "Forrestville High School." and that while at school "Dorothy was involved with extra-curricular activities [and] . . . never had any behavior or discipline problems." (Trial Record C103.) The PSI contained the following information about defendant's "physical and mental health" (Trial Record C104):

Dorothy stated that her mental health is good. She has never seen a psychiatrist, psychologist, or a mental health worker as an in-patient or an out-patient mental health problem.

Dorothy stated that her physical health is good. She stated that she has never suffered a serious physical injury or been in a hospital other than child birth.

The defense did not offer any corrections or additions to the PSI. (Trial Record 1283.)

As its case in aggravation, the prosecution introduced evidence that defendant had committed two other murders and four robberies, all of elderly persons. 164 Ill.2d at 24-25.

This Court summarized defendant's mitigation evidence as follows (164 Ill.2d at 26):

In mitigation, defendant introduced evidence that during her incarceration prior to trial she was charged with no disciplinary violation other than the one arising out of her behavior on November 23, 1989. Defendant's mother testified that she had separated from defendant's father shortly before defendant's birth and that defendant's contact with her father, who had died four years prior to the hearing, had been limited essentially to "writing." Defendant's older sister, to whom defendant had been close, had died of bronchial pneumonia in January of 1989. Defendant has two children, a daughter aged 22 at the time of the hearing in 1991 and a son aged 20. Defendant became pregnant with her daughter when she was 15 years old. The father of that child was killed in 1978. The father of defendant's son appears to have provided no support for his child. Defendant's daughter testified that she had been raised by her mother, who had treated her and her brother very well.

The trial judge noted that there was nothing in the record about any use of drugs (Trial Transcript 1717) or anything to suggest that defendant had not always "enjoyed good health" and had "an active and healthy social life." (Trial Transcript 1718.) The trial judge found that "the matters in aggravation so far exceed the matters in mitigation as to reduce the matters in mitigation to insignificance. The matters in mitigation pale in light of the matters in aggravation." (Trial Record 1720.)

E. Initial Post-Conviction Proceedings and the Finding of Unfitness

Defendant filed her initial post-conviction petition on June 30, 1995. (C21.) The petition, which was supported by two affidavits, requested additional time to gather evidence to support the allegations that defendant had not

been competent to stand trial, to cooperate with counsel, to waive a jury determination of penalty, to make a pre-trial voluntary statement, or to be sentenced and that at the time of trial, defendant had been prescribed psychotropic medication.

After defendant supported her petition with a report from Dr. Laura Wetzel, a neuropsychologist, the trial judge ordered that defendant be examined by the Psychiatric Institute, which concluded on December 7, 1995 that defendant was "presently not fit for post-conviction proceedings." (C36.)

On April 17, 1996, the trial judge granted the state's request for an examination by another psychiatrist regarding fitness. (C44.) As part of this examination, the state sought access to the records of interviews that had been conducted by a social worker who was assisting defendant's post-conviction counsel. (C46.) The prosecution sought access to the defense work product on the contention that these documents had been furnished to Dr. Markos and Dr. Blumstein for their examinations at the Behavioral Clinic. (R248-49.) Defense counsel pointed out that none of the defense work product had been provided to Drs. Markos or Blumstein (R250-52), specifically stating "that neither Blumstein nor Markos had any of the work product from the capital resource center." (R258.) The state argued that this representation was false (R258) and defense counsel requested that the trial judge hold a hearing to resolve the factual dispute. (R258-59.) The trial judge refused to hold a hearing (R259) and announced that he would conduct an in camera inspection of the defense files. (R261.)

The state also asked the trial judge to order the production of notes maintained by Dr. Michael Kovar, a psychiatrist who had been retained by the Public Defender to examine petitioner before trial. (C42-43.) These motions were

continued to May 1, 1996. (R.12.)

On February 27, 1996, before the trial judge had ruled on the state's motion to allow communication with Dr. Kovar, the Public Defender had written to Dr. Kovar, advising him that he was free to cooperate with the State's Attorney concerning defendant's case. (C54.) The Public Defender also advised Dr. Kovar that, according to an assistant state's attorney, defendant "was not taking psychotropic medicines during the pendency of her case." (Id.)

On April 18, 1996, the day after the state had filed its motion seeking production of Dr. Kovar's notes, defendant's counsel informed Dr. Kovar that defendant was asserting a privilege as to all of her communications with him. (C55.) Defense counsel "admonished [Dr. Kovar] not to disclose any information or to produce any documents until such time as a court of competent jurisdiction has ruled on this matter." (C56.)

On May 1, 1996, the state asked the trial judge to impose sanctions on defense counsel for communicating with Dr. Kovar. (R15.) After a lengthy colloquy, the trial judge declined to impose sanctions and held in abeyance his ruling on whether the state could obtain access to Dr. Kovar's notes. (R.44.) The trial judge ruled in favor of the state on its request for production of the files of the defense investigator Apollon Beaudoin and the defense social worker, Karen Tatelli. (R. 62.) The trial judge overruled all of defendant's objections and ordered Dr. Wetzel and defense social worker Tatelli to produce all of their records, including interview notes with the defendant as well as with any other person. (C57-58). The trial judge also ordered that he would conduct an in-camera inspection of Dr. Kovar's notes. (C59.)

Defendant filed an application for a supervisory order, asking this Court to stay the trial court orders, *Williams v. Singer*, No. 80998. (C68.) This Court stayed enforcement of the circuit court's discovery orders while it considered the application for supervisory order. (C76.) On May 20, 1996, this Court denied without opinion defendant's application for a supervisory order.¹

F. Court Ordered Disclosure of Defense Work Product

On May 31, 1996, Dr. Wetzel appeared in court with all of her interview notes, test scores and test results. (R.196-98.) Dr. Wetzel explained that she had been retained by the Capital Resource Center to perform psychological tests on Dorothy Williams (R200.) The prosecutor asked Dr. Wetzel about information she had provided to Dr. Blumstein (the basis on which the trial judge had permitted the state to subpoena Dr. Wetzel's record); Dr. Wetzel answered that she did not know who Dr. Blumstein is and she had not provided any records to him. (R.204.)

In compliance with the trial court's orders, defendant counsel submitted for an *in camera* review the entirety of the defense investigative file. (C79-C82.)

Defense counsel against requested that Dr. Blumstein be questioned to reveal "what he relied on" before the defense files were turned over to the prosecution. (R303.) The trial judge concluded that because Dr. Blumstein had

1. The Court subsequently resolved this issue in *People v. Burgess*, 176 Ill.2d 289, 305 (1997). See *infra* at 50.

relied on information that originated with Karen Tatelli, "the basis for her impression must be provided [to the prosecution]." (R305.) "Any of the work product that, that Tatelli generated up to the time she communicated with Dr. Blumstein, that should be turned over."

The trial judge turned over to the prosecution handwritten notes from Dr. Kovar. (R311.)

The trial judge announced the results of his in camera review of the defense files on December 13, 1996 (R269) and ordered that defense interviews with defendant's mother (R315-16) and defendant's daughter (R317) be turned over to the prosecution. The judge stated that although these interview notes were work product they were discoverable by the prosecution because they relate to "the mental condition" of the defendant. (R319.) In addition to notes of these interviews, the trial court gave the prosecution access to handwritten notes of defense counsel's support staff with 11 other witnesses. (C120.)

The trial court turned the defense work product over to the prosecution over defense counsel's repeated objections (R341):

"[T]he threshold question is what, if anything, in those files was related to any of the experts who examined Miss Williams. And I think that Miss Tatelli will tell you nothing was told to any expert, and there is no basis for proceeding any further with this invasion of defense work product and defense investigative efforts and attorney client conversations."

The trial rejected the defense argument and explained his ruling as follows (R345-46):

What I have ruled is that since the defendant petitioner has raised the issue of her competency at trial under the issue of mental condition either as a defense or as mitigation matters, any attorney

client privilege relative to those issues no longer exists. So that any information relative to that, I should say those issues, should be made available to the State.

If there is any work product such as evaluation of a lawyer as to certain information that can be redacted. As to the issue of present competency to proceed I have ruled that this — that the allegation any material that is relative to that should be turned over to the State and that, of course, would exclude any work product, attorney work product.

Again just by way of example, a lawyer who made notes. Saying I believe this is an avenue to be explored, should not be explored. That should be redacted or if it's on a separate document should not be turned over. In summary, I believe that anything relating to present competency should be turned over.

G. Hearing on Fitness for Post-Conviction Proceedings

Because of the initial finding of unfitness, the trial judge held that he would not "do anything on the PC petition" until the question of defendant's present competence was resolved. (R265.) The trial judge reiterated at the conclusion of the proceedings of May 29, 1998 that he the hearing was limited to fitness for post-conviction proceedings (R704):

The Court: If there's a finding of fitness, if there a finding of fitness, then but only then do we go to the matters involved in trial.

In 1997, the defendant was evaluated by a prosecution psychiatrist (C134-139) and a psychologist. (C127-133.) Upon receipt of reports from these experts, defendant was re-evaluated by the Psychiatric Institute. (C141.) Thereafter, the defendant secured entry of an order authorizing access to defendant by a defense psychologist. (R456.)

The hearing on fitness for post-conviction proceedings began on May 11, 1998.² (R467.)

1. Dr. Markos

The first witness was Dr. Mathew Markos of the Cook County Psychiatric Institute (R473-74), now known as the "Forensic Institute." (R476.)

Dr. Markos examined the defendant on two occasions. (R489.) In 1995, Dr. Markos concluded that "Miss Dorothy Williams was mentally not fit for post conviction proceedings based on symptoms suggestive of memory deficits and cognitive problems related to a reported head injury." (R493.) At that time, the defendant demonstrated "symptoms and signs of organic mental disorder" (R548) and "demonstrated confusion," (id.), "poor concentration" (R548-49), "poor grasp," (R549), "serious memory deficits, both short term and long term." (Id.)

After re-examining defendant in 1997, Dr. Markos concluded that she was "mentally fit for post conviction proceedings," (R513), i.e., that she could cooperate with counsel, (R525), and that she "understands the role of the state's attorneys, and the role of the Court and other personnel in the post conviction proceedings" (R526), as well as the "subject matter and the nature of these proceedings." (Id.) Dr. Markos also expressed the opinion that defendant had been fit for trial in 1991. (R526-27.)

2. The hearing was conducted in accord with the rule subsequently adopted by this Court in *People v. Johnson*, 191 Ill.2d 257, 271 (2000), that the burden of proving fitness was upon the state.

On cross-examination, Dr. Markos explained that his opinions were based in part on records that were furnished to him. (R533.) Dr. Markos admitted that he did not know the source of of the documents on which he had relied, (R537), and conceded that he did not know if he had all of defendant's records from the penitentiary (R539), or all of the police reports. (Id.)

Dr. Markos stated that his initial opinion of unfitness had been "based on the information that was available to me," (R551), and that his second opinion was based on "clinical information and findings [that] clearly indicated a diagnosis of malingering." (R552.) Dr. Markos explained that malingering is "a clinical situation or phenomenon when an individual would either fabricate or reign or exaggerate physical or mental symptoms with a clearly identifiable goal, which may be to evade trial, or incarceration, for that matter." (R503.) Dr. Markos stated that with malingering, "there may be a preexisting symptom, but it's vastly exaggerated out of proportion for the purposes of meeting an identifying goal." (R.563.)

In reaching his opinion of malingering, Dr. Markos relied in part on his belief that defendant had "completed the twelfth grade at Forrestville."³ (R568.)

2. Dr. Blumstein

Dr. Edward Blumstein is a clinical psychologist (R715) who has been employed at the Psychiatric Institute for 26 years. (R717.) Dr. Blumstein evaluated the defendant in 1995 (R745) and again in 1997. (R747.)

3. The correctness of this information is challenged by defendant. See *infra* at 51-52.

In 1995, Dr. Blumstein concluded that defendant was unfit for post-conviction proceedings and that she had been unfit at the time of trial in 1991. (R780.) In 1997, Dr. Blumstein concluded that defendant was fit for post-conviction proceedings and had been fit at the time of trial. (R781.) Dr. Blumstein explained the change in his assessment as resulting from review of additional data. (R781.)

In 1995, Dr. Blumstein administered the "Wechsler Adult Intelligence Scale, Revised Version" to defendant. (R852.) Defendant scored a verbal IQ of 62 (R803), which Dr. Blumstein stated is "within the retarded range" (R854) because it is below 70. (R889.) Defendant in 1995 received a raw score of 4 on the "information subtest," (R862), a raw score of 4 on the "digit span" subtest (R865), a raw score of ten on the "vocabulary" subtest" (R866), a raw score of 11 on the "vocabulary" subtest (R866), a raw score of 3 on the "arithmetic" subtest, (R870), and a raw score of 4 on the "comprehension" subtest. (R885).

Dr. Blumstein administered the same IQ test to defendant in 1997. (R801-02.) This time, defendant scored a verbal IQ of 66. (R803), four points higher than in 1995. (Id.) On the "information subtest," defendant received a raw score of 5. (R862.) The increase in score on the "information subtest" (from 4 to 5) (from 4 to 5) was within the reliability of the test. (R865.)

On the "digit span" subtest of the Wechsler, defendant scored 6 in 1997, as compared to 4 in 1995. (R864-65.) This small improvement is also within the "standard error of measurement" of the test. (R865-66.)

On the "vocabulary" subtest of the Wechsler, defendant had a raw score of 11, one higher than the 10 she had received in 1995. (R866-67.) On the

"arithmetic" subtest, defendant scored 4 in 1997, as compared to 3 in 1995. (R870.) These difference in scores are within the standard error of measurement. (R879.)

On the "comprehension" subtest, defendant scored a 4 in 1995 and the identical score in 1997. (R885.) Similarly, defendant received the same score on the "similarities" subtest in 1995 and 1997. (R886.)

On the 1997 tests, defendant scored a "performance IQ of 72" and "a full scale IQ of 67." (Id.) Dr. Blumstein compared defendant's scores on the tests he administered with defendant's scores on tests administered by a defense psychologist (verbal IQ of 71, performance IQ of 71, full scale IQ of 71, R804) and a prosecution psychologist (verbal IQ of 61, performance IQ of 59, full scale IQ of 56) and concluded that defendant had been trying to do poorly for the prosecution's expert. (R807.) On cross-examination, Dr. Blumstein conceded that the difference between the score of 72 on the test that he had administered and the score of 71 on the test administered by the defense psychologist was within the standard error or measurement. (R892.)

Dr. Blumstein revealed that the psychiatric institute had recently begun to use a newer and more accurate version of the WAIR-R intelligence test. (R881-82.) Defendant's counsel requested that the new test be administered to defendant (R883), but the trial judge refused this request. (R883-84.)

In 1995, Dr. Blumstein had administered "an abbreviated version of the Grey's oral reading test" to measure defendant's reading ability. (R908.) Dr. Blumstein concluded that defendant was "functionally illiterate," (R909) i.e., "[t]hat she was unable to read or write." (R910.)

3. Dr. Calvin Flowers

Dr. Calvin Flowers is a board certified radiologist (R971) who reviewed a CAT scan of defendant's brain (R976) and was unable to find any abnormality. (R977.) Dr. Flowers also reviewed a MRI of defendant's brain (R979) and observed several small "high signal or unidentified bright objects in the brain." (R982.) According to Dr. Flowers, these bright objects "signify nothing great in terms of abnormalities." (R984.) Dr. Flowers did not observe any evidence of a head injury in the MRI. (R985-89, 991-92.) On cross examination, Dr. Flowers conceded that defendant could have a brain abnormality that was not visible in the CAT scan or the MRI. (R995-96.) On redirect examination, Dr. Flowers expressed his view that it was unlikely that there was any head injury if he could not observe it in the MRI or CAT scan. (R1003.)

4. Argument on Fitness

On March 4, 1999, the trial court heard arguments on defendant's fitness for post-conviction proceedings. (R1015-1024.) Defendant's counsel asserted that the defendant had become able to cooperate to counsel and was fit for post-conviction proceedings. (R1018.) The state agreed with defense counsel's assessment (R1020) and the trial judge found that defendant has "the capacity to cooperate and communicate with her counsel." (R1024.) The trial judge made plain that his "finding is only for the purposes of proceeding in this post conviction, and not for anything else." (Id.) The court granted defendant 60 days in which to file an amended post-conviction petition. (R1027.)

The trial judge subsequently reaffirmed that the fitness hearing had concerned "only questions of competency to proceed with the PC, post conviction petition." (R1035.)

H. Psychotropic Medication

At the hearing on fitness for post-conviction proceedings, Dr. Markos revealed that defendant was receiving Pamelor, a psychotropic drug, and that defendant had previously been prescribed Sinequan. (R508.) Dr. Markos explained that sinequan "is an antidepressant which in smaller dosage like 25 or 50 milligrams is used as a sedating agent, as a sleeping pill to treat insomnia." (R552.) Markos also stated that in "higher doses, 100 and 150 to 200 milligrams a day, it [sinequan] is used to treat depression, as an antidepressant." (R553.)

During the testimony of Dr. Markos, the trial judge pointed out that an evaluation was required if, at the time of post-conviction proceedings, the defendant was taking psychotropic medication. (R589-90.) The trial judge summarized his view of the applicable law as follows: "[A]ny time a defendant in a pretrial state is purported to be taking a psychotropic medication, we now must have an evaluation. And, indeed, not necessarily a hearing, but many times a hearing. At the very least we have to have an evaluation." (R590.)

In response to a hypothetical question from the prosecution, Dr. Markos opined that if the defendant had been receiving sinequan for "several months" at a dosage of fifty milligrams, it would not interfere "with her fitness to go through post conviction proceedings." (R594.) Dr. Markos also expressed the view that if defendant had been taking 150 milligrams of sinequan "then it would be an antidepressant dose which would alleviate symptoms of depression which would only render her more stable." (R600.) Dr. Markos explained that "[d]epression is a mood disorder which is characterized by feelings of feeling depressed. Down in the dumps. The blues. It may have — it may present with symptoms of insomnia, which is poor sleep or interrupted sleep, poor appetite,

feelings of helplessness, hopelessness." (R613-14.) The psychotropic medication "would alleviate those symptoms of depression." (R616.)

On the state's objection, the trial judge refused to permit defense counsel to inquire about the effect of a dosage of 200 milligrams of sinequan. (R616.)

The trial judge ordered an evaluation of the effects of Pamelor on defendant's present competency. Dr. Markos returned to court on May 29, 1998 to testify about his assessment of the impact of the psychotropic medication — 50 milligrams of Pamelor (R645) — that defendant was then receiving each night. Dr. Markos explained that Pamelor was prescribed as a sedative and as an anti-depressant (R653), and that 50 milligrams would be the dosage for sedative purposes. (R654.) According to Dr. Markos, defendant's medical records show "a history of receiving one low dose of anti-depressant at bedtime for insomnia." (R661.) As stated by Dr. Markos, "a dosage of fifty milligrams of Sinequan, or a dosage of Pamelor fifty milligrams at bedtime only, would clearly suggest that Miss Dorothy Williams had been prescribed both these medicines over a period of time in a dosage that would effectively deal with insomnia or sleep disorders." (R662.) Dr. Markos concluded that the 50 milligram dosage was not having any impact on defendant's present mental functioning, (R664), and reiterated his opinion that defendant "is presently mentally fit for post conviction proceedings." (R669.)

On the state's objection, the trial judge refused to permit inquiry about the effects of psychotropic medication at the time of trial (R680):

Defense Counsel: Did you look at any records that pertain to medication that Miss Williams received at the time of her trial?

Prosecution: Objection.

The Court: Sustained. This is now only on competency today.
That is the purpose of this particular hearing now.

In one of his answers, Dr. Markos offered the opinion that while fifty milligrams is a "typical dosage for treating insomnia . . . [a] typical anti-depressant dosage in order to treat symptoms of depression . . . would be within the 150 to 250 milligrams range." (R685.)

The trial judge subsequently found that the psychotropic medication that defendant was taking at the time of post-conviction proceedings did not render her unfit. (R1036.) The judge refused to make any additional findings about the effect of psychotropic medication. (Id.)

I. The Amended Post-Conviction Petition

On June 10, 1999, counsel filed an amended petition (Supplemental Record 62-247), asserting several grounds for relief:

- a. Petitioner was receiving psychotropic medication at the time of trial and did not receive a fitness hearing.
- b. Petitioner's mental retardation and illiteracy were not presented to the Court at the hearing on the motion to suppress statements or to the jury as a ground for refusing to afford weight to petitioner's inculpatory statements;
- c. The testimony at trial that petitioner read aloud her confession was perjured testimony because petitioner was illiterate;
- d. Petitioner was denied the effective assistance of counsel at trial and at sentencing;
- e. Petitioner's mental retardation, if known to the Court at the time of sentencing, would likely have prevented the Court from imposing a capital sentence.

The State moved to dismiss defendant's claims involving psychotropic medication (C296-304) and conceded that "the proper method for disputing these

[defendant's remaining] allegations does not lie in a motion to dismiss. (C304.) After defendant was granted leave to file an amendment (R1039), the state filed a "supplemental motion to dismiss," seeking dismissal of all claims in the post-conviction petition. (C309-18.) The State asserted that defendant had failed to support her allegations that she was mentally retarded and illiterate, (C314), and sought dismissal of defendant's ineffective assistance of counsel claims by relying on Dr. Brownstein's testimony that trial counsel had told him that she had consulted with a psychologist who had concluded that defendant was malingering. (C316.)

The court heard arguments on the motion to dismiss on July 15, 1999. One focus of that hearing was whether defendant had supported her allegation that she had been ingesting psychotropic medication at the time of trial. The state argued that defendant had failed to present "medical records of anything" to support her allegation. (R1057.) Because "[w]e have no factual documentation here to prove up any of the petitioner's claims," (R1060), the prosecution asked that the petition be dismissed. (R1064.) Defense counsel asserted that the prosecution was seeking to mislead the Court because, counsel argued, "[t]he prosecution knows that the [medication] records from Cermak have been lost and can't be found." (R1064.) The prosecution conceded that Cermak had responded to a subpoena that it could not locate any records, (R1065), and stated that "I believe they tendered all the records." (Id.) The trial judge, though, directed defense counsel to subpoena the records from Cermak Hospital and proceed on a rule to show cause if the records were not produced. (R1068.)

Defense counsel argued that there was enough evidence in the record to warrant a hearing on whether defendant was illiterate (R1072), as well as on the

question of whether trial counsel had adequately explored defendant's mental problems. (R1073-74.)

After the trial judge continued the argument to permit defendant to subpoena the Cermak records, (which were produced pursuant to the subpoena), defendant also subpoenaed the Public Defender's file. The trial judge refused to turn over the entirety of the Public Defender's file to defendant but instead, acting *sua sponte*, conducted an in camera inspection of the file and concluded that a portion of the file should not be produced to defendant. (R1081.) Defendant asked that a copy of those documents be sealed and made a part of the record and the trial judge granted that request. (Id.) The trial judge also granted defendant leave to file a second amendment to the amended post-conviction petition. (R1085-86.) The second amendment included the medication record from Cermak Hospital (Supplemental Record 322-C329) and an "affidavit of John Williams." (Supplemental Record 330-32.)

Mr. Williams, who signed his affidavit "under penalties of perjury as provided by law," (Supplemental Record 330), stated that he is defendant's brother (Williams Affidavit, par. 1) and that defendant did not graduate from grammar school and did not attend high school. (Williams Affidavit, par. 4.) Mr. Williams also averred that defendant "has always been unable to read," (Williams Affidavit, par. 7), had been a discipline problem at school, and, before her conviction, had a serious heroin and cocaine problem. (Williams Affidavit, par 9.) Mr. Williams also averred that he had shared this information with a Public Defender investigator before defendant was convicted. (Williams Affidavit, par 10.)

1. Resolution of Factual and Legal Issues Raised in Post Conviction Proceedings

In granting the state's motion to dismiss, the trial judge refused to credit the sworn declaration of John Williams because "the documents does not bear the indications that it was sworn to or affirmed before someone who has the lawful authority to take oaths or affirmations such as a notary and who would properly identify the affiant before accepting the oath or affirmance." (R1097.)

The trial judge rejected defendant's contention that she was unable to read based on testimony at trial that defendant had read a consent to search form (R1098), and that defendant had read aloud her inculpatory oral statements. (R1099-1102.) The trial judge also relied on the report in the presentence report that petitioner had completed the 11th grade. (R1102.) In the view of the trial judge, "there was overwhelming competent evidence from the record of the trial court proceedings which reveals convincingly that petitioner was not illiterate and did not have impairment of her intellect." (R1102.)

The trial judge rejected the three IQ tests that had been conducted in post-conviction proceedings and accepted a statement in a school record that defendant's "IQ test results were within the normal range of IQ, albeit the lower end of that normal range." (R1104.) In the view of the trial judge, defendant's low IQ scores were "a result of petitioner's malingering." (R1106.)

Based on the testimony of Dr. Blumstein about a conversation he had with defendant's trial counsel (R776-77), the trial judge made a factual finding that trial counsel had been advised by a consulting psychologist "that there was no evidence of mental illness or mental defect exhibited by petitioner at the time of trial." (R1105.) The trial judge supported this finding with a document he had come across in his in camera inspection of the public defendant's file. (R1105,

R1126.) (This document is attached to defendant's motion to reconsider, and appears in the Supplemental Record C203.)

As summarized by the trial judge (R1107):

The results of the hearings and my opinion revealed with crystal clarity and substantial evidence that petitioner's mental capacity was within the normal range, that she was well able to understand her right to read, to write, and had the capacity to knowingly and intelligently waive her Fifth Amendment Right to remain silent.

Furthermore, for the defense lawyer to have opened the issue of her mental capacity in mitigation would have allowed the prosecution to then introduce evidence of petitioner's sociopathic, psychopathic character.

As to defendant's ingestion of psychotropic medication during trial, the trial judge stated that he was unable to read the prescription orders that had been produced by Cermak Hospital and that "the only dates I could read in terms of years was 1996." (R1112.) The trial judge also noted that he had observed defendant during the trial and had addressed her on two occasions, and that he had believed that defendant "was fully aware of what was taking place and fully involved in the trial process." (R1114.)

After ruling against defendant, the trial judge assured petitioner's attorney that all of the materials he had reviewed would be made part of the record. (R1130-32.)

The prosecution asked the trial judge to make explicit findings "that the defendant was fit at trial even if the record shows that she was taking Sinequan or some other antidepressant during trial." (R1136.) The trial judge refused to permit defense counsel to respond to this request (id.) and stated as follows (R1136):

The Court: No. There's no argument. There were two parts to my opinion. The first part was that if we had not held a hearing, the fact that she was taking, if that been the fact, Sinequan would not have warranted a hearing.

As it happened, we did have a hearing, and the evidence is from that hearing. She was competent.

Defendant's counsel pointed out that there had not been any testimony about the effects of Sinequan other than at a dosage of 25 milligrams (R1136) and asserted that there had not been any testimony about the effects of Sinequan at the time of trial. (R1137.)

2. The Motion to Reconsider

On September 17, 1999, defendant filed a motion to reconsider. (Supplemental Record 365.) Defendant supported the motion with an affidavit from Dr. James O'Donnell (Supplemental Record 368-371), providing his opinion that the Cermak Hospital Records showed that defendant had been receiving 200 milligrams of Sinequan per day throughout trial and sentencing. (C176.) Dr. O'Donnell explained that this dosage "is considered high dose therapy" (Id.) and "had the potential to be an impairing psychotropic drug." (C371.) Defendant also attached to the motion to reconsider defendant's school records (C390-93), which show that defendant dropped out of school in September, 1967, at age 14, when she was in the sixth grade. (C391.) In addition, defendant appended to the motion to reconsider the four pages from the Public Defender's file (C394-96, 402) that appeared to be the entirety of the mitigation investigation that had been conducted at trial.

The motion to reconsider was denied on October 25, 1999 by Judge Woods, to whom the case had been reassigned following the retirement of Judge Singer. (R1150.) Defendant filed her notice of appeal on November 22, 1999.

(C211.)

IV. ARGUMENT

A. A CONSTITUTIONALLY FAIR TRIAL REQUIRES THAT DEFENSE COUNSEL AND THE TRIAL JUDGE BE AWARE THAT A CAPITAL DEFENDANT IS RECEIVING PSYCHOTROPIC MEDICATION

The Court's decisions involving psychotropic medication have focused on whether the medication has rendered the defendant unfit. Defendant in this case raises a different claim, specifically that she could not have received a constitutionally fair trial because neither defense counsel nor the trial judge was aware that the defendant was being treated with psychotropic medication.

1. Psychotropic Medication and a Fair Trial

The rule that defendant advocates in this case is based on the decision of the United States Supreme Court in *Riggins v. Missouri*, 504 U.S. 127 (1992). At issue in *Riggins* was "whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments." 504 U.S. at 132-33. In the course of resolving this issue, the Supreme Court noted that the ingestion of psychotropic medication "may well have impaired the constitutionally protected trial rights [defendant] invokes." *Id.* at 137. The United States Supreme Court recognized that the side effects of the psychotropic medication could have "had an impact upon not just [defendant's] outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.*

Justice Kennedy, in his concurring opinion in *Riggins*, reiterated the dangers of psychotropic medication to a defendant accused of a serious crime: "The drugs can prejudice the accused in two principal ways: (1) by altering his

demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel." 504 U.S. at 142. We show in Part A(2) below that the Court's opinion on psychotropic medication had focused on this second ground and have not considered the denial of a fair trial that results when neither defense counsel nor the trial judge knows that the defendant is ingesting psychotropic medication.

The demeanor of a criminal defendant in a capital case is of crucial importance: "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring). This is true *a fortiori* during capital sentencing:

The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [citation omitted]

504 U.S. at 142 (Kennedy, J., concurring).

Psychotropic medication also interferes with the effective assistance of counsel: "The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense." 504 U.S. at 142 (Kennedy, J., concurring).

More than 100 years ago, this Court stated that "It is clear that whenever a trial is so conducted as to deprive the accused of any substantial right, he has

not had a fair trial, within the meaning of the constitution." *Quinn v. People*, 123 Ill. 333, 345 (1888). It is also clear that the Illinois and federal constitutions protect the right of an accused to a fair trial "however strong the evidence against an accused may be." *People v. Finn*, 17 Ill.2d 614, 617 (1959).

We show below that this Court has not considered the impact of psychotropic medication on a defendant's right to a fair trial in its decision involving psychotropic medication.

2. A Brief Review of the Court's Cases Involving the Administration of Psychotropic Medication to Capital Defendants

Starting with *People v. Eddmonds*, 143 Ill.2d 501 (1991), this Court has announced a series of confusing and inconsistent cases involving the administration of psychotropic medication to persons accused of capital offenses.⁴ As we

4. As this Court stated in *People v. Britz*, 174 Ill.2d 163, 198 (1996) (holding that Mylanta — over the counter medication for a "nervous stomach" — is not "psychotropic medication):

"Psychotropic medication[s]" are defined in the Mental Health and Developmental Disabilities Code as "medication whose use for antipsychotic, antidepressant, antimanic, antianxiety, behavioral modification or behavioral management purposes is listed in AMA Drug Evaluations, latest edition, or Physician's Desk Reference [PDR], latest edition, or which are administered for any of these purposes." 405 ILCS 5/1-121.1 The United States Supreme Court has also explained that psychotropic drugs are "medications commonly used in treating mental disorders such as schizophrenia," the effect of which is "to alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rational state of mind." *Washington v. Harper*, 494 U.S. 210, 214 (1990).

This case involves the psychotropic medication doxepin, also known as sinequan. Unlike dilantin (phenytoin), *People v. Kidd*, 175 Ill.2d 1, 18-19 (1996), this Court has recognized that doxepin is a "psychotropic agent". *People v. Burgess*, 176 Ill.2d 289, 299 (1997); *People v. Cortes*, 181 Ill.2d 249, 275 (1998).

show below, these decisions have focused on the fitness for trial, rather than, as defendant urges in this case, how the psychotropic medication deprived the accused of a constitutionally fair trial.

In *People v. Edmonds*, the defendant had taken "psychotropic medication for six months while awaiting trial, but did not take medication at the time of trial." 143 Ill.2d at 511. After receiving a capital sentence, the defendant argued in a post-conviction petition, *inter alia*, that his counsel had been incompetent in failing to learn about the ingestion of psychotropic medication before trial. *Id.* The Court rejected the ineffective assistance of counsel claim, assuming that counsel had been deficient in failing to learn about the medication but concluding that the defendant had not been prejudiced. *Id.* There had been several pre-trial fitness hearings in *Edmonds*, and psychotropic medication had been discontinued more than a year before trial. 143 Ill.2d at 524.

The Court was next confronted with a claim involving psychotropic medication and a capital sentence in *People v. Strickland*, 154 Ill.2d 489 (1992). There, the defendant had received a fitness hearing after trial but before sentencing; the hearing, the trial judge had found that the medication had not rendered the defendant unfit for trial. 154 Ill.2d at 508. In affirming the conviction, the Court observed that the medication had been discontinued a month before trial. 154 Ill.2d at 511. Relevant to defendant's claim in this case is that in *Strickland*, defense counsel and the trial judge were each fully cognizant of defendant's medication history at the time of sentencing.

Two years after *Strickland*, a sharply divided Court in *People v. Brandon*, 162 Ill.2d 650 (1994) adopted a bright line (and short lived) rule that a new trial is required if trial counsel had failed to request the fitness hearing then required

by 725 ILCS 5/104-21(a) when a defendant was receiving psychotropic medication. The Court reached this result on a Sixth Amendment ineffective assistance of counsel theory. The State in *Brandon* had conceded that the failure of defense counsel to request a fitness hearing satisfied the first prong of the ineffective assistance of counsel standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court concluded that trial counsel's failure to have requested the statutory hearing was per se prejudicial. Relevant to defendant's claim in this case is that, as in *People v. Strickland, supra*, the trial judge in *Brandon* had imposed a capital sentence without full awareness that the defendant was receiving psychotropic medication:

In this case, evidence adduced at the sentencing hearing established that Brandon was taking drugs under medical direction. According to the record, Brandon began experiencing auditory hallucinations within several days of his incarceration. To control those hallucinations, he was started on a program of psychotropic medications, including an antidepressant drug, an antipsychotic drug, and a drug to control the side effects of the antipsychotic drug. Brandon was on these medications continuously and remained on them through sentencing.

162 Ill.2d at 456.

People v. Gevas, 166 Ill.2d 461 (1995) was a straightforward application of *Brandon* in a direct appeal where, at a hearing on a pro se motion to waive all appeals and stays of execution, the trial judge was informed that the defendant had been receiving psychotropic medication when he pleaded guilty. This Court held that "the fact that the trial court was informed of defendant's treatment with psychotropic drugs during the proceedings, but refused to investigate further by holding a fitness hearing, warrants a reversal of defendant's convictions and sentence." 166 Ill.2d at 467-68. In this case, the trial judge was ignorant of defendant's treatment of psychotropic drugs when he accepted

defendant's waiver of jury sentencing and when he imposed sentence.

The Court clarified *Brandon* and *Gevas* in *People v. Kinkead*, 168 Ill.2d 394 (1995), when it held that relief was not required "without an adequate record upon which to evaluate whether defendant's receipt of psychotropic drugs while in jail was medically significant." *Id.* at 414.

An adequate record of the administration of psychotropic medication was before the Court in *People v. Birdsall*, 172 Ill.2d 464 (1996). There, the presentence report revealed that defendant had been taking psychotropic medication "during the time of pre-trial proceedings in September 1993 and throughout the January 1994 trial and death eligibility sentencing proceedings." 172 Ill.2d at 476. A four to three majority of this Court reversed and remanded because the trial judge had imposed a capital sentence without holding a hearing on the effects of the psychotropic medication. 172 Ill.2d at 479.

People v. Nitz, 173 Ill.2d 151 (1996) came before this Court on an appeal from the dismissal without an evidentiary hearing of a post-conviction petition.

The post-conviction record in *Nix* included jail records and the affidavit of Dr. James O'Donnell, an expert pharmacologist, that the defendant had been receiving psychotropic medication during trial.⁵ 173 Ill.2d at 157-58. A four to three majority of the Court held that, upon a showing of the administration of psychotropic medication, the failure to have held the fitness hearing that was, at the time of trial, required by statute,⁶ "constitutes more than a statutory violation and is properly cognizable under the Post-Conviction Hearing act." 173 Ill.3d at 161. By the same four to three vote, the Court also reaffirmed the automatic reversal rule of *Brandon* and *Gevas*, rejecting the state's argument for a retrospective fitness hearing. 173 Ill.3d at 163-64. The Court in *Nitz* did not reach the defendant's alternative argument:

As an alternative basis to support the grant of a new trial, defendant contends that the State, by its failure to disclose information concerning administration of the medication, violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment). Given our determination that

5. Dr. O'Donnell has also submitted an affidavit in this case. (Supplemental Record 368-371.)

6. 725 ILCS 5/104-21(a) was amended, effective December 13, 1995, to provide that a fitness hearing is not required unless the court finds that there is a bona fide doubt of the defendant's fitness. Pub. Act 89-428, §605. This amendment was part of a bill which violated the single subject requirement of the Illinois Constitution and was struck down in *Johnson v. Edgar*, 176 Ill.2d 499 (1997).

The statute was subsequently amended to provide that "[a] defendant who is receiving psychotropic drugs shall not be presumed to be unfit to stand trial solely by virtue of the receipt of those drugs or medications." Pub. Act 89-689, §90.

defendant is entitled to a new trial based upon a violation of his right to an inquiry on the issue of his fitness, we do not address defendant's *Brady* claim. *But see People v. Sanchez*, 169 Ill.2d 472 (1996).
173 Ill.2d at 164-65.

The Court's holding in *Nitz* that failure to hold a statutory fitness hearing "constitutes more than a statutory violation" was another expression of the Court's view that the ingestion of psychotropic medication should be analyzed as it related to fitness.

The Court created the first exception to the automatic reversal rule of *Brandon, Gevas, and Nitz* in *People v. Burgess*, 176 Ill.2d 289 (1997). There, during the pendency of the appeal, the Court granted the defendant's motion to remand to the circuit court for a hearing "for the 'limited purpose of determining whether defendant ingested psychotropic medication at or near the time of his trial and sentencing.'" *Id.* at 299. The trial court held such a hearing, found that the defendant had received psychotropic medication during trial, and also found that the medication had not had any "effect on the defendant's 'mental functioning, mood, or demeanor in the courtroom.'" *Id.* at 303.

The record in *Burgess* showed that "the defendant had discontinued taking doxepin months before trial, and that [the effects of the] lorazepam, which the defendant took at bedtime during the course of the trial, would have dissipated overnight." *Id.* at 304. The Court concluded that relief was not appropriate because evidence of record "compels the conclusion that the defendant was suffering no impairment as a result of his ingestion of psychotropic drugs during the time of his trial and sentencing hearing." *Id.* The Court held that this finding justified a departure from the automatic reversal rule. 176 Ill.2d at 303. *Burgess* approved a "case-specific inquiry into the psychotropic drugs

administered to this particular defendant." *Id.*

Burgess again focused on fitness and did not consider the claim presented here, that a defendant cannot receive a constitutionally fair trial when neither defense counsel nor the trial judge is aware that the defendant is being treated with psychotropic medication.

The Court extended *Burgess* in *People v. Neal*, 179 Ill.2d 541 (1998). There, the defendant established in post-conviction proceedings that he had received psychotropic medication before trial. 179 Ill.2d at 546. The trial court held an evidentiary hearing and found that "defendant's ingestion of Thorazine was not proximate in time to his trial and there was no scientific basis to believe that defendant was affected by the Thorazine during his trial or sentencing hearing." *Id.* at 547. On appeal, this Court noted that

When the circuit court was presented with this evidence during the post-conviction proceeding, what it should have done under *Brandon, Gevas, Kinkead, Birdsall, Nitz, Britz* and *Kidd* was to vacate defendant's conviction and sentence and grant him a new trial. Making an after-the-fact determination as to the effect of the medication on defendant's fitness, as the court did here, was improper. 179 Ill.2d at 551-52.

Even though the trial court had acted improperly on remand in *Neal*, the Court held that under *People v. Burgess* it could make a case by case determination as to whether "the issue of defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact." 179 Ill.2d at 554. Applying this standard, the Court held that the defendant in *Neal* was not entitled to an automatic new trial. *Id.* at 554. *Neal* is a clear expression of the Court's focus on fitness and competency to stand trial, rather than upon the constitutional fairness of trial and capital sentencing.

The Court approved another retrospective determination of fitness in *People v. Cortes*, 181 Ill.2d 249 (1998). There, the issue of psychotropic medication had been raised in a post-trial motion; after an evidentiary hearing, the trial court found that the medication had not rendered defendant unfit either for trial or for sentencing. 181 Ill.2d at 272. This Court approved the trial court's "retrospective determination as to whether the medication taken by defendant rendered him unfit." 181 Ill.2d at 277.

The Court sought to reconcile its cases in its decision following remand in *People v. Kinkead (II)*, 182 Ill.2d 316 (1998). After reviewing its cases on psychotropic medication, the Court stated the following:

The above history of our cases demonstrates the inherent difficulties in attempting to apply a bright-line rule of law to specific factual circumstances involving defendants' fitness to stand trial. The bright-line or automatic reversal rule of the *Brandon* line of cases has been modified by the case-specific approach taken in *Burgess* and subsequent cases. We believe that the case-by-case approach comports with due process and does not impose an unduly restrictive burden on the State. In light of our case law, we conclude that defendant cannot prevail in his request for a new trial based solely on the fact that the evidence on remand showed that he had been receiving antipsychotic medication during his trial and sentencing proceedings.

182 Ill.2d at 340.

The standard that the Court applied in *Kinkead (II)* is that a new trial is required when, in addition to showing the ingestion of psychotropic medication, the evidence "establishes the existence of a *bona fide* doubt as to defendant's competency." 182 Ill.2d at 342.

After defendant filed her notice of appeal in this case,⁷ the Court announced a new standard in *People v. Mitchell*, 189 Ill.2d 312 (2000). There, without urging by the State, a sharply divided Court overruled *Brandon* and its progeny and held that the "denial of a section 104-21(a) fitness hearing was in and of itself a due process violation." 189 Ill.2d 327. The Court also overruled *Nitz*, concluding that "[t]his court's prior determination that the legislature equated the ingestion of psychotropic medication with a *bona fide* doubt of defendant's fitness was simply erroneous." 189 Ill.2d at 330. The Court also overturned the holding of *Brandon* that prejudice under the second prong of the *Strickland v. Washington*, 466 U.S. 668 (1984) could be presumed.

Mitchell continued to focus on fitness and competency to stand trial; the Court expressly limited its review to whether the defendant would have been found unfit had a fitness hearing been held, *id.*, and denied relief, concluding that "[t]here is no reasonable probability that defendant would have been found unfit, and therefore defendant's trial counsel was not ineffective for failing to request a fitness hearing." 189 Ill.2d at 337. The Court summarized its holding as follows:

In sum, the right to a fitness hearing that used to be provided for in section 104-21(a) was a statutory right. A defendant did not have a due process right to such a hearing, and trial courts had no obligation to order *sua sponte* a section 104-21(a) fitness hearing if a defendant did not request one. Thus, in a post-conviction case, the claim will be considered only if it is framed in the context of

7. Defendant filed her notice of appeal on November 22, 1999. (C211.)

ineffective assistance of counsel. To prevail on such a claim, a defendant must show a reasonable probability that, if a section 104-21(a) fitness hearing would have been held, he would have been found unfit to stand trial.

189 Ill.3d at 337-38.

Mitchell did not consider the claim presented here, that a defendant cannot receive a constitutionally fair trial when neither defense counsel nor the trial judge is aware that the defendant is being treated with psychotropic medication.

The Court applied *Mitchell* in *People v. Moore*, 189 Ill.2d 521 (2000) and *People v. Willie Jones*, 191 Ill.2d 194 (2000), *People v. Holman*, 191 Ill.2d 204 (2000), and *People v. Andre Jones*, 191 Ill.2d 354 (2000).⁸ These cases share the view that "the only constitutional ground on which the defendant may now seek relief [relating to the failure to have held a section 104-21(a) fitness hearing] is his contention that trial counsel was constitutionally ineffective for failing to request a fitness hearing in this case." *People v. Holman*, 191 Ill.2d at 211.

This case presents a different theory than that considered by the Court in its *sua sponte* reversal of *Brandon* and *Nitz*, where the Court appeared to mistakenly assume that the only prejudice from psychotropic medication is if the

8. As Justice Freeman pointed out in a series of dissenting opinions, *Mitchell* and its progeny were each decided on the basis of a trial court (and appellate) record that had been made before this Court overruled *Brandon* and *Nitz*. See *People v. Mitchell*, 189 Ill.2d 312, 400 (Freeman, J., dissenting from denial of rehearing); *People v. Moore*, 189 Ill.2d 521, 546 (Freeman, J., dissenting); *People v. Willie Jones*, 191 Ill.2d 194, 203 (Freeman, J., dissenting); *People v. Andre Jones*, 191 Ill.2d 354, 362-63 (Freeman, J., dissenting); *People v. Holman*, 191 Ill.2d 204, 213 (2000) (Freeman, J., dissenting).

medication renders the accused unfit. There is far greater prejudice to a defendant facing a capital sentence when, as in this case, a judge makes the decision to impose a death sentence without knowing that he is imposing that punishment on a person whose demeanor has been blurred by psychotropic medication.

3. THE RECORD IN THIS CASE SHOWS THAT PETITIONER DID NOT RECEIVE A FAIR TRIAL BECAUSE NEITHER TRIAL COUNSEL NOR THE TRIAL JUDGE KNEW ABOUT THE PSYCHOTROPIC MEDICATION

a. Defendant's Claims

The pleadings in this case were drafted without anticipating this Court's decision in *People v. Mitchell*, 189 Ill.2d 312 (2000). Defendant asserted two claims in her initial petition (C21-22):

3. Petitioner's rights were violated in the following respects:

- a. Petitioner was suffering from a serious neurological deficit at all times relevant and was not competent to stand trial, to cooperate with counsel, to waive a jury determination of penalty, to make a pre-trial voluntary statement, or to be sentenced.
- b. Petitioner's neurological problems were not brought to the attention of the Court because of the ineffective assistance of counsel or, in the alternative, because the neurological deficits were masked by psychotropic medication that was being given to defendant while she was at the Cook County Jail.

Petitioner restated these claims in a "first amended petition," filed on August 20, 1996 (C85-99):

8. Based on his independent review of the records, defendant's undersigned counsel believes that defendant is entitled to post-conviction relief on the following grounds:

- a. Petitioner was receiving psychotropic medication at the time of trial and did not receive a fitness hearing.
- b. Petitioner was suffering from a serious neurological deficit at all times relevant and was not competent to stand trial, to

cooperate with counsel, to waive a jury determination of penalty, to make a pre-trial voluntary statement, to be sentenced, or to be executed.

- c. Petitioner's neurological problems were not brought to the attention of the Court because of the ineffective assistance of counsel or, in the alternative, because the neurological deficits were masked by psychotropic medication that was being given to defendant while she was at the Cook County Jail.

Defendant broadened her claims in her final amended petition, filed on June 10, 1999. (Supplemental Record 62-247.) In addition to the claim that defendant had been receiving psychotropic medication and had not received a fitness hearing, defendant asserted several claims arising from the fact that her mental retardation and illiteracy had not been raised at the hearing on the motion to suppress or at trial as a ground for refusing to afford weight to her inculpatory statements. Because she is illiterate, defendant urged that the testimony at trial that she had "read out loud" her confession was false and perjurious. (Supplemental Record 64-66, par. 5.) In addition to asserting that her conviction rests on perjured testimony, defendant contended that the fact that she is mentally retarded and unable to read or write was withheld from the jury because of the ineffective assistance of counsel. Defendant also challenged the imposition of a capital sentence without awareness that she was mentally retarded.

If defendant had had the opportunity to plead her case after this Court's decision in *People v. Mitchell*, 189 Ill.2d 312 (2000), she would have focused on how her ingestion of psychotropic medication before, during, and after trial and sentencing — without the knowledge of her attorney or of the trial judge — made her trial constitutionally unfair.⁹ These claims are, in defendant's view,

subsumed within the claims presented in the amended post-conviction petition and should be considered by Court in this appeal. We show below that the secret doping of defendant made her trial unfair because the medication apparently masked defendant's serious mental shortcomings and prevented her disabilities from being raised in connection with the voluntariness of her pre-trial admissions. The secret doping also infected the trial court's acceptance of defendant's waiver of a jury for sentencing. The heavy dosage of psychotropic medication likely contributed to the failure of defendant to cooperate with counsel and correct the numerous significant errors that appear in the pre-sentence investigation.¹⁰ Finally, because the judge who imposed the capital sentence was unaware that defendant was under the influence of mind deadening chemicals, he could not fairly decide whether defendant should live or die.

b. The Record Shows Secret Doping

Doxepin (also known as "sinequan") is a psychotropic medication that is commonly used as an antidepressant. (C176.) Sinequan was prescribed for defendant shortly after her arrival at the Cook County Department of Corrections; defendant continued to receive daily dosages of the psychotropic medication until her departure for the Illinois Department of Corrections. For more than one year before trial, defendant received 150 milligrams of sinequan each

9. On January 16, 2001, this Court denied defendant's request for a remand to permit her to replead her petition in light of the post-notice of appeal change in the law wrought by *Mitchell* and its progeny.

10. In the alternative, the failure of trial counsel to have corrected the numerous material errors in the pre-sentence investigation report constituted the ineffective assistance of counsel. See *infra* at 54-55.

day. (C176.) Starting on September 14, 1990, defendant began to receive 200 milligrams per day of the psychotropic medication. This doping continued through trial (in March of 1991) and sentencing on April 18, 1991. (C176.) The 200 milligram daily dosage is "above the high end of the usual therapeutic dose." (Id.) Neither the trial judge nor defense counsel knew that defendant was receiving this psychotropic medication. (C54.)

c. Adjudication of the Voluntariness of Pre-trial Admissions

Before trial, the Public Defender filed for defendant a motion to suppress her written and oral statements. (Trial Record C41-42.) This motion asserted that defendant had not received *Miranda* warnings, that defendant had asserted her right to remain silent, and that the statements were involuntary because of physical coercion and threats. Defendant did not testify at the hearing; the Public Defender did not present any evidence that defendant had failed to receive or understand *Miranda* warnings, had invoked her right to remain silent, or that there had been any physical coercion or threats.

Defendant's mental capacity should have been considered at the hearing on the voluntariness of her statements. "This court has long recognized that the mental capacity of a defendant must be taken into consideration in determining whether his actions were voluntary." *People v. Scott*, 148 Ill.2d 479, 510 (1992). "Limited intellectual capacity is one of several factors to be considered under the totality of the circumstances." *People v. Foster*, 168 Ill.2d 465, 476 (1995). "The mental capacity of a defendant must be taken into consideration in determining whether a waiver was valid, and while mental deficiency, of itself, does not render a statement unintelligent, it is nonetheless a factor which must be considered in the totality of the circumstances under which the right to counsel was waived or a statement or confession given." *In re W.C.*, 167 Ill.2d 307,

328 (1995).

Defendant's most salient cognitive deficit is that she is unable to read or write. (Blumstein Testimony, Tr. 909-10.) That defendant is "functionally illiterate" (Blumstein Testimony, Tr. 909) would have been relevant to assessing the credibility of the detectives who testified that defendant her confession out loud. (Detective Cassidy, Trial Transcript R230-31; Detective Bilyk, Trial Transcript R321, R1005.)

Defendant is also mentally retarded. In 1995, defendant's verbal IQ was measured at 62, below the IQ of 70 that is used as the cutoff for retardation. (Brownstein Testimony, Tr. 853-54.) Defendant's verbal IQ was measured at 66 in 1997, still below the cutoff for mental retardation. (Brownstein Testimony, Tr. 890.) On another psychological test — the "trails test" — petitioner's score was less than that of a mildly retarded person. (Brownstein Testimony, Tr. 946.)

Defendant does not contend that her low intelligence and cognitive deficits *required* the suppression of her inculpatory statements. Our argument is that, because the psychotropic medication that was being administered to defendant before and during trial appears to have masked defendant's significant cognitive deficits, the trial court was unable to fairly consider defendant's mental capacity in adjudicating the voluntariness of her confession. Because mental capacity is a factor "which must be considered in the totality of the circumstances," *People v. Turner*, 56 Ill.2d 201, 205 (1973), the psychotropic medication made the adjudication of the voluntariness of the confession neither full nor fair. The medication had a similar impact on defendant's waiver of jury sentencing.

d. The Impact of Psychotropic Medication on the Waiver of Jury Sentencing

Before jury selection, the trial judge accepted defendant's waiver of her right to a jury determination of penalty. (Trial Record 455-61.) After defendant told the judge that she had not discussed with her attorneys the consequences of waiving a jury, the judge allowed counsel a brief period (two minutes) to explain this issue to defendant. (Trial Record 455.) The jury waiver colloquy, which does not include any admonishment that the jurors would have to decide unanimously that the death sentence should be imposed, would have been more detailed and thorough if the trial judge had been aware of defendant's low IQ.

The entirety of the jury waiver colloquy (Trial Transcript 456-61) is set out below:

The Court: Now, Miss Williams, your lawyer has advised me that you wish to give up your right to [457] trial by jury on the issue of eligibility for death penalty and if convicted, have this charge and the imposition of the death penalty it is found eligible for the death penalty, is that correct, ma'am?

Defendant: Yes.

The Court: You have had a conference with your lawyers where they have explained to you your right to a jury trial on the question of eligibility for the death penalty, should you be convicted of an offense, which is charge, and if found eligible for the death penalty, the imposition of the death penalty, should you be found eligible. I told you about the right to a jury trial in that case.

Defendant: Yes.

The Court: And your lawyers have told you what happens if you give up that right to a jury trial on the penalty?

Defendant: Yes.

The Court: Probably just as they have told you, I too have to tell you. First, you are going to proceed to trial on charges which, if you are found guilty as charged, you may then have, be [458] considered for eligibility for imposition of death.

Now, if you are found guilty as charged, the next question would be the issue of are you eligible for a penalty of death. Having been found guilty of that charge, you understand that?

Defendant: Uh-huh.

The Court: Ma'am, you have to say yes or no.

Defendant: Yes.

The Court: You have the right to trial by jury, a trial by jury on that issue. You understand that?

Defendant: Yes.

The Court: If you give up that right to trial by jury, then I would decide whether you are eligible for the 'enalty of death if you are found guilty as charged.

Defendant: Yes.

The Court: Furthermore, if found guilty of an offense for which the penalty of death may be imposed, you also have a right to trial by jury on the question of whether or not the death penalty should be imposed. You understand that?

Defendant: Uh-huh.

The Court: You have to say yes or no.

Defendant: [459] Yes, sir.

The Court: If you give up that right to trial by jury on the question of whether or not the death penalty will be, would be imposed, then I alone, I by myself, would decide whether you are to receive the death penalty or some other penalty. You understand that?

Defendant: Yes, sir.

The Court: Now, understanding that, do you wish a jury to consider the question of penalty or do you wish me to consider the question of penalty should you be found guilty of an offense for which you could possibly be eligible for the death penalty or who do you wish to consider that?

Defendant: You, sir.

The Court: Now, do you have a written jury waiver?

Defense Counsel Pantle: Yes, Judge, I have already prepared it for Miss Williams.

The Court: Has the State seen the copy of the proposed written waiver?

Prosecutor McInerney: Yes, you Honor, I have.

The Court: Now, Miss Williams, your lawyer has given me what appears to be your written waiver [460] of a right to a trial by jury on the question of sentence, should you be found eligible for the death penalty. I show you that document.

Do you understand, ma'am, by signing this document, you are giving up your right to trial by jury on a question of imposition of the death penalty should you be convicted of an offense for which the death penalty could be imposed?

Defendant: Yes.

The Court: Is that your signature?

Defendant: Yes.

The Court: Is that what you want?

Defendant: Yes.

The Court: Did anyone threaten you or your family in order to get you to give up your right to a trial by jury on the question of penalty?

Defendant: No, sir.

The Court: All right, let the record reflect that the court finds that the defendant understands her right to trial by jury on the issue of penalty should she been found eligible for a death penalty. While the defendant understands that, the defendant states she wishes to give up that right. As evidence of her intent to give up that right, she [461] asks leave to file her written waiver of that right.

The court will grant the defendant leave to file her written waiver, the defendant leave to file her written waiver of that right and the court further finds that defendant knowingly, voluntarily, intelligently wishes to give up

her right to trial by jury on the question of penalty should she been found guilty of an offense for which the death penalty may be imposed.

Well in advance of defendant's trial, this Court suggested to trial judges that "before accepting a jury waiver at a capital sentencing hearing, they would inform defendants that a sentencing jury would have to unanimously decide that the State had proved beyond a reasonable doubt the existence of a statutory aggravating factor and that are not sufficient mitigating factors established to preclude the death sentence." *People v. Albanese*, 104 Ill.2d 504, 536 (1984). Although there is no "fixed formula that must be recited by the court prior to receiving a defendant's valid jury waiver" for a capital sentencing hearing, *People v. Strickland*, 154 Ill.3d 489, 517 (1992), it is common, as in *Strickland*, for the trial judge to admonish the defendant that a single juror could prevent the imposition of a capital sentence. For example, the judge told the defendant in *Strickland* that "You realize again that if you or counsel were to, simply one jury [sic] not to pose [sic] the death penalty, that's sufficient to not impose?" 154 Ill.3d at 516. Similarly, in *People v. Smith*, 176 Ill.3d 217, 226 (1997), the admonishments included a reference to the need for unanimity in imposition of the death penalty.

It might well be that the terse admonishments in this case would be sufficient for a defendant of average intelligence who was not under the effects of psychotropic medication. Unknown to the trial judge, however, the defendant in this case is mentally retarded and, at the time she waived her right to jury sentencing, was receiving high therapeutic doses of psychotropic medication. Under these circumstances, the terse admonishments fail to show that defendant knowingly waived jury sentencing.

e. The Impact of Psychotropic Medication on the Sentencing Hearing

Defendant's contention that the psychotropic medication prevented her from cooperating with counsel is supported by defense counsel's failure to correct material errors in the pre-sentence investigation report and in counsel's failure to have presented crucial mitigation evidence.

Before beginning the sentencing hearing, the trial judge asked the Public Defender if there was "Anything you want to add in that Presentence Investigation in terms of additions or deletions or whatever? (Trial Transcript R1283.) The Public Defender responded with a simple "No." (Id.) The presentence investigation report, though, contains material misstatements of fact which the trial judge relied on in imposing the capital sentence.

According to the presentence investigation report, defendant graduated from "Forrestville Grade School" in 1967 and then attended "Forrestville High School," where she completed the eleventh grade before dropping out while pregnant. (Trial Record, C103.) The school records that were obtained in post-conviction proceedings do not show attendance at either "Forrestville Grade School" or "Forrestville High School."

On the contrary, the records show that defendant attended "Doolittle" for kindergarten and first grade (C392-93), then transferred to the "Einstein School," where she repeated the first grade and completed the second grade. (C393.) Defendant then transferred to "Carter D. Woodson School," where she attended school for two years before advancing (at age 11) to the fourth grade in September of 1964. (C391.) Defendant required two years to complete the 5th grade, and dropped out at age 14 shortly after beginning the sixth grade. (C391)

Defendant's poor school record is confirmed by her brother, John Williams, who submitted a sworn statement in post-conviction proceedings.¹¹ (C358-360.)

In addition to misstating defendant's education background, the pre-sentence investigation erroneously recites that defendant "never had any behavior or discipline problems" while attending school. (Trial Record C103.) Defendant was expelled from Woodson School in November of 1967 and was later expelled from a school for pregnant girls. (John Williams Affidavit, par. 3, C358.) John Williams also specifically averred that "Dorothy was a serious discipline problem at grammar school." (Williams Affidavit, par. 5, C359.) Williams stated that "My mother would have to go to school two or three times a week because Dorothy had gotten into trouble." (Id.)

The pre-sentence investigation report is also in error in stating that defendant "was involved in extra-curricular activities" while in school. (Trial Record C103.) The truth is that "Dorothy was never involved in extra-curricular activities in school." (John Williams Affidavit, par. 6, C359.)

The pre-sentence investigation report also erroneously recites that defendant has "good" mental health, and "has never seen a psychiatrist, psychologist,

11. The trial judge refused to consider this statement because it had not been sworn to before a notary. (R1097.) The statement was submitted in full compliance with 735 ILCS 5/1-109, which expressly permits verification by certification in the manner used in the sworn statement. See *infra* at 48-49.

or a mental health worker in an in-patient or an out-patient mental health program." (Trial Record C104.) This representation is at odds with the fact, documented in the Cermak prescription records, that starting on January 1, 1990 and continuing through September 13, 1990, defendant received sinequan, a psychotropic medication, at a dosage of 150 milligrams per day; the dosage was increased to 200 milligrams per day on September 14, 1990 and continued at that level through July 5, 1991. (Supplemental Record 348, par. 1.)

The pre-sentence investigation report asserts that defendant "has never used drugs, ever." (Trial Record C104.) This is manifestly in error: Defendant "had a serious drug addiction and used heroin and cocaine that started when she was fourteen years of age." (Williams Affidavit, par. 9, C359.)

It is plain that any competent defense counsel would have corrected these errors if defendant had called the errors to counsel's attention. It is also plain that competent defense counsel would have presented significant mitigating evidence if defendant's cognitive deficits had not been masked by the psychotropic medication.

f. The Record Establishes Denial of a Constitutionally Fair Trial

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, as well as article I, section 2, of the Illinois Constitution, guarantees a fair trial to a defendant in a criminal case. A "fair trial" is one where the "result is reliable." *People v. Franklin*, 135 Ill.3d 78, 103 (1990). A capital sentence imposed on the basis of improper or inaccurate information cannot be reliable.

This Court has repeatedly emphasized that "a high standard of procedural accuracy is required when determining whether the death penalty will be

imposed." *People v. Wooley*, 178 Ill.2d 175, 209 (1997). *People v. Hooper*, 172 Ill.2d 64, 76 (1996); *People v. Williams*, 161 Ill.2d 1, 77 (1994); *People v. Davis*, 97 Ill.2d 1, 26-27 (1983). This accuracy cannot be obtained when, as in this case, a capital sentence is imposed without knowledge that the defendant is under the influence of a therapeutic dosage of psychotropic medication. Defendant did not receive a fair trial because of the secret doping; a new trial, or in the alternative a new sentencing hearing, is required.

B. THE TRIAL COURT ERRED IN DISMISSING THE POST-CONVICTION PETITION WITHOUT AN EVIDENTIARY HEARING

1. The Court Reviews DeNovo the Dismissal of a Post-Conviction Petition

In *People v. Crane*, ___ Ill.2d ___ (No. 88454, January 19, 2001), this Court reaffirmed that it affords plenary review to a summary dismissal of a post-conviction petition:

We determined that neither standard was proper when reviewing the summary dismissal of a post-conviction proceeding, since at this stage no factual issues had to be decided by the trial court. *Coleman*, 183 Ill. 2d at 388. A court of review would have the same ability as the trial court in the first instance to assess the allegations and, thus, there would be little justification for giving the trial court's conclusions deference. *Coleman*, 183 Ill. 2d at 388-89. Accordingly, we held "the appropriate standard for this question is that of plenary review." *Coleman*, 183 Ill. 2d at 388-89."

Under this standard of review, the trial court's order dismissing the petition without an evidentiary hearing must be reversed.

2. Defendant Was Entitled to Review the Entirety of the Public Defender's File

The trial court unreasonably interfered with defendant's presentation of her post-conviction claims by refusing to grant defendant access to the entirety of the Public Defender's trial file.

Defendant was represented by the Public Defender at trial. In the course of post-conviction proceedings, defendant served a subpoena on the Public Defender seeking production of its litigation file. The trial judge, acting without any motion to quash, refused to permit defendant to examine the entirety of the Public Defender's file, but instead conducted an in camera inspection of the file and concluded that a portion of the file should not be produced to defendant. (R1081.) The trial judge stated that these documents "are not relative" to post-conviction proceedings. (Id.) Although the trial judge granted the request of defense counsel that a copy of the withheld documents be sealed and made a part of the record, (id.), the withheld documents have been lost and are not part of the trial court record.

Defendant was entitled to review the entirety of the Public Defender's file. Everything in that file is relevant to defendant's claim that the Public Defender did not provide the effective assistance of counsel. There was no basis for the trial judge to withhold any portion of the Public Defender's file.

3. A Statement Verified by Certification to 735 ILCS 5/1-109 Must Be Afforded the Same Weight as an Affidavit Sworn to before a Notary

Defendant supported her post-conviction petition with a statement from John Williams which was certified pursuant to section 1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109. The trial judge concluded (R1097) that the Post-Conviction Hearing Act superseded the provision of 735 ILCS 5/1-109 that a statement certified under penalty of perjury "may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath." The trial judge erred in refusing to consider the sworn statement.

725 ILCS 5/122-2 provides as follows:

Contents of Petition The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. *The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.* The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition. (emphasis supplied)

Although this Court does not appear to have considered the provisions of Section 1-109 of the Code of Civil Procedure, the Appellate Court had repeatedly held that this section should be construed as written. This statute avoids the need for notarization of a "law enforcement sworn report." *People v. Angelino*, 155 Ill.App.3d 1088, 1091 (1987); *People v. Angelino*, 160 Ill.App.3d 632, 637 (1987); *People v. Sargeant*, 165 Ill.App.3d 10, 13 (1987). Similarly, a sworn statement may be used in the same way as a notarized affidavit in opposing a motion for summary judgment. *Griffin v. Universal Cas. Co.*, 274 Ill.App.3d 1056, 1063 (1995).

Nothing in the Post-Conviction Hearing Act precludes the use of sworn statements that are signed in compliance with Section 1-109. The sworn statement of John Williams should be considered by this Court in its plenary review of the dismissal without an evidentiary hearing on the post-conviction petition.

4. Information Obtained in Violation of the Attorney-Client Privilege May Not Be Considered on a Motion to Dismiss

In granting the state's motion to dismiss, the trial judge relied on information that had been presented at the fitness hearing in violation of the attorney-client privilege, specifically that the public defender had conferred with

a psychologist "who advised the trial defense lawyer verbally that there was no evidence of mental illness or mental defect exhibited by petitioner at the time of trial." (R1105.)

One source of this information was double hearsay — the trial judge cited to testimony by Dr. Blumstein about what he had been told by trial counsel about the psychologist's evaluation, (R1105.) A second source of this information was provided by documents that had been before the trial judge in an in camera inspection of the Public Defender's file. In the course of this inspection, the trial judge found "the billing of Dr. Kovar" and "Dr. Kovar's notes of the interviews he had with the defendant petitioner here." (R1105.) None of this information should have been considered in ruling on the motion to dismiss.

In *People v. Knuckles*, 165 Ill.2d 125 (1995), this Court held "that the attorney-client privilege in Illinois protects communications between a defendant who raises an insanity defense and a psychiatrist employed by defense counsel to aid in the preparation of the defense, if the psychiatrist will not testify and the psychiatrist's notes and opinions will not be used in the formulation of the other defense experts' trial testimony." 165 Ill.2d at 140. Thereafter, in *People v. Burgess*, 176 Ill.2d 289 (1997), the Court held that in considering a defendant's fitness, a court may not weigh "privileged communications made by the defendant in the course of the attorney-client relationship." 176 Ill.3d at 305. This is precisely what the trial judge did in this case; this error should not be repeated by this Court in its plenary review of the petition.

5. Evidentiary Materials Other than those Submitted by the Petitioner May Not Be Considered on a Motion to Dismiss

In dismissing the post-conviction petition without an evidentiary hearing, the trial judge relied on testimony, including hearsay testimony, that had been presented at the fitness hearing. This was error: First, the fitness hearing had been conducted for the limited purpose of assessing defendant's fitness for post-conviction proceedings, (R704), as the trial judge made plain when he stated that the hearing had concerned "only questions of competency to proceed with the PC, post conviction petition." (R1035.) In ruling on the motion to dismiss, though, the trial judge viewed the fitness hearing for post-conviction proceedings as having adjudicated "petitioner's mental condition at the time of trial." (R1103.) Second, "[m]otions to dismiss are generally limited to consideration of the petitioner's allegations and the original trial record. *People v. Moore*, 189 Ill.2d 521, 532-33 (2000).

The trial judge based his decision to grant the State's motion to dismiss on the factual findings that

[P]etitioner had a basic formal education, was able to read; and, in addition, had a crafty intelligency above that of normal person's. (R1097.)

The trial judge based these findings on testimony at trial that defendant could read and write. (R1098-1102.) But defendant challenged this testimony as perjured in her post-conviction petition, where she relied on the testimony of Dr. Blumstein that defendant was "agraphic" or "functionally illiterate." (R909-10.) Defendant supported Dr. Blumstein's testimony with the sworn statement of John Williams that defendant "has always been unable to read" and that "[o]ur sister Peggy (who died in 1988) would help Dorothy with matters that required reading and writing."¹² (Williams Affidavit, par. 7, Supplemental

Record 331.). (Supplemental Record 330-32.) The factual dispute about defendant's ability to read and write could not be resolved on a motion to dismiss.

The trial judge based his finding of "formal education" on the pre-sentence report. (R1102.) The pre-sentence report is contradicted by school records (C390-93), which show that defendant dropped out of school in September, 1967, at age 14, when she was in the sixth grade. (C391.) The pre-sentence report is also contradicted by the sworn statement of John Williams (Supplemental Record 330-31):

3. Dorothy Williams never attended Forrestville Grade School. She attended Einstein and, when the family moved, to Woodson. She was expelled from Woodson in about November of 1967. She then attended an all girls school (Bousefield) at 46th and Drexel until 1969. Thereafter, she attended the school for pregnant girls (I think it was called Molly School) when she was pregnant with her daughter at 739 North Ada. She was expelled from that school and never returned to school.
4. Dorothy did not graduate from grammar school and did not attend high school.
5. Dorothy was a serious discipline problem at grammar school. My mother would have to go to school two or three times a week because Dorothy had gotten into trouble.
6. Dorothy was never involved in extra-curricular activities in

12. The death of defendant's older sister had been referred to at the sentencing hearing, where there was testimony that "[d]efendant's older sister, to whom defendant had been close, had died of bronchial pneumonia in January of 1989." *People v. Williams*, 164 Ill.2d at 26 There had not been any testimony, however, that placed the sister's death in context.

school.

7. Dorothy has always been unable to read. Our sister Peggy (who died in 1988) would help Dorothy with matters that required reading and writing.

Supplemental Record 330-31

We show below that the evidentiary materials submitted by defendant in support of her post-conviction petition required an evidentiary hearing.

6. An Evidentiary Hearing Is Required on the Allegations of the Post Conviction Petition

The record in this case establishes that the Public Defender, who represented defendant at trial, did not know that defendant was receiving psychotropic medication. On February 27, 1996, after defendant had filed her initial post-conviction petition, defendant's trial attorney communicated by mail with Dr. Michael Kovar, a psychologist whom she had retained during trial preparation. (C54.) In this letter, the Public Defender indicated that she had discussed her representation of defendant with an assistant State's Attorney and that she had accepted the representation of that prosecutor that defendant "was not taking psychotropic medicine during the pendency of her case." (Id.) This representation was incorrect: Starting on January 1, 1990 and continuing through September 13, 1990, defendant received sinequan, a psychotropic medication, at a dosage of 150 milligrams per day; the dosage was increased to 200 milligrams per day on September 14, 1990 and continued at that level through July 5, 1991. (Supplemental Record 348, par. 1.) Defendant waived a jury on March 12, 1991 (Trial Record C62), the jury returned its verdict on March 12, 1991 (Trial Record C100) and defendant was sentenced on April 18, 1991. (Trial Record C127.)

In *People v. Brandon*, 162 Ill.2d 650 (1994), the prosecution conceded that the failure of defense counsel to have requested a fitness hearing satisfied the "performance" prong of the ineffective assistance of counsel standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). Although this Court has overruled the holding of *Brandon* that failure to request a fitness hearing satisfies the "prejudice" prong of the *Strickland* standard, the Court appears to have left intact its holding about the "performance" prong. The Court should reaffirm that "the wide range of professional competent assistance," *Strickland v. Washington*, 466 U.S. at 690, requires that an attorney in a capital case be aware of whether or not his (or her) client is receiving psychotropic medication.

Defendant has come forward with enough evidence to warrant an evidentiary hearing on whether she was prejudiced by her counsel's failure to learn about the psychotropic medication. The medication apparently masked defendant's serious mental shortcomings and prevented her disabilities from being raised in connection with the voluntariness of her pre-trial admissions. See above at 40-42.

This Court has consistently permitted persons convicted of capital offenses an opportunity to establish at an evidentiary hearing a claim of the ineffective assistance of counsel at sentencing. The Court has relied on the rule that "the sentencing authority in a capital case may not refuse to consider, or be barred from considering, relevant mitigating evidence concerning the offender or the circumstances of the offense," and has mandated evidentiary hearing when the defendant has come forward with admissible evidence that "would have been relevant to the determination whether the defendant should be sentenced to death." *People v. Ruiz*, 132 Ill.2d 1, 25-26 (1989)

Following the remand in *Ruiz*, the trial court found that trial counsel had rendered ineffective assistance of counsel at sentencing, and this Court affirmed. 177 Ill.2d 268 (1997). Similarly, in *People v. Thompkins*, 161 Ill.2d 148 (1994), the Court held that an evidentiary hearing was required to assess the impact that letters from the defendants "parents, siblings, children and friends" would have had on decision to impose the death penalty. 161 Ill.2d at 167. Following an evidentiary hearing, this Court found that the defendant had not received the effective assistance of counsel at sentencing because "a wealth of mitigation was available to defense counsel in 1982, none of which was investigated or presented at defendant's capital sentencing hearing." *People v. Thompkins*, 191 Ill.2d 438, 473 (2000).

In this case, the Public Defender failed to correct several material misstatements of fact in the pre-sentence investigation report.

The pre-sentence investigation report erroneously recites that defendant has "good" mental health, and "has never seen a psychiatrist, psychologist, or a mental health worker in an in-patient or an out-patient mental health program." (Trial Record C104.) At the time of trial and sentencing, however, defendant was receiving psychotropic medication, for which she had seen a psychiatrist. The therapeutic dosage of the medication is at odds with "good" mental health.

The pre-sentence investigation report asserts that defendant "has never used drugs, ever." (Trial Record C104.) This is manifestly in error: Defendant "had a serious drug addiction and used heroin and cocaine that started when she was fourteen years of age." (Williams Affidavit, par. 9, C359.)

The pre-sentence investigation report also describes defendant as a good student, who completed the eleventh grade. before dropping out while pregnant. (Trial Record, C103.) School records, however, show that defendant dropped out of school at age 14 shortly after beginning the sixth grade. (C391)

Nothing in the pre-sentence report, or in the sentencing hearing, brought before the trial judge defendant's low IQ and cognitive deficits. In 1995, defendant's verbal IQ was measured at 62, below the IQ of 70 that is used as the cutoff for retardation. (Brownstein Testimony, Tr. 853-54.) Defendant's verbal IQ was measured at 66 in 1997, still below the cutoff for mental retardation. (Brownstein Testimony, Tr. 890.)

A capital sentencing proceeding should be made on the basis of all relevant information. Defendant came forward with sufficient evidence to raise questions about the reliability of the decision to impose a capital sentence; at the very least, an evidentiary hearing is required on defendant's claims of ineffective assistance of counsel.

V. CONCLUSION

It is therefore respectfully requested that the order dismissing the post-conviction petition be reversed and the case remanded with instructions to resentence defendant or, in the alternative, to hold an evidentiary hearing on defendant's claims of the ineffective assistance of counsel at trial and at sentencing.

December, 2000

Respectfully submitted,

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