No. 19-7864

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DEREK E. CROSBY — PETITIONER
(Your Name)

vs.

STATE OF ILLINOIS et.al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Appellate Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DEREK E. CROSBY pro-se
(Your Name)

MENARD CORRECTIONAL CENTER
(Address)

P.O.BOX 1000, Menard, IL 62259
(City, State, Zip Code)

618-826-5071
(Phone Number)

QUESTION(S) PRESENTED

Whether The Legislature Can Remove The Facts From The Jury That Increase The Statutory Maximum ?

Whether Defendant Was Properly Found Death Eligible Under Section 9-1(b)(6)(ii)(720 ILCS 9-1(b),(6)(ii)(west 1987). ?

Whether Section 9-1(d),(B),(C)(3)(Ill.Rev.Stat.1987,Chapter.38, par.9-1(d),(B),(C)(3)Violated Articles 11, section 1, Of The Illinois Constitution Separation Of Power ?

Whether Petitioner Can Be Sentence Under Another Statute Other Then For Which He Was Indicted ?

Whether Petitioner Extended Term Sentence's Are Unconstitutional ?

Whether Illinois Statute's Defined Three Distinct Offenses With A Choice Of Three Maximum Penalties ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Supreme Court of Illinois, Springfied, Illinois 62701-1721
2. Appellate Court of Illinois, First and Fourth Judicial District 160 North LaSalle St. Room 51400
3. The Honorable Judge Rickey Jones, Cook County Criminal Court 2600 S. California Ave. (Presiding Judge Denying Petition).
4. Order of State Appellate Court Denying Rehearing.

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7) Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1 (a) (1) (a).

7) Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1 (b), (c).

8) Section 9-1 (b) (6) (ii) (720 ILCS 5/9-1 (b) (6) (ii) West 1987).

8) Ill. Rev. Stat. 1987, ch. 38, par's 9-1 through (h).

10) Section 9-1 (d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987), ch. 38, par. 9-1 (d).

4.) Section 9-1 (d), (b), (c) (3) (720 ILCS 9-1 (d), (b), (c) (3) West 1987).

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13 People v. Montana(1942), 380 Ill. 596, 608, 44 N.E. 2d 596;

13 State v. Leonardis(1977), 73 N.J. 360 370, 375 A. 2d 607, 612;

13 State v. Leggeadrini(1977), 75 N.J.150, 158-59, 380 A. 2d 1112,1116;

13 Jackson v. United States(D.N.J.1971), 338 F. Supp.7, 15;

13 Sullivan v. Louisiana, 508 U.S. 275, 113 s.ct. 2078, 124L.Ed. 2d 182(1993).

13 Ulster City v. Allen, 442 U.S. 140, 156, 99 s.ct. 2213, 2224, 60 L.Ed. 2d 777 (1979).

13 Patterson v. New York, 432 U.S. 197, 206, 97 S.CT. 2319, 2324-2325, 52 L.Ed. 2d 281(1977).

13 In Re Winship, 397 U.S. 358, 364, 90 S. CT. 1068, 1072-1073, 25 L.Ed. 2d 368 (1970).

12.) People v. Fuller, 205 Ill. Ed. 308, 275 Ill. Dec. 755, 793, N.E. 2d 526 (2002).

13.) People v. Mack, 167 Ill. 2d 525, 538, 212 Ill. Dec. 955, 658 N.E. 26 436 (1995).

15.) O'Neal v. Vermont, 144 U.S. 323, 339-10, 12 S. Ct. 693, 619-700 (1892).

15.) Enmund v. Florida, 102 S. Ct. 2263 73 L. Ed. 2d 1140 (1982).

16.) Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

16.) Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 947 (1976).

17) Lockett v. Ohio, 438 U.S. 566 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

17) Bell v. Ohio, 483 U.S. 637, 98 S. Ct. 2977 57 L. Ed. 2d 1010 (1978).

17.) People v. Devin, 93 Ill. 2d 326 345-346 444 N.E. 2d 102 67 Ill. Dec. 63 (1982).

18.) Agran v. Taxi Co., 421 Ill. 413, 105 N.E. 2d 713 (1937).

19.) People v. Montana, 380 Ill. 596, 44 N.E. 2d 569 (1942).

19.) People v. Mallary, 195 Ill. 582, 63 N.E. 508, 511 (1902).

20.) Roberts v. Louisiana, 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977).

20.) Lockett v. Ohio, 438 U.S. 566 98 S. Ct. 29 S. Ct. 2954, 57 L. Ed. 2d 973, (1978).

20.) Bell v. Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 1010 (1975).

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22) United States v. Gaudin, 512 u.s. 506, 511 s.ct 2310, 132 L.Ed. 2d 444(1995).

22) Murphy v.Cuesta, Ray 7 co. (1942),381 Ill. 163. 166 67 45 N.E.2d 26.

22) People v. Manuel 94 Ill. Ed at 245, 68 Ill. Dec 506 446 N.E. 2d 240,

22) People v. Meyerowite (1974), 61 Ill. 2d 200, 335 N.E.Ed 1.

23) People v. Hernadez, 296 Ill. App. 3d 349 230 Ill. Dec 805, 694 N.E. 2d 1082 (1998).

23) People v. Bryant, 128 Ill. 2d 448 132 Ill. Dec 415, 539 NE 14 2d 122 (1989).

OTHERS - CONSTITUTION PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was June 13, 2019. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: July 23, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE VII, AMENDMENT V, OF THE U.S. CONSTITUTION-

NO person shell be held to answer for a Capital, or other wise infamous crime, unless on a presentment or indictment of a grand jury....nor be deprived of life, liberty, or property, without due process of law...

AMENDMENT VI, OF THE U.S CONSTITUTION:

In all criminaal prosecutions, the accused shall enjoy the right to a sppedy and public trial, by an impartial jury of t the state and district wherein the crime shall have been committed... and to be informed of the nature and cause of the accusation...

AMENDMENT XIV, OF THE U.S CONSTITUTION:

... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the united states; nor shall any state deprive any person of life, liberty, or prorerty without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE II, SECTION I, OF THE ILLINOIS CONSTITUTION:

The legislative, executive and judicial branches are separated No branch shall exercise power properly belonging to another.

ARTICLE I, SECTION XIII, OF THE ILLINOIS CONSTITUTION:

The right of trial by jury as heretofore enjoyed shall remain inviolate (1970).

ILLINOIS Rev Stat Ch 38, par 1005-8-1 (A) (1) (west1987)

ILLINOIS Rev Stat Ch 38, par 1005-8-1 (A) (1), (B) (west 1987)

Chapter 38 CRIMINAL LAW AND PROCEDURE, section 1005-5-3.2 (B) (2) (west 1987

Chapter 38 CRIMINAL LAW AND PROCEDURE, section 1005-8-2 (A) (2) (west 1987) (Extended Term)

STATEMENT OF THE CASE

The state charged the Defendand-Appellant, with first degree murder (Ill. Rev. Stat. 1987, ch. 38, par.9-1(A)(1), Attempt first degree murder (Ill. Rev. Stat. 1987. ch. 38, sec. 8-4, 9-1), Aggravated Battery (Ill. Rev. Stat. 1987. ch 38, sec. 12-4-A), and Armed Violence (ch. 38-33A-2/ I. In the charging instrument, the state specifically alleged that on August 1, 1987, without lawful justification and with intent to kill, the defendant caused the death by stabbing. The state sought imposition of the death penalty, and defendant was found death eligible by the judge for the first phase of the Capital sentencing hearing. Shortly thereafter the jury determined that mitigating factors existed precluding the imposition of a death sentence and the trial court sentence the defendant to Natural life and a concurrent extended term of 60 years based upon its finding that the murder was exceptionally brutal or heinous behavior (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1 (A)(1)(b), and 5/5-5-3.2(b)(2).

The defendant sights: (1) that he was not properly found eligible for the death penalty and that section 9-1(d),(B),(C)(3) of the murder statute violates articles 11, IV and VI of the Illinois Constitution (Ill.Const. 1970, art 11, IV, VI) because the legislature encroached upon the powers of the judiciary following a criminal conviction; (2) his life sentence violated the cruel and unusual punishment clause of the eighth amendment and due process and equal protection clauses of the fourteenth amendment; and (3) his sentence violates article 1, section 2 of the Illinois Constitution.

On August 15,2016, the circuit court denied defendant's petition. Shortly thereafter, the defendant was granted leave to file a late notice of appeal and counsel was appointed. Counsel then file a motion for leave to withdraw as appellate counsel, citing Pennsylvania v. Finley, 481 U.S.551 (1987), in which counsel concludes that no issues of merit exist warranting argument on appeal.

REASON FOR GRANTING THE PETITION

This case concerns the right to a jury trial in Capital Prosecution. In Illinois following a jury's adjudication of a defendants guilt of first degree murder, the trial judge, sitting alone, determines the presence or absence of an aggravating factor required by Illinois law for imposition of the Death Penalty. See section 5-8-1 (b) 720 ILCS 5/5-8-1 (A) (1), (b) (West 1987).

The petitioner contends that he was not properly found eligible for the death penalty, therefore he was not eligible for a sentence of natural life under section 5-8-1 (b) 720 ILCS 5/5-8-1 (A) (1) (b) (West 1987), which may be imposed when the court elects not to impose the death penalty on a death eligible defendant. The proper sentencing range for a defendant convicted of felony murder but acquitted of intentional or knowing murder is 20-to-40 years. Compare (Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-1 (A) (1) (A) prescribing 20-to-40 years) with (ch. 38, par, 5/5-8-1 (b), (c) authorizing natural life, but only upon additional elements to those required).

The trial court was foreclosed from making its own determination of defendants mental state because under the Federal Constitution (U.S. Constitution Amendments Six and Fourteen); if a defendant preferred a jury over the judge, he was to have it. Duncan v. Louisiana, 391 u.s. 145, 155-156, 88 s. ct. 1444, 20 L. Ed. 2d 491 (1968).

Although the evidence may have been sufficient to support a verdict of guilt of first degree murder it does not reveal whether the jury actually found defendant guilty of

intentional or knowing murder or only of felony murder.

Moreover, because the court was the finder of fact and not the jury the defendant was not properly found eligible for the death penalty under section 9-1 (b) (6) (ii) of the Criminal Code of 1961 and, therefore, for the alternative sentence of Natural Life pursuant to section 5-8-1 (A) (1) (b) (**730** ILCS 5/5-8-1 (a) (1) (b) (West 1987) of the Unified Code of Correction.

The present argument focuses on the fact that no death sentence may be imposed at all without a sentencing proceeding, and that such a proceeding cannot take place unless it is requested by the State, in which case it becomes mandatory on the trial court.

Illinois Statute creates a bifurcated procedure in which guilt and sentencing are determined in separate proceeding. (Ill. Rev. Stat. 1987, ch. 38, par's 9-1) through (h). The defendant if first tried under an indictment for murder. If he is found guilty, then the state may request the court to conduct a death penalty hearing before the judge or jury. If the sentencing authority finds beyond a reasonable doubt that any one of the aggravating factors exists, then it must unanimously find that there are no mitigating factors sufficient to preclude capital punishment in order to impose the death sentence. If the determination is made by the jury, it is binding on the judge. See Hopper v. Evans, 456 u.s. 605, 611, 102 s. ct. 2049, 72 L, Ed, 2d 367 (1982).

Under the Illinois statute, the prosecutor is given unlimited discretion in determining whether a sentencing hearing should be conducted. There is no authority in the statute for

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the court to call for such a hearing and there is no provision in the statute making such a hearing mandatory under any given set of facts.

In addition, under the language of the statute the court has no authority to decline the state's request for such a hearing. The law is clear in that sentencing is a judicial function, and the sentence to be imposed is for the court and the court alone. People v. Weeks (1976), 37 Ill. App. 3d 41, 44, 344 N.E. 2d 791, 793; People v. Jackson (1977), 69 Ill. 2d 252, 256, 13 Ill. Dec. 667, 371 N.E. 2d 602; People v. Bruner (1931), 343 Ill. 146, 157, 175 N.E. 400; Agran v. Checker Taxi Co. (1952), 412 Ill. 145, 149, 105 N.E. 2d 713; People v. Spegal (1955), 5 Ill. 2d 211, 219 125 N.E. 2d 468.

When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature. People v. Tenorio (1970), 3 Cal. 3d 89, 94, 89 Cal. Rptr. 249, 252, 473 P. 2d 993, 996) and any attempt by the legislature to confer upon the prosecutors authority to exercise any part of the sentencing function or the authority to limit, interfere with, or to condition the exercise of the judicial function, upon a request by the prosecutor is a violation of the doctrine of separation of power as contained in Article II, Section 1, of the Illinois Constitution of 1970.

There are other infirmities in the statute which petitioner considers significant. One of these involves the lack of notice to the defendant that a penalty hearing will be held. There is no requirement that the defendant, at any stage of the proceeding prior to or during the hearing to determine his guilt or innocence, be notified that the death penalty will be requested. If the accused is not notified prior to trial that the state will ultimately

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seek the death penalty, and if he is not advised of the aggravating factor or factors upon which the state will rely the accused and his counsel will be unable to make intelligent decisions with regard to his defense. Such fundamental questions as whether the accused should stand trial before a jury or the court, whether he should testify on his own behalf or whether he should, in fact, bargain for a plea of guilty, may all be dictated by the severity of the potential penalty.

A crucial part of Section 9-1 (d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch. 38, par. 9-1 (d) provides;

> Where requested by the state, the Court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c).

This it is argued, constitutes a violation of Article II, Section 1, of the Illinois Constitution of 1970, which provides;

> The legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another.

Article VI, Section 1, of the Illinois Constitution provides;

> The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts.

However, section 9-1 (d), (B), (c), (3) provides;

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The proceeding shall be conducted:

1.) before the jury that determined the defendant's guilt; or

2.) before a jury impaneled for the proceeding if;

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt, or

3. before the court alone if the defendant waives a jury for the separate proceeding.

A Judge "shall" specify reason for his or her sentence determination is constitutional when "shall" is construed in that context to be permissive rather than mandatory but, by contrast, if "shall" is interpreted to reflect a mandatory intent, the provision would unconstitutionally infringe upon the inherent separation of power. People v. Davis 93 Ill. 2d 155, 161-162 (1982); see also People v. English, 287 Ill. App. 3d 1043 (1997).

1. People v. Scott (1943), 383 Ill. 122, 48 N.E. 2d 530, the court held that a statute providing that a criminal defendant could waive a jury for trial violated the separation of power doctrine because the statute attempted to specify how the judicial power should be exercised in a given circumstance. (383 Ill. 122, 126, 48 N.E. 2d 530). See also People v. Spegal (1955), 5 Ill. 2d 211, 219-20, 125 N.E. 2d 468; People v. Crawford Distributing Co. (1972), 53 Ill. 2d 332, 338, 291 N.E. 2d 648; People v. Davis (1982), 93 Ill. 2d 155, 66 Ill. Dec. 294, 442 N.E. 2d 885; People v. Callopy (1934), 358 Ill. 11, 14, 192 N. E.

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634; People v. Brumfield (1977), 51 Ill. App. 3d 643, 9 Ill. Dec. 619, 355 N.E. 2d 1130. See also Duncan v. Louisiana , 391 U.S. 145, 155 - 156, 88 s. ct. 1444, 20 L. Ed. 491 (1968).

The normal sentencing procedures are the same regardless of the rationale behind the sentence, and no where in these procedures, aside from presenting the evidence in aggravation, is the prosecutor given authority over what sentence shall be imposed for a specific crime. Even in plea bargaining, where the defendant agrees to plead guilty upon the recommendation of a certain sentence from the prosecutor, the judge is not bound by the prosecutors agreement. The sentence to be imposed is for the court. People v. Weeks (1976), 37 Ill. App. 3d 41, 44, 344 N.E. 2d 791, 793, see also state v. Leonardis (1977), 73 N.J. 360, 370, 375 A. 2d 607, 612; State v. Leffeadrini (1977), 75 N.J. 150, 158 - 59, 380 A. 2d 1112, 1116; Armstrong v. People, 37 Ill. 459, 462 - 63 (1865). In Armstrong, the court noted that, at common law, a verdict was not valid unless it stated that the defendant was found guilty "as charged in the Indictment".

In People v. Fuller, 205 Ill. Ed. 308, 275 Ill. Dec. 755, 793, N.E. 2d 526 (2002) (the death penalty was vacated where the sentencing jury was never instructed regarding the necessary (section 9-1 (b) (6) (ii) mental state requirements and a general finding of eligibility was returned; People v. Mack, 167 Ill. 2d 525, 538, 212 Ill. Dec. 955, 658 N.E. 2d 436 (1995) (death penalty vacated where verdict from attempted to set forth the

(section 9-1 (b) (6) statutory aggravating factor, but failed to do so completely and omitted an essential element).

The power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct is vested in the legislature. However, the imposition of the sentence within the limits prescribed by the legislature is purely a judicial function People v. Montana (1942), 380 Ill. 596, 608, 44 N.E. 2d 596; State v. Leonardis (1977). 73 N.J. 360, 370, 375 A. 2d 607, 612; State v. Leggeadrini (1977). 75 N.J. 150, 158-59, 380 A. 2d 1112, 1116; Jackson v. United States (D.N.J. 1971), 338 F. Supp. 7,15; see also Sullivan v. Louisiana, 508 U.S. 275, 113 s. ct. 2078, 124 L. Ed. 2d 182 (1993); Court of Ulster Cty. v. Allen, 442 U.S. 140, 156, 99 s. ct. 2213, 2224, 60 L. Ed. 2d 777 (1979); Patterson v. New York, 432 U.S. 197, 206, 97 s. ct. 2319, 2324-2325, 53 L. Ed. 2d 281 (1977); In re: Winship, 397 U.S. 358, 364, 90 s. ct. 1068, 1072-1073, 25 L. Ed. 2d 368 (1970).

The Petitioner contends that section 9-1 (d) of the criminal code of 1961 (Ill. Rev. Stat. 1987), ch. 38, par. 9-1 (d) is unconstitutional and no valid sentencing hearing could be held there under. In Summary, that section confers upon the prosecutor, the executive branch of our government, the authority to exercise, interfere with and limit the sentencing function (a judicial power) in violation of Article II, section 1, of the Illinois Constitution.

One of the questions presented in Jones v. United States, was whether the statute "defined three distinct offenses or a single crime with a choice of three maximum penalties. See Jones, 530 U.S. 227, 119 s. ct. 1215, 143 L. Ed. 2d 311.

Under the Constitution of the United States the trial court was foreclosed from making it's own determination of defendants mental state because if a defendant preferred a jury over the judge, he was to have it. Duncan v. Louisiana, 391 U.S. 145, 155-156, 88 s. ct. 1444, 20 L. Ed. 2d 491 (1968), (U.S. Const. Amendment's Fifth, Sixth, and Fourteenth). See also Sullivan v. Louisana, supra 508 U.S., at 277, 113 s. ct., at 2080 (The right to jury trial) includes, of course, as it's most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty"; Patterson, supra, 432 U.S., at 204, 97 s. ct., at 2324; Winship, supra, 397 U.S., at 361, 363, 90 s. ct., at 1071, 1072.

14.

A SENTENCE OF LIFE IMPRISONMENT FIXED UPON THIS PARTICULAR DEFENDANT VIOLATES THE CRUEL AND UNUSUAL PUNIHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The cruel and unusual punishment clause of the eighth amendment is directed in part "against all punishments which by their excessive length and severity are greatly disproportionate to the offense charged", O'Neil v. Vermont, 144 U.S. 323, 339-10, 12 s. ct. 693, (619-700) (1892).

In Enmund v. Florida, 102 s. ct. 2263 73 L. Ed. 2d 1140 (1982), the Supreme Court held that the death penalty constituted cruel and unusual punishment in that the prosecution failed to prove the defendant had intended to kill. The court noted that defendant himself did not intend to kill the decedents, nor did he anticipate the actual killing. In the absence of these aggravating factors, the court concluded that a sentence of death constituted cruel and unusual punishment. Furthermore, the court emphasized that in the past quarter of a century individuals convicted of felony murder who were sentenced to death, killed or attempted to kill with intent.

The Supreme Court has repeatedly emphasized that when sentencing is imposed, it must focus on the unique circumstances of each case. In Woodson v. North Carolina, 428 u.s. 280, 304, 96 s. ct. 2978, 49 L. Ed. 2d 944 (1976), the Supreme Court struck down the mandatory death penalty fixed upon Woodson. The court stated;

> A process that accords on significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment the possibility of compassionate mitigating factors stemming from the diverse frailties of mankind. It treats all persons of a designated offense not as uniquely individual human beings, but as members of a faceless undifferentiated mass to be subjected to blind infliction of the penalty of death.

Similarly, in Stanislaus Roberts v. Louisiana, 428 u.s. 325, 96 s. ct. 3001, 49 L. Ed. 947 (1976), defendant was convicted of first degree murder for a killing which occurred during an armed robbery. He was sentenced to death under Louisiana mandatory death sentencing statute. The Supreme Court reversed the Louisiana Supreme Court decision, pointing out mandatory death penalty statutes were unconstitutional in that they failed to focus on the circumstances of the particular offenses and the character and propensities of the offender. See Roberts v. Louisiana, supre no 5. Also see Lockett

v. Ohio, 438 u.s. 566 98 s. ct. 2954, 57 L. Ed. 2d 973 (1978); where the supreme court stated that individual consideration is a constitutional requirement in imposing the maximum sentence. Bell v. Ohio, 438 u.s. 637, 98 s. ct. 2977 57 L. Ed. 2d 1010 (1978).

Mandatory life sentencing statutes are no less constitutionally infirm then statutes mandating the penalty of death as in Woodson, Roberts, and Enmund, to require a life imprisonment sentence or the death penalty, would be to subject defendant to a legislative scheme that permits inflicting the highest possible term of incarceration even if the defendant is found not to have intended to kill. The scheme also precludes consideration of substantial mitigating factors as to defendants character and record under the applicable Illinois statutes, there is no possibility of mitigating the legislatures mandated sentence. The court must be able to consider all mitigating factors as a constitutional indispensable part of the process of imposing any sentence - especially one so severe as imprisonment for natural life. See People v. Devin, 93 Ill. 2d 326 345-346, 444 N.E. 2d 102 67 Ill. Dec 63 (1982).

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Chapter 38, 1005-8-1 (c) of the Illinois Revised Statutes are a usurpation of Judicial Authority and Thereby violates Article 2, sec. 1 of the Illinois Constitution. (Illinois Const. 1970, art. 2, sec. 1).

Prior to the adoption of the United States Constitution, courts exercised complete power in control of their procedure with the adoption of federal statutes regulating judicial proceedings, the judiciary became subject to legislative restraints. The legislature usurped a part of the judicial rulemaking function. See Pound Regulation of judicial procedure by rules of court 10 Ill. L. Rev. 1963.

There must be a limit to which the legislative rules affecting the judiciary can be imposed. The separation of the power of the executive, legislative and judicial branches of government is a basic precept of both the federal and state constitution. It is the undisputed duty of the court to protect their own judicial power from encroachment by legislative enactments and thus preserve an independent judicial system. See Agran v. Taxi Co. 421 Ill. 413, 105 N.E. 2d 713 1937.

In the present case because defendant, has been found guilty of the murder of more than one individual but not sentenced to death, ch. 38 1005-8-1 (c) of the Illinois Revised Statutes requires that the court sentences the defendant to imprisonment for natural life.

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These legislative provisions impose the sentence. It is the sentence of the legislature which is being imposed, thus, usurping judicial discretion.

In all other types of criminal cases the court uses it's discretion to fix sentencing within legislative restriction. In the case at bar, these parameters are so narrow that the court is divested of any real discretion in sentencing. Only maximum sentences can be ordered thus, in ordering such specific sentencing's, the legislature I delegating judicial power to it's own branch of government.

That, In People v. Montana, 380 Ill. 596, 44 N.E. 2d 569 (1942) the Illinois Supreme Court reviewed certain amendments to the Illinois Parole Act which vested the power to change the maximum and minimum limit of duration of imprisonment in the Division of Corrections. In declaring the regulations unconstitutional, the court referred to People v. Mallary, 195 Ill. 582, 63 N.E. 508, 511 (1902).

> In the administration of criminal law of the state there is no person outside the court to authorize the punishment of a person for the crime of confinement in the penitentiary and the constitution expressly inhibits any person or collection of persons of one department of government from exercising any power properly belonging to either of the other.

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In the instance, case, ch.38, 1005, 8-1 (c) strips from the judiciary all discretion in imposing sentence. It is the legislature which has fixed punishment in violation of the constitutional mandates separating the branches of government and prohibiting either branch from exercising power belonging to the other. That in Roberts v. Louisiana, 431 U.S. 633, 97 s. ct. 1993, 52 L. Ed. 2d 637 (1977) the defendant was found guilty of first degree murder for killing a police officer. The defendant was sentenced to death under a Louisiana Statute making the death penalty mandatory for intentionally killing a fireman or a peace officer. The United States Supreme Court reversed the Louisiana Supreme Court judgment in so far as it upheld the death penalty. The court concluded that particular statutes did not allow consideration of mitigating factors before imposing the mandatory legislative sentence.

In cases such as Roberts, where the death penalty is considered, the trial court has the discretion to mitigate the sentence. 428 U.S. 325, 96 s. ct. 3001 49 L. Ed. 974 (1976); Lockett v. Ohio, 438 U.S. 566 98 s. ct. 29 s. ct. 2954, 57 L. Ed. 2d 973, (1978); Bell v. Ohio, 438 U.S. 637, 98 s. ct. 2977, 57 L. Ed. 2d 1010 (1975). But in the case before the court here, where a maximum term of imprisonment is mandated, the court is divested of discretion to mitigate the sentence and must obey the legislative order and impose the prescribed sentence. Examination of mitigating factors is meaningless, since ch. 38, 1005-8-1 (c) orders the court to sentence the defendant to a term of imprisonment for natural life. By stripping the judiciary of discretion in imposing sentence, the statute usurps judicial authority thereby violating Article 2, section 1, of the Illinois Constitution (Ill. Const. 1970, Article 2, section 1).

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Chapter 38, Paragraph 1005, section 8-1 (c) of the Illinois Revised Statutes is in Direct Conflict with sentencing statutes, Illinois Revised Statutes Chapter 38, Paragraph 1005, section 3-2 (a) (1), et. Seg., Chapter 38, Paragraph 1005, section 4-1 (a) and (b), Chapter 38, Paragraph 1-2 (c) and (d), violates Article 1, section 2, of the Illinois constitution.

The sentencing statutes of the Unified Criminal Code of Illinois state that a defendant shall not be sentenced for a felony before a pre-sentence investigation report is considered by the court. Ill. Rev. Stat. Ch. 38, 1005, 3-1.

If the statute is strictly interpreted it ignores the constitutional mandate of Article 1, section 2, of the Illinois Constitution that penalties are to be determined with an objective of restoring the offender to useful citizenship. Finally, the mandatory sentencing statute disregards the statutory requirement of Ch. 38, 1-2 (c) and (d) which state respectively the penalties are to be prescribed proportionally to the seriousness of the offense and permit recognition of differences in rehabilitation possibilities among individual offenders; and that the court is to be prevented from arbitrary or oppressive treatment of persons accused or convicted of offenses.

The Constitutional Safeguards that figure in the courts analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment. These are safeguards going to the formality of notice, the identity of the fact finder, and the burden of proof. 526 U.S., at 243, n. 6, 119 s. ct. 1215

It has long been setteled that the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. United States v. Gaudin, 512 U.S. 506 511 s. ct. 2310, 132 L.Ed. 2d 444 1995.

It is equally clear that such facts define the Constitutional limits on the enforcement of legislative and executive decision, Pure oil Co. v. City of Northlake, 1956, 10 Ill. 2d 241, 245, 140 N.E. 2d 298(purpose of due process clause is to protect all citizens in there personal and property rights from arbitrary action by any person or authority); Murphy v. Cuesta, Ray 7 co. (1942), 381 Ill. 153, 166 67 45 N.E. 2d 26 (due process requires that each citizen have protection of his day in court and the benefit of the general law).) Along with these consideration, We note that a defendant cannot be prosecuted under an Unconstitutional Act. Manuel, 94 Ill. Ed at 245 68 Ill. Dec. 506 446 N.E. 2d 240, Citing People v. Meyerowite (1974), 61 Ill. 2d 200, 335 N.E. Ed 1.

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It is Unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

The Defendaht Petitioner contends that he has been subject to substantial constitutional violations. People v. Hernadez, 296 Ill. App 3d 349, 230 Ill. Dec 805, 694 N.E. 2d 1082 (1982). Morevore a constitutional challenge to a state can be raised at any time. People v. Bryant, 128 Ill. 2d 448, 132 Ill. Dec. 415, 539 N.E. 14 2d 122 1989.

In Concluding the Petitioner asserts that his Indictment did not charge him with the essential elements or aggravating factors as held within subsection 5/5-8-2(A)(2)(Ill.Rev. Stat. 1987, ch.38, par. 5-8-2(A)(2).

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