No. 90256

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

MAURICE DUNN,

PETITIONER,

-vs-

GUY PIERCE, Warden,
Pinckneyville Correctional Center,

RESPONDENT.

BRIEF AND ARGUMENT FOR THE PETITIONER

Ralph Ruebner*
Professor of Law and
Executive Director of the
Criminal Justice Clinic of the
The John Marshall Law School,
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-2384

Attorney for the Petitioner
pro bono

*Assisted by:
Rachel L. Baker
and
Patrick R. Fagan,
students at
The John Marshall Law School

ORAL ARGUMENT REQUESTED

FILED

FEB 6 - 2001

SUPREME COURT CLERK

POINTS AND AUTHORITIES

I.

THE EXTENDED SENTENCE PROVISION OF THE ILLINOIS SENTENCING LAW, 730 ILCS 5/5-8-2(a)(2) (1973) IS UNCONSTITUTIONAL ON ITS FACE. ALTERNATIVELY, IT WAS UNCONSTITUTIONALLY APPLIED IN CONJUNCTION WITH 730 ILCS 5/5-5-3.2(b)(2) (1973) TO EXTEND MAURICE DUNN'S SENTENCE FOR THE CRIME OF RAPE BEYOND THE STATUTORY MAXIMUM OF THIRTY YEARS BY TEN YEARS. 10

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 11, 12

STATUTES

720 ILCS 5/12-14(d)(1) (1979) 10
730 ILCS 5/5-5-3.2(b)(2) (1973) 10
730 ILCS 5/5-8-1(a)(3) (1973) 10
730 ILCS 5/5-8-2(a)(2) (1973) 10

UNITED STATES CONSTITUTION

U.S. Const. amend XIV 10
U.S. Const. amend. XI 10

ILLINOIS CONSTITUTION

Il. Const. art. I, § 13 (1970) 10

II.

THE EXTENDED TERM PROVISIONS UNDER WHICH THE PETITIONER WAS SENTENCED ARE UNCONSTITUTIONAL AND VOID *AB INITIO* 13

CASES

Bonham's Case, 77 Engl. Rep. 638 (C. P. 1610) 14
People ex rel. Barrett et al. v. Sbarbaro et al., 386 Ill. 581, 54 N.E.2d 559 (1944) 15
People ex rel. Daley v. Joyce, 126 Ill.2d 209, 533 N.E.2d 873 (1988) 16
People v. Gersch, 135 Ill.2d 384, 553 N.E.2d 281 (1990) 13, 15, 16, 17
People v. Manuel, 94 Ill.2d 242, 446 N.E.2d 240 (1983) 15
People v., Zeisler, 125 Ill.2d 42, 531 N.E.2d 24 (1988) 13

STATUTES

5 ILCS 50/1 (2000) 13
730 ILCS 5/5-5-3.2(b)(2) 15
730 ILCS 5/5-8-2(a)(2) 15

OTHER AUTHORITIES

Field, O., *The Effect of an Unconstitutional Statute* 3 (1935) 14
Tribe, L., *American Constitutional Law* 29-30 (2d ed. 1988) 13

ILLINOIS CONSTITUTION

Il. Const. art. I, § 13 (1970)... 15

III.

ALTERNATIVELY, THIS COURT SHOULD APPLY *APPRENDI* RETROACTIVELY BECAUSE THE RATIONALE OF *APPRENDI* REQUIRES FULL AND COMPLETE RETROACTIVITY.. 18

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 18, 19, 20
Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). 19, 20

IV.

ALTERNATIVELY, EVEN IF *APPRENDI* CREATED A NEW CONSTITUTIONAL RULE OF LAW THIS COURT SHOULD NEVERTHELESS APPLY IT RETROACTIVELY BECAUSE ITS SAFEGUARDS ARE ESSENTIAL TO THE FAIRNESS OF THE SENTENCING PROCESS AND THE ACCURACY OF THE SENTENCE.. 21

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 21, 23, 24
In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 22
Ivan v. City of New York, 407 U.S. 203, 92 S.Ct. 1951 (1972)............................ 22
People v. Beachem, ____ Ill.App.3d ____, _____ N.E.2d ____, 2000 WL 1677715 (1st Dist. 2000)... 23, 24
People v. Flowers, 138 Ill.2d 218, 561 N.E.2d 674 (1990) 22
Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822 (1990) 23, 25
Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) 21, 22, 23, 25
United States v. Murphy, 109 F.Supp.2d 1059 (D. Minn. 2000).................. 24, 25

V.

APPRENDI **RELIEF MUST EXTEND TO AN INCARCERATED INDIVIDUAL WHOSE MANDATORY SUPERVISED RELEASE HAD BEEN REVOKED. 26**

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 26
Barney v. Prisoner Review Board, 184 Ill.2d 428, 704 N.E.2d 350 (1998) 27
People ex rel. Scott v. Israel, 66 Ill.2d 190, 361 N.E.2d 1108 (1977).................26

STATUTES

730 ILCS 5/3-3-9(a)(3)(i)(B)...27
730 ILCS 5/5-8-1(d)(1)...27

NATURE OF THE CASE

On January 2, 2001, this Honorable Court granted Maurice Dunn leave to file an original petition for a writ *of habeas corpus*. He challenges his incarceration under the authority of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the Constitution of the United States, and the Illinois Constitution.

ISSUES PRESENTED FOR REVIEW

1. Whether the extended sentence provision of the Illinois sentencing law, 730 ILCS 5/5-8-2(a)(2) (1973), is unconstitutional on its face?

2. Whether 730 ILCS 5/5-8-2(a)(2) (1973) was unconstitutionally applied in conjunction with 730 ILCS 5/5-5-3.2(b)(2) (1973) to extend Maurice Dunn's sentence for the crime of rape beyond the statutory maximum of thirty years by ten years.

3. Whether the extended term provisions under which the petitioner was sentenced are void *ab initio*?

4. Whether this Court should apply *Apprendi* retroactively when the rationale of *Apprendi* requires full and complete retroactivity?

5. Whether this Court should apply *Apprendi* retroactively when its safeguards are essential to the fairness of the sentencing process and the accuracy of the sentence?

6. Whether this Court should extend *Apprendi* relief to an incarcerated individual whose mandatory supervised release had been revoked and to other individuals who have no recourse to Illinois courts or legal remedies other than this State's writ of *habeas corpus*?

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court pursuant to Article VI, Section 4(a) of the *Constitution of the State of Illinois* and Supreme Court Rule 381.

In imposing an unconstitutional extended term, the sentencer "exceeded the limit of its jurisdiction, either as to the matter, place, sum or person." 735 ILCS 5/10-124(1). He is entitled to his immediate and unqualified release, since his total period of incarceration has exceeded the maximum allowable time for serving an unextended term of incarceration for the crime of rape. That portion of his sentence that goes beyond the statutory maximum is void. *People v. Arna*, 168 Ill.2d 107, 658 N.E.2d 445 (1995). Petitioner has the right to challenge the constitutionality of his sentence at this time. *People v. Zeisler*, 125 Ill.2d 42, 46, 531 N.E.2d 24, 26 (1988). The *Apprendi* decision demonstrates that Petitioner's "imprisonment [is] not authorized by law:.." 735 ILCS 5/10-124(4). Moreover, the *Apprendi* decision is an intervening event which has taken place "since the original date of sentencing." 735 ILCS 5/10-124(2). Since Petitioner has already served the maximum time allowable under an unextended term for rape, he is entitled to his immediate release through *habeas corpus*. *Cf. People ex rel. Barrett, et al. vs. Sbarbaro, et al.*, 386 Ill. 581, 54 N.E.2d 559 (1944). Petitioner is not bringing a collateral attack on his conviction, nor is he seeking a review of the judgment of conviction. He merely challenges his continued confinement under an unconstitutional sentencing scheme. A sentence that violates *Apprendi*

is not authorized as a matter of law and is void. This Court has stated that "[a] void judgment is one entered by a court without jurisdiction of the parties or the subject matter or that lacks 'the inherent power to make or enter the particular order involved.'" *People v. Wade*, 116 Ill.2d 1, 5, 506 N.E.2d 954, 955 (1987). That portion of Maurice Dunn's sentence which extended his incarceration beyond the statutory maximum is void, and therefore his claim is cognizable in a *habeas corpus* proceeding before this Court. *People v. Murphy*, 202 Ill. 493, 498, 67 N.E. 226, 227-28 (1903); *Barney v. Prisoner Review Board*, 184 Ill.2d 428, 431, 704 N.E.2d 350, 351 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

Amendment XIV, Section 1:

"...nor shall any State deprive any person of...liberty...without due process of law..."

Constitution of the State of Illinois (1970)

Article I, Section 13:

"The right of trial by jury as heretofore enjoyed shall remain inviolate."

STATUTES INVOLVED

730 ILCS 5/5-8-2(a)(2) (1973)

§5-8-2. Extended Term. (a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of section 5-5-3.2 were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:

* * *

(2) for a Class X felony, a term shall be not less than 30 years and not more than 60 years;

730 ILCS 5/5-5-3.2(b)(2) (1973)

§5-5-3.2 Factors in Aggravation

* * *

(b) The following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender:

* * *

(2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty;...

STATEMENT OF FACTS

The Petitioner, Maurice Dunn, is currently a prisoner in the Illinois Department of Corrections, Register Number N-04174. The Respondent is Guy Pierce, the Warden at Pinckneyville Correctional Center. Petitioner is in custody of the Illinois Department of Corrections pursuant to a commitment order entered by the Honorable Lawrence I. Genesen, Judge of the Circuit Court of Cook County on October 10, 1980, sentencing the Petitioner to serve a term of forty years for the offense of rape and two counts of aggravated battery. See Appendix A, the Commitment Order and Appendix B, the Notice of Appeal. The Appellate Court, *People v. Dunn*, No. 1-80-2898 (1983) (unpublished Rule 23 order, June 29, 1983), affirmed but vacated one count of aggravated battery. Appendix, Exhibit C.

Maurice Dunn was sentenced to an extended term of forty years pursuant to 730 ILCS 5/5-8-2(a)(2) and 730 ILCS 5/5-5-3.2(b)(2) (1973) because the sentencing judge had determined that the circumstances of the crime involved exceptional brutal or heinous behavior indicative of wanton cruelty. Appendix D, sentencing record, page 339. A more complete explanation of the sentence appears in Argument I of this brief.

Maurice Dunn had been in custody from September 5, 1979 to June 10, 1999, when he was released on mandatory supervised release. He was returned to custody on February 4, 2000, when he was arrested in DuPage County on two misdemeanor charges. He has been in custody since that arrest. A

misdemeanor complaint, OOCM681, two counts, charged Maurice Dunn with possession of drug paraphernalia and possession of more than ten grams but less than thirty grams of cannabis on February 4, 2000. His mandatory supervised release was revoked on April 27, 2000. On June 30, 2000, Maurice Dunn pleaded guilty to possession of cannabis and was fined $350.00. The other count was dismissed. Appendix E, Motion to Release Petitioner on Bond. Prior to his release on mandatory supervised release, Maurice Dunn had served nineteen years, nine months and five days of his sentence. Appendix F, Verified Petition for a Writ of *Habeas Corpus*.

Petitioner had filed a petition for a *writ* of *habeas corpus* in the Circuit Court of Cook County on August 25, 2000. That petition was dismissed by the Honorable Dennis A. Dernbach on September 15, 2000. Appendix G, Memorandum and Ruling.

STANDARD OF REVIEW

This case is before this Honorable Court on a petition for a writ *of habeas corpus* invoking this Court's original jurisdiction. Petitioner challenges the constitutionality of Illinois statutory provisions that allow a judge to impose an extended term without the benefit of a jury determination of the sentencing factor and without the requirement of proof beyond a reasonable doubt of that aggravating factor. "The constitutionality of a statute is a question of law which [this Court] review[s] *de novo*." *People v. Fisher*, 184 Ill.2d 441, 448, 705 N.E.2d 67, 71-72 (1998).

ARGUMENT

I.

THE EXTENDED SENTENCE PROVISION OF THE ILLINOIS SENTENCING LAW, 730 ILCS 5/5-8-2(a)(2) (1973) IS UNCONSTITUTIONAL ON ITS FACE. ALTERNATIVELY, IT WAS UNCONSTITUTIONALLY APPLIED IN CONJUNCTION WITH 730 ILCS 5/5-5-3.2(b)(2) (1973) TO EXTEND MAURICE DUNN'S SENTENCE FOR THE CRIME OF RAPE BEYOND THE STATUTORY MAXIMUM OF THIRTY YEARS BY TEN YEARS.

Illinois through its statutory sentencing scheme authorizes the imposition of additional years of imprisonment that extend the sentence beyond the statutory maximum on a finding of an aggravating factor by the sentencing judge. 730 ILCS 5/5-8-2(a)(2) (1973). One such aggravating factor is "that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty..." 730 ILCS 5/5-5-3.2(b)(2) (1973). Petitioner maintains that 730 ILCS 5/5-8-2(a)(2) is unconstitutional on its face. Alternatively, it was unconstitutionally applied in conjunction with 730 ILCS 5/5-5-3.2(b)(2) (1973) to extend Maurice Dunn's sentence for the crime of rape beyond the statutory maximum of thirty years by ten years in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 13 of the Constitution of the State of Illinois (1970).

The statutory maximum sentence for rape in 1979, a class X offense, was thirty years. 720 ILCS 5/12-14(d)(1); 730 ILCS 5/5-8-1(a)(3) (1973). The sentencing judge in this case imposed an additional term of ten years without the benefit of a jury determination of the aggravating factor or proof beyond a reasonable doubt. This is what the judge said in imposing an extended term:

> The State is asking for the extended term. In order for me to find that there's an extended term applicable I have to find as there is two factors in aggravation that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. I find the recollection of the events as to be one of complete horror. If this is not exceptionally brutal or heinous behavior indicative of wanton cruelty, I don't know what is. I will so find. Therefore, there will be a finding of extended term. And accordingly the defendant will be sentenced to a term of 40 years in the Department of Corrections.

Appendix D, sentencing record, page 339.

In considering "facts in aggravation", the judge also

> "believe[d] there was serious physical harm. The scratches, the bruises, the victim's face being pushed in the mud. She was struck and then thrown about in a violent manner indicated physical harm. To say nothing about the emotional harm which I suppose will never be fully undone, not even to herself but to her family and friends and possibly to an entire community. And two...what he did actually threatened her life. To have struck her and throw her back in this fashion certainly might have resulted in a permanent injury or death.

Appendix D, sentencing record, page 337.

This sentencing procedure offended the right of Maurice Dunn to due process of law and his right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Illinois Constitution.

In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the United States Supreme Court declared unequivocally that the United States Constitution limits

the power of a state to impose an extended term of incarceration. This Court should declare that the Illinois Constitution equally limits the sentencing power of judges in this state.

The United States Supreme Court stated:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi v. New Jersey, 120 S.Ct. at 2362-63.

The aggravating factor in this case was not submitted to a jury or proven beyond a reasonable doubt. In violation of the United States Constitution, as interpreted by the United States Supreme Court in *Apprendi*, and in violation of the Illinois Constitution, Illinois applied an unconstitutional sentencing scheme against Maurice Dunn. Therefore the ten year extension of his sentence is constitutionally void.

II.

THE EXTENDED TERM PROVISIONS UNDER WHICH THE PETITIONER WAS SENTENCED ARE UNCONSTITUTIONAL AND VOID *AB INITIO*.

While there are various theories on the effect of an unconstitutional statute, Illinois adheres to the void *ab initio* theory, a unique rule that can be traced from statehood and earlier territorial law to the English common law. "When Illinois became a State, the legislature adopted the applicable general common law and most pre-1606 statutes of England... These common law rules and decisions became the basis for all judicial determinations in this State." *People v. Gersch*, 135 Ill.2d 384, 395-96, 553 N.E.2d 281, 286 (1990); 5 ILCS 50/1 (2000) (relating back to March 24, 1606). This Court has consistently declared that when an Illinois statute is "declared invalid by the supreme court, it is null and void as of the date of its enactment, and as such, it confers no rights, imposes no duties, and affords no protection. It is, in legal contemplation, as though no such law had ever been passed. It is void *ab initio*." *People v., Zeisler*, 125 Ill.2d 42, 46, 531 N.E.2d 24, 28 (1988).

According to the *ab initio* approach, a declaration of unconstitutionality of a criminal statute is given full and complete retroactivity, and *habeas corpus* is recognized as an appropriate remedy for those who had been previously convicted and whose convictions had taken place before the declaration of unconstitutionality. L. Tribe, *American Constitutional Law* 29-30 (2d ed. 1988). That same remedy should be available to individuals such as Maurice Dunn and

others who had been sentenced under an unconstitutional statutory sentencing scheme.

> This theory gives no weight to the fact that the statute has been enacted by the legislature, approved by the governor, and relied upon by the people until it was declared invalid by a court.

O. Field, *The Effect of an Unconstitutional Statute* 3 (1935).

The void *ab initio* theory is linked to the core concept of our constitutional governance, namely judicial review of legislative acts that violate the Constitution. This judicial doctrine is derived from the English common law that recognized the authority of the courts to void legislation in derogation of a common right. *Bonham's Case*, 77 Engl. Rep. 638, 652 (C. P. 1610). Chief Justice Lord Coke explained:

> And it appears in our books, that in many cases, the common law will ... controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void;...

Bonham's Case, 77 Engl. Rep. at 652.

This Court has also recognized that it has a duty to strike down unconstitutional acts of the legislature.

> In cases where we determine that a statute is repugnant to the Constitution, our duty to declare the law void, in order to protect the rights which that document guarantees, is a paramount and

> constitutionally mandated function of our court system. *Droste v. Kerner* (1966), 34 Ill.2d 495, 498-99 (General Assembly basically may enact any law, provided it is not inhibited by some constitutional provision); *Henson v. City of Chicago (1953), 415 Ill. 564, 570* (judiciary has power to decide whether law is within scope of constitutional powers of legislature); *People v. Bruner (1931), 343 Ill. 146, 158* (interpretation of statutes and determining their validity are inherently judicial functions vested in courts by Constitution); see *Marbury v. Madison (1803), 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73)* ("an act of the legislature, repugnant to the constitution, is void," and "[i]t is emphatically the province and duty of the judicial department to say what the law is").

People v. Gersch, 135 Ill.2d at 398-99, 553 N.E.2d at 287-88.

In *People v. Manuel*, 94 Ill.2d 242, 244-45, 446 N.E.2d 240, 241 (1983), this Court held that "[w]hen a statute is held unconstitutional in its entirety, it is void *ab initio*." In *People ex rel. Barrett et al. v. Sbarbaro et al.*, 386 Ill. 581, 590, 54 N.E.2d 559, 562 (1944), this Court declared that "[a]n invalid law is not law at all. It confers no rights and imposes no duties."

In this case, this Court should hold that Sections 5/5-8-2(a)(2) and 5/5-5-3.2(b)(2) are unconstitutional and void *ab initio* because the Illinois legislature encroached on Petitioner's fundamental right to have a jury find an aggravating factor on proof beyond a reasonable doubt.

In Illinois, we the people regard the right to a jury trial in a criminal prosecution as sacred. By our own Constitution and this Court's interpretation, this right is greater in scope than the federal constitutional right. Article I, Section 13, *Constitution of the State of Illinois* (1970). It is "one of the most revered of

rights acquired by a people to protect themselves from the arbitrary use of power by the State." *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 212, 533 N.E.2d 873, 874 (1988). In *Joyce* this Court voided the legislature's attempt to condition the waiver of that right on prosecutorial consent. Similarly, this Court should not tolerate the legislature's encroachment on this fundamental right in allowing a judge to find an aggravating factor which is then used by her to impose an extended term of incarceration.

This Court refused to depart from the *ab initio* principle in *Gersch* and rejected the criticism of some scholars who had argued that the doctrine may be too harsh, "particularly where law enforcement officials have relied in good faith on the validity of a statute..., or where the invalidation of rules of criminal procedure would allow otherwise guilty criminals to win their freedom...." *People v. Gersch*, 135 Ill.2d at 399-400, 553 N.E.2d at 288. This Court could "see no persuasive policy arguments" which would justify it to depart from the *ab initio* principle in cases that involve constitutional criminal procedures which favor the accused. *People v. Gersch*, 135 Ill.2d at 401, 553 N.E.2d at 288-89. Accordingly, *Gersch* elevated the accused's constitutional right to waive a jury above the statutory right of the State to try the case to a jury, stating that "where a statute is violative of constitutional guarantees, we have a duty not only to declare such a legislative act void, but also to correct the wrongs wrought through such an act by holding our decision retroactive." *People v. Gersch*, 135 Ill.2d at 399, 553 N.E.2d at 288.

We ask this Court to once again embrace the doctrine of void *ab initio* and declare that the two statutory provisions, which together unlawfully allowed a judge to extend Maurice Dunn's sentence to forty years, are unconstitutional.

> To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions.

People v. Gersch, 135 Ill.2d at 397-98, 553 N.E.2d at 287.

III.

ALTERNATIVELY, THIS COURT SHOULD APPLY *APPRENDI* RETROACTIVELY BECAUSE THE RATIONALE OF *APPRENDI* REQUIRES FULL AND COMPLETE RETROACTIVITY.

Alternatively, this Court should apply the *Apprendi* rule to the present case because *Apprendi* by its own rationale and force voids all unconstitutional extended term sentences, including those that predate it. *Apprendi* did not create a new constitutional rule; it merely reaffirmed the centrality of two fundamental procedural safeguards for the individual against oppressive and arbitrary behavior of those who prosecute or sentence in the name of the governed, namely the right to trial by jury and a conviction that rests on proof beyond a reasonable doubt. In finding the New Jersey procedure unconstitutional, the Supreme Court explained that the fundamental right of trial by jury and due process interests of the accused were implicated. These rights are at the core of our criminal justice system. These are procedural safeguards that evolved from the days of the common law and are enshrined in our Constitution.

Paramount is the right to trial by jury:

> As we have, unanimously, explained, *Gaudin*, 515 U.S. at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers." and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require

> that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (hereinafter Blackstone (emphasis added). See also *Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Apprendi, 120 S.Ct. at 2356.

Another core right of the accused, as a matter of due process, is the requirement that a conviction must rest on proof beyond a reasonable doubt.

> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. C. McCormick, *Evidence* § 321, pp. 681-682 (1954); see also 9 J. Wigmore, *Evidence* § 2497 (3d ed. 1940)." *Winship*, 397 U.S., at 361, 90 S.Ct. 1068. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.'" *Id.*, at 361-362, 90 S.Ct. 1068 (quoting *Duncan*, 391 U.S., at 155, 88 S.Ct. 1444).

Apprendi, 120 S.Ct. at 2356.

The best illustration in the *Apprendi* opinion that the Supreme Court was not creating a new constitutional rule of law is the concurring opinion of Justice Thomas which was joined by Justice Scalia. Justice Thomas stated that

"[t]oday's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* - the status quo that reflected the original meaning of the Fifth and Sixth Amendments." *Apprendi*, 120 S.Ct. at 2378.

Other United States Supreme Court precedents dictate the conclusion that the constitutional protections observed by the Supreme Court in *Apprendi* were mandated by the Constitution of the United States prior to the enactment of the Illinois extended sentence legislation. The Supreme Court had previously said that the States must comply with the demands of the federal constitution that guarantee the rights of the accused to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), and the right to have a conviction rest on proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). These core principles were binding on Illinois before the Illinois legislature enacted the extended sentence provisions, which went into effect on January 1, 1973. Therefore the actions of the Illinois legislature were unconstitutional from the outset. For this reason, this Court should give *Apprendi* full and complete retroactivity.

IV.

ALTERNATIVELY, EVEN IF *APPRENDI* CREATED A NEW CONSTITUTIONAL RULE OF LAW THIS COURT SHOULD NEVERTHELESS APPLY IT RETROACTIVELY BECAUSE ITS SAFEGUARDS ARE ESSENTIAL TO THE FAIRNESS OF THE SENTENCING PROCESS AND THE ACCURACY OF THE SENTENCE.

Even if Your Honors determine that *Apprendi* created a new rule of constitutional procedure, Petitioner urges this Court to apply *Apprendi* retroactively because that rule validates the accuracy of sentencing and serves as a bedrock ingredient to the fairness of that process and of the sentence itself. An extended sentence that is imposed by a judge without the benefit of a jury's determination of the aggravating factor and without proof beyond a reasonable doubt raises substantial doubts about the fairness of the sentencing proceedings and the accuracy of the sentence.

The rule announced in *Apprendi* involves two very important constitutional concepts: the right to a trial by a jury and the requirement of proof beyond a reasonable doubt. As stated in *Apprendi*, these are "constitutional protections of surpassing importance...." *Apprendi*, 120 S.Ct. at 2355. *Apprendi* mandates the observance of procedures that promote the fairness in sentencing decisions as well as the fairness of the sentence itself. These are core ingredients "implicit in the concept of ordered liberty..." *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 1076 (1989).

In *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451 (1968), the United States Supreme Court explained that historically the right to a jury trial

was to allow "an accused, ...to be tried by a jury of his peers [which] gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

The Supreme Court has also held that the reasonable doubt standard of proof is a "bedrock" principle which acts as an effective method for reducing the risk of factual error. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072 (1970). In *Ivan v. City of New York*, 407 U.S. 203, 205, 92 S.Ct. 1951, 1952 (1972), the Supreme Court held that *Winship* was to be applied retroactively because the reasonable doubt standard "announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function..."

In *People v. Flowers*, 138 Ill.2d 218, 237, 561 N.E.2d 674, 682 (1990), this Court adopted the retroactivity test announced by a plurality of the United States Supreme Court in *Teague v. Lane*. Petitioner suggests that there was no reason for this Court to lock itself to the *Teague* test and urges this Court to re-examine it. The *Flowers* decision was not mandated by the federal constitution or by *Teague* because *Teague*'s limitations were intended to limit state prisoners from using the federal courts and the remedy of the writ of *habeas corpus* in challenging their state convictions. What the United States Supreme Court intended in *Teague* was to uphold the finality of state criminal convictions in order to foster the interests of comity. *Teague*, 489 U.S. at 308-10, 109 S.Ct. at 1074-75. No such limitations exist here where Your Honors are the final arbiters in this State in resolving legal questions that arise under our statutes and constitution. It is, therefore, most appropriate for this Court to review claims of Illinois

prisoners who utilize state procedures, including *habeas corpus*, to challenge unconstitutional convictions or sentences.

However, should this Court continue to follow the *Flowers-Teague* test for retroactivity, Petitioner should prevail under the second exception of *Teague*.

> The second exception suggested by Justice Harlan - that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *Id.*, at 693 (quoting *Palko*, 302 U.S., at 325) - we apply with a modification. The language used by Justice Harlán in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure...

Teague, 489 U.S. at 311, 109 S.Ct. at 1076.

The *Teague* test was further defined by the Supreme Court in *Sawyer v., Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822, 2831 (1990):

> It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. *Teague*, *supra*, at 311 (plurality opinion) (quoting *Mackey*, 401 U.S., at 693).

The application of the *Teague-Sawyer* standard compels the retroactivity of *Apprendi*. In *People v. Beachem*, ____ Ill.App.3d ____, _____ N.E.2d ____, 2000 WL 1677715 (1st Dist. 2000), Justice Wolfson, speaking for the Appellate Court, cogently explained the essence of *Apprendi*.

> We take *Apprendi* to mean that once the defendant serves the prescribed maximum sentence, he or she remains in prison on a charge never made and never proved. And if we acknowledge the defendant remains in prison on a charge never made or proved, we have impugned the integrity of our criminal justice system. It is as if the sentencing judge actually said to the defendant: "I have convicted you of a charge never made against you and never heard by the jury, and I have done it based on the preponderance of the evidence." Such a conviction, and its concomitant sentence, are repugnant to our notions of fundamental fairness.

Beachem, ____ Ill. App.3d at ____, ____ N.E.2d at ____, 2000 WL 1677715, 5.

Beachem held *Apprendi* retroactively:

> *Apprendi* not only safeguards fundamental fairness; its reasonable doubt standard provides the only measure of accuracy in extended sentencing. Where a new rule secures both "the accuracy of the truth-finding function" and "the fairness and the constitutional integrity of a criminal proceeding," courts have held it applies retroactively.

Beachem, ______ Ill.App.3d at _______, ____ N.E.2d at _____, 2000 WL 1677715, 7.

Another very persuasive analysis of *Apprendi*'s retroactivity is the decision of the United States District Court of Minnesota. *United States v. Murphy*, 109 F.Supp.2d 1059 (D. Minn. 2000). District Court Judge Doty observed that the *Apprendi* rule "is so grounded in fundamental fairness that it may be considered of watershed importance." 109 F.Supp.2d at 1064. Judge Doty concluded that *Apprendi* applies retroactively under the second exception of *Teague*. That exception "applies to those 'watershed rules of criminal procedure' which 'alter

our understanding of the bedrock procedural elements essential to the fairness of a proceeding' and 'without which the likelihood of an accurate conviction is seriously diminished.'" *United States v. Murphy*, 109 F.Supp.2d at 1063, quoting *Sawyer v. Smith*, 497 U.S. 227, 241-44, 254, 110 S.Ct. 2822, 2831-32, 2838 (1990) and *Teague*, 489 U.S. at 311, 109 S.Ct. at 1060.

Petitioner urges this Honorable Court to adopt the rationale of *Beachem* and *Murphy* and apply *Apprendi* retroactively.

V.

APPRENDI RELIEF MUST EXTEND TO AN INCARCERATED INDIVIDUAL WHOSE MANDATORY SUPERVISED RELEASE HAD BEEN REVOKED.

If *Apprendi* is to be applied retroactively, then *any* person who is serving an unconstitutional extended term is entitled to relief. That includes a prisoner who is currently in custody following the revocation of mandatory supervised release.

Petitioner previously filed a petition for a writ of *habeas corpus* in the Circuit Court of Cook County. In a "Memorandum and Ruling" entered on September 15, 2000, the Honorable Dennis A. Dernbach ruled that the *Apprendi* "issue need not be addressed because petitioner is not currently incarcerated as a result of the extended sentence imposed upon him by the trial court." Appendix G, at page 2. The Court explained that Petitioner's current incarceration resulted from the revocation of mandatory supervised release that had occurred on April 27, 2000. Appendix G, at page 2. The Court reasoned that a sentence of mandatory supervised release is not "part and parcel of the original sentence imposed by the court." Appendix G, at page 3. The Court concluded that "petitioner's current incarceration which stems from a violation of mandatory supervised release does not fall within the scope of the *Apprendi* decision..." Appendix G, at page 4.

Contrary to the reasoning of the Circuit Court, Petitioner is entitled to the benefit of the *Apprendi* rule. The court's ruling below separating Petitioner's extended term sentence from his mandatory supervised release term is wrong as

a matter of law. The clear language of the relevant Illinois statute establishes that a mandatory supervised release term is *included* in the extended term sentence. Therefore, it is not a separate sentence.

> Except where a term of natural life is imposed, every sentence shall *include* as though written *therein* a term in addition to the term of imprisonment....For those sentenced on or after February 1, 1978, such term shall be identified as a mandatory supervised release term...(1) for first degree murder or a Class X felony, three years;...(emphasis added).

730 ILCS 5/5-8-1(d)(1).

This Court has previously recognized in the context of former law which addressed reincarceration following the revocation of parole that parole is not a separate sentence. The consequences of reincarceration follow from a single sentence that was imposed by the sentencing judge. "The sentence to a mandatory parole is a part of the original sentence by operation of law." *People ex rel. Scott v. Israel*, 66 Ill.2d 190, 194, 361 N.E.2d 1108, 1009 (1977). Similarly, mandatory supervised release is part of the original sentence by operation of law. 730 ILCS 5/5-8-1(d)(1).

Illinois statutory law provides that upon revocation of mandatory supervised release "the recommitment shall be for the total mandatory supervised release term, [here three years] less the time elapsed between the release of the person and the commission of the violation for which mandatory supervised release is revoked [here, seven months and 25 days]..." 730 ILCS 5/3-3-9(a)(3)(i)(B). It follows that Petitioner is entitled to his immediate release. Petitioner was originally taken into custody on the charge of rape on September

5, 1979. He remained incarcerated until June 10, 1999. Therefore, on June 10, 1999, his mandatory supervised release date, he had already served nineteen years, nine months and five days. He was taken into custody on February 4, 2000. Since February 4, 2000, to date [February 6, 2001] he has served an additional year and two days. Given this reality, the State of Illinois cannot incarcerate him any longer because the limit for incarceration has expired. As such, Petitioner is entitled to his discharge by *habeas corpus*. *Barney v. Prisoner Review Board*, 184 Ill.2d 428, 431, 704 N.E.2d 350, 351 (1998).

CONCLUSION

Petititioner, Maurice Dunn, respectfully requests this Honorable Court to issue a writ of *habeas* corpus and order his immediate release from confinement.

Respectfully submitted,

Ralph Ruebner*
Professor of Law and
Executive Director of the
Criminal Justice Clinic of the
The John Marshall Law School,
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-2384

Attorney for the Petitioner
pro bono

*Assisted by:
Rachel L. Baker
and
Patrick R. Fagan,
students at
The John Marshall Law School

APPENDIX

TABLE OF CONTENTS

	Page
Commitment Order	A. 1
Notice of Appeal	B. 1
Appellate Court Order	C. 1-7
Sentencing Record	D. 1-13
Motion to Release Petitioner on Bond	E. 1-4
Verified Petition for Writ of *Habeas Corpus*	F. 1-11
Memorandum and Ruling	G. 1-4

APPENDIX A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

_____ DEPARTMENT Criminal _____
(Municipal) (Division) (District)

People of the State of Illinois

v.

Maurice A. Dixon
Defendant

No. 79 C 4915

ORDER OF SENTENCE AND COMMITMENT TO
ILLINOIS DEPARTMENT OF CORRECTIONS

having been adjudged guilty of committing the offenses enumerated below,

that the defendant Maurice A. Dixon

sentenced to the Illinois Department of Corrections as follows:

[handwritten, partially illegible:] Honorable Lawrence I. Genesen ... the Defendant to a term of ... (40) for the charge of Count One ... Count Two to merge into Count One ... to commence on December 5, 1980 ... not to return to Court

	Ch.	Sec.	Par.
[illegible]	38	11	1

...ER ORDERED that the Clerk of the Court shall deliver a copy of this order to the Sheriff of Cook

...ER ORDERED that the Sheriff of Cook County shall take the defendant into custody and deliver him ...tment of Corrections.

...ER ORDERED that the Illinois Department of Corrections shall take the defendant into custody and ...manner provided by law until the above sentence is fulfilled.

ENTER: Lawrence Genesen
Judge

LAWRENCE I. GENESEN

Dec 10, 1980

INSTRUCTIONS

...quested to insert in the appropriate spaces above (1) each sentence and the conditions thereof, including ...the sentence shall run concurrently or consecutively, as the case may be, with other sentences imposed ...case, or other sentences imposed by courts in other cases; and (2) fill in the following information:

...of counsel for defendant [illegible]

557 [illegible], [illegible] Illinois

...Record No. 533955 Illinois Bureau Identification No. _____

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

-459-

APPENDIX B

: THE STATE OF ILLINOIS,

:tiff-Appellee,

vs.

:ICE DUNN
Defendant-Appellant

Number 79 C 4915

HONORABLE

Judge Genesen
Trial Judge

ILED

NOV 3 1980

MORC N M. FINL
E CIRCUIT C

NOTICE OF APPEAL

: appeal is taken from the order of judgment described below:

1. Court to which appeal is taken: Appellate Court of Illinois

First Judicial District

2. Names of appellant and address to which notices shall be sent.

Name: MAURICE DUNN

Address: 9322 South Vanderpool, Chicago, IL 60620

3. Name and address of appellant's attorney on appeal.

Name: Ralph Ruebier

Address: Office of the State Appellate Defender, 130 N. Wells, Chicago, IL

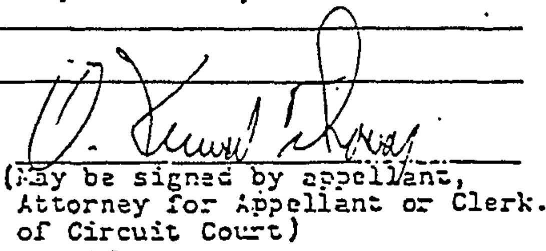
If appellant is indigent and has no attorney, does he want one appointed? ________

4. Date of Judgment or Order October 10, 1980

5. Offense of which convicted: Rape, Battery, Aggravated Battery, Battery on a Public Way

6. Sentence: 40 years

7. If appeal is not from a conviction, nature or order appealed from: ________



(May be signed by appellant, Attorney for Appellant or Clerk of Circuit Court)

Dated: ________

APPENDIX C

June 29, 1983

EXHIBIT

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

80-2898

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
MAURICE A. DUNN, Defendant-Appellant.	)	Honorable Lawrence I. Genesen, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Maurice A. Dunn (Dunn) was indicted for two crimes, rape and aggravated battery (great bodily harm). At the conclusion of his trial the jury signed three verdicts finding Dunn guilty of rape, guilty of aggravated battery causing great bodily harm, and guilty of aggravated battery while on a public way. In his appeal, Dunn assigns several errors. For the reasons hereinafter stated we affirm the judgment of the circuit court of Cook County.

I

DUNN WAS DENIED A FAIR TRIAL BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL CAUSED BY DEFENSE COUNSEL'S LACK OF PREPARATION.

Dunn had an earlier trial on this indictment which ended in a hung jury and a mistrial. Dunn's counsel in the second trial on

EXHIBIT

September 18, 1980, filed a motion for continuance stating that he filed his appearance September 11th and did not have sufficient time to prepare for trial by September 22, 1980, the trial date set. The record does not show any pursuit of this motion. Indeed, when the trial judge asked the prosecutor and defense counsel if they were ready for trial, the response made by the prosecutor was, "Yes, we are." Nevertheless, we have examined the record, particularly the instances noted by Dunn, to determine if the record reflects the claimed ineffective assistance of counsel.

Dunn says that his defense counsel failed to introduce exculpatory evidence. In the first trial, three pictures of Dunn were introduced into evidence to show the jury that on the day after the attack he had no scratches on his neck. The victim had testified that she scratched her attacker, and a detective sergeant had testified that he saw scratches on defendant. The probative value of the photos was reduced by the testimony of the photographer that he noticed small cuts on Dunn when he took the pictures. In the second trial defense counsel did not offer these pictures into evidence. Before the second trial the court ruled that if the pictures were introduced by the defense, the State would be permitted to bring out that the pictures were taken in a police lineup where the victim was present, even though their use by the State had been ordered suppressed. In the second trial the defense succeeded in having the detective sergeant's testimony excluded, thus obviating the need to impeach him. The nonuse of the pictures kept out State evidence which the defense had succeeded in having suppressed.

EXHIBIT

At the first trial, defense counsel called Dunn's sister to testify about a fruitless police search of Dunn's room several days after the offense, and defense counsel Lazar was called to testify that the fence crossing the escape route used by the attacker was four feet, seven inches high. In the second trial, a prosecution witness testified that the fence was three and one-half feet high. A police officer who visited the scene said he flipped over the fence. The attacker was variously described by the victim and witnesses as between 18 and 30 years old, well built, wearing gym shoes and sweat pants. The sister and Lazar were not called as witnesses in the second trial. It is not clear how testimony that the police found nothing in the search of defendant's room or that the escape was over a four feet, seven inches fence would have materially altered the picture presented to the jury, particularly when the defense was alibi.

All of counsel's actions in the second trial about which defendant complains were matters of judgment and singly and in combination fail to establish incompetency.

Defendant points to alleged inadequacy of some of defense counsel cross-examination as further examples of inadequate representation. The question of whether or how to impeach a witness is largely a matter of trial strategy. (People v. Carter (1980), 85 Ill. App. 3d 818, 407 N.E.2d 584.) It certainly was here, where the apparent inconsistencies in the witnesses' testimony were minor.

II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS VICTIM'S IN-COURT IDENTIFICATION OF DEFENDANT AS HER ATTACKER.

EXHIBIT

This contention of the defendant must be rejected because it is clear from the record here that defendant's illegal arrest and subsequent lineup did not infect the victim's ability to give accurate identification testimony. She had more than adequate opportunity to observe Dunn during their 15-minute struggle in the daylight. Her in-court identification had this independent source, and the trial court properly denied the motion to suppress. United States v. Crews (1980), 445 U.S. 463, 63 L.Ed.2d 537, 100 S. Ct. 1244.

III

THE DEFENDANT WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT.

As basis for this contention defendant attacks the victim's identification as sketchy and points out that defendant's alibi was uncontradicted. The State on the other hand submits that defendant's guilt was established by the victim's clear and convincing testimony. Where the identification of the accused is at issue, the testimony of one witness is sufficient to convict even though such testimony is contradicted by the accused, provided the witness is credible, and he viewed the accused under such circumstances as would permit a positive identification to be made. (People v. Hughes (1977), 55 Ill. App. 3d 359, 371 N.E.2d 41.) In our opinion, defendant was proved guilty beyond a reasonable doubt.

IV

DEFENDANT WAS NOT INDICTED FOR AGGRAVATED BATTERY ON A PUBLIC WAY. HIS CONVICTION ON THIS CHARGE MUST BE VACATED.

The State agrees that the jury verdict on aggravated battery (on a public way) was improper. It was not a lesser included offense of the indicted offenses: rape and aggravated battery (great bodily harm. Accordingly, defendant's conviction on this charge must be vacated.

EXHIBIT

No sentence was entered on the guilty verdict for aggravated battery (great bodily harm). The State asks that the case be remanded to the trial court for sentencing on that charge. The order of sentence reads, "Sentence the defendant to a term of forty years (40) for the charge of rape Count I, Count II, aggravated battery to merge into Count I rape." The question is whether the trial court erred in entering one sentence for both the rape and aggravated battery guilty verdicts. Although we are not convinced that the holding of the trial court that the offenses of rape and aggravated battery merged is correct, we note that defendant received an extended term of forty years for his criminal activity and see no useful purpose to be served in remanding the cause to the trial court for resentencing.

V

TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING DEFENDANT TO AN EXTENDED TERM OF FORTY YEARS FOR RAPE.

The defendant was sentenced to an extended term pursuant to section 5-5-3.2(b)(2) of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(2)), which provides for such sentences when the defendant "is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." The victim testified that she was walking on the public sidewalk when she was grabbed from behind. She and her attacker landed on the ground where he choked her and ground her face in the dirt. She received scratches and bruises on her throat in the attack. Although the attacker threatened to kill the victim, apparently no weapon was involved in

EXHIBIT

the attack.

To justify an extended sentence the trial court was required to find that this rape was accompanied by exceptionally brutal or heinous behavior. The imposition of sentence rests within the discretion of the trial court and its determination will not be altered absent abuse of discretion. The same rule applies to the imposition of the extended sentence. People v. Adams (1980), 91 Ill. App. 3d 1059, 415 N.E.2d 610, cert. denied 454 U.S. 849.

The record here shows that the trial judge orally considered ad seriatum the statutory factors in mitigation and in aggravation (Ill. Rev. Stat. 1979, ch. 38, pars. 1005-5-3.1 and 1005-5-3.2) before imposing sentence. He referred to the fact that he had heard the evidence twice, in the first and second trials, and stated, "I find the recollection of the events as to be one of complete horror. If this is not exceptionally brutal or heinous behavior indicative of wanton cruelty, I don't know what is. I will so find." On this record we cannot say judicial discretion was abused.

VI

PRESENTATION IN THE FIRST TRIAL OF THE TESTIMONY OF THE ARRESTING OFFICER WHICH WAS RULED INADMISSIBLE CONSTITUTED PROSECUTORIAL OVERREACHING AND THE SECOND TRIAL WAS THEREFORE BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

We fail to find the deliberate, intentional action by the prosecutor taken to subvert the protection afforded by the double jeopardy clause that is necessary to support this argument. Oregon v. Kennedy (1982), 456 U.S. 667, 72 L.Ed.2d 416, 102 S. Ct. 2083.

For the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed as modified.

AFFIRMED AS MODIFIED.

RIZZI, WHITE and O'CONNOR, JJ.

EXHIBIT

APPENDIX D

experience for the family of the defendant as well as for the family of the victim to be put on some sort yoyo on this type of thing. Particularly, when you told Mr. O'Donnell you will be ready today. We will pass it until 11:30. If you find problems involved here that would require additional time, I will consider it at that time.

(The case was passed briefly.)

THE CLERK: People of the State of Illinois versus Maurice Dunn.

THE COURT: Mr. Thomas, what's your position?

MR. THOMAS: Your Honor, we are ready.

THE COURT: The State may proceed first.

MR. O'DONNELL: As Your Honor is aware this was a jury trial in which the defendant Maurice Dunn was found guilty of the offense of rape. And short of murder I suppose rape is probably the worst possible thing you can do to a female.

The legislature has been criticising the courts and prosecution other the years in that they feel the public in general feels that enough is not done to number one prevent the crime and punish the defendant for the crime. Pursuant to that the legislature passed the Class X felony provisions several

1 years ago. The Class X felony as Your Honor is aware
2 provides for a minimum sentence of six years with a
3 maximum sentence of thirty years for a Class X felony.
4 In addition to that the legislature in its wisdom saw
5 fit to put in under Section 1005-8-2 the extended term
6 provision. The extended term provision provides that
7 pursuant to certain aggravating factors the court
8 finds the defendant is eligible for an extended term
9 that the court can sentence him from 30 to 60 years.
10 Your Honor, at this time it's the position
11 of the People of the State of Illinois and the State's
12 Attorney Office of Cook County that the defendant does
13 in fact qualify for the extended term provisions, and
14 we are asking that the defendant in fact be sentenced
15 under the extended term provisions; that being sen-
16 tenced between a period of 30 to 60 years. Specifi-
17 cally, we feel that the defendant is eligible if
18 that's to be interpreted as a badge of honor and that
19 the defendant is eligible for the extended term.
20 He's eligible under at least three of the provisions.
21 And the provisions are laid out under Section 1005-3.2
22 And they have certain aggravating factors, the first
23 being that the defendant conducted, caused or threatened
24 serious harm. I don't believe that there's any doubt

1 based on the evidence of the trial that the victim in
2 this matter, Mrs. Constance Dourdy, was attacked as she
3 was walking on 94th Street. She was on her way to
4 work. She was a productive citizen in our society.
5 And that's why the defendant saw fit to not only attack
6 her but to rape her viciously, threaten to kill her,
7 and choked her repeatedly. But for the fact that he
8 satisfied the lust in his life he very well may have
9 killed Mrs. Dourdy. And he would be involved in a
10 totally different situation today.
11 The second aggravating factor is number three
12 that the defendant has a history of prior delinquency
13 or prior activity. At this time I would submit to
14 Your Honor a certified copy of conviction of Maurice
15 Dunn in which he was convicted of the crime of robbery.
16 The fact that he was convicted of the crime of robbery
17 is indicative that not only did he commit a crime
18 against a person in this matter but robbery itself is
19 a crime against a person. It is not simply a property
20 crime like burglary that involves the taking of anything
21 from a person or persons or another individual. That
22 conviction was a plea of guilty. So the defendant in
23 fact admitted fully that he committed that crime. I
24 don't believe that should be considered in mitigation

1 but I am only pointing it out because I am sure that
2 the defense during the course of their talking as far
3 as mitigating portion will say he admitted he was wrong
4 there and he wanted to correct the problems that he
5 may have had and follow a straight and narrow path.
6 Unfortunately, approximately two weeks after the de-
7 fendant was released from the completion of probation
8 on that robbery charge he committed the offense for
9 which he's now being sentenced on.
10 THE COURT: My understanding it is two weeks
11 before.
12 MR. O'DONNELL: I believe the date on that con-
13 viction, Your Honor, I think it is the 7-76 month. And
14 by my calculations the two years would have expired
15 prior to the incident which occurred. I don't know
16 exactly when the probation department released him.
17 But simple calculation I would submit it was prior
18 to the commission of the rape.
19 The third factor is that the sentence is
20 necessary to deter others from committing the same
21 crime. And I think this is probably one of the most
22 important points that Your Honor has to consider. Is
23 the sentence an appropriate sentence? And will it
24 deter other individuals from committing the same crime?

1 Obviously, if you slap an individual's hand and say I
2 am going to give you a minimum sentence of eight years,
3 that really isn't going to deter too many people from
4 doing anything because Your Honor is probably aware
5 rape is a crime which occurs where the defendant picks
6 the time he's going to commit the rape. He picks his
7 victim. And he picks all of the circumstances. The
8 victim has very little to say. Because of that, num-
9 ber one, it is hard to get arrests of rapists and,
10 number two, it is even harder to get a conviction. And
11 if the people that are convicted are sentenced to a
12 very light sentence, I think the people who have a
13 propensity to commit this crime surely are going to
14 say I am going to take the chance. It is worth it for
15 me to take that chance.
16 For the reasons stated, Your Honor, I would
17 ask that the defendant in fact be sentenced under the
18 extended term provisions. Specifically, I would be
19 asking for a sentence of 52 years in the Illinois
20 State Penitentiary.
21 I am asking for this for what I believe are
22 logical reasons. Number one, Your Honor as a sitting
23 judge knows that there's a high recidivous among rapists,
24 especially when they are given small sentences. It is

1 not very hard to find the same individuals arrested two,
2 three, or four times for the same offense. It is not
3 hard to find those who are committed to the peniten-
4 tiary and released turn around and commit the same
5 offense. About the only possible way you can prevent
6 these people from committing the same offense is to
7 incarcerate in the penitentiary long enough where if
8 they are released they are not going to commit that
9 offense again because they are not going to physi-
10 cally be able to do it.
11 Mr. Dunn is a young man. If -- I understand
12 that he is only twenty years old. But the outlook for
13 his next twenty years if he's not committed to the
14 extended term in the penitentiary is he probably will
15 revert to the same acts that he committed on the 20th
16 of July when he committed a rape against Mrs. Dourdy.
17 For all of these reasons, Your Honor, the
18 People of the State of Illinois would be asking and
19 Bernard Carey, the State's Attorney of Cook County,
20 would be asking that the defendant be sentenced to a
21 period of 52 years in the penitentiary.
22 THE COURT: Mr. Thomas.
23 MR. THOMAS: It goes without saying, of course,
24 that rape is a terrible crime. But I should point out

1 in this particular instance, Your Honor, that the
2 evidence while showing a great deal of physical activity
3 and threats to the victim there was never any actual
4 evidence that her life was in danger. In addition to
5 which I would point out there was no evidence intro-
6 duced that the victim suffered any permanent physical
7 harm. And in fact as I recall the evidence the only
8 time in the hospital was the day the event occurred.
9 Of course, one reason for incarceration is,
10 of course, to see that a particular crime is not com-
11 mitted again by the same individual. I should point
12 out to the court that Mr. Dunn is twenty years of age.
13 And while he does have a robbery conviction there's
14 absolutely no evidence of any arrest in his record
15 for any sex crime or any crime against a person other
16 than this '80 robbery. One purpose of incarceration,
17 of course, is to try and rehabilitate, try to make a
18 person a useful citizen in the time when he eventually
19 is released from the prison. Obviously, if the defen-
20 dant is given a 52 year sentence and if he served the
21 minimum time, he will be of such an age what we are
22 going to have on our hands is someone who's not
23 rehabilitated himself but someone who's a welfare
24 case.

BH

Mr. Dunn is a young man. I think the court made notice of this which I am sure it has. I think the court should render a sentence that will let Mr. Dunn be released from time to give himself a education and make himself a useful member of society.

THE COURT: All right. Is there anything you wish to say, Mr. Dunn, before I impose sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Would you stand up?

THE DEFENDANT: Yes. I would like to say to Mrs. Dourdy that as my God is my witness I think there's some mistake in your identity. I hope she don't have to go through it again. Honestly, the person is still out there.

And I would like to thank my attorney for doing his job and Mr. English for courtroom captain. I would like to thank my wife for supporting me and giving me strength that it happened.

If you believe in God with me, my mother and my family and I believe God will make a way for me to combat it. Thank you, Your Honor, also.

THE COURT: First I sat and listened to the testimony in this case twice. I am convinced from all the facts and the circumstances as well as the jury

1 was that Mr. Dunn is the man who committed this par-
2 ticular act.
3 I am required by the legislature to consider
4 certain facts in aggravation and mitigation. And
5 these I have considered and these I am considering
6 now. The factors in mitigation, number one, is the
7 defendant's criminal conduct neither caused or
8 threatened serious harm to another. Well, that is
9 not applicable to this case because I believe there
10 was serious physical harm. The scratches, the bruises,
11 the victim's face being pushed in the mud. She was
12 struck and then thrown about in a violent manner
13 indicated physical harm. To say nothing about the
14 emotional harm which I suppose will never be fully
15 undone, not even to herself but to her family and
16 friends and possibly to an entire community.
17 And two, the defendant did not contemplate
18 the criminal conduct would cause or threaten serious
19 physical harm to another. This is contrary to the
20 facts because obviously what he did actually threatened
21 her life. To have struck her and throw her back in
22 this fashion certainly might have resulted in a perma-
23 nent injury or death.
24 Number four, there was substantial grounds

1 tending to excuse or justify the defendant's criminal
2 conduct, though failing to establish a defense. There
3 is nothing, absolutely nothing, to justify or excuse
4 the defendant's conduct in my opinion.
5 Number five, the defendant's criminal conduct
6 produced or facilitated by one other than the defendant,
7 absolutely not.
8 Number six has to do with compensation.
9 There's no way the defendant can compensate the victim.
10 The other, number seven, has the history
11 of prior delinquency. As the State has pointed out
12 the defendant was at -- had just gotten off probation
13 for robbery. Robbery itself is a crime against the
14 person. It is either by the use of force or the
15 threatened use of force. Either of which the person
16 is not physically harmed in that is indicative that
17 the defendant is at least threatens violence or had
18 threatened violence on a previous occasion.
19 The defendant's criminal conduct was the
20 result of circumstances unlikely to reoccur. I have
21 to feel that where a defendant once has been on pro-
22 bation and has -- then commits another crime like
23 this shortly after he gets out, and it indicates to
24 me that the defendant is likely to consider other

1 offenses or commit other offenses if he's let out
2 within a short time.
3 The other matters that are obviously imprison-
4 ment would be a hardship upon his dependents. I feel
5 sorry for them, but I feel he did this to them, what
6 I do is just the results of his actions.
7 All right. As I said I listened to the
8 testimony twice. The State is asking for the extended
9 term. In order for me to find that there's an extended
10 term applicable I have to find as there is two factors
11 in aggravation that the offense was accompanied by
12 exceptionally brutal or heinous behavior indicative
13 of wanton cruelty. I find the recollection of the
14 events as to be one of complete horror. If this is not
15 exceptionally brutal or heinous behavior indicative of
16 wanton cruelty, I don't know what is. I will so find.
17 Therefore, there will be a finding of extended term.
18 And accordingly the defendant will be sentenced to a
19 term of 40 years in the Department of Corrections.
20 You have thirty days in which to appeal from
21 the Court's ruling. And if you cannot afford a lawyer
22 or a transcript of these proceedings, the Court will
23 furnish them to you free of charge. Discuss this with
24 your lawyer. And if you file such a motion, I will

1 see that it's considered and granted.

2 There will be a short recess.

3 MR. THOMAS: Your Honor, the defendant has re-

4 quested 60 days.

5 THE COURT: I will discuss that with you.

6

7 (Which were all the proceedings

8 had in the above entitled cause.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 STATE ILLINOIS)
2) SS:
COUNTY OF COOK)

3

4 We, the undersigned, Official Court Reporters
5 of the Circuit Court of Cook County, County Department-
6 Criminal Division, do hereby certify that we reported
7 in shorthand the proceedings had in the above-entitled
8 cause; that we thereafter caused to be transcribed into
9 typewriting the foregoing transcript, which we hereby
10 certify is a true and correct Report of Proceedings had
11 in the above-entitled cause.

12

13 Betty Sacks

14

15 Ora Hady

16 Delores Bobin

17

18 Beverly Hooker

19

20

21 FILED

22 FEB 24 1981

23 MORGAN M. FINLEY
CLERK OF THE CIRCUIT COURT
CRIMINAL DIVISION

24

APPENDIX E

No. 90256

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

MAURICE DUNN,

PETITIONER,

-vs-

GUY PIERCE, Warden,
Pinckneyville Correctional Center,

RESPONDENT.

MOTION TO RELEASE PETITIONER ON BOND

Now comes Petitioner, Maurice Dunn, by his attorney, Ralph Ruebner, Professor of Law and Executive Director of The John Marshall Law School Criminal Justice Clinic, and asks this Honorable Court to release him on his personal recognizance, and in the alternative, on a $10,000.00 bond pending the outcome of this litigation.

Counsel, first duly sworn on oath, states:

1. On January 2, 2001, this Honorable Court allowed Petitioner leave to file a petition for a *writ* of *habeas corpus*. Petitioner's brief is due to be filed on or before February 6, 2001. The issue before this Court is whether Maurice Dunn is entitled to be released from custody pursuant to the authority of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2. Maurice Dunn is in custody of the Illinois Department of Corrections pursuant to a commitment order entered by the Honorable Lawrence I. Genesen, Judge

of the Circuit Court of Cook County, on October 10, 1980, sentencing him to serve a term of forty years for the offense of rape and two counts of aggravated battery. The Appellate Court, *People v. Dunn*, No. 1-80-2898 (1983) (unpublished Rule 23 order, June 29, 1983), affirmed but vacated one count of aggravated battery. Maurice Dunn was sentenced to an extended term of forty years pursuant to 730 ILCS 5/5-8-2(b) and 730 ILCS 5/5-5-3.2(b)(2) because the sentencing judge determined that the circumstances of the crime involved exceptional brutal or heinous behavior indicative of wanton cruelty. The unextended maximum sentence for rape in 1979, a class X offense, was thirty years. 720 ILCS 5/12-14(d)(1).

3. Maurice Dunn had been in custody from September 5, 1979 to June 10, 1999, when he was released on mandatory supervised release. He was returned to custody on February 4, 2000, when he was arrested in DuPage County on two misdemeanor charges. He has been in custody since that arrest. A misdemeanor complaint, OOCM681, two counts, charged Maurice Dunn with possession of drug paraphernalia and possession of more than ten grams but less than thirty grams of cannabis on February 4, 2000. His mandatory supervised release was revoked on April 27, 2000. On June 30, 2000, Maurice Dunn pleaded guilty to possession of cannabis and was fined $350.00. The other count was dismissed.

4. Maurice Dunn is scheduled to be released from the Department of Corrections on April 8, 2001. Prior to his release on mandatory supervised release, Petitioner had served nineteen years, nine months and five days of his sentence. Since February 4, 2000, the date of his arrest in DuPage County, he has served to date (January 9, 2001) an additional eleven months and three days. Had Petitioner received

the statutory maximum sentence of thirty yeas for rape, under a constitutional sentencing scheme, non-extended, the outer limit of his actual imprisonment, including the full three years of mandatory supervised release, earning day for day credit, would have been eighteen years. He has *exceeded* that by two years, eight months and eight days.

5. It is most probable that Maurice Dunn will be released from confinement prior to a final decision in this case.

6. Maurice Dunn has no other record of convictions.

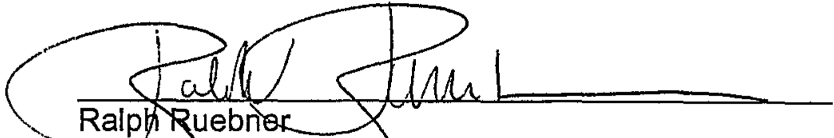
7. Maurice Dunn will reside with his wife, Wila Dunn, at their residence at 2744 East Poplar Court, Crete, Illinois 60417. The home telephone number is (708) 367-0514.

8. Although, Maurice Dunn, is personally indigent, Wila Dunn is currently employed by Mirim LLC, a product development company, 2901 Finley Road, No. 105, Downers Grove, Illinois, 60515, as a software developer. Her work telephone number is (630) 916-3632. She can raise $1,000.00 cash for a bond for her husband.

9. Maurice Dunn will adhere to all the conditions that this Honorable Court may impose on his release on bond.

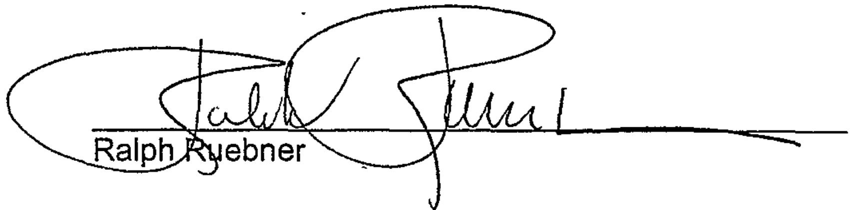
WHEREFORE, Maurice Dunn respectfully requests that this Honorable Court grant his immediate release on personal recognizance or admit him to bail in the amount of $10,000.00 pending the outcome of this litigation.

Respectfully submitted,



Ralph Ruebner
Attorney for Maurice Dunn
Attorney Number: 53533
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-2384

I swear that the statements set forth in this Motion are true and correct except as to matters therein stated to be on information and belief, and as to such matters I swear that I believe the same to be true.



Ralph Ruebner

SUBSCRIBED AND SWORN TO BEFORE ME
this 9th day of January, 2001.

NOTARY PUBLIC

APPENDIX F

No. ________

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

MAURICE DUNN,

PETITIONER,

-vs-

GUY PIERCE, Warden, Pinckneyville Correctional Center,

RESPONDENT.

VERIFIED PETITION FOR A *WRIT* OF *HABEAS CORPUS*

Now comes Petitioner, Maurice Dunn, by his attorney, Ralph Ruebner, Professor of Law and Executive Director of The John Marshall Law School Criminal Justice Clinic, and asks this Honorable Court to grant his petition for a *Writ* of *Habeas Corpus* and order his immediate release from confinement.

Counsel, first duly sworn on oath, states:

1. Petitioner, Maurice Dunn, is currently a prisoner in the Illinois Department of Corrections, Register Number N-04174. The Respondent is Guy Pierce, Warden, Pinckneyville Correctional Center. Petitioner is currently serving an unconstitutional

extended term in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2. This Court has jurisdiction pursuant to the Constitution of the State of Illinois, Article VI, Section 4(a) and Supreme Court Rule 381.

3. Petitioner is in custody of the Illinois Department of Corrections pursuant to a commitment order entered by the Honorable Lawrence I. Genesen, Judge of the Circuit Court of Cook County, in this cause on October 10, 1980, sentencing the Petitioner to serve a term of forty years for the offense of rape and two counts of aggravated battery. A copy of the commitment order is attached as Exhibit A and the Notice of Appeal is attached as Exhibit B. The Appellate Court, *People v. Dunn*, No. 1-80-2898 (1983) (unpublished Rule 23 order, June 29, 1983), affirmed but vacated one count of aggravated battery. See Exhibit C.

4. Petitioner was sentenced to an extended term of forty years pursuant to 730 ILCS 5/5-8-2(b) and 730 ILCS 5/5-5-3.2(b)(2) because the sentencing judge determined that the circumstances of the crime involved exceptional brutal or heinous behavior indicative of wanton cruelty. See Record pp. 329-41 attached as Exhibit D.

5. Petitioner filed a petition for a *writ* of *habeas corpus* in the Circuit Court of Cook County on August 25, 2000. That petition was dismissed by the Honorable Dennis a. Dernbach on September 15, 2000. The court's memorandum and ruling is attached as Exhibit E.

6. The statutory maximum for rape in 1979, a class X offense, was thirty years. 720 ILCS 5/12-14(d)(1).

7. His present confinement under a forty year sentence was justified by the sentencer and the Illinois Appellate Court as an extended term. Petitioner contends, however, that the Illinois extended term provision is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment and the Trial by Jury provision of the Sixth Amendment to the United States Constitution. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). His sentence is unconstitutional because a judge, and not a jury, had found the aggravating factors used to extend his sentence. Moreover, that determination did not satisfy the constitutional standard of proof beyond a reasonable doubt.

8. Petitioner had been in custody from September 5, 1979 (see attached Exhibit F) to June 10, 1999, when he was released on mandatory supervised release. He was returned to custody on February 4, 2000, when he was arrested in DuPage County on two misdemeanor charges. He has been in custody since that arrest. His mandatory supervised release was revoked on April 27, 2000. On June 30, 2000, the drug paraphernalia charge was dismissed, and the possession of drug charge ended with a mere fine. *Prior* to his release on mandatory supervised release, Petitioner had served nineteen years, nine months and five days of his sentence. Since February 4, 2000 he has served to date (September 25, 2000) an additional seven months and twenty-one days. Had Petitioner received the statutory maximum sentence of thirty years for rape, non-extended, the outer limit of his actual imprisonment, including the full three years of mandatory supervised release, having earned day for day credit, would have been eighteen years. He has exceeded that by two years, six months and twenty-six days.

9. The extended term provisions for rape, 730 ILCS 5/5-8-2(b) and 730 ILCS 5/5-5-3.2(b)(2) are unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution. This statutory scheme allows the imposition of additional years of imprisonment beyond the statutory maximum sentence on a sentencing judge's finding that the circumstances of the crime involved an exceptional brutal or heinous behavior indicative of wanton cruelty. The extension is imposed without the benefit of notice, a jury finding of the added aggravating sentencing factor, or proof beyond a reasonable doubt. This procedure offends the right of the Petitioner to due process of law and his right to a trial by jury. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). *Apprendi* controls this important question.

10. This Honorable Court should allow this motion and ought to proceed immediately with his application for a *Writ* of *Habeas Corpus*. This review will not only allow this Petitioner to bring this claim of first impression to this Court, but it would also serve the many Illinois prisoners who are incarcerated under identical or similar circumstances who cannot be otherwise heard. This review process calls for due speed. This review will undoubtedly benefit the Illinois judiciary as well in that a uniform ruling coming from this Court will avoid the development of conflicting legal rulings on this question among the various districts of the Illinois Appellate Court and reduce the volume of appeals to the Appellate Court and to this Court.

11. To justify the imposition of an extended term, the Constitution of the United States now mandates as follows:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 120 S.Ct. at 2362-63.

12. It is clear that in light of *Apprendi*, Petitioner's sentence cannot stand because the Illinois statutory scheme allowing for his extended term is unconstitutional. Illinois allows a judge, not a jury, to find a factor which will be used to extend a person's sentence beyond the statutory maximum without proof of that factor beyond a reasonable doubt. Therefore, the statute that allowed this to happen to the Petitioner is unconstitutional and his extended sentence is void.

13. Under Illinois law, the unconstitutionality of a statute and a void judgment may be attacked at any time, and *habeas corpus* is an appropriate remedy. Under the reasoning and holding of *Apprendi*, the extended term provisions under which Petitioner was sentenced must be declared to be unconstitutional because the factors relied upon to increase the statutory maximum sentence were not charged in the indictment, submitted to a jury, or proven beyond a reasonable doubt. Since Sections 5/5-8-2(b) and 5-5-3.2(b)(2) are unconstitutional, they are void *ab initio*, which means that "in legal contemplation, as though no such law had ever been passed." *People v. Zeisler*, 125 Ill.2d 42, 531 N.E.2d 24, 28 (1988). In *Ziesler* this Court held that "the constitutionality of a statute can be raised at any time." *Id.* at 26. This Court has also held that a void judgment can be challenged at any time. *People v. Wade*, 116 Ill.2d 1, 506 N.E.2d 954, 955 (1987). It follows that the unconstitutionality of the Illinois extended sentencing scheme can be challenged at this time without regard to any question of retroactivity. This conclusion follows from the unique Illinois position that a declaration of

unconstitutionality of a criminal statute wipes it away as if it had never existed. For that reason alone, Petitioner has the right to benefit from the *Apprendi* rule.

14. Alternatively, this Court should apply the *Apprendi* rule to the present case because *Apprendi* by its own rationale and force voids all unconstitutional extended term sentences, including those that predate it. In finding the New Jersey procedure unconstitutional, the Supreme Court explained that the due process and jury trial rights implicated there are at the core of our criminal justice system, recognizing these procedural safeguards from the days of the common law and the founding of our Constitution. *Apprendi*, 120 S.Ct. at 2356.

> As we have, unanimously, explained, *Gaudin*, 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers." and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....:" 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone (emphasis added). See also *Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S.Ct. 1444, 20 L.Ed2d 491 (1968).
>
> Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'. C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940)." *Winship*, 397 U.S., at 361, 90 S.Ct. 1068. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions "'reflect[s] a profound judgment about the way in which law should be enforced and justice

administered.'" *Id.*, at 361-362, 90 S.Ct. 1068 (quoting *Duncan*, 391 U.S., at 155, 88 S.Ct. 1444). *Id.*, at 2356.

The best illustration in the *Apprendi* opinion that the Court was not creating a new constitutional rule of law is the concurring opinion of Justice Thomas which was joined by Justice Scalia. *Apprendi,* 120 S.Ct. beginning at 2367. Justice Thomas stated that "[t]oday's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* - the status quo that reflected the original meaning of the Fifth and Sixth Amendments." *Id.* at 2378.

Other United States Supreme Court precedents dictate the conclusion that the constitutional protections mentioned by the Court in *Apprendi* existed prior to the enactment of the Illinois extended sentence legislation. The Court had previously and explicitly announced the right to a jury trial in the 1968 case of *Duncan v. Louisiana*, 391 U.S. 145 (1968), and the right to have every element of the offense proved beyond a reasonable doubt in the 1970 case of *In re Winship*, 397 U.S. 358 (1970). Both cases preceded the Illinois legislature's enactment of the extended sentence statute, which went into effect on January 1, 1973. *See* 730 ILCS 5/5-8-2(b) and 730 ILCS 5/5-5-3.2(b)(2) Therefore, the Illinois legislature's actions were unconstitutional from the outset and this Court need not address a retroactivity challenge by the State of Illinois.

15. Alternatively, the *Apprendi* rule should be applied retroactively because it involves the observance of procedures that are implicit in the concept of ordered liberty. This Court should give full retroactivity to the *Apprendi* rule, a rule that alters our understanding of the bedrock procedural elements that are essential to the fairness and accuracy of a sentence. Even if this Court determines that this is a new rule of law, it

should nevertheless apply it retroactively because it fits the second retroactivity exception set out by the United States Supreme Court in *Teague v. Lane*, 489 U.S.288 (1989). According to *Teague*, a new rule may be applied retroactively "if it requires the observance of 'those procedures that...are implicit in the concept of ordered liberty...'" *Teague*, 489 U.S. at 311. The United States District Court of Minnesota recently held that *Apprendi* applies retroactively because that decision involves "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding...". *United States v. Murphy*, 2000 WL 1140782 (D. Minn. August 7, 2000) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242-44 (1990) and *Teague*, 489 U.S. at 311.). Also, the Supreme Court has held that the reasonable doubt standard is an effective method for reducing the risk of factual error. *In re Winship*, 397 U.S. 358, 358 (1970). In *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972), the Court held that *Winship* was to be applied retroactively since the reason for the reasonable doubt standard announced in *Winship* "was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function..." *Id.* at 205.

In *Duncan v. Louisiana*, 391 U.S. at 156, the Court explained that historically the reason for the right to a jury trial was to allow "an accused, ...to be tried by a jury of his peers [which] gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

The rule announced in *Apprendi* involves two very important constitutional concepts: 1) the right to a trial by a jury, and 2) the requirement of proof beyond a reasonable doubt. As stated in *Apprendi*, these are "constitutional protections of surpassing importance..." *Apprendi*, 120 S.Ct. at 2355. In their absence serious

doubts remain as to the fairness and accuracy of a judge determined extended sentence, arrived at without the benefit of a jury determination or proof beyond a reasonable doubt. For these reasons *Apprendi* should be applied retroactively.

16. Contrary to the reasoning of the Circuit Court of Cook County, Petitioner is entitled to the benefit of the *Apprendi* rule. The court's ruling below that bifurcates Petitioner's extended term sentence and his mandatory supervised release term is wrong. The court erroneously validated the Respondent's position that Petitioner is not currently imprisoned on his original extended sentence. Respondent argued that Petitioner is imprisoned because his mandatory supervised release was revoked following his arrest on February 4, 2000, while released on mandatory supervised release. Therefore, according to the Respondent even a retroactive application of *Apprendi* would not help this Petitioner. This argument lacks merit.

The clear language of the statute establishes that the mandatory supervised release term is *included* in the extended term sentence. Therefore, it is not a separate sentence as the Respondent claimed below. The relevant statute is 730 ILCS 5/5-8-1(d)(1) which states:

> Except where a term of natural life is imposed, every sentence shall *include* as though written *therein* a term in addition to the term of imprisonment...For those sentenced on or after February 1, 1978, such term shall be identified as a mandatory supervised release term...(1) for first degree murder or a Class X felony, three years;...(emphasis added)

As this Court has previously recognized in a parole revocation setting that revocation and subsequent reincarceration is not a second sentence. The consequence of reincarceration follows from a single sentence that was imposed by the

sentencing judge. "The sentence to a mandatory parole is a part of the original sentence by operation of law." *People ex rel. Scott v. Israel*, 66 Ill.2d 190, 361 N.E.2d 1108, 1109 (1977). Statutory construction and logic must dictate the same analysis and result to a mandatory supervised release term.

The law provides that upon revocation of mandatory supervised release "the recommitment shall be for the total mandatory supervised release term, [here three years] less the time elapsed between the release of the person and the commission of the violation for which mandatory supervised release is revoked [here, seven months and 25 days]..." 730 ILCS 5/3-3-9(a)(3)(i)(B). Under this statute, Petitioner is entitled to his immediate release. He has maxed out under the mathematical formula of the above-cited statute. Petitioner was originally taken into custody on the charge of rape on September 5, 1979. He remained incarcerated until June 10, 1999. Therefore, on June 10, 1999, his mandatory supervised release date, he had already served nineteen years, nine months and five days. He was retaken into custody on February 4, 2000. Since February 4, 2000, he has served an additional seven months and twenty-one days for a total of twenty years, six months and twenty-six days. Given this reality, the State of Illinois cannot incarcerate him any longer. For that reason this Court should release him immediately. *People ex rel. Castle v. Spivey*, 10 Ill.2d 586, 141 N.E.2d 321, 325 (1957).

WHEREFORE, the Petitioner respectfully requests that this Honorable Court grant his petition for a *Writ* of *Habeas Corpus* and order his immediate release.

Respectfully submitted,

____

Ralph Ruebner
Attorney for Maurice Dunn
Attorney Number: 53533
The John Marshall Law School
Criminal Justice Clinic
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-2384

Assisting in this petition was:
Mr. Patrick Fagan
A third year law student at
The John Marshall Law School

I swear that the statements set forth in this Petition are true and correct except as to matters therein stated to be on information and belief, and as to such matters I swear that I believe the same to be true.

____
Ralph Ruebner

SUBSCRIBED AND SWORN TO BEFORE ME
this 25th day of September, 2000.

____
NOTARY PUBLIC

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

MAURICE DUNN,	)	
	)	
Defendant-Petitioner,	)	
	)	Writ of Habeas Corpus
v.	)	79 CR 4915
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent	)	
	)	

FILED
JOHNNY DAVIS
15 2000
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

MEMORANDUM AND RULING

Petitioner, Maurice Dunn, pursuant to the Illinois Habeas Corpus Act, 735 ILCS 5/10-101 *et seq.* (West 2000) petitions this Court for immediate release from the custody of the Illinois Department of Corrections. As grounds for this relief, petitioner claims: (1) that his original extended term sentence of 40 years imprisonment is unconstitutional based on the recent United States Supreme Court decision in *Apprendi v. New Jersey*, 147 L.Ed. 2d 435, 120 S.Ct. 2348 (2000); and (2) the maximum term of imprisonment for the offenses of rape and aggravated battery has expired as a result of the unconstitutionality of petitioner's extended sentence.

BACKGROUND

On October 10, 1980, petitioner was sentenced to a term of forty years imprisonment following a jury trial wherein petitioner was found guilty of rape and two counts of aggravated battery. At the time of petitioner's sentencing, the statutory maximum for the crime of rape was 30 years. Petitioner, however, was given an extended sentence of ten additional years because the trial court determined that the offense was exceptionally brutal or heinous and indicative of wanton cruelty.

Petitioner remained in custody from February 4, 1979 until June 10, 1999 at which time he was released from the Illinois Department of Corrections on mandatory

supervised release (also referred to herein as "parole") pursuant to Section 3-3-3 (c) of the Unified Code of Corrections, (hereinafter the "Code'). 730 ILCS 5/3-3-3 (c) (West 2000). Petitioner, however, was taken back into custody following an arrest in DuPage County, and his mandatory supervised release was revoked on April 27, 2000. Petitioner remains in custody at the present time.

ANALYSIS

The instant proceeding was commenced on August 25, 2000 and is before this court on a petition for writ of habeas corpus. Petitioner asserts that he should be immediately released from custody because the extended sentence imposed upon him by the trial court is unconstitutional. Furthermore, petitioner claims that, because his extended sentence is void, he has exceeded the maximum period of incarceration possible for the crimes of which he was convicted. Indeed, the United States Supreme Court has held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 147 L.Ed. 2d at 455, 120 S.Ct. at 2362-63. This issue, as proposed by petitioner, raises the question as to whether or not the ruling set forth in *Apprendi* is meant to be applied retroactively to cases on collateral review.

However, in the instant case, this issue need not be addressed because petitioner is not currently incarcerated as a result of the extended sentence imposed upon him by the trial court. In fact, petitioner's current incarceration results from the mandatory supervised release revocation which occurred on April 27, 2000 wherein petitioner was found to have violated his parole after being charged with a drug related offense in DuPage County.

Petitioner contends that this court's estimation of his current circumstance is inaccurate because the mandatory supervised release term is included in the extended term sentence. In support of this argument, petitioner relies on 730 ILCS 5/5-8-1 (d)(1) (West 2000), which states in relevant part,

> [e]xcept where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment...For those sentenced on or after February 1,

> 1978, such term shall be identified as a mandatory supervised release term...(1) for first degree murder or a Class X felony, three years;...

Petitioner's argument rests on the notion that the period of time one can serve as punishment for a violation of mandatory supervised release is dependent upon the amount of time defendant has spent incarcerated. Petitioner, however, neglects Section 5/3-3-9 (B) of the Code which discusses revocation of mandatory supervised release and states:

> For those subject to mandatory supervised release under paragraph (d) of Section 5-8-1 of this Code, the recommitment shall be for the total mandatory supervised release term, less the time elapsed between the release of the person and the commission of the violation for which mandatory supervised release is revoked... 730 ILCS 5/3-3-9(B) (West 2000)

Therefore, it is apparent that the legislature did not intend for the period of incarceration following a violation of mandatory supervised release to be strictly construed as dependent upon the amount of time defendant served on his original sentence. Indeed, it is contrary to Illinois law to interpret a sentence of mandatory supervised release[1]

as part and parcel of the original sentence imposed by the court. *Harris v. Irving*, 90 Ill. App.3d 56, 63, 412 N.E.2d 976, 981 (5th Dist. 1980). In fact, courts have held that "parole is a matter of clemency and grace and not of right...it is not a part of the sentence imposed by the court." *People ex rel. Kubala v. Kinney*, 25 Ill.2d 491, 493, 185 N.E.2d 337, 338 (1962).

Moreover, when mandatory supervised release is revoked, a defendant can be held in custody for a period of time which exceeds the maximum sentence imposed by the sentencing court. *People v. Wills*, 61 Ill.2d 105, 108-09, 330 N.E.2d 505, 507 (1975). Additionally, even if a defendant is released early on parole due to good behavior credits, there is a possibility of re-incarceration if that parole is violated. *People v. Gaither*, 221 Ill. App.3d 629, 639, 582 N.E.2d 735, 743 (5th Dist. 1991). Furthermore, re-confinement on account of a violation of parole is not considered a second sentence imposed for

---

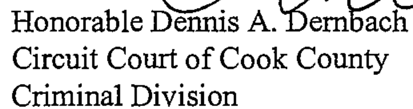
[1] For the purposes of this discussion, the term "mandatory supervised release" has been used interchangeably with the term "parole" and is considered to be synonymous to "parole." However, it should be noted that the term "parole" is used in the cases cited.

defendant's original crime. *People ex rel Scott v. Israel*, 66 Ill.2d 190, 193-94, 361 N.E.2d 1108, 1109-10 (1977).

Clearly, a violation of mandatory supervised release is an offense punishable by additional time in custody, and is not considered part of the original sentence of imprisonment. Consequently, petitioner's current incarceration which stems from a violation of mandatory supervised release does not fall within the scope of the *Apprendi* decision, is not a part of petitioner's original sentence for the crimes of rape and aggravated assault, and does not warrant a writ of habeas corpus authorizing petitioner's immediate release from custody.

CONCLUSION

Based upon the foregoing discussion, the Court finds the issues raised by petitioner are non-meritorious. Accordingly, the petition for writ of habeas corpus is dismissed.



ENTERED: ____________________

Honorable Dennis A. Dernbach
Circuit Court of Cook County
Criminal Division

DATED: 9-15-00