

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

STATE OF ILLINOIS,)	
)	
Plaintiff-Respondent,)	
)	
v.)	94 CF 2389
)	
CHRISTOPHER THOMAS,)	
)	
Defendant-Petitioner.)	

**PETITIONER CHRISTOPHER THOMAS'S
RESPONSE TO MOTION TO DISMISS
AMENDED PETITION FOR POST-
CONVICTION RELIEF IN A CAPITAL CASE**

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constitutional rights is unsupported by any case authority and, frankly, is distasteful. Prosecutorial misconduct in gathering and using privileged materials has, in some cases, even been grounds for dismissal of the indictment. See, e.g., United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (ordering trial court to dismiss indictment "where attorney-client confidences [were] actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case"); United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991) (government's collaboration with defendant's attorney required dismissal of indictment). Under these authorities, the state's willful expropriation and misuse of records privileged at law should bar it, without more, from being able to seek the death penalty on resentencing.

Furthermore, the violation of Christopher's fifth amendment rights under Estelle commands a similar result. As the United States Supreme Court has made clear, the misuse of Fifth Amendment information subjects the state to the "heavy burden" of demonstrating that the evidence played no part in the prosecution. See Kastigar v. United States, 406 U.S. 441, 461-62 (1972) (where prosecution violates Fifth Amendment, defendant need only show that state relied on improper information "in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources"). Accordingly, leaving aside the remedy for violating Christopher's statutory privilege, the state bears the "heavy burden" of proving that it would have elected the death penalty without use of this constitutionally-protected evidence. This the state clearly cannot do.

In point of fact, Christopher's case, when compared with the five other cases from this County in which defendants are on death row is far the least aggravated. See People v. McNeal, 175 Ill. 2d 335, 677 N.E.2d 841 (1997) (double murder); People v. Coleman, 168 Ill. 2d 509, 660 N.E.2d 919 (1995) (kidnapping and murder of a 9-year old girl; state used as evidence in

aggravation the seven other murders defendant had committed, most of which involved children); People v. Enis, 163 Ill. 2d 367, 645 N.E.2d 856 (1994) (after defendant's rape victim brought charges, defendant shot her five times in the head); People v. Sanchez, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996) (rape and strangulation death of a woman and the shooting of her boyfriend); People v. Neal, 111 Ill. 2d 180, 489 N.E.2d 845 (1985) (defendant robbed and killed a 63-year old widow, beating her with a pipe filled with concrete and stabbing her through the heart); see also People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984), cert. denied, 471 U.S. 1044 (1985) (defendant murdered his mother-in-law, as well as his father and grandmother-in-law, and attempted to murder his brother).

Indeed, the circumstances of this case are less aggravated than any matter reported in the last decade in which this State's Attorney Office attempted but did not succeed in obtaining a death sentence. People v. Edwards, 301 Ill. App. 3d 966, 704 N.E.2d 982 (2d Dist. 1998) (defendant beat a 71 year old man to death and also confessed to two additional murders and various armed robberies, not counting another murder for which he had been convicted and served time; sentenced to natural life); People v. Matney, 293 Ill. App. 3d 139, 686 N.E.2d 1239 (2d Dist. 1997) (defendant knocked a former friend unconscious and placed him on railroad tracks before an oncoming train; sentenced to 45 years); People v. Banks, 287 Ill. App. 3d 273, 678 N.E.2d 348 (2d Dist. 1997) (defendant shot a fifteen year old girl in a drive-by while he was attempting to shoot a rival gang member; sentenced to 50 years); People v. Woods, 184 Ill. 2d 130, 703 N.E.2d 35 (1998) (robbery and double murder at a local pizza restaurant; sentenced to natural life, prior to reversal); People v. Gonzales, 285 Ill. App. 3d 102, 673 N.E.2d 1181 (2d Dist. 1996) (defendant shot his girlfriend's ex-husband; sentenced to 42 years for the murder); People v. Coleman, 166 Ill. 2d 247, 652 N.E.2d 322 (1995) (defendant fire bombed a home,

killing a 17 year old girl and injuring her father and two sisters; sentenced to an 85-year prison sentence); People v. Waldron, 219 Ill. App. 3d 1017, 580 N.E.2d 549 (2d Dist. 1991) (victim shot at inception of armed robbery of a gas station, which defendant then completed; defendant also committed another armed robbery the next day and planned to murder the police officers who were sent to apprehend him); People v. Smith, 241 Ill. App. 3d 446, 608 N.E.2d 1259 (2d Dist. 1993) (defendant given 60-year sentence for force-feeding acid to her three month old baby, killing him, as part of a scheme to sue the formula manufacturer); People v. Melock, 149 Ill. 2d 423, 599 N.E.2d 941 (1992) (defendant killed his grandmother by strangling, stabbing and beating her; ultimately sentenced to 85 years); Melock v. Gilmore, 1996 WL 596402 (N.D. Ill. 1996).

Accordingly, the state will never be able to meet the "heavy burden" of establishing it would have arrived at the same decision, absent this evidence, and it thus will be barred from seeking the death penalty again. For present purposes, however, it is clear that the state's motion to dismiss Count II, Parts A and B of Christopher's post-conviction petition must be denied.

C. The Petition Properly Alleges That Christopher Had A Right To Bifurcate The Factfinder In His Sentencing Hearing And He Received Ineffective Assistance Of Counsel When His Lawyers Failed To Preserve The Reversible Error

The state's improper introduction of Christopher's alleged gang membership and its impact on the jury caused Christopher's attorneys to request bifurcation of the eligibility and sentencing proceedings on two separate occasions. Despite that, the court erroneously refused to decide the bifurcation issue each time. (R 1487-88, 1509-10.) As a result, Christopher was improperly forced to waive the jury for both eligibility and sentencing, although he clearly would not have done so without being put to this Hobson's choice. A violation of a defendant's rights