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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

ANDRES ANTONIO TORRES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000842

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Petitioner Andres Antonio Torres requests that this Court grant rehearing because it overlooked or misapprehended significant material facts and matters of law as explained below in denying certiorari in this case. See, Andres Antonio Torres v. State of South Carolina, Appellate Case No. 2020-000842 (June 27, 2023).

1.

This Court should grant rehearing to fully examine the unconstitutional construction of section 16-3-20(C) of the South Carolina Code and, alternatively, trial counsel's ineffective assistance in failing to object to the unconstitutional jury instruction.

The trial judge repeatedly and impermissibly charged the jury that their sentence would be a recommendation. App. 2326, ll. 2-8; App. 2865, ll. 4-7. He told the jury that the verdict form was a recommendation. App. 2865, l. 20 – 2866, l. 6. Trial counsel did not object. App. 2882, ll. 23-25. Trial counsel admitted they never even discussed whether to object to this erroneous instruction. App. 3837, ll. 17-20; App. 4128, ll. 2-5; App. 4129, ll. 12-14; App. 4290, l. 23 – 4291, l. 3.

Jurors in a capital trial cannot be led to believe that they do not have the ultimate responsibility for sentencing a defendant to death. Jurors must feel this "awesome responsibility" when they consider whether to impose a death sentence. Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29.

This Court has reversed death sentences after Caldwell for failure to convey to the jury that it was making the final decision on sentencing. State v. Bellamy, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); see also State v. Davis, 306 S.C. 246, 250, 411 S.E.2d 220, 222 (1991) (reversing where the trial judge refused to instruct the jury that its sentencing recommendation would be accepted by the judge and the sentence imposed accordingly and nowhere in the record did the

trial judge refer to the jury's sentencing decision as anything more than a recommendation); State v. Plemmons, 296 S.C. 76, 79, 370 S.E.2d 871, 872 (1988) (vacating a death sentence where the "trial judge failed to apprise the jury its sentencing recommendation would be followed" and "[t]he record [was] devoid of any statement by the trial judge that would have conveyed this idea to the jury"); State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981) (vacating a death sentence where the solicitor's closing argument attempted to minimize the jurors' own sense of responsibility for Woomer's fate by stressing that he had already made the same decision that he was asking the jurors to make).

Here, the jury charge, read as a whole, left the singular impression that the jury's function was merely to provide a recommendation as to sentencing. The trial judge unequivocally informed the jurors at the very start of the sentencing phase that their role during that portion of the trial was to recommend a sentence to the court. Without question, this instruction was in violation of federal and state law that the jury's role in sentencing not be diminished. A recommendation is a suggestion, not a decision. After this initial instruction, the jurors listened to the evidence presented during the sentencing phase with their role in mind – to act as advisor to the court on sentencing. The trial judge's opening directive to the jurors set the parameters through which the jurors filtered and processed the sentencing phase evidence. At the conclusion of the sentencing phase, the judge reinforced this directive by repeatedly and continually and consistently instructing the jury that its job was to recommend a sentence. In the jury room, this function was further supported by the verdict forms that referred to the jury's verdict as a recommendation.

The judge's incidental instruction that the recommendation would be followed, which occurred in the middle of a lengthy instruction, could not cure the sixty unconstitutional

instructions because the unconstitutional instructions provided the foundation for the jury's understanding of its role during the sentencing proceeding. The unconstitutional instructions also were repeated at least sixty times and physically accompanied the jurors in the jury room during deliberations in multiple written forms. At best, the attenuated instruction that the judge would impose the jury's recommendation created ambiguity in the jury's actual role. "'Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.'" Lowry v. State, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) (quoting Francis v. Franklin, 471 U.S. 307, 322 (1985)).

The PCR court's conclusion that "[t]he trial court's instruction conforms to the statutory language which was applicable and case law dictating what is required to be provided by way of instruction to a jury in a capital trial" was error. App. 5322. As applied in this case, the statutory language referring to the jury's verdict as a recommendation is unconstitutional. The PCR court failed to understand this point. The jury heard "recommendation" or "recommend" sixty times but heard only twice that the judge would follow the recommendation. App. 3037, ll. 6-12. The PCR court's conclusion is untenable after Caldwell and this Court's jurisprudence.

Trial judges must clearly explain "to all prospective jurors that the 'ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty.'" State v. Middleton, 295 S.C. 318, 325-326, 368 S.E.2d 457, 461 (1988); see also State v. Cain, 297 S.C. 497, 509-510, 377 S.E.2d 556, 563 (1988); State v. Sims, 304 S.C. 409, 421-422, 405 S.E.2d 377, 384 (1991); State v. Johnson, 306 S.C. 119, 135, 410 S.E.2d 547, 556 (1991). In Cain, this Court held that even where a trial judge's sentencing instruction contained "the word 'recommendation,' the instruction did not undermine the jury's responsibility because the judge told the jury "at the outset of the penalty phase" "that the

ultimate decision on punishment was the jury's." Cain, 297 S.C. at 509-510, 377 S.E.2d at 563. Here, the jury heard an unequivocal directive to *recommend* a sentence to the court at the very beginning of the sentencing phase and at the end. See Miller, N., & Campbell, D.T., Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements, The Journal of Abnormal and Social Psychology, 59(1), July 1959 (explaining through empirical study that people remember the first and last things they hear). The message to the jury that it was only making a recommendation was not undone by the buried references that the court would follow the recommendation.

Trial counsel failed to understand this legal problem and did not object to the judge's erroneous instructions. Unlike other capital post-conviction cases where trial counsel failed to "clairvoyantly" see obvious changes in the law, the law on this point was well-settled by the time of petitioner's trial. Caldwell was decided in 1985. The cases following Caldwell were decided long before petitioner's trial. Yet, trial counsel failed to object to the erroneous instructions.

The error here is arguably structural, relieving petitioner of the burden of proving prejudice under Strickland. See Weaver v. Massachusetts, 582 U.S. 286, 300 (2017) (assuming without deciding that if a convicted person shows that attorney errors rendered the trial fundamentally unfair, there is no required showing of a reasonable probability of a different outcome). However, even if prejudice is required, it is easily shown under the same logic of Caldwell. According to Caldwell, the jury must be informed that it alone is the sentencing authority, and this heavy burden placed on a capital sentencing jury must not be lessened. Here, the trial judge repeatedly informed the jury that its role was merely advisory.

The correct instruction simply arrived too late and was buried under an avalanche of Caldwell errors. In doing so, the trial judge denied petitioner the fundamental fairness to which

he was entitled. Prejudice must be presumed from trial counsel's failure to object to this error. This Court should grant rehearing and certiorari to consider this important constitutional deprivation.

2.

This Court should grant rehearing and certiorari to closely examine the shocking medical facts trial counsel failed to uncover and, if the jury had heard them, would likely have resulted in a life sentence.

Because of trial counsel's ineptitude, petitioner's jury never heard that he has multiple genetic chromosomal defects which substantially limit his ability to understand and process information, to learn from experience, to engage in logical reasoning, to control impulses, and inhibit the effectiveness of psychiatric medication. App. 4269, l. 11 – 4270, l. 7. Throughout his life, doctors treated petitioner incorrectly from both pharmacological and psychological perspectives. App. 4271, ll. 1-10. The mitigation case presented during the PCR hearing provided substantial reasons for a jury to vote for life, unlike the mitigation case presented during his trial, which merely buttressed the state's request for death.

Petitioner lived in institutions for most of his infancy and adolescence. App. 4940; Supp. App. 43, ll. 8-12. Trial counsel failed to see the obvious indications of congenital defects in the medical records from petitioner's evaluations during these institutionalizations. When petitioner was fourteen, a doctor noted petitioner's numerous physical abnormalities and suspected Klienfelter's syndrome or some other chromosomal defects. App. 4942; Supp. App. 52, ll. 16-19. The doctor explained that he was concerned as to whether he was "dealing with purely a behavior disorder or something with an organic basis to it." Supp. App. 53, ll. 20-25. The doctor "suspected people needed to look at hormonal and chromosomal studies" due to the abnormalities observed during the physical exam and the unusualness of petitioner's history of violent behavior requiring confinement starting at three years old. App. 4956, ll. 5-12.

Although trial counsel was well aware of the doctor's evaluation of petitioner, neither he nor anyone on his defense team contacted him. App. 4249, ll. 7-18; App. 4250, ll. 5-9; App. 4252, ll. 18-21; App. 4939-4943; Supp. App. 35, ll. 14-20. However, petitioner's PCR counsel examined the doctor's findings and followed the obvious clue they left – that petitioner suffered from genetic and organic defects.

PCR counsel found that petitioner suffered from multiple serious genetic defects that should have been obvious to trial counsel. Petitioner has Prader-Willi Syndrome ("PWS"). App. 3429, ll. 5-23. Petitioner's micropenis is the tell-tale sign of PWS, along with other easily observable characteristics. App. 3477, ll. 18-20. PWS causes behavioral problems, including violent outbursts and the inability to stop eating. App. 3459, l. 21 – 3460, l. 10.

Petitioner has hyperprolinemia. App. 3429, ll. 5-23. Microarray DNA testing showed petitioner was missing 90,766 base pairs in the chromosome 22q region. App. 3461, ll. 11-22. "This encompassed two different genetic syndromes," including the PRODH, which is the hyperprolinemia gene, and a big area of the critical DiGeorge area. App. 3461, l. 23 – 3462, l. 1. The hyperprolinemia gene was responsible for the degradation of proline, an amino acid. App. 3462, ll. 9-17. When this gene fails to function or is deleted, as it was for petitioner, then the person has an elevated level of proline in the plasma. App. 3462, ll. 19-22. Plasma testing showed "dramatically elevated" proline for petitioner.[1] App. 3462, l. 24 – 3463, l. 3; App. 3472, ll. 23-25.

[1] Dr. Lipman explained he was "certain" petitioner suffered from 22q11 deletion syndrome based upon the microarray assay. App. 3538, ll. 11-20. Petitioner's deleted region of 22q11 "contains a number of very, very important genes." App. 3538, ll. 12-14. The proline dehydrogenase, the PRODH, gene codes for the enzyme that breaks down proline, which is an amino acid in the body. App. 3538, ll. 16-18. Testing of petitioner's proline levels confirmed he had "higher than normal" proline. App. 3540, ll. 4-6.

Due to the deletion in the DiGeorge region, Dr. Rary diagnosed petitioner with DiGeorge syndrome. App. 3464, ll. 5-25. DiGeorge syndrome exists on a spectrum based upon the degree of deletion. App. 3464, ll. 17-20. Dr. Rary explained that a large portion of petitioner's DiGeorge gene is deleted. App. 3465, ll. 6-7. In addition to the gene deletion, Dr. Rary noted that petitioner had low-set ears, which was a dysmorphic feature of 22q11 deletion syndrome. App. 3487, ll. 15-24.

These genetic conditions explained petitioner's behavior since birth. Individuals with PWS often have "deficits in processing information that go beyond the kinds of things that are typically captured by IQ tests." App. 3633, ll. 3-5. "This involves" impairment in executive functions, including "judgment, planning, sequencing, carrying out the steps and remembering the steps to do something." App. 3633, ll. 5-9. Individuals with PWS have difficulty recognizing facial expressions in other people. App. 3633, l. 15 – 3634, l. 5.

"Many of the deficits that are seen in Prader-Willi Syndrome" are attributed to impairments in functions supported by the orbital frontal cortex of the brain. App. 3634, ll. 6-10. "[T]he orbital frontal cortex and the lower emotion centers represent the poles of reason and emotion, and having an intact relationship between the two speaks to the relationship between reason and emotion in an individual's life." App. 3634, l. 23 – 3635, l. 2. When the orbital frontal cortex is undeveloped or damaged, the individual's behavior can be dominated by emotion. App. 3635, ll. 3-6. When petitioner was seven years old, an evaluator described his behavior as controlled by "raw affect." App. 3635, ll. 7-12. Petitioner's "emotional explosiveness interferes with [his] logical reasoning." App. 3705, ll. 10-15. He does not process information through rational capacities in the way a normal individual would. App. 3705, ll. 12-15. "Impulsivity," and "lack of self-control," like that used to describe petitioner, "is

characteristic of a significantly large number of individuals with Prader-Willi." App. 3703, ll. 7-15.

Individuals with PWS are more prone to "temper outbursts, aggressive outbursts, often explosive." App. 3638, ll. 1-7. Petitioner's "developmental history certainly shows those features to an extreme degree." Being "admitted to a psychiatric hospital at the age of three and a half with the chief complaint of I-am-going-to-kill-myself-or-you, that's exceptional." App. 3638, ll. 9-12. Going back to his infancy, petitioner engaged in headbanging, including to the point where he was bloody, demonstrating inward aggression, a sign of PWS. App. 3638, ll. 13-25. "For some children headbanging can also be a desperate, if doomed, attempt at self-regulation." App. 3639, ll. 2-4.

In sum, the neuropsychological testing showing petitioner suffered from brain damage was consistent with the medical records that talked about impaired brain function, the EEG[2] showing electrical problems in his brain at a very early age, and the MRI report from 2008 showing the angioma. App. 4005, ll. 17-19; App. 4032, ll. 20-23. The symptoms experienced by petitioner that resulted in numerous psychiatric disorders were consistent with brain impairments. App. 4037, ll. 6-12. As Dr. Woods explained "[e]ach of the symptoms" were "ongoing, neurologically based and lifelong starting at the age of 18 months, and each of these symptoms were present at the time of the offense." App. 4039, ll. 13-24. The "potpourri of medications" administered to petitioner over the years that failed to help alleviate his symptoms indicated that the underlying causes of the symptoms – genetic disorders and brain damage – were undiagnosed and undetected. App. 4038, ll. 14-15.

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[2] When petitioner was two years old, an EEG of his brain revealed "the electrical impulses of his brain were not quite normal." App. 2676, ll. 12-25. Although he was not diagnosed with a seizure disorder, he was placed on seizure medication. App. 2676, ll. 12-25. Trial counsel was aware of this abnormal EEG, but failed to realize its significance.

The jury never heard this evidence because of trial counsel's failures. In multiple cases, this Court and the United States Supreme Court has held that trial counsel's failure to uncover substantial mitigating evidence is prejudicial deficient performance. See Wiggins v. Smith, 539 U.S. 510, 533 (2003); Rompilla v. Beard, 545 U.S. 374 (2005); Weik v. State, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014). In these cases, the mitigating evidence trial counsel failed to uncover was largely related to horrific upbringings by the defendants.

Petitioner's case is better than Wiggins, Rompilla, and Weik because PCR counsel uncovered genetic and organic explanations for petitioner's conduct and the failures of the psychiatric medications. Misconstruing petitioner's claim as asserting the existence of a "crime gene," the PCR judge failed to grapple with the hard and complex questions raised by the genetic defects and concluded this information "would rest on misleading the fact finder under the label of science," which would be "improper." App. 5330. A jury needed to hear this scientific information and assess its credibility. Had the jury heard this evidence, it is extremely probable that at least one juror would have voted for a life sentence. This Court should grant rehearing and grant certiorari to examine the genetic evidence that a jury never saw.

3.

This Court should grant rehearing to fully examine the incompetence and the attendant prejudice in defense counsel repeatedly telling the jury in dramatic fashion during the guilt phase opening argument that petitioner was "not guilty." The defense knew it was not calling any guilt phase witnesses, evidence of guilt was overwhelming, and the failure of the defense team to have a theory that connected the guilt and penalty stages caused the defense to have no credibility with the jury during the critical penalty stage presentation.

Prior to trial, Solicitor Gowdy made a motion to exclude third-party guilt unless the defense could "proffer evidence that would tend to show their client's innocence and rise above mere speculation with respect to someone else." App. 1555, ll. 11-19. Defense counsel Reckenbeil told the judge that the defense was focused on Chuck Emery who was the son of murder victim Ray Emery and the stepson of decedent Ann Emery. App. 1555, l. 22 – 1562, l. 10. The defense then proffered its "third-party guilt" evidence regarding Emery.

On the morning the trial began the following day, Friday, October 17, 2008, the judge ruled that "As to the evidence of third party guilt, it's my finding that it does not rise to the level provided for by our Courts for introduction, and, therefore, I'll be excluding that evidence." App. 1690, ll. 20-24. The defense did not request any time to talk to petitioner after the judge ruled the third-party guilt evidence was inadmissible. Only three transcript pages after the judge ruled on the issue, the judge gave the jury his opening charge on the law without objection, and the trial began. App. 1693, l. 20 –1709, l. 2.

Assistant Solicitor Crick then gave her opening statement to the jury, wherein she told the jury about petitioner wrecking the victims' van in Union County, petitioner paying someone to drive him back to Spartanburg following the accident after telling him a lie about his wife having

a baby, and the police finding the dead victims' property in the stolen van. The solicitor also told the jury about inculpatory forensic evidence taken from the petitioner's grandmother's washing machine which matched the crime scene. "Sometimes, in life, we have a tendency to make things very complicated and overlook the obvious. But I think what you're gonna find out in this case that it's not that complicated. All of the forensic evidence that you will hear about points to one person and only one person. And that person is the defendant." App. 1709, l. 21 – 1714, l. 1. The solicitor also stressed *that petitioner's semen would be a DNA profile match to that DNA left on Ann Emery's body*. App. 1714, l. 2 – 1716, l. 11.

Defense counsel Hodges then told the jurors in the defense opening, "Tony Torres has pled not guilty to each and every one of these indictments. He's put the State on notice that they have to prove their case to you." App. 1718, ll. 1-2.

Defense counsel Hodges argued:

> He was *not guilty on May the 11th of 2007* when the police officers arrested him. He was *not guilty* when he was served notice of the State's intent to seek the death penalty. He was *not guilty on Monday* when this case was called to court. He *was not guilty on the days that you were here being questioned* individually. He's *not guilty today*. He's *not guilty tomorrow*. He's *not guilty each and every day* unless and until you find that the State has met their burden.
>
> That, ladies and gentlemen, is why we're here. *It's because Tony Torres is not guilty*. Thank you.

App. 1720, l. 16 – 1721, l. 2. (emphasis added).

The state then called twenty-eight prosecution witnesses before it rested. App. 1722-2221. Defense counsel Allen made a truncated motion for a directed verdict referencing prior rulings by the trial judge. App. 2221, l. 14 – 2222, l. 11. The solicitor, when asked to respond,

stated, "It strikes me that every conceivable genre of evidence exists in this case against this defendant . . ." and the judge denied the directed verdict motion. App. 2222, ll. 13-23.

Defense counsel then made a brief renewal of his motion to present evidence of third-party guilt. When asked to respond, the solicitor stated, "Your Honor, I think it's even more clear now than it was during pretrial hearings that nothing the defense proffered exonerates or exculpates this defendant. It is speculative. It is conjectural. And it doesn't rise to the level of our Supreme Court cases or the United States Supreme Court cases with respect to third party guilt." The judge ruled that he was not altering his ruling excluding evidence of third-party guilt, and the defense immediately rested without offering any evidence. App. 2226, l. 3 – 2227, l. 7; app. 2235, l. 20 – 2236, l. 2.

Solicitor Gowdy then argued in closing:

> [L]adies and gentlemen, I heard Friday morning and I underlined it twice because I wanted to make sure that I heard it correctly, *amid a chorus of not guilty pleas by the defense counsel*, I heard the comment that there were no eyewitnesses as if that somehow means a crime doesn't occur because they're no eye witnesses.
>
> Ladies and gentlemen, I beg to differ. There were eye witnesses. There were two of them. He just killed them. He just made it where they couldn't talk with their mouths. But their blood screams out and Ann Emery's body will testify. There are eye witnesses.
>
> ***
>
> You have Ann Emery's body to do what defense counsel said couldn't be done, to be an eyewitness to what happened. *This defendant's semen was found inside the body of a murdered woman one hundred and ten quadrillion to one. Those are numbers that stagger the human mind. A hundred and ten quadrillion to one it's Andres Torres' semen inside Ann Emery.*
>
> Ladies and gentlemen, every piece of circumstantial, direct, and forensic evidence that you can have in a criminal case you

have in this case. And every single solitary piece of it implicates Andres Torres.

App. 2243, l. 17 – 2244, l. 2; app. 2245, ll. 1-11. (emphasis added).

Defense counsel Reckenbeil then argued to the jury:

> The solicitor talked about the fact that one in one hundred ten quadrillion that DNA in the vagina of Ann Emery matches Tony Torres.
>
> But do you know what also was questioned and talked about, about the DNA?
>
> We can not exclude Tony Torres from the handle of the hammer. Well, you remember when Professor Fitts and Doctor Fitts talked about the fact of how we go about finding out DNA and matches. We enter it into an FBI database. That's how we find out about our matches. Well, one hundred and ten quadrillion, there ain't enough people on this planet to figure that one out. Six billion people.
>
> Well, did they do that with the fact of the matches for and exclude Tony Torres from the handle of the hammer?
>
> No.

App. 2254, ll. 7-21.

The jury found petitioner guilty on all counts. After the twenty-four-hour waiting period at the beginning of the penalty phase, defense counsel Allen admitted to the jury petitioner killed the victims. "*You have indeed heard evidence about horrible crimes that Tony Torres committed. Nothing that I can say and nothing that the defense can present during this phase can take away from that part.* But what we're gonna try to demonstrate between this portion of the trial is to try to give you some understanding and some background into why Tony Torres did this." App. 2331, l. 25 – 2332, l. 6. (emphasis added). Defense counsel also told the jurors, "[H]e [petitioner] essentially could not or did not control himself." App. 2332, ll. 20-21.

PCR

At the post-conviction relief hearing, Defense Counsel Hodges acknowledged that she told the jury nine times in her opening statement that petitioner was "not guilty." App. 3817, ll. 15-18. Hodges admitted, "The known physical evidence in advance was very strong indicating the client's presence at the scene." App. 3824, ll. 1-6. Yet, Hodges insisted, "I still think that there was an argument that the Emerys—there's no evidence that the Emerys were killed by Mr. Torres." App. 3824, ll. 12-14. However, Hodges then admitted the obvious, "*[T]he fight in this case was going to be in the penalty phase as opposed to the guilt or innocence phase*. But we—you know, we discussed as to whether—how to—how to craft the opening statement. *But it was essentially kind of left up to me to actually develop it."* App. 3799, ll. 20-24. (emphasis added). Hodges said her recollection was that it was a "team decision" to assert that petitioner was not guilty, and to ask the jury to acquit petitioner. Hodges strangely asserted that while building credibility with the jury in the opening statement was important in "most trials" *I don't necessarily know that in terms of a death penalty trial* – I mean, your first instance that you're building a relationship and credibility with the jury is during the voir dire process." App. 3800, l. 6 – 3801, l. 19. (emphasis added). Hodges admitted, while she felt someone else was involved in committing the crime, she acknowledged that petitioner never told her that Chuck Emery or anyone else was involved. App. 3877, l. 6 – 3878, l.1

Lead counsel, Clay Allen, acknowledged that Hodges told the jury "nine different times" in her opening statement that petitioner was not guilty. App. 4309, ll. 10-25. Allen conceded that the state's guilt phase case against petitioner was "very strong" and that the defense "didn't present any witnesses in the defense on the guilt phase of the case." App. 4310, ll. 1-7. Defense counsel said the conflict between stressing to the jury during the guilt phase that the defendant

was not guilty and then asking the jurors to consider mitigating evidence after the defendant was found guilty was an *"inherent problem."* He nonetheless thought that the defense was "compelled to argue" in this manner that petitioner was not guilty. Allen erroneously reasoned that telling the jury the client was not guilty during the guilt phase, and then turning around and admitting his guilt while begging for mercy during the penalty phase was essentially just a structural problem in a capital case that could not be avoided. App. 4310, l. 15 – 4312, l. 3. (emphasis added).

The post-conviction judge noted petitioner alleged "ineffective assistance of counsel" in:

> 1. "Trial counsel's strongly worded opening statement that the applicant was not guilty when they knew the strength of the State's guilt phase evidence and knew that they would not be offering a single witness in defense of the charges. The error forfeited counsel's credibility during the sentencing phase and evidenced a complete lack of a unified trial strategy between two phases in a capital trial."
>
> Trial counsel testified that Applicant did not want a concession of guilt and wished to contest his guilt at the trial. *Counsel was under an ethical obligation in their representation to follow the instructions of their client.* Counsel testified that they devised a strategy based upon that decision to divide the representation in the guilt phase and penalty phase so that different counsel would be handling the separate phases so as to avoid the possibility that counsel's credibility would be compromised by taking what might be considered inconsistent, conflicting, or alternate positions.
>
> Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

App. 5337. (emphasis added).

Discussion

Defense counsel incorrectly reasoned that stressing your client's innocence to the jury where there was overwhelming evidence of his guilt was an "inherent problem." The PCR court

erred by concluding that defense counsel was ethically obligated to make an opening argument repeatedly and dramatically asserting petitioner's innocence. App. 5337. There is much middle ground between not conceding your client's guilt and a foolhardy opening argument stressing that a client in a capital case was innocent where any reasonable defense counsel would have known he would have to concede his client's guilt at the start of the penalty stage. Rehearing should be granted for these reasons.

ABA Guideline 10.10.1 Trial Preparation Overall A. provides, "As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with guilt and penalty, and should seek to minimize any inconsistencies."

Instead, Defense Counsel Hodges told the jury nine times in dramatic fashion during her opening statement that petitioner was "not guilty." Defense counsel later admitted at the post-conviction hearing that they were aware that the defense was not going to call any witnesses during the guilt phase. They also knew that the state had overwhelming evidence of petitioner's guilt. Petitioner's DNA by way of his semen was found inside victim Ann Emery. The state also presented evidence that the victim's blood was found on petitioner's clothes. There was also evidence petitioner wrecked the Emery's stolen van in Union county. The van contained many of the personal belongings that were stolen from the victims.

At the start of the penalty phase, Defense Counsel Allen admitted to the jury that petitioner killed the victims. App. 2331, l. 25 – 2332, l. 21. The entire guilt phase was just a charade the jurors should forget ever happened during the penalty stage where the jury would make the critical decision whether to spare petitioner's life – which his defense attorneys admitted – petitioner wanted spared.

No defense theory connected the guilt and penalty phases. In accordance with ABA Guideline 10.10.1, the defense went from dramatically claiming nine times during the guilt phase opening statement that petitioner was not guilty to admitting to the jury after the twenty-four-hour waiting period that petitioner indeed committed these "horrible crimes." The jurors would now hear "some background into why Tony Torres did this." App. 2331, l. 25 – 2332, l. 6.

The commentary to ABA Guideline 10.10.1 states:

> Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case. In a capital trial, the task of constructing a viable strategy is complicated by the fact that the proceedings are bifurcated. The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt. At the same time, if counsel takes contradictory positions at guilt/ innocence and sentencing, credibility with the sentencer may be damaged and the defendant's chances for a non-death sentence reduced. Accordingly, *it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation states. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.*

In Eaton v. State, 192 P.3d 36, 64 (Wyo. 2008), the Wyoming Supreme Court wrote that, pursuant to ABA Guideline 10.10.1, "Counsel should seek a theory that will be effective in connection with both guilt and penalty and should seek to minimize any inconsistencies." In Eaton, there was consistency because Eaton conceded that he committed the homicide but did not premeditate it or commit it in the perpetration of the kidnapping, robbery, or sexual assault. In the penalty phase, he could then point to his admission of wrongdoing, in conjunction with his remorse and severe emotional distress, as mitigating factors that suggested either life, or life without parole, would be appropriate punishments." Eaton 192 P.3d at 65.

Conversely, the defense in this case had no credibility with the jury when the penalty phase began. It was apparent petitioner was guilty, and that the defense had engaged in a sham dramatically arguing that petitioner was innocent during the guilt stage. It is quite a different thing to argue the state had to prove its case beyond a reasonable doubt than it is to repeatedly argue actual innocence in the face of overwhelming evidence of guilt, and where defense counsel knows it will call no defense witnesses.

The penalty phase presentation was also far from compelling. Dr. Alex Morton testified as an expert in addictions, regarding petitioner's addictions and his psychiatric disorders and how petitioner's love of meth caused "impulsivity and aggression." App. 2606-2607. Dr. Donna Schwartz-Watts testified about petitioner's mental illnesses and petitioner being bipolar, which caused poor judgment, aggressive behavior, and irritability. App. 2674; app. 2680. However, Dr. Schwartz-Watts also testified that petitioner had shown himself to be intelligent and at times had "straight A's" in school. App. 2674. Dr. Schwartz-Watts also told the jurors that petitioner had apparently been awake for four days before the murders, attributed to drugs, methamphetamines, mood swings, and his bipolar disorder. App. 2694. In addition, petitioner had an anti-social personality disorder and, while petitioner was mentally ill, his twenty-four car breaking offenses were not caused by him being manic, but rather petitioner choosing to break the law. App. 2697-2698. Dr. James Aiken testified that petitioner could adapt to prison. App. 2813-2816.

The incoherence between the guilt phase presentation and the penalty phase defense in this case cannot be attributed to the subsequent opinion of the United States Supreme Court in McCoy v. Louisiana, 138 S. Ct. 1500 (2018) in any manner either. In McCoy, the Supreme Court distinguished its holding in Florida v. Nixon, 543 U.S. 175 (2004), where the Court

considered whether the constitution barred defense counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects to that strategy. In Florida v. Nixon, defense counsel several times explained to the defendant a proposed guilt phase concession strategy, but the defendant was unresponsive. The Court noted that it held in Florida v. Nixon, when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy. McCoy v. Louisiana, 138 S. Ct. at 1505, *citing* Florida v. Nixon. 543 U.S. at 192.

In McCoy v. Louisiana, the Court noted that, in contrast to Nixon, the defendant in McCoy *ferociously insisted* he did not engage in the charged acts and *adamantly objected* to any admission of his guilt. Yet, the trial court permitted defense counsel during the guilt phase of the trial to tell the jury that Nixon "committed three murders . . . he is guilty." McCoy v. Louisiana, 138 S. Ct. at 1505, *citing* Florida v. Nixon, 543 U.S. 175 (2004). Even if McCoy v. Louisiana was a watershed rule of criminal procedure, retroactively applicable to cases on collateral review, which it is not, the record in this case does not disclose that trial counsel warned petitioner here that insisting to the jury that he was not guilty during the guilt phase where the defense was not going to offer any defense witnesses would very likely leave the defense team with no credibility in the eyes of the jury at the beginning of the penalty stage. See Smith v. Stein, 982 F.3d 229 (4th Cir. 2020). The record here did disclose that petitioner strongly wished for the defense to save him from a death sentence during the penalty phase and that defense counsel was aware of that fact prior to trial.

Defense counsel in this case did not have to concede petitioner's guilt during the guilt phase to maintain a coherent connection between the guilt and penalty stage. Defense counsel

erroneously thought it was an "inherent problem" in bifurcated death penalty trials to maintain innocence during the guilt phase, and then have to admit guilt during the penalty stage. Where the defense did not call any witnesses during the guilt phase, it could have reminded the jury in opening and closing arguments that the state bore the burden of proving petitioner's guilt beyond a reasonable doubt. Instead, the defense in dramatic fashion told the jurors nine times in its opening that petitioner was "not guilty," and it was left with no credibility when the penalty phase began, and where it was undisputed petitioner wished for the defense team to save his life. Neither Nixon nor McCoy mandated the incoherent, futile opening statement dramatics, insisting petitioner was not guilty in this case where the evidence of guilt was overwhelming, and the defense knew it was not calling any guilt phase witnesses. Cf. State v. Nance, 393 S.C. 289, 297, 712 S.E.2d 446, 450-451 (2011) (decision not to cross-examine victim's husband was based upon an acceptable overall trial strategy to concede guilt, attempt to establish the defendant's mental illness, and focus on mitigation).

The failure of the defense team to establish any connection between its guilt phase and penalty phase strategy left the defense with no credibility at the start of the critical penalty phase trial. When defense counsel Allen sheepishly had to admit to the jury at the start of the penalty phase that petitioner killed the victims, the defense had no credibility left at that point to save petitioner's life, which the defense attorneys admitted petitioner wanted them to do. Defense counsel's incoherent disconnect between the two stages of petitioner's capital trial constituted ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984).

Importantly, also, the PCR court's ruling that defense counsel here was ethically obligated to make an opening argument repeatedly and dramatically asserting petitioner's

innocence was in direct contravention of the holdings of Florida v. Nixon, 543 U.S. 175 (2004) and McCoy v. Louisiana, 138 S. Ct. 1500 (2018). Rehearing should respectfully be granted.

4.

This Court should reconsider its decision denying certiorari because petitioner should be ineligible for the death penalty by reason of his severe mental illnesses and genetic disorders. These impairments significantly diminished petitioner's ability to exercise rational judgment and executing an individual suffering from these severe disorders would constitute cruel and unusual punishment in violation of the Eighth Amendment in the same manner as executing an individual with an intellectual disability would violate the reasoning and holding of *Atkins v. Virginia*, 536 U.S. 304 (2002). Defense counsel was ineffective for failing to raise this issue to the trial court.

At the PCR hearing, lead counsel, Clay Allen, acknowledged he was aware of Atkins v. Virginia, 536 U.S. 304 (2002), wherein the Supreme Court held that the execution of a mentally retarded (now intellectually disabled), convicted person was cruel and unusual punishment prohibited by the Eighth Amendment. Allen was also familiar with Roper v. Simmons, 543 U.S. 551 (2005), where the Supreme Court held that the execution of individuals who were under 18 years of age at the time of their capital crimes was prohibited by the Eighth and Fourteenth Amendments. Defense Counsel Allen was intimately aware of Roper v. Simmons because he was trial counsel in State v. Morgan, 367 S.C. 615, 626 S.E.2d 888 (2006) where this Court vacated Morgan's sentence, pursuant to Roper, since Morgan was under 18 years of age at the time he committed his capital crime. App. 4288, l. 1 – 4290, l. 5. Allen said he raised the issue to the trial court that it was unconstitutional to execute a person who committed a capital offense before he was 18 years of age in Morgan because Roper "was pending in the U.S. Supreme Court on that very issue [at the time of Morgan's trial]." App. 4363, l. 1 – 4365, l. 11. Here, Allen admitted he was aware of Atkins v. Virginia, 536 U.S. 304 which barred the execution of people with an intellectual disability since their moral culpability is lessen because of their

disability. However, Allen was not aware of the fact evidence regarding "Prader-Willi and 22qll deletions." Allen did not know "whether the phenotypes of this group of genetically impaired individuals matches that of a mental retarded -- intellectually disabled person." App. 4288, l. 23 – 4290, l. 5:

> Q Had you known that would you have made a categorical presentation that -- that is that this individual -- your client, Mr. Torres, fit the same criteria and therefore should be considered ineligible as Atkins in his group were because they were exactly parallel? In fact, we had statistics that showed Prader-Willi was even more commonplace than mental retardation.
>
> A Okay. I see -- see that argument. Yes.
>
> Q You didn't make that argument; you didn't discuss that argument.
>
> A No.

App. 4288, l. 23 – 4290, l. 5.

When Counsel Allen was asked why he did not argue at trial that petitioner was "[c]ategorically ineligible" for the death penalty given his severe mental illness, Allen said: "I don't know if in 2008 I was that inventive, quite frankly. I notice—I notice when you were asking me questions on Friday you suggested that. And I remember being struck by that suggestion like—it's almost like a lightbulb went on like, oh, yeah." App. 4364, l. 23 – 4365, l. 7.

Similarly, Defense Counsel Hodges said she was aware of the Supreme Court's holding in Atkins v. Virginia. App. 3850, ll. 3-9. Hodges acknowledged that the evolving standards of decency reasoning which underscored the Supreme Court's decision in Atkins was that it was unconstitutional to execute individuals whose moral culpabilities were reduced due to circumstances beyond their control. App. 3850, ll. 3-17:

> Q Did you ever think or talk about opposing and advancing a forward looking theory consistent in using the Atkins analysis that this Prader-Willi group is, in fact, a good subset with mental retardation to be ineligible for the death penalty?
>
> A I don't remember any conversations about that issue.

App. 3850, ll. 18-23.

As this Court is aware, petitioner presented abundant evidence at the PCR hearing that he suffered from Prader-Willi Syndrome, that he had the 22q11 deletion syndrome, and a hyperprolinemia deficiency. App. 3429, ll. 5-23. However, even at trial there was strong uncontradicted evidence petitioner suffered from a bi-polar disorder. Dr. Schwartz-Watts testified that "[f]irst and foremost I did diagnose him [petitioner] with bipolar disorder. . ." App. 2692, ll. 8-25; app. 2698, l. 23 – 2699, l. 12; app. 2711-3-5. Bi-polar disorders also ran in petitioner's family according to Dr. Marti Loring. App. 2767, ll. 4-14. At PCR, it was apparent these genetic disorders and mental disorders were the cause and effect for petitioner's criminal acts, which resulted in his impaired decision-making, where he had "impaired executive functioning consistent with both frontal and occipital lobe impairment." App. 4038, l. 16 – 4040, l. 1.

Dr. Schacht testified at PCR there are "significant functional equivalencies between Prader-Willi Syndrome and mental retardation that can be demonstrated by empirical research." App. 3701, l. 15 – 3702, l. 9. Dr. Schacht said that Prader-Willi Syndrome results in an "emotional explosiveness [that] interferes with logical reasoning so that, you know, as was described in the psychological evaluations, Tony acts on raw affect. It doesn't get processed through the rational capacities, through a reflective process the way it would in a normal individual. So it's not so much that he can't reason. It's that his capacity for reasoning gets short circuited by overly intensive emotion on an episodic basis." App. 3705, ll. 2-18. Dr.

Schacht also said that the impact of petitioner's 22q11 deletion causes psychiatric difficulties which substantially overlaps between what the "[l]iterature describes for Prader-Willi [Syndrome] as well." App. 3705, ll. 19-25. Dr. Schacht compared Prader-Willi Syndrome with Down syndrome, which "[t]he DSM is now calling intellectual disability or mental retardation." App. 3706, l. 1 – 3708, l. 18.

Dr. George Woods also testified that petitioner's genetic disorders with their attendant lack of impulse control were similar to an intellectual disability. App. 4040, l. 2 – 4041, l. 5.

In the order of dismissal, the PCR court rejected petitioner's argument that he should be ineligible for the death penalty given his mental and genetic disorders. App. 5330-5332. The court ruled, since this issue was not raised to the trial court, that petitioner could not raise it as a free-standing claim to request an extension of Atkins v. Virginia. "Regardless of the questionable genetic material presented during the post-conviction hearing, counsel clearly had the ability to argue a reduced mental capacity as an ineligibility basis in extension of the Atkins logic. Atkins was decided in 2002, well before the 2008 trial. The free-standing claim is thus barred by the ruling in Simmons.[3] Applicant has not established that he suffers from the specific mental condition that would render him ineligible for a death sentence." App. 5331.

The PCR court also ruled defense counsel was not ineffective for failing to raise this ineligibility for the death penalty issue before the trial court. It wrote that petitioner had to prove by a preponderance of the evidence he suffered from "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period," *citing* S.C. Code § 44-20-30 (Supp. 2011); Franklin v. Maynard, 256 S.C. 276, 278-79, 588 S.E.2d 604, 605 (2003). App. 5331. This was the

[3] Simmons v. State, 262 S.C. 417, 423, 215 S.E.2d 883, 885 (1975).

intellectual disability standard. The PCR court therefore reasoned that defense counsel was not deficient or ineffective for failing to raise this issue to the trial court. App. 5332.

Discussion

As the Supreme Court's Eighth Amendment jurisprudence on the "evolving sense of decency" has progressed, the Court in 1986 held that the Eighth Amendment prohibits the state from inflicting the penalty of death upon a convicted person who is insane. See Ford v. Wainwright, 477 U.S. 399 (1986). In 2002, the Supreme Court held in Atkins v. Virginia, 536 U.S. 304 (2002) that a mentally retarded or intellectually disabled individual may not be executed for capital crimes that he or she committed. In 2005, in Roper v. Simmons, 543 U.S. 551 (2005), the Court held that the Eighth Amendment bars the execution of an individual who committed a capital offense before he or she was 18 years old.

The next logical step would be for our criminal justice system, courts or legislatures to similarly recognize that the Eighth Amendment prohibits the execution of individuals who committed their offenses while suffering from a serious mental illness. Connecticut had such a statute before the death penalty was abolished altogether in that state. Conn. Gen. Stat. Section 53a-46a(h)(2002) prohibits imposition of the death penalty when the jury or judge finds, by special verdict, that "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired or so impaired in either case as to constitute a defense to prosecution." Ohio Governor Michael DeWine signed into law House Bill 136 in 2021 which prohibits imposing the death penalty on individuals with several mental illnesses, including bipolar disorders, which significantly impaired the person's judgment, capacity, or ability to appreciate the nature of their conduct. Similarly, the Kentucky House of Representatives passed HB 148 in

2021, which similarly included bipolar disorders in the list of death penalty ineligible "severe mental illnesses."

In Florida, Section 921.135 of a proposed bill defines a "serious mental illness" as "any mental diagnosis, disability, or defect that significantly impairs a person's capacity to do any of the following: Appreciate the nature, consequences, or wrongfulness of his or her conduct in the criminal offense; exercise rational judgment in relation to the criminal offense; or conform his or her conduct to the requirements of the law in connection with the criminal offense." Arizona (SB 1695) and Missouri (HB 278) also have current bills pending banning the death penalty for those suffering from "severe" or "serious mental illnesses."

"[F]or offenders suffering from severe mental illnesses, which at times causes them to be incapable of controlling their actions, the law's treatment of their conduct as deliberate for the sake of judicial convenience or to avoid complication is an injustice. It inadequately addresses an individual's uniqueness and posits intent where there may be none. Advances in psychiatry and psychology in the past several decades have revealed that certain severe mental illnesses render individuals who suffer from them powerless to control their own thoughts and/or behavior. Moreover, such people are often not even aware that they are ill. Recently, legislatures and courts have crafted and interpreted laws in a manner that reveals their respect for, and recognition of, the validity of the mental health sciences -- psychiatry and psychology -- often relying on the developments in the two related disciplines in enacting legislation and deciding cases." Helen Shin, Is the Death of the Death Penalty Near? The impact of *Atkins* and *Roper* on the future of capital punishment for mentally ill defendants, 76 Fordham L. Rev. 465, 466 (October 2007). This article also notes that Congress recognized that mental illness was a

valid disability when it passed the Americans with Disabilities Act of 1990. 76 Fordham L. Rev. 465, 466, n. 4.

Underscoring why the intellectually disabled must be ineligible for the death penalty, the Supreme Court in Atkins v. Virginia, 536 U.S. 304, 318 (2002) reasoned, "[B]ecause of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse, rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."

The Court in Atkins found that neither justification for the death penalty—retribution or deterrence—was applicable to mentally retarded (intellectually disabled) individuals. As to retribution, the Atkins Court wrote, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, *the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.* Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." Atkins v. Virginia, 536 U.S. at 318. (emphasis added).

The Atkins Court also wrote, "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive behavior impairments that make these defendants less culpable—for example, the diminished ability to understand and process

information, to learn from experience, to engage in logical reasoning, or to control impulses—could *also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution.* Thus, executing the mentally retarded will not measurably further the goal of deterrence." Atkins v. Virginia, 536 U.S. at 320. (emphasis added).

The same must be said of the severely mentally ill with respect to retribution and deterrence. There are many key functional equivalencies between the symptoms associated with Prader-Willi Syndrome, 22q11 deletion syndrome, and intellectual disability. A person suffering from the combined and synergistic effects of Prader-Willi Syndrome and 22q11 deletion syndrome, such as Petitioner Torres, is likely to act impulsively, have a diminished capacity to understand and process information, decreased ability to learn from experience, suffer from interpersonal and social deficits, including less ability to empathize with others, and a diminished capacity for logical reasoning. App. 3701, l. 15 – 3712, l. 11; app. 4040, l. 2 – 4041, l. 5.

Lead defense counsel, Clay Allen, testified that the "lightbulb" as to making a motion that petitioner be ruled ineligible for the death penalty based on petitioner's severe mental illnesses and genetic deficiencies first went on during the post-conviction relief hearing. That lightbulb, respectfully, should have gone on prior to petitioner's trial. Defense Counsel Allen acknowledged as lead counsel in Eric Dale Morgan that he recognized Morgan's ineligibility for the death penalty due to him having committed his capital crime before the age of 18. Allen

attributed this to the fact that Roper v. Simmons was pending in the United States Supreme Court at the time of Morgan's trial.

Allen, as his post-conviction relief testimony showed, was very familiar with the Supreme Court's reasoning of Atkins v. Virginia. Severe mental illness being the next logical step for ineligibility for the death penalty after Atkins and Roper has been widely discussed. Just as intellectual disability and youth can no longer be considered as mitigating circumstances on a case-by-case basis, the same is true of individuals such as petitioner suffering from severe mental illness. See Scott Sundby, The True Legacy of *Atkins* and *Roper*: the Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling, 23 Wm. & Mary Bill Rts. J. 487, 495, 511-523 (December 2014) (discussing the six "special difficulties" with treating Atkins-Roper defendants on a case-by-case basis). Each of these difficulties applied to petitioner, and his genetic disorders.

Defense counsel was deficient and petitioner was prejudiced where he was sentenced to death where effective death penalty trial counsel would have moved for a ruling that petitioner was ineligible for the death penalty due to his severe mental illnesses, including his bipolar disorder, his brain damage, and genetic disorders, to include Prader-Willi Syndrome which has been analogized to an intellectual disability. See, Strickland v. Washington, 466 U.S. 668 (1984); See, also, Christopher Slobogin, What *Atkins* Could Mean for People with Mental Illness, 33 N.M. L. Rev. 293 (2003). This Court should respectfully reconsider its decision denying certiorari on this issue.

CONCLUSION

By reason of the foregoing arguments, rehearing should be granted as to issues one, two, three, and four.

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This 11th day of July, 2023