

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to 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 WRIT OF CERTIORARI

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The PCR judge's construction of section 16-3-20(C) of the South Carolina Code rendered the statute unconstitutional as applied where the PCR judge determined the statute allowed the trial judge to instruct the jury no fewer than sixty times that it would be recommending a sentencing verdict in violation petitioner's rights pursuant to the Eighth, Fifth, and Fourteenth Amendments, which prohibit any instruction that impermissibly conveys to the jury that the responsibility for determining whether petitioner would die rested elsewhere, as this instruction did. In the alternative, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the unconstitutional jury instruction. 7

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ISSUES PRESENTED

1.

Whether the PCR judge's construction of section 16-3-20(C) of the South Carolina Code rendered the statute unconstitutional as applied where the PCR judge determined the statute allowed the trial judge to instruct the jury no fewer than sixty times that it would be recommending a sentencing verdict in violation petitioner's rights pursuant to the Eighth, Fifth, and Fourteenth Amendments, which prohibit any instruction that impermissibly conveys to the jury that the responsibility for determining whether petitioner would die rested elsewhere, as this instruction did? In the alternative, whether trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the unconstitutional jury instruction?

2.

Whether trial counsel violated petitioner's right to the effective assistance of counsel by (1) ignoring red flags in petitioner's records signifying genetic defects and organic brain damage, (2) failing to acquire petitioner's mother's medical records, which would have suggested the etiology of petitioner's mental and emotional health as congenital, and (3) failing to obtain petitioner's records associated with his first psychiatric hospitalization, when he was three years old, which prevented the presentation of mitigating evidence that petitioner suffered from genetic defects and organic brain damage rendering his conduct not a matter of choice?

3.

Whether defense counsel was ineffective, in derogation of petitioner's Sixth, Eighth, and Fourteenth Amendments rights, for repeatedly telling the jury in dramatic fashion during the guilt phase opening argument that petitioner was "not guilty" where 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?

4.

Whether petitioner should be ineligible for the death penalty by reason of his severe mental illnesses, including his bipolar disorder, brain damage, and genetic disorders, where these disorders significantly impaired petitioner's ability to exercise rational judgment since executing an individual suffering from these 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), and defense counsel was ineffective for failing to raise this issue in the trial court?

STATEMENT

In 2007-2008, a Spartanburg County grand jury indicted petitioner Andres “Tony” Torres for two counts of armed robbery, first-degree burglary, two counts of murder, first-degree criminal sexual conduct, and attempt to burn. App. 5365-5378. The state, represented by Trey Gowdy, Barry Barnette, and Cindy Crick, called the case for trial on October 13-23, 2008, before the Honorable Roger L. Couch and a jury. App. 114. Clay Allen, Kathleen Hodges, and John G. Reckenbeil represented petitioner. App. 114.

Immediately prior to the start of the trial, the state moved to exclude third-party guilt evidence. App. 1555, ll. 11-19. Assistant solicitor Barnette argued the defense case was pure speculation, “[T]here is not a shred of evidence that connects Chuck Emery [Victim Ray Emery’s son and Victim Ann Emery’s stepson] to this scene.” App. 1562, ll. 12-18. After the defense’s proffer, the judge found the presentation was not sufficient to be considered admissible third-party guilt evidence. App. 1690, ll. 21-24. Without any request for time by the defense to adjust its strategy based on the adverse ruling, the trial proceeded immediately. App. 1693, l. 19. In her opening statement, Defense Counsel Hodges repeatedly argued in dramatic fashion that petitioner was not guilty, seemingly in keeping with some strategy of third-party guilt despite knowledge that any evidence to support the theory was not admissible. App. 1716, l. 17 – 1721, l. 2.

Thereafter, the jury heard how during the early morning hours of May 11, 2007, petitioner was driving a van erratically in Union County until he finally crashed it. App. 1724, ll. 4-24; App. 1774, l. 1 – 1782, l. 3; App. 1792, l. 3 – 1795, l. 7; App. 1796, l. 2 – 1797, l. 7. Petitioner left the scene of the accident prior to the arrival of police by paying another motorist \$100 for a ride to Spartanburg Regional Hospital purportedly because his wife was having a

baby. App. 1802, l. 16 – 1803, l. 9. When the police arrived at the scene of the crash, they learned the van belonged to Spartanburg County residents, Ray and Ann Emery. App. 1723, l. 11-16; App. 1724, ll. 4-11; App. 1818, ll. 1-5. In light of this discovery, the police conducted a welfare check at the Emery residence. App. 1724, ll. 4-24; App. 1740, ll. 11-21. There, they discovered the bodies of Ray and Ann Emery. App. 1726, ll. 15-17; App. 1744, ll. 21-25; App. 1765, ll. 13-17. Later, the police recovered numerous items within the van that belonged to the victims. App. 1823, l. 13 – 1824, l. 24; App. 1830, l. 16 – 1834, l. 21; App. 1878, l. 15 – 1882, l. 4. Also, petitioner's fingerprints were found on the van door and items inside the van. App. 1933, l. 5 – 1936, l. 18.

Other forensic evidence linked petitioner to the crimes committed at the Emery home. Most incriminating was a DNA profile developed from a vaginal swab taken from Ann that matched petitioner. App. 2185, ll. 5-11. Also, Ann's DNA was found on petitioner's shoe. App. 2188, l. 20 – 2189, l. 1. Finally, DNA from Ray and Ann was found on petitioner's clothing. App. 2191, l. 5 – 2193, l. 24.

The police found petitioner at his grandmother's house around 2 p.m. on that same day, May 11, 2007. App. 2065, l. 17 – 2066, ll. 6. In conjunction with arresting petitioner, the police seized petitioner's clothing, including shoes, which were in the washing machine. App. 2067, ll. 6-20; App. 2069, l. 9-19. These shoes were compared to shoe prints that were found in the house. App. 2013, ll. 9-14; App. 2154, l. 4 – 2160, l. 11. According to a SLED expert in footwear, the impressions made by petitioner's shoes were consistent in class to the impressions recovered inside the Emery home. App. 2144, l. 22 – 2145, l. 2; App. 2156, l. 22 – 2157, l. 23.

The jury learned through gruesome photographs and testimony that the injuries to Ray and Ann were numerous and severe. Ray suffered eight blows to his scalp, macerating his brain.

App. 1895, ll. 4-18. Ray died as a result of open head injuries secondary to sharp and blunt force trauma to the head and body. App. 1897, ll. 6-10. Ann suffered significant blunt force trauma that ultimately led to her death. App. 1897, l. 14 – 1905, l. 12.

Despite defense counsel's insistence in the opening statement that petitioner was innocent, and in the face of overwhelming state's evidence of guilt, the defense presented *no* evidence. App. 2227, ll. 5-7; App. 2236, l. 2. Counsel Reckenbeil then delivered the defense's closing argument. His closing was a half-hearted attempt to challenge the integrity of the police investigation. App. 2247, l. 12 – 2256, l. 25. Unsurprisingly, on October 19, 2008, the jury found petitioner guilty as charged. App. 2307, ll. 2-17.

During the sentencing phase, the solicitor presented evidence of petitioner's prior criminal record. App. 2335, l. 13 – 2352, l. 9. The jurors also learned that on the day of the murders, petitioner called a friend and threatened to kill her. App. 2363, ll. 10-20. In addition to powerful victim impact evidence, the state introduced a video recording of an incident that transpired between petitioner and detention center officers on the night after the jury rendered its guilty verdicts. App. 2376, l. 24 – 2383, l. 23; App. 2398, l. 6 – 2410, l. 9; App. 2422, l. 10 – 2428, l. 2; App. 2445, l. 1 – 2460, l. 24. For the coup de grace, the state introduced additional gruesome photographs from the crime scene and the autopsies of Ray and Ann Emery. App. 2466, l. 20 – 2478, l. 19; App. 2479, l. 15 – 2482, l. 15.

For its part, the defense presented a formulaic case in mitigation. Petitioner's mother, Lisa Lamb, described petitioner as having violent outbursts from a very young age. App. 2545, l. 8 – 2457, l. 10. Over the course of his young life, petitioner was hospitalized in psychiatric institutions multiple times starting when he was three years old. App. 2550, l. 22 – 2560, l. 1. Lamb was unable to "deal with" petitioner, and he was forced to live in residential group homes

until he was seventeen when he aged out. App. 2560, l. 2 – 2563, l. 17; App. 2566, l. 3 – 2574, l. 23.

Alex Morton, an expert in psychopharmacology, addictions, and psycho-pharmacy practice, explained petitioner's substance abuse was partly a form of self-medication due to his mental illness. App. 2606, l. 3-10. However, petitioner's voluntary use of illegal drugs actually made his psychiatric symptoms worse. App. 2638, ll. 13-14. Finally, Dr. Morton told the jurors that in order for petitioner to get better, he would need to comply with a treatment plan, but petitioner's history showed his persistent refusal to comply with treatment. App. 2651, ll. 12-21.

Donna Schwartz-Watts,¹ an expert in forensic psychiatry, delivered a devastating blow to the defense. App. 2667, ll. 19-24. Dr. Schwartz-Watts diagnosed petitioner with bipolar disorder, and she informed the jurors that he was under the influence of a mental or emotional disturbance at the time of the crime. App. 2689, ll. 1-2; App. 2700, l. 24 – 2701, l. 2. Along these lines, she concluded petitioner's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. App. 2702, ll. 8-14. Yet, she maintained that petitioner had the capacity to conform despite the impairment. App. 2707, ll. 17-23. Further, Dr. Schwartz-Watts also diagnosed petitioner with the most disturbing mental illness of all – antisocial personality disorder and she *agreed* he was a sociopath. App. 2723, l. 15 – 2724, l. 20.

Unbelievably, on direct examination, Dr. Schwartz-Watts declared, “[I]n my 20 years of doing this work, those are the most violent crime scene pictures I’ve seen.” App. 2704, ll. 22-23. According to her, the photographs did not show evidence of remorse, but did show evidence of an intent to conceal the crimes. App. 2712, l. 19 – 2713, l. 12.

¹ Dr. Donna Schwartz-Watts is now Dr. Donna Maddox.

Dr. Marti Loring, a clinical sociologist, conducted a psychosocial evaluation of petitioner, which she presented to the jury during sentencing. App. 2754, l. 10 – 2755, l. 4. Essentially, she catalogued petitioner's tragic life story for the jurors including abandonment by his father, rejection by his mother, multiple psychiatric institutionalizations and concomitant diagnoses, series of residential group home placements, lifelong violent outbursts, and substance abuse. App. 2764, l. 3 – 2791, l. 21. And, finally, James Aiken opined that petitioner could adapt to prison. App. 2813, l. 16-21

Based upon the jury's recommendation, Judge Couch sentenced petitioner to death on each count of murder. App. 2893, ll. 3-19; Supp. App. 1-3. Additionally, he sentenced petitioner to thirty years' imprisonment on each count of armed robbery and criminal sexual conduct in the first degree, to life imprisonment for burglary, and to five years' imprisonment for attempt to burn. App. 2893, l. 20 – 2894, l. 19. He ordered the sentences to be served consecutively. App. 2893, l. 20 – 2894, l. 19.

Petitioner filed a direct appeal. App. 2897-2912. Joseph L. Savitz, III, represented petitioner. App. 2897-2912. Petitioner challenged the introduction of excessively gruesome and unfairly prejudicial autopsy photographs during the sentencing phase of his trial as well as the introduction of a video of petitioner being pepper-sprayed and subdued in the detention center during the cooling off period as unfairly prejudicial. App. 2897-2912. Donald J. Zelenka and Brendan J. McDonald represented the state. App. 2913-2937. This Court affirmed his convictions and sentences on December 13, 2010. App. 2934-2941; State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). Although this Court held the photographs at issue in this case were admissible, this Court held they were “at the outer limits of what our law permits a jury to

consider.” Id. at 624, 703 S.E.2d at 229. This Court “strongly encourage[d] all solicitors to refrain from pushing the envelope on the admissibility in order to gain a victory.” Id.

On April 22, 2011, petitioner filed a pro se application for post-conviction relief (PCR). App. 2942-2950. The Honorable J. Derham Cole presided over evidentiary hearings regarding the matter on April 14-15, 2015, April 21-25, 2015, April 30, 2015, and June 30, 2016. App. 3020-4496. William H. Ehliess, II, Troy Tessier, and Chris Schoen represented petitioner. App. 3020. Donald J. Zelenka, Melody Brown, and Kaycie Smith Timmons represented the state. App. 3020. By an order filed December 9, 2019, the PCR judge denied petitioner relief from his convictions and death sentence. App. 5294-5342. On December 18, 2019, petitioner filed a motion to alter or amend the judgment pursuant to Rule 59, SCRCP. App. 5343-5352. Without a hearing, on May 8, 2020, the PCR judge issued a Form 4 Order in which he denied petitioner’s motion to alter or amend the judgment pursuant to Rule 59, SCRCP. App. 5364.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR judge’s construction of section 16-3-20(C) of the South Carolina Code rendered the statute unconstitutional as applied where the PCR judge determined the statute allowed the trial judge to instruct the jury no fewer than sixty times that it would be recommending a sentencing verdict in violation petitioner’s rights pursuant to the Eighth, Fifth, and Fourteenth Amendments, which prohibit any instruction that impermissibly conveys to the jury that the responsibility for determining whether petitioner would die rested elsewhere, as this instruction did. In the alternative, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the unconstitutional jury instruction.

Relevant facts

Unconstitutional jury instruction

The trial judge's initial instructions to the jury during the sentencing phase provided that because petitioner had been convicted of murder on two separate indictments, the court "must conduct an additional proceeding to determine the punishment that the Court is to impose upon [petitioner] for the crime of murder." App. 2325, ll. 12-15. He stated, "our purpose in conducting the proceeding in which we are now engaged is to determine whether [petitioner] should be sentenced by the Court to death or life imprisonment." App. 2325, l. 23 – 2326, l. 1. The judge continued:

With respect to your particular role in this proceeding, you will be asked to recommend to the Court whether it should sentence [petitioner] to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in this phase of the trial.

App. 2326, ll. 2-8.

At the conclusion of the sentencing phase, the trial judge instructed the jurors that it was their duty to decide which sentence they would "recommend that this Court impose upon" petitioner. App. 2865, ll. 4-7. After informing the jurors that there were two verdicts to consider, the death penalty and life imprisonment without the possibility of parole, the judge advised the jurors that its "sentencing recommendation will be followed by this Court." App. 2865, ll. 7-12. He then proceeded to discuss the verdict forms² with the jurors:

Now, by this form that I hold in my hand at this time, this form is entitled recommendation of the sentence of death. You, the jury may recommend that the Court sentence [petitioner] to death.

² The penalty phase verdict form mirrored the language in the judge's instruction, including the caption or title of "Recommendation of Sentence (Death)" and that the jury "recommend[ed] to the Court that [petitioner] be sentenced to death." Supp. App. 2-3

Please, please observe that on this form, when you see it, that immediately below the body of the recommendation there are lines, 12 lines, where, should you decide to recommend the death penalty, each one of you would sign your name. It's the law in this state, Mr. Foreman, and members of the jury, that a recommendation for the imposition of the death penalty be a unanimous recommendation and each and every juror must sign his or her name to the recommendation form.

App. 2865, l. 20 – 2866, l. 6. The form itself stated the jury's verdict would "recommend to the Court that [petitioner] be sentenced to death." App. 2866, ll. 17-18. This was "the form for the recommendation of the death penalty." App. 2866, ll. 19-20.

In order "for this recommendation to be made, that is that [petitioner] be sentenced to death," the jury must find first that a statutory aggravating circumstance existed beyond a reasonable doubt. App. 2866, ll. 21-24. "The body of th[is] form" informed the jurors that "in determining whether to recommend" that petitioner "be sentenced by the Court to life imprisonment or to death," the jurors may consider certain enumerated statutory aggravating circumstances. App. 2867, ll. 8-17. According to the judge, if the jurors found the existence of one or more aggravating circumstances beyond a reasonable doubt, then the jurors would be permitted to consider "recommending, recommending to this Court that [petitioner] be sentenced to death." App. 2868, ll. 13-22.

While explaining the meaning of "beyond a reasonable doubt," the trial judge instructed that if the jurors were firmly convinced of the existence of an aggravating circumstance, then the jurors were permitted "to consider recommending to this Court that [petitioner] be sentenced to death." App. 2869, ll. 5-9. "If, on the other hand," the jurors determined there was "a real possibility that the aggravating circumstances did not exist," the jurors "would make no recommendation of sentence." App. 2869, ll. 9-13. He reiterated that if the jury found no aggravating circumstances, then the jury would "not make a recommendation of sentence." App.

2869, l. 22 – 2870, l. 2. Thereafter, the trial judge cautioned, “You are never required to recommend the death penalty even if you find that a statutory aggravating circumstance existed at the time the offense occurred.” App. 2871, ll. 2-5.

Before discussing life imprisonment with the jurors, the judge reminded them that if they had a reasonable doubt as to the existence of the aggravating circumstances, they “would not make a recommendation concerning sentence and the Court would sentence [petitioner] under the law.” App. 2874, ll. 10-17.

Confusingly, the judge instructed:

Now, should you find, beyond a reasonable doubt, that one or more aggravating circumstances listed on the statutory instructions existed at the time of the murder or during the commission of the crime of murder, and should you then decide, after considering the elements, in favor of a recommendation of life imprisonment, about which I will instruct you later, that if you then find that the recommendation of the jury is that the defendant be sentenced to death, then it would be your duty, Mr. Foreman, to write, to write on the recommendation of this sentence form, and that, again, is the form that I’ve shown you earlier for the recommendation of the death penalty.

App. 2874, l. 18 –2875, l. 6.

Next, the judge turned to “the other sentencing recommendation sheet” that the jurors could enter if they “decide[d] to recommend a life sentence,” which he called “the recommendation of the sentence for life imprisonment.” App. 2876, ll. 2-6. He then read “the text of that recommendation” to the jury. App. 2876, l. 6. This form reflected that the jury “recommend[ed] to the Court” that petitioner “be sentenced to life imprisonment.” App. 2876, ll. 7-9. He noted only the foreman was “required to sign this recommendation form.” App. 2876, ll. 9-12. He then instructed the jurors on what they “may consider in making [their] decision as to which sentence to recommend.” App. 2876, ll. 13-14. He reminded the jurors that

if they found the existence of a statutory aggravating circumstance beyond a reasonable doubt, the jury was permitted, but not required “to recommend the death penalty.” App. 2876, ll. 14-18.

He conveyed that “[w]hile a statutory aggravating circumstance must be found before [the jury] can consider recommending the death penalty,” the jury “may recommend the death sentence even though [the jury found] the existence of a statutory mitigating circumstance.” App. 2879, ll. 5-10. The judge explained the jury may sentence petitioner “to life imprisonment for any reason or for no reason at all,” which the judge said was “traditionally referred to as a recommendation of mercy.” App. 2879, ll. 18-20. If the jury made this decision, then it “would so indicate by returning to the Court the recommendation of life imprisonment form.” App. 2879, ll. 20-23. “In other words,” the jury “may choose to recommend life imprisonment even if [the jury found] a statutory or a non-statutory mitigating circumstance or [the jury] may choose to recommend life imprisonment as an act of mercy.” App. 2879, l. 24 –2880, l. 2. The judge warned the jury’s decision must be unanimous should it “choose to recommend life imprisonment.” App. 2880, ll. 2-5.

According to the judge, the jurors had two forms while deliberating. “One [was] a recommendation of the sentence of death. The other [was] a recommendation of the sentence of life imprisonment.” App. 2880, ll. 14-15. He summarized his earlier instructions, explaining that if the jury failed to find beyond a reasonable doubt the existence of an aggravating circumstance, it “would make no recommendation and the Court would sentence [petitioner] accordingly.” App. 2880, ll. 21-25. On the other hand, if the jury found the existence of an aggravating circumstance beyond a reasonable doubt, then it “would be authorized to consider recommending the death penalty.” App. 2881, ll. 1-4. He told the jurors to “consider the aggravating circumstances” “and the mitigating circumstances,” and then decide “whether to

recommend the death penalty or life imprisonment.” App. 2881, ll. 6-9. The judge allowed the jurors to “consider any other factor in mitigation of the offense” and “recommend a sentence of life imprisonment for no reason at all.” App. 2881, ll. 10-12. If the jurors “decide[d] to recommend the death penalty,” then they would “complete the proper form,” “write out the aggravating circumstances,” and “sign that recommendation.” App. 2881, ll. 12-16. Should the jurors “decide to recommend life imprisonment,” then “only the foreman” would sign “that recommendation.” App. 2881, ll. 17-19. He cautioned again that “[w]hatever [the] recommendation, it must be a unanimous one” if the jurors made a “recommendation.” App. 2881, ll. 19-21. In other words, “each and every juror must agree to the sentencing recommendation, and the recommendation [would] be followed by the Court.” App. 2881, ll. 21-23. Thereafter, the judge instructed the jurors “[i]n considering whether to recommend, whether [petitioner] is to be sentenced to death or life imprisonment,” they must decide the issue without bias and prejudice. App. 2881, l. 24 – 2882, l. 3.

In his final words to the jury before deliberations began, the trial judge explained the jurors would have the forms for “the two recommendations either for the life sentence or for the death penalty.” App. 2884, ll. 12-17. He then provided the jurors with his written instructions. App. 2884, ll. 7-18.

When the jury returned its verdict “recommend[ing] to the Court that [petitioner] ... be sentenced to death,” the judge polled the jurors with three questions: “whether the recommended sentences were unanimously agreed upon, whether the jury found aggravating circumstances beyond a reasonable doubt, and whether the aggravating circumstances were unanimously agreed upon by the jury.” App. 2887, ll. 8-16.

Trial counsel made no objections to the judge's repeated unconstitutional instructions that undermined the jury's understanding of its responsibility for sentencing. App. 2882, ll. 23-25.

PCR hearing

Prior to his PCR evidentiary hearing, petitioner moved for summary judgment based upon the trial court's constant and consistent instruction to the jury that its sentencing verdict would be a mere recommendation. Supp. App. 22-72. Petitioner argued section 16-3-20 of the South Carolina Code referring to the jury's verdict as a recommendation was unconstitutional on its face and as applied in his case. Supp. App. 22-72. This provision, as interpreted and used by the trial judge to instruct the jury that its verdict would be a recommendation, was inherently ambiguous and created a contradiction to render the statute, as applied in this case, unconstitutional. Supp. App. 22-72. As such, the instruction injected an arbitrary factor into the sentencing process. Supp. App. 22-72.

During the motion hearing, petitioner noted the trial judge's initial sentencing instructions repeatedly informed the jurors that they would make a "recommendation" as to the sentence. App. 3032, l. 15 – 3034, l. 16. Petitioner argued the instruction was improper because it did "not [] let the jury know that they were, in fact, sentencing and that the responsibility did not rest elsewhere." App. 3034, ll. 17-21. Noting that in the final instructions, the judge mentioned that the court would follow the recommendation, petitioner argued the correct charge could not cure the inaccurate charge, and in fact, the latter instruction "only complicated the ambiguity and the prejudice." App. 3035, ll. 11-16. Petitioner explained the jury heard "recommendation or recommend" sixty times, but heard only twice that the judge would follow the recommendation. App. 3037, ll. 6-12. Further, petitioner noted the judge provided verdict forms that re-enforced his instruction that the jury's verdict would be a recommendation. App. 3037, ll. 1-5. Finally,

petitioner explained the jury had the statutory instructions in writing while deliberating that had “no reference to anything other than your sole role is to recommend to this Court.” App. 3037, ll. 18-24.

Petitioner argued for summary judgment because the jury charge was unconstitutional and trial counsel’s failure to object. App. 3040, l. 2 – 3042, l. 20; App. 3045, ll. 16-19. Petitioner explained the judge’s latter remarks could not “undo 61 references to recommendation.” App. 3040, ll. 13-19. The instruction “was defective from the start.” App. 3040, l. 20. The instruction was “aggravated towards the end by 61 references to recommendation” and further aggravated by the verdict forms and written charge using the word “recommendation.” App. 3040, l. 20 – 3041, l. 3.

Trial counsel admitted there was no objection posed to the judge’s erroneous and unconstitutional jury instruction that the jury would be “recommending” a sentence. App. 3837, ll. 17-20; App. 4128, ll. 2-5; App. 4129, ll. 12-14; App. 4290, l. 23 – 4291, l. 3. There were no discussions amongst the team about it. App. 3837, ll. 17-20; App. 4128, ll. 2-5; App. 4290, l. 23 – 4291, l. 3. No team member was assigned the task to listen closely to the instructions to determine if objections should be interposed. App. 3837, l. 21 – 3838, l. 15. In fact, “[n]o specific attention [was] paid to that charge in reference to those issues.” App. 3838, ll. 12-15. Counsel Reckenbeil noted the instruction as given “completely contradict[ed] itself” because it referred to the jury’s verdict as both a recommendation and mandatory. App. 4129, ll. 3-6. Those “[t]wo words ... shouldn’t be in the same sentence.” App. 4129, ll. 8-9.

PCR order improperly denying relief

Judge Cole denied petitioner relief, concluding “[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.” App. 5322. “Nothing ha[d] been shown” to convince Judge Cole “that the sentencing jury in this case did not understand their obligations as instructed by the Court or that they were confused or failed to understand that the decision, as to the appropriate sentence to be imposed, was solely in their discretion applying the statutory legal framework as instructed by the Court.” App. 5322. Specifically, Judge Cole indicated he reviewed the individual voir dire of the venire prior to their selection and found “that no reasonable juror would have failed to understand that the decision returned by the jury as to its’ [sic] ‘recommendation’ would be the sentence imposed by the Court on [petitioner].” App. 5322. Thus, Judge Cole found no structural error or arbitrariness in the instruction as given. App. 5321-5322; see also App. 3046, ll. 16-21 (oral denial of motion for summary judgment).

Concerning petitioner’s claim that the instruction injected an arbitrary factor into the sentencing proceeding, Judge Cole found that any review for arbitrariness was limited to direct review pursuant to section 16-3-25(C)(1) of the South Carolina Code. App. 5321. Accordingly, Judge Cole concluded that petitioner “received that statutorily mandated review” when this Court heard his appeal and affirmed the trial court’s verdicts. App. 5321-5322.

Additionally, Judge Cole found petitioner failed to establish trial counsel’s failure to object to the trial court’s recommendation charge was deficient or that petitioner suffered prejudice resulting from the failure. App. 5322.

Discussion

“In this state, the jury is given the heavy responsibility of determining whether a convicted murderer will live or die.” State v. Linder, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). Pursuant to statute, “[w]here a statutory aggravating circumstance is found and a

recommendation of death is made, the trial judge *shall* sentence the defendant to death.” S.C. Code Ann. 16-3-20(C) (emphasis added). According to the United States Supreme Court, “it 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.” Caldwell v. Mississippi, 472 U.S. 320, 328-329 (1985). “The Eighth Amendment’s ‘need for reliability in the determination that death is the appropriate punishment in a specific case’ necessitates that ‘sentencers treat their power to determine the appropriateness of death as an ‘awesome responsibility.’” Id. at 329-330 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

Prior to Caldwell, this Court concluded “[t]he use of the word ‘recommend’ by the trial judge or solicitor is not per se suspect.” Linder, 276 S.C. at 310, 278 S.E.2d at 338. Recognizing that the statute used the term “recommendation” to refer to the jury’s function, this Court held that “[t]o instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors responsibility at this phase of the trial.” Id. at 310, 278 S.E.2d at 338-339. After Caldwell, this Court explained that in South Carolina, “[t]he idea should be conveyed to the jury that its sentencing recommendation will be followed.” 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).

Thereafter, this Court consistently held the requirement that the trial judge convey to the jury that its recommendation will be followed was satisfied when a trial judge “clearly explained 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).

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. Similarly, this Court held that where the judge “clearly explained to all prospective jurors that ‘whatever you recommend, will be the sentence that will be given to a defendant’” satisfied the requirement that the judge convey to the jury that its sentencing decision would be followed.” Sims, 304 S.C. at 421-422, 405 S.E.2d at 384. Importantly, in Sims, the jurors learned of their role in sentencing at the very beginning of the trial. Id. Additionally, this Court held “[t]he entire record reveal[ed] that the

jury was adequately informed that it was to make the ultimate decision as to Sims' fate." Id. at 422, 405 S.E.2d at 384.

Statute is unconstitutional as applied

South Carolina's death penalty statute refers to the jury's verdict as a recommendation. S.C. Code Ann. § 16-3-20(C). However, the statute makes clear that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death." Id. Put simply, the judge has no discretion and must sentence the defendant to death. The jury's verdict is the final word on the matter.

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 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 trial judge told the jury no fewer than sixty times that it would "recommend" a sentence, without explaining that "recommendation" would determine life or death for petitioner. The judge changed his instructions with insufficient clarity, only twice, to provide that the jury recommendation would be followed by the court. See Lisa K. Fazio et al., Knowledge Does Not Protect Against Illusory Truth, 144 J. Exp. Psychol. 993-1002 (2015) (the "illusory truth" effect refers to the phenomenon whereby repetition of a statement increases its likelihood of being judged true. This phenomenon has important implications for why individuals believe oft-repeated information that may be misleading or unknown); Wei-Chun Wang et al., On Known Unknowns: Fluency and the Neural Mechanisms of Illusory Truth, 28 J. Cogn. Neurosci. 739-746 (2016) (research on

the illusory truth effect demonstrates repeated statements are easier to process and are perceived to be more truthful than new statements).

In construing the death penalty statute to sanction the repeated characterization of the jury's verdict as a recommendation, the PCR judge rendered the statute unconstitutional as applied. Courts presume statutes are constitutional. Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134-135, 568 S.E.2d 338, 344 (2002). A statute may be challenged as vague on its face or as applied. An as-applied challenge requires the moving party to show that the statute cannot be constitutionally applied to the party under the particular facts of the case. Chapman v. United States, 500 U.S. 453, 467-468 (1991). When the PCR judge construed South Carolina's death penalty to allow the judge to instruct the jury in a way to diminish the jury's role in determining the sentence, he rendered the statute unconstitutional as applied to petitioner.

Further, the PCR judge based, in part, his finding that no reasonable juror could have understood the judge's instructions to mean that the jury's function would be as advisor to the trial judge on sentence on the jury voir dire process. Contrary to the PCR judge's finding, the individual voir dire provided additional support for providing relief to petitioner.

Toria Murray, a member of the jury venire, expressed confusion during the individual voir dire regarding who would actually sentence petitioner. After the trial judge thoroughly inquired about her views on the death penalty, defense counsel probed Murray for more information. During this discussion, Murray expressed that she did not know that sentencing "was ever up to the jury" and she "thought it was always up to the judge." App. 1214, ll. 1-10.

The trial judge stepped in to explain to Murray that the jury would decide the penalty. App. 1214, l. 12 –1215, l. 21. During this exchange, Murray again expressed that she did not “realize the jury decide[d]” whether to impose a life or death sentence. App. 1215, ll. 22-24. Importantly, when the judge reminded Murray that he had asked her about the phases of a capital trial and if she could listen to the facts to determine “which penalty was most appropriate,” Murray responded that she remembered the exchange but she “still thought that it was [the judge’s] decision.” App. 1216, ll. 1-11. Only after clear and unequivocal instruction from the judge on this matter did Murray indicate she understood. App. 1216, ll. 22-25. Thus, in contrast to the PCR judge’s finding, Murray’s exchange with the trial judge on the jury’s role in sentencing demonstrated that the voir dire process did not remove all doubt as to the jury’s function during the sentencing phase. The scholarly theories of repetition, primacy, and recency are proved true by Murray’s example.

Finally, Judge Cole’s finding that any claim regarding the arbitrariness injected into the sentencing proceeding by the instruction was reviewed by this Court pursuant on direct appeal runs counter to controlling law. In light of trial counsel’s failure to object to the instruction, it was not preserved for appellate review, even in a capital case, and was not raised on appeal. This Court requires a contemporaneous and specific objection in order to preserve a matter for review. See State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (Toal, J., concurring) (abolishing *in favorem vitae* for capital cases). Thus, this Court would not have undertaken a review of the record to determine if the unconstitutional jury instruction injected an arbitrary factor into the sentencing proceeding.

The United States Supreme Court declared the prosecutor’s argument that “minimize[d] the jury’s sense of responsibility for determining the appropriateness of death” “sought to give

the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is appropriate punishment in a specific case.'" Caldwell, 472 U.S. at 340 (quoting Woodson, 428 U.S. at 305). The Court could not "say that this effort had no effect on the sentencing decision," and therefore, the decision did not meet the standard of reliability that the Eighth Amendment required. Id. at 341. Thus, the Court vacated the death sentence. Id. Importantly, the Court did not engage in a harmless error analysis.

Some errors should not be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23, n.8 (1967). These errors are called structural errors. Arizona Fulminante, 499 U.S. 279, 309-310 (1991). The structural error doctrine ensures certain basic, constitutional guarantees that must define the framework of any criminal trial; therefore, a structural error is one that "affect[s] the framework within which the trial proceeds," and not "simply an error in the trial process itself." Id. at 310. Structural errors "defy analysis by harmless error standards." Id. at 309.

Although a majority of the Supreme Court's justices have not declared explicitly that a Caldwell error is a structural error, four members of the Court expressed their belief that Caldwell violations are automatically reversible. Sawyer v. Smith, 497 U.S. 227, 253 (1990) (Marshall, J. dissenting) (stating that prosecutorial arguments that mislead a jury about its sentencing role in the capital context can never be deemed harmless). Even the majority opinion compels the conclusion that Caldwell errors are structural. Writing for the majority, Justice Kennedy observed that Caldwell provided "an additional measure of protection against error, beyond that afforded" by the due process clause's protection against fundamentally unfair proceedings, "in the special context of capital sentencing." Id. at 244. Additionally, the majority

described Caldwell as “a protection of systemic value for state and federal courts charged with reviewing capital proceedings.” Id. “Caldwell can provide ‘additional ... protection’ against sentencing error and have ‘systemic value’ for reviewing courts only if it conclusively presumes prejudice and thereby relieves reviewing courts of case-specific prejudice inquiries, including harmless error analysis.” Louis D. Bilonis, Moral Appropriateness, Capital Punishment, and the Lockett Doctrine, 82 J. Crim. L. & Criminology 283, 320-321 (1991).

Additionally, the judge’s erroneous instruction injected an arbitrary factor into the jury’s consideration in violation of section 16-3-25(C)(1) of the South Carolina Code. According to this Court, when the death sentence is influenced by an arbitrary factor, reversal is required and harmless error analysis plays no role. Bowman v. State, 422 S.C. 19, 43-44, 809 S.E.2d 232, 245 (2018). When the trial judge diminished the jury’s role in the sentencing decision by repeatedly instructing the jury that its verdict would be only a recommendation for the judge to use when imposing the sentence, he injected an arbitrary factor into the sentencing phase of the trial. Thus, the error was structural in nature and no analysis of the harm caused by the error is necessary.

Ineffective assistance of trial counsel

In the alternative, if this Court determines this issue may not be considered as an independent ground for relief, then trial counsel rendered ineffective assistance by failing to object to the instruction. Counsel was well aware of the requirement that the judge instruct the jury that its recommendation would be followed by the judge. 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.

Typically, a criminal defendant must show counsel performed deficiently and that such deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

However, where the error is structural in nature, the defendant may not need to show prejudice. See Weaver v. Massachusetts, 137 S.Ct. 1899, 1911 (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). According to the Supreme Court, structural errors fall into three broad categories. Id. at 1908. “First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.” Id. An example of this is the “fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” Id. “Second, an error has been deemed structural if the effects of the error are simply too hard to measure,” which includes when a defendant is denied the right to select his own attorney. Id. “Third, an error has been deemed structural if the error always results in fundamental unfairness.” Id. This last category includes when a trial judge fails to give a reasonable-doubt instruction. Id.

The defendant in Weaver was denied his right to a public trial, which the Court agreed was a structural error. Id. However, the Court determined that it was not a violation that always resulted in a denial of fundamental fairness. Id. at 1909. Thus, the Court concluded,

when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes ... to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Id. at 1911. Analyzing whether a Caldwell error constituted a new rule for purposes of Teague v. Lane, 489 U.S. 288 (1989), retroactivity, the Supreme Court held the Caldwell rule, which was “designed as an enhancement of the accuracy of capital sentencing” was not an “absolute

prerequisite to fundamental fairness” as required for Teague retroactivity. Sawyer, 497 U.S. at 243-244. While such language would appear to suggest that a Caldwell error, though structural in nature, would not relieve a criminal defendant from showing prejudice based upon the Court’s holding in Weaver, the test put forward by the Supreme Court in Weaver to determine whether a defendant in a post-conviction proceeding was required to show prejudice stemming from a structural error was not the same as the test announced over thirty years ago in Teague. Had the Court intended the tests be the same, the Court would have simply said so. Applying the holding in Weaver to the present case requires a determination that a Caldwell error, when delivered by the judge as part of the jury’s instructions, alleviates the need for showing prejudice pursuant to Strickland. 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. 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.

In the event this Court requires petitioner show prejudice arising from trial counsel’s failure to object to the erroneous and unconstitutional jury instruction, petitioner satisfied this burden. The trial judge’s correct instruction that the recommendation of the jury would be followed could not cure the unconstitutional instructions, which were repeated no fewer than sixty times, served to bookend the entirety of the instructions, and were carried in writing into the jury room during the deliberations. The isolated, casual remarks from the judge about following the jury’s recommendation were simply inadequate. Cf. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267-268 (1996) (holding a solicitor’s improper comments during closing did not require a reversal where the comment was “one isolated event in the entire argument”);

Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) (holding that a solicitor's argument in violation of the Golden Rule was improper but did not so infect the trial with unfairness as to make the resulting conviction a denial of due process because it was a single comment). The correct instruction simply arrived too late and was buried under an avalanche of Caldwell errors.

The instruction did more than affect the jurors' assessment of the facts; this instruction implicated the core function of the jury at a capital sentencing hearing – to impose a sentence. The trial judge repeatedly informed the jurors that its role was to act in an advisory capacity. Here, the significance of the jury's role in sentencing was reduced when the trial judge characterized the jury's job as providing a recommendation to the court for sentencing. This mischaracterization led the jury to believe the actual authority for determining the sentence rested with the judge. Counsel's failure to object prejudiced petitioner because there is a reasonable probability that, but for counsel's error, the outcome of the sentencing proceeding would have been different.

2.

In violation of petitioner's right to the effective assistance of counsel, trial counsel (1) ignored red flags in petitioner's records signifying genetic defects and organic brain damage, (2) failed to acquire petitioner's mother's medical records, which would have suggested the etiology of petitioner's mental and emotional health as congenital, and (3) failed to obtain petitioner's records associated with his first psychiatric hospitalization, when he was three years old, which prevented the presentation of mitigating evidence that petitioner suffered from genetic defects and organic brain damage rendering his conduct not a matter of choice.

Introduction

Trial counsel's failure to recognize the significance of multiple red flags uncovered during the investigation of petitioner's life history coupled with trial counsel's inexperience and lack of training relative to capital trials resulted in the jury hearing a case from the defense that *supported* a recommendation of death. Trial counsel told the jurors that petitioner was severely emotionally disturbed, was unsuccessful with the psychiatric and behavioral modification treatment he received, lashed out at residential program directors, required physical restraining on multiple occasions, had several psychiatric diagnoses, including intermittent explosive disorder, depression, bipolar disorder, and anti-social personality disorder, was feared by his own mother, engaged in physical violence, brutalized the family dog, abused illicit drugs, and lacked empathy. App. 4257, l. 13 – 4269, l. 2. Based upon the information presented by trial counsel, the jurors were left to conclude that petitioner was a violently dangerous man who possessed the ability to alter his behavior, but he simply refused to do so. It was no surprise then when the jury recommended a sentence of death.

Not only did the presentation support the state's argument for imposition of the death penalty, trial counsel failed to (1) take heed of the red flags in petitioner's records pointing to genetic defects and organic brain damage, (2) obtain medical records related to petitioner's mother, including petitioner's birth records, that disclosed much needed information for the experts to diagnose petitioner properly, and (3) obtain records related to petitioner's psychiatric commitment when he was three years old that revealed critical information about petitioner's mental, emotional, and physical health. Had trial counsel done so, then the mitigation in the sentencing case would have been vastly different.

The jury would have learned petitioner has multiple genetic chromosomal defects, which substantially limited his ability to understand and process information, to learn from experience, to engage in logical reasoning, and to control impulses. App. 4269, l. 11 – 4270, l. 7. Due to one genetic defect, petitioner is incapable of metabolizing imipramine, which was administered to him at a very young age. App. 4270, ll. 8-13. Petitioner suffered toxicity and reacted adversely, which the treating physician misinterpreted as meaning the entire class of drugs were not helpful to petitioner. App. 4270, ll. 14-19. Doctors then treated him with a dangerous antipsychotic to chemically restrain him during the most critical developmental years of his life. App. 4270, ll. 19-23. Treatment with this drug combined with other congenital and environmental factors resulted in brain damage. App. 4270, ll. 19-23. 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.

Relevant facts

The red flags

The most obvious red flag trial counsel failed to see was in the records from Dr. H. Wayne Tobin, who worked at Patrick Harris Psychiatric Hospital in South Carolina when he evaluated petitioner on October 23, 1994, when petitioner was fourteen years old. App. 4939; Supp. App. 32, ll. 3-21. Petitioner was admitted on an involuntary basis as a danger to himself or property. App. 4939; Supp. App. 37, ll. 24-25. This was petitioner's fifth admission to Patrick Harris. App. 4939; Supp. App. 39, ll. 15-21. Dr. Tobin's medical report indicated petitioner "lived in institution[s] most of his infancy and adolescence" as there were "reports of

violence even as early as the age of 17 months.” App. 4940; Supp. App. 43, ll. 8-12. Petitioner’s behavior was labile during the exam. Supp. App. 45, ll. 4-16.

During the examination, Dr. Tobin noted petitioner was “[s]hort statured, markedly obese, mustached.” App. 4940; Supp. App. 44, ll. 12-16. In fact, he found petitioner’s “appearance [to be] somewhat striking based on the obesity.” Supp. App. 45, ll. 22-23. Petitioner had “large breasts” and infantile hair distribution. App. 4941; Supp. App. 45, l. 23 – 46, l. 4. He had a “small scrotal sac, small testicle in there.” App. 4941; Supp. App. 49, ll. 11-21. Petitioner was a little clumsy and mildly hyporeflexic in his upper extremities. App. 4942; Supp. App. 50, ll. 7-12. “He just looked different than your average kid.” Supp. App. 46, ll. 5-6. Dr. Tobin explained petitioner did not have a “normal body habitus.” Supp. App. 48, ll. 1-11.

Based on these observations during his examination of petitioner, Dr. Tobin expressed that Klinefelter’s syndrome should be ruled out as well as chromosomal abnormalities. App. 4942; Supp. App. 52, ll. 16-19. Dr. Tobin 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. Dr. Tobin “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. Petitioner’s failure to respond to usual treatments for the usual diagnosis concerned Dr. Tobin. App. 4956, ll. 13-16. He warned against “just writ[ing] it off as just a ‘behavior.’” App. 4956, ll. 17-21. Despite Dr. Tobin’s expressed concern that petitioner may have Klinefelter syndrome, the treating pediatrician “felt that he did not.” Supp. App. 59, ll. 3-7. The note included that this could be evaluated as an outpatient if questions persisted. Supp. App. 59, ll. 7-9.

Although trial counsel was well aware of Dr. Tobin's evaluation of petitioner, neither he nor anyone on his defense team contacted Dr. Tobin. 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 Dr. Tobin's note and followed the obvious clue it left – that petitioner suffered from genetic and organic defects. Whereas trial counsel relied upon his fact investigator, Pete Skidmore, to advise him on what experts to retain, PCR counsel consulted with a developmental psychologist. See App. 4226, ll. 10-20.

In addition to the red flag presented by Dr. Tobin's evaluation of petitioner that portended petitioner's genetic defects, trial counsel failed to obtain records, which he knew existed and were important to understanding petitioner. Specifically, trial counsel never obtained the records from petitioner's psychiatric admission to MUSC in 1984 when petitioner was just three years old. App. 4240, ll. 21-22; App. 4241, l. 11 – 4242, l. 17; App. 4633-4748; App. 4749-4775. Trial counsel never obtained medical records of petitioner's mother, Lisa Bull Torres, which included critical records of her prenatal care and petitioner's birth. App. 4246, l. 12 – App. 4247, l. 16; App. 4776-4938. During the PCR hearing, trial counsel confessed the detailed medical records of a very young child and his mother were important. App. 4248, ll. 16-24.

Trial counsel did not hire a geneticist despite his knowledge of petitioner's family history of mental illness, which often indicates a genetic component. App. 4265, ll. 7-12. Similarly, trial counsel did not hire a geneticist despite his knowledge that his experts noted that petitioner was not treated adequately, which signified an untreated psychiatric disorder and served as a "genetic tipoff." App. 4264, ll. 16-20.

Dr. Thomas Schacht, an expert in clinical psychology, forensic psychology, and developmental psychology retained by PCR counsel, explained that petitioner suffered from “multiple overlapping factors” “that converge to create a very severe situation with respect to developmental disability.” App. 3623, ll. 14-18; App. 3626, ll. 12-15. Dr. Schacht explained that petitioner’s records show “profound impairment in capacity for self-regulation.” App. 3629, ll. 1-5. Petitioner had “very, very early – onset of severely disordered behavior,” as evidenced by his prescription for antipsychotic medication as a toddler. App. 3660, ll. 8-15. Because petitioner’s “difficulties began so very, very early in life, extraordinarily early,” Dr. Schacht was immediately suspicious that petitioner suffered from genetic defects. App. 3627, ll. 17-20. Putting it bluntly, Dr. Schacht explained that knowing petitioner was on an antipsychotic medication at the age of 19 months “screams the need for genetic evaluation.” App. 3689, ll. 11-14; see also App. 2683, ll. 1-8 (Dr. Schwartz-Watts testifying at trial that she had “not seen anybody else with a younger age of onset of mental illness and being prescribed psychiatric meds”); App. 2716, ll. 1-6 (same).

Genetic Defects: Prader-Willi Syndrome, Hyperprolinemia Deficiency, and 22q11 Deletion

Dr. Jack Rary, a founding fellow of the American Board of Medical Genetics, determined petitioner suffered from three genetic defects: Prader-Willi Syndrome, hyperprolinemia deficiency and 22q11 deletion syndrome. App. 3429, ll. 5-23. In arriving at his diagnoses, Dr. Rary relied upon his almost fifty years of experience as a geneticist, which included a post-doctoral fellowship at Johns Hopkins University School of Medicine, and the OMIM, which was sponsored by the National Institutes of Health and provided the full description and history of every known genetic syndrome. App. 3489, ll. 2-4.

Upon examining photographs of petitioner, Dr. Rary was confident he had a genetic syndrome. App. 3432, ll. 2-11. Dr. Rary examined petitioner to confirm his assessment.³ App. 3438, ll. 13-18. According to Dr. Rary, petitioner displayed the hallmark dysmorphic features of Prader-Willi Syndrome (PWS), including low-set ears, almond shaped eyes, truncal obesity from a young age, a small mouth, and a low nasal bridge. App. 3439, ll. 6-15; App. 3441, ll. 2-20. During the physical exam, petitioner's fingers measured three-quarters of an inch shorter than normal. App. 3443, ll. 5-12. Petitioner's voluminous records indicated he had an undescended testicle at an earlier age, but at the time of Dr. Rary's examination, he had two normal testes. App. 3444, l. 20 – 3445, l. 1. However, he did have a "microphallus or small, small penis" with "a terribly small, extremely small" urethral opening. App. 3445, ll. 2-3; App. 3447, ll. 14-20. Dr. Rary described the "small phallus" as the "real clincher" that "point[ed] immediately to Prader-Willi syndrome." App. 3477, ll. 18-20. In 1984, petitioner was three years old and his penis measured two inches long. App. 3753, ll. 3-9. His penis measured 2.75 inches in 2014 during his PCR hearing. App. 3753, ll. 10-12. His penis grew less than an inch from three years old to adulthood. App. 3753, ll. 13-15. Additionally, petitioner had a female pubic hairline. App. 3445, ll. 4-8.

Dr. Rary explained that children with PWS often display behavioral problems, including violent outbursts, and hyperphagia, which occurs when the child cannot stop eating. App. 3459, l. 21 – 3460, l. 10. Petitioner's medical and psychological records showed petitioner's mother complained to doctors that he would not stop eating. App. 3486, l. 23 – 3487, l. 7. Based upon his clinical observations, Dr. Rary was absolutely confident in reaching his diagnosis of Prader-Willi Syndrome. App. 3448, ll. 6-9.

³ The genetics testing and physical examination conducted by Dr. Rary were available in 2007 and 2008. App. 3471, l. 13 – 3472, l. 15.

Dr. Rary's diagnosis was not affected by the negative lab testing results for methylation. App. 3449, l. 20 – 3450, l. 19. Roughly thirty to forty percent of the PWS cases involve uniparental disomy, which is when two copies of a chromosome come from the same parent. App. 3450, l. 9 – 3451, l. 5. Approximately forty to fifty percent of cases of PWS are the result of a deletion of part of the chromosome number 15 in the q arm; the testing indicated petitioner did not have this deletion. App. 3453, l. 17 – 3454, l. 2. While these two genetic abnormalities comprise the majority of the causes of PWS, there are many more causes that are not detected by the genetics tests performed on petitioner. App. 3454, l. 14 – 3455, l. 10. Dr. Rary was “absolutely” confident of his diagnosis of PWS based upon his clinical examination. App. 3456, ll. 20-23; App. 3498, ll. 19-25. A geneticist examining petitioner in 2007 or 2008 would have made the same diagnosis. App. 3458, ll. 13-21.

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.⁴ App. 3462, l. 24 – 3463, l. 3; App. 3472, ll. 23-25.

⁴ 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.

During his hospitalization at seven years of age, the doctors attempted to conduct some psychological testing. App. 3683, ll. 11-18. Most children enjoy the testing, but petitioner was uncooperative to the point that it required as many as three adults to hold him on his bed. App. 3683, ll. 19-23. Part of PWS is hyperphagia, or obsessive excessive eating, and petitioner finally relented to the testing, and did well, when offered ice cream, which was consistent with hyperphagia and the observed preference for carbohydrates by petitioner. App. 3684, ll. 2-10.

Dr. Jonathan Lipman, an expert in neuropharmacology, concluded petitioner’s use of street drugs coincided with his desire to treat symptoms associated with his genetic defects and behavioral problems. Dr. Lipman explained that when first used, methamphetamine is a mood elevator. App. 3565, ll. 12-13. For a depressed person, methamphetamine “is like magic” and “seems to be the solution.” App. 3565, ll. 21-24. “Large doses [of methamphetamine] produce a sensation of competence and power and euphoria and aloofness.” App. 3566, ll. 6-9. Methamphetamine also “banishes hunger,” which appeals to someone with Prader-Willi

Syndrome, experiencing outrageous hunger. App. 3567, ll. 11-22. Individuals who use methamphetamine are able to function “without sleep for days and days and days,” but “protracted sleeplessness has really psychotoxic effect[s] on the brain.” App. 3567, ll. 8-11.

“Another feature of Prader-Willi is the occurrence in some individuals of relative insensitivity to pain.” App. 3644, ll. 8-9. Petitioner suffered second degree burns at the age of two on the soles of both feet as a result of standing on a hot floor grate. App. 3644, ll. 20-22. When Dr. Schacht first learned of these burns, he thought petitioner may have been abused because “any normal child would have simply jumped off.” App. 3645, ll. 2-8. However, upon learning of petitioner’s PWS diagnosis, he realized petitioner’s relative pain insensitivity would explain why he would stand on a hot grate and get burned so severely. App. 3645, ll. 8-12. “An individual who has relative pain insensitivity is at a disadvantage in terms of developing ... empathic capacity, and they may well be impaired as a result of that.” App. 3645, ll. 23-25. Petitioner’s records stating he lacked insight into the impact of his behavior on others supported his impairment in developing empathy. App. 3646, ll. 6-11.

With 22q11 deletion syndrome, Dr. Schacht expects to see “[m]ood spectrum symptoms, transient psychotic symptoms, disruptive social behavior,” and frequent, intense emotional changes. App. 3647, ll. 1-7. Petitioner exhibited these symptoms from a very early age as evidenced by the voluminous records.

While there is no cure for these genetic defects, symptoms can be treated. App. 3479, ll. 12-18; App. 3596, ll. 11-23. PCR counsel engaged the services of a neuropharmacologist to address the best treatments for individuals with petitioner’s genetic conditions. This expert also examined petitioner’s history of medications to determine what impact, if any, those medications had on petitioner.

Dr. Lipman explained petitioner's PWS placed "him in a class of people who have an impulse control disorder, who are developmentally impaired in a number of ways and who need pharmacological and behavioral assistance to get through life." App. 3536, l. 25 – 3537, l. 4. People who have PWS have an almost eighty percent higher incidence of DSM diagnoses, a much higher incidence of transient psychotic episodes of nonsituational emotionality and frequent outbursts. App. 3546, ll. 1-10. Similarly, "[s]eventy-nine percent of [individuals with 22q11 deletion syndrome] have more than one DSM diagnosis, four times higher than a controlled group." App. 3541, ll. 19-24. "Forty-eight percent have transient psychotic experiences." App. 3541, l. 25. "[A]bout 40 percent have inappropriate emotionality and emotional outbursts frequently." App. 3542, ll. 3-4. These individuals typically do not suffer from chronic psychosis; rather, their psychotic symptoms are transient. App. 3542, ll. 6-13.

Had the doctors, who treated petitioner during his multiple psychiatric commitments, understood that petitioner's behavior was related to his genetic defects of PWS and 22q11 deletion syndrome, the doctors would not have treated petitioner as having a behavioral problem stemming from the parent-child relationship. App. 3679, ll. 7-12. Instead the doctors would have treated his anxiety and instability of mood, products of his PWS and 22q11 deletion syndrome, with SSRI drugs. App. 3536, ll. 21-24; App. 3543, ll. 13-23; App. 3545, ll. 13-25; App. 3679, ll. 15-20. In addition, anticonvulsant drugs help with the emotional instability. App. 3544, ll. 8-25. Petitioner never got these drugs.

Genetic defects: Defective Cytochrome P450

Dr. Lipman tested petitioner's ability to metabolize certain medications in light of the large doses and varied medications administered to petitioner over the years. The testing⁵

⁵ This testing was available in 2007 and 2008. App. 3554, ll. 7-17.

revealed petitioner “cannot properly metabolize imipramine, which is a drug that he was treated with as a child.” App. 3534, ll. 12-14. Dr. Lipman explained, petitioner “has a defective, a low activity, Cytochrome P450 2C19,” which “means that he cannot properly metabolize imipramine, the tricyclic antidepressant he was given as a child.” App. 3535, l. 23 – 3536, l. 1; App. 3552, ll. 12-15.

As a result of this genetic condition, petitioner’s treatment with imipramine when he was three years old “would increase the toxic levels and would have adverse behavioral outcomes.” App. 3536, ll. 1-18; App. 3552, ll. 15-17. Petitioner’s mother reported that petitioner “went bonkers” when he was taking imipramine. App. 3555, ll. 2-9. Imipramine “massively increased his problems” and “he became violent.” App. 3555, ll. 9-10. He “suffered an adverse reaction to imipramine which was catastrophic” as he was “never again given an antidepressant drug.” App. 3534, ll. 14-16. “[T]hat experience determined in part his future treatment.” App. 3534, ll. 16-17. After petitioner reacted so negatively to imipramine, no doctor ever placed him on any antidepressant. App. 3556, ll. 9-16.

Chemical restraint

In response to petitioner’s reaction to imipramine, petitioner was treated with “a chemical restraint,” thioridazine. App. 3534, ll. 18-19. From the age of nineteen months until he turned eleven, petitioner was treated with thioridazine, which is also called Mellaril. App. 3558, ll. 1-5. Thioridazine is an extremely powerful antipsychotic drug normally used to control schizophrenic psychotic symptoms in adults.” App. 3558, ll. 5-9. Petitioner’s treatment with thioridazine occurred during his major developmental years when his brain should have been undergoing development. App. 3534, ll. 19-22. Thioridazine interfered with his brain’s development. App. 3534, ll. 22-23.

Administering Mellaril to a child as young as petitioner was not authorized by the Food and Drug Administration. App. 3558, ll. 13-19. None of the professional literature supported the use of antipsychotic medication on a child only nineteen months old. App. 3662, ll. 15-25. Mellaril is “chemically stunning” and causes “zombie like movement.” App. 3559, ll.16-21. Prolonged use of the drug damages the brain. App. 3561, ll. 4-11. When the drug is withdrawn, individuals display mood disorders. App. 3561, l. 18 –3562, l. 1. “[T]he drug leaves branding on the brain.” App. 3562, ll. 3-4. “The drug is so stunning” “that it can be used as a kind of chemical shackle.” App. 3562, ll. 14-16.

Petitioner was taking Mellaril for “nine years of critical brain development period.” App. 3563, ll. 5-7. Antipsychotics cause damage or atrophy to the frontal lobes. App. 3563, ll. 8-11. The frontal lobes “are responsible for self regulation and judgment and self control.” App. 3563, ll. 13-15. “When the frontal lobes are damaged the personality becomes changed. The person has less ability to plan, to - - to reason, to judge, to control impulses.” App. 3563, ll. 18-20.

Dr. Lipman explained the “appropriate pharmacological treatment” for petitioner from the age of two to adulthood was “[a]n SSRI with a mood stabilizer,” exactly as he was being treated successfully at the time of his PCR hearing. App. 3556, l. 17 – 3557, l. 6. Petitioner never received the correct treatment for any length of time despite his records showing he responded well to Lithium and carbamazepine. App. 3557, ll. 16-21; App. 3549, ll. 6-14.

“Missing” Records: Mother’s medical records and petitioner’s birth records

PCR counsel obtained the missing records related to petitioner’s mother, including petitioner’s birth records. These records assisted the experts in understanding petitioner’s mental, emotional, and physical health. Examining these records, Dr. Schacht noted that petitioner’s mother had an abortion the year prior to petitioner’s birth. App. 3653, ll. 16-19.

Oddly, she had “a major turnaround” in her attitude about having children. App. 3653, ll. 21-24. When she learned she was pregnant with petitioner, she “harbored an idea that [petitioner] was going to be her companion for life.” App. 3654, ll. 1-7. However, petitioner’s father did not share his mother’s enthusiasm over his birth. App. 3654, ll. 18-23. He beat petitioner’s mother while she was pregnant. App. 3654, ll. 20-21. Fetal harm may occur through direct physical trauma or through indirect physiological effects such as the effects of stress hormones. App. 3655, ll. 3-8.

His mother also smoked more than one pack of cigarettes per day during her pregnancy, placing petitioner at risk for toxicity while in the womb. App. 3655, ll. 9-13. There was also some exposure to marijuana and alcohol while in utero. App. 3655, ll. 12-13. Tobacco exposure has adverse effects on brain development, particularly in the frontal lobe. App. 3656, ll. 7-9. Infants exposed to tobacco show increased irritability, less focused attention, more distractibility, and decreased capacity for self-regulation. App. 3657, ll. 8-15. Petitioner’s records showed that throughout his life, he was not able to calm himself and not able to put himself to sleep. App. 3657, ll. 19-23.

Dr. George Woods, an expert in neuropsychiatry, noted that these records revealed petitioner’s mother was treated for premature labor at three months. App. 3994, ll. 8-9. Genetic or developmental impairments are often connected to prenatal problems during the first trimester. App. 3994, ll. 8-17. Also, the meconium staining that occurred during his birth was “a clue that something may not be functioning in this pregnancy the way that it should be.” App. 3995, ll. 4-10. Petitioner was born with an Apgar score of seven, which was low, and indicated he was born with fetal distress. App. 3995, ll. 11-21.

Petitioner's mother was hospitalized when she was fifteen for "borderline schizophrenic reaction complicated by severe depression." App. 3694, ll. 12-17. She reported explosive rage episodes – screaming, pulling her hair, bashing her head against a wall, and wanting to kill herself. App. 3694, ll. 14-16. According to Dr. Schacht, "there's the potential for some genetic transmission of these traits." App. 3695, ll. 23-25. Despite the volume of these records and the undisputed importance of this records to experts evaluating petitioner, trial counsel never bothered to obtain them.

"Missing" Records: Petitioner's psychiatric hospitalization at three-years old

Petitioner was first hospitalized at MUSC in April 1984 when he was only three years old. App. 3663, ll. 2-8. Due to the distance from his home, petitioner was alone, with his mother visiting on some weekends. App. 3663, ll. 8-15. This inhibited the doctors from observing and understanding the interactions and relationship between child and parent in order to develop treatment for petitioner. App. 3663, ll. 16-20. Petitioner initially told evaluators at MUSC that his mother was mean to him and hit him, but there was no follow-up on that despite the fact that he had bruising on his body and he was missing a fingernail. App. 3664, ll. 18-23. However, individuals with Prader-Willi often bite their fingernails until the nails disappear. App. 3665, ll. 1-6. The records indicated petitioner's symptoms from this stay were consistent with Prader-Willi, including headbanging, ongoing sleep disturbance, stress intolerance, and explosive reactions to trivial stressors. App. 3665, ll. 20-24.

From early on, MUSC therapists concluded petitioner did not have adequate respect for authority and "was spoiled." App. 3667, l. 25 – 3668, l. 4. Their solution was to "crack down" on petitioner. App. 3668, l. 5. Despite evidence throughout the record, few mentioned that petitioner "was suffering from damaged attachment." App. 3668, ll. 8-11. The development of

self-regulation is directly linked to secure attachment. App. 3668, ll. 12-19. Petitioner suffered from disorganized attachment because his attachment figure was not safe. App. 3668, ll. 20-23. When dealing with disorganized attachment, the positive side of the parent-child relationship must be healed first. App. 3669, ll. 10-12. MUSC failed to do this. App. 3669, ll. 16-18.

On the day petitioner arrived at MUSC, the staff noted his acting out “escalated” when he realized his mother was leaving. App. 3671, ll. 3-5. To a three-year-old, being left by a parent is abandonment and emotionally catastrophic. App. 3671, ll. 13-15. Instead of being comforted, petitioner was made to stand alone in a corner for twenty minutes. App. 3671, ll. 16-20. During his commitment, when three-year-old petitioner cried for his mother, he was instructed to stop. App. 3672, ll. 15-18.

MUSC focused on enhancing the coercive aspects of the parenting relationship, not on enhancing the positive aspects of it. App. 3675, ll. 14-16. There was no appreciation for the roots of petitioner’s difficulty, including genetic disorders, trauma, and failures in the parent-child relationship. App. 3675, ll. 20-23. Instead, the staff determined his mother needed some parenting skills to discipline petitioner better. App. 3675, l. 25 – 3676, l. 1. Furthermore, MUSC discharged three-year-old petitioner with no plan for follow-up or continued treatment. App. 3675, ll. 17-19.

These records of petitioner’s hospitalization at three years old were critical for a developmental psychologist in understanding the trajectory of petitioner’s mental health treatment. App. 3676, ll. 10-12. The hospitalization created a record that was “relied upon by the next people in line.” App. 3676, ll. 13-14. The records “represent[ed] a 25-day period of a 24-hour-a-day interaction and observation with him in a controlled clinical setting.” App. 3687, ll. 2-13. The “observation and level of information” provided from those records “would be very

difficult to obtain retrospectively in any way.” App. 3687, ll. 13-15. Importantly, the records of his psychiatric hospitalization at the tender age of three, like his placement on an antipsychotic drug at the age of nineteen-months, “would have pointed somebody reasonably” in the direction of exploring petitioner’s genetic composition. App. 3689, ll. 15-21.

Petitioner was hospitalized again at age seven.⁶ App. 3677, ll. 18-22. During the intervening time between hospitalizations, petitioner had to live outside the home in some group settings as his mother was unable or unwilling to parent him. App. 3676, ll. 19-22. Although petitioner had an average IQ, his emotional intelligence was severely impaired. App. 3677, ll. 13-17. At this point, petitioner was diagnosed with intermittent explosive disorder because he lacked the capacity for self-regulation. App. 3677, ll. 17-20. However, petitioner’s oscillation between good behavior and bad behavior was not an indication that he could control his behavior; rather, it indicated “he’s not able ... to control himself.” App. 3673, ll. 21-25. No causes for this behavior were sought when petitioner was seven years old, and none were sought when he was in his mid-twenties and facing the death penalty.

Organic brain damage

Dr. Stacey Wood, an expert in clinical neuropsychology, determined that petitioner suffered from “some cognitive impairment, specifically in the areas of executive functioning and verbal memory in the context of a relatively intact general intellectual functioning.” App. 3890, ll. 16-20. Petitioner’s score on a memory test was “five standard deviations below the norm” placing him in less than the first percentile. App. 3918, ll. 14-16. This was “consistent with problems with frontal lobe impairment or deficits in executive functioning.” App. 3919, ll. 1-4. On a test of petitioner’s cognitive flexibility, he scored in the impaired range at the first

⁶ Trial counsel had the records from this hospitalization.

percentile. App. 3929, ll. 20-24. On other tests, petitioner's performance indicated cognitive impairments. App. 3931, ll. 13-14; App. 3931, ll. 14-15; App. 3992, ll. 22-25; App. 3993, ll. 8-12; App. 3935, ll. 8-19.

Dr. Wood explained that petitioner's testing from 2008 showed a focal pattern of impaired executive functioning within intact intellectual functioning, which should prompt a neuropsychologist to consider the etiology. App. 3945, ll. 12-16. Petitioner's history provided numerous possibilities for the cause of petitioner's cognitive impairment, including a potential brain injury from a fall down stairs when he was seven-months old, exposure to various medications starting at a young age, genetic disorders, and a congenital cerebellar angioma. App. 3945, ll. 5-24; App. 3946, l. 22 – 3947, l. 6.

Dr. Woods determined petitioner suffered from several neurocognitive impairments, which would have been called cognitive disorder not otherwise specified, severe, at the time of his 2008 trial. App. 3982, ll. 19-25. Further, Dr. Woods agreed with Dr. Rary that petitioner met the clinical criteria for PWS. App. 3982, ll. 10-13. Finally, Dr. Woods explained that petitioner suffered from cerebellar affective syndrome. App. 3982, ll. 14-17.

Petitioner sustained significant head injuries in infancy and early in life, which affected his brain's development during a critical period. App. 4001, ll. 4-23. As his brain was "pruning" during the early years, it worked around the areas damaged by the head injuries, resulting in a not fully developed brain. App. 4002, ll. 1-4.

Petitioner's behavioral problems started as young as eighteen months, which was more consistent with an impaired brain than a behavioral syndrome. App. 4010, ll. 10-15. Early onset of severe disinhibition was indicative of genetic defects. App. 4010, l. 19 – 4011, l. 3. The

failed attempts to treat petitioner with multiple medications showed the doctors were “in the wrong basket ... the psychiatric basket.” App. 4011, ll. 12-15.

Petitioner complained of headaches his entire life. App. 4024, ll. 13-14. He described headaches emanating from the left side of his head, which related to an angioma on his brain. App. 4024, l. 16 – 4025, l. 3. Prior to petitioner’s trial, it was discovered he had a hemangioma, a collection of blood in the left occipital lobe; however, neither trial counsel nor his expert appreciated its significance. App. 4025, ll. 7-12; App. 4033, ll. 9-13. “Hemangiomas are typically congenital.” App. 4025, l. 12. When the blood vessels developed along petitioner’s brain, the vessels did not develop properly. App. 4025, ll. 15-24. Instead of his vessels developing in a “river” pattern to carry blood to all parts of his brain, a “lake of blood” developed in the left occipital lobe. App. 4025, ll. 22-24. “[C]onsequently, those parts of the brain don’t work properly.” App. 4026, l. 1. Also, that lake of blood in petitioner’s brain hardened by the time he was three or four, leaving him with a big lump in his brain and causing his headaches. App. 4026, l. 21 – 4027, l. 3.

Petitioner’s hemangioma affected his left cerebellum, creating problems with motor function and executive functioning. App. 4027, ll. 10-23; App. 4028, ll. 4-7. Problems in the left cerebellum also create problems in executive functioning because there are connections between the frontal lobe and the cerebellum. App. 4028, ll. 4-7. Impairments in one’s left cerebellum causes cerebellar cognitive affective syndrome. App. 4028, ll. 17-19. This syndrome is characterized by impairments in one’s ability to weigh and deliberate as shown through impulsivity and disinhibition. App. 4028, l. 17-21. Petitioner’s angioma in the left cerebellum explained his emotional problems, distractibility, hyperactivity, compulsions, ritualistic behaviors, impulsivity, disinhibition, unpredictability, anxiety, and agitation. App. 4020, l. 25 –

4021, l. 14; App. 4028, ll. 22-24; App. 4031, l. 18 – 4032, l. 9. Many of these symptoms fit psychiatric diagnoses, which petitioner received, including ADHD and bipolar disorder. App. 4032, ll. 10-19.

The medical records for petitioner and the testing conducted by Dr. Woods confirmed deficits in motor function since childhood, verifying the impact of the hemangioma on his brain. According to his records, petitioner had problems with rapid alternative movements when engaged in tandem walking and ataxia or balance. App. 4029, ll. 3-21. Although Dr. Woods was unable to replicate the testing exactly due to petitioner's restraints, he confirmed that petitioner continued to exhibit problems with rapid alternating movements. App. 4030, ll. 10-14. When Dr. Woods administered "a go/no test" to petitioner, he observed petitioner had greater problems on the right side with following the test's commands. App. 4030, ll. 21-22.

Petitioner's diagnosis with PWS was significant to Dr. Woods because of its accompanying dysmorphic features that are brain-related. App. 4034, ll. 11-18. A person with PWS experiences hyperphagia, which is related to Kluver-Bucy syndrome, a specific problem in the left temporal lobe. App. 4035, ll. 20-23. A person who has an impaired locus ceruleus, which is part of the left temporal lobe, has no control over appetite. App. 4035, ll. 3-11. This was important to Dr. Woods because "right in front of th[e] area that controls hyperphagia is the area that controls expressive language," called "Broca's area." App. 4035, ll. 12-16. Thus, multiple areas of petitioner's brain "don't work quite right." App. 4035, ll. 17-24.

In sum, the neuropsychological testing showing petitioner suffered from brain damage was consistent with the medical records that talked about impaired brain function, the EEG⁷

⁷ 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

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.

State’s response

At the conclusion of the presentation of petitioner’s case for relief on April 30, 2014, the state requested “a little bit of additional time” in order to present its rebuttal. App. 4441, ll. 21-23. Although the state retained a consulting geneticist for assistance with cross-examination, this person was not available for testimony for some unstated reason. App. 4442, l. 25 – 4443, l. 3. Thus, the state requested “30 days to contact experts ... and offer at that time maybe another time that we could convene for one day and hear testimony from the expert.” App. 4444, ll. 3-7; App. 4444, ll. 13-14.

More than a year later, the PCR court convened a hearing to allow the state to present its witness, John Edward Spence. App. 4446, l. 1. When DNA testing was first used in criminal cases, approximately twenty-five years ago, Dr. Spence was qualified as an expert in medical genetics. App. 4449, ll. 6-13. Concerning petitioner, Dr. Spence reviewed photographs and Dr. Rary’s testimony. App. 4453, ll. 15-24. He also reviewed lab reports and “a very small portion

seizure disorder, he was placed on seizure medication. App. 2676, ll. 12-25. Trial counsel was aware of this abnormal EEG, failed to realize its significance.

of past history.” App. 4454, ll. 1-4. Typically, when evaluating his patients, Dr. Spence reviewed the patients’ medical records, not the “small batch of records” provided to him by the state in this case. App. 4469, ll. 8-12; App. 4469, ll. 21-24. Thus, he did not “know the vast majority” of petitioner’s medical history. App. 4469, l. 25 – 4470, l. 2.

Dr. Spence explained that “the majority of individuals” with PWS “have short stature,” “intellectual disability,” and may have “delays in cognitive abilities, intellectual abilities with speaking and cognitive processing.” App. 4454, ll. 11-16. Additionally, “[t]hey often have ... some mild dysmorphic features, unusual facial features such as maybe an almond shape to the eyes, maybe bi-frontal narrowing.” App. 4454, ll. 17-19. Such features “may not be obvious.” App. 4454, ll. 19-20. According to Dr. Spence, “[t]hey often will have small hands and small feet.” App. 4454, l. 21. Finally, “as infants and young children they **may** have hypotonia that will improve as they get older in most cases.” App. 4454, ll. 21-23 (emphasis added).

In order to diagnose PWS, Dr. Spence “**primarily**” uses “an imprinting or methylation study of the chromosome 15 region.” App. 4455, ll. 12-16 (emphasis added). He noted he “can also do deletion testing for that region,” but such testing was not complete “as only 70 or 75 percent of the individuals with the condition have a deletion of chromosome 15.” App. 4455, ll. 17-20.

Many publications list the specific features of PWS and some list the frequency of occurrence. App. 4456, ll. 2-4. “A common resource” that he used in his clinic is GeneReviews that list the “common features, the uncommon features, the very unusual features and what other conditions may look like Prader-Willi Syndrome.” App. 4456, ll. 5-9. Using GeneReviews as one of his resources, Dr. Spence claimed petitioner does not have PWS. App. 4456, ll. 17-24.

Dr. Spence declared that petitioner did “not have many of the typical features” based on his review of photographs. App. 4457, ll. 1-11. Dr. Spence did **not** conduct a clinical evaluation of petitioner, which was something he always did when evaluating patients. App. 4469, ll. 1-7; App. 4469, ll. 18-20. He believed petitioner’s hands were normal size, “not small.” App. 4457, ll. 1-5. He also did not believe his eyes were unusually spaced “according to the measurements that were available” to him. App. 4457, ll. 13-14. Dr. Spence claimed petitioner “had endocrinology evaluations” when he was younger, and they mentioned he did not have low muscle tone. App. 4457, ll. 15-20. He also claimed petitioner had normal developmental progress as an infant. App. 4457, ll. 21-22. Based upon this “clinical presentation,” he did not believe petitioner could be diagnosed with PWS. App. 4458, ll. 4-8.

Dr. Spence declared “[t]he DNA tests that he had done, the imprinting analysis was normal with no abnormality noted,” would “would mean that there was no deletion on chromosome 15, there was no uniparental disomy on chromosome 15, and there was no imprinting defect on chromosome 15.” App. 4457, l. 23 – 4458, l. 3. Based upon the methylation test, Dr. Spence concluded there was “more than a 99 percent chance” petitioner “does not have Prader-Willi Syndrome by laboratory testing alone.” App. 4458, ll. 17-20. In his practice, such was “the definitive test that determines whether a person has the condition or not.” App. 4458, ll. 24-25. Based upon the tests results alone, Dr. Spence could conclude petitioner did not have PPWS. App. 4459, ll. 14-18.

According to Dr. Spence, “[s]eventy-five percent or so” of people with 22q11 deletion syndrome have congenital heart defects. App. 4460, ll. 16-25. While “the physical features are quite variable” and not as obvious, Dr. Spence described that individuals with 22q11 deletion syndrome may have intellectual disability, soft palate cleft, or small cupped ears. App. 4461, ll.

1-7. Without explanation of how he arrived at the conclusion, Dr. Spence declared petitioner did “not have the typical features of the chromosome 22q11.2 deletion syndrome.” App. 4462, l. 24 – 4463, l. 2.

As to testing conducted on petitioner, Dr. Spence asserted that petitioner had “a small deletion on a very fringe region” of the syndrome region on chromosome 22. App. 4463, ll. 3-5. It was his opinion that petitioner did “not have the typical syndrome.” App. 4463, ll. 5-6. The microarray test that showed the deletion on petitioner’s chromosome 22 was “one of the tests” Dr. Spence “might use.” App. 4463, ll. 11-13. Another test he “might use” was “a simple deletion test just of that region by florescence and situ hybridization analysis or FISH analysis. App. 4463, ll. 13-16. He admitted the microarray test “does a better job of picking up smaller or variable deletions of this region.” App. 4463, ll. 16-17.

Specifically, the microarray showed a deletion of “91kb, kilobase, deletion of the region and overlapped one recognized syndromic gene and a couple of other ... genes in the region.” App. 4463, ll. 20-25. He declared “it did not include the fully typical - - full deletion seen in 22q11.2 deletion syndrome.” App. 4463, l. 25 – 4464, l. 2. Dr. Spence claimed a “normal deletion is 2.5 megabytes or 2,500 kilobases or 3,000 kilobases in size.” App. 4464, ll. 5-6. He claimed petitioner’s deletion “was only 91 kilobases in size and on a very fringe region,” and “did not include the more critical region for DiGeorge syndrome and velocardiofacial syndrome for the 22q11 syndrome.” App. 4464, ll. 3-9. Dr. Spence observed that petitioner’s deletion “did not include the more classic part of the region” that researchers “think is involved in intellectual disabilities and general heart defects and the typical features.” App. 4664, ll. 10-15.

Nevertheless, Dr. Spence was forced to admit that the deletion included the proline dehydrogenase, which means a person “may not metabolize proline as well as usual” and “may

have **minor** - - some elevation of proline in the blood stream.” App. 4464, ll. 21-23; App. 4465, ll. 2-7 (emphasis added). Unable to remember the specifics of the report he saw that measured petitioner’s proline levels and unable to remember the scale for proline, Dr. Spence claimed petitioner had “a minor elevation of proline.” App. 4465, ll. 8-20.

Concerning diagnosing 22q11 deletion syndrome, Dr. Spence used GeneReviews only “sometimes” because it was “such a common condition” that he found the literature unhelpful. App. 4461, ll. 8-18.

Admitting that petitioner suffered from the genetic condition of hyperprolinemia and had a chromosomal deletion within the 22q11 region, Dr. Spence agreed he did not “know which [of petitioner’s] behavioral abnormalities have been caused by any genetic defect.” App. 4474, l. 25 – 4475, l. 25. In fact, he had made no effort whatsoever to assess whether petitioner’s genetic abnormalities affected his behavior at all. App. 4484, l. 24 – 4485, l. 4. He admitted that individuals with deletions of the PRODH gene are associated with a higher risk of schizophrenia. App. 4481, ll. 5-8. He could not rule out that petitioner was schizophrenic based upon that gene abnormality. App. 4481, ll. 9-13. Dr. Spence was unfamiliar with the types of schizophrenia despite his knowledge that some genetic disorders, for which he was an expert, manifest as schizophrenia. App. 4481, ll. 16-22.

Regarding hyperprolinemia, Dr. Spence simply “suspect[ed] it could be” toxic for there to be high doses of proline in the human body. App. 4476, l. 24 – 4477, l. 2. He insisted petitioner had only “mild to moderate elevation” of proline “based on the single assay that [he] saw.” App. 4477, ll. 10-24. Dr. Spence was forced to admit his opinion was based upon his review of a single test, which “could be affected by diet,” about which he had no clue. App. 4478, ll. 1-4; App. 4479, ll. 10-15. According to the test, the normal range is ten to thirty-one,

and petitioner's level was forty. App. 4478, ll. 16-19. Dr. Spence had "read about" types of hyperprolinemia, but he could not "remember the differences" when he had been called as an expert witness by the state to testify regarding that very genetic disorder. App. 4480, ll. 17-20.

Dr. Spence could, but did not, perform additional sequencing on the non-deleted allele to look for mutations in the non-deleted allele. App. 4481, l. 23 – 4482, l. 6. Such a mutation would suggest "an even greater likelihood of problems" for petitioner, including behavioral and neurological problems. App. 4482, ll. 7-19. He then backtracked and claimed he did not know if there was a greater risk of behavioral problems because there were so few individuals with the condition, but he would admit there would not be a "lower risk of schizophrenia or other behavioral problems." App. 4483, ll. 1-18. Dr. Spence pleaded for relief during the cross-examination, "I don't claim to have expertise in behavioral disorders." App. 4484, ll. 2-3.

Order denying post-conviction relief

The PCR judge determined petitioner was not entitled to relief based upon trial counsel's failure to identify, develop, and present evidence of his genetic defects. App. 5323. While discussing the evidence of petitioner's genetic defects, the PCR judge also addressed trial counsel's failure to present evidence of the impact of petitioner's prescribed use of Mellaril, an antipsychotic medication on his brain development, petitioner's organic brain damage manifesting in severe cognitive disorder and cerebral affective syndrome, and how an understanding of petitioner's genetic defects and brain damage affected his ingestion of illicit drugs. App. 5324.

Ultimately, the PCR judge found Dr. Spence's testimony that petitioner does not have PWS or 22q11 deletion syndrome to be credible.⁸ App. 5327-5329. The PCR judge claimed Dr. Rary lacked "any supporting sources to confirm his conclusion" and that his diagnosis based solely on a clinical evaluation was "incongruous with the literature" provided to the court by the state. App. 5327-5329. The PCR judge faulted Dr. Rary for pointing generally to the OMIM (Online Medelian Inheritance in Man) as a source he routinely relied upon and not informing the court of "anything in particular" in the resource to support his diagnosis. App. 5328-5329. Next, the PCR judge determined that petitioner's claim that trial counsel failed to present evidence of his cognitive impairments was not deficient because the PCR judge believed those impairments were dependent upon his suffering from genetic defects. App. 5329.

Misconstruing petitioner's claim as asserting the existence of a crime gene, the PCR judge noted that Dr. Spence testified there was no definite link between genetics and crime and concluded that petitioner's evidence regarding his genetic defects "would rest on misleading the fact finder under the label of science," which would be "improper." App. 5330. Nevertheless, the PCR judge concluded "[t]he evidence here certainly could be offered at a trial," but he claimed "its worth is so damaged and questionable" that petitioner could not show prejudice due to trial counsel's failure to develop and present evidence of his genetic defects and organic brain damage. App. 5330.

Despite obvious errors pointed out by petitioner's Rule 59 motion, the PCR judge denied the motion without a hearing and in a Form 4 order. App. 5364.

⁸ Despite the PCR judge's credibility determination regarding the experts presented during the PCR hearing and whatever concern the PCR judge had about the sources relied upon by Dr. Rary, "it does not undermine the well-credentialed expert's assessment." See Sears v. Upton, 561 U.S. 945, 949-950 (2010).

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Deficient performance

An attorney whose representation falls below an objective standard of reasonableness provides deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. Attorneys are not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins v. Smith, 539 U.S. 510, 533 (2003). Nevertheless, courts must determine whether a decision not to investigate is reasonable in all circumstances. Id.

The United States Supreme Court explained the ABA Guidelines provide evidence of well-defined and prevailing professional norms. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)).⁹ As explained by the Court,

⁹ The 2003 ABA Guidelines are relevant for evaluating the deficient performance of petitioner's trial counsel. According to the Guidelines, when deciding which witnesses and evidence to prepare concerning penalty, counsel should consider "[w]itnesses familiar with and evidence relating to the client's life and development, from conception to the time of the sentencing, that would be explanatory of the offense(s) for which the client is being sentenced ... or would otherwise support a sentence less than death." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(F)(1) reprinted in 31 Hofstra L. Rev. 913, 1056 (2003). In addition, the Guidelines directed counsel to consider "expert and lay witnesses along with supporting documentation ... to provide medical, psychological, ... or other insights into the client's mental and or/emotional state and life history that may explain or lessen the

the Guidelines provided that counsel should consider presenting evidence of a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id.

In Wiggins, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written pre-sentence investigation, which included a one-page account of Wiggins' personal history, and (2) the state's social services records documenting Wiggins' various placements in the state's foster care system. Id. at 523. Counsel thereafter abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

In addition, the Wiggins Court held counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic and Wiggins displayed emotional difficulties in foster homes and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

client's culpability for the underlying offense(s), ... or otherwise support a sentence less than death." Id. at 10.11(F)(2).

The United States Supreme Court confronted the issue of trial counsel's duties to investigate mitigation in a capital case where counsel conducted a minimal investigation with a disinterested client. Rompilla v. Beard, 545 U.S. 374 (2005). In general, Rompilla's contribution was minimal as he was not interested in helping his attorneys develop a mitigation case. He told trial counsel his childhood was normal. At times, he actively obstructed counsel by sending them off on false leads. Id. at 381. Trial counsel interviewed five family members, who indicated they did not know Rompilla well because he spent much of his adult years and some of his childhood years in custody. Id. at 381-382. The three mental health witnesses who examined Rompilla offered nothing useful. Trial counsel made no further efforts to investigate a mitigation case. Id. at 382. However, post-conviction counsel for Rompilla uncovered multiple sources of mitigation evidence, including school records, incarceration records, and a history of alcohol dependence. Id. The Court concluded trial counsel's failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Id. at 383. The file concerned Rompilla's prior conviction for rape and assault, which trial counsel knew would be used by the prosecution. Id.

The Court held trial counsel had a duty to make all reasonable efforts to learn what they could about the prior offense, and that reasonable efforts included obtaining the readily available file to learn what the prosecution knew, to discover any mitigating evidence, and to anticipate the details of the aggravating evidence. Id. at 385.

Recently, the Fourth Circuit Court of Appeals granted habeas relief to Charles Williams because trial counsel failed to present readily available evidence that he suffered from fetal alcohol syndrome. Williams v. Stirling, 914 F.3d 302 (4th Cir. 2019). In preparation for sentencing, Williams' trial counsel assembled a team that included a social worker, a clinical

neuropsychologist, a clinical psychiatrist, neurologist, and forensic psychiatrist. Id. at 307. Trial counsel's investigation revealed Williams' mother abused alcohol while she was pregnant. Id. "During the penalty phase, defense counsel presented mitigating evidence of Williams' troubled childhood – including his mother's alcoholism – as well as his mental illness and difficulties in school." Id. The jury learned Williams suffered neurological impairments as a result of frontal lobe damage causing learning difficulties. Id. The jury also learned Williams was diagnosed with bipolar, obsessive-compulsive disorder, and major depressive disorder. Id. at 307-308.

Williams' post-conviction relief counsel alleged trial counsel failed to investigate signs that Williams suffered from fetal alcohol syndrome – "namely, evidence of [mother]'s drinking during her pregnancy and Williams' corresponding brain damage." Id. at 308. During the state PCR hearing, one expert testified Williams suffered from partial fetal alcohol syndrome, another expert testified Williams had several functional impairments and damage to the corpus callosum, which were consistent with fetal alcohol syndrome, and a final expert concluded Williams' executive functions, including self-regulation and behavior control, were impaired by fetal alcohol syndrome, resulting in behavioral difficulties, impulse control problems, and coping skills equivalent to those of a nine-year-old. Id. "All three experts acknowledged that at the time of the trial in 2005, a widely recognized protocol to forensically assess FAS in the criminal justice context had not yet been fully developed, but that individual practitioners had been addressing FAS and had developed a framework for diagnosing the condition and treating its symptoms." Id.

The state PCR court denied Williams relief on his claim that trial counsel provided ineffective assistance by failing to investigate and present evidence that he suffered from fetal alcohol syndrome despite trial counsel's awareness of his mother's drinking during the

pregnancy. Id. at 309-310. The state PCR court also determined that even if the evidence had been presented it was unlikely that the jury would have returned a different sentence. Id. at 310.

The Fourth Circuit Court of Appeals explained that “an inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance.” Id. at 314. Thus, the court concluded “counsel’s investigation into potentially mitigating evidence of FAS failed to meet an objective standard of reasonableness.” Id. Williams’ trial lawyers admitted “they were aware of the mitigating value of neurological defects at the time of Williams’ sentencing ... yet they failed to investigate this issue.” Id. The court explained that “because there was no recognition of potential FAS diagnosis by trial counsel, there was no further exploration of FAS as a potential mitigating factor[a]nd because there was no exploration, there was necessarily no opportunity for counsel to make a strategic decision about whether or not to further develop the FAS evidence or present it in mitigation.” Id. The investigation was deficient because “the lack of an informed decision regarding mitigating evidence.” Id. “[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses.” Id.

The court explained trial counsel missed the “red flags” that required additional investigation, including evidence of his mother’s drinking during pregnancy and of Williams’ brain damage. Id. at 315. “[E]vidence of FAS *was* reasonably available, but counsel failed to connect the indicators suggesting further investigation.” Id. “[G]iven that FAS evidence was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored – as outlined in the ABA Guidelines and caselaw at the time, and by counsel during their PCR testimony – counsel’s actions were deficient.” Id.

Similarly, this Court has addressed trial counsel's deficient performance in capital cases involving failures to investigate mitigating evidence. This Court vacated John Edward Weik's death sentence based upon his counsel's failure to present Weik's social history "even though there was abundant social history evidence available to them." Weik v. State, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014). While trial counsel presented psychological testimony of Weik's mental illness, "counsel failed to present even a skeletal version" of his social history. Id. Defense counsel provided the mitigation investigator no support or guidance, but the investigator "uncover[ed] substantial mitigating information about [Weik]'s social history and provided counsel with written reports detailing that information." Id. Yet, counsel failed to use the information. Id. The mitigation case was "extremely limited," "general, vague, and offered no detail or insight into the degree of abuse Weik suffered as a child." Id. "[T]he jury remained unaware of the severity and pervasiveness of the physical and psychological abuse Weik faced and the full extent of his father's mental illness." Id. This Court attributed this to "counsel's failure to review the investigators' reports they possessed in their own case files to become aware of the wealth of information that had been uncovered." Id. Thus, there was no strategic decision not to present the evidence as counsel "simply did not read the investigators' reports." Id. "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." Id. See also Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (holding trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable).

In Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), this Court held trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort." The mitigation case presented during the trial was that

Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. Witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen's personality dramatically changed when his brother was murdered two weeks before the murder involving Von Dohlen and he began abusing alcohol and Valium. A psychiatrist testified on behalf of Von Dohlen indicating he suffered from an adjustment reaction, which was easily treated, short-termed, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.” Id. at 605, 602 S.E.2d at 741. Another psychiatrist testified at the post-conviction relief hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. This Court held that although trial counsel “exerted some effort,” their failure “to adequately investigate and prepare expert testimony about Von Dohlen’s condition as it existed at the time of the murder” was deficient performance. Id.

The question presented in the instant case is whether trial counsel’s failure to recognize the red flags presented in petitioner’s case, including Dr. Tobin’s evaluation pointing to the need to examine petitioner’s genetic make-up, and to obtain the medical and psychiatric records for petitioner’s mother and the records of petitioner’s admission into a psychiatric institution when he was just three years old was reasonable. It was undisputed that Dr. Tobin’s report was in trial counsel’s file. When questioned about his failure to recognize the “red flag” presented by the

report regarding the need to examine petitioner's genetic make-up, trial counsel responded, "I'm just going to tell you. I didn't think of genetics. ... **No one told me** to do genetics or suggested that I really needed to do genetics...." App. 4285, ll. 5-19; see also App. 4286, ll. 9-24 (emphasis added).

Perhaps trial counsel's answers were not surprising in light of his lack of experience in capital cases. Prior to representing petitioner, trial counsel had participated in only one death penalty trial, in which he was lead counsel.¹⁰ App. 4221, l. 24 – 4222, l. 15. Prior to petitioner's 2008 trial, counsel's very limited training consisted of a single seminar tangentially related to mitigation and one course on voir dire. App. 4222, l. 14 – 4223, l. 2. Trial counsel admitted during the PCR hearing that the records showing substantial behavioral and medical problems at such a young age "scream[ed] something [was] wrong." App. 4287, ll. 5-12. Importantly, trial counsel confessed, "There was no strategic reason not to engage a geneticist." App. 4319, ll. 1-2. He had "no clue" and "just did not know to do that." App. 4319, ll. 2-7. Just as this Court held in Weik, there can be no strategic decision to omit mitigation evidence where trial counsel failed to identify and present the available evidence.

Prejudice

The Wiggins Court explained that to show prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). To assess prejudice, the Court reweighed the evidence in aggravation against the totality of

¹⁰ Trial counsel represented Eric Morgan, who was sentenced to death. App. 4221, l. 24 – 4222, l. 15; State v. Morgan, 367 S.C. 615, 626 S.E.2d 888 (2006) (vacating Morgan's death sentence because he was under the age of eighteen at the time of the offense).

available mitigation evidence. Id. The mitigation evidence showed Wiggins experienced “severe privation and abuse in the first six years of his life,” “suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care,” was homeless for a period of time, and had diminished mental capacities. Id. at 535. The Court concluded that had the jury been informed of the additional mitigating evidence that a reasonable investigation would have uncovered, there was a reasonable probability that the jury would have returned a different sentence. Id. at 536.

The Rompilla Court held trial counsel’s failure to examine the file on his prior conviction was prejudicial. Rompilla, 545 U.S. at 390. The file contained “a range of mitigation leads that no other source had opened up.” Id. Evidence in the file indicated Rompilla grew up in a “slum environment,” his criminal activity was accompanied by alcohol abuse, mental health testing indicated possible schizophrenia, and cognitive testing placed him at a third-grade level. Id. at 391. The undiscovered evidence, which the file would have prompted reasonably competent counsel to investigate, showed Rompilla’s parents were extreme alcoholics who fought violently; Rompilla was physically abused by his father, Rompilla and his siblings lived in terror; Rompilla and his brother had been locked in a small wire mesh dog pen containing excrement; Rompilla had been isolated as a child; the family had no indoor plumbing; Rompilla slept in the attic with no heat; and the children were not given clothes. Id. at 391-392.

Armed with the appropriate social history, the post-conviction mental health experts found Rompilla suffered from organic brain damage that significantly impaired his cognitive functions. His problems were likely the result of fetal alcohol syndrome and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. Id. at 392. The Court held the mitigation

case taken as a whole may have influenced the jury's appraisal of Rompilla's culpability and the likelihood of a different result if the evidence had been presented was sufficient to under confidence in the result at sentencing. Id. at 394.

Important for consideration of petitioner's claims, the Fourth Circuit explained in Williams that "[a]n investigation into FAS evidence would also have been substantively different from the defense team's investigation into other mental illnesses and behavioral issues because FAS could have established both *cause and effect* for Williams' criminal acts whereas the other mitigation evidence went more to effects on behavior." Williams, 914 F.3d at 315. "That is, FAS evidence could have provided to the jury evidence of an overarching neurological defect that *caused* Williams' criminal behavior." Id. (citing ABA Guidelines, 31 Hofstra L. Rev. at 1061 for the proposition that "it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly mitigating factors"). "Without the information on FAS, the jury could have assumed that Williams was an individual who – despite a challenging childhood, learning disabilities, and other mental health issues – was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior." Id. at 315-316.¹¹

Petitioner's case presents striking similarities to Williams. Although trial counsel investigated and presented mitigating evidence, trial counsel's failure to investigate and present evidence of petitioner's genetic defects and brain damage prevented the jury from learning the *cause and effect* for petitioner's criminal acts. See Sears v. Upton, 561 U.S. 945, 953-955 (2010) (explaining that trial counsel's presentation of evidence in mitigation does not shield trial

¹¹ The Fourth Circuit Court of Appeals went on to hold the state PCR court's determination that the investigation was not deficient involved both an unreasonable application of the law and an unreasonable determination of the facts. Williams v. Stirling, 914 F.3d 302, 316 (4th Cir. 2019).

counsel's failings from a probing prejudice analysis). During the PCR hearing, expert testimony established petitioner suffered from three genetic defects and organic brain damage. These conditions, as explained by the expert witnesses, have a substantial impact on petitioner's degree of culpability.¹² In petitioner's case, his defects and damaged brain had an additive effect. This evidence was not developed by trial counsel, who admitted his failure.

The mitigating evidence presented by trial counsel simply addressed petitioner's behavior and failed to assist the jury in understanding the "why" of petitioner's behavior. The Williams Court's reversal hinged on explaining the "why." Petitioner's genetic deformities and organic brain damage were this case's "why" that trial counsel failed to uncover. Trial counsel only provided the jury with a laundry list of petitioner's lifetime of bad behavior and psychiatric diagnoses, which included the fatal blow of antisocial personality disorder, despite psychiatric hospitalizations and medications. He did not explain the underlying cause. Like the fetal alcohol syndrome evidence in Williams, the evidence of petitioner's genetic defects and brain damage could have provided the jury with evidence of an overarching chromosomal and neurological defect that *caused* petitioner's criminal behavior. "This evidence might not have made [petitioner] more likable to the jury, but it might well have helped the jury understand [petitioner], and his horrendous acts." Sears, 561 U.S. at 951 (201).

Petitioner's genetic defects and brain damage were not a matter of choice for petitioner and would have blunted the solicitor's closing argument theme as discussed infra. No nineteen-month-old chooses psychiatric drugs. No three-year-old chooses commitment to a psychiatric hospital. Very early in his life, petitioner manifested the symptoms of his genetic defects and

¹² While petitioner never argued a "crime gene" exists or that he possesses such a gene, as the order denying relief suggests, the undisputed evidence is that petitioner had at least one genetic abnormality that affects his behavior and places him at greater risk for schizophrenia.

brain damage, including dangerous and spontaneous behavior. Faced with a toddler showing signs of hyperactivity and depression, doctors placed him on an anti-depressant, which his body could not metabolize due to his genetic defect. When petitioner went “bonkers” due to the toxic effects of the drug, he was placed on the powerful anti-psychotic drug, Mellaril, to act as a chemical restraint. Despite this chemical restraint, petitioner was committed to the psychiatric hospital at age three. Although trial counsel was aware of this hospitalization and of the importance of securing these records for his experts to use in their evaluations, trial counsel failed to obtain these records. As established during the PCR hearing, these records would have provided the clues to defense counsel and his experts that something organically or genetically was wrong with petitioner.

Just like the Williams jury, petitioner’s jury was left to assume petitioner was an individual who, despite a lifetime of psychiatric hospitalizations coupled with multiple and changing psychiatric diagnoses and pharmacological interventions was responsible for his actions. This allowed the jury to assign greater moral culpability to petitioner for his criminal behavior.

The solicitor skillfully seized upon the inept mitigation presentation in the sentencing case. After informing the jurors that he would not permit mental illness to be denigrated by allowing it to be used to explain away what he did, the solicitor reminded the jurors that he and the defense’s expert witness, Dr. Schwartz-Watts, agreed petitioner had “antisocial personality disorder. Sociopathic.” App. 2843, ll. 1-16; see also App. 2698, ll. 1-22 (Dr. Schwartz-Watts testifying to her diagnosis of petitioner with anti-social personality disorder); App. 2723, l. 15 – 2726, l. 4 (same). He emphasized Dr. Schwartz-Watts’ testimony that petitioner knew right from wrong and could conform his conduct to the requirements of the law. App. 2843, ll. 17-21; App.

2844, ll. 1-4. Based upon the defense's presentation, the solicitor told the jurors that petitioner "can do good when he wants to do good." App. 2845, l. 1.

According to the solicitor, petitioner was not "somebody that hears voices ... somebody who is psychotic ... somebody who thinks they're Jesus or Mohammed or Buddha." App. 2843, ll. 22-25. Instead, petitioner was someone described by the defense expert witness as acting "incredibly clear and cogent" on the night of the murders. App. 2845, ll. 4-5. He told the jurors that what petitioner did was not "insanity," and it was "perfectly logical." App. 2845, l. 22.

The solicitor argued that the jurors could "walk a mile in any direction of th[e] courthouse, and ... find children that are poor, cold, hungry, and ... from single parent homes" and none of those children committed the atrocities that petitioner did. App. 2844, ll. 5-11. He warned the jurors that the young petitioner, who was admitted to a psychiatric hospital, was not on trial because the case was "not about rattling your crib" or "cussing in school." App. 2844, ll. 19-21. Rather it was "the most brutal violent crime scene that Donna Schwartz-Watts has seen in her 20 years as a forensic psychiatrist **and she's not even our witness.**" App. 2844, ll. 19-24 (emphasis added). Thereafter, he returned to his theme that the defense case in mitigation presented to him – petitioner "knew the difference between right and wrong," he "could appreciate the wrongfulness of his conduct," and "[h]e chose to do wrong." App. 2845, ll. 22-25.

Had the mitigation case presented during the PCR hearing been presented during the trial, the solicitor would have had to confront expert testimony that petitioner's genetic defects and brain damage made him genetically predisposed to mood disorders, schizophrenia, and impulse control disorders. These were not a matter of choice for petitioner. The evidence presented during the PCR was not a "fancier" case in mitigation than the one presented at trial; rather, the evidence demonstrated a reasonable probability that the result of the sentencing proceeding

would have been different had the jury learned of the genetic defects and brain damage petitioner suffered. See Sears, 561 U.S. at 956 (holding “[a] proper analysis of prejudice under Strickland would have taken into account the newly uncovered evidence of Sears’ ‘significant’ mental and psychological impairments, along with the mitigation evidence introduced during Sears’ penalty phase, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation”). These organic abnormalities resulted in measurable, objective deficits in executive functioning, including impulse control – a “why” that would have led at least one juror to strike a different balance. See Weik, 409 S.C. at 233, 761 S.E.2d at 767.

3.

Defense counsel was ineffective, in derogation of petitioner’s Sixth, Eighth, and Fourteenth Amendments rights, for repeatedly telling the jury in dramatic fashion during the guilt phase opening argument that petitioner was “not guilty” where 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.

Relevant facts

Prior to trial, Solicitor Trey 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, as seen above, was the son of murder victim Ray Emery and the stepson of decedent Ann Emery. App. 1555, l. 22 – 1562, l. 10. Reckenbeil said there were two eyewitnesses “putting Chuck Emery outside of

the, the victim's house at 6:30 in the morning after supposedly these murders took place." Reckenbeil offered that neighbor Tammy Hughey would testify that when Chuck Emery was around the victim's house after the murders. Emery immediately blamed the crime on "Tony Torres" when he heard about it. Reckenbeil also said that a search of the probate records showed that Chuck Emery "did inherit the proceeds from the estate of the Emery's." App. 1560, l. 3 – 1562, l. 10.

Assistant Solicitor Barnette countered, "[T]here is not a shred of evidence that connects Chuck Emery to this scene." App. 1562, ll. 12-18. Barnette further argued that none of the defense suspicion that Chuck Emery may have been involved was inconsistent with petitioner's own guilt. Barnette told the judge that appellant left his DNA on Mrs. Emery after he raped her. Further, Petitioner Torres had wrecked the victims' van with much of their property inside it in Union County later in the morning after the murders were committed. Barnette also said it was undisputed that petitioner used Ann Emery's cellphone at 5:15 a.m. that same morning. Chuck Emery being seen in the neighborhood of the victim's home at 6:30 in the morning was "not really relevant in this situation," according to Barnette. App. 1562, l. 12 – 1565, l. 8.

That same day, which was the day before the jury trial began, the defense proffered the testimony of Tammy Hughey. Hughey said that on the morning of May 11, 2011, as the victims' next-door neighbor, she saw Chuck Emery and his girlfriend Holly looking for sunglasses at 6:45 a.m. She described Chuck as being in a "panic" and sweating profusely. App. 1568-1571. About two hours later, at about 8:45 that morning, Hughey said there were police "everywhere" around the Emery's house. App. 1574. Chuck was called and told to come over to the scene where his father and stepmother lived. Hughey said Chuck Emery and his girlfriend Holly

arrived about five to seven minutes later. App. 1577. Chuck was eating a Whopper and he said, “I know who did this shit,” and he blamed the crime on Petitioner Torres. App. 1577-1578.

During the proffer, the solicitor asked Hughey if she had any idea how the Emery’s blood was “found in his clothes in his [petitioner’s] grandmother’s washing machine?” The defense objected that this was irrelevant and was eliciting speculation. The solicitor argued it was relevant because “[t]he whole reason she’s testifying is to suggest that somebody other than Tony Torres committed this crime. Because if they committed it together, then that doesn’t establish his actual innocence. He’s complicit and he’s still guilty and they can’t go into third-party guilt. So, he has to be innocent and somebody else has to be guilty or this is an exercise that’s not gonna be in front of the jury.” App. 1586-1587. The judge overruled the objection, and Hughey answered that she did not know why the Emery’s blood was on petitioner’s clothing. App. 1587-1588. Hughey offered on re-direct examination that Chuck Emery referred to his stepmother, Ann Emery, as a “Martha Stewart Bitch.” App. 1588, l. 18 – 1589, l. 5.

The defense also proffered the testimony of Mandy McKinnish. McKinnish also testified that she saw Chuck Emery and his girlfriend Holly in the same location as Hughey did at about 6:45 on the morning the victims’ bodies were discovered. “I saw two people outside kind of piddling through the grass with their feet like you would if you dropped a car key or something. So, I stopped and I said what are you doing out here. It’s a little early.” App. 1592, l. 12 – 1594, l. 12. McKinnish said while she was at work at about 10:30 a.m. that morning, her husband telephoned from their house. He said there were “a lot of police out there and an ambulance.” App. 1594, l. 16 – 1595, l. 15. McKinnish testified on cross-examination that she did not know what time Ann and Ray Emery were killed. App. 1597, ll. 3-6.

The defense introduced the probate records of Charles Ray Emery without objection. App. 1599, l. 17 – 1600, l. 20. Solicitor Gowdy then repeated that third-party guilt had to exonerate petitioner “and tend to show that somebody else did it. I know we’re getting ready to embark on the guilt phase trial. If the Court wants us to proffer the evidence we have that shows it doesn’t exonerate him, we can do that. It would take a large period of time for me—” The judge told the solicitor that “I don’t, I don’t know that that will be necessary at this time.” App. 1600, l. 23 – 1601, l. 16.

The state presented evidence of petitioner’s statements to the police during the Jackson v. Denno, 378 U.S. 368 (1964), hearing which immediately followed the third-party guilt proffer. Detective Reid Lindsey testified that when he confronted petitioner about “some of the evidence that we had” that was inculpatory of him, petitioner responded: “Prove it.” App. 1613, l. 14 – 1615, l. 3. Investigator Jason Bryant testified that petitioner’s grandmother got petitioner’s clothes out of her washing machine when the police went to her house shortly after the murders to interview petitioner. App. 1634, l. 12 – 1635, l. 15. Bryant said that petitioner was a suspect in the murders, and he noted that petitioner had wrecked the victims’ van in Union county and petitioner had been seen fleeing the scene of the accident. App. 1646, l. 1 – 1647, l. 24.

At the conclusion of the Jackson v. Denno hearing, Solicitor Gowdy withdrew the state’s request to admit petitioner’s statement to the police where “he tells them to prove it.” The solicitor said he would not attempt to introduce that statement “[u]nless he testifies—if, if he testified, then I think it’s relevant. But out of a super-abundance of caution, we will not—[introduce it.]” App. 1674, l. 18 – 1676, l. 5.

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 judge also ruled that he was excluding petitioner's statements "[f]rom the time that he was asked or requested by the police officers to step out of the home and at the time that he was given his Miranda¹³ warnings in the police car going to the police station for further questioning . . .".¹⁴ App. 1690, ll. 1-24. The defense did not request any time to talk to petitioner after the judge ruled the third-party guilt evidence was inadmissible.¹⁵ Three transcript pages after the judge ruled on the issue, the judge gave the jury his opening charge on the law without objection. 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.

¹³ Miranda v. Arizona, 384 U.S. 436 (1966).

¹⁴ The state did not introduce any of petitioner's statements into evidence.

¹⁵ In fact, as will be seen *infra*, the subsequent PCR testimony of Defense Counsel Hodges, who gave the opening statement during the guilt phase, was that her planned opening statement emphatically arguing petitioner was not guilty did not change at all after third-party guilt was eliminated as a defense.

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.

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 not surprisingly 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. 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).

The following occurred on direct examination of Defense Counsel Hodges during the post-conviction relief hearing.

Q And in your professional judgment you just alluded to, what was your concern about the guilt-phase opening statement in relation to the sentencing-phase function of presenting the case in mitigation to the jury?

A In retrospect the opening statement, I guess, *was kind of diametrically opposed to* -- well, I mean, in the opening statement essentially, you know, we denied that -- we as a team, you know, *we're denying any culpability and asking the jury to acquit the client.*

Q Okay. And you're saying that that was a team decision to present that way.

A That's my recollection, yes.

Q Okay. Did -- but the responsibility fell to you.

A Yes.

Q And would you agree to me, with me -- I am sorry --that the opening statement may be the most important thing that happens *in the course of a trial with the jury in developing relationships and credibility?*

A I guess I would -- in most trials, yes. *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.

Q Correct. But as far as the single function with the petit jury once they're in the box and you are presenting yourself to that jury, isn't it very important to have their good will and credibility, maintain your credibility with the jury?

A I would say that's true, yes.

Q So even if the case is difficult and even if the client is difficult, those are factors that you should consider in formulating your opening statement to the jury.

A Yes.

Q Okay. And did you consult with anybody in doing that work formulating the opening statement?

A I remember consulting with Mr. Allen about it and discussing with him the conflict, but I don't know that I consulted with anybody outside of kind of the defense team about the issues.

App. 3800, l. 6 – 3801, l. 19. (emphasis added).

On re-cross examination, 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. 11

Lead counsel, Clay Allen, testified that: “I know Kathy [Hodges] and I had discussed it [the opening statement], and, you know, bouncing ideas off of each other. And it was decided in the opening statement that we thought we would go after the—what we viewed as the state’s weakest point or points, were in this particular case, which is essentially to present it as a circumstantial case or no specific witnesses who saw anyone killing Mr. and Mrs. Emery. So we felt as if it was essentially a circumstantial case accusing Tony of having done that.” App. 4305, ll. 12-24.

Allen maintained that he was “sure” the issue of third-party guilt was considered as to the opening guilt phase statement and that they knew it was a “big possibility that the judge was not going to allow us to go into third-party guilt, which meant that we’re not going to be able to specifically talk about the specific of the person. . .” App. 4305, l. 12 – 4306, l. 17.

Allen admitted 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.

[W]ell, that is to some degree *an inherent problem* when you're having a trial where the plea is not guilty and where we're essentially going to have to at some point, I felt at that time, argue that he is, in fact, not guilty *with having to appear 24 hours later before that same jury to start a mitigation phase knowing and understanding that the jury found him not -- or found him guilty beyond a reasonable doubt.* To some degree I felt like we were -- you know, there is something called residual doubt, you know, where a jury may find someone guilty beyond a reasonable doubt, and still there may be some residual doubt which may take -- Can't really say it, but, you know, it can play a part in the -- in a juror's decision on whether to impose a death sentence or life in prison.

I've heard sometimes residual doubt may weigh in favor of a life sentence for one or more particular jurors, which of course, as you know, get one or more particular jurors holding for life, then you end up getting a life sentence for the client. so that's one thought. But, yeah, we knew it was a strong case for the government on the guilt phase, but yet we -- I think we just felt we were compelled to argue that he -- during the guilt phase that he was not guilty. And to some degree the client wanted it argued that way. He wanted us as we got closer and closer to trial, he wanted us to fight in the guilt phase.

Q Well, *did he not want a trial because he wanted you to fight for his life?*

A *We wanted us to fight for his life.*

Q Okay.

A He also wanted us to as we got closer to trial, he wanted us to fight even the guilt aspect of the case even though I tried to talk to him about that and tried to warn him of some of the dangers. But, you know, that was some of our discussions with him as well.

Q *So he did ask you to fight for his life.*

A *Yes, sir.*

Q *Okay.*

A *He did not want the death sentence.*

App. 4310, l. 15 – 4312, l. 3. (emphasis added).

Allen was asked if there was a strategic decision not to change the opening statement, knowing there was going to be overwhelming evidence of petitioner's guilt where the defense also knew it was not going to offer any third-party guilt evidence during the guilt phase. Allen answered, "I'm not quite sure how to answer that question." App. 4313, ll. 18-22. Allen again said he "felt that we were required to do that"—stress to the jury during the guilt phase that petitioner was not guilty. App. 4313, l. 18 – 4314, l. 7.

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.

Discussion

Defense counsel tried this death penalty case as if it were a garden-variety burglary case. Meaning, the defendant pleads not guilty and the entire defense centers upon trying to acquire a not guilty verdict from the jury. While trial counsel thought pursuing that strategy in a death penalty case, such as this one, where evidence of guilt was overwhelming was an “inherent problem,” that answer was unacceptable. There was no coherence in the defense strategy between the guilt and penalty phases in this case. Further, as seen, defense counsel Allen admitted in his opening statement during the penalty stage that petitioner was guilty so any PCR testimony claim regarding “residual doubt” was, respectfully, bogus.

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.”

Hodges testified that the task of giving the opening statement to the jury during the guilt phase fell to her. She had discussed it in broad terms with lead counsel, Clay Allen. However, there was no evidence, after the judge ruled shortly before opening statements that evidence of third-party guilt as to Chuck Emery would not be allowed, that the defense reconsidered its affirmatively aggressive strategy of insisting to the jury that petitioner was not guilty. There was no evidence that Defense Counsel Hodges talked to Defense Counsel Allen after the judge ruled third-party guilt evidence would not be allowed. There is also no evidence that Hodges or Allen talked to petitioner to ensure he understood that, if an aggressive strategy insisting petitioner was not guilty was ever wise, it had now become an impossible strategy. Defense Counsel Hodges

gave her opening statement as if nothing had changed, insisting nine times in dramatic fashion to the jury 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.

By the conclusion of the guilt phase, defense counsel Reckenbeil lamely questioned the integrity of the extensive law enforcement evidence. He argued in closing that, while petitioner’s DNA conclusively was found inside of victim Ann Emery, the fact that his DNA was not on the murder weapon, the hammer, created a reasonable doubt as to petitioner’s guilt. As seen, 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 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." The Court in Eaton noted that defense counsel decided that its second-degree murder theory -- that Eaton conceded he committed the murder but he did not premeditate it -- did segue into the mitigation theory that Eaton acted without premeditation and in the face of acute mental and emotional disturbance and that he was remorseful about what he had done. *Id.* at 64.

The Court wrote that, "As required by the ABA guidelines, the theory did provide consistency between the guilt/innocence and penalty phases. That is, 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. Dr. Schwartz-Watts said petitioner had an anti-social personality disorder and, while petitioner was mentally ill, his twenty-four car breaking incidents 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. Counsel’s PCR claim of a hope of “residual guilt” also made no sense since counsel admitted petitioner’s guilt during the penalty stage opening. 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). This issue respectfully warrants the grant of certiorari to allow further briefing on it.

Petitioner should be ineligible for the death penalty by reason of his severe mental illnesses, including his bipolar disorder, brain damage, and genetic disorders, where these disorders significantly impaired petitioner's ability to exercise rational judgment since 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), and defense counsel was ineffective for failing to raise this issue to the trial court.

Relevant facts

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.

The following occurred on direct examination of Allen:

Q But you were familiar at the time you represented Mr. Torres in '08 from the Atkins decision that the Supreme Court, SCOTUS, discussed what they considered to be the characteristics of a class of people whose moral culpability was significantly less than the groups without those in progress.

A Yes.

Q And that the evolving standards of community conscience would require that that category of individual be ineligible for death.

A Right.

Q Okay. So if you had done that are you aware of whether - do you know anything about Prader-Willi and 22q11 deletions and all of that?

A No, sir.

Q So you -- you had no way then of knowing whether the phenotypes of this group of genetically impaired individuals matches that of a mental retarded -- intellectually disabled person.

A No, I do not.

Q You don't know that.

A I don't know that.

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. The following occurred on direct examination of Hodges at the PCR hearing:

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 seen supra, 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 was recognized as an expert in neuropsychiatry without objection. App. 3977. The following occurred with Dr. Woods:

Q Starting at age 18 months you're referencing symptoms manifesting to the point that they needed to be treated and came to the attention of the medical providers at age 18 months.

A That's right. They were so significant.

Q Actually, the genetic component starts in the ovarian lottery, I think we heard.

A That's – that's right. A very good term. Yes.

Q Thank you.

A They were present at the time of the offense, and they're extreme, and they really reflect extreme emotional distress.

Q All right, sir. In conclusion, I'd like you to run back for me to the referral question.

A Sure.

Q And in part two of the referral question you listed some elements, genotype elements, or a collection of the elements. And we'll read those conditions affecting his ability to control impulses, effectively weigh and deliberate decisions, learn from experience, understand and process information and understand social context and other context in everyday living.

A Yes.

Q Do those conditions also -- are they found in the subset of intellectual disability, mental retardation?

A They can be, that's correct.

Q So they would be similar in the -- to those expressed in the Supreme Court in the Atkins vs. Virginia decision.

A Yes.

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.¹⁶ 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, writing 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 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

¹⁶ Simmons v. State, 262 S.C. 417, 423, 215 S.E.2d 883, 885 (1975).

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.” On January 9, 2021, Ohio Governor Michael DeWine signed into law House Bill 136 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. On March 1, 2021, the Kentucky House of Representatives passed HB 148 which similarly included bipolar disorders in the list of death penalty ineligible “severe mental illnesses”

Similar legislation is pending in Florida. Section 921.135 of the 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.

With respect to deterrence, the Atkins Court 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.

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.

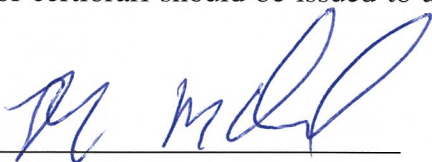
Allen, as his post-conviction relief testimony showed, was very familiar with the Supreme Court’s reasoning of Atkins v. Virginia. Severe mental illness being the next logical step for ineligibility for the death penalty after Atkins and Roper has been widely discussed. Just as intellectual disability and youth can no longer be taken into account 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). Those six special difficulties factors are: (1) where the mitigation impairs the defendant’s cooperation with his lawyer and the lawyer’s ability to prepare a defense; (2) where the mitigation makes the defendant into a ‘poor witness’ in part because of the likelihood that their demeanor would make them appear to be remorseless; (3) where the mitigation causes distortions in the defendant’s thinking process that

are likely to produce bad decisions; (4) when the mitigation has a double-edged nature that poses the risk that it will improperly turn into aggravation; (5) when the complexity and conflicting views of experts are likely to generate confusion and misunderstanding among the jurors; and (6) when the risk that the sheer ‘brutality’ of the crime will preclude jurors from considering the mitigation.” The article concluded that if these six criteria were applied to mentally ill defendants, each factor “[c]ould be recited almost verbatim with a cutting and pasting of ‘mentally ill defendant’ in for ‘intellectually disabled’ in Atkins or ‘juvenile’ defendant in Roper and Graham.” Id. at 511.

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).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.



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