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S.C. SUPREME COURT

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

1.

The state cannot dispute that the trial judge's penalty phase jury instruction, which informed the jury no fewer than sixty times that its sentencing verdict would be a recommendation to the trial judge, impermissibly conveyed to the jury that the responsibility for determining life-or-death rested elsewhere.

Statute is unconstitutional as applied

The trial judge instructed the jury no fewer than sixty times that its sentencing verdict would be a recommendation to the judge. By repeatedly informing the jury that its verdict would serve only as a recommendation to the judge as to the sentence to impose, the judge lessened the jury's responsibility in violation of the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320, 328-329 (1985); 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); State v. Davis, 306 S.C. 246, 250, 411 S.E.2d 220, 222 (1991); State v. Plemmons, 296 S.C. 76, 79, 370 S.E.2d 871, 872 (1988); State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981).

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of death rests elsewhere." Caldwell, 472 U.S. at 328-329. "[C]apital sentencers [should] view their tasks as the serious ones of determining whether a specific human being should die at the hands of the state." Id. at 329. That capital sentencers do so is "indispensable" to the Eighth Amendment's need for reliability. Id. at 330. When a juror does not understand his "awesome responsibility" regarding sentencing, there is a bias in favor of a death sentence as

the juror may be inclined to shift the responsibility to another participant in the criminal justice system such as the presiding judge or appellate court. Id. at 330-332.

Two remarks by the judge that the recommendation would be followed by the judge, which were buried in pages of instructions where the verdict was repeatedly referred to only as a recommendation, could not rescue the unconstitutional instruction. Despite recognizing that a jury instruction must be viewed in the context of the entire charge, the state's entire argument relied upon these two comments without any analysis of how the no fewer than sixty references to the verdict as a recommendation impacted the jury.

Here, the judge repeatedly instructed the jury that its verdict would be a recommendation and the verdict form confirmed this instruction. In total, he used the word recommendation to describe the verdict no fewer than sixty times. Furthermore, the judge's *initial* instructions to the jury that the sentencing phase was "to determine the punishment that *the Court is to impose*" set the foundation for the jury that the trial court would be the entity that actually imposed the sentence. App. 2325, ll. 12-15 (emphasis added). Thereafter, the judge instructed the jury on its role in this second proceeding: "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." App. 2326, ll. 2-8 (emphasis added). Read in conjunction, it could not be any clearer that the jury would recommend a sentence, but the ultimate responsibility of imposing a sentence was on the trial court. At the conclusion of the sentencing proceeding, the judge's lengthy instruction and verdict form built upon this foundation – the jury would recommend a sentence, but the trial court would ultimately impose a sentence – by informing the jury dozens of times that its verdict was a recommendation. The suggestion by the state – and adopted by the PCR judge – that two sentences buried in the lengthy instruction salvaged the unconstitutional

instruction must be rejected as those two sentences could not supplant the clear, unambiguous, and repeated instructions that the jury would only recommend the sentence.

This instruction is more egregious than what transpired in Caldwell, supra, where the Supreme Court held the prosecutor improperly minimized the jury's sense of importance in its role. Responding to Caldwell's counsel's argument that the jury had an awesome responsibility in deciding whether to impose the death penalty, the prosecutor argued that the jury's decision was "not the final decision" and was "reviewable." Caldwell, 472 U.S. at 325. In response to an objection, the judge informed the jury that "it is reviewable automatically as the death penalty commands." Id. Thereafter, the prosecutor again informed the jury that its decision was not the final decision and its verdict was automatically reviewable by the appellate court. Id. Thus, the jury heard from an advocate approximately four times and from the judge once that its decision was not final. What makes the error in petitioner's case more egregious is that the jury was instructed *by the trial judge*, not a mere prosecutor, that its verdict would be a recommendation *no fewer than sixty times*, in contrast to the five times the jury heard the same type of minimizing language in Caldwell. If the error in Caldwell required reversal, so does the error here.

The Kentucky Supreme Court held the prosecutor "committed a grievous error by repeatedly minimizing the responsibility of the jury in assessing the death penalty." Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985). Four times, the prosecutor informed the jury in closing that its verdict was only a recommendation and was reviewable by an appellate court. Id. at 407-408. The Kentucky Supreme Court determined "the prosecutor clearly sought to divert from the minds of the jurors their true responsibility in this case by implying that the ultimate responsibility would fall to the trial judge, [the Kentucky Supreme C]ourt, other appellate courts, or to the Governor." Id. at 408. This error, the Court held, was "*clearly*" "of

reversible magnitude." Id. (emphasis added). According to the Court, "[t]he mere fact that the statute provide[d] for jury recommendation [could not] be utilized as a license to induce the jury to disregard its responsibility." Id. Again, the offending minimizing language of the jury's responsibility was more damaging in petitioner's case because petitioner's jury was told – no fewer than sixty times – by the trial judge, who was presumably instructing the jury on the law at the time, that its verdict was a recommendation to the trial judge. If the prosecutor's argument in Ward required reversal, then the judge's instructions on the law to the jury that referred to their verdict as a recommendation at least sixty times requires reversal.

In the years following the Ward decision, the Kentucky Supreme Court faced several cases in which the "prosecutors continue[d] to nudge at the boundary of abuse" when using the word "recommend" in reference to the jury's sentencing verdict. Tamme v. Commonwealth, 759 S.W.2d 51, 53 (Ky. 1988). Like this Court, the Kentucky Supreme Court had "map[ped] out the territory of permissible use of the word 'recommend,'" but the effort was for naught as prosecutors continued to use the word "recommend" in a way to alleviate the responsibility on the jurors. Id. Therefore, the Kentucky Supreme Court held that thereafter in capital cases, "the word 'recommend' may not be used with reference to a jury's sentencing responsibilities in voir dire, instructions, or closing argument." Id.

Where a prosecutor remarked to the jury that any death sentence would be reviewed by the trial court and the appellate court, the Georgia Supreme Court held the defendant was entitled to a new trial. Fleming v. State, 240 S.E.2d 37, 40 (Ga. 1977). Despite the trial judge telling the jury to disregard the statement by the prosecutor, the Georgia Supreme Court concluded the "curative instruction" was not adequate. Id. The minimal instructions given by the judge were not enough because "this type of remark has an unusual potential for corrupting the death

sentencing process." Id. "The jury is given the heavy burden of making a decision of whether a defendant will live or die. Comments about appellate safeguards on the death penalty suggest to the jury that the can pass the responsibility for the death sentence on to [the appellate] court." Id. See also Pait v. State, 112 So.2d 380, 385-386 (Fla. 1959) (reversing where a prosecutor improperly argued to a jury that a defendant had the right to appeal, but the state did not); Blackwell v. State, 79 So. 731, 735-736 (Fla. 1918) (condemning a prosecutor arguing to the jury that the appellate court was there to correct any error in the case where the trial judge overruled defense counsel's objection, stating it was a legitimate argument, because the comment lessened the jury's weight of their responsibility and the judge sanctioned the improper comment); Commonwealth v. Baker, 511 A.2d 777 (Pa. 1986) (reversing a death sentence based on a prosecutor's improper argument that referred to appeals).

North Carolina determined that when a prosecutor "suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it," counsel's failure to make a timely objection will not waive a defendant's right to review of the issue on appeal. State v. White, 211 S.E.2d 445, 450 (N.C. 1975). In that case, the prosecutor argued that if the jury found the defendant guilty, then he would get "an automatic appeal to the Supreme Court of North Carolina" where any errors made in the trial court would be corrected. Id. at 449. Counsel objected, and the trial judge sustained the objection, ordering the jurors not to consider what the prosecutor said. Id. When the judge issued his final instructions to the jury, he told the jurors that the state supreme court would review the case, but would only send the case back if the judge made a legal mistake. Id. The judge noted that an appellate court would not review the decisions of fact by the jury because the jury was the sole trier of fact. Id.

The North Carolina Supreme Court determined these instructions were not enough to ameliorate the single remark made by the prosecutor, which "was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for its consequences." Id. at 450. At a minimum, an effective curative instruction would inform the jury (1) the argument was improper; (2) that no governmental agency, including an appellate court, could share the jury's responsibility for their verdict; and (3) that their duty required them to weigh the evidence and find the facts based on the assumption that their verdict would be the final disposition of the case. Id.

To the extent this Court considers the judge's statements, twice, during the penalty phase instructions that he would follow the jury's recommendation to cure any error emanating from the judge's repeated instruction that the verdict would be a recommendation, the White opinion is instructive. As discussed, in White, the jury heard once from the prosecutor, not the judge, that the defendant would get an appeal; the jury was instructed to ignore that argument from the prosecutor; and the judge provided a curative instruction explaining that the jury's verdict would not be reviewed by an appellate court. Here, petitioner's jury was told its verdict was a recommendation no fewer than sixty times by the trial judge. Even viewing the two comments by the judge that he would follow the recommendation as curative instructions, White provides persuasive authority that an error of this magnitude could not be cured so easily.

The Supreme Court of Mississippi addressed a prosecutor commenting on "the eight automatic stages of appeal" that a capital defendant would have an opportunity to pursue. Williams v. State, 445 So.2d 798, 811 (Miss. 1984). Rejecting the state's invitation to delineate a proper argument on the subject of appellate review, the court forbade such an argument altogether. Id. The Court explained its reasoning:

> The structure of the capital sentencing system enacted by our Legislature places the entire sentencing burden on the jury. No judge or other official within our system has the power to impose the sentence of death; only the jury. Therefore, if under our system the capital sentencing jurors are allowed to consider or speculate that any death verdict they may return may later be vacated on appellate review can *only* have the effect of lessening the sense of responsibility our law has devolved upon them.
>
> Sentencing a citizen to death is the responsibility vested by law in our juries. *Any matter presented to such jurors which would allow them to shift their awesome responsibility to others is simply contrary to our law.* That we have limited powers of appellate review in no way changes the fact that the primary and ultimate sentencing power is vested alone in the jury. We hold, therefore, that no argument may be made to the jury regarding appellate review or any other matter which might reasonably be expected to cause a juror to consider that he or she shares with anyone other than his or her eleven fellow jurors the responsibility of determining whether the defendant will be sentenced.

Id. at 811-812 (emphasis added).

Importantly, the offending remarks diminishing the jury's responsibility in assessing punishment in Caldwell and many of the cases cited here were by the prosecutor during closing argument; the remarks were not from the trial judge as part of the jury instructions as they were in this case. Another important distinction is that the offending remarks in the cases discussed above were not repeated to the jury at least sixty times. In light of the repeated unconstitutional remarks deriving from the trial judge and the PCR judge's reliance on the statutory language to find no error in the instruction, South Carolina's death penalty statute referring to the jury's verdict as a recommendation is unconstitutional as applied in this case.

The state also tried to save the unconstitutional jury instruction here in which the judge informed the jury no fewer than sixty times that its sentencing verdict would be a recommendation by claiming the judge "clearly told them it would be their decision alone during pre-trial voir dire." Return at 12. The state also cited an example of what the trial judge told the jurors during the voir dire process to support its argument. Return at 5-6. Although most of the

jurors heard various iterations of the judge's remarks during the voir dire process that the jury would decide the sentence, seven days passed between the conclusion of voir dire and the penalty phase instructions. To the extent any juror remembered the judge stating during voir dire that the jury would decide the punishment, those remarks were overshadowed by the actual jury instructions at the conclusion of the penalty phase, which emphatically declared – no less than sixty times – that the jury's verdict would merely be a recommendation to the judge. Furthermore, if any juror believed that the jury's verdict was not a simple recommendation based upon the voir dire, the juror was disabused of any such notion when the judge instructed the jury to disregard any notion about the law that the jurors had prior to hearing the judge's final instructions. App. 2265, ll. 10-17; App. 2863, ll. 16 – 2864, l. 1. Finally, and most importantly, the judge was *not* instructing the jury on its role during the voir dire process. It was the judge's instructions that the jury was required to follow – not any exchange with the judge or the lawyers during the voir dire process.

In its return, the state continues to defend the PCR judge's finding regarding this issue by referring to this Court's review on direct appeal pursuant to section 16-3-25(C) of the South Carolina Code. Return at 10-11. Under the statute, this Court determines whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of a statutory aggravating circumstance, and whether the sentence is excessive or disproportionate. S.C. Code Ann. § 16-3-25(C). Without question, this Court conducted this statutory review when it considered petitioner's direct appeal. State v. Torres, 390 S.C. 618, 626, 703 S.E.2d 226, 230 (2010). However, this issue was not preserved for appellate review because trial counsel did not object and it was not raised on appeal by appellate counsel. It is disingenuous to argue that because this Court did not, sua sponte, rule this

sentencing instruction constituted an arbitrary factor that the issue was ruled upon in petitioner's direct appeal. Furthermore, the PCR judge's reliance upon this Court's review pursuant to section 16-3-25(C) shows the PCR judge abdicated his duty to consider the issue.

Contrary to the state's assertion that petitioner seeks "unending review," petitioner simply seeks the review to which he is entitled. This issue was *first* raised to the PCR court who abandoned his responsibility to examine the issue presented. Now, the issue is being presented to this Court for review. This is the *first* time this issue has been raised to this Court and any claim by the state that this Court examined the matter pursuant to the statutorily mandated review of death sentences is, again, disingenuous. Had petitioner raised this matter on direct appeal, the state would have cried foul and argued the matter was not preserved for appellate review due to the lack of objection by trial counsel. The time to review this issue is now.

Ineffective assistance of trial counsel

The state's brief response to petitioner's ineffective assistance of trial counsel claim is simply – there was no ineffective assistance because the instruction was not erroneous. As demonstrated, the judge's repeated instruction to the jury that its role in the sentencing proceeding was to recommend a sentence was error. The instruction relieved the jury's awesome responsibility on which the Eighth Amendment's heightened reliability requirement rests as the jury believed it would recommend a sentence and the judge, who would consider the recommendation, would ultimately decide what sentence to impose.

While trial counsel may have expressed his familiarity with the "nomenclature" of using "recommendation" when referring to the jury's verdict during capital sentencing, this knowledge should not excuse trial counsel's failure to object. Quite the contrary, trial counsel's awareness

of the use of "recommendation" to refer to the jury's verdict should have placed him on guard against any instruction that diluted the jury's awesome responsibility in capital sentencing.

Although trial counsel failed to request a copy of the judge's instructions as recommended[1] by the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, his familiarity with the use of the term "recommendation" to describe a jury's sentencing verdict placed him on notice of the insidiousness of the instruction and its constitutional implications. Further, the Guideline provides that counsel should object to instructions or verdict forms that are constitutionally flawed, inaccurate, or confusing. American Bar Association for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003). Despite these guidelines, counsel's awareness of the governing legal principles involved, and counsel's familiarity with the "nomenclature" of recommendation being used to describe the jury's verdict, counsel posed no objection to the trial judge's erroneous instruction that failed to convey to the jury its true role in sentencing petitioner to death. As a result, trial counsel's performance fell below an objective standard of reasonableness as it was below professional norms. Quite simply, trial counsel performed deficiently.

In conclusion, petitioner agrees with the state that "[j]urors are presumed to follow the law as instructed to them." See Return at 9 n.1. Petitioner's jury did just that. At the start of the sentencing proceeding, the trial judge told the jury that its role was to recommend a sentence to the trial court and that the trial court would be responsible for imposing a sentence. Thereafter, the trial judge instructed the jury *repeatedly* that its verdict would be a recommendation. The

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[1] According to Guideline 10.11, counsel should request jury instructions and verdict forms. American Bar Association for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003).

jury followed the trial judge's instruction, as the law presumes, and applied the common understanding of a recommendation – something that may be followed or discarded. The two minor instances of the judge stating he would follow the recommendation were buried in pages of instructions, which described the jury's sentencing verdict as a recommendation, could not save the overall instruction. In doing so, the jury's awesome responsibility, which is necessary for the Eighth Amendment's heightened reliability, was lessened. The death verdict rendered under these circumstances cannot stand.

2.

The state imprudently relies upon the PCR court's flawed prejudice analysis where the PCR judge used his personal judgment of the witnesses' credibility to render a decision instead of determining whether there is a reasonable probability the outcome of the proceeding would have been different had defense counsel presented the witnesses and evidence at trial.

The PCR judge erred when he conducted the prejudice analysis in this case, and the state unwisely relies upon that reasoning when urging this Court to deny certiorari. Specifically, the PCR judge erred (1) when he required petitioner prove to the judge's satisfaction that he suffered from the chromosomal defects and organic brain damage and (2) used his personal credibility findings regarding the expert testimony to conclude petitioner did not suffer prejudice due to trial counsel's deficient performance. Instead, petitioner was required only to show that the testimony of his experts might reasonably have affected the vote of one juror, which petitioner did. See e.g., Winston v. Kelly, 784 F.Supp.2d 623, 634 (W.D. Va. 2011), aff'd sub nom. Winston v. Pearson, 683 F.3d 489 (4th Cir. 2012) (acknowledging the dispute among each side's experts in a federal habeas case raising a Strickland claim and stating that its role was not to resolve that dispute but simply to decide whether counsel's failure to present the expert testimony deprived the defendant of a reasonable opportunity to secure a different verdict).

The undisputed evidence presented during the PCR hearing showed trial counsel failed to recognize several red flags uncovered during the investigation of petitioner's life history that pointed to genetic defects and organic brain damage. Additionally, the undisputed evidence showed trial counsel simply failed to obtain medical records related to petitioner's mother that contained information necessary for medical experts to issue proper diagnoses for petitioner. Finally, the undisputed evidence showed trial counsel failed to secure records concerning

petitioner's psychiatric commitment when he was only three years old. These failures resulted in trial counsel presenting a case in mitigation that was actually aggravating instead of mitigating.

Contrary to the state's contention that the case in mitigation at trial was "robust," trial counsel's presentation of mitigating evidence simply "checked the boxes" of a perfunctory capital sentencing case: a couple of family members, check; expert in psychopharmacology, check; forensic psychiatrist, check; social historian, check; and prison adaptability expert, check. Return at 25; 34. The case lacked refinement as demonstrated by the evidence presented during the PCR hearing. Had counsel conducted the proper investigation and followed up on the red flags evident in petitioner's social history, the jury would have learned of his multiple genetic chromosomal defects and organic brain damage. Having learned this, there is a reasonable probability that at least one juror would have struck a different balance.

Here, the PCR judge conducted a flawed[2] prejudice analysis. Importantly and correctly, the PCR judge admitted the mitigating evidence presented during the PCR hearing "certainly could be offered at a trial." App. 5330. In fact, petitioner's expert witnesses were qualified pursuant to Rule 702, SCRE, without objection; thus, the PCR judge and the state agreed their testimony would assist the trier of fact, the witnesses were qualified, and the science on which they based their opinions was reliable. App. 3428, ll. 21-24; App. 3523, ll. 10-14; App. 3623, ll. 14-18; App. 3890, ll. 1-4; App. 3977, ll. 18-21. However, he erred when he concluded petitioner failed to show prejudice resulting from trial counsel's deficient performance because (1) the PCR judge did not believe petitioner had the chromosomal defects and (2) petitioner's evidence was

[2] Petitioner objected to the flawed prejudice analysis in his Rule 59(e), SCRCP motion. App. 5344-5345 ("The standard for measuring prejudice is not what the PCR Court determines is or is not credible, but rather what a reasonable juror might find credible while parsing that evidence during the sentencing deliberation." "In doing so, the PCR Court makes credibility determinations between two experts, and such credibility determinations are properly left to the jury that should have heard the testimony about genetics in the underlying trial.").

"damaged and questionable." App. 5324 (stating that "[i]n order for [petitioner] to be granted relief for failure of trial counsel to present evidence of his genetic related claims, he must establish that he suffers the genetic condition(s) upon which he bases his request for relief"); App. 5329 (finding "[t]he credible evidence in the record demonstrates that [petitioner] does not suffer from the genetic syndromes as alleged and therefore has failed to meet his burden of showing that he has either Prader-Willi Syndrome or 22Q11.2 Deletion Syndrome which might otherwise establish a credible ground for relief based upon him having a cognitive impairment"); App. 5330 (finding "its worth [was] so damaged and questionable that [petitioner] cannot carry his burden of showing Strickland prejudice"). This was error.

The very heart of the issue was *not* whether petitioner showed to this PCR judge's satisfaction that he *had* the chromosomal defects and brain damage, which was attested to by multiple experts. Rather, the issue was whether there was a reasonable probability that at least one juror would have struck a different balance and returned with a different sentence had the jury been confronted with the evidence. See Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); see also State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) (explaining "the evaluation of the consequences of an error in the sentencing phase of a capital trial are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all"). The relevant inquiry pursuant to Strickland v. Washington, 466 U.S. 668 (1984) is *not* whether a particular judge hearing a post-conviction claim deems new mitigation evidence worthy of a life sentence. The relevant inquiry is whether a single hypothetical juror hearing the evidence would. See Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose that [the sentencer] could have heard it all and still have decided on the death penalty, that is not the test.").

The United States Supreme Court elaborated on the proper methodology for a post-conviction court to use when conducting a prejudice analysis pursuant to Strickland when the Court held the Florida Supreme Court unreasonably applied clearly established law. Porter v. McCollum, 558 U.S. 30, 42-44 (2009). The Court acknowledged the "state's experts identified perceived problems with the tests that [the defendant's expert] used and the conclusions he drew from them, [yet] it was not reasonable to discount entirely the effect that his testimony might have had on the jury." Id. at 43. The Court held it was "unreasonable to discount to irrelevance" mitigating evidence presented at the state post-conviction relief hearing "especially when that kind of [evidence] may have particular salience for a jury evaluating [the defendant]'s behavior." Id. The Court made clear that a defendant is not required "to show 'that counsel's deficient conduct more likely than not altered the outcome' of the penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" Id. at 44 (quoting Strickland, 466 U.S. at 693-694). A "reasonable probability is *less than a preponderance of the evidence* and need only undermine confidence in the outcome." United States v. Barrett, 985 F.3d1203, 1233 (10th Cir. 2021) (emphasis added). Courts adjudicating Strickland ineffectiveness claims thus are "not to evaluate the evidence in order to reach a conclusive opinion as to" the credibility of new mitigation witnesses, but instead should assess "only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing would have concluded, based on the evidence presented, that" a life sentence was proper. Correll v. Ryan, 539 F.3d 938, 952 n.6 (9th Cir. 2008).

The District Court for the Western District of Virginia examined an issue similar to the one presented here where trial counsel failed to present evidence of intellectual disability during a capital sentencing proceeding. Winston v. Kelly, 784 F.Supp.2d 623, 634 (W.D. Va. 2011),

aff'd sub nom. Winston v. Pearson, 683 F.3d 489 (4th Cir. 2012). "[A]cknowledged experts in the field of mental retardation" "reached nearly opposing conclusions on the fact-laden determination" of whether the defendant met the criteria for intellectual disability. Id. "Along the way, the experts ... sparred over the application of the Flynn Effect and disagreed concerning the proper application of the [standard error of measurement]." Id. The court explained how a court must analyze Strickland prejudice when the parties present competing expert opinions. Id. It was *not* for the court to decide whether the defendant was intellectually disabled. Id. "Rather, [the court was] called upon the decide whether there is a reasonable probability a sentencing jury might have so concluded." Id. Furthermore, "[t]hough the court cannot say that the outcome likely would be different, it can say that the likelihood of a different result is not insubstantial." Id.

The Pennsylvania Supreme Court made this point clearly when asked to decide what standard should apply when a lower court resolves a claim that trial counsel was ineffective for failing to present certain evidence. Commonwealth v. Johnson, 966 A.2d 523, 542 (Pa. 2009). The Commonwealth had urged the Pennsylvania Supreme Court to require the lower court to first find that the jury would have credited the evidence before it could grant relief. Id. at 541. The Court rejected this position, holding that "[s]uch a high burden, it seems to us, does not comport with the Strickland reasonable probability standard." Id. The Court explained further that the question on post-conviction is "not whether the jury in fact would have credited [the applicant]'s new evidence and recast his alibi witness," but is "whether the nature and quality of the evidence is such that there is a reasonable probability that the jury would have credited it and rendered a more favorable verdict." Id. at 542. Therefore, "assessing credibility for purposes of Strickland prejudice is not necessarily the same thing as assessing credibility at a trial." Id. at

541. See also Commonwealth v. Roberio, 700 N.E.2d 830, 832-833 (Mass. 1998) (holding "[i]t was error for the judge to deny the motion for a new trial based on his assessment of the expert's credibility").

Other cases also support that the PCR court's role is *not* to weigh the expert testimony presented by both sides and decide which is more credible; instead, the PCR court's job is to decide whether there is a reasonable probability that a different verdict would have resulted had trial counsel presented the available expert testimony. See Cauthern v. Colson, 736 F.3d 465, 486-487 (6th Cir. 2013) (holding the Tennessee Supreme Court's ruling that trial counsel's failure to introduce certain mitigating evidence was not prejudicial because a jury reasonably could reject the evidence was an unreasonable interpretation of federal law because the test for Strickland prejudice is whether there is a reasonable probability that a juror would have found the evidence mitigating); Saranchak v. Beard, 616 F.3d 292, 309 (3d Cir. 2010) (explaining that the state court erred by employing "a subjective review of the evidence introduced at the [state post-conviction relief] hearing and analyzed the effect it would have had on the judge presiding, and acting as factfinder, at the degree of guilt hearing" "rather than considering, more abstractly, the effect the same evidence would have had on an unspecified, objective factfinder as required by Strickland"); Sanders v. Cook, 99 Fed. Appx. 778, 780 (9th Cir. 2004) (holding that "it is not the state judge's role to determine at the post-conviction stage whether an eye-witness is credible to the judge," but it is the judge's job to "consider whether there is a reasonable probability that a *reasonable juror* might find that witness credible") (emphasis in original); Smith v. Stewart, 140 F.3d 1263, 1270 (9th Cir. 1998) (explaining that the reviewing court has "a particularly difficult practical and jurisprudential question because [it is] not asked to imagine what the effect of certain testimony would have upon [the reviewing judges] personally"; instead, the reviewing

court is "asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer"); Antwine v. Delo, 54 F.3d 1357, 1365 (8th Cir. 1995) (refusing to give a state-court finding a presumption of correctness where the state court found there was no credible evidence to support the defendant's claim that he suffered from a mental disease or defect because the question is not whether the state court found the evidence credible, but whether the jury would have found the evidence credible).

Here, the PCR judge erred in conducting the prejudice analysis as he was tasked with only determining whether there was a reasonable probability that the new information undermined confidence in the outcome, the well-established definition of Strickland prejudice. Instead, the PCR judge established too high of a burden when he required petitioner prove that he suffered from chromosomal defects and organic brain damage and then utilized his own credibility findings regarding the expert testimony to conclude petitioner did not suffer prejudice due to trial counsel's deficient performance. It is unreasonable to assume that all jurors would view the evidence as the PCR judge did. Petitioner was required only to show that the testimony of his experts might reasonably have affected the vote of one juror. Petitioner satisfied this burden.

Furthermore, contrary to the PCR judge's opinion that petitioner's evidence was "damaged," the only damage to petitioner's evidence presented during the PCR hearing, to the extent it could be called such, was that the state called a witness who testified differently. Nevertheless, the evidence was of the nature and quality of evidence such that there is a reasonable probability that the jury would have credited it and rendered a more favorable verdict.

Even the state's own expert admitted he was not claiming that petitioner's expert violated the standard of care applicable to medical geneticists when he diagnosed petitioner with the chromosomal defects and testified accordingly. App. 4472, ll. 10-15. The state's expert simply had a different opinion on the subject. App. 447, ll. 16-18.

In addition to the PCR judge concluding there was no prejudice to petitioner simply because the PCR judge determined the state's expert was more credible *to the PCR judge* than petitioner's multitude of experts, the PCR judge resolved there was no prejudice because the evidence relied upon "an outdated stereotype of the science of genetics." App. 5329. The judge went on to claim petitioner's claim rested upon the crime gene theory. App. 5329-5330. According to the judge, if petitioner were allowed to present his evidence of chromosomal defects, his presentation "would rest on misleading the fact finder under the label of science," which "would be improper." App. 5330. No factual support exists in the record to support the contention that petitioner posited "genes determine violence." At no time did petitioner, his counsel, or his expert state, suggest, imply, or insinuate that a crime gene exists or that petitioner has such a gene. Rather, the undisputed evidence showed that these chromosomal defects impacted petitioner's ability to understand and process information, to learn from experience, to engage in logical reasoning, and to control impulses.

Finally, the PCR judge failed[3] to consider or address the substantial and uncontroverted evidence that petitioner suffers from organic brain damage resulting from the administration of a powerful antipsychotic drug to him between the ages of nineteen months until at least age 11. In its return, the state *also* failed to address the undisputed evidence of petitioner's organic brain damage. As detailed in the petition, the uncontroverted testimony at the evidentiary hearing

[3] Petitioner objected to the PCR judge's failure to address this matter in his motion for reconsideration pursuant to Rule 59(e), SCRCP. App. 5345-5346.

established that petitioner's ingestion of Mellaril, a powerful drug, which was prescribed to him, most certainly caused significant impairment of petitioner's executive function as a result of organic brain damage and atrophy to the front lobes of his brain. Petitioner's brain damage was confirmed by objective testing conducted by a clinical neuropsychologist, Dr. Stacey Wood, who testified at the evidentiary hearing without opposing expert testimony. The testimony showed that while these cognitive deficits could have been caused by the genetic defects, they were *independent* of those genetic conditions and existed regardless of whether they were caused or compounded by his genetic condition. The undisputed testimony presented at the merits hearing established that petitioner's organic brain damage resulting from Mellaril, independent of his genetic conditions, would be expected to result, and did result, in his 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. This evidence pointed to petitioner's diminished moral culpability.

The state's refusal to address this issue is telling. First and foremost, the state presented no evidence to refute petitioner's organic brain damage. Thus, the record is devoid of any facts to support a contrary position. Second, most courts examining a failure by trial counsel to investigate and present evidence of a capital defendant's brain damage have found deficient performance and prejudice. See e.g., Haliym v. Mitchell, 492 F.3d 680, 718-720 (6th Cir. 2007) (holding trial counsel performed deficiently by failing to investigate and present evidence of the defendant's brain damage and the deficiency was prejudicial); Summerlin v. Schriro, 427 F.3d 623, 643 (9th Cir. 2005) (holding trial counsel's failure to uncover the defendant's brain damage and inform the jury of such was deficient performance prejudicial to the defendant); Smith v.

Mullin, 379 F.3d 919, 944 (10th Cir. 2004) (holding trial counsel's failure to present evidence of brain damage was prejudicial deficient performance); Simmons v. State, 105 So.3d 475, 510 (Fla. 2012) (holding penalty phase counsel was deficient in failing to fully investigate and present evidence of organic brain damage and the deficiency prejudiced the defendant); People v. Morgan, 719 N.E.2d 681, 712 (Ill. 1999) (holding counsel's failure to present evidence of the defendant's brain damage was prejudicial). In light of the general understanding that brain damage represents significant mitigating evidence that humanizes capital defendants, and most importantly, explains the defendants' conduct, the state likely recognized a losing battle.

3.

Defense counsel was not ethically obligated to repeatedly argue to the jury during the guilt phase that petitioner was "not guilty" merely because petitioner exercised his constitutional right to plead not guilty. Not conceding guilt given *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) was not synonymous with incomprehensibly and obsessively stressing to the jury in its opening statement that petitioner was not guilty where the defense knew it would not offer any evidence in petitioner's defense, and that it would have to concede his guilt at the start of the penalty phase.

Petitioner explained in his petition for writ of certiorari that the incoherent guilt phase opening argument repeatedly insisting that petitioner was not guilty could not be attributed to the subsequent opinion of the United States Supreme Court in McCoy v. Louisiana, 138 S. Ct. 1500 (2018) or the Supreme Court's prior holding in Florida v. Nixon, 543 U.S. 175 (2004). The choice defense counsel had to make was not whether to concede petitioner's guilt or insist at every turn in its opening to the jury that petitioner was not guilty where defense counsel understood they would not present any witnesses or evidence in petitioner's defense during the guilt phase. It was incomprehensible as, respectfully, is the state's defense of it.

Rule 1.2 of the South Carolina Rules of Professional Conduct provides, in pertinent part, "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Rule 1.2, RPC, Rule 407, SCACR. Rule 1.2 simply does not mandate that because a defendant enters a plea of not guilty that the lawyer becomes the defendant's unwitting puppet or mouthpiece in all strategic decisions to follow that plea of not guilty. The client's decisions that

must be respected in the final analysis, after consultation with his attorney, are how to plead and whether or not to testify.

Defense counsel here was not bound to repeatedly -- nine times -- insist to the jury at the start of the guilt phase that petitioner was not guilty where it was aware it would not present any witnesses in petitioner's defense during the guilt phase, and that it would not offer any other evidence in his defense.

Defense counsel could have argued in opening and closing guilt phase arguments that petitioner had plead not guilty. Therefore, it could have strongly stressed that the state bore the burden of proving petitioner's guilt beyond a reasonable doubt as to each and every element of each crime with which he was charged.

However, telling the jurors in dramatic fashion nine times in opening that petitioner was not guilty where the defense attorneys knew petitioner was going to be found guilty was not mandated by the rules of ethics, and it left the defense with no credibility when the penalty phase began where it was undisputed petitioner wished for his defense team to save his life.

A criminal defendant has defense counsel because that counsel is expected to be learned in the law and have the wisdom to make strategic decisions that his untrained in the law client cannot be expected to make for himself. After meaningful consultation with counsel, petitioner had the absolute right to plead not guilty or guilty and to determine whether he would testify in his own defense. See State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013) (trial court violated the defendant's constitutional right to testify in his own defense at trial because he would have conceded his guilt and the deprivation of that constitutional right to testify was a structural error).

The guilt phase defense argument strategy in petitioner's case was egregiously incoherent since this was a death penalty bifurcated trial. Again, ABA Guideline 10.10.1 Trial

Preparation Overall provides, "as the investigations mandated by Guideline 10.7 produce information, trial counsel shall formulate a defense theory. Counsel shall seek a theory that will be effective in connection with both guilt and penalty and seek to minimize any inconsistencies." It was virtually impossible to violate the terms of this guideline any more than petitioner's defense team did in this case.

At the beginning of the penalty stage the defense was literally devoid of all credibility with the sentencing jury. Yet, petitioner wanted his defense team to save his life. This was not a case where the record showed the capital defendant was antagonistic to his defense teams efforts to achieve a life sentence during the penalty stage. The reverse was true, but the defense had irresponsibly lost all of its credibility during the guilt stage *for no sound or ethical reason.*

Before defense counsel Hodges gave her opening statement to the jury during the guilt phase, the trial judge ruled he would not allow the defense to offer any evidence of third-party guilt. Yet, there was no evidence in this record that the defense team ever reconsidered its affirmatively aggressive guilt phase strategy of repeatedly insisting to the jury petitioner was not guilty after that important adverse ruling. Nor did the defense seek a continuance to discuss with petitioner the consequential ruling on third party guilt.

Thus, even though the aggressive strategy had now become an impossible strategy, defense counsel Hodges insisted nine times to the jury that petitioner was "not guilty" in her opening statement. Such an indefensible, incomprehensible "strategy" did not become defensible or comprehensible merely because petitioner did not authorize his defense team to concede his guilt during the guilt phase of the trial, where they did not concede his guilt, and exposing the McCoy v. Louisiana strawman for what it is in this case. See Return at 36-37. Certiorari should be granted on this issue.

CONCLUSION

By reason of the arguments contained in his petition for writ of certiorari, and in this reply, a writ of certiorari should issue to allow full briefing on all four of petitioner's legal issues.

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ATTORNEYS FOR PETITIONER

This 28th day of October, 2021.