OVER THE COUNTER

IN THE TENNESSEE SUPREME COURT
AT KNOXVILLE

STEPHEN M. WEST,	)	
	)	No. _____
Petitioner-Appellant,	)	No. E2010-02258-CCA-R28-PD
	)	Case No. 629
v.	)	(POST CONVICTION)
	)	**DEATH PENALTY CASE**
STATE OF TENNESSEE,	)	
	)	**EXECUTION SET NOV. 9, 2010**
Respondent-Appellee	)	

APPLICATION FOR PERMISSION TO APPEAL PURSUANT TO TENNESSEE RULES OF APPELLATE PROCEDURE, RULE 11

Comes the petitioner, Stephen Michael West, by and through counsel, and pursuant to RULE 11 of the Tennessee Rules of Appellate Procedure and makes this application for appeal by permission to this Court. In support of this application and as prescribed by RULE 11 of the Tennessee Rules of Appellate Procedure, the petitioner submits the following procedural history, questions presented, statement of facts, and statement of reasons supporting review by the Supreme Court.

INTRODUCTION

This is an appeal from the lower court's order of November 3, 2010, denying Mr. West's Rule 28 appeal of the denial of his motion to reopen his post-conviction proceedings. That proceeding below was initiated as a motion to reopen based on recent cases from the United States Supreme Court that have set new standards for reviewing claims of ineffective assistance of counsel. *See Porter v. McCollum*, 130 S.Ct. 447 (2009) (decided November 30, 2009) and *Sears v. Upton*, 130 S.Ct. 3259 (2010) (decided June 29, 2010). Mr. West also asked the post-conviction court to

reopen his post-conviction petition so he could establish a categorical exemption from the death penalty for defendants suffering from severe mental illness. Finally, Mr. West asked the court to reopen his post-conviction because a recent case from this Court finds structural error where a criminal defendant asserts that his attorney had a conflict of interest at the time he represented him. *See State v. Frazier*, 303 S.W.3d 674 (Tenn. 2010) (decided February 18, 2010). Because each of these issues was meritorious, the trial court abused its discretion when it denied Mr. West's motion.

I. PROCEDURAL HISTORY

1. On March 18, 1986, Stephen West was the second person arrested for crimes against Wanda and Sheila Romines.[1] Wanda and Vestor West hired Richard McConnell, a lawyer with no experience in defending capital cases, *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *8 (Tenn.Crim.App. 1998), to represent their son, Stephen. The trial court later appointed Tom McAlexander, who had just recently graduated from law school, as co-counsel. *Id.* at *7. Like Mr. McConnell, Mr. McAlexander had no capital case experience.

2. In the Criminal Court of Union County, Tennessee, Stephen West was convicted of two counts of first degree murder, two counts of aggravated kidnaping, one count of aggravated rape, and one count of grand larceny. *State v. West*, 767 S.W.2d 387 (Tenn. 1989). After a penalty phase presentation that takes up only twenty pages of transcript, he was sentenced to death on the murder counts, forty years each on the

[1]Ronnie Martin was first arrested for the crimes and it was he who led police to Mr. West.

convictions for rape and kidnaping, and six years for grand larceny.[2] His convictions and sentences were affirmed on direct appeal. *Id.*

3. On October 23, 1990, Stephen West filed a petition for post-conviction relief. Mr. West requested the post-conviction court grant him funding for a mental health expert and for an investigator. (Tech. Rec. Vol. I pp. 51-157). The post-conviction court refused to grant *ex parte* consideration of the requests for services (Tech. Rec. Vol. II pp. 161-162) and instead required counsel to disclose to the prosecution the material submitted in support of the funding request. (Tech. Rec. Vol. I pp. 49-50, Vol. II pp. 164-165).

4. On April 10, 1996, Mr. West filed an application for an extraordinary appeal on the trial court's denial of expert funding,[3] which was denied on June 5, 1996. (Tech. Rec. Vol. II pp. 185, 174-176).

5. On June 17, 1996, Mr. West moved for a continuation of the evidentiary hearing date, to disqualify the district attorney from participation because of the information learned through the disclosure of the *ex parte* material and the district attorney's later use of that information, and/or to withdraw from the case. (Tech. Rec. Vol. II pp. 173-191, 258-60). The motion was denied with the exception that the court awarded $3,000 for the mental health expert (instead of the $1,200 originally authorized). (Tech. Rec. Vol. II p.195).

6. On September 24 and October 22, 1996, an evidentiary hearing was held.

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[2]Co-defendant Martin pled guilty and received life sentences.

[3]The trial court had granted post-conviction counsel merely $1,200 for a mental health expert.

On April 14, 1997, Mr. West's petition for post-conviction relief was denied. (PCR Tr. Vol. II, pp. 412-18.)

7. On June 12, 1998, the Court of Criminal Appeals affirmed the denial of post-conviction relief. *West v. State*, No. 03C01-9708-CR-321, 1998 Tenn.Crim.App.Lexis 636.

8. On February 8, 1999, the Tennessee Supreme Court granted Mr. West permission to appeal on the limited issue of whether the evidence was sufficient to support a finding of the aggravating factor of "avoiding arrest and prosecution." (Order dated February 8, 1999). On April 9, 1999, Mr. West moved to supplement the record with the affidavits of Vestor West and Debra Gail Harless.

9. The Tennessee Supreme Court refused to address the issue on the merits pursuant to Rule 52(b) of the Tennessee Rules of Criminal Procedure because it found that Rule 28 of the Tennessee Supreme Court Rules foreclosed the use of Rule 52(b) in this case. Rule 28 was adopted in 1996, six years after Stephen West filed his post-conviction petition for relief. *West v. State*, 19 S.W.3d 753 (Tenn. 2000). On Motion for Rehearing, Mr. West argued that reliance on Rule 28 violated the application of the law *ex post facto*. Rehearing was denied on June 7, 2000. (Order dated June 7, 2000).

10. On February 20, 2001, counsel for Stephen West filed a motion for appointment of counsel and stay of execution in the United States District Court for the Middle District of Tennessee.

11. On February 21, 2001, Judge Todd Campbell granted the motion for appointment of counsel and transferred the case to the United States District Court for

the Eastern District of Tennessee without ruling on the motion for stay.

12. Based on the motion filed February 20, 2001, the district court granted a stay of execution, which subsequently was lifted by the Sixth Circuit.

13. On February 28, 2001, Stephen West filed a Motion for Stay of Execution to Investigate and Prepare Petition for Writ of *Habeas Corpus*, and the district court granted a stay until May 1, 2001.

14. Pursuant to the district court's order, Mr. West filed his initial *habeas* petition on June 7, 2001. On June 19, 2001, Federal Defender Services of Eastern Tennessee, Inc. was appointed as co-counsel to Mr. West.

15. The district court denied relief to Mr. West on September 30, 2004.

16. Mr. West appealed the denial of habeas relief to the United States Court of Appeals for the Sixth Circuit on January 6, 2005.

17. The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision on December 18, 2008. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008).

18. Mr. West appealed the Sixth Circuit decision to the United States Supreme Court on October 19, 2009.

19. The United States Supreme Court denied certiorari on March 1, 2010. *West v. Bell*, 130 S.Ct. 1687 (2010).

20. On April 19, 2010, the United States Supreme Court denied Mr. West's petition for rehearing. *West v. Bell*, 130 S.Ct. 2142 (2010).

21. The State of Tennessee on April 26, 2010, moved the Tennessee Supreme Court for an order setting an execution date for Mr. West.

22. On July 15, 2010, the Tennessee Supreme Court set Mr. West's execution date for November 9, 2010.

23. Mr. West filed his Motion to Reopen Post-Conviction Petition in the Criminal Court of Union County on October 8, 2010.

24. After hearing oral argument, the Union County, Tennessee Criminal Court denied Mr. West's motion to reopen on October 26, 2010.

25. On November 1, 2010, Mr. West filed an Application for Permission to Appeal from the order of the Criminal Court of Union County in the Court of Criminal Appeals in Knoxville. That court denied the Rule 28 application on November 3, 2010 (Attachment A).

This appeal follows.

II. QUESTIONS PRESENTED

1. Whether reopening a post-conviction petition is required after a recent decision by the Tennessee Supreme Court that creates an automatic right of a new trial where an obvious conflict of interest is brought to the attention of the trial court, but is not resolved and where the defendant never waives that conflict after being fully advised of it.

2. Whether reopening a post-conviction petition is required after recent decisions by the United States Supreme Court establish new constitutional rights for reversal of death sentences where reviewing courts applied the wrong standards to the prejudice prong of ineffective assistance of counsel claims from the penalty phase of a capital trial.

3. Whether reopening a post-conviction is required to adjudicate whether a

condemned inmate who suffers from severe mental illness should be exempted from eligibility for the death penalty.

III. STATMENT OF FACTS

The facts necessary to support the claims contained in this Petition are presented and developed in support of the claims to which they are pertinent.

IV. REASONS SUPPORTING REVIEW BY THE SUPREME COURT

A. Stephen West's post-conviction petition must be reopened where the Tennessee Supreme Court has recently established that the representation by an attorney burdened with a conflict of interest is a structural error. The right to a new trial for a defendant represented by conflicted counsel did not exist at the time of West's trial and post-conviction.

This Court's recent opinion in *Frazier v. State* reaffirms the rule that a trial court must follow certain procedures if it is aware that defense counsel is operating under a conflict of interest. 303 S.W.3d 674 (Tenn. 2010). Now, under *Frazier*, failure to comply with these procedures amounts to structural error requiring that any subsequent conviction and sentence be vacated. There is now a new state constitutional right to an automatic reversal upon a finding of a conflict of interest. In this case, Mr. West's lead trial counsel operated under an actual conflict of interest. The trial court was aware of this conflict but failed to remedy it in accordance with constitutional mandates. Accordingly, Mr. West's post-conviction petition must be reopened so that his conviction and sentence can be set aside.

1. The Holding in *Frazier*

Frazier stands for three propositions of law that are pertinent to the case at bar: (1) that trial courts must inquire into and remedy defense counsel conflicts of which they

know or should know; (2) that a trial court must follow certain procedures to find a knowing and intelligent waiver of the right to conflict-free counsel; and (3) that a trial court's failure to remedy a known conflict warrants automatic reversal and vacation of any conviction and sentence. It constitutes structural error.

a. *Frazier* requires that trial courts remedy known attorney conflicts.

In *Frazier*, this Court held that:

> [C]ourts have an independent duty to ensure that all proceedings are conducted within the ethical standards of the profession and are "fair to all who observe." *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988). When, therefore, the trial court is aware or should be aware of a conflict of interest, there must be an inquiry as to its nature and appropriate measures taken. [*Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980)]; *see also* [*Wood v. Georgia*, 450 U.S. 261. 272 (1981)]. Otherwise, prejudice will be presumed. *Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708.

303 S.W.3d at 683.

Frazier thus requires a trial court with actual or constructive knowledge of a potential attorney conflict to first make an inquiry, and then, if a conflict is found, to take "appropriate measures." *Id.* The trial court's duty is irrespective of the type of conflict at issue – a trial court is duty-bound to remedy "'any circumstance in which an attorney cannot exercise his independent professional judgment free of competing interests." *Id.* at 682 (quoting *State v. Culbreath*, 30 S.W.3d 309, 312 (Tenn. 2000)). Only two courses of action are "appropriate measures" for remedy of a known attorney conflict: (1) the court may disqualify the conflicted attorney, or (2) the court may oversee the defendant's knowing and voluntary waiver. *Id.* at 684-85.[4]

[4] As *Frazier* held, "[d]isqualification of counsel is not required in every instance [in which an actual conflict is found by the trial court]. Counsel may continue

b. *Frazier* delineates the minimum procedures for securing waiver.

Frazier defines the requisite procedures for knowing and voluntary waiver of the right to conflict-free counsel. Citing the safeguards compelled by this Court in *Burns v. State*, 2001 WL 912817 (Tenn. Crim. App. Aug. 9, 2001), *Frazier* requires that, at a minimum, the party waiving the right:

> (1) be brought into open court, (2) be given a full explanation on the record how this matter would affect him; (3) be advised of his right to appointment of other counsel; (4) be questioned under oath by the parties and the post-conviction court to determine his understanding of the matter and waiver; and (5) state under oath whether he desires to waive any appearance of impropriety.

Frazier, 303 S.W.3d at 684 (*quoting Burns v. State*, 2001 WL 912817, at *6 (Tenn.Crim.App. Aug. 9, 2001)); *accord McCullough v. State*, 144 S.W.3d 382, 386 (Tenn.Crim.App. 2003); *Kirby v. State*, 1994 WL 525086, at *6 (Tenn.Crim.App. Sept. 28, 1994). A trial court with actual or constructive knowledge of a defense attorney's conflict is thus limited to two curative measures: (1) disqualification or (2) waiver under the specific procedures set out in *Burns*.

c. Failure to comply with *Frazier* constitutes structural error.

Under *Frazier*, when a trial court fails to remedy a known conflict, reversal and vacation of any conviction and sentence is automatic. Noncompliance with *Frazier* is structural error – a litigant challenging his conviction and sentence need not show that any harm resulted from the fact of his attorney's conflict.

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representation, however, only when there has been a knowing and voluntary waiver of the conflict of interest that is satisfactory to the trial court." 303 S.W.3d at 684-85.

This rule is manifested by two means in *Frazier*. First, *Frazier* holds that, "[w]hen . . . the trial court is aware or should be aware of a conflict of interest, there must be an inquiry as to its nature and appropriate measures taken. *Otherwise, prejudice will be presumed.*" *Frazier*, 303 S.W.3d at 683 (internal citations omitted) (emphasis added). The plain import of this language is that a *Frazier* claimant need not prove that counsel's conflict affected his representation, *i.e.*, that the court's error was prejudicial, but only that the trial court knew or should have known of the conflict and failed to take corrective action.

Second, that failure to follow *Frazier* is structural error is apparent from the remedy in *Frazier* itself. The *Frazier* Court remanded for determination of whether the petitioner had waived his rights in accordance with *Burns*. *Id.* at 685. If not, the Court ordered, new counsel was to be appointed, the petitioner given leave to amend his petition, and any grounds for relief considered, *i.e.* the decision below was to be vacated. *Id.* Significantly, the Court's decision entails no consideration of whether the attorney's conflict affected his representation in any way, or moreover, of the petitioner's ability to prove the same. *Frazier*, 303 S.W.3d at 685. This establishes a new constitutional right.

The fact that *Frazier* involved the statutory right to post-conviction counsel is not fatal to Mr. West's claim of a new rule of law for constitutionally required trial counsel. Much of the *Frazier* opinion concerned the issue of whether the petitioner in that case could bring a claim of conflict of interest. *See Frazier*, 303 S.W. at 680-84. However, once the right to effective assistance was established, this Court addressed the issue of

remedy. Since that remedy involved issues of due process, it necessarily entailed a constitutional analysis. Furthermore, the remedy for a statutory violation cannot possibly be greater than the remedy for a constitutional violation. For this reason, a fair reading of *Frazier* shows that it established a new constitutional right. Mr. West should now be allowed to reopen his post-conviction proceedings to show that this right was violated at trial.

2. Because Stephen West's trial counsel was not conflict-free counsel, *Frazier* requires that this Court order the reopening of the post-conviction petition in order to grant him a new trial because Mr. West never made a knowing and intelligent waiver of that conflict.

Stephen West's trial counsel labored under a conflict of interest at his capital trial. Through a letter from Stephen West to Judge Asbury dated March 9, 1987, Stephen West set forth a specific list of complaints documenting the conflict of interest between McConnell and himself, including specific allegations of misconduct, dates upon which the misconduct occurred and citations to the ethical code. (Letter from Stephen West to Judge Asbury dated March 9, 1987, (Trial Tech. Rec. p. 146) Attachment B hereto. Mr. West informed the trial court that his family had hired Mr. McConnell without his consent and that McConnell told Mr. West that if he rejected his (McConnell's) representation that the West family would still be obligated to pay McConnell. Mr. West further informed the trial court of Mr. McConnell's stance that he was taking all instruction regarding the case from Stephen West's mother and father who paid Mr. McConnell's fees. In this same letter, Stephen West informed Judge Asbury of Mr. McConnell's threat to withdraw from the case which would cause Mr.

West "definitely to go to the electric chair" and McConnell's further threat that he (McConnell) would not adequately prepare for the case unless he received an amount over the originally set compensation nor would McConnell be present at trial if he did not receive additional expense money.

On the first day of trial the trial court purportedly addressed the issues set forth in Mr. West's letter. However, the trial court "asked only open-ended questions and put the onus on [Mr. West] to articulate why the appointed counsel could not provide competent representation." *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir. 2001). The trial court asked Mr. West to state "his position" on the record and tell the court why it "should not proceed with the trial of this case with you being represented by these attorneys". (TT. Vol.3, p. 4). When Mr. West indicated that his letter to the court "clearly states my position on the matter with the attorney" (*id.* p. 4) the trial court told Mr. West that he was "talking in generalities" and he needed "to be specific." (*Id.* p. 5)

The court said that Mr. West was "talking in generalities" despite the fact that Mr. West's letter contained very specific allegations of conflict of interest. The record demonstrates that the colloquy with Mr. West on these issues was simply designed to resolve the matter so that the trial could go forward. The court stated, "I don't see that there is anything at all in the letter that would indicate that either of your attorneys have not performed admirably, that either of them are not competent or either of them are not ready, willing and able to proceed with the trial of the case." (*Id.* p. 5-6) That statement is flatly contradicted by the letter that alleges that trial counsel was taking direction from

Mr. West's family members. The letter also alleges that counsel had threatened to not attend the trial if he did not receive $500 to pay for a hotel room.

Mr. West has established that a genuine conflict of interest existed. His trial attorney told him that his representation was materially limited by his own interests. *See* DR 1.7. McConnell further failed in his duty to Mr. West by taking direction from others. *See* DR 1.8. The trial court had clear notice of these conflicts and failed to investigate them.

Mr. West's allegations were borne out by evidence outside the original trial record in this case. In a transcription of a telephone conversation with Mr. West's sister, Debbie West Adams, Mr. McConnell demanded more money from West's family for his trial expenses. In addition, Vestor West has given testimony that his wife was telling the attorneys what they could say and what they could investigate in his son's case. *See* Mr. West's Motion to Supplement the Record filed in this Court on April 12, 1999, with affidavits of Vestor West and Debra West Harless attached. Finally, Mr. McConnell's co-counsel, Mr. McAlexander, corroborated this conflict of interest. *See* Attachment C, McAlexander Affidavit. This evidence substantiates the problems that Mr. West brought to the trial court's attention.

These matters were never specifically addressed by the trial court despite its duty of inquiry under *Frazier*. Mr. West's letter brought these very specific matters to the trial court's attention. As the trial court failed to take steps to adequately protect Stephen West, his constitutional rights were violated. Given these circumstances, the trial court had a duty to either disqualify Mr. McConnell or to secure Mr. West's knowing

and intelligent waiver. Under *Frazier*, the trial court's failure to take either of these steps requires a new trial with conflict-free counsel.

Conclusion: This Court must vacate Petitioner's conviction and sentence.

Because the trial court in this case failed to take the measures required under *Frazier* to remedy the serious conflict facing defense counsel, this Court must find that Mr. West's trial was marked by structural error. New case law on this constitutional error justifies reopening Mr. West's Post-Conviction Petition and ultimately, the Court must vacate Mr. West's conviction and sentence.

B. Where a Post-Conviction Petitioner's Claims of Ineffective Assistance of Counsel in the Penalty Phase of his Capital Trial Were Never Considered Under the Proper Constitutional Standards and Where The Right to Relief Has Recently Been Established by The United States Supreme Court, The Tennessee Courts Must Re-examine His Post-Conviction Claim.

1. Stephen West's Capital Trial

Evidence presented at West's capital trial showed that in the early hours of March 17, 1986, he and Ronnie Martin left their work at a McDonald's in Lake City, Tennessee. Many hours later, after driving around all night and drinking beer, they arrived at and were admitted into the Romines household in Union County, Tennessee. Martin knew fifteen-year-old Sheila Romines. Sometime between the hours of 6 a.m. and 8:30 a.m., Sheila and her mother, Wanda, were stabbed to death. Sheila had been raped before she was killed. *State v. West*, 767 S.W.2d 387, 389-90 (Tenn. 1989). Martin and West were arrested the next day. Their trials were severed, and the trial against West proceeded first.

Two attorneys represented West: Richard McConnell and Thomas McAlexander. West's parents had hired McConnell, who had no experience in capital cases. McAlexander, court-appointed co-counsel, also had no capital experience. PC Vol.I p.201, PC Vol.II p.251-52.

The key issue at West's trial was his level of involvement in the murders and his susceptibility to manipulation by Martin, a more dominant personality. There was no question that West had accompanied Martin into the Romines home and that he was there with Martin at the time of the crimes; evidence also showed that West was involved in the rape of Sheila Romines. However, West testified during the guilt phase that it was Martin who had "stabbed and killed" the two women. TT Vol.VIII p.42. West testified that Martin threatened West with a gun and said that he would kill West and West's wife if he told anyone what had happened inside the Romines home. The prosecution introduced prior statements that West had made in which West described Martin stabbing Sheila Romines; West recounted that when the victim asked Martin why, Martin replied, "I owe you, I owe you." *Id.* at Vol.XI p.15-16.

The trial court excluded two taped jailhouse conversations demonstrating that Martin was the main perpetrator and that Martin, not West, had killed Wanda and Sheila Romines. On these tapes, Martin told his cellmate that he had killed both women.

The trial court also excluded testimony from Libby Woods, an acquaintance of both Martin and Sheila Romines. Woods was prepared to testify that Martin had said he would kill Sheila; that he was upset with her for striking and embarrassing him in front of some other students at school; that he wanted to date and have sex with her and she

resisted his advances; and that Martin had said that he owed her, and that is why he would kill her. TT Vol.XII p.63. West's jury never heard this testimony.

The prosecution focused heavily on portraying West and his legal team as liars. During closing argument, the prosecutor argued on eleven separate occasions that defense counsel were attempting to mislead or deceive the jury by "blowing smoke" or "throwing sand" in jurors' eyes. The prosecutor also repeatedly called West a liar and made several inflammatory statements not supported by the evidence. *Id.* at p.112. ("He said that Ronnie took the knife and killed both women. We know that that is a lie. We know that that is a lie.... That's a lie. That's a lie.... That's a lie.").

The jury found West guilty of two counts of murder, one count of aggravated rape, two counts of aggravated kidnaping, and one count of grand larceny. *State v. West*, 767 S.W.2d at 389, 403.

During sentencing, the prosecutor relied mostly on the evidence presented at trial and again called West a liar and a coward. He also improperly told the jurors that they should not feel responsible about opting for the death penalty because they "did not set punishment in this case, per se." TT Vol.XIII p.138. "[T]he law ...is self-executing," he said, "in the sense that the law mandates, requires a death sentence in certain situations, unless it is outweighed by other factors." *Id.* at p.137.

West's attorneys put on minimal mitigation evidence; their entire mitigation case consumed only twenty pages of transcript. Such a short case is not surprising in light of how little investigation West's counsel did. Despite the fact that counsel knew West had no memory of the first ten years of his life, as well as the presence of several other red flags, counsel did not seek to interview family members about potential childhood

abuse, concluding that doing so would have been a waste of time. McAlexander, who spent *four hours* preparing for sentencing, spoke with West's parents and said "it was like running into a brick wall." Attachment C, Affidavit of McAlexander p.2. McAlexander did not seek to investigate further, despite the parents' lack of cooperation. West's sister, Debra, later testified she told counsel that West had been subject to terrible abuse. Counsel, she testified, told her it was not relevant. Dr. Ben Bursten, a mental-health expert tasked with exploring West's competency and a possible insanity defense, also did not discover West's childhood abuse. He spent only two or three hours with West and never asked West's family - who had hired him - any questions about abuse, despite knowing that West's father was an alcoholic. PC Vol.II p.427, 461. He omitted any such questioning because "[t]hey created such a picture of a close family." *Id.* at p.428. Asking them questions about abuse would have been "outrageous" in Dr. Bursten's opinion because "[y]ou have to be a little sensitive about the people you are talking to." *Id.*

In short, West's counsel did not investigate or present to the jury *any* of the evidence about abuse in West's childhood. West's attorneys called no one to testify on this subject, and the jury never heard any evidence touching on it. Ultimately, West's mitigation case (including testimony from West himself) emphasized that West had no behavior issues in jail, was a good husband and father, had been an honor student in school, and had no prior criminal record.

West's counsel presented no explanation for why West would have behaved passively and been dominated by Martin during the crimes. Yet his counsel argued that if the jury believed West actually committed the murders, it should send him to the

electric chair with counsel's blessing. TT Vol.XIII p.145. The jury sentenced West to death. On direct appeal, the courts affirmed West's convictions and death sentence, despite concluding that the prosecutor's closing argument was improper. *State v. West*, 767 S.W.2d at 399-400.

2. Evidence Presented During Original Post-Conviction Proceedings

In 1990, West filed a petition for post-conviction relief, arguing that his attorneys were ineffective during sentencing because they should have discovered and presented mitigating evidence that might have convinced the jury to spare his life. Petition for Post Conviction Relief, filed 10-23-90, p.4, paragraph ix. The post-conviction trial court held evidentiary hearings that revealed that, prior to sentencing, West's counsel were aware of a number of facts that should have caused them to investigate the circumstances of West's childhood more closely.

For example, Paul Morrow, West's post-conviction legal expert, testified that counsel's awareness that West's severe drug and alcohol problems were noted in Army records would have led reasonable counsel to look further into West's background. PC Vol.II p.408. Morrow also testified that West's statement that he was present at the time of the crime and could not do anything to stop Martin was a red flag signaling that counsel should do a more thorough investigation into West's background and psychological makeup. *Id.* at 410. Finally, the fact that West had virtually no childhood memories before the age of ten was an indication of possible abuse. PC Vol.I p.138-39, Dr. Eric Engum.

Regardless of these red flags, McConnell and McAlexander readily admitted that prior to West's sentencing they did not conduct a probing investigation into West's

background or into any issues of abuse within his family. McConnell testified that family members failed to come forward on the issue of abuse. McAlexander was not "entirely sure about [any allegations of] physical abuse, but if they were mentioned, there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into." PC Vol.I p.198. McConnell believed such an investigation "would have been chasing down blind alleys." *Id.* at Vol.II p.267-68. With respect to conducting separate interviews of siblings and other family members outside the presence of West's parents in order to explore mitigation themes, counsel "certainly wouldn't have wasted time on that." *Id.* at 267. Trial counsel also did not obtain West's school, employment or medical records. *Id.* at 265-66. Counsel agreed, however, that if they had an "inkling that there may have been a childhood problem" or mental problem, they "would have been obligated to" present that information at sentencing. *Id.* at 304.

Instead of investigating West's background for possible abuse, West's attorneys laid the burden of bringing up this sensitive subject on West and his family: "Mr. West never raised any physical ...or sexual abuse or anything of this nature." *Id.* at 267. But the evidence was readily available if counsel had sought it out. West's sister Patricia testified during the post-conviction proceeding that she did not tell the attorneys about West's background of abuse because "[n]obody asked and I didn't think it would matter." *Id.* at p.373. And his sister, Debra, testified that she informed McConnell about West's history of abuse and that McConnell told her it was not relevant and that

because West's parents were paying his fee, he would not raise it. *Id.* at Vol.I p.168.[5] Other potential witnesses, including West's aunt, were simply never contacted. *Id.* at Vol.II p.384.

Had counsel conducted a constitutionally adequate investigation, they would have uncovered abundant evidence of the horrific childhood abuse West suffered at the hands of his parents. They would also have been able to present psychological evidence that would have helped explain West's actions at the time of the crime.

Stephen West's mother gave birth to him in a mental institution; she had been placed there after she tried to commit suicide. *Id.* at Vol.I p.163-64; *See* West's Motion to Supplement the Record, Exhibit A, Affidavit of Vestor West, Exhibit B, Affidavit of Debra Gail Harless, filed in Tennessee Supreme Court on April 9, 1999. She had a history of mental illness, including auditory hallucinations. Attachment D, Dr. Coleman's report. His father was a lifelong alcoholic and a violent man who openly questioned West's paternity. *West v. State*, No. 03C01-9708-CR-00321, 1998 Tenn.Crim.App. LEXIS 636, at *5 (Tenn.Crim.App. June 12, 1998). Under the care of these parents, West's childhood was cruel and traumatizing. Both his mother and his father brutalized him from the time he was a baby. PC Vol.II p.370-71; *See* West's Motion to Supplement the Record, Exhibit A, Affidavit of Vestor West, Exhibit B, Affidavit of Debra Gail Harless, filed in Tennessee Supreme Court on April 9, 1999 . His mother would beat him mercilessly by "[s]winging a belt so long and so hard that it

[5]McConnell denied the conversation. PC Vol.II p.301. However, Debra's account was later corroborated by Vestor West. *See* West's Motion to Supplement the Record, Exhibit A, Affidavit of Vestor West, Exhibit B, Affidavit of Debra Gail Harless, filed in Tennessee Supreme Court on April 9, 1999.

would wear her out." *Id.* at 371. She hit him with shoes and struck him so hard that he became cross-eyed. The beatings left West with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* They were never predictable and occurred without reason. *Id.*

West's aunt, who lived in an apartment above West's family, witnessed some of this horrible abuse. Specifically, she recalled that West's mother swore at him, beat him, threw him against the wall by his feet, and would leave him in a cold room on a mattress wet with urine. His aunt explained: "She was always hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." *Id.* at 383.

She also vividly described one example of the kind of abuse that West regularly suffered:

> I came down. Patty [West's sister] came out to get some food for Steve and she [West's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

Id. at 382-83.

West's oldest sister, Debra, remembers him being slapped in the head and hit with shoes throughout his childhood. *West*, 1998 Tenn.Crim.App. LEXIS 636, at *5. She portrayed him as the family scapegoat: "If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital." PC Vol.I p.166. Debra described their father as an alcoholic who was violent when sober and

even more violent when drinking. *Id.* at 166-67. Like West's aunt, Debra remembered at least one occasion when West's mother threw him against a wall to punish him. *West*, 1998 Tenn.Crim.App. LEXIS 636 *5.

The abuse was so merciless that West has no recollection of the first decade of his life. His sister, Patricia, likewise, has few childhood memories. West's mother eventually told him that during that period his ankles were broken multiple times and he also suffered broken toes and a fractured elbow. (Attachment D, Dr. Coleman's report). In response to this abuse, West never became violent or fought back. Debra explained that West would "duck" when either of his parents raised a hand near him. PC Vol.I p.167. His aunt said:

> He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please why are you doing this?" She said, "If I could kill him and get away with it I would."

PC Vol.II p.383.

This evidence of childhood abuse adds up to a compelling mitigation case. However, West's counsel never investigated these issues prior to sentencing, and the jury that sentenced West to death never heard any of this evidence.

In addition to the evidence of abuse, West also presented testimony from Dr. Eric Engum, a clinical psychologist who diagnosed West as suffering from significant depression, longstanding in nature. Dr. Engum's findings of depression were so pronounced that he warned of the possibility of suicide several times in his report to the post-conviction court. He also concluded that West suffered from a severe mixed personality disorder. According to Dr. Engum, West is submissive and operates at the

emotional level of a thirteen- to fifteen-year-old. PC Vol.I p.96, 9/24/96. The results of West's testing were consistent with those of an individual who had suffered from severe childhood abuse.

Testimony such as that presented by Dr. Engum could have been used at trial to provide an explanation for how West could stand by passively as Martin stabbed both victims. Dr. Engum concluded that "[u]nder extreme levels of stress ... West may, in fact, experience brief temporary psychotic breaks." PC TR Vol.II p.155. West rated very low on psychological dominance testing, PC Vol.I p.96-97, supporting the theory that he was dominated by his co-defendant and acting under duress at the time of the offense, *id.* at 156, as well as suffering from extreme emotional disturbance. *Id.* at 113-14. Thus, evidence was available that while the crimes were being committed, West was "in an extreme situation, and he became essentially dysfunctional during that time." *Id.* at 114.

Legal expert Morrow testified that this information would have explained West's actions during the crime. It would have fit hand-in-glove with trial counsel's theory of the case:

> [T]here is in this case a series of statements that Steve West gives that are reasonably incomprehensible unless you have the psychological background. His statement that a juvenile dominated him sounds on the surface incredible; his actions on that day of being dominated or not participating. Why didn't he run out the door? Why did he act the way he did? I'm sure that runs through jurors' minds. Is this person credible? Would a reasonable person act that way? You can't determine that in the abstract. If you know his psychological profile, his background as Dr. Engum spelled it out, there is a reason why he would have behaved that way.

Id. at Vol.II p.413. This evidence would have provided, for the first time, some explanation for why West stood by and did nothing during the murders.[6]

Although this previously undiscovered evidence constituted a compelling case for a jury to spare West's life, the post-conviction trial court denied relief. It recognized counsel's failure to investigate any issues of childhood abuse, explicitly finding that "[n]one [of West's family members] w[as] questioned concerning possible abuse." *West*, 1998 Tenn.Crim.App. LEXIS 636, at *21. But the court denied relief on the ground that West had failed to prove *by a preponderance of the evidence* that the result of his trial would have been different had the newly discovered mitigating evidence been presented to the jury. *Id.* at 21-24. That burden of proof is incorrect. The Court of Criminal Appeals failed to correct the misstated burden of proof – indeed, that Court failed even to apply *Strickland*'s two-part test for evaluating ineffective assistance claims. *Id.*

3. Post-Conviction Courts Failed to Consider West's Mitigating Evidence under the Proper Standards of Review.

Reopening is required in this case because the federal courts on habeas review specifically found that West's post-conviction review was constitutionally flawed at all levels. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008). Although the evidence presented to the post-conviction courts constituted a compelling case for a jury to spare West's life,

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[6]West has attached additional reports from mental health experts that were presented during his federal habeas proceedings. These reports, from Drs. Coleman, (Attachment D), Dudley, (Attachment E), and Stewart, (Attachment F), corroborate Dr. Engum's findings about West's passivity and further conclude that West was suffering from post-traumatic stress disorder (PTSD) at the time of the offense.

the post-conviction courts denied relief because they failed to correctly consider West's claims.

The post-conviction trial court's denial was based on an erroneous view of the law. Although the Court correctly articulated the constitutional standard for a claim of ineffective assistance of counsel from *Strickland v. Washington*, 466 U.S. 668 (1984), the court went on to apply an incorrect burden of proof:

> The petitioner contends that he was denied his Sixth Amendment right to the effective assistance of counsel. In order to be granted relief on the grounds of ineffective assistance of counsel, the petitioner must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). If the petitioner fails to prove by a preponderance of the evidence that the result would have been different had counsel acted differently, i.e., the prejudice prong, it is unnecessary to address the competency of counsel prong.

West v. State, No. 629, slip op. at 3-4 (Union Cty. Crim. Ct. Apr. 14, 1997); PC Tech.Rec. Vol.II, p.274-75. As the Sixth Circuit pointed out, "[t]he correct burden of proof under *Strickland*, however, is 'reasonable probability,' not preponderance of the evidence." *West*, 550 F.3d at 552. Indeed, it is the very same burden that the United States Supreme Court would eventually identify as "contrary to" *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in

character or nature' and 'mutually opposed' to our clearly established precedent...'). Thus, the court failed to correctly consider whether the tragic evidence from West's childhood and the resulting psychological damage, including the role it played in West's behavior during the crime here, created a reasonable probability of a different outcome in the penalty phase.

The court's denial was based on the fact that it found West had failed to meet an unreasonable, and unconstitutional, burden of proof. Furthermore, the court unreasonably discounted all of the evidence presented because it was "conflicting." There is absolutely no precedent holding that a court may discount the value of mitigating evidence due to the fact that a petitioner's evidence is not uncontroverted. Indeed, the United States Supreme Court has recently found that discounting potential evidence because it is inconsistent is unreasonable. *Porter v. McCollum*, __ U.S.__, 130 S.Ct. 447, 451 (2009). It further recognized that state courts must fully consider the impact of mitigating evidence even if the evidence has potential problems of reliability. *Sears v. Upton*, __ U.S. __, 130 S.Ct. 3259, 3263 (2010).

This court failed to correct the misstated burden of proof applied in the trial court – indeed, this court failed to even apply *Strickland's* two-part test for evaluating ineffective assistance claims. *West*, 1998 Tenn.Crim.App. LEXIS 636, at *20-24. Instead, this court denied relief on the standards from *Lockhart v. Fretwell*, 506 US 364, 369-70 (1993). Just as in the trial court's misapplication of the preponderance of the evidence standard, the United States Supreme Court has explicitly found that the

application of *Lockhart* to an ineffective assistance of counsel claim is unreasonable. *Williams v. Taylor*, 529 U.S. at 397, 413-14.

The Sixth Circuit Court of Appeals correctly identified the errors made by the Tennessee courts in considering Stephen West's case in mitigation. Because the Tennessee courts did not apply the correct standards for granting relief, there can be no confidence that West's mitigating evidence received proper consideration in this state's post-conviction process. Without this proper consideration of West's mitigation case, this Court can have no confidence that the death penalty has been justly and fairly applied to Stephen West. The United States Supreme Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable – which is of particular concern where the sentence is death. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). Indeed, the Court has explained that it is because of "the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189-90 & n.38 (1976).

Such evidence is relevant because it explains the defendant and his actions for the jury – it creates a complete picture of a flawed and complicated human being, to which the jury, in all of its complex humanity, can react. Thus, deeply embedded in death penalty jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime...." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also, e.g.*, *Lockett*, 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"). Any other process necessarily "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass...." *Woodson*, 428 U.S. at 304.

The prejudice analysis mandated by the Supreme Court reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this Society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). The Supreme Court has long held that evidence showing that the defendant was subject to severe abuse as a child is indisputably mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing

the reliability of the sentencing proceeding. *See Strickland*, 466 U.S. at 687 (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable"). Such evidence humanizes and gives context – it shows that the person whom the jury already has decided is a killer is less blameworthy for his actions because of what others did to him when he was innocent and vulnerable.

At no level of West's state post-conviction process did the courts apply the correct standards to his compelling claims. The federal courts' recent recognition of these errors justify reopening his post-conviction proceedings.

4. New Standards from the United States Supreme Court

Two recent cases from the United States Supreme Court establish Stephen West's right to have his ineffective assistance of counsel claims properly considered for the impact the mitigating evidence would have had on the sentencing jury before any death sentence can be constitutionally carried out. *Porter v. McCollum*, __ U.S. __, 130 S.Ct. 447 (2009) and *Sears v. Upton*, __ U.S. __, 130 S. Ct. 3259 (2010) conclusively establish West's right to relief. Since both of these cases were released within the past year, they mandate reopening West's post-conviction petition pursuant to TENN. CODE ANN. § 40-30-117(a)(1).

In *Porter*, the Supreme Court reversed the Eleventh Circuit Court of Appeals' denial of habeas relief where the petitioner presented evidence of childhood abuse, heroic military service and psychological problems that his trial counsel never uncovered or presented to his jury. Crucial to the Court's decision that the state post-conviction court had unreasonably denied sentencing relief was the fact that "it was not

reasonable to discount entirely the effect" of the mitigating evidence. *Porter*, 130 S.Ct. at 455. This is especially true of expert psychological testimony that had direct relevance to Porter's actions at the time of the crime. *Id.* Furthermore, the Court required that the post-conviction court "consider 'the totality of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding...." *Id.* at 453 (quoting *Williams*, 529 U.S. at 397-98). The Court stressed the need for reviewing courts to analyze the evidence for the impact it would have had on the sentencing jury. *Porter*, 130 S.Ct. at 455.

The post-conviction trial court did exactly what *Porter* forbids: It discounted entirely West's mitigating evidence, including expert psychological evidence that explained West's actions at the time of the crime. The trial court here discounted all of West's mitigating evidence because it was "conflicting." *West*, 550 F.3d at 553. This was unreasonable under *Porter* because that fact alone does not mean it would have had no effect on the jury or sentencing judge. Under *Porter,* even inconsistent evidence may have a large impact on the jury. *Porter*, 130 S.Ct. at 451. In order to assess prejudice under *Strickland*, the *Porter* Court requires the post-conviction court to consider what that impact would have been even if some of the evidence was conflicting.

Decided just this past June, *Sears v. Upton*, ___ U.S. ___, 130 S.Ct. 3259 (2010) went even further than *Porter* in enunciating standards that reviewing courts must consider in determining penalty phase ineffectiveness claims. In *Sears*, the Supreme Court announced that the fact that trial counsel had presented "some

mitigation evidence should [not] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 3266. The analysis by the reviewing court must be "probing and fact-specific." *Id.*

The *Sears* Court further warned against a reviewing court denying relief simply because some evidence in mitigation was presented. In *Sears*, like in West, the attorneys conducted almost no background investigation in search of potential mitigating evidence. *Id.* at 3264. In fact, the investigation in *Sears*, like that in West's case, was directed by his mother. Also similarly to West's case, the post-conviction court in *Sears* articulated the correct standard under *Strickland*, but failed to "correctly conceptualize how that standard applies to the circumstances of this case." *Sears*, 130 S.Ct. at 3264. This required the reviewing court to "engage with the evidence." *Id.* at 3265, fn.9. This was never done during Stephen West's post-conviction proceedings.

Most importantly, the *Sears* Court held that the prejudice inquiry of the reviewing court must not be less probing merely because some mitigating evidence was presented at trial. *Id.* at 3266. Even where trial counsel had some theory of mitigation and presented some evidence in support of that theory, the post-conviction court must conduct a "probing and fact-specific analysis" to determine the impact of the undiscovered and unpresented mitigating evidence. *Id.* Here, the fact that West's attorneys presented some mitigating evidence does not foreclose a finding of constitutional ineffectiveness. *Sears* demonstrates that relief is warranted in the present case where the proper standards were never considered.

Furthermore, the *Sears* decision clearly implicated a defendant's Sixth Amendment right to trial by jury. While the state court concluded that it was impossible to know what effect mitigating evidence would have on the jury, the *Sears* Court compelled just that analysis. *Id.* at 3267. This analysis of the impact on the jury also underpins the decision in *Porter* and again, implicates the defendant's right to trial by jury. *See Porter*,130 S.Ct. at 455 (court must consider impact evidence would have had on jury.)

These recent cases demonstrate the way the law on the consideration of mitigating evidence has changed and evolved since the Tennessee Court's considered West's post-conviction claims and highlight the need for re-examination. The state courts' original decision on post-conviction cannot be squared with recent Supreme Court's decisions concerning the relevance and importance of mitigating evidence, and particularly evidence concerning a defendant's abusive or deprived childhood. Here, and in every capital case, the jury did not even reach the question of sentencing until it had found that the defendant was guilty of a murder for which a sentence of death was potentially appropriate. The issue at sentencing was not whether West had played some role in these violent offenses, but why he had done so, why he had not stopped the codefendant or run away, and whether there was any evidence that might have influenced the **jury's** appraisal of his moral culpability.

The evidence of the severe depredations West suffered in his abusive and unhappy childhood is the epitome of mitigating evidence under Supreme Court precedent. As in *Porter* and *Sears*, its presentation would have allowed the jury to give

force to our society's belief that West was "less culpable" for the crimes because his acts were attributable not to some inherent wickedness but rather to his "disadvantaged background" and his resulting "emotional and mental problems." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

5. Failure to Reopen West's Post-conviction Would Leave it in Stark Contrast with Another Case Decided at Roughly the Same Time.

In order to be constitutional, the death penalty must not be applied in an inconsistent and arbitrary manner. *Gregg v. Georgia*, 428 U.S. 153 (1976). The height of arbitrariness is achieved where one client is denied relief and another is granted relief on very similar mitigating evidence. The fact that two Tennessee post-conviction courts reached diametrically opposed conclusions warrants a reopening of West's post-conviction.

Courts have recognized that, by its nature, mitigation evidence often is double-edged, and that this is precisely the point of the evidence - it may explain why a defendant engaged in the violent act the jury already has found, or show that the defendant is a troubled or disturbed person, rather than a cold-blooded killer. Thus, by definition, the evidence may suggest that the defendant could engage in a violent act or fail to prevent one from occurring. The Court of Criminal Appeals, in an opinion by Justice Wade, has recognized the fact that a violent background is mitigating and is a compelling reason to spare a defendant's life. *Adkins v. State*, 911 S.W.2d 334 (Tenn.Crim.App. 1994). This is the opposite conclusion from the one reached by West's Sixth Circuit panel that found that a jury might find such evidence to be

aggravating and sentence West to death because "violence begets violence." *West*, 550 F.3d at 556.

In *Adkins*, the Court of Criminal Appeals vacated the death sentence on counsel's failure to present mitigating evidence of childhood abuse that was very similar to that which could have been presented in West's case. Adkins's expert psychiatrist testified that "what we know from studies that have been done, from the clinical experiences is that children who grow up in families where there is a tremendous amount of parental violence have a much greater likelihood of themselves being violent." *Adkins*, 911 S.W.2d at 355. The *Adkins* Court recognized the mitigating nature of evidence that showed "that the petitioner's violent nature was due to his social background." *Id.* Relief was granted because Adkins had "shown ample evidence concerning [his] childhood, background, psychiatric and psychological examination results, all of which a jury could have considered in mitigation of the death penalty." *Id.* at 356.

The *Adkins* Court literally concluded that a jury's finding that "violence begets violence" constitutes mitigating evidence of such weight as to undermine confidence in a death sentence. This was precisely the formula used to deny relief when West's case reached the Sixth Circuit Court of Appeals. *West*, 550 F.3d at 556. The evidence is all the more significant in West's case because the psychological evidence shows that West had become a passive follower as a result of his childhood abuse. However, if Tennessee post-conviction courts are granting relief because childhood violence led to the crime in one case, it is arbitrary for those courts to deny relief in another case on

the exact same reasoning. Childhood violence must be considered as a mitigating factor and lead courts to grant relief in all cases, not just some. If this Court does not reopen West's post-conviction, these inconsistent and incompatible rulings will stand and Tennessee's death penalty will be applied in an arbitrary fashion.

Conclusion

Recent cases from the United States Supreme Court demonstrate that Stephen West's original post-conviction petition was wrongly rejected. Evidence of a violent and tragic childhood should have been presented to West's jury. It is reasonably likely that this evidence, in conjunction with evidence about West's psychological make-up in light of this childhood, would have led to a different outcome at trial. Such a ruling from this Court would be consistent with other post-conviction rulings in this state. Violence did not beget violence for Stephen West and that fact could have saved his life if his jury had been allowed to hear his case.

C. Article One, Sections Eight and Sixteen of The Tennessee Constitution and The Eighth and Fourteenth Amendments to The U.S. Constitution Categorically Exempt From The Death Penalty Defendants, Such as Stephen West, Who are Severely Mentally Ill.

Introduction

Stephen West's post-conviction petition must be reopened in order to consider whether the execution of a person, such as Stephen West, who suffers from severe mental illness is a violation of the Eighth Amendment of the United States Constitution and Article One, Sections Eight and Sixteen of the Tennessee Constitution. Even though this Court has not yet recognized that the execution of the severely mentally ill violates the constitution, the Court has recognized that a motion to reopen the post-

conviction process is a proper vehicle for establishing that right. As the court recognized in *Van Tran v. State*, 66 S.W.3d 790, 800, fn.12 (Tenn. 2001): "[O]ne of the fundamental roles of this Court is often to confront and to determine issues of first impression."

The Court of Criminal Appeals was in error when it stated that *Van Tran* "does not stand for the proposition that a petitioner can seek to establish a new constitutional right through a motion to reopen." Court of Criminal Appeals Order, Nov. 3, 2010, p. 3. *Van Tran* does precisely that. Van Tran filed a motion to reopen, arguing that a newly adopted statutory right forbidding the execution of the mentally retarded should be applied to him. *Id.* at 794. This Court declined to extend the statutory right, but rather found that it should create a categorical exemption under the Tennessee constitution. *Id.* at 809. *Van Tran's* creation of a new constitutional right through a Motion to Reopen Post-Conviction demonstrates that procedure is open to petitioners like Stephen West. The Court of Criminal Appeals was in error when it found to the contrary.

This is the proper case and now is the proper time for the Tennessee courts to expand the holding of *Van Tran* and, based on the same reasoning, to ban the execution of the severely mentally ill. Stephen West's execution must not go forward on November 9, 2010.

1. Stephen West Suffers from Severe Mental Illness.

No one can dispute that Stephen West is severely mentally ill. According to his current diagnosis, Stephen West suffers from schizoaffective disorder. Attachment G, Dr. Kenner Affidavit, paragraph 5. This disorder combines aspects from schizophrenia

and bipolar disorder. *Id.*, at paragraph 10. West was previously diagnosed as suffering from chronic paranoid schizophrenia. *Id.*, at paragraph 7. Schizophrenia has long been recognized as a "devastating brain disorder ... [which] interferes with a person's ability to think clearly, to distinguish reality from fantasy, to manage emotions, make decisions, and relate to others."[7] The World Health Organization lists schizophrenia as one of the ten most disabling diseases afflicting humans.[8] Among the symptoms associated with schizophrenia are "gross impairment in reality testing" , "grossly disorganized behavior" and "structural brain abnormalities." American Psychiatric Association, *Diagnostic and Statistical Manual* 297, 300, 304-05 (4th ed., Text Rev. 2000) [hereinafter *DSM-IV-TR*]. At the deepest levels, this disease distorts identity and warps behavior – "schizophrenia is characterized by profound disruption in cognition and emotion, affecting the most fundamental human attributes: language, thought, perception, affect, and sense of self."[9] Because schizophrenia strikes at those "most fundamental human attributes," moreover, it directly affects those aspects of moral judgment, social interaction and impulse control implicated in criminal behavior.

Schizoaffective disorder is a severe and debilitating mental illness. According to the Mayo Clinic, "Schizoaffective disorder is a condition in which a person experiences

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[7]National Alliance on Mental Illness, *About Mental Illness: Schizophrenia*, at: http://www.nami.org/Template.cfm?Section=By_Illness&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=54&ContentID=23036 (last updated October 2010).

[8]See World Health Organization, *The Global Burden of Disease: A Comprehensive Assessment of Mortality and Disability from Diseases, Injuries, and Risk Factors in 1990 and Projected to 2020* (Harvard University Press 1996) (executive summary available at: http://www.hup.harvard.edu/catalog.php?isbn=9780674354487.

[9]Surgeon General of the United States, *Mental Health: A Report by the Surgeon General 269,* available at: http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c4.pdf (1999) (last updated October 2010).

a combination of schizophrenia symptoms – such as hallucinations or delusions – and of mood disorder symptoms, such as mania or depression." http://www.mayoclinic.com/ health /schizoaffective-disorder/DS00866. According to Dr. Kenner.

> To understand Mr. West's latest diagnosis, schizoafftective disorder, it helps to picture someone with the disordered brain and symptoms of schizophrenia, hallucinations and delusions, at the same time he is riding the rollercoaster of bipolar disorder.

Attachment G, Dr. Kenner Affidavit, paragraph 10. Dr. Kenner concludes that this is a severe mental illness.

The medications currently prescribed to West by doctors working on behalf of the Tennessee Department of Corrections to treat this disorder, bear out the fact that State officials also recognize that West genuinely suffers from severe mental illness. No psychiatrist should prescribe these powerful antipsychotic medications unless the treating physician sincerely believes that the patient is indeed suffering from a severe mental illness. *Id.* at paragraphs 12-13. In fact, Dr. Kenner states that the side effects of the prescribed drugs that West takes are "so unpleasant that less sick individuals and those faking mental illness will refuse to take them." *Id.* at paragraph 12. Prison doctors have never indicated that they believe West is malingering, or faking symptoms. *Id.* at paragraph 14.

Although there is no way to know when West's severe mental illness began, it is highly likely that is very longstanding in nature. His auditory hallucinations have been traced back to at least his adolescence. *Id.* at paragraph 10. This would fit the usual

onset of this illness and shows that West was severely mentally ill at the time of the offense in this case. *Id.* The fact that the illness was not recognized and treated until many years later is not unusual. *Id.* at paragraph 11. West's symptoms were probably masked by self-medication with alcohol and marijuana. *Id.* His military records show that he was discharged from the army due to alcohol abuse. PC Vol.II p.299-300, 307. This indicates that West's self-medication was going on well before the offense in this case.

Thus, there can be little question that Stephen West suffers from severe mental illness. His mental illness is longstanding in nature. Prison medical staff have made this conclusion and administer treatment consistent with such a diagnosis.

2. Supreme Court Precedence Regarding Cruel and Unusual Punishment Should Be Extended to Categorically Prohibit the Execution of Offenders with Severe Mental Illness

The Tennessee courts must extend the ban on cruel and unusual punishment, contained in the Tennessee Constitution as well as Eighth Amendment of the United States Constitution to include a categorical prohibition against the execution of the severely mentally ill. The logic of recent cases from the United States Supreme Court striking down extreme punishments on the mentally retarded and children applies with equal strength to those defendants suffering from severe mental illness. Furthermore, the Tennessee courts and the Tennessee legislature were at the forefront in banning the execution of both children and the mentally retarded, eschewing those punishments well in advance of the Supreme Court striking them down. *See* 1982 Public Acts, c. 637 § 1, (prohibiting the execution of children in 1982, long before *Roper* was decided

in 2005); 1990 Pub. Acts, c. 1038, § 1 (prohibiting the execution of the "mentally retarded" in 1990); *Van Tran*, 66 S.W.3d at 811 (banning the execution of the mentally retarded under the Tennessee constitution in 2001 before *Atkins* was decided in 2002). This Court has recognized the important role the judiciary plays in narrowing the class of people fit for execution, stating: "It is axiomatic that [the Tennessee courts] may extend greater protection under the Tennessee Constitution than is provided by the United States Supreme Court's interpretations of the federal constitution." *Van Tran*, 66 S.W.3d at 801.

Standard of Review

With respect to the irrevocable sentence of death, the United States Supreme Court "has fashioned a three-prong analysis for determining whether a punishment constitutes cruel and unusual punishment under the Eighth Amendment .... 'First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?'" *New Jersey v. Nelson*, 803 A.2d 1, 41 (N.J. 2002) (Zazzali, J., concurring) (finding under state constitution that death is a disproportionate sentence for mentally ill defendant), *citing Gregg v. Georgia*, 428 U.S. 153, 173 (1976). *See also Van Tran*, 66 S.W.3d at 800 (applying the *Gregg* analysis to prohibit execution of the mentally retarded); *Corcoran v. State*, 774 N.E.2d 495, 503 (Ind. 2002) (Rucker, J. dissenting) ("I would hold that a seriously mentally ill person is not among those most deserving to be put to death. To do so in my view violates the Cruel and Unusual Punishment provision

of the Indiana Constitution."). Because capital punishment is not disproportionate to the offense of murder, in this brief, as in *Atkins*, only the first and third prongs of the *Gregg* test are at issue.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals who suffered from mental retardation at the time of the capital offense. The Court declared that, "[b]ecause of their disabilities in the areas of reasoning, judgment, and control of their impulses, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. The Court recognized that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation.

First, the Court noted that mentally retarded persons have a "lesser ability ... to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors," in part because they "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21.

Second, the Court noted that, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.* at 321 (citation omitted). To protect the constitutional rights of this vulnerable group, the Court created a categorical exemption to the death penalty for the mentally retarded. *Id. See also*

Timothy Hall, *Mental Status and Criminal Culpability after Atkins v. Virginia*, 29 Dayton L. Rev. 355, 361-62 (2004). The Court explained:

> Because of their impairments ... 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 .... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

In *Van Tran*, this Court anticipated *Atkins* in finding that:

> [T]he Eighth Amendment to the United States Constitution and article I §§, section 16 of the Tennessee Constitution prohibit the execution of mentally retarded individuals because such executions violate evolving standards of decency that mark the progress of a maturing society, are grossly disproportionate, and serve no valid penological purpose in any case.

Van Tran, 66 S.W.3d at 792. Like *Atkins*, *Van Tran* cited "fundamental concerns that necessarily bear on a mentally retarded person's mental state, culpability, blameworthiness, and the proportionality of death as a punishment." *Id.* at 807. Likewise, the Court in *Van Tran* found that "the jury's consideration of mental retardation as a mitigating factor is by itself insufficient to address the concerns protected under the Eighth Amendment or Article I, § 16." *Id.* at 809. Rather, as in *Atkins*, only a categorical prohibition against executing the mentally retarded was found by the Court to be adequate to protect the constitutional interests at stake. *Id.* at 792.

In another case restricting imposition of the death penalty, *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court adopted a categorical prohibition against executing people under eighteen, finding that:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

Id. at 572-73. The Court found that juries were ill-equipped to make the subtle distinction between immature but redeemable juvenile offenders and those exhibiting "irreparable corruption." *Id.* at 573. For this reason, the Court enacted a categorical prohibition: "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.*

Similarly, in *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008), the Court invalidated Louisiana's statute allowing the death penalty for the crime of child rape. There, the Court recognized that while community consensus was "entitled to great weight," it was not itself determinative of whether a punishment is cruel and unusual. *Id.* at 2658. The Court stressed that it has consistently "insist[ed] upon confining the instances in which capital punishment may be imposed." *Id.* at 2659. The *Kennedy* Court demanded that careful moral distinctions be made so that the death penalty was truly reserved for the worst crimes by the worst offenders.

Finally, and most recently, the Court has found that the punishment of life without parole violated the Eighth Amendment's ban against cruel and unusual punishment for a juvenile offender convicted of a non-homicide crime. *Graham v. Florida*, 130 S.Ct. 2011 (2010). The *Graham* Court emphasized the need to look beyond community consensus and to consider the individual offender and to determine whether the challenged sentencing practice serves legitimate penological goals. *Id.* at 2026. The Court relied on recent developments in psychological and brain science to further guide its inquiry. *Id.* A punishment lacking any penological justification is by its nature disproportionate to the offense. *Id.* at 2028. While retribution is a legitimate reason to punish, it must be related to the personal culpability of the criminal offender. *Id.*

The holdings in *Atkins*, *Roper, Kennedy, Graham* and *Van Tran* logically compel the conclusion that Article I, Section 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of individuals who suffer from serious mental illness.[10]

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[10] *See Corcoran*, 774 N.E.2d at 502, 503 (Ind. 2002) (Rucker, J. dissenting) ("The underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency."). *See also* RALPH REISNER ET AL., 2002 UPDATE, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 17 (2002) (discussing the logical extension of *Atkins*' protections to persons with mental illness); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 Cath. U. L. Rev. 1133, 1136-37 (2005) ("People with significant mental disorder at the time of the offense may often be culpable enough to deserve conviction for murder, but they are never as culpable as the consummately evil killer envisioned by the Supreme Court's death penalty jurisprudence") [hereinafter Slobogin, *Mental Disorder as an Exemption*]; Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. Rev. 349, 367-68 (2003) ("The *Atkins* decision itself provides ample jurisprudential justification, mutatis

3. The Infliction of Capital Punishment Upon Individuals Who Are Severely Mentally Ill is Contrary to Evolving Standards of Decency

Under the Eighth Amendment, death is an excessive penalty for a crime when it is contrary to "contemporary values" – that is, "the 'evolving standards of decency that mark the progress of a maturing society.'" *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989), *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The "evolving standard," the Court stated in *Atkins*, "should be informed by 'objective factors to the maximum possible extent,'" including the actions of legislatures, juries and prosecutors, but "in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 311-12, citing, *inter alia*, *Coker v. Georgia*, 433 U.S. 584, 597 (1977). *See also Enmund v. Florida*, 458 U.S. 782, 801 (1982). *See also*, *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010) (re-affirming this principle). Furthermore, in *Atkins*, the Court again recognized that social and professional opinions must play a significant role in defining the evolving standards of decency that mark the progress of a maturing society. *Atkins*, 536 U.S. at 316 n.21. Accordingly, the Court in *Atkins* looked

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mutandis, for the exclusion of juveniles and the mentally ill as well as the mentally retarded from capital prosecution."); Douglas Mossman, *Atkins v. Virginia, A Psychiatric Can of Worms*, 33 N.M. L. Rev. 255, 289 (2003) ("Increased knowledge about the biological underpinnings of mental illness may well help convince courts that sufferers of several mental disorders deserve the same constitutional protections that *Atkins* confers upon defendants with mental retardation."); John Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. Rev. 93 (2003); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293 (2003) (there is no rational basis for distinguishing the severely mentally ill and the mentally retarded) [hereinafter Slobogin, *What Atkins Could Mean*].

to the opinions of social and professional organizations with "germane expertise," the opposition to the practice by "widely diverse religious communities," international practice, and polling data, in determining that death is a disproportionate punishment for the mentally retarded. *Id.* These opinions provided ballast for the Court's judgment that there was a consensus opposing the practice of executing the mentally retarded "among those who have addressed the issue." *Id.* (citation omitted). The majority of factors[11] considered by the Court in *Atkins* point directly to a conclusion that death is disproportionate for severely mentally ill defendants.

a. Professional Organizations

As in *Atkins*, professional organizations with relevant expertise are overwhelmingly opposed to the execution of the mentally ill.

The American Bar Association supports a categorical exemption of the severely mental ill from capital punishment:

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[11] There does not appear to be *conclusive* evidence that legislatures, juries and prosecutors view the execution of individuals who suffered from mental illness at the time of the capital offense as disproportionate punishment. *See* Blume and Johnson, *Killing the Non-Willing*, *supra*, at 131-43. *But see* Connecticut General Statutes § 53(a)-46(a) (exempting a capital defendant from execution if "his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution"); *New Jersey v. Nelson*, 803 A.2d 1, 41, 42-44 (N.J. 2002) (Zazzali, J., concurring) ("An examination of *jury verdicts* in New Jersey capital sentencing trials ... shows that attitudes toward those with mental illness or defects are evolving, with a growing reluctance to execute those whose mental disease or defect or intoxication contributes to their difficulty in reasoning about that they are doing.... Notably, *prosecutors* have sought the death penalty at a significantly decreased rate for defendants who present evidence" of mental defects or illnesses; these trends "suggest an evolving aversion in our community to subjecting defendants with mental disease or defects to execution") (emphasis added).

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115, 1115 (2005) [hereinafter *ABA Task Force Recommendations*]. The ABA Recommendations have been adopted by the National Alliance on Mental Illness (NAMI),[12] the National Mental Health Association (NMHA)[13] and the American Psychiatric Association,[14] and were approved by the ABA House of Delegates on August 8, 2006.[15]

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[12] *See* Public Policy Committee of the Board of Directors and the NAMI Department of Public Policy and Research, *Public Policy Platform of the National Alliance on Mental Illness*, § 10.6, at pp. 60-61, (http://www.nami.org/TextTemplate.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=105491) (Updated October 2010). *See also* Laurie Flynn, *No Death Penalty for Persons with Severe Mental Illnesses*, National Alliance on Mental Illness, at (http://www.nami.org/Content/ContentGroups/Press_Room1/1998/January_1998/No_Death_Penalty_For_Persons_With_Severe_Mental_Illnesses_hr__i_Statement_By_Laurie_M__Flynn,_Execut.htm (released Jan. 12, 1998) (Updated October 2010).

[13] *See NMHA Position Statement: Death Penalty and People with Mental Illness*, National Mental Health Association, *at* http://www.nmha.org/go/position-statements/54 (approved June 11, 2006) (Updated October 2010).

[14] *See* American Psychiatric Association, *Position Statement: Diminished Responsibility in Capital Sentencing*, American Psychiatric Association, at: http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx (approved Dec. 2004) (Updated October 2010).

[15] *See ABA Online Media Kit: News from the Annual Meeting*, American Bar Association, at http://www.abavideonews.org/ABA374/index.php (Updated October 2010).

Virtually every major mental health association in the United States that has addressed the issue of the execution of mentally ill offenders vigorously supports either an outright ban or a moratorium until an adequate comprehensive evaluation system is implemented. The National Alliance for the Mentally Ill (NAMI) believes that "the death penalty is *never* appropriate for a defendant suffering from schizophrenia or other serious brain disorders."[16] The National Mental Health Association (NMHA) takes a similar position.

Indeed, mental health organizations unanimously agree that the current capital punishment system inadequately addresses the complexity of issues inherent in cases involving mentally ill defendants.[17] Like the NMHA, the American Psychological Association (APA) has explained that too many "procedural problems, such as assessing competency," render capital punishment unfair to the mentally ill. American Psychological Association, *Resolution on the Death Penalty in the United States*, available at http://www.apa.org/pi/deathpenalty.html (adopted Aug. 2001). According to the APA, these procedural inadequacies fall far short of the "basic requirements of due process." *Id.*

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[16]*See* Laurie Flynn, *No Death Penalty for Persons with Severe Mental Illnesses*, National Alliance on Mental Illness, *supra* note 6.

[17]*See, e.g.*, American Psychiatric Ass'n, *Moratorium on Capital Punishment in the United States: Position Statement*, APA Document Ref. No. 200006, at: http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200006.aspx (approved Oct. 2000) (Updated October 2010); American Psychological Ass'n, *Resolution on the Death Penalty in the United States*, at: http://www.apa.org/about/governance/council/policy/death-penalty.aspx (adopted Aug. 2001) (Updated October 2010).

The former president of the American Psychiatric Association, Dr. Alan A. Stone[18], has written that:

> From a biopsychosocial perspective, primary mental retardation and significant Axis I disorders [such as schizophrenia] have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens' words, 'do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.' 'Evolving standards of decency' mean many different things to different people. But an important part of our standards of decency derive from our scientific understanding of behavior. I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.

Alan Stone, *Supreme Court Decision Raises New Ethical Questions for Psychiatry*, Psychiatric Times (September 2002; Vol. XIX; Issue 9) (available at: http://www.psychiatrictimes.com/p020901b.html (visited September 27, 2010), *cited in Mossman*, *supra*.

The conclusion of the experts in this field is clear. Severely mentally ill people, like Stephen West, should be exempt from the death penalty.

b. International Legal Standards

The Human Rights Committee of the United Nations has interpreted the International Covenant on Civil and Political Rights (ICCPR) to forbid the execution of persons with severe mental illness. *See* William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Crim. L.F. 95, 100-01 (1993). *See also* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174. In addition, the United Nations Commission on Human Rights has

[18]Dr. Stone is also Touroff-Glueck Professor of Law and Psychiatry in the faculty of law and the faculty of medicine at Harvard University.

consistently adopted resolutions calling on all states that maintain the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."[19] The Commission has interpreted the phrase "mental disorder" to encompass both mental illness and mental retardation. As recently as 2000, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions called on the United States "to take immediate steps to bring [its] domestic legislation and legal practice into line with the international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons."[20]

Thus, just as in *Graham, Atkins* and *Roper*, where international law and considered professional opinion weighed against extreme punishments of persons with diminished culpability due to youth or mental retardation, international law and professional opinion strongly suggest that the severely mentally ill should not be subject

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[19] *See The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 1991/61, ¶ 3(e), U.N. Doc. E/CN.4/RES/1999/61 (April 28, 1999); *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2000/65, ¶ 3(e), U.N. Doc. E/CN.4/RES/2000/65 (Apr. 27, 2000), *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2001/68, ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001); *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2002/77, ¶ 4(f), U.N. Doc. E/CN.4/RES/2002/77 (Apr. 25, 2002); *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2003/67, ¶ 4(g), U.N. Doc. E/CN.4/RES/2003/67 (Apr. 24, 2003); *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2004/67, ¶ 4(c), U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *The Question of the Death Penalty*, U.N. Commission on Human Rights Res. 2005/59, ¶ 7(c), U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005)

[20] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, delivered to the Economic and Social Counsel, Commission on Human Rights*, ¶ 97, U.N. Doc. E/CN.4/2000/3 (Jan. 25, 2000). *See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Summary of cases transmitted to Governments and replies received, ¶ 771, delivered to the Economic and Social Counsel, Commission on Human Rights*, U.N. Doc. E/CN.4/2005/7/Add.1 (Mar. 17, 2005) (protesting the imminent execution of a Texas defendant with schizophrenia who had been allowed to represent himself).

to execution. *See* Anthony Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. Tex. L. Rev. 1115, 1138-39 (2002).

c. Public Opinion

Furthermore, as in *Atkins*, polling of the citizens of this country makes clear that Americans overwhelmingly reject death as punishment for the mentally ill. According to a Gallup Poll taken in 2002, 75 percent of those surveyed opposed executing the mentally ill, while only 19 percent supported it. The poll surveyed 1,012 Americans across the country from May 6-9 of 2002. *See* http://www.pollingreport.com/crime.htm (visited September 27, 2010). Such data constitute "'objective evidence of how our society views a particular punishment today.'" *Van Tran*, 66 S.W.3d at 801, *quoting Penry*, 492 U.S. at 331 (citations omitted).

d. State Legislatures

Furthermore, across the country, members of state legislatures have introduced legislation aimed at preventing the execution of the mentally ill. Most states with capital punishment already list mental illness as a statutory mitigating circumstance that must be considered if it is raised. However, some legislatures are considering an outright ban. Such a ban already exists in Connecticut. CONN. GEN. STAT. § 53a-46a(h)(3) (2009). In North Carolina and Kentucky, both neighboring states to Tennessee,

legislators have introduced bills to ban the execution of the severely mentally ill.[21] Indiana also has a senate bill pending.[22]

e. State Justices' Opinions

Because knowledge about the seriousness and complexity of mental illness is increasing among members of the judiciary, more concurring and dissenting opinions are addressing this issue. Justice Pfeifer of the Ohio Supreme Court stated in a stirring dissent that:

> Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so .... I believe that executing a convict with a severe mental illness is cruel and unusual punishment.

State v. Scott, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting).

In another Ohio case, the Chief Justice expressed similar concerns:

> I am persuaded by clear evidence in the record that appellant suffers from a severe mental illness. On the record before us, I cannot conclude beyond a reasonable

[21]In North Carolina, Representative Insko of the House and Representative Kinnaird of the Senate both proposed a bill entitled, "An Act to Amend the Capital Trial, Sentencing, and Post-Conviction Procedures for a Person With a Severe Mental Disability." This bill would have prohibited the death penalty for a "defendant with severe mental disability at time of commission of criminal offense." In Kentucky, HB16 10RS entitled "An Act relating to mental illness," was proposed to do the following: "Amend KRS 532.130 (defining mental retardation and juvenile defendants for this section) to define severe mental illness; amend KRS 532.135 to include a severely mentally ill defendant; amend KRS 532.140 (banning the execution of the mentally retarded defendant) to include severely mentally ill offender and to establish effective date."

[22]In Indiana, Senate Bill No.22 proposes to "[p]rohibit[] the imposition of the death penalty on a defendant found to be an individual with a severe mental illness."

> doubt that Vrabel's mental illness did not causally contribute to his tragic criminal conduct, thereby reducing his moral culpability to a level inconsistent with the imposition of the ultimate penalty of death.

State v. Vrabel, 790 N.E.2d 303, 319-21 (Ohio 2003) (Moyer, J., dissenting).

Yet another justice from that court has called for ending the practice of executing the severely mentally ill:

> *Atkins* identified "'retribution and deterrence of capital crimes by prospective offenders'" as the social purposes served by the death penalty. *Id.* at 319, 122 S.Ct. 2242, 153 L.Ed.2d 335, quoting *Gregg v. Georgia* (1976), 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859. *Atkins* noted that there was a serious question as to whether either justification applied to mentally retarded offenders. *Id.* at 321, 122 S.Ct. 2242, 153 L.Ed.2d 335. I too question whether either justification applies to severely mentally ill offenders.
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> Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities. As for retribution, capital punishment still enjoys wide public support among Americans, but a Gallup Poll conducted in October 2003 found that while almost two thirds of Americans surveyed support the death penalty, 75 percent of those surveyed in 2002 opposed executing the mentally ill. Kevin Drew, Arkansas Prepares to Execute Mentally Ill Inmate. CNN.com. Jan. 5, 2004, at http://www.cnn.com/2004/LAW/01/05/singleton.death.row/index.html?iref=storysearch (Updated October 2010).

State v. Ketterer, 855 N.E.2d 48, 84-85 (Ohio 2006) (Lundberg Stratton, J., concurring).

In an Indiana case before the state Supreme Court, Justice Rucker wrote in dissent that:

> The underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.

Corcoran, 774 N.E.2d at 502, 503 (Ind. 2002) (Rucker, J. dissenting).

In a Pennsylvania case Supreme Court Justice Todd wrote in dissent:

> Our legal system struggles with how to fairly allocate criminal liability and criminal punishment to individuals whose mental illness leaves them with diminished capacity for moral decision-making. Some defendants, we recognize, are so impaired in this regard that to assign any criminal liability to them would be inequitable. In those cases, the law requires a verdict of not guilty by reason of insanity. See 18 Pa.C.S.A. § 315. Other defendants are less impaired but still impaired enough that the opprobrium of a conviction should be mitigated by a recognition of their condition. In those cases, the law requires a verdict of guilty but mentally ill.
>
> An individual with a serious mental illness may be just as seriously impaired in his ability to "understand and process information" as an individual with a diminished IQ or an individual who has not yet reached the age of legal majority. Moreover, while mental illness is no more an unavoidable cause of criminal conduct than mental retardation or being a juvenile, its manifestations-such as the delusions that accompany paranoid schizophrenia-hamper a sufferer's ability to "engage in logical reasoning," and the disconnect between a paranoid schizophrenic's basic understanding of the world around him and that of an individual not similarly afflicted will make it difficult for the schizophrenic to understand others' reactions.

Commonwealth v. Baumhammers, 960 A.2d 59, 74, 79 (Pa. 2008) (Todd, J., dissenting).

In a New Jersey case, Justice Zazzali wrote in his concurring opinion that:

> Executions, our most extreme expression of indignation, cannot be carried out on a defendant whose irrationalities were exacerbated at the time of her criminal acts to such an extent as to undermine our confidence that she is fully culpable. If capital punishment is constitutional, it must be reserved for those defendants whose capacities allow them to be fully culpable, so that the death penalty can exact its intended retributive value.

State v. Nelson, 803 A.2d 1, 47 (N.J. 2002) (Zazzali, J., concurring).

These jurists, who review the country's death penalty cases, have recognized that executing the severely mentally ill serves no legitimate purpose. Rather, the practice violates the ban on cruel and unusual punishments and must be discontinued.

f. Governors

Where the legislatures and the courts have failed to act, some state Governors have used their power as the failsafe of justice to commute death sentences for the severely mentally ill. In 2008, Governor Timothy M. Kaine of Virginia granted clemency to Percy Levar Walton due to Walton's severe mental illness. See the Governor's public statement at: http://www2.wsls.com/news/2008/jun/09/gov_kaine_commutes_percy_waltons_death_sentence-ar-469193/ (Updated October 2010). Also, in 1999, then Virginia Governor James Gilmore commuted the death sentence of Calvin Swann where Swann was said to have suffered from schizophrenia. Governor Gilmore stated that he had, "the solemn responsibility to intervene in the judicial process to commute a prisoner's death penalty where I believe justice and mercy compel such action." *See* the Governer's public statement at: http://www.washingtonpost.com/wp-srv/local/daily/may99/swann13.htm (Updated October 2010). And Governor Mitch Daniels of Indiana commuted the death sentence of Arthur Baird II to life without parole. Baird was said to have been psychotic when he committed the murders for which he was sentenced to death. Governor Daniels stated that he changed the sentence, in part, because the victim's family believed that Mr. Baird deserved a lesser sentence because of his severe mental illness. See the executive clemency order at:

http://www.in.gov/gov/files/EO_05-23_Clemency_Arthur_Baird_II.pdf (Updated October 2010).

All of these sources demonstrate that the execution of defendants who were seriously mentally ill is contrary to the evolving standards of decency that mark the progress of a maturing society. Accordingly, this Court should hold that Article 1, §§ 8, 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments require a categorical exemption to capital punishment for those who were seriously mentally ill at the time of the offense.

4. A Categorical Prohibition against Executing Offenders with Severe Mental Illness is Necessary to Protect Their Rights to be Free of Cruel and Unusual Punishment.

Relying on juries to weigh the mitigating value of mental illness is inadequate to protect the right of mentally-ill defendants to be free of cruel and unusual punishment: "Juries and judges, like people generally, harbor hostile attitudes toward people with mental disability. Numerous studies document that capital sentencing juries tend to devalue evidence of significant mental disorder, often treating it as an aggravating circumstance rather than a mitigating one. And prosecutors routinely play to this bias." Slobogin, *Mental Disorder as an Exemption*, *supra*, at 1150-51 (*citing* Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 Mental & Physical Disability L. Rep. 667, 669-70 (2000) (describing studies that show juries treat mental disability as an aggravating circumstance) [hereinafter Slobogin, *Mental Illness*]).

In its *Position Statement on Diminished Responsibility in Capital Sentencing*, *available at*

http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx (approved Dec. 2004) (Updated October 2010), the American Psychiatric Association voiced its concern that juries commonly misapply evidence of severe mental illness:

> Even though defendants with mental illness are entitled to introduce mental health evidence in mitigation of sentence, commentators on capital sentencing have often observed that juries tend to devalue undisputed and strong evidence of diminished responsibility in the face of strong evidence in aggravation. Indeed, such evidence is often a double-edged sword, tending to show both impaired capacity as well as future dangerousness.[23]

In *Atkins* and *Roper*, the Court recognized that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation and youth. This reasoning applies *a fortiori* to the issue of severe mental illness. As with mental retardation, mental illness "can be a two-edged sword that may enhance the likelihood that the aggravating [fact] of future dangerousness will be found by the jury." *Atkins*, 536 U.S.

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[23] *Id.* (citing Phyllis Crocker, *Concepts of Culpability and Deathworthiness: Differentiating between Guilt and Punishment in Death Penalty Cases*, 22 Fordham L. Rev. 21 (1997); Richard J. Bonnie and C. Robert Showalter, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 Bulletin of the American Academy of Psychiatry and Law 159-67 (1984)). *See also* Amnesty International, *The Execution of Mentally Ill Offenders* 69, available at http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf (Jan. 31, 2006) (Updated October 2010) (citing Lawrence T. White, *The Mental Illness Defense in The Capital Murder Hearing*, 5 Behav. Sci. & L. 411 (1987) (suggesting that the available research indicates that a mental illness defense at a capital penalty phase will be ineffective because 1) death qualified jurors do not respond favorably to psychological explanations of criminal behavior, and 2) such a defense may mislead jurors into believing the defendant has a high probability of future dangerousness); Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409, 420 (1990); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26 (2000)).

at 321. Numerous courts have so recognized. *See, e.g., Boyle v. Johnson*, 93 F.3d 180, 187-88 (5th Cir. 1996) (attorney's decision not to pursue mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies); *Williams v. Angelone*, 1999 U.S. App. LEXIS 8139, at *14 (4th Cir. 1999) ("Although evidence that a defendant suffers from a mental impairment or has a history of being abused as a child may diminish his blameworthiness for his crime, this evidence is a double-edged sword that a sentencer could well find to be aggravating rather than mitigating"). *See also* Stephen Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 57-58 (2000) (analysis of Capital Jury Project data). Capital juries are likely to treat mental illness as an aggravator, in part because they incorrectly assume that mental illness significantly increases future dangerousness, and are ill-equipped to appreciate the role of mental illness in criminal behavior. Such misuse of mental illness evidence unbalances the process by which mitigating and aggravating factors are weighed, and impermissibly increases the chances that a mentally ill offender will receive the death penalty. As with juvenile offenders and the mentally retarded, only a categorical ban on executing offenders who were severely mentally ill at the time of the crime can adequately protect their constitutional rights.

Further, executing those who were mentally ill is fundamentally unfair. In *Atkins*, the Court cited the enhanced risk faced by retarded defendants "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" as another

justification for holding that they should be categorically excluded from eligibility for the death penalty. *Atkins,* 536 U.S. at 320, quoting *Lockett*, 438 U.S. at 605. Severely mentally ill defendants, such as the petitioner, face similar obstacles in "mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." *Atkins*, 536 U.S. at 320. Mental illness, like significant cognitive limitations, sharply constricts a defendant's ability "to give meaningful assistance to their counsel." *Id.*

In short, it is not enough to allow jury consideration of mental illness as mitigation because mental illness, like mental retardation, can be a double-edged sword. Rather, as with mental retardation, the Court must read the Eighth Amendment to contain a categorical exemption for those who suffer from severe mental illness.

5. The Infliction of Capital Punishment upon Individuals Who Are Mentally Ill Makes No Measurable Contribution to the Acceptable Goals of Punishment and Is Nothing More Than the Purposeless and Needless Infliction of Pain and Suffering.

The United States Supreme Court has held that the death penalty is excessive when "it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.'" *Penry*, 492 U.S. at 335, *quoting Coker*, 433 U.S. at 592. The Court has identified "'two principal social purposes'" served by capital punishment: "'retribution and deterrence of capital crimes.'" *Penry*, 492 U.S. at 335-36, *quoting Gregg*, 428 U.S. at 183. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court held that, "unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and

needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id.* at 798, *quoting Coker*, 433 U.S. at 592.

Capital punishment inflicted on individuals who were seriously mentally ill is nothing more than the purposeless and needless imposition of pain and suffering. It makes no measurable contribution to the acceptable goals of punishment, and fails to serve any legitimate penal purpose more effectively than a less severe penalty, including both retribution and deterrence.

a. Retribution is not served by executing those who were mentally ill.

The United States Supreme Court has explained that "retribution as a justification for executing [offenders] very much depends on the degree of [their] culpability." *Enmund*, 458 U.S. at 800. Moreover, culpability is not based solely upon the magnitude of harm resulting from the offense. "[F]or purposes of imposing the death penalty ... punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Id.* at 801. The rationale of the Court's acceptance in *Atkins* that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty should lead to the conclusion that the seriously mentally ill are likewise ineligible.

The characterizations of the mentally retarded relied upon by the Court in *Atkins* in reaching its holding apply with equal force to those who suffered from severe mental illness such as schizophrenia at the time of the offense. *See California v. Danks*, 82 P.3d 1249, 1285 (Cal. 2004) (Kennard, J., concurring and dissenting) (quoting *Atkins*, 536 U.S. at 318). Moreover, lessened maturity and volitional control was a central

component of the Court's determination that the execution of juvenile offenders violates the Cruel and Unusual Punishments Clause. *See Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity"). By the same token, "[o]ften persons experiencing symptoms of mental disabilities have cognitive impairments and distortions of reality that reduce their culpability in ways that are similar to, but arguably even more substantial than, the developmental shortcomings of 16 and 17 year olds." *Parry*, *supra*, at 668.

Of all serious mental illnesses, schizophrenia is among the most mitigating, since it often distorts perception and judgment, leading sufferers to take actions based on delusions about the people and situations around them:

> Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia .... 'The characteristic symptoms of Schizophrenia involve a range of cognitive and emotional dysfunctions that include perception' .... Symptoms include delusions, which are 'erroneous beliefs that usually involve a misinterpretation of perceptions or experiences.'

Clark v. Arizona,548 U.S. 735, 783 (2006) (Kennedy, J., dissenting) (quoting DSM-IV-TR at 299). Stephen West has been diagnosed with schizophrenia as well as schizoaffective disorder which is characterized by symptoms of schizophrenia. Attachment G, Kenner Affidavit, paragraphs 4-5.

The rationale of *Atkins v. Virginia* applies with equal force to persons with severe mental illness such as schizophrenia and schizoaffective disorder, which as explained more fully in the introductory paragraph of this brief section are "devastating brain

disorders." Persons who are severely mentally ill have significantly reduced moral culpability. Therefore, their executions will not serve the goal of retribution.

b. Deterrence is not served by executing those who were seriously mentally ill.

Defendants who suffer from severe mental illness will not be deterred from committing their offenses by the threat of capital punishment. "The characteristic symptoms of schizophrenia," for example, "involve a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring...volition and drive, and attention." DSM-IV-TR, *supra*, at 299. As a result of these dysfunctions, schizophrenics often hold bizarre beliefs and make decisions based on distorted perceptions of reality. *Id.* As Justice Powell noted, "the death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring), *citing Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982).

As with juveniles and the mentally retarded,[24] the fear of execution, even if it deters some, cannot plausibly be thought to deter mentally ill persons.

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[24] In *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) the Court observed that, for murderers under the age of sixteen, "the likelihood that the ... offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." In *Roper v. Simmons*, the Court noted that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles", finding that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. In *Atkins*, the Court said that, for mentally retarded offenders, the "cold calculus" of cost and benefit is "at the opposite end of the spectrum from behavior." *Atkins*, 536 U.S. at 319.

Medical knowledge, logic, and the precedent of the Supreme Court dictate the conclusion that the death penalty can serve no legitimate penological purpose when applied to defendants who are seriously mentally ill. The capital sentencing of persons determined to be seriously mentally ill amounts to the purposeless infliction of needless pain and suffering because it fails to advance either retribution or deterrence. "A defendant cannot be used as an example to others, through her execution, if it is unjust to put her to death because of lessened culpability." *New Jersey v. Nelson*, 803 A.2d 1, 41, 48 (N.J. 2002) (Zazzali, J., concurring), *citing* H.L.A. Hart, *Prolegomena to the Principles of Punishment, in Punishment and Responsibility* 1-27 (1968) (arguing that general deterrence justifies practice of punishment, but allocation of punishment on specific occasion must be deserved). As the Tennessee Supreme Court recognized in *Van Tran*, "inflicting the death penalty on a mentally defective person" in the absence of a legitimate penological objective "becomes a process in which society seeks vengeance, not retribution or deterrence. Such a result is neither civilized, nor humane." *Van Tran*, 66 S.W.3d at 808, *quoting* Bicknell, *supra*, at 368.

Conclusion

It is cruel and unusual punishment to execute a person for crimes that were inextricably rooted in his mental illness. The execution of severely mentally ill persons debases us all. In their dissent in the lower court opinion in *Atkins*, Justices Hassell and Koontz movingly wrote:

> It is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes

> itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.

Atkins v. Virginia, 534 S.E.2d 312, 395, 397 (Va. 2002) (Hassell, J., & Koontz, J., dissenting). The very same must be said about the severely mentally ill, who kill not by rational choice but because of "a dagger of the mind, a false creation, proceeding from the heat-oppressed brain." William Shakespeare, *Macbeth* act 2, sc. 1. Just as the United States Supreme Court has found for juveniles and the mentally retarded, this Court should find that when a seriously mentally ill offender "commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a [lucid] understanding of his own humanity." *Roper*, 543 U.S. at 573. This Court should hold that Article 1, §§ 8, 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments contain a categorical exemption to capital punishment for those who were severely mentally ill at the time of the offense.

This Court must reopen Mr. West's post-conviction petition.

V. RELIEF REQUESTED

WHEREFORE, Mr. West respectfully requests this Court:

(1) grant permission to appeal whether the lower courts abused their discretion when they denied Mr. West's Motion to Reopen His Post-Conviction Petition; and,

(2) should this Court determine that further evidence is required to support Mr. West's allegations of constitutional error, that Mr. West's Execution be stayed and the case be remanded for a full evidentiary hearing; and,

(3) for such other relief as deemed proper in the interests of justice.

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was emailed and Fed Ex overnight to:

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this the 3rd day of November, 2010.

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