No.

IN THE

SUPREME COURT OF THE UNITED STATES

MILTON LATTIMORE, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a person who is fit to stand trial only with special conditions is denied due process when the trial court accepts a guilty plea entered without use of those special conditions?

TABLE OF CONTENTS

INDEX TO APPENDIX

Appendix A: Illinois Appellate Court's decision filed on January 9, 2020, affirming the defendant's conviction and sentence. *People v. Lattimore*, 2020 IL App (5th) 170194-U. Appendix B is the petition for rehearing denial.

Appendix B: The order of the Illinois Appellate Court denying rehearing (Appendix B) is not reported

Appendix C: Illinois Supreme Court's order filed on November 24, 2021, denying Petitioner's petition for leave to appeal. *People v. Milton Lattimore*, No. 125864 (November 24, 2021).

Appendix D: Fitness evaluation by Dr. Cuneo, March 18, 2010

Appendix E: Fitness evaluation by Dr. Rabun, April 1, 2010.

Appendix F: Fitness evaluation by Dr. Cuneo, July 6, 2011.

Appendix G: Report of proceedings from the August 3, 2011 fitness restoration hearing

Appendix H: Miranda evaluation by Dr. Cuneo, September 11, 2012.

Appendix I: Sanity evaluation by Dr. Cuneo, May 21, 2013.

Appendix J: Guilty plea hearing, October 2, 2013.

TABLE OF AUTHORITIES

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PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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To The Appellate Court Of Illinois

The petitioner, Milton Lattimore, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2020 IL App (5th) 170194-U, and is not published. The order of the Illinois Appellate Court denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 2021 WL 6500358 (Table)(November 24, 2021).

JURISDICTION

On January 9, 2020, the Appellate Court of Illinois issued its decision. A petition for rehearing was timely filed and denied on February 11, 2020. The Illinois Supreme Court denied a timely-filed petition for leave to appeal on November 24, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Milton Lattimore is intellectually disabled and mentally ill. (R.C380-1) Milton began special education classes by first grade and began receiving Supplemental Security Income for his intellectual disability at age 6. (R.C380,381) He also was diagnosed with attention deficit hyperactivity disorder. (R.C380) As a child, he heard voices telling him to light fires and kill himself. (R.C380) Milton never obtained a driver's license, had a bank account, held a job, or "shopped on his own." (R.C382; C390) In December 2009, at age 21, Milton was arrested and charged with three counts of first degree murder. (R.C12-14)

On January 12, 2010, the trial court appointed Dr. Cuneo to evaluate Milton's fitness to stand trial. (R.C21) On March 15, 2010, Dr. Cuneo found Milton did not know the day of the week or the year. (R.C379, Appendix D) When pushed, "he could only shrug, [and responded] 'It seventh week.'" (R.C379) Milton exhibited "extremely concrete" thinking "consistent with his very limited intellectual abilities." (R.C380) He scored at or below the second percentile on all of the subtests of the WAIS-III and exhibited a full-scale IQ of 54, verbal IQ of 60, and performance IQ of 57, placing him in the mild mentally retarded range of intelligence. (R.C380) He had an "extremely limited" fund of general information, and he did not know the number of months in a year or from "what direct[ion] the sun rose." (R.C380) Dr. Cuneo reported that Milton functioned "in the bottom 1 % of the nation," with "overall cognitive abilities" of a nine to ten year old." (R.C380) He had "grossly impaired" short and long-term memory. (R.C380) Dr. Cuneo found that Milton had "an extremely low frustration tolerance" and would "quickly decompensate into anger when placed under the slightest stress."

(R.C380) His anger caused him to be depressed and suicidal, and he tried to "hang himself" at the jail. (R.C380-81) When his anger turned outward, he lashed out at others. (R.C381)

Dr. Cuneo diagnosed Milton with a non-specified psychotic disorder, alcohol and polysubstance dependence, mild mental retardation, and borderline personality traits. (R.C382) He opined that these disorders "substantially impaired his ability to understand the nature and purpose of the proceedings against him and his ability to assist in his own defense." (R.C382) He was unable to "grasp the adversarial roles in the court even after repeated" explanations. (R.C382) Milton believed "that the state's attorney, judge, and public defender were all there to help him." (R.C382) "He could not understand how a person would be found guilty or not guilty." (R.C382) His impairments made communicating with his attorney in any meaningful way or assisting in his own defense very difficult. (R.C382) Dr. Cuneo found him unfit, but thought that he could probably attain fitness within a year with treatment and medication. (R.C382)

At the State's request, Dr. Rabun examined Milton on April 1, 2010. (R.C389, Appendix E) He also concluded that Milton was unfit. (R.C391-92) When Dr. Rabun explained the purpose of the evaluation, Milton "stared blankly at [him], appearing not to understand." (R.C389) Dr. Rabun confirmed the diagnosis of mild mental retardation and intellectual functioning "below 98% of the general population." (R.C390, 392) Milton showed trouble with language, and Dr. Rabun "often had to use simple terms [and] explain concepts" in order to communicate. (R.C390) He also "rejected the possibility of malingering" and "found no evidence to suggest" it. (R.C391)

The court found Milton unfit. He was transferred to Department of Human Services custody at Chester Mental Health Center. By March 28, 2011, Milton "thought he was fit" and wanted to go back to court and get his trial "over with." (R.C413-17) A facility doctor found that Milton could communicate appropriately, assist counsel in his defense, and was fit to stand trial; but continuing proper treatment with medication was "imperative." (R.C418)

On July 6, 2011, Dr. Cuneo indicated that Milton was oriented to time, "a striking improvement." (R.C384-85, Appendix F) Milton had "been medication compliant for roughly four months and ha[d] stabilized," including no longer hearing voices. (R.C385-7) He still had limited vocabulary and functioned at the nine to ten-year-old level. (R.C387-88) Dr. Cuneo opined that Milton had "a very basic understanding of the concepts of plea bargaining." (R.C388) Dr. Cuneo concluded that Milton was "fit to stand trial with special provisions," including: continued medication, use of simple vocabulary at a nine to ten-year-old level, with periodic questioning to ensure he understood. The special provisions prohibited yes-or-no questions. (R.C388) Instead, the court should ask Milton to explain in his own words what was happening. (R.C388)

At the restoration hearing on August 3, 2011,[1] the parties stipulated that Drs. Vallabhaneni (the facility doctor) and Cuneo would testify consistently with their reports. (R.C54,58; Appendix G) The court briefly questioned Milton. (R.C58-9) Milton knew that he was in court because "[t]hey found me fit" and that his attorney was

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[1]Judge Milton S. Wharton presided over this hearing. (R.C55-56) Judge John Baricevic presided over all subsequent proceedings except the March 21, 2017 hearing after the second remand. (R.C139,177,217,238,473)

there "[t]o help" him; he did not know who the State's attorney was or his job – only that the "prosecutor" was "against" him. (R.C58-9)

The court found Milton fit with its own special provisions:

> So long as he continues with his psychotropic medications, so long as communications are kept at a nine to ten year old level, and the Court would order that periodic checks be made each month to verify that the Defendant continues . . . to be fit to stand trial.

(R.C59) Milton returned to the county jail. (R.C63) In the written order, the trial court indicated that he was fit "with special provisions as recommended by Dr. Cuneo." (R.C55)

Dr. Cuneo again evaluated Milton on September 11, 2012, to determine his ability to knowingly and voluntarily waive his *Miranda* rights prior to his 2009 police interrogation. (R.C88-9; Appendix H; C424) During the evaluation, Milton reported that he had heard voices a few days earlier. (R.C425) He told Dr. Cuneo that he was not receiving his medication and did not "want to go into the Quiet Room and be naked." (R.C425) Dr. Cuneo administered "the Reading Subtest of the Wide Range Achievement Test-3." (R.C425) Milton "only scored at the third grade level" on the reading subtest, and was not able to read words such as stretch or bulk. (R.C427) His short and long-term memory were impaired. (R.C427) During the evaluation, he exhibited "an inappropriate smile," "a wide eyed stare," and rapid speech. (R.C427,434) Dr. Cuneo concluded that Milton did not have the ability to waive his *Miranda* rights knowingly and intelligently. (R.C428) He reiterated that Milton was "severely intellectually limited" with severe reading difficulties. (R.C428) Milton could not read all of the rights or "such simple words as 'questions,' or 'answering.'" (R.C429)

At the time of Dr. Cuneo's second evaluation, Milton still did "not have the

ability to understand all of the" *Miranda* rights when Dr. Cuneo read them to him. (R.C429) He did not understand his right against self-incrimination or that his statements could be used against him in court. (R.C429) Milton told Dr. Cuneo that when in court, he would ask his attorney questions, but "[s]ometimes [he would] say something and mess up." (R.C429) He also asked if the right to stop answering questions was "Like when you stop me from answering questions? Like you stop me?"" (R.C429) And finally, he thought that he "[h]ad to talk to police" because they told him to and he was scared. (R.C429)

Dr. Cuneo found Milton "easily led," as evidenced in the interrogation tape. (R.C429) His intellectual disability made him even more suggestible when confronted with an authority figure. (R.C429) Dr. Cuneo concluded that Milton's mental illnesses "substantially impaired his ability" to waive his *Miranda* rights. (R.C430) At the State's request, Dr. Rabun evaluated Milton again and agreed that he could not knowingly and voluntarily waive his *Miranda* rights.[2] (R.C93; C116-17)

On May 21, 2013, Dr. Cuneo saw Milton again to evaluate his sanity at the time of the incident and need "for special provisions pursuant to *People v. Watters*," 231 Ill. App. 3d 370, 383 (5th Dist. 1992). (R.C106; C435; Appendix I) Dr. Cuneo noted that officials had discontinued Milton's medications on January 24, 2013, after he had refused them. (R.C435) Milton later requested to restart them, and Dr. Cuneo "strongly recommend[ed] that he go back on his psychotropic medication or he will decompensate into psychosis, much as he has in the past." (R.C435) Dr. Cuneo concluded that "Milton

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[2] This full evaluation does not appear in the appellate record, but trial counsel cited to the report and Dr. Rabun's conclusions in a motion to suppress statements filed June 17, 2013. (R.C116-17)

was suffering from a substantial disorder of thought, mood, and behavior . . . at the time of the alleged offense which severely impaired his judgment and effected his behavior," but that he was able to appreciate the criminality of his conduct. (R.C436) Dr. Cuneo thought that Milton knew "that shooting someone is wrong and could cause death." (R.C436) Dr. Cuneo opined that he was legally sane and "would qualify for a Guilty But Mentally Ill plea." (R.C436)

On October 2, 2013, in anticipation of a guilty plea, the State filed an amended criminal information charging Milton with one count of first degree murder "with a dangerous weapon." (R.C137) He pled guilty but mentally ill to the single count of the new information, and his attorney agreed not to request fewer than 30 years in prison. (R.C137-38,141) In exchange, the State agreed to dismiss the original three count indictment. (R.C142) In response to a series of yes-or-no questions, Milton indicated that he was taking medication but that it did not affect his ability to understand the proceeding; that he would stop the judge or ask counsel if he did not understand; that he had enough time to speak to counsel; and that he understood the charges against him. (R.C143-44) The court did not ask Milton to explain in his own words the previous questions or his answers.

The court then informed Milton that each of the original charges "are not probationable" and "carry" sentences of 45 years to life and a fine of up to $25,000. (R.C144) The court added that if he were convicted of all three charges, then he would be sentenced to life without parole. (R.C144) The court informed Milton that the new charge was also not probationable and had a sentencing range of 20 to 60 years with 3 years of mandatory supervised release that would be served at 100 percent. (R.C144-

45) The court then informed Milton that by pleading guilty, he would be giving up certain constitutional rights. (R.C145) In paragraph form, the court detailed his trial rights. (R.C145-46) Milton responded to the court's yes-or-no questions. (R.C146) The State asserted its factual basis. (Appendix J at R.C147-51) At no point in the proceeding in which Milton pled guilty did the court ask him to explain in his own words what he had heard, said, or done.

Before sentencing, Milton filed a *pro se* motion seeking new counsel due to "ineffective assistance of counsel." (R.C155-58) He alleged that there was a breakdown of communication, that counsel told him that he would die in prison unless he took the plea, that he had difficulty understanding counsel due to his mental problems, and that he and counsel "were always in conflict about me going to trial." (R.C156)

The parties appeared in court on November 25, 2013, the date originally set for sentencing. (R.C164-74) Milton told the court:

> My mother – My mother – My mother have me a new attorney. So, I want to get rid of Mr. Thomas Keefe because my mother have me a new attorney. And I don't want to take the plea.

(R.C166) The court informed him that he "already took a plea," and Milton responded, "I want to withdraw the plea." (R.C166) Milton's mother confirmed that she had contacted an attorney but he was not present; the attorney had told her "to see what was going on first, and then he'll take over." (R.C168)

In response to the court's questions, Milton said that he had not understood what counsel told him and that he pled guilty because counsel said his mother said "to take the plea." (R.C168) However, he "wanted to get [his] motion and stuff like that." (R.C168) Milton stated that he did not understand what was happening at the plea

hearing because he had not taken his medicine. (R.169) He "didn't want to plead guilty to something [he] didn't do." (R.C169-70) The court denied Milton's motion for new counsel. (R.C163,170) It told him that he could hire counsel of his choosing at any time. (R.C171) When asked if he had any questions, Milton stated, "I want to – I say I want to take the plea back. I don't want to plead guilty to it." (R.C172) The court told him he had to wait until after sentencing. (R.C172)

The trial court sentenced Milton to 55 years in prison. (R.C206-7) After sentencing, defense counsel filed a timely motion to withdraw the guilty plea, referencing Milton's complaints in court on November 25. (R.C214-16) Milton also filed a timely *pro se* motion, seeking to withdraw his plea or have the court reconsider his sentence. (R.C229-30) The court appointed a new attorney to represent Milton on his motion to withdraw the plea. (R.C237) At the March 18, 2014 hearing, Milton testified that his prior defense counsel had threatened him with violence. (R.C241) Milton testified that his attorney told him he would die in prison, but Milton told him "no, I want a trial." (R.C241) He said that his attorney incorrectly told him his mother said to take the plea. (R.C242-43) Finally, Milton reported that he saw the plea agreement but did not read it. (R.C243) He reported counsel first told him that the State could argue for 60 years and he could request no less than 35 years; but when Milton still wanted to go to trial, counsel told him: "they're at thirty years at fifty percent." (R.C243)

Guilty plea counsel testified that he repeatedly explained the terms of the agreement to Milton, did not ask him leading questions, simplified his vocabulary, and made him repeat back to him to ensure understanding. (R.C252) He also testified that

he did not threaten or coerce him. (R.C253) He did speak to Milton's mother, who agreed that the plea "was in his best interest." (R.C253) The trial court denied the motion, telling Milton that his "arguments today are in never never land," and stated: "Your problem is you killed somebody and you don't want to take responsibility for it. . . Go back to prison." (R.C258-59)

On September 17, 2015, the appellate court granted Milton's motion for summary remand due to a deficient Rule 604(d) certificate. Ill. S. Ct. R. 604(d); (R.C319-21) On remand, defense counsel filed a motion to reconsider the sentence, arguing that the sentence was not consistent with Milton's "past history of criminality, occupational or personal habits, mental history, family situation, economic status, or education," that it gave insufficient "consideration to mitigating factors," and that the sentence was "unduly harsh" and inconsistent with rehabilitation. (R.C336)

At the May 16, 2016 hearing, Milton told the court that he "never did want to plead guilty." (R.C341,348) He thought he would receive thirty years because counsel told him that they had "agreed for thirty." (R.C349) He also stated:

> By me coming back from Chester Mental Health, I was unfit and I wasn't on the right medication. But now that I'm – I'm functioning better, I think I got a better chance now because Tom didn't want to take it because he kept telling them I wasn't ready because I was unfit, you know. But now that I've been taking my medicine, I'm properly functioning now, I think I should deserve a trial and with a trial lawyer, with my – with Brian Flynn. I think he will take me to trial. Tom didn't never want to take me to trial.

(R.C350) The court denied the motion to withdraw the guilty plea. (R.C353) Milton appealed, and on October 21, 2016, the appellate court dismissed the appeal for lack of jurisdiction because the trial court had not ruled on the motion to reconsider the sentence. (R.C458-60) On remand, the court denied the motion, and this appeal

followed. (R.C481,483)

On appeal, Milton argued that his guilty plea should have been vacated because there was a *bona fide* doubt that he was fit and the record does not show that he knowingly, intelligently, and voluntarily pled guilty. He argued that the trial court had erred in finding Milton restored to fitness following a deficient restoration hearing. He argued that he was presumptively unfit at the guilty plea hearing because the court did not use the ordered special provisions. Specifically, the record did not show the ordered monthly checks on Milton's fitness, did not confirm Milton's medication status despite indications that his necessary medications had been discontinued, and did not utilize the necessary language and questioning proceedings to ensure Milton's comprehension. Milton also argued that guilty plea counsel was ineffective for failing to ensure the trial court implemented the ordered special provisions, failing to provide evidentiary support for Milton's post-plea claims, and failing to raise an independent *bona fide* doubt about his fitness. Finally, Milton argued that the record does not confirm that he knowingly, intelligently, and voluntarily pled guilty. Alternatively, Milton argued that his 55-year de facto life prison term is unconstitutional because the trial court failed to properly consider the mitigating nature of his youth, intellectual disability, mental health impairments, environment, and his demonstrated rehabilitative potential.

The appellate court upheld both Milton's guilty plea and his sentence. *Lattimore*, 2020 IL App (5th) 170194-U at ¶¶ 1-2. The court found no error in the trial court's restoration order finding Milton fit with special provisions; it also found no *bona fide* doubt about Milton's fitness at the plea hearing. *Id.* at ¶¶ 96, 139. Further, it

found that the special provisions were not a constitutional matter, reviewed the record to independently assess Milton's comprehension at the plea hearing, and found no error. *Id.* at ¶¶ 101-2, 140. Finally, the appellate court upheld Milton's 55-year sentence, finding no abuse of discretion. *Id.* at ¶ 152. It reduced the constitutional question to a procedural question and held that the court's mere consideration of mitigating facts was sufficient. *Id.* at ¶¶ 154-58, 164.

REASON FOR GRANTING CERTIORARI

This Court should answer a question of first impression: whether a person who is fit to stand trial only with special provisions must be provided those provisions at his guilty plea hearing for the plea to be binding.

Milton Lattimore's case presents an issue of first impression: when a trial court finds that special provisions are necessary to ensure that a person is fit to stand trial, whether due process requires the court to utilize those provisions at a guilty plea hearing to ensure that the person is fit to plead guilty, is properly admonished, and can knowingly, intelligently, and voluntarily plead guilty. If so, then Milton's case also presents the question of the proper remedy when the court does not adequately employ the necessary provisions to accommodate the person's disabilities at the plea hearing. This Court should grant leave to appeal to address this novel and important issue of how conditional fitness findings impact the guilty plea process.

The trial court found Milton fit to stand trial *with special provisions*.[3] (R.C55,59) There is no dispute that to be and remain fit, Milton needed psychotropic medication, communication "kept at a nine to ten year old level," and monthly checks to ensure that he maintained fitness. (R.C59) Milton also needed periodic checks to ensure his comprehension. (R.C388; C55) Checks should be done without yes-or-no questions; instead, Milton should be asked to explain in his own words what was happening. (R.C388; C55) The trial court never rescinded the special provisions. However, in

[3] The trial court specified certain provisions on the record that differed slightly from Dr. Cuneo's recommendations, but its written order clarified that it found Milton fit "with special provisions as recommended by Dr. Cuneo." (R.C55; C388)

violation of the order for special provisions, the trial court at the plea hearing – albeit a different judge – questioned Milton using yes-or-no questions, admonished him in paragraph form, and did not ask him to explain the plea terms or his rights in his own words. (R.C143-52) On appeal, the appellate court approved the procedure used at the guilty plea hearing. *Lattimore*, 2020 IL App (5th) 170194-U, ¶¶ 98, 140.

In effect, the appellate court revised the initial conditional fitness order and found Milton fit without the special provisions despite the lack of a new fitness hearing or any assessment below of whether the provisions were no longer necessary. Further, the appellate court stated that the special provisions were not a constitutional matter. *Id.* at ¶ 101. The trial and appellate court proceedings show that lower courts need guidance for how conditional fitness should be managed at plea hearings and on review. It is undisputed that the trial court found Milton fit only with special provisions. *Id.*¶ 99; (R.C55,59) The trial court adopted these provisions as recommended by Dr. Cuneo, continuing medications, monthly checks, using simple vocabulary that a nine or ten-year-old could understand, and verifying Milton's comprehension by having him explain matters in his own words rather than asking yes-or-no questions.[4] (R.C55; C59; C388) But at the guilty plea hearing, the trial court – albeit a different judge – did not abide by any of the provisions detailed by the trial court or Dr. Cuneo. Instead, the court asked Milton *only* yes-or-no questions, admonished him in paragraph form,

[4] In both the written and oral finding, the trial court based its order of special provisions on Dr. Cuneo's opinion. (R.C55,388) While the conditions listed orally differ slightly from Dr. Cuneo's report, the provisions do not conflict, and Dr. Cuneo's provisions should be presumed to be incorporated by reference. Further, the differences are not relevant because the judge at the guilty plea did not abide by either set of provisions.

and did not have Milton explain his understanding of the guilty plea terms or his rights in his own words. (R.C143-52) Even so, the appellate court found no error. This Court should review that analysis and holding for the following reasons.

A. Review is needed because the guilty plea judge and appellate court denied Milton the ordered accommodations without notice or hearing.

First, the appellate court's decision retrospectively amends the fitness order to exclude the special provisions finding based on its own review of the cold record. It held that the trial court's 2011 fitness order – including the special provisions recommended by Dr. Cuneo – was not against the manifest weight of the evidence. *Id.* at ¶ 92. It also acknowledged that the court did not use the provisions during the 2013 guilty plea hearing, when the court asked yes-or-no questions and did not have Milton explain matters in his own words. *Id.* at ¶ 120. Nevertheless, the appellate court found no fault in the admonishments and held that Milton's plea was knowing and voluntary even without those special provisions based on its own, independent review of the record. *Id.* at ¶¶ 98, 140. Thus, even though the appellate court upheld the order for special provisions, it nevertheless functionally overruled that order by finding Milton fit at the plea hearing *without* special provisions.

Critically, the appellate court erroneously asserted that the special provisions were not a constitutional matter. Citing to *People v. Mitchell*, 189 Ill. 2d 312, 326-27 (2000), the appellate court asserted that the provisions were "an important part of [its] inquiry," but that they did "not establish a protected constitutional right." *Lattimore*, 2020 IL App (5th) 170194-U, ¶ 101. But *Mitchell* did not address special provisions at all. *Mitchell* addressed the former Illinois statutory right to a fitness hearing when a

defendant is taking psychotropic medication. *Mitchell*, 189 Ill. 2d at 328-31.

Conversely, Milton's case concerns the constitutional right to be fit to plead guilty. As this Court detailed in *Godinez v. Moran*, the trial court must ensure not only that a person is competent to plead guilty but that "a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993). Although the specific provisions diverged slightly, according to both Dr. Cuneo and the trial court's fitness order, Milton was only fit *with* special provisions. (R.C55,59; C388) Thus, use of those provisions was necessary to ensure both Milton's fitness and comprehension of the guilty plea proceedings. The trial court's complete abandonment of those necessary accommodations thus implicates the voluntariness of Milton's guilty plea.

Milton's claim does not depend on any right granted or defined by statute. The only statutory language regarding special provisions is in section 104-2 of the Illinois Code of Criminal Procedure. 725 ILCS 5/104-22. This section allows for the determination of "whether special provisions or assistance will render the defendant fit to stand trial." *Id.* This is a statutory provision aimed at securing due process. The existence of this statute does not undercut the constitutional nature of this issue. Instead, the issue is that the trial court found that Milton was only constitutionally fit with certain conditions, but those conditions were not met at the guilty plea hearing. Conviction of an unfit defendant unquestionably violates due process; it is a constitutional issue, not a statutory issue. *People v. Holt*, 2014 IL 116989, ¶ 51; *Medina v. California*, 505 U.S. 437, 439 (1992). Based on this error, the appellate court treated the special provisions as an optional precaution, not part of the court's ruling that

Milton was fit only with special provisions, or put differently, that he was *not fit without the special provisions*. This mistake by the appellate court regarding the constitutional significance of the special provisions merits review.

B. This Court should review the appellate court's holding that retrospectively limits the special provisions of fitness to trial proceedings only.

This Court should also grant review because lower courts need guidance on the impact of a conditional fitness order on guilty plea proceedings. The appellate court held that the requirement of periodic checks could not be implemented because Milton pled guilty instead of going to trial. *Lattimore*, 2020 IL App (5th) 170194-U, ¶ 121. It added that applying the order to the guilty plea hearing would require "a judicially modified version of Dr. Cuneo's special provisions." *Id.* at ¶ 122. But there was only one fitness order, entered while the parties prepared for trial. (R.C55,59) That order held that Milton was fit only "so long as communications are kept at a nine to ten year old level" and "periodic checks be made each month." (R.C59) Further, Dr. Cuneo's opinion that formed the basis of these special provisions did contemplate that Milton might plead guilty. Dr. Cuneo opined that Milton had "a very basic understanding of the concepts of plea bargaining." (R.C388)

This Court should grant review to address the impact of this order and the appellate court's finding that Dr. Cuneo's use of the word "trial" restricted the special provisions in a way not otherwise specified. Specifically, what is the impact of an order for special provisions entered while a trial is contemplated on later guilty plea proceedings and admonitions? If special provisions are necessary to ensure fitness at trial, and those provisions are not rescinded at any time, how can those provisions be

ignored at a guilty plea hearing with any assurance that the plea is knowing, intelligent, and voluntary?

C. Guidance is needed on whether – and to what degree – the presence of counsel impacts the trial court's responsibilities for implementing a conditional fitness finding.

Next, the appellate court curiously found that Dr. Cuneo's recommendations "did not specify who was required to ask the defendant to explain the proceedings in his own words," and so found counsel's later assertion that he had explained matters to Milton and had communicated with him carefully – off the record – was sufficient to establish compliance with the special provisions. *Id.* at ¶ 122. The trial court found Milton fit only "so long as communications" were kept simple. (R.C59) The lack of specification in the trial court's order more aptly applies to all communications rather than meaning that *anyone* could fulfill the requirement, whether on or off record. Further, Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402) – adopted to ensure due process at plea proceedings – is binding on the court, not counsel. Due process requires that the record "affirmatively show the plea was intelligent and voluntary." *People v. Johns*, 229 Ill. App. 3d 740, 742 (4th Dist. 1992). See *Moran*, 509 U.S. at 400, ("a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.").

Thus, this Court should review the appellate court's decision and provide additional guidance on the proper manner of ordering special provisions, the impact of such provisions on plea hearings, and the appropriate manner of reviewing compliance with these necessary provisions. "It is of no consequence to inform a deaf

man of his rights through the spoken word." *People v. McKay*, 282 Ill. App. 3d 108, 113 (2d Dist. 1996). Similarly, where the trial court found that Milton required specific provisions to be fit, admonishing him without those provisions is no admonishment at all. Lower courts need clarification so that similarly situated persons are not deprived of due process or full and adequate admonishments when they choose to plead guilty rather than go to trial.

By analogy, "it would violate procedural due process rights to find a waiver under Rule 604(d) if a defendant cannot comprehend the Rule 605(b) admonitions." *Id.* at 113; Ill. S. Ct. R. 604(d), 605(b). What Dr. Cuneo opined and what the trial court held was that if you do not use the special provisions, you cannot know what Milton does or does not understand. The record must affirmatively show that a guilty plea is knowing, intelligent, and voluntary. Without the use of any special provisions, the record does not affirmatively show that Milton understood the plea terms or his rights, or that his plea was knowing, intelligent, and voluntary.

D. Lower courts need guidance on whether accommodations ordered for trial must be utilized at plea proceedings.

This Court should also grant review because lower courts need guidance on conditional fitness findings. In rejecting a higher competence standard for guilty pleas versus trials, this Court indicated that the standard should not be different. *Moran*, 509 U.S. at 398. This Court indicated that competence "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that

are more elaborate . . . , the Due Process Clause does not impose these additional requirements." *Id.* at 402. This leaves open the question of how to ensure due process when a person only has the capacity to understand the proceedings and assist counsel when given specific accommodations or special provisions. While the standard for competence may not be higher in guilty plea hearings, it should not be lower. Such a practice would permit an improper incentive for obtaining guilty pleas from otherwise unfit persons.

E. Review is necessary because the appellate court relied on a factual error.

Additionally, the appellate court's decision relied on a factual error. It used Milton's written "pleadings" as a gauge of his comprehension. *Lattimore*, 2020 IL App (5th) 170194-U, ¶¶ 15, 110, 112, 113, 130. Without any record detail about the production of those pleadings, that conclusion is unfounded and unreasonable. In 2012, after the restoration finding, Dr. Cuneo noted that Milton "has severe reading difficulties." (R.C428) Even then, Milton could not read all of the *Miranda* rights to Dr. Cuneo. (R.C428) This included "simple words [such] as 'questions,' or 'answering.' " (R.C429) Without more, assuming that Milton – an intellectually disabled person who cannot read simple words – independently authored his *pro se* filings and that those filings reflect his personal understanding of the legal process and issues in his case is not reasonable.

The appellate court concluded that "no error occurred at the plea hearing that affected the ultimate fairness of [Milton's] plea or the integrity of the judicial process." *Id.* ¶ 140. However, the trial court found that Milton was *only* fit *with* special provisions. But the court did not use those necessary provisions during the guilty plea

hearing. No expert or judge assessed Milton's fitness without those provisions at any time after the trial court's finding of conditional fitness. Yet the appellate court improperly conflated the trial court's denial of Milton's request to withdraw his plea – without addressing fitness – as a new fitness finding. In essence, the appellate court has not so much affirmed the trial court and respected its discretion as it has rejected the conditional fitness ruling and entered an independent finding that Milton was fit *without* the special provisions.

As this Court explained in *Moran*, in order to plead guilty, a person must be competent to stand trial. *Moran*, 509 U.S. at 400. In addition to competence, the trial court also must ensure that the waiver of constitutional rights effected by the guilty plea is both knowing and voluntary. *Id.* This Court noted that "[i]n this sense there is a 'heightened' standard for pleading guilty." *Id.* at 400-1. Both the expert and the judge who presided over and ruled on the fitness issues in this case found that Milton's capacity was so limited that he required accommodations in the form of the ordered special provisions. These provisions were necessary to ensure Milton's comprehension of the proceedings – thus implicating both his competence and his ability to enter a knowing and voluntary waiver of his constitutional rights. Without any further proceedings or findings on the issue of fitness, the trial judge who presided over Milton's guilty plea abandoned these accommodations without comment. For these reasons, this Court should grant review to consider whether the guilty plea hearing and resulting guilty plea comport with the Due Process Clause.

CONCLUSION

For the foregoing reasons, petitioner, Milton Lattimore, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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