No. 24-6646

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

RANDY ALLEN HERMAN, JR.,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITON FOR A WRIT OF CERTIORARI

Randy Herman, Jr., DC# A80442
Petitioner, *pro se*

South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

QUESTION PRESENTED

Whether Petitioner was deprived of effective assistance of counsel in violation of his Sixth and Fourteenth Amendments to the United States Constitution when Trial Counsel misadvised Petitioner to assert an affirmative insanity defense for a claim of sleepwalking, where Petitioner was asleep at the time of the homicide and committed the act involuntarily while in an unconscious state?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Randy Allen Herman, Jr., a Florida prisoner, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Secretary, Department of Corrections, and Attorney General, State of Florida, were the appellees in the United States Court of Appeals for the Eleventh Circuit.

CORPORATE DISCLOSURE STATEMENT

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

RELATED CASES

There are no proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Randy Allen Herman, Jr. respectfully petitions for a Writ of Certiorari to review the errors in the judgment of the United States Court of Appeals for the Eleventh Circuit by denying Petitioner's Application for a Certificate of Appealability from the denial of his 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus.

OPINIONS BELOW

The Eleventh Circuit's Order Denying Petitioner's Certificate of Appealability filed on November 27, 2024 is reproduced at Appendix C. The District Court's unpublished Order Denying Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus filed on May 20, 2024 is reproduced at Appendix G. The following opinions and orders below are also pertinent here, all of which are attached as appendices: [1] The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Motion for Reconsideration (01-24-2025). *See* Appendix A. [2] The order of the United States District Court for the Southern District of Florida denying Petitioner's Motion to Alter or Amend Judgment (06-21-2024). *See* Appendix E.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit denied Petitioner's Application for a Certificate of Appealability on November 27, 2024 and subsequently denied Petitioner's Motion for Reconsideration on January 24, 2025. *See* Appendix A. The United States Supreme Court has jurisdiction, on certiorari, to review a denial of a Certificate of Appealability by a circuit judge or a panel of a Federal Court of Appeals, pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The right of a State prisoner to seek federal habeas corpus relief is set forth in 28 U.S.C. § 2254. Pursuant to the *AEDPA*, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in the state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

The absence of effective assistance of counsel violates a State prisoner's rights under the Sixth and Fourteenth Amendments of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984).

The Sixth Amendment provides, in relevant part: In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence. *U.S. Const. amend. VI.*

The Fourteenth Amendment provides, in relevant part:

> No State shall make or 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

The state charged Herman by Indictment with First Degree Murder, *F.S.* 782.04(1)(a)1 and *F.S.* 782.04(1)(a)2, for the stabbing death of Brooke Preston that occurred on March 25, 2017.

Prior to Herman's trial, defense Counsel retained Dr. Charles Patrick Ewing, a forensic psychologist, for the purposes of conducting a mitigation evaluation [TT Pg 929]. At the conclusion of the evaluation and after further research, Dr. Ewing opined to a reasonable degree of professional certainty that Herman was suffering from the non-rapid eye movement sleep arousal disorder of sleepwalking, and therefore, he was unconscious and asleep at the time of the homicide [TT Pg 966-967, 975]. As a result of Dr. Ewing's clinical diagnosis, Trial Counsel filed a 'Notice of Intent to Rely on the Defense of Insanity.'

Herman's case proceeded to a jury trial before the Honorable John Kastrenakes and on May 8, 2019, the jury returned a verdict of 'Guilty of First

Degree Murder, as charged in the Indictment.' The Court adjudicated Herman guilty in accordance with the verdict and sentenced him to life in the Florida Department of Corrections without the possibility of parole.

Herman appealed his conviction and sentence and on April 14, 2021, the Fourth District Court of Appeal affirmed with a written opinion and mandate issued on May 14, 2021. *See Herman v. State*, 315 So. 3d 743 (Fla. 4th DCA 2021).

On November 16, 2021, Herman timely filed a Motion for Postconviction Relief, pursuant to Fla. R. Crim. P. 3.850, raising seven claims of ineffective assistance of trial counsel, including the claim currently before this Court for review. By Order of the Court, the state filed a Response to Herman's motion on February 10, 2023. In the Response the state alleged that "Florida law provides ample support for the reasonableness of defense counsel's conclusion that the only mechanism for presenting a sleepwalking defense is through an insanity defense", and "if, as defendant claims, sleepwalking does not constitute insanity, then it necessarily follows that it is simply an abnormal mental condition with no relevance but to impermissibly negate intent, i.e., evidence of diminished mental capacity." [Record Pg 57-58]. Herman filed a subsequent Reply to the state's Response on February 27, 2023.

Herman's motion came before the Honorable Judge Howard K. Coates, Jr. of the Fifteenth Judicial Circuit Court and was summarily denied without an evidentiary hearing on May 18, 2023. In the Order denying relief, the Court adopted

the facts, legal analyses, and conclusions of law contained in the state's Response as its own.

Herman timely filed a Notice of Appeal on June 06, 2023 and served his Initial Brief to the Fourth District Court of Appeal on July 13, 2023. The Fourth District Court of Appeal issued an order on October 05, 2023 *per curiam* affirming the lower court's decision without a written opinion. *See Herman v. State,* 373 So. 3d 315 (Fla. 4th DCA 2023). On October 18, 2023 Herman timely filed a Motion for Rehearing and Request for Written Opinion that was subsequently denied on November 08, 2023 and mandate issued on December 07, 2023.

On April 08, 2024 Herman timely filed a Petition for Writ of Habeas Corpus and supporting Memorandum of Law in the United States District Court for the Southern District of Florida challenging the constitutional validity of his state conviction by raising the instant constitutional claim of ineffective assistance of counsel, pursuant to 28 U.S.C. § 2254(a). *See* Appendix H.

The District Court issued an Order to Show Cause on April 9, 2024 and counsel for the Respondent subsequently filed their Response and Appendix on May 10, 2024. On May 20, 2024, prior to receiving and without considering Herman's timely filed Reply to the Respondent's Response, the District Court entered a final judgment denying Herman's Petition. *See* Appendix G. In the Order denying relief, the District Court held that federal courts "cannot second-guess a state court's application of state law, so its finding that sleepwalking must be presented as an insanity defense under Florida law is fatal to Petitioner's claim," further holding

that "Counsel was not ineffective for presenting sleepwalking as an insanity defense because, under state law, that was the only way he could." [App. G – Pg 10-11].

On June 13, 2024 Herman timely filed a Motion to Alter or Amend Judgment, pursuant to Federal Rule of Civil Procedure 59(e). *See* Appendix F. The District Court entered a final judgment denying Herman's motion on June 21, 2024 and declined to issue a Certificate of Appealability. *See* Appendix E.

On July 18, 2024 Herman filed a Notice of Appeal and Motion for Permission to Appeal *In Forma Pauperis* and Affidavit to appeal to the United States Court of Appeals for the Eleventh Circuit from the final order denying his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. On July 23, 2024 the District Court granted Herman's motion to proceed *in forma pauperis* on appeal.

On August 08, 2024 Herman moved the Eleventh Circuit to grant him a Certificate of Appealability (COA) to appeal the District Court's denial of his Petition for Writ of Habeas Corpus, pursuant to Federal Rule of Appellate Procedure 22 and Title 28 U.S.C. § 2253. *See* Appendix D. The Eleventh Circuit denied Herman's COA on November 27, 2024 concluding that "[p]etitoner failed to make a substantial showing of a denial of a constitutional right." *See* Appendix C. On December 05, 2024 Herman filed a Motion for Reconsideration requesting the Eleventh Circuit to reconsider its denial of Herman's Certificate of Appealability. *See* Appendix B. Herman's motion was subsequently denied by the Eleventh Circuit on January 24, 2025. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

I. Ineffective Assistance of Counsel Claim

In his state postconviction motion and in his federal habeas petition, Herman contends that he was deprived of his constitutional right to effective assistance of counsel when Trial Counsel misadvised him to assert an affirmative insanity defense for a claim of sleepwalking over the proper defense of automatism, where Herman was asleep at the time of the homicide and committed the act involuntarily while in an unconscious state. An adequate investigation of Herman's theory of defense and sufficient knowledge of the law would have revealed that sleepwalking is properly raised through a defense of automatism, often referred to as unconsciousness, and that such a defense was available in Florida and further supported by Federal law.

Black's Law Dictionary defines automatism as an "action or conduct occurring without will, purpose, or reasoned intention, such as *sleepwalking*; behavior carried out in a state of unconsciousness; Automatism may be asserted as a defense to negate the requisite mental state of voluntariness for commission of a crime. (2) The state of a person who, though capable of action, is not conscious of his or her actions." *Black's Law Dictionary,* pg. 154 (9th ed. 2009). An automatism defense has been recognized by courts as a complete defense bearing on the voluntariness of an otherwise criminal act. John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric Psychological Evidence and Testimony*, pg. 155-56, 174-75 (Am. Bar Ass'n, ed. 2000). Moreover, "[s]leepwalking, confusional arousals,

and night terrors are not considered to be psychiatric disorders. Thus, they do not currently fit under the rubric of a mental disorder or defect of reason required for the diagnosis of legal insanity based on M'Naghten." Mark Pressman, *Sleepwalking, Criminal Behavior, and Reliable Scientific Evidence: A Guide for Expert Witnesses,* pg. 39 (Washington, DC: American Psychological Association, 2018).

> "A defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness. Although this is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime, the better rationale is that the individual has not engaged in a voluntary act." Wayne R. LaFave, *Substantive Criminal Law*, pg. 33-34 (2nd ed. 2003).

Criminal liability usually requires that two elements must be present: *actus reus* (literally "guilty act"), and *mens rea* (literally "guilty mind"). The *actus reus* is the prohibited conduct, performed voluntarily. Someone in a state of legal automatism is not acting voluntarily and so cannot have carried out the *actus reus* (nor could they have the required *mens rea*). If the accused lacks the requisite *actus reus* or *mens rea*, then the criminal offense is not made out [Record Pg 818]. Sleepwalking has long been held to fulfill the requirements of legal automatism, and therefore, an act performed while sleepwalking does not meet the definition of a criminal act [Record Pg 821]. "With few exceptions, wrongdoing must be conscious to be criminal. Indeed, we have said that consciousness of wrongdoing is a principle as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to

choose between good and evil." Donald F. Samuel, *Eleventh Circuit Criminal Handbook*, Vol 1: Chapter 1 § 4(a) (Matthew Bender, 2023 Ed.).

The United States Supreme Court has long admonished that the prosecution must prove every element of a criminal charge beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). Therefore, an automatism defense, in which Herman was sleepwalking and thus unconscious of his involuntary acts, negates both of the basic elements of a crime – the mental state (*mens rea*) and the voluntary nature of the act (*actus reus*). As such, once the issue of automatism, or unconsciousness, is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. *See United States v. Idris Shamsid-Deen,* 61 F. 4th 935 (11th Cir. 2023) ("Any defense which tends to negate an element of the crime charged, sufficiently raised by the defendant, must be disproved by the government").

There is no legal precedent to support Trial Counsel's decision to pursue an affirmative insanity defense for a claim of sleepwalking in the State of Florida and the record in this case expressly supports Herman's claim that sleepwalking is properly raised under a defense of automatism. Specifically, Trial Counsel acknowledged during closing arguments that sleepwalking is an ***involuntary act*** and Dr. Charles Patrick Ewing, the sole expert witness for the Defense, testified numerous times during trial that Herman was ***unconscious*** and ***asleep*** at the time of the homicide, directly supporting an automatism defense:

"The whole point of sleepwalking is that you don't know that you are doing it. That's what you heard from Dr. Ewing. I think that's what you heard from Dr. Myers. You don't know what you are doing. You are [will] acting involuntarily. That's the point of sleepwalking" [TT Pg 1272-1273].

"The studies that I looked at seemed to indicate that there was, because you're asleep at the time, because you're unconscious, that you are largely, if not completely, impervious to pain" [TT Pg 966].

"During the attack he was unconscious, asleep, and that afterwards he was awake..." [TT Pg 966].

"They're not conscious of what's going on, but the literature is pretty clear that even though they're not conscious they're still capable of carrying out very complex acts" [TT Pg 967].

"Yes, the fact that somebody who is unconscious, who's asleep and sleepwalking is still capable of carrying out complex tasks" [TT Pg 967].

"...as a result he was not conscious at the time of the homicide, and because he was not conscious, he was not capable of knowing what he was doing, or knowing that what he was doing was wrong" [TT Pg 975].

"Because he was unconscious, because he was suffering from this illness that he was not able to know what he was doing, or know the consequences of what he was doing" [TT Pg 977].

In addition, research articles introduced by Counsel as defense exhibits at trial further conclude that "sleepwalking is seen as a classic example of a legal automatism" [Record Pg 821], that "later cases clearly opposed the use of the insanity defense in sleepwalking cases", and that "modern courts and scholars have abandoned the classification of sleepwalking as an insanity defense" [Record Pg 838]. The articles further reference several judicial decisions from superior courts holding that a sleepwalking defense is separate and distinct from a defense of

insanity and that an automatism defense is more appropriate in the context of sleepwalking [Record Pg 836-838].

According to § 775.027, *Florida Statutes*, insanity is an affirmative defense in which Herman carried the burden to prove by clear and convincing evidence that he (1) had a mental infirmity, disease, or defect; and (2) because of this condition, he did not know what he was doing or its consequences. On the other hand, an automatism defense, where Herman was asleep and sleepwalking at the time of the homicide, negates the basic elements of the crime and therefore the burden remains on the State to prove that Herman acted consciously and voluntarily beyond any reasonable doubt to support a finding of guilt. Trial Counsel's misadvice to pursue an affirmative insanity defense over the proper defense of automatism violated the Due Process clause of the Fourteenth Amendment of the United States Constitution and prejudiced Herman because it removed the presumption of innocence and relieved the state of its burden of proving, beyond a reasonable doubt, the basic elements of the crime. As a result, Herman proceeded to trial with the sleepwalking defense that unnecessarily and unconstitutionally shifted the heavier burden of proof to the Defense to prove the absence of those elements, thereby rendering the result of the proceeding unfair and unreliable.

Herman was further prejudiced by Counsel's misadvice where "under the present statutory scheme, a successful plea of insanity avoids a conviction, but confronts the accused with the very real possibility of prolonged therapeutic confinement." *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989). However, a verdict of

'not guilty' under an automatism defense would result in an outright acquittal, where Herman was not legally insane at the time of the homicide, but rather committed the act involuntarily ***while in the natural state of sleep.*** Viewing the facts of the case at the time of his decision, no competent counsel would have decided to pursue an affirmative insanity defense where Herman was unconscious and asleep at the time of the homicide.

Trial Counsel should have understood that an automatism defense for a claim of sleepwalking would negate the basic elements of the crime and did not support a standard for insanity under *Florida Statutes*. For purposes of *Strickland*, the failure to assert an obvious defense to the elements of a crime - intent and voluntariness - constitutes deficient performance. Competence requires a basic conception of the elements of a crime and how lawyers must go about casting doubt on *mens rea* and *actus reus*, which the State must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. Instead, Counsel chose to carry the heavier burden of proving the affirmative defense of insanity by clear and convincing evidence, unnecessarily shifting the burden of proof to the Defense. There's a reasonable probability that the evidence presented by the Defense may have been sufficient to establish that Herman was not guilty beyond a reasonable doubt, but was insufficient to rise to the level of clear and convincing evidence to persuade the jury that Herman was not guilty by reason of insanity, thereby prejudicing Herman and rendering the result of the proceeding unreliable and fundamentally unfair.

II. Unreasonable Application of *Strickland*

The District Court erred in denying habeas corpus relief where the state court's adjudication of the claim resulted in a decision that involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The Eleventh Circuit further erred in denying Herman's Certificate of Appealability where Herman made a substantial showing of a denial of a constitutional right.

The state court's determination that "Florida law provides ample support for the reasonableness of defense counsel's conclusion that the ***only*** mechanism for presenting a sleepwalking defense is through an insanity defense" is objectively unreasonable where a defense of automatism for a claim of sleepwalking, where Herman was ***asleep*** at the time of the homicide and his acts were ***involuntary***, is separate and distinct from an insanity defense and was cognizable under Florida law [Record Pg 57-58].

In denying relief, the state court held that Counsel's decision was reasonable based entirely on *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973) where "a defense utilizing a state of unconsciousness or automatism, such as a defendant claiming no recollection of committing a crime due to allegedly suffering an epileptic seizure at the time of the crime, falls within the insanity defense." [Record Pg 57]. Relying on the state court's reasoning, the District Court further held that "although the state postconviction court conceded that *Cook* concerned epileptic seizure (and not

sleepwalking), it applied *Cook's* reasoning to find that a condition causing a defendant to have 'no recollection of committing a crime' was properly categorized as an insanity defense." [App. G – Pg 10].

However, the state court's denial of Herman's claim and Trial Counsel's misadvice to pursue an insanity defense, where Herman was unconscious and asleep at the time of the crime, was objectively unreasonable based on long-standing precedent by the Florida Supreme Court holding that a defense that presents a question of the defendant's consciousness of his acts is wholly distinguishable from a diminished capacity defense and may be presented absent a plea of insanity. *See Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991); *see also Bunney v. State*, 603 So. 2d 1270 (Fla. 1992).

In *Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991) the appellant was embroiled in an altercation at a bar when he was struck on the left side of his head. As a result, he suffered from a seizure due to partial complex epilepsy and lost consciousness at the time of the crime, a situation wholly distinguishable from that involving a diminished capacity or insanity defense. This case raised a question of whether appellant had consciousness of his acts themselves, not of his understanding of their wrongful nature. *Id.* at 330. Nearly materially indistinguishable from the facts held in *Cook*, *Wise* did not seek to prove the existence of any mental illness or psychiatric condition, but instead he contended that he had a blackout at the time of the assault in question. *Id.* Accordingly, the First District Court of Appeal held that a defense that presents a question of the

defendant's consciousness of his acts may be raised separate from a defense of insanity.

In *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992), the Florida Supreme Court approved the decision held in *Wise* and further held that a defendant's epileptic defense presents a question of the defendant's consciousness of his acts themselves, not of his understanding of their wrongful nature, and is thus admissible absent a plea of insanity. The Florida Supreme Court further clarified that their prior decision in *Chestnut* drew a distinction between evidence of "commonly understood conditions beyond one's control," which is admissible, and evidence of "relatively esoteric conditions," which is not admissible absent an insanity defense. *Id.* at 1272-73.

The Florida Supreme Court's ruling in *Bunney* and approval of the decision held in *Wise* receded from the Second DCA's holding in *Cook* and clarified the distinction between unconsciousness and insanity, distinguishing between a defendant's consciousness of his acts from his understanding of their wrongful nature. Insanity is incapacity from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto. In contrast, a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong. Insanity relates to cognitive understanding, while automatism focuses on involuntary actions without conscious control.

Using the rationale established by the Florida Supreme Court in *Bunney* and *Wise*, an automatism defense, where Herman was unconscious and asleep at the time of the homicide, is a defense that specifically presents a question of Herman's consciousness of his acts and may be raised distinct from an insanity defense. Therefore, had Trial Counsel performed a reasonable investigation and a thorough understanding of the law and facts relevant to Herman's case, Counsel would not have advised Herman to pursue an affirmative insanity defense where he lacked the necessary criminal intent and voluntariness to commit the crime charged, thus warranting relief under *Strickland.*

III. Contrary to Clearly Established Federal Law

The Eleventh Circuit and the District Court further erred in denying relief where the state court's adjudication of the claim resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979); and *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977).

A. Automatism Defense

In denying Herman's federal claim and relying on the state court's decision, the District Court held that "Counsel was not ineffective for presenting sleepwalking as an insanity defense because, under state law, that was the *only* way he could," further stating that "Petitioner is right that some jurisdictions

categorize sleepwalking as an 'automatism' defense rather than an insanity defense. The problem is that many other states – **including Florida** – categorize sleepwalking, unconsciousness, and other forms of automatism as insanity defenses" [App. G – Pg 10-11]. In support of that conclusion, the District Court cited a string of cases from Texas, Kentucky, and a Military Justice case, but failed to cite any relevant or applicable cases in Florida or Federal law to reject Herman's claim. Although those specific cases may be considered controlling law in their respective states, such case law is not legally binding on Florida or Federal courts.

An automatism defense, where Herman lacked the criminal intent and voluntariness to commit the crime based on expert testimony that he was asleep and unconscious at the time of the homicide, is separate and distinct from an insanity defense and is cognizable under Florida and Federal law. Due to the rarity of the sleepwalking defense, statutory authority or case law is limited in Florida. However, there is precedent to raise an automatism, or unconsciousness defense, to negate the required intent (*mens rea*) and voluntariness (*actus reus*) that the state must prove in order to meet its burden with respect to the elements of the crime, *see, e.g., State v. Justin Glenn Cox*, No. 2006-CF-007577-A-O (Fla. 9th Cir. Ct., 2006) (Defendant acquitted after presenting a sleepwalking defense to negate essential elements of crime charged); *Rivera v. State*, 235 So. 3d 983 (Fla. 2d DCA 2017) (defense asserted "the shooting was an automatism, an automatic but not conscious behavior," and that the defendant "lacked the intent to shoot the officer"); *Kemp v. State*, 280 So. 3d 81 (Fla. 4th DCA 2019) ("Dispute over whether defendant

was braking at the time of the collision went to the heart of his defense that he had lost consciousness immediately before the accident"). An automatism defense is used to argue that no criminal act occurred in the first place due to the lack of voluntary action or intent. As such, an automatism defense is analogous to a state-of-mind or lack-of-intent defense that is widely recognized and used in Florida law to negate the essential elements of a crime.

As the Respondent conceded and the record reflects, the defense expert testified that Herman was ***not conscious*** at the time he committed this homicide. When a person is sleepwalking, they lack the conscious intent or awareness to commit a crime, meaning the *mens rea* is absent. The law further requires that a criminal act be voluntary and since actions taken while sleepwalking are involuntary, the *actus reus* is absent. Accordingly, an automatism defense for a claim of sleepwalking negates both of the basic elements of a crime, the *mens rea* and the *actus reus*, which the state must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime.

Therefore, the denial of Herman's claim in which the state court and the District Court rejected the legality of an automatism defense in Florida and held that sleepwalking ***must*** be presented under an insanity defense according to Florida law is objectively unreasonable and contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) (the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charge); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) (a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979) (the burden of proving the elements of a crime cannot be shifted to the defendant).

B. Affirmative Defense

The District Court also held that "the distinction between insanity and automatism defenses would have had no bearing on the outcome of Petitioner's case," further stating that "both automatism and insanity are affirmative defenses which place the burden of proof on the defendant." [App. G – Pg 11]. The District Court again cited a string of state law cases from North Carolina, Montana, Ohio, and Wyoming, but failed to cite any relevant or applicable cases to reject Herman's claim in the context of Florida or Federal law.

Under clearly established Florida precedent, "an affirmative defense is any defense that assumes the complaint or charges to be correct, but raises other facts that, if true, establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it ***concedes*** them." *State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990).

There is a distinction between evidence of psychological impairment that supports an affirmative defense and psychological evidence that negates an element of the offense charged. If a state of mind is an element of a crime, evidence

regarding the existence or absence of that state of mind is evidence relevant to whether a crime was, in fact, committed. A defense that negates *mens rea* and *actus reus* thus negates the essential elements of the offense rather than constituting a justification or excuse. *See United States v. Westcott*, 83 F. 3d 1354 (11th Cir. 1996); *see also United States v. Cameron*, 907 F. 2d 1051 (11th Cir. 1990). Evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions he took at the time the charged offense was committed, by contrast, is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime. *See Montana v. Egelhoff*, 518 U.S. 37, 66, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996) ("The placement of the burden of proof for affirmative defenses should not be confused with the use of evidence to negate elements of the offense charged.")

"Evidence that a defendant lacks the capacity to form *mens rea* is to be distinguished from evidence that the defendant actually lacked *mens rea*. While the two may be logically related, only the latter is admissible to negate the *mens rea* element of an offense." Donald F. Samuel, *Eleventh Circuit Criminal Handbook*, Vol 1: Chapter 4 § 86(b) (Matthew Bender, 2023 Ed.). This issue was further explored in *United States v. Bates*, 960 F. 3d 1278 (11th Cir. 2020). In *Bates*, the Eleventh Circuit held - consistent with *Cameron* - that while psychiatric evidence that negates the *mens rea* element would be admissible, psychiatric evidence that negates the ability to form the *mens rea* to commit the offense was not admissible. *See also United States v. Litzky*, 18 F. 4th 1296 (11th Cir. 2021) (distinguishing

psychiatric evidence that negates *mens rea* from psychiatric evidence that focuses on excuse or justification). Although a majority of the decisions held by this Court cited above pertain to the Insanity Defense Reform Act, 18 U.S.C. § 17, the same legal reasoning and logic applies to Herman's case. Accordingly, an automatism defense for a claim of sleepwalking, where Herman was unconscious and lacked *mens rea* and *actus reus* to commit the offense, challenges the fundamental elements of the crime itself rather than providing a justification or excuse for the behavior.

In *Patterson v. New York*, 432 U.S. 197, 207, 97 S. Ct. 2319 (1977), the United States Supreme Court concluded that the New York legislature's decision to define extreme emotional disturbance as an affirmative defense to the crime of murder was permissible because the defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder" but instead "constituted a separate issue on which the defendant is required to carry the burden of persuasion." The Supreme Court explained that because the fact constituting the affirmative defense was not logically intertwined with a fact necessary to prove guilt, the affirmative defense did not "unhinge the procedural presumption of innocence." *Id.* at 211.

The Florida Supreme Court applied similar reasoning in *State v. Cohen*, 568 So. 2d 49 (Fla. 1990). In *Cohen*, the Florida Supreme Court reviewed a statutory affirmative defense to Florida's witness-tampering statute. The affirmative defense required Cohen to prove that he engaged in lawful conduct and that his sole

intention was to encourage, induce, or cause the witness to testify truthfully. *Id.* at 51. The Florida Supreme Court concluded that the supposed affirmative defense was merely an illusory affirmative defense because Cohen could not logically both raise the affirmative defense and concede the elements of the crime. By attempting to prove the affirmative defense that he had acted lawfully with the intent to encourage the witness to testify truthfully, Cohen would necessarily negate the state's theory that he illegally contacted a witness, as opposed to conceding the state's charges. Thus, the purported affirmative defense unconstitutionally placed a burden on Cohen as a defendant to refute the State's case. *Id.* at 52.

Similarly, in Herman's case Trial Counsel's misadvice to pursue an affirmative defense for a claim of sleepwalking, where Herman lacked *mens rea* and *actus reus* to commit the offense, relieved the state of its burden of proof, beyond a reasonable doubt, of the necessary elements of the offense and unconstitutionally shifted the heavier burden to Herman to prove the absence of those elements. By attempting to prove the affirmative defense that he was sleepwalking, and was therefore unconscious and his acts were involuntary, Herman would necessarily negate the state's theory that he intentionally and voluntarily committed first degree premeditated murder. As a result, a claim of sleepwalking cannot logically be raised as an affirmative defense and simultaneously concede the elements of the crime. Therefore, Trial Counsel's misadvice to pursue an affirmative defense for a claim of sleepwalking and both the state and District Court's denial of Herman's

claim is contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) (an affirmative defense is one that does not serve to negative any facts of the crime which the state is to prove in order to convict of the crime charged) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) (a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime).

CONCLUSION

Based on the forgoing facts, arguments, and citations of authority, this Honorable Court should grant this Petition for a Writ of Certiorari and order further briefing, or in the alternative, vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Dated this 18th day of February, 2025.

Respectfully submitted,

/s/ _____

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Petitioner, *pro se*