No. 18-6916

# In the Supreme Court of the United States

**TROY LINCOLN POWELL,**

Petitioner,

**v.**

**STATE OF CALIFORNIA,**

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

## BRIEF IN OPPOSITION


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CAPITAL CASE

## QUESTION PRESENTED

Whether petitioner's death sentence is unconstitutional because of his asserted mental illness at the time of his offense and at his trial.

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## STATEMENT

1. In November 2000, petitioner Troy Lincoln Powell brutally murdered Tammy Epperson in her Los Angeles apartment. Pet. App. A 2-7. Powell, recently released from prison, met Epperson at a center for people recovering from substance abuse. *Id.* at 2. Over time, he "bec[a]me obsessed" with her, appearing uninvited at her workplace, calling her repeatedly, and declaring that he would kill her if he could not have her. *Id.* at 3. In early November, when Powell was loitering near Epperson's church, Epperson went to talk to him and then went with him to Epperson's nearby apartment. *Id.* Powell later left the apartment alone, telling the security guard that Epperson was "in her unit resting." *Id.* at 3-4.

The next day, Epperson's bloodied body, nude from the waist down, was found in her apartment. Pet. App. A 4. She had died from multiple blunt force injuries and had suffered other injuries suggestive of sexual abuse. *Id.* at 5-6. Her head had been slammed against the wall at least six times, leaving blood splatters, and had been bludgeoned repeatedly with a vase and lamp. *Id.* at 4-5. She had been stabbed below her eye, perhaps with a screwdriver found by her body; and hemorrhaging in her eyes and bruises on her neck suggested that she had been choked. *Id.* at 6.

Her body also showed bruises and abrasions in her vaginal area, the extent of which the deputy medical examiner characterized as "very rare[]." Pet. App. A 6. DNA analysis identified Powell's blood on Epperson's jeans,

panties, and inner thighs, and on a washcloth and bottle in the sink. *Id.* at 7. Epperson's apartment had been ransacked; paper towels in the home apparently had been used to clean up blood. *Id.* at 4-5.

The next day, Powell acknowledged to an acquaintance that he had killed Epperson. Pet. App. A 10. He said that, after he and Epperson had argued about her relationship with another man, he had told her that he was going to kill her; and he described how he struck her with a candle holder, hit her over the head with a stool and a lamp, and drove a screwdriver or ice pick into her. *Id.* The day after that, Powell was arrested at a local motel. *Id.* at 4-5. Epperson's keys were found on a table in his room. *Id.* at 4.

2.a. The State initially filed a felony complaint charging Powell with Epperson's murder. 1 CT 15-19. The complaint also alleged, as "special circumstances" making the murder punishable by death, that the murder involved torture and rape. *Id.*

The judge declared a doubt about Powell's competence to stand trial and, pursuant to state procedure, suspended proceedings pending a competency hearing. 1 CT 48-49.[1] After the hearing, Powell was found to be incompetent

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[1] "Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law require a trial judge to suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial." *People v. Blair*, 36 Cal. 4th 686, 711 (2005). A defendant is

and placed in a state hospital. 3 CT 401. Five months later, the state hospital certified Powell to be competent to stand trial. 3 CT 403-405.

b. Thereafter, a state grand jury indicted Powell for murder, forcible rape, sexual penetration by a foreign object, mayhem, and torture; the indictment also charged four "special circumstances" (torture-murder, rape, rape by instrument, and mayhem). 3 CT 347-350. Before arraignment, Powell's trial counsel declared a doubt about Powell's mental competency. 2 RT 1-5; 3 CT 354-355. Proceedings again were suspended, and a mental health professional was appointed to evaluate Powell. 2 RT 5; 3 CT 355, 360. After a hearing, the judge found Powell to be mentally competent. 2 RT 8; 3 CT 360, 362.

Some time after Powell was arraigned and pleaded not guilty, Powell's counsel stated that he wanted to have Powell withdraw his not-guilty plea and enter a plea of not guilty by reason of insanity. 2 RT 33-34; 3 CT 417. The judge again declared a doubt about Powell's competency; but, after another hearing, the judge found Powell competent to stand trial. 2 RT 36-47, 54-55; 3 CT 417-418, 431-432. Powell then pleaded both not guilty and not guilty by reason of insanity. 2 RT 58-59; 3 CT 432.

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incompetent to stand trial if he is unable to consult with his attorney with a reasonable degree of rational understanding or lacks a rational and factual understanding of the proceedings against him. *Id.*; *see* Cal. Penal Code § 1367(a).

c. The trial was divided into three parts: the guilt phase, the sanity phase, and the penalty phase. At the guilt phase, the prosecution presented the evidence of the murder. *See* Pet. App. A. It also presented evidence that Powell has committed two prior assaults against women in 1992 and 1999. *Id.* at 7. In both attacks, Powell had threatened the women, hit them, and grabbed them around their throats. *Id.* In his defense, Powell testified that he had not planned or intended to kill Epperson. *Id.* at 9. He admitted that he had struck Epperson during an argument but claimed that he had "no memory of what happened after that, although he remembered seeing her on the floor." *Id.* He also claimed that he had "blanked out" before. *Id.* The jury convicted Powell of the first-degree murder of Epperson and found three special circumstances: rape, mayhem, and torture. *Id.* at 1. The jury also convicted Powell of forcible rape, mayhem, and torture. *Id.*

There followed the sanity-phase of trial, addressing whether Powell was able to understand the nature and quality of his criminal acts and to distinguish right from wrong when the acts were committed. Pet. App. A 1; *see People v. Elmore*, 59 Cal. 4th 121, 140 (2014). Powell presented the testimony of four experts. Pet. App. A at 11-15. Dr. Kyle Boone testified that Powell's level of intelligence fell within the average range but that Powell's poor performance on certain standardized tests indicated that the frontal lobes of Powell's brain were not "'working correctly' due to 'brain damage or dysfunction,'" causing him to "make bad decisions and lose control of his

behavior." *Id.* at 12. Dr. Roger Bertoldi testified—based on his review of records, an electroencephalogram (EEG), a computer analysis, and Powell's statements—that Powell had an underlying epileptic disorder and that his "brain dysfunction" could result in "'extraordinary rage like a primitive, very primitive rage.'" *Id.* at 12-13. Dr. Saul Niedorf testified, based on three interviews with Powell and his review of "a dozen" reports, that Powell suffered from "'intermittent explosive disorder,' which is characterized by destructive or violent actions that occur suddenly and lack a 'cutoff.'" *Id.* at 13-14. He opined that Powell was not sane at the time he committed the killing, because he did not know or understand the nature and quality of his actions at the time he was beating Epperson and could not distinguish right from wrong. *Id.* Dr. William Vicary, who had first evaluated Powell for competence to stand trial in a prior case and had interviewed Powell for about ten hours in this case, opined that Powell suffered from a "'major mental disorder,' primarily bipolar disorder," and that, although Powell understood the nature and quality of his acts at the time of the killing, Powell could not distinguish right from wrong. *Id.* at 14-15.

The prosecution presented the testimony of two experts. Pet. App. A 16-17. Dr. David Griesemer examined Powell and found his functioning normal. *Id.* at 16. He did not believe that Powell's EEG indicated a tendency toward epilepsy or suggested any significant frontal lobe slowing. *Id.* Dr. Kris Mohandie—who interviewed Powell on three occasions, reviewed medical and

psychiatric records, and administered two "objective" psychological tests—opined that Powell was "faking at least some of his psychiatric symptoms." *Id.* Moreover, on account of Powell's "tendency to exaggerate his symptoms," Dr. Mohandie was "unable to find reliable evidence to diagnose [Powell] with a major mental disorder." *Id.* Dr. Mohandie opined that Powell was legally sane at the time of Epperson's murder. *Id.* at 17.

Dr. Mohandie also testified that: Powell in his interviews had "disclaimed any overt symptoms of mental illness, such as voices, delusions, or hallucinations;" Powell had a "very specific memory of all events leading up to the killing, and his behavior after the killing, which involved some cleaning up and avoiding detection, was inconsistent with a failure to recognize his conduct was wrongful;" and Powell's "claim of amnesia surrounding the moment of the killing seemed 'unlikely.'" Pet. App. A 17. Dr. Mohandie believed that Powell instead exhibited an antisocial personality with narcissistic traits and had committed "the 'garden variety violence' of killing a woman who he believed had treated him poorly." *Id.* Dr. Mohandie also rejected an intermittent-explosive-disorder diagnosis, which he found inconsistent with the purposeful, motivated behavior in the killing. *Id.*

The jury found Powell sane. *See* Pet. App. A 11.

At the penalty-phase, the original jury was unable to reach a verdict, so a new jury was impaneled. Pet. App. A 2. The prosecution presented evidence in aggravation that comprised, largely, the same evidence regarding

Epperson's murder presented during the guilt phase. *Id.* at 17. In mitigation, Powell offered the testimony of his mother and two sisters, concerning his difficult family life and history of violence, and testimony from childhood and adulthood friends. *Id.* at 18-20.

In addition, Powell presented the same four mental-health experts, whose testimony was materially the same as their sanity-phase testimony. Pet. App. A 18-20. In rebuttal, the prosecution re-presented the testimony of the state's two psychiatric experts from the sanity phase. *Id.* In sur-rebuttal, Powell presented the testimony of Dr. Richard Romanoff, who opined that Powell "suffers from a 'complex set of mental disorders,' beginning with 'organic impairment,' or abnormal brain function," compounded by dysfunctional family circumstances during his youth. *Id.* He agreed with the diagnosis of intermittent explosive disorder and criticized Dr. Mohandie's contrary view as incomplete. *Id.* The second jury returned a verdict of death. *Id.* at 2.

3. The California Supreme Court affirmed the conviction and sentence. *See* Pet. App. A. It rejected Powell's claim that, even if he was legally sane at the time of the killing, he was and is mentally ill, and that imposing a death sentence under those circumstances constitutes cruel and unusual punishment under the Eighth Amendment. *Id.* at 50. Relying on its prior holding in *People v. Hajek and Vo*, 58 Cal. 4th 1144, 1252 (2014), the court explained:

> There are a number of different conditions recognized as mental illness, and the degree and manner of impairment in a particular individual is often the subject of expert dispute. Thus,

> while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn. Thus, we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence. We leave it to the Legislature, if it chooses, to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty.

*Id.* at 50. The court added that it earlier had applied the same "broad holding" in *People v. Mendoza*, 62 Cal. 4th 856 (2016), "especially considering" that "the jury, after a separate trial involving copious testimony from mental health experts, rejected defendant's claim that he was not culpable for the murders on the ground of insanity as defined by our law, and at the penalty phase rejected his argument that because of his mental illness the death penalty was not warranted." *Id.* at 50-51. The court noted that the same considerations applied here. *Id.* at 51.

## ARGUMENT

Powell argues that the reasoning underlying this Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to preclude his execution because he suffered from "severe mental illness" at the time of his crime and at his trial. Pet. 15-25. Powell points to no appellate opinion adopting such an extension. The Court has previously declined to consider a similar claim, and Powell's case likewise does not warrant further review. *See Mendoza v. California*, 137 S. Ct. 111

(2016) (No. 15-9640); *Castaneda v. California*, 565 U.S. 1123 (2012) (No. 11-7087).

1. The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits cruel and unusual punishment. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). What constitutes cruel and unusual punishment depends on evolving standards of decency, which "must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Id.* at 420. Capital punishment must be limited to offenders who commit the most serious crimes and whose extreme culpability makes them the most deserving of execution. *Id.* Whether the death penalty is disproportionate to the crime depends on the controlling precedents and this Court's understanding and interpretation of the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 67-68 (2010); *Kennedy v. Louisiana*, 554 U.S. at 421. In general, "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy*, 554 U.S. at 420.

In *Atkins v. Virginia*, 536 U.S. 304, this Court held that the execution of a person who was sufficiently intellectually disabled at the time he committed a crime would violate the Eighth Amendment's prohibition against cruel and unusual punishment for two reasons. First, as evidence of evolving standards of decency, a significant number of States had concluded that death was not a suitable punishment for an intellectually disabled criminal, and, even in States

allowing such executions, the practice was rare. *Atkins* at 311-317. Second, intellectually disabled persons have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320. These cognitive and behavioral impairments make intellectually disabled persons both less culpable and less likely to be subject to effective deterrence. *Id.* at 319-320.

The *Atkins* Court also identified an additional reason to refrain from imposing the death penalty on persons with an intellectual disability: to protect the integrity of the trial process. The intellectually disabled face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Atkins*, 536 U.S. at 320-321. In light of all these considerations, persons with a sufficient intellectual disability who "meet the law's requirements for criminal responsibility" may still be tried and punished, *id*. at 306, but they may not receive the law's most severe sentence, *id*. at 318.

In *Roper v. Simmons*, 543 U.S. 551, this Court held that imposition of the death penalty for crimes committed while the defendant was under the age of eighteen also constituted cruel and unusual punishment. Similar to the intellectually disabled in *Atkins*, there was an emerging consensus among the States to reject the death penalty for juveniles, and even in States that

permitted the death penalty for juveniles the actual practice was rare. *Roper*, 543 U.S. at 560-568. This Court further relied on three general differences between juveniles and adults that decrease juveniles' culpability for their actions: (1) compared to adults, juveniles lack maturity and have an underdeveloped sense of responsibility; (2) juveniles are more vulnerable and susceptible to negative influences and peer pressure; and (3) juveniles have personality traits that are more transitory and less fixed than adults. *Id.* at 568-571. Based on those differences, this Court determined, the death-penalty rationales of retribution and deterrence did not apply to juveniles to the same extent as to adults. *Id.* at 571-572. Finally, this Court relied on the fact that the United States was the only country in the world that continued to give official sanction to the death penalty for juveniles. *Id.* at 575-578.

2. Powell asks this Court to analogize a diagnosis of mental illness to juvenile status or a finding of intellectual disability, and on that basis to hold that imposing the death penalty in this case would constitute cruel and unusual punishment in violation of the Eighth Amendment. Pet. 15-25. Powell makes no showing, however, that among the States that have capital punishment there is an emerging consensus that a death sentence is categorically improper where an adult defendant, although legally sane and competent to stand trial, suffered from some mental illness at the time he committed a capital crime. See *Atkins v. Virginia*, 536 U.S. at 314-317. Indeed, Powell has not identified any capital-punishment State that categorically

exempts such individuals from the death penalty and acknowledges that "there is no legislative enactment which specifically prohibits the execution of the severely mentally ill." Pet. 21. Moreover, federal and state courts have consistently declined to extend the categorical rule of *Atkins* to any group defined by some definition of mental illness. *See, e.g., ShisInday v. Quarterman*, 511 F.3d 514, 521 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); *Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007); *Lewis v. State*, 620 S.E.2d 778, 764 (Ga. 2005); *Matheny v. State*, 833 N.E.2d 454, 458 (Ind. 2005); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006); *State v. Ketterer*, 855 N.E.2d 48, 105 (Ohio 2006); *State v. Hancock*, 840 N.E.2d 1032, 1059-1060 (Ohio 2006); *Commonwealth v. Baumhammers*, 960 A.2d 59, 96-97 (Pa. 2008); *Mays v. State*, 318 S.W.3d 368, 379-380 (Tex. 2010); *see also Joshua v. Adams*, 231 Fed. Appx. 592, 593 (9th Cir. 2007).

Powell also fails to demonstrate that mental illness categorically renders adults less culpable for their crimes or less susceptible to deterrence, as this Court concluded that intellectual disability and juvenile status do. In *Atkins*, this Court identified three features essential to the definition of an intellectual disability sufficient to preclude the imposition of capital punishment: (1) significantly sub-average general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) the appearance of factors (1) and (2) during the individual's developmental period. *Atkins*, 536 U.S. at 308 n.3, 318. Thus, a diagnosis and finding of intellectual disability requires not only sub-

average intellectual functioning but also significant deficits in adaptive skills, such as communication, self-care, and self-direction, that become manifest before age eighteen.

An adult offender with mental illness, if nevertheless sane and competent, does not necessarily have the same categorical cognitive deficiencies as an intellectually disabled person. The California Supreme Court has recognized that, in contrast with those who fall within the legal definition of intellectually disabled for this purpose, persons with one of "a number of different conditions recognized as mental illnesses" might well nonetheless "have greater personal culpability for crime because they retain more awareness and personal autonomy." *People v. Mendoza*, 62 Cal. 4th at 909. The goals of retribution and deterrence may be served by application of the death penalty to murderers in that situation, so long as they were legally sane at the time of their crimes.

In explaining why it declined to rule that executing a murderer such as Powell would never serve the societal goals of retribution and deterrence, the state court reasoned:

> There are a number of different conditions recognized as mental illnesses, and the degree and manner of impairment in a particular individual is often the subject of expert dispute. Thus, while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn.

Pet. App. A 50. Powell, in contrast, asks this Court to establish a new, ill-defined category of murderers who would receive a categorical exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case.[2]

In this case, the trier of fact's repeated rejections of Powell's evidence of mental illness as a ground for finding lack of competence, legal insanity, or mitigated culpability, demonstrate his failure to establish that he personally suffered from specific deficits that might make his condition legally analogous to intellectual disability or juvenile status for this purpose. Medical experts at trial did not even agree about Powell's mental health. Dr. Mohandie testified that, given Powell's "faking" of some of his psychiatric symptoms and tendency to exaggerate his symptoms, he was unable to find reliable evidence to diagnose Powell with a major mental disorder. Pet. App. A 16. Three defense experts opined that Powell had a mental disorder, but they did not agree on a diagnosis: Dr. Niedorf diagnosed Powell with "intermittent explosive disorder;" Dr. Vicary diagnosed him with bipolar disorder; and Dr. Romanoff

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[2] In analyzing the question of mental illness generally in *Mendoza*, the California Supreme Court relied in part on its prior decisions in *People v. Boyce*, 59 Cal. 4th 672, 719-722 (2014); *People v. Hajek and Vo*, 58 Cal. 4th at 1250-1252; and *People v. Castaneda*, 51 Cal. 4th 1292, 1344-1345 (2011). As noted above, in *Mendoza* and *Castaneda* this Court declined to review a question similar to the one Powell seeks to present here. *Mendoza v. California*, 137 S. Ct. 111 (No. 15-9640); *Castaneda v. California*, 565 U.S. 1123 (No. 11-7087). Petitions in the other cases did not raise similar questions. See *Boyce v. California*, 135 S. Ct. 1428 (2015) (No.14-7581); *Hajek v. California*, 135 S. Ct. 1400 (2015) (No. 14-6898).

diagnosed him with a "complex set of mental disorders," including "intermittent explosive disorder." *Id.* at 13-15, 20. In addition, the doctors who examined Powell found no evidence of sub-average intellectual functioning; indeed, his intelligence was found to be within the average range. *Id.* at 11; 33 RT 5099.

Significantly, Powell's conduct at the time of the crime showed that he understood that what he had done was wrong, and that he was able to think logically about the need to avoid detection and some ways to do so, such as by using paper towels in an apparent effort to clean blood from his hands and by lying to the security guard. *See* Pet. App. A at 4-5. Similarly, his statement to his acquaintance the next day showed that he had thought about the killing beforehand and that he remembered the various ways he had bludgeoned the victim. *Id.* at 9-10.

Powell thus fails to show that either mental illness as an overall category, or his condition in particular, is so akin to intellectual disability or juvenile status that the death sentence in his case is constitutionally improper. He has not established that he is "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316.

3. Powell further contends that imposition of a death sentence on a person with mental illness violates the Equal Protection Clause because juveniles and the intellectually disabled are "identically situated in all relevant respects." Pet. 18. This argument is essentially a restatement of Powell's cruel

and unusual punishment claim, and fails for the same reasons. Powell's claimed mental illness is not categorically akin to the immaturity of juveniles or to the type of intellectual disability recognized in *Atkins*. Principles of equal protection "do not require that things different in fact or opinion must be treated in law as though they were the same." *Mendoza*, 62 Cal. 4th at 912 (internal quotation marks and alterations omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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