

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

LEMUEL WHITESIDE,
PETITIONER,

V.

STATE OF ARKANSAS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ARKANSAS COURTS APPLIED AN INCORRECT STANDARD FOR RESOLVING PETITIONER WHITESIDE'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN SENTENCING BY REQUIRING PROOF THAT ANY INDIVIDUAL ACT OF DEFICIENT PERFORMANCE MUST SATISFY THE PREJUDICE PRONG OF *STRICKLAND v. WASHIINGTOM*, 466 U.S. 668 (1984), RATHER THAN CONSIDERING, CUMULATIVELY, THE PROBABLE PREJUDGE ATTRIBUTABLE TO COUNSEL'S MULTIPLE ERRORS OR DEFICIENCIES IN PERFORMANCE IN ASSESSING THE TOTALITY OF COUNSEL'S REPRESENTATION.

- A. WHETHER *STRICKLAND* PERMITS CHARACTERIZATION OF PERFORMANCE DEFICIENCIES BY COUNSEL AS MATTERS OF *STRATEGIC DECISION-MAKING* WHEN COUNSEL ADMITS THAT ALTERNATIVE STRATEGIES WERE NEVER RECOGNIZED OR GIVEN CONSIDERATION.
- B. WHETHER DETERMINATION OF PRECEDENT CONTROLLING FEDERAL HABEAS CORPUS REVIEW OF STATE PETITIONER'S CLAIMS PURSUANT TO *STRICKLAND* IS ALTERED BY AEDPA.

PRIOR LITIGATION RELATED TO THIS CASE

- *Whiteside v. State*, 383 S.W.3d 859 (Ark. 2010), affirming conviction and sentence life imprisonment for capital felony murder on direct appeal;
- *Whiteside v. Arkansas*, 567 U.S. 850 (2012), *granting certiorari, vacating judgment and remanding* for reconsideration in light of *Miller v. Alabama*, 567 U.S. 460 (2012);
- *Whiteside v. Arkansas*, 567 U.S. 964 (2012). Petition for rehearing denied; seeking review of state law requiring accused to prove affirmative defense of lack of intent to commit capital felony murder;
- *Whiteside v. State*, 426 S.W. 3d 917 (Ark. 2013), *opinion on remand* from *Whiteside v. Arkansas*, 567 U.S. 850 (2012), remanding for resentencing on capital murder charge and denying Petitioner's argument for resentencing on underlying felony charge of aggravated robbery supporting capital felony murder count;
- *Whiteside v. Arkansas*, 571 U.S. 922 (2013), *cert. denied*; denying review of Petitioner's argument that that re-sentencing order limited to capital murder conviction and precluding re-sentencing on conviction on underlying felony of aggravated robbery;
- *Whiteside v. State*. 588 S.W.3d 720 (Ark. 2019), *affirming denial of motion for new trial*; holding claimed sentencing instruction error in authorizing jury to impose life sentence on underlying aggravated robbery conviction violated Eighth Amendment based on juvenile non-homicide life sentencing issue expressly left unresolved by *Graham v. Florida*, 560 U.S. 48 (2010) defaulted by failure to present issue on direct appeal, *cert. denied*, *Whiteside v. Arkansas*, 141 S.Ct. 1048 (2021);
- *Whiteside v. State*. 684 S.W.3d 588 (Ark. 2024), affirming denial of post-conviction relief by trial court following hearing on Petitioner's claims of counsel's ineffective assistance in sentencing process on conviction for underlying felony of aggravated robbery.

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OPINION BELOW

Petitioner Whiteside appealed to the Arkansas Supreme Court from the denial of post-conviction relief by the Pulaski County Circuit Court, the trial court of conviction, which upheld denial of relief. *Whiteside v. State*, 2024 Ark. 30, 684 S.W.3d 588 (2024). A copy of the opinion is appended as Exhibit A.

JURISDICTION

Whiteside invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), authorizing review of the decision rendered by the Arkansas Supreme Court upholding denial of his petition for post-conviction relief. The court issued its opinion on March 14, 2024. No petition for rehearing was filed. This petition is timely if filed on or before June 12, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance counsel for his defence."

ARKANSAS RULE OF CRIMINAL PROCEDURE, 37.1, is the primary vehicle for an individual convicted of a felony who is in custody to challenge the conviction or sentence imposed. It provides, in pertinent part:

A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

- (a)** that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
- (b)** that the court imposing the sentence was without jurisdiction to do so; or
- (c)** that the sentence was in excess of the maximum sentence authorized by law; or
- (d)** that the sentence is otherwise subject to collateral attack; may file a verified petition in the court which imposed the sentence, praying that the sentence be vacated or corrected.
- (e)** The petition will state in concise, nonrepetitive, factually specific language, the grounds upon which it is based and shall not exceed ten pages in length. The petition, whether handwritten or typewritten, will be clearly legible, will not exceed thirty lines per page and fifteen words per line, with lefthand and righthand margins of at least one and one-half inches and upper and lower margins of at least two inches. Petitions which are not in compliance with this rule will not be filed without leave of the court.

The statutory remedy for an individual convicted in a state court proceeding to obtain relief by federal writ of habeas corpus is 28 U.S.C. § 2254, which sets forth the standard for obtaining relief in subsection (d):

- (d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

STATEMENT OF THE CASE

Petitioner Lemuel Whiteside seeks review from the denial of post-conviction relief by the Arkansas courts challenging the sentence 35-year imposed by jurors on his conviction for aggravated robbery, an underlying felony supporting his conviction for capital felony murder and sentence of life imprisonment mandatorily imposed for an offense committed while he was a juvenile. This Court vacated the life sentence and remanded the case, *Whiteside v. Arkansas*, 567 U.S. 850 (2012), which ultimately resulted in imposition of a ten (10) year sentence on the capital murder charge. In the post-conviction litigation, the state courts rejected his Sixth Amendment argument that counsel failed to provide effective assistance during the sentencing proceeding with respect to the aggravated robbery charge.

A. *Procedural history of the litigation*

Whiteside was convicted of capital murder based upon a capital felony murder committed while in commission of aggravated robbery. A juvenile at the time of the offense, he was sentenced to life on the murder charge and a total of fifty (35) years on the aggravated robbery with the convictions and sentences affirmed on direct appeal. *Whiteside v. State*, 383 S.W.3d 859 (Ark. 2010). On certiorari, the Court vacated the judgment of the state court, *Whiteside v. Arkansas*, 567 U.S. 850 (2012), remanding for consideration based on *Miller v. Alabama*, 567 U.S. 460 (2012).

On remand, the Arkansas Supreme Court ordered resentencing consistent with *Miller*, directing the trial court to afford Petitioner a hearing in which his age at the time of the offense could potentially be found to be a mitigating factor warranting a sentence less than the life sentence mandatorily imposed under Arkansas law. The court, however, rejected Petitioner's argument that the resentencing proceeding should also involve include resentencing on the aggravated robbery charge, *Whiteside v. State*, 426 S.W.3d 917 (Ark. 2013), *opinion on remand* from *Whiteside v. Arkansas*, 567 U.S. 850 (2012), and this Court denied certiorari. *Whiteside v. Arkansas*, 513 U.S. 922 (2013).

On resentencing, the trial court imposed a sentence of ten years in the Arkansas Department of Correction on the capital murder count and ordered this sentence to be served concurrently with the 50-year sentence imposed by the jury on the aggravated robbery charge, enhanced by the 15-year term for Whiteside's use of a firearm in the attempted commission of the robbery. The sentencing order includes the following reference to the agreed disposition:

Therefore, by agreement of all parties, this court hereby amends, no pro tunc, Mr. Whiteside's original sentence of life imprisonment without the possibility of parole to a sentence of ten (10) years in the Arkansas Department of Correction. . . . *It is further agreed that Mr. Whiteside's acceptance of this agreement shall not act as a waiver to any appellate rights or to collaterally attack his prior convictions in this case.*

[APP. EXHIBIT C: Nunc Pro Tunc Amended Sentencing Order (emphasis added).]

The state court subsequently rejected Whiteside's challenge to the 35-year sentence on the aggravated robbery charge based on the trial court's sentencing instruction that authorized the jury to consider imposition of a life sentence on this charge. *Whiteside v. State*. 588 S.W.3d 720 (Ark. 2019) (*affirming denial of motion for new trial*). Trial counsel had persistently objected that imposition of a life sentence without parole eligibility on a juvenile convicted of a non-homicide offense was impermissible based on the reasoning in *Graham v. Florida*, 560 U.S. 48 (2010). There, this Court had expressly limited its holding when the juvenile was also convicted of a homicide in addition to the non-homicide, felony offense. *Id.* at 63. On appeal from denial of the motion for new trial, the state court ruled that the trial court lacked jurisdiction to re-sentence Whiteside based on its limited remand and concluded that the failure to raise the issue on direct appeal from conviction defaulted the claim. 588 S.W.3d at 724. The Court denied certiorari. *Whiteside v. Arkansas*, 141 S.Ct. 1048 (2021).

The imposition of the ten-year sentence on the capital murder charge in the re-sentencing process altered dramatically the sentencing consequences of the jury's 35-year term on the aggravated robbery charge, enhanced by fifteen years imposed on the firearm enhancement for a total sentence of fifty years. Instead of the aggravated robbery sentence essentially being legally inconsequential because Whiteside would serve the life sentence on the capital murder charge without right

to parole eligibility, the 50-year total punishment on the underlying felony now dwarfs the 10-year sentence he has already discharged on the murder count.

Petitioner's post-conviction challenge to counsel's performance in the sentencing phase, as contemplated by the trial court's *nunc pro tunc* sentencing order, (APP. EX. D), now raises a particularly critical issue in terms of the actual terms of the punishment imposed for his offenses. The state trial court of conviction, sitting as the post-conviction court under ARKANSAS RULE OF CRIMINAL PROCEDURE 37.1, rejected his ineffective assistance challenges and the Arkansas Supreme Court affirmed the denial, preserving his federal constitutional claim for this petition.

B. Summary of material facts relating to the offense and evidence at trial

Whiteside and another juvenile, Cambrin Barnes, were charged with capital felony murder and the underlying aggravated robbery in the attempted robbery of James London. Whiteside's girlfriend, Loretta Talley, drove Whiteside, Barnes, and another young woman, Cynthia Arrington, who was not involved in the offenses, to Whiteside's mother's house. Their purpose was to facilitate the robbery of James London, who supposedly had a substantial sum of money from his tax return with him at the time. After two failed attempts, Whiteside and Barnes approached the residence in their final effort to induce London to leave the residence where they would rob him. Arrington testified for the prosecution that she observed Whiteside hand a handgun to Barnes prior to the final robbery attempt. Whiteside entered the

residence and London left with him. Once outside, Barnes confronted London with the weapon and demanded the money. When London lunged toward Barnes, Barnes fired a single, fatal shot. Barnes fled the scene in the car driven by Talley. *Whiteside v. State*, 383 S.W.3d 859, 862-63 (Ark. 2010).

Whiteside returned to the victim and testified at trial that he attempted to perform CPR on London after a 9-1-1- call had been made. Barnes entered a plea of guilty to the charge of capital murder and was sentenced to serve a term of forty (40) years in the Arkansas Department of Correction pursuant to a plea agreement with the aggravated robbery charge being dismissed. *Whiteside v. State*, 426 S.W. 3d 917, 918 (Ark. 2013), *opinion on remand..*

Whiteside declined a plea offer, was tried before a jury, and convicted of both capital felony murder and the underlying aggravated robbery offense. The jury also found that he used a firearm in the commission of the offenses charged. He was sentenced to the mandatory life sentence on the capital felony murder as a matter of law and the trial jury set his punishment on the aggravated robbery charge at thirty-five (35) years and fifteen (15) years on the firearm enhancement count. The Court ordered these sentences to be served consecutively. *Id.* at 919.

Following the re-sentencing, Whiteside filed a Motion for New Trial or Other Relief. The ten-year sentence on the capital murder charge rendered the 50-year concurrent sentence on the aggravated robbery prejudicial. When Whiteside was

faced with the mandatorily-imposed sentence of life imprisonment without possibility of parole, the concurrent 50-year sentence did not result in any actual prejudice because he would never be eligible for parole or discharge, even assuming he completed serving the sentence on the aggravated robbery count. His challenge to the sentencing instruction on the aggravated robbery charge failed, however.

C. Preservation of the federal constitutional claim

Once the trial court sentenced Whiteside to a ten-year prison term on the capital murder on remand, the 50-year total sentence imposed on the underlying felony to be served concurrently with the life sentence originally imposed mandatorily on the murder count, infused the longer sentence for the aggravated robbery with actual prejudice. Petitioner's argument of trial counsel's ineffectiveness in the sentencing phase on that count ripened for consideration. His petition for post-conviction relief brought pursuant to ARKANSAS RULE OF CRIMINAL PROCEDURE 37.1 is appended to this petition as Exhibit C and includes his claims for ineffective assistance of counsel based on the Sixth Amendment. In the Rule 37.1 petition Whiteside argued that trial counsel had been ineffective in failing to present mitigation evidence with respect to his participation in the capital felony murder and conviction for the underlying offense of aggravated robbery in two significant respects:

First, trial counsel failed to offer evidence that Barnes, his accomplice in the offense and who fired the fatal shot at the victim, told police detectives that he fired because when the victim, London, lunged at him during the robbery he feared that London would take the gun from him and shoot him. (APP. EX. C, at 6-8).

Second, trial counsel failed to investigate records of Whiteside's two psychiatric hospitalizations while a juvenile or obtain expert assistance in developing mitigation evidence relevant to jury sentencing on the aggravated robbery charge, the underlying felony for the capital felony murder charge upon which he was convicted. While he was sentenced to life imprisonment under the mandatory capital sentencing statute, jurors were still authorized to impose a sentence on the aggravated robbery charge of 10 to 40 years, or life imprisonment, having discretion to impose a sentence within the statutory range on this charge, enhanced for use of a firearm in commission of the crime for up to 15 years, to be served consecutively. (APP. EX. C., at 8-12).

Whiteside expressly preserved his challenge to the Arkansas law precluding cumulative review of counsel's errors, arguing that counsel's failure to offer evidence that Barnes admitted shooting the victim because of his own personal fear and evidence of the effect of his mental impairment resulting in hospitalizations as a child failed to afford him effective assistance in the sentencing phase of trial with

respect to the jury's imposition of the range of years authorized by statute. (APP. EX. C., at 12-13).

At the hearing on the Rule 37.1 petition, Whiteside offered the testimony of trial counsel who assumed responsibility for sentencing on the robbery charge, and whose sentencing case consisted of three pages of transcript and closing argument:

I'll just describe in my own words, a juvenile is less mature by definition. A juvenile as he was, he was a 17 year old, is less able to withstand peer pressure. A juvenile is, well, has their whole life ahead of them just like Lemuel Whiteside does. At this point I would ask you to make a determination on these remaining charges. You've determined that he is guilty of capital murder and that is your determination. That's what you were here to do. Don't hold it against Lemuel. Don't hold it against us that we believe him and argue his case. We ask you to go back and make a fair determination on the sentence for Lemuel Whiteside. Thank you.

Trial counsel confirmed that the defense theory at the capital trial was based on the affirmative defense which, if proved, would reduce the guilt to first degree murder if the accused demonstrates that he did not participate in the homicidal act. (RT 44) and that the prosecutor would have disclosed evidence including the statement Barnes made to detectives, although he admitted not being 100% certain because of passage of time. (RT 45-46). Counsel testified that there was no evidence offered at trial with respect to Barnes' motivation in firing the fatal shot. (RT 46). His recollection was that he and lead counsel did not offer evidence of this state because they assumed that Barnes would exercise his right to remain silent and not

testify. (RT 46-47). They did not consider offering Barnes' statement as a declaration against his penal interest, because they considered it hearsay, as he recalled. (RT 47), but he also agreed that it could have been admitted as a statement against Barnes' penal interest pursuant to Evidence Rule 804(b)(3). (RT 61).

Counsel explained that the defense proceeded on the theory that the mandatory life sentence for a juvenile convicted of capital murder would be unconstitutional in light of *Graham v. Florida*. (RT 47-48). He agreed that evidence of Barnes' motivation for shooting Mr. London not implicating Whiteside would have been potentially mitigating on the aggravated robbery and firearm enhancement charges. (RT 49). He also testified that he argued to the trial court the jury's duty in imposing punishment on those charges and Whiteside's reduced culpability as a juvenile. (RT 49-50), but admitted he argued without evidence of Barnes' motivation for shooting to show that Whiteside did not do anything to provoke the shooting. (RT 50). He testified that in his opinion, evidence of Barnes' motivation for shooting would have been mitigating in punishment. (RT 50). He stated that he could not recall any strategic reason for not offering Barnes' explanation at the sentencing phase of trial. (RT 50-51). He then confirmed that there was no strategic decision for not offering evidence of Barnes' motivation for shooting London as mitigating evidence. (RT 52).

Trial counsel then testified that he was aware of the use of psychiatric evidence for mitigation, recalling that Whiteside had been evaluated for competence by Dr. Michael Wood, who found him competent to proceed to trial. (RT 52-53). He recalled knowing that Whiteside had been hospitalized as a juvenile, (RT 53), but had never reviewed the records of his hospitalizations at Pinnacle Pointe Psychiatric Hospital or the Center for Youth and Families. (RT 54). He conceded that evidence of Whiteside's psychiatric hospitalizations would have had no bearing on the mandatory life sentence imposed for capital murder, it could have had a bearing on the sentences imposed on the aggravated robbery and firearm enhancement charges. (RT 54). He also admitted that there was no strategic reason for not exploring the use of evidence from these hospitalizations as mitigation.

On cross-examination, counsel testified that he believed he had seen Barnes' statement prior to trial, but had not reviewed it since. He also stated that he believed the Barnes statement would not have been admissible because it was hearsay. He testified that he argued on the sentencing issue, stressing Whiteside's age. In fact, he argued a juvenile's reduced culpability, but without reference to any mitigating circumstances. On cross, he also agreed that by offering evidence of Whiteside's mental health history, it could open the door to any negative evidence the State might have been able to offer and that he would have considered that in deciding what evidence to offer during sentencing.

On redirect, counsel conceded that he could have offered Barnes' statement as a declaration against penal interest through Detective Hudson's testimony, and that Hudson had testified at trial about the search of Barnes' residence that produced .40 caliber ammunition. He then admitted that Dr. Wood, in evaluating Whiteside, would not have been considering mitigating factors, and that he did not recall reviewing any of Whiteside's hospitalization records. He further admitted that the defense did not seek any expert opinion regarding possible mitigation evidence and that there was no strategic reason for not doing so. On recross-examination, he conceded that it would not have been in the client's interest to open up any negative information that might have been included in the mental health records. He also conceded that had Barnes' been called to testify at trial, he might not have testified consistently with the statement he gave to Detective Hudson. Also, he confirmed that he believed the transcript would have been hearsay, then explained that he believed that he was mistaken.

Barnes, being advised by counsel, exercised his right to remain silent.

Co-counsel then called retired LRPD Detective Tommy Hudson, who testified that he took a statement from co-defendant Barnes after his arrest and provided the predicate for admission of the statement as Petitioner's Exhibit 1, which was admitted without objection. (RT 71-74). The statement contained the following admission by Barnes in response to questioning by Hudson:

HUDSON: Why'd you kill this guy man?

BARNES: Huh?

HUDSON: Whey you kill this guy?

BARNES: Because I was scared for my life when he rushed toward me. I ain't wanted to take the chance of him staking the gun from me and shooting me.

HUDSON: I mean don't you think he was scare that you were fixing to kill him? Because you did.

BARNES: True. True but you know what I'm saying he—he rushed towards me. You know what I'm saying and I was scared, you know what I'm saying for him taking the gun from me and [inaudible] shoot me with the gun.

(RT 143-144; Lines 667-681). Detective Hudson then testified that he understood Barnes to explain that originally he and Whiteside were going to exchange the gun with Mr. London for money, but then decided to rob him. (RT 77).

On cross-examination, Detective Hudson agreed that Barnes told him that Whiteside set up the robbery and claimed that London had \$8,000 in a tax refund, (RT 78), and that he masterminded the robbery and gave the gun to Barnes. (RT 79).

Petitioner then called Dr. Benjamin Silber, forensic psychologist, with experience in testifying for both the State and defense in criminal cases, having testified more than fifty times in Arkansas state and federal courts. (RT 82-83). He explained that he was familiar with the concept of mitigating circumstances, particularly as they related to the mental state of an individual at the time of

commission of an offense. (RT 84). Dr. Silber then testified that he had reviewed Whiteside's hospital records for commitment while he was a juvenile, prior to commission of the offense in this case, as well as Dr. Woods' competence evaluation. (RT 85). He explained that the evaluations of Whiteside would relate to his mental state as a juvenile, specifically, the diagnosis of Attention Hyperactivity Deficit Disorder, which relates directly to impulsivity as a result of emotional immaturity. (RT 86-87). This is reflected in "rash and impulsive decision-making" as Dr. Silber read from evaluation notes:

[H]e shows very little ability to inhibit his aggression. He had very little frustration threshold. He had an inability to focus, an inability to sit still. He was always on the go, very easily frustrated, and had poor problem-solving skills. It says "Extremely impulsive; he remains extremely active."

(RT 88). He then explained that mature functioning does not develop until age 25 or so and that this diagnosis is not uncommon for a juvenile who commits a violent offense. (RT 90).

Dr. Silber also related that Whiteside was diagnosed as having "borderline intellectual functioning," suggesting low IQ warranting clinical concern. (RT 90-91). He explained that a juvenile with lower IQ is even more impaired than an adult with the same level of intellectual development. (RT 91). The combined effect of ADHD and lower IQ compounds the individual's inability to make their ability to function or make good decisions even more difficult. (RT 91-92). Specifically, he

agreed that this combination would result in Whiteside having less realization that the gun he furnished to Barnes could be used than would otherwise be expected. (RT 93). Dr. Silber also found that the psychiatric records indicated that Whiteside suffered from depression and suicide ideation throughout his childhood and had been diagnosed with conduct and mood disorders. (RT 94).

Dr. Silber opined that the records would have provided evidence of mitigating circumstances, even recognizing that information in Dr. Woods' competency evaluation might have given laypersons pause, but that a mitigation expert would have connected these to an unhappy childhood home experience. (RT 97). He explained that he considered the psychiatric history as a potential source of mitigation evidence requiring additional investigation to assess the circumstances in which these impairments arose and stated that the records indicated that there were additional sources of information that could have been reviewed to assist in evaluating Whiteside's mental state. (RT 98). Finally, he explained on direct that mental health professionals routinely rely on records created by other professionals in the evaluation process and must necessarily do so in practice. (RT 98).

On cross-examination, the State questioned whether mitigation evaluation was readily available in criminal cases prior to the decision in *Miller v. Alabama* issued in 2012. He answered that it was and identified psychologist Mark Cunningham as an example of an expert in mitigation assessment. (RT 100-101).

He acknowledged that Whiteside's psychological records included notes that he carried guns, threatened his family, and abused his sister physically, and that he had significant prior experience with the juvenile justice system. (RT 102). He further acknowledged that the records showed that Whiteside had threatened to kill people and abused animals, set fires and bullied others, acting without remorse. (RT 103-104). But he explained these behaviors, such as abusing frogs, reflect underlying anger and fear, as evidence of impairment. (RT 104-105).

The State then questioned Dr. Silber's experience in studying the juvenile mind and asked if laypersons would have the benefit of his six years of professional work. (RT 106). He explained that jurors would not all view this evidence in the same way and some would likely understand the context in which the bad behaviors and causes for the behavior occur, which he termed a "nuanced approach."

On redirect, Dr. Silber affirmed that evaluation of mitigating circumstances did not begin with the *Miller* or *Graham v. Florida* decisions, but had been an active aspect of death penalty defense since the 1980's and 90's. (RT 107). He explained that his interest in looking at juveniles in the commission of offenses for some six years did originate in the decisions in *Graham* and *Miller*. (RT 109).

The trial court issued the Order denying relief on Petitioner's claims. (APP, EX. B, at 7).

D. Disposition of Petitioner's claim by the Arkansas Supreme Court

The Arkansas Supreme Court rejected Petitioner's argument that *Strickland* requires cumulative review of counsel's deficiencies in performance in determining whether counsel failed to provide effective assistance. It declined to overrule its "long-held precedent" for assessing ineffectiveness claims independently, noting:

This court has consistently refused to recognize the doctrine of cumulative error in allegations of ineffective assistance of counsel. See, e.g., *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123; *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); see also *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002); *State v. Hardin*, 347 Ark. 62, 60 S.W.3d 397 (2001) (holding that it was error for the circuit court to entertain a claim of cumulative error in a *Strickland* analysis).

(APP. EX. A, at 9; 2024 Ark. 30, *n. 5).

In upholding the trial court's findings that with respect to Whiteside's claim respecting failure to offer Barnes' statement to Detective Hudson explaining his reason for shooting Mr. London, the intended robbery victim and counsel's failure to offer evidence of his mental hospitalizations as a juvenile, the supreme court impliedly found the trial court's characterization of counsel's deficiencies to reflect sound strategy.

With respect to counsel's failure to offer Barnes' admission that he shot out of fear, the trial court minimized the impact of this uncounseled confession to Detective Hudson on the jury's appreciation of Petitioner Whiteside's degree of culpability for the fatal shooting, explaining that there was no allegation that he had

fired himself, (APP. EX. B, at 5). The court mischaracterized the claimed degree of prejudice finding that Whiteside claimed the “outcome of the trial would have been different,” misstating *Strickland*’s reasonable probability of a different outcome test, as Whiteside correctly argued in the Rule 37.1 petition:

This evidence bore directly on Petitioner’s culpability, serving to mitigate his role in the use of the firearm in the aggravated robbery and London’s death. There was a reasonable probability that had this evidence been developed in support of the counsel’s defense theory the jury would have considered Barnes’ explanation as mitigation, warranting a different sentence than the 35 years imposed on the robbery and 15 year maximum on the firearm enhancement.

(APP. EX. C, at 8). The trial court then concluded that “a review of that interview (Petitioner’s Exhibit 1) shows the statement could have been more harmful than helpful to the petitioner,” without offering any explanation as to why, then concluding that counsel’s failure to offer the statement was “trial strategy.” Yet counsel, himself, never offered any explanation why the failure to offer the statement as a declaration against penal interest, even if Barnes would have logically refused to testify, would have been more “harmful than helpful.” (APP. EX. B, at 5-6). Moreover, counsel conceded that the defense team never considered this as an option. This was not a matter of strategy at all and the trial court misapplied *Strickland*’s deference to objectively reasonable strategic decisions by counsel in finding: “The failure to call Barnes was trial strategy, and petitioner’s counsel was not deficient.” (APP. EX. B, at 6).

With respect to counsel’s failure to develop expert mitigation evidence based on Whiteside’s mental history interrelated to his age, the trial court similarly rejected Dr. Silber’s explanation that many of the adverse character factors included by Dr. Wood in his competency determination report were consistent with emotion and mental impairment. Counsel testified that he never reviewed the hospitalization records or diagnoses included in those records, yet the trial court found that the “significant negative information” included in the records available to counsel at the time of trial rendered the “decision not to call an expert regarding potential mitigation based on the petitioner’s age and history of psychiatric treatment falls within a matter of professional judgment.” (APP. EX. B, at 7).

The state supreme court agreed with the post-conviction court’s conclusion that Petitioner was not prejudiced by the failure to offer Barnes’ statement and held that because the finding was “not clearly erroneous; therefore, we must affirm.” (APP. EX. A, at 7). With respect to counsel’s failure to review Whiteside’s psychiatric hospitalization records and seek expert assistance for mitigation purposes, the supreme court concluded that he failed to overcome the presumption that counsel’s conduct constituted reasonable professional assistance and that “trial counsel’s decision not to call an expert witness fell within “a matter of professional judgment.” Yet, counsel admitted that he never reviewed the records at all, and never considered attempting to obtain an expert who could offer support in terms of

mitigation. In other words, the state courts both decided that because negative information might have been exposed had a mitigation case been presented, counsel's failure to conduct the investigation that underscores the decisions in *Graham* and *Miller*, rejecting mandatory imposition of life sentences without prospect for parole eligibility, and required vacation of Whiteside's life sentence for capital murder, constituted strategically reasonable professional judgment even when there was no strategic decision made at all.

REASONS FOR GRANTING THE WRIT

Arkansas requires a convicted criminal defendant challenging the conviction or sentence imposed based on claims of ineffective assistance of counsel to prove that any individual act of defective performance resulted in a reasonable probability that the outcome would have been different but for counsel's error in order to demonstrate a violation of the Sixth Amendment right to assistance of counsel. The test applied by Arkansas and other jurisdictions rests on a premise contrary to the express language of the Court's controlling decision governing disposition of ineffective assistance claims, *Strickland v. Washington*, 466 U.S. 668 (1984).

The Arkansas approach to resolution of ineffective assistance claims requiring proof that single claims be treated independently with respect to probable prejudice, the second prong of the two-part test that must be met to demonstrate a violation warranting relief cannot be squared with the Court's language in *Strickland*.

Nothing in the decision imposes this requirement for any one individual act of deficient performance by counsel when multiple defects in the representation are identified by the accused challenging the disposition of the criminal prosecution. The rule applied in Arkansas cases, and by other jurisdictions, treating acts of deficient performance independently in terms of assessment of probable prejudice in light of the implicit guarantee of *effective* assistance under the Sixth Amendment, *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970), reflects a misreading of *Strickland*.

A. *The language and focus of Strickland*

The key to the proper interpretation of the Court's test for assessing claims of ineffective assistance of counsel lies in its general reference to the probability that the criminal accused suffered prejudice as a result of counsel's *errors* in representing the client. The repetitive reference in *Strickland* to deficiencies in performance as *errors* is key to the test. For example, the Court explained:

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that *counsel's errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687 (emphasis added). Similarly, in discussing the required proof of defective performance by counsel, the first prong of the *Strickland* test, the Court explained that the claim of ineffective assistance may arise from multiple instances of error in that performance:

A convicted defendant making a claim of ineffective assistance must identify the *acts or omissions* of counsel that are alleged not to have been the result of reasonable professional judgment.

466 U.S., at 690 (emphasis added). Significantly, the Court in *Harrington v. Richter* noted:

And while in some instances “even an isolated error” can support an ineffective-assistance claim if it is “sufficiently egregious and prejudicial,” it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy. Here Richter’s attorney represented him with vigor and conducted a skillful cross-examination.

562 U.S. 86, 111 (2011).

Strickland couched the test for ineffectiveness in representation in terms of counsel’s *errors*, explaining that in determining if relief is warranted it is necessary to determining whether counsel’s “specified *errors* resulted in the required prejudice.” 466 U.S., at 694. The test for prejudice requires only proof that there is a reasonable probability that the outcome is not reliable, the Court explaining:

The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the *errors* of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Id. (emphasis added). To meet the test for demonstrating a violation of the effective assistance of counsel protection implied in the Sixth Amendment, *Strickland* adopted a straightforward test for obtaining relief:

The defendant must show that there is a reasonable probability that, but for *counsel’s unprofessional errors*, the result of the proceeding would have been different. A reasonable probability is a probability sufficient

to undermine confidence in the outcome.

Id. (emphasis added). The Court's language does not suggest that in the event of multiple instances of deficient performance—or errors—relief is only available if any individual error meets both the test for unprofessional error, not being the product of a reasonable alternative strategic option, and probable prejudice in terms of the effect of the deficient performance, or error, on the outcome of the proceeding.

The Sixth Amendment test for the guarantee of assistance of counsel is one of the totality of representation, rather than the approach taken by Arkansas and other jurisdictions which focuses the prejudice determination on each or any one instance of counsel's deficient performance not insulated from attack as an objectively reasonable alternative strategic decision. As *Strickland* makes clear, the focus of the ineffectiveness challenge encompasses the effect of all of counsel's *errors* on the representation actually provided for the client.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's *errors*.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the *errors*, and factual findings that were affected will have been affected in different ways. Some *errors* will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by *errors* than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the *errors* on the remaining findings, a

court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S., at 696 (emphasis added).

Strickland's repeated references to counsel's deficient acts in the plural—*errors*—cannot be assumed to be meaningless in requiring courts reviewing Sixth Amendment ineffective assistance claims in terms of the totality of counsel's representation, although as *Harrington* observed "even an isolated error" claim warrant relief upon the requisite showing that the error raised a reasonable probability that the outcome of the proceeding would have been different had there been no deficiency in counsel's performance. *Strickland* contemplates a violation of the Sixth Amendment protection in light of the totality of the representation resulting in a reasonable probability that the errors or error committed by counsel rendered the outcome unreliable.

B. Cumulative consideration of errors in assessing the totality of representation

The restriction on consideration of multiple errors in terms of determining probability that counsel's deficient performance has affected the outcome of the proceedings, or compromising the credibility of the result applied by Arkansas and other courts in reviewing ineffectiveness claims lies in the fact that it precludes relief when the cumulative effect of counsel's deficiencies would be sufficient to meet *Strickland*'s second prong, warranting relief. The Sixth Amendment guarantee of

effective assistance is frustrated when the totality of representation has compromised the accused's right to fair trial, or fair determination of guilt or sentence.

Like enforcement of the protection afforded by the Due Process Clause of the Fourteenth Amendment for failure by the prosecution to disclose exculpatory, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or material evidence, *United States v. Bagley*, 473 U.S. 667, 682 (1985), to the accused, enforcement of the effective assistance protection involves a two-prong analysis. Initially, claim of a violation requires demonstrating that the prosecution or members of the prosecution team failed to disclose the favorable evidence without requiring any proof of improper intent on their part. Once the non-disclosure or, in some cases, suppression of evidence favorable to the defense has been shown, the violation warrants relief from the outcome of the proceeding if there is a reasonable probability that the outcome of the proceeding would have been different had the favorable evidence been disclosed the same test for probable prejudice required by *Strickland*.

In *Bagley*, the Court held that consideration of probable impact on the outcome of the proceeding requires assessment of the "totality of the circumstances" when there are multiple disclosure failures, 473 U.S., at 682, referring to *Strickland*'s test for assessment of probable prejudice in light of counsel's *errors*. *Id.* at 683. Subsequently, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court affirmed that cumulative assessment of the multiple instances of suppression or non-disclosure of

evidence favorable to the defense was required by due process considerations. *Id.* at 436 (“The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.”). Independent assessment of the multiple individual instances of non-disclosure in Kyles could have failed to reflect the totality of the effects of the multiple violations, as the Court noted in reviewing the violations independently in Section IVD of the majority opinion, finding that the cumulative impact of the multiple violations rendered the prosecution’s far weaker than might have been thought. *Id.* at 451-454.

The parallel framework for determination of Sixth Amendment ineffectiveness claims and 14th Amendment Due Process violations based on non-disclosure of favorable evidence supports *Strickland*’s reference to counsel’s errors in considering the totality of the impact of multiple errors in terms of the reasonable probability test for assessing whether the outcome of the proceeding was fair.

C. The lack of rationale for rejection of cumulative error by Arkansas courts

In rejecting Petitioner’s argument for application of the cumulative error test for assessment of the probable impact of counsel’s deficiencies in performance in presenting the argument for mitigation in the setting of his punishment on the aggravated robbery charge, the state supreme court held that he failed to meet the very heavy burden of showing that refusal to overrule the precedent “would result

injustice or great injury,” citing *Houghton v. State*, 2015 Ark. 252, at 12, 464 S.W.3d 922, 930–31. In referencing two other decisions in note 5 of its opinion (APP. EX. A, at 9), *Franklin* and *Hardin*, the court distinguished between an order granting new trial on grounds other than cumulative ineffective assistance error although a claim of cumulative error had been advanced, and an order granting relief on cumulative error grounds the supreme court reversed in *Hardin*. These cases reflect the court’s clear rejection of cumulative error assessment for ineffectiveness claims.

In a series of decisions, the Arkansas court has relied on the consistent application of its rule limiting determination of ineffective assistance claims to individual errors on the part of counsel, rather than considering the cumulative prejudice from multiple deficiencies in performance in assessing the totality of the representation provided the accused. Consistently rejecting arguments for application of the cumulative error test for determining whether the aggregate effect of multiple errors that would not meet the probability test imposed in *Strickland* individually or independently actually compromising the reliability of the outcome of the proceedings, the court has cited its decision in *Henderson v. State*, 281 Ark. 306, 663 S.W.2d 734 (1984). *E.g., Guy v. State*, 282 Ark. 424, 427, 668 S.W.2d 952, (1984) (“We have previously refused to recognize cumulative error in allegations of ineffective assistance of counsel,” citing *Henderson, supra*); *Isom v. State*, 284 Ark. 426, 431 682 S.W.2d 755, 758 (1985) (citing *Guy* and *Henderson*,

supra); *Parks v. State*, 301 Ark. 513, 515, 785 S.W.2d 213, 215 (1990) (citing *Isom, supra*); *Jones v. State*, 308 Ark. 555, 560, 826 S.W.2d 233, 236 (1990) (citing *Parks, supra*); *Huddleston v. State*, 339 Ark. 266, 272, 262 5 S.W.3d 46, 50 (1999) (citing *Isom, Parks and Jones, supra*).

There are two problems in evaluating the Arkansas Supreme Court's rationale for opting for evaluating individual claims of ineffective assistance independently. First, its decision in *Henderson*, upon which subsequent decisions draw for authority, was issued on February 6, 1984, two and one/half months before this Court issued its decision in *Strickland*, on May 14, 1984. While subsequent decisions of the state court routinely mention the *Strickland* test, as in its opinion in Whiteside's case, (APP. EX. A, 3, 6, 9), there appears to be no discussion in its published decisions of its reasoning in not applying the cumulative error test to ineffective assistance claims arising under the Sixth Amendment. *Strickland* set this Court's standard for evaluation of those claims, yet the Arkansas court appears to have avoided discussing *Strickland*'s repeated references to counsel's errors in light of *Henderson*'s clear expression of state law.

The reason for this apparent omission might well lie in the fact that a careful reading of the decision in *Henderson* finds no reference to the cumulative error test, at all. Its precedential value its doubtful, at least in terms of the obligation of state courts to apply this Court's precedents in resolution of federal constitutional claims.

Arkansas v. Sullivan, 532 U.S. 769, 771 (2001), (reversing state court ruling failing to comply with *Whren v. United States*, 517 U.S. 806 (1996)).

Certiorari is warranted in Whiteside's case to address directly the Arkansas response to *Strickland*, in light of the post-conviction court's finding that counsel's arguable deficiencies in performance constituted objectively reasonable strategic decisions in light of his admissions at the hearing on Whiteside's ineffective assistance writ. There, counsel honestly admitted that the failure to offer Barnes' admission about the cause for the fatal shooting and his failure to review mental health hospitalization records and seek expert assistance with respect to mitigation based on Whiteside's age and mental history were not matters of strategy.

Certiorari is also warranted to consider of the rejection of cumulative error assessment for purposes of determining when the totality of representation at trial or in sentencing fails to meet the Sixth Amendment test for effectiveness.

D. The rejection of cumulative error review reflects a split in jurisdictions

The approach taken by the Arkansas Supreme Court in rejecting cumulative error assessment of multiple claims of deficient performance by counsel to reach a conclusion as to the totality of counsel's errors in representation is not isolated. In fact, it may well be that the majority of jurisdictions either reject cumulative error review, or question *Strickland*'s repeated reference to counsel's errors as permitting cumulative error review in light of amendments to 28 U.S.C. § 2254 made in the

Antiterrorism and Effective Death Penalty Act of 1996. Petitioner notes that there is a conflict in the interpretation and application of *Strickland*'s requirement for probable proof that counsel's multiple errors would serve to meet the second prong for proof of a reasonable probability when the errors, taken cumulatively, demonstrate that the totality of representation failed in terms of effective assistance. *See, e.g.*, Michael C. McLaughlin, Note and Comment, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 GA. ST. U. L. REV. 859, 871-78 (2014).

Some lower courts apply cumulative error analysis consistent with *Strickland*'s reference in the plural to counsel's errors reflecting deficiencies in performance. *E.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 194 (2nd Cir. 2001) (holding *Strickland* directs review of errors in the aggregate); *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020); *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005) ("We must analyze each of his claims separately to determine whether his counsel was deficient, but prejudice may result from the cumulative impact of multiple deficiencies."); *Littlejohn v. Trammell*, 704 F.3d 817, 869 (10th Cir. 2013); *People v. Clarke*, 66 A.D.3d 694, 696, 886 N.Y.S.2d 753, 755 (N.Y. App. Div. 2009); *Pratt v. State*, 303 A.3d 661, 671 (Maine 2023); *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005); *State v. Collins*, 91 A.3d 1208, 1212-1213 (N.H. 2014) (ordering relief based on counsel's errors);

Other courts have rejected application of the cumulative error test for review of claims of counsel's deficient performance as warranting relief based on the collective effect of errors when no individual error demonstrates the requisite probability of prejudice based on the second prong of the *Strickland* test. *E.g., Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Holland v. State*, 250 Ga. App. 24, 28, 550 S.E.2d 433, 437 (2001);

Further, some jurisdictions have declined to apply cumulative error analysis because this Court has not expressly ruled on the issue of whether AEDPA precludes cumulative error review because there is no precedent compelling its use. *E.g., Moore v. Parker*, 425 F.3d 250, 256-57 (6th Cir. 2005) (holding pre-AEDPA Circuit caselaw authorizing cumulative error review of ineffective assistance claims, *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) rendered inapplicable); *Hill v. Davis*, 781 Fed.Appx. 277, 280-81 (5th Cir. 2019). Other jurisdictions remain undecided on use of cumulative error analysis in dealing with ineffective assistance claims. *State v. Pandeli*, 394 P.3d 2, 18-19 (Az. 2017) (state supreme court has not recognized cumulative error applied to ineffective assistance claims); *McNabb v. State*, 919 So.2d 313, 332 (Ala. Crim. App. 2007) ("We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel.).

Even a cursory review of positions taken with regard to the Court's persistent

reference to counsel's errors among various lower courts demonstrates inconsistency, or uncertainty, with respect to the proper application of *Strickland*'s second prong, proof of the probability that the outcome of the proceedings would have been different had the multiple errors not occurred. Moreover, nothing in the language of Section 2254(d) clearly changed the appropriate standard for review of ineffectiveness claims because *Strickland* requires cumulative error review where counsel commits multiple errors in representation.

Strickland's recognition of cumulative deficiencies in performance reflected in its persistent reference to counsel's *errors* constitutes the existing precedent of this Court upon which the claim for federal habeas relief under Section 2254 would be determined. Certiorari is warranted in this case because the need to clarify the issue of application of cumulative error with respect to claims of multiple errors by counsel is necessary to ensure that the accused's right to fair trial and fair determination in the guilt/innocence and sentencing phases of trial are not compromised by counsel's failure to provide effective assistance in representation.

CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing analysis, the Court should grant the writ of certiorari to review the disposition of Petitioner's ineffective assistance claims in the sentencing phase of trial based on counsel's failure to offer mitigation evidence by the Arkansas courts. Petitioner Whiteside prays the Court grant his petition and issue

the writ of certiorari. Upon hearing, Petitioner prays the Court hold that the state courts failed in their denial of relief on his claim that counsel's deficiencies in performance resulted in a reasonable probability that the sentence imposed by the jury on the underlying felony charge of aggravated robbery would have been different had a mitigation case available based on the record been presented.

Respectfully submitted this 11th day of June, 2024.

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