No. 24-5974

IN THE
Supreme Court of the United States

JAMES COBB HUTTO III,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Should this court grant review to decide whether a right of competency applies in state capital post-conviction proceedings when the decision below rests on two adequate and independent state-law grounds, petitioner developed no record on his right-of-competency claim, the decision below rests on yet another alternative ground that petitioner does not challenge, and petitioner's claim is meritless and does not raise any lower-court conflict?

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The Mississippi Supreme Court's order denying petitioner's motion for leave to file a successive petition for post-conviction relief (Petition Appendix (App.) 1-7), is reported at 391 So. 3d 1192.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on July 25, 2024. On October 17, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to November 22, 2024. The petition for certiorari was filed on November 5, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

Thirty-nine-year-old petitioner James Cobb Hutto III "befriended" eighty-one-year-old Ethel W. Simpson one day at a fitness center and later that night robbed her, murdered her, and dumped her body at a "hog farm." *Hutto v. State*, 227 So. 3d 963, 970–71 (Miss. 2017) (*Hutto I*). A jury convicted petitioner of capital murder and sentenced him to death. *Id*. at 970. The Mississippi Supreme Court affirmed and later denied post-conviction relief. The present petition for certiorari arises from that court's denial of petitioner's second motion for post-conviction relief.

1. In September 2010, petitioner, an Alabama resident, drove to Clinton, Mississippi, to visit an ex-girlfriend for the weekend. 227 So. 3d at 970. After that visit, petitioner went to a fitness center in Clinton where he met Simpson. *Ibid*. Petitioner's car broke down, so Simpson drove him back to the Clinton hotel where he was staying. *Ibid*. Later that night, Simpson picked up petitioner in her silver Mercedes and the two drove to a Vicksburg, Mississippi casino where they had dinner

and gambled. *Ibid*. They left the casino together at 11:24 p.m., and petitioner arrived at his hotel an hour later, alone, in Simpson's car. *Ibid*. "[S]even minutes after arriving back at the hotel," petitioner emerged from his room "wearing different clothes." *Ibid*. He then drove to another Vicksburg casino and gambled until around 2 a.m. *Ibid*. A "tag-reading camera" on the interstate "captured an image of Simpson's car traveling ... toward Alabama just after 3:00 a.m." *Ibid*. Later that morning, Simpson's son called police to report that his mother had not returned home the night before. *Id*. at 971. After "law-enforcement officials determined that petitioner was the last person seen with Simpson," an Alabama police officer "spotted [petitioner] driving Simpson's silver Mercedes" and "took him into custody." *Ibid*. That day, "Simpson's body was found on a hog farm" located "halfway between Clinton and Vicksburg." *Ibid*.

2. Petitioner was indicted for capital murder. 227 So. 3d at 971. Before trial, his counsel filed a motion "to determine [petitioner's] competence." *Id.* at 973. The trial court ordered a mental evaluation, but because of "delay at the State Hospital," petitioner's counsel hired a private psychologist to conduct a competency evaluation. *Ibid*. That psychologist was unable to complete that evaluation "because [petitioner] would not cooperate." *Id*. When a State Hospital psychologist later tried to evaluate petitioner's competency, petitioner "initially stated that he would not cooperate" with that psychologist either, but did "agree[ ] to complete" some psychological testing. *Ibid*. That testing produced "invalid" results because petitioner tried to game them. *Ibid.*; *see id.* at 973 n.3. Petitioner also "refus[ed] to answer questions." *Id.* at 973. So the psychologist "could not give an expert opinion to a reasonable degree of

psychological and psychiatric certainty" about petitioner's competence. *Ibid*. But the psychologist did report that witness interviews and petitioner's medical and jail records contained "no evidence of cognitive deficits, memory problems, or irrational thought processes" or "deficits in his ability to communicate clearly and effectively or in his ability to think logically." *Ibid*. The psychologist also observed that petitioner showed "the ability to reconsider and reverse a prior decision," the "ability to interact with staff," and no "deficits in his awareness of his situation, his thought process, or his ability to understand a wide range of pertinent issues." *Ibid*. The psychologist also found "good evidence" that petitioner did not "suffer[ ] from mental disease or defect" and did possess "the functional abilities associated with competence." *Ibid*.

The trial court ruled that petitioner was competent to stand trial "[b]ased on his observations of [petitioner]," the State Hospital psychologist's report, and an earlier plea colloquy. 227 So. 3d at 974. The court's observations of petitioner included several pretrial in-court "outbursts"—including "profanities" and "other crude behavior"—that were mostly about "the circumstances of his confinement." *Id*. at 973.

At trial, petitioner "exhibited crude behavior" and had other "outburst[s]." 227 So. 3d at 971, 975–76. After one of them, defense counsel "renewed their motion to determine competence." *Id*. at 976. The court denied the motion, and when the judge later told petitioner that "his outbursts were not helping his cause," petitioner admitted he had been acting like "a pompous ass or prima donna." *Ibid*. The jury convicted petitioner and sentenced him to death. *Id.* at 971–72.

3. On direct appeal, the Mississippi Supreme Court affirmed petitioner's conviction and sentence, rejecting (among other challenges) petitioner's claim that he

had been incompetent to stand trial. 227 So. 3d at 972–77. On that claim, the court applied the "well-settled" standard for determining competence to stand trial and upheld the trial court's finding that petitioner was competent under that standard. *Id*. at 974 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (establishing test for competence to stand trial—a "sufficient present ability to consult" with counsel "with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings")). The court ruled that petitioner "presented *no evidence* to the trial judge suggesting he was incompetent to stand trial." *Id*. at 975. Petitioner relied on his in-court outbursts to support his incompetency claim, but the supreme court ruled that the record supported the trial court's finding that those outbursts, "though disruptive," primarily concerned petitioner's dissatisfaction with the "conditions of the detention center, including showers and recreational time," and did not suggest incompetence. *Id*. at 974. The supreme court credited the trial judge's observations of petitioner during "numerous" pretrial and trial proceedings and ruled that the record showed "instances in which [petitioner] failed to cooperate with counsel" but no suggestion that petitioner "lacked the *ability* to do so." *Ibid*. Nor, the supreme court ruled, did the record suggest that petitioner "lacked an understanding of the proceedings against him." *Ibid*. (emphasis omitted). Instead, it showed that petitioner "understood the proceedings": petitioner changed his mind about entering a guilty plea "when he learned he would be waiving his appeal rights"; "actively participated in the proceedings and engaged in discussions with his counsel"; and "cross-examined some witnesses, stated objections, and presented mitigating evidence in the penalty phase." *Id*. at 974, 976.

Petitioner sought this Court's review. In doing so, he did not challenge the Mississippi Supreme Court's competency ruling. Petition, *Hutto v. Mississippi*, No. 17-6825 (U.S. Nov. 8, 2017). This Court denied certiorari. 583 U.S. 1123 (2018).

4. The mandate in petitioner's direct appeal issued on August 17, 2017, triggering the one-year statute of limitations for petitioning for post-conviction relief in state court. *See* Miss. Code Ann. § 99-39-5(2)(b); *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2002). In 2018, petitioner timely sought post-conviction relief, claiming ineffective assistance of trial counsel and prosecutorial misconduct. *Hutto v. State*, 286 So. 3d 653, 656 (Miss. 2019). The Mississippi Supreme Court denied relief, rejecting petitioner's claims on the merits. *Id.* at 657–68. Petitioner then sought federal habeas review, but he successfully moved to stay habeas proceedings to allow him "to exhaust certain claims not previously raised in state court." App.1.

Petitioner then filed the motion at issue here. In 2023, he moved the Mississippi Supreme Court for leave to file a successive petition for post-conviction relief. He made "four claims that his prior post-conviction counsel rendered constitutionally ineffective assistance" for not raising other ineffective-assistance claims and he claimed that he was "incompetent to proceed with these post-conviction proceedings." App.2, 6.

The Mississippi Supreme Court denied petitioner's motion. First, the court ruled that, under Mississippi's Uniform Post-Conviction Collateral Relief Act, the motion was barred on two procedural grounds—it was untimely and it was successive. App.2; *see* Miss. Code Ann. § 99-39-5(2)(b) ("filings for post-conviction relief in capital cases" must be made "within one (1) year after conviction"); *id.* § 99-39-27(9) (bar on

"second or successive" applications for post-conviction relief). Second, the court alternatively ruled that petitioner's claims failed. App.3–6. The court ruled that petitioner's ineffective-assistance claims failed because he had not shown that "post-conviction counsel's performance was deficient" or that any alleged deficiency resulted in "prejudice[ ]." App.3. And because the ineffective-assistance claims were "barred," the court ruled, the issue of petitioner's "competency to bring those claims" was "moot." App.6. On that last ruling, the court added that (as it had recently held) there is "no right of competency" in state post-conviction proceedings. *Ibid*. (citing *Powers v. State*, 371 So. 3d 629, 643 (Miss. 2023)).

Justice Kitchens, joined by Justice King, wrote a separate statement agreeing that petitioner's motion should be denied, but on the ground that the claims were "without merit" rather than because they were "barred from consideration." App.7.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant review to decide "whether there is a Constitutional right to competency during the pendency of capital state-court collateral proceedings." Pet. ii; *see* Pet. 11–16. This case is not a vehicle for addressing that question and the decision below does not warrant further review. The petition should be denied.

1. This case is not a vehicle to decide the question that the petition presses.

a. To start, this Court lacks jurisdiction to review the decision below because it rests on adequate and independent state-law grounds.

This Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). "This rule

applies whether the state law ground is substantive or procedural." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). And where, as here, this Court is asked to directly review a state-court judgment, "the independent and adequate state ground doctrine is jurisdictional." *Ibid*.

That rule bars this Court's review here. The decision below rests on two "state law ground[s]." *Coleman*, 501 U.S. at 729. First, as the Mississippi Supreme Court ruled, petitioner's claims are barred by the one-year limitations period imposed by the State's Post-Conviction Collateral Relief Act. App.2. Under that Act, "filings for post-conviction relief in capital cases" must be made "within one (1) year after conviction." Miss. Code Ann. § 99-39-5(2)(b). Petitioner's conviction became final in 2017, yet he did not file this present motion until 2023—well beyond the one-year limitations period. App.2. Second, as the Mississippi Supreme Court also ruled, petitioner's claims are barred by the successive-writ prohibition imposed by the Collateral Relief Act. App.2. Under that Act, "[t]he dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article." Miss. Code Ann. § 99-39-27(9). The Mississippi Supreme Court denied petitioner's first motion for post-conviction relief. *Hutto v. State*, 286 So. 3d 653, 657–68 (Miss. 2019). So his present motion is successive and barred. The Mississippi Supreme Court was thus required to deny all the claims he pressed in his successive petition. Miss. Code Ann. § 99-39-27(5).

Those state-law grounds are "independent of" federal law and "adequate to support the judgment" below. *Coleman*, 501 U.S. at 729. Start with independence. A state-law ground is "independent of federal law" if its resolution does not "depend

upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). The Collateral Relief Act's time and successive-writ bars satisfy that standard because both apply without regard for federal law. Because the decision below was not "entirely dependent on" federal law, did not "rest[] primarily on" federal law, and was not even "influenced by" federal law, it is "independent of federal law." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016). Now take adequacy. A state-law ground is "adequate to foreclose review" of a "federal claim" when the ground is "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376 (2002). The time and successive-writ bars satisfy that standard. Longstanding precedent holds that Mississippi's time and successive-writ bars are firmly established and regularly followed. *See Sones v. Hargett*, 61 F.3d 410, 417–18 (5th Cir. 1995) (holding that Mississippi Supreme Court "regularly" and "consistently" applies the Act's time bar); *Moawad v. Anderson*, 143 F.3d 942, 947 (5th Cir. 1998) (finding the Act's successive-writ bar an "adequate state procedural rule"); *Lott v. Hargett*, 80 F.3d 161, 165 (5th Cir. 1996) (finding the Act's time and successive-writ bars "adequate" to support judgment because they are "consistently or regularly applied").

Because this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights," *Herb*, 324 U.S. at 125–26, and because the Mississippi Supreme Court's decision denying petitioners' post-conviction-relief motion was based on state-law rules that are independent of federal law and are consistently followed, this Court lacks jurisdiction and should deny review on that basis alone.

b. This case is a poor vehicle for other reasons too.

First, there is no record on the question that petitioner asks this Court to decide—"whether there is a Constitutional right to competency during the pendency of capital state-court collateral proceedings." Pet. ii. In his present bid for post-conviction relief, petitioner made only a perfunctory argument on competency:

> At this time, Petitioner is incompetent. Although he speaks and meets with counsel, he remains incapable of assisting counsel with his defense. He lacks a "sufficient present ability to consult with his lawyer[s] with a reasonable degree of rational understanding." *Dusky v. United States*, 362 U.S. 402, 402 (per curiam).

Resp. App. 33. *Dusky* established the test for determining whether a criminal defendant is competent "to stand trial." 362 U.S. at 402. Petitioner has never argued that *Dusky* established a constitutional right to competency in capital post-conviction proceedings or defended the view that the *Dusky* standard should apply in such proceedings. And petitioner offered no proof to the Mississippi Supreme Court to support his claim. The factual matter that he did submit with his present motion concerned only his meritless ineffective-assistance claims. The petition admits: "there has not been an assessment of [petitioner's] competency." Pet. 11. So there is no record on the question that petitioner asks this Court to decide—because he failed to develop one—and this case is accordingly not a vehicle for deciding that question.

Second, the federal question that petitioner asks this Court to resolve would not affect the judgment below. Petitioner claims that the Mississippi Supreme Court "declared th[e] issue" of his alleged post-conviction incompetence "moot" on the ground that there is "no right to competency in post-conviction proceedings." Pet. i (citing *Powers v. State*, 371 So. 3d 629, 643 (Miss. 2023). That is incorrect. The court held that "the issue of [petitioner's] competency" to raise his four ineffective-

assistance claims did not matter—it was "moot"—because those claims are "barred." App.6. Only after so holding did the court alternatively observe that petitioner "has no right of competency in post-conviction proceedings." *Ibid.* (citing *Powers*, 371 So. 3d at 643). Petitioner does not challenge the court's rejection of his current ineffective-assistance claims. So a decision resolving whether there is a constitutional right to competency in capital state-court collateral proceedings would not change the outcome here because the court below rejected petitioner's competency claim on alternative grounds that he has not challenged. This Court's review is not warranted because an independent and unchallenged basis for the judgment exists. *See Coleman*, 501 U.S. at 730 ("[I]f resolution of a federal question cannot affect the [state court's] judgment, there is nothing for the Court to do.").

2. Besides vehicle problems set out above, the decision below is correct and does not implicate any lower-court conflict. Further review is not warranted.

a. Petitioner makes no sound case that this Court should recognize a right to competency in state capital post-conviction proceedings. *Contra* Pet. 11–13, 15–16.

This Court has recognized a constitutional right of competency for criminal defendants facing trial and for prisoners imminently facing execution. *See Dusky v. U.S.*, 362 U.S. 402 (1960); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986). The right of competency to stand trial is based on the Fourteenth Amendment's Due Process Clause. *Pate v. Robinson*, 383 U.S. 375 (1966). The prohibition against forcing an incompetent defendant to stand trial is recognized as "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975). That right is "rudimentary" and bound up with all of the "fair trial" rights afforded to criminal

defendants. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). And the right of competency to be executed is based on the Eighth Amendment's prohibition against cruel and unusual punishment. *Ford*, 477 U.S. at 409–10.

This Court has not recognized—and should not recognize—a constitutional right to competency in capital state collateral review. The considerations supporting a right to competency in other contexts do not apply in state collateral review. Start with the right to competency to stand trial. A post-conviction petitioner has already been "prove[n] guilty after a fair trial" and so "does not have the same" due-process rights he had before "the presumption of innocence disappear[ed]." *District Attorney's Office for Third Judicial District v. Osborne,* 557 U.S. 52, 68–69 (2009); *see Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (criminal defendants "are in a fundamentally different position" than state post-conviction petitioner and so are afforded "the full panoply of procedural protections that the Constitution requires"). And there is no "history and tradition" supporting an alleged due-process right of competency in state collateral proceedings. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Now take the right to competency to be executed. Eighth Amendment "limitation[s] upon the State's ability to execute its sentences," *Ford*, 477 U.S. at 409, are irrelevant to a State's discretionary collateral-review proceedings. The common-law prohibition against executing the "insane" may be defended on the grounds that executing an "insane" prisoner "simply offends humanity," has no "deterrence value," and "serves no purpose ... because madness is its own punishment." *Id*. at 407–08. No such concerns exist where a petitioner, assisted by counsel, initiates civil proceedings to collaterally attack his conviction and sentence then claims that he is unable to

assist counsel with that collateral attack. Indeed, this Court has long recognized that a "next friend" can pursue collateral relief on behalf of a prisoner unable to litigate his own case because of "mental incapacity." *See Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990).

Further, "States have no obligation to provide" post-conviction relief proceedings at all. *Finley*, 481 U.S. at 557. And this Court has consistently declined to extend constitutional rights afforded to criminal defendants to prisoners seeking post-conviction relief. *See*, *e.g.*, *id.* at 555 (declining to extend a "constitutional right to counsel" to prisoners "mounting collateral attacks upon their convictions"); *Murray v. Giarratano*, 492 U.S. 1, 10, 109 (1989) (applying *Finley*'s holding to capital cases); *Osborne*, 557 U.S. at 68–74 (acknowledging that state post-conviction petitioners lack a "parallel ... trial right" to criminal defendants' due-process right to the disclosure of exculpatory evidence and holding that post-conviction prisoners have no "substantive due process right" to access evidence for DNA testing); *Herrera v. Collins*, 506 U.S. 390, 406–12 (1993) (rejecting claims that the Eighth or Fourteenth Amendments require new trials for federal habeas petitioners who have "newly discovered evidence" of their "actual innocence"). When this Court held in *Ryan v. Gonzales* that a federal statute "guarantee[ing] federal habeas petitioners on death row the right to federally funded counsel" did not establish a "right to competence" in federal habeas proceedings, 568 U.S. 57, 64–66 (2013), the parties did not even argue over any constitutional right to competency in such collateral proceedings. That supports the intuition that the constitutional underpinnings for the right of competency to stand trial are not implicated in discretionary review proceedings like those at issue here.

Petitioner argues that the Court should establish a constitutional right to competency in capital state-court collateral proceedings "as a failsafe guard against wrongful convictions." Pet. 12. But petitioner fails to explain how creating such a right would prevent "wrongful convictions," and petitioner's case is clearly not such a conviction. The evidence at trial showed that petitioner was with the victim in her car just before the murder and was driving her car alone just after the murder, was in possession of the victim's car the same day her body was found, and had the victim's blood on the shoes he was wearing the night she "disappeared." *Hutto I*, 227 So. 3d at 970–71. Indeed, petitioner admits that Simpson's "encounter" with him "direct[ly] result[ed]" in her "untimely death." Pet. 3.

Petitioner also claims that creating a constitutional right to competency in state collateral proceedings would "ensure proportionality between a capital defendant and his sentence." Pet. 12. He never explains why that is so. And the Mississippi Supreme Court already addressed proportionality on direct review—as it is statutorily required to do in capital cases. *Hutto I*, 227 So. 3d at 997–98 (citing Miss. Code Ann. § 99-19-105) (requiring Mississippi Supreme Court in all cases where "the death penalty is imposed" to determine, among other things, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant")).

b. Petitioner claims "[l]ower court[ ] disagree[ment]" about "the right to competency in state postconviction cases" as a reason to grant review. Pet. 13; *see* Pet. 13–15. But petitioner does not show any disagreement on the question whether the *federal Constitution* protects a right to competency in capital state collateral

proceedings. The decisions he cites—from Florida, Maine, and Illinois—recognize a *statutory* right to competency as a matter of *state* law. *See Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1221 n.54 (11th Cir. 2009) (discussing *Carter v. State*, 706 So. 2d 873 (Fla. 1997), and observing that Florida's "right to competency" during post-conviction proceedings "stem[s] principally from the right to collateral counsel under Florida law"); *Haraden v. State*, 32 A.3d 448, 452 (Me. 2011) ("discern[ing] a right to post-conviction competence implied from the statutory right to counsel"); *People v. Owens*, 564 N.E.2d 1184, 1188 (Ill. 1990) (basing post-conviction competency right on statute ensuring "a reasonable level of assistance by counsel in post-conviction proceedings"). In any event, petitioner's three-sentence competency argument below would not support a finding of incompetency in any of those States. He failed to present *any* evidence of his alleged incompetence, so there were no "reasonable grounds" for a court "to believe that [he was] incompetent to proceed in postconviction" on "factual matters ... at issue" that "require[d] [his] input." *Carter*, 706 So. 2d at 875. He failed to rebut the "presumption of competence" in collateral proceedings that attached after he was adjudicated competent to stand trial. *Haraden*, 32 A.3d at 453. And the court below could have no "bona fide doubt" about his "mental ability to communicate with his post-conviction counsel." *Owens*, 564 N.E.2d at 1188. So even if a lower-court conflict existed—and it does not—it would not matter here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Appendix to Respondent's Brief in Opposition

IN THE SUPREME COURT OF MISSISSIPPI
No. 2017-DR-01207-SCT

JAMES COBB HUTTO III,

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

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I. Introduction

Petitioner, James Cobb Hutto III, respectfully asks this Court to grant him post-conviction relief or, in the alternative, permit him to file a successive petition for post-conviction relief and grant him an evidentiary hearing. Petitioner raises several challenges to the performance of his trial counsel during the sentencing phase of his capital trial. These grounds were not presented to the Court due to the denial of his rights to the effective assistance of post-conviction counsel, due process of law, and access to the courts guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article III. §§14, 25, and 26 of the Mississippi Constitution.

Petitioner now raises these following claims for this Court's further consideration.

II. Statement of the Case

The relevant history of the case and its proceedings are as follows:

James Cobb Hutto, III was convicted in the Circuit Court of Hinds County (Second Judicial District), Mississippi, in Jackson, Mississippi. Cause No. 11-5-05. His death sentence was entered on May 25, 2013. He was tried and sentenced on one count of capital murder.

He then timely appealed his conviction and sentence to the Mississippi Supreme Court. 2014-DP-00177-SCT.

The issues raised on direct appeal were:

I. The prosecution abused its discretion in seeking the death penalty against Hutto but not against George Affleck based on socio-economic factors and/or a position that domestic crimes are less important.

II. The trial court erred in holding Hutto was competent to be tried and in not ordering further evaluation mid-trial when his irrational behavior escalated.

III. The trial court erred by admitting into evidence custodial statements of Hutto to law enforcement.

IV. The trial court erred in submitting the "prior violent felony" aggravating circumstance to the jury.

V. The trial court erred in excluding relevant evidence offered in mitigation in violation of state law and the state and federal constitutions.

VI. The admission of overly prejudicial and inflammatory post-autopsy photographs mandates reversal of the conviction and/or sentence.

VII. Hutto's constitutional right to confront witnesses was violated by the trial court grant of prosecution motion *in limine*.

VIII. Hutto's right to a fair trial was violated when a former jail administrator testified that Hutto had made threats to him.

IX. The trial court erred in allowing extensive irrelevant and prejudicial victim character evidence to be introduced over defense objection.

X. The trial court erred in denying a theory of defense instruction that was a proper instruction on the law, supported by the evidence and found nowhere else in the instructions given.

XI. The trial court erred in allowing speculative and unreliable opinion testimony in violation of the rules of court and the state and federal constitutions which prejudiced Hutto in both the guilt and sentencing phases of this trial.

XII. The trial court erred in allowing the jury to consider the underlying felony as an aggravating factor in sentencing.

XIII. The death sentence in this matter is constitutionally and statutorily disproportionate.

XIV. The cumulative effect of the errors in the trial court mandates reversal of the verdict of guilt and/or sentence of death.

This Court denied Petitioner relief on May 11, 2017. *James Cobb Hutto, III. V. State of Mississippi*, 227 So. 3d 963 (2017). A petition for rehearing was denied on August 10, 2017.

Petitioner then sought certiorari in the United States Supreme Court which denied his petition on February 20, 2018. *James Cobb Hutto, III. V. Mississippi,* 138 S. Ct. 983 (2018).

Petitioner then filed an application for post-conviction relief or in the alternative for leave to proceed in trial court with a petition for post-conviction relief on August 17, 2018. *James Cobb*

Hutto, III. V. State of Mississippi, 2017-DR-01207-SCT. Petitioner raised the following claims for this Court's consideration:

I. Claim One: Trial counsel did not present and explain the significance of all of the evidence available for mitigation.

   a. Mr. Hutto's refusal to cooperate is no excuse for failing to present expert psychological testimony.

   b. Deficient performance: Defense counsel failed to explain the connection between trauma and violent behavior.

   c. The lack of psychological testimony prejudiced Mr. Hutto's case against the death penalty.

   d. Mr. Hutto's lawyers presented broad categories of evidence instead of specific, individualized details of his trauma and abuse.

II. Claim Two: Prosecutorial misconduct resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the evidence.

   a. Defense counsel was ineffective in failing to respond to the prosecutor's improper comments on Mr. Hutto's behavior.

III. Claim Three: Trial counsel was ineffective in failing to investigate the circumstances underlying the "prior violent felony" aggravator.

IV. Claim Four: Defense counsel was ineffective in failing to challenge a juror with cognitive impairments.

   a. Remand to the trial court is necessary to inquire into the juror's cognitive capacity at the time of trial.

V. Reservation by Post-Conviction Counsel.

The State filed a Motion to Dismiss Application for Post-Conviction Relief Due to Petitioner's Failure to Comply with Mississippi Code Annotated §99-39-9(1)(d), 99-39-9(3) on December 17, 2018. On October 3, 2019, the Mississippi Supreme Court denied Petitioner's post-conviction relief petition without granting an evidentiary hearing. After a timely filed petition for

rehearing filed on October 17, 2019, this Court denied rehearing on January 9, 2020. The mandate was issued on January 16, 2020.

On October 12, 2020, Petitioner filed a petition for writ of habeas corpus, with appointed counsel Elizabeth Franklin-Best and Caroline K. Ivanov in the District Court for the Southern District of Mississippi within the statutory timeframe. Petitioner raised the following claims:

I. The Mississippi Supreme court unreasonably found that the trial court did not err in holding Petitioner was competent to be tried and not ordering further evaluation mid-trial when Petitioner's irrational behavior escalated.

II. The Mississippi state court's adjudication of Petitioner's claim that the trial court erred by excluding mitigation testimony from defendant's former wife that Petitioner had told her he had been sexually abused as a child, which the Mississippi state court found harmless, is unreasonable.

III. The Mississippi state court's adjudication of Petitioner's claim that trial counsel did not render ineffective assistance of counsel by failing to present evidence of Petitioner's childhood exposure to significant sexual abuse is unreasonable.

IV. The trial court erred in submitting the "prior violent felony" aggravating circumstance to the jury.

V. Trial counsel rendered ineffective assistance of counsel in failing to investigate the circumstances underlying the "prior violent felony" aggravator.

VI. The admission of overly prejudicial and inflammatory post-autopsy photographs mandates reversal of Petitioner's sentence.

VII. Petitioner's right to a fair trial was violated when a former jail administrator testified that Petitioner made threats to him.

VIII. Prosecutorial misconduct resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the evidence.

IX. Petitioner's rights to due process were violated when the prosecutor remarked on Petitioner's "lack of remorse" during her closing argument in the penalty phase of Petitioner's capital trial.

X. Trial counsel rendered ineffective assistance of counsel in failing to object to the prosecution's closing argument that focused on Petitioner's courtroom behavior.

XI. Trial counsel rendered ineffective assistance of counsel by not using a peremptory challenge to remove juror Glen Miller who was incapable of following the law and would have automatically imposed the death penalty upon a finding that Hutto was guilty of capital murder.

XII. Trial counsel rendered ineffective assistance of counsel by failing to uncover and present evidence that Petitioner suffers from Fetal Alcohol Spectrum Disorder which would have been significantly mitigating.

XIII. Trial counsel rendered ineffective assistance of counsel by failing to uncover and then present evidence that Petitioner, at the time of his crime, was experiencing a psychotic episode due to his untreated bipolar disability when the jury would have found that evidence to be highly mitigating.

XIV. Trial counsel rendered ineffective assistance of counsel by failing to develop and present evidence showing that Petitioner suffers from post-traumatic stress disorder when the jury would have found that evidence to be significantly mitigating.

XV. Trial counsel rendered ineffective assistance of counsel by failing to develop and present mitigating evidence related to Hutto's abuse of steroids.

XVI. The Mississippi Supreme Court opinion, holding that it was appropriate to submit the heinous, atrocious, or cruel aggravator to the jury was unreasonable.

XVII. Trial counsel rendered ineffective assistance of counsel when he failed to object to the prosecution's closing argument that argued that Petitioner's mitigation should not be given any weight by the jury because it lacked a nexus to the crime.

XVIII. Trial counsel rendered ineffective assistance of counsel by failing to develop and present mitigating evidence related to Petitioner's exposure to toxins while working with chemical sat Southeast Wood Treating.

XIX. James Hutto remains incompetent.

The United States District Court for the Southern District of Mississippi stayed Petitioner's federal habeas proceedings to allow him to exhaust certain claims not previously raised to this Court. Memorandum Opinion and Order on Motion to Stay, *Hutto v. Cain*, No. 3:20-cv-98-DPJ (S.D. Miss. Nov. 10, 2021).

This Court remanded Petitioner's case to the Circuit Court of Hinds County to conduct a hearing to determine whether Petitioner wished to proceed with the assistance of counsel in a

successive post-conviction relief petition on April 19, 2022. This hearing occurred on August 3, 2022 via video with Elizabeth Franklin-Best appearing with Petitioner at Parchman. On August 8, 2022, the circuit court entered an order admitting Elizabeth Franklin-Best *pro hac vice* and appointing her and Caroline K. Ivanov as counsel to pursue a successive motion for post-conviction relief.

On January 31, 2023, this Court granted a motion for an extension to file a successor post-conviction relief petition until May 8, 2023. This motion for leave to file a successor post-conviction relief petition timely follows.

In support of this Motion, Petitioner submits the following exhibits:

1. Dr. Robert Ouaou's Final Neuropsychological Report
2. Dr. Robert Ouaou's Curriculum Vitae
3. Juror Glenn Miller Questionnaire
4. Alexander Kassoff Affidavit

III. Brief Factual Basis of the Case

On September 8, 2010, Petitioner contacted his ex-girlfriend and traveled from Alabama to Mississippi, where he spent the weekend with her at a hotel. His car broke down, and he left it at a local repair shop. On Monday, September 13, Petitioner and his ex-girlfriend parted ways, and he went to the Baptist Healthplex on the Mississippi College campus. There, he met Ms. Simpson, who drove him back to his hotel and later picked him up to go to a casino in Vicksburg, Mississippi. They left the casino together at 11:24pm and Petitioner arrived back at the hotel alone in Simpson's Mercedes at approximately 12:51am. He left again soon after, this time in different clothes, and went to another casino in Vicksburg.

On the morning of September 14, Ms. Simpson's son reported Ms. Simpson missing to the Clinton Police Department, and law-enforcement official determined that Petitioner was the last person seen with her. Petitioner was arrested in Alabama after being spotted driving Ms. Simpson's car, and Ms. Simpson's body was found on a hog farm in Edwards, Mississippi, later that day. She had died from severe injuries to her head and neck, and forensic testing confirmed that her blood was on the Nike flip-flops that Petitioner wore on the night off her disappearance.

After his arrest, Petitioner claimed in four separate interrogations with law-enforcement officials that another man named Mark Cox had killed Ms. Simpson. However, it was later determined that Cox was in Alabama at the time of Simpson's disappearance.

IV. Legal Standards

This Court recognizes "that post-conviction efforts … have become an appendage, or part, of the death penalty appeal process at the state level." *Jackson v. State,* 732 So. 2d 187, 190 (Miss. 1999). The well-established standard of review for capital convictions and sentences is "one of 'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." *Flowers v. State,* 773 So. 2d 309, 317 (Miss. 2000) (internal citations omitted). *See also Randall v. State,* 806 So. 2d 185 (Miss. 2001) ("the rule in this State is clear: death is different. In capital case, all bona fide doubts are resolved in favor of the defendant"). This Court recognizes that "[w]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Flowers*, 773 So. 2d at 317; *Irving v. State*, 361 So. 2d 1360, 1363 (Miss. 1978) (citing *Forrest v. State,* 335 So. 2d 900 (Miss. 1976); *Russell v. State,* 185 Miss. 464, 189 So. 90 (1939).

Because all bona fide doubts must be construed in his favor, Petitioner is entitled to an evidentiary hearing "unless it appears *beyond a doubt* that he cannot prove any set of facts entitling

him to relief. *See Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996) ("a post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief"); *accord Archer v. State*, 986 So. 2d 951, 957 (Miss. 2008) ("If [petitioner's] application states a *prima facie* claim, he then will be *entitled* to an evidentiary hearing on the merits of that issue in the Circuit Court . . . .") (emphasis added).

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Ronk v. State*, 267 So. 3d 1239, 1247 (Miss. 2019). *See also* Miss. Code Ann. § 99-39-27(5) (Rev. 2015). The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692. *Ross v. State*, 954 So.2d 968, 1003 (Miss. 2007).

A. Deficient Performance.

In determining whether "counsel's representation fell below an objective standard of reasonableness" counsel's conduct must be judged under "prevailing professional norms," *id.* at 688, "when the representation took place," *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009). "Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89. Further, in applying the *Strickland* standard, this Court has held that "'an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty.'" *Doss v. State*, 19 So. 3d 690, 695 (Miss. 2009) (quoting *Ross v. State*, 954 So. 2d 968, 1004 (Miss. 2007) (citing *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990)). Trial counsel's decisions must be based on reasoned

strategic judgment and not the result of inattention, lack of investigation, or other shortcomings of counsel. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

B. Prejudice.

To demonstrate prejudice, "[t]he 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." *Strickland*, 466 U.S. at 694. The *Strickland* test is not a sufficiency of the evidence test. *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995) (citing *Kyles v. Whitley*, 514 U.S. 419, 432–41 (1995)). Nor does the *Strickland* test require demonstration by a preponderance of the evidence. *Id.* Rather, prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance" but for the constitutional error. *Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *see also Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000); *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990); *Leatherwood, v. State*, 473 So. 2d 964 (Miss. 1985); *Woodward v. State*, 635 So. 2d 805 (Miss. 1993); *Moody and Garcia v. State*, 644 So. 2d 451, 456 (Miss. 1994). Finally, in determining prejudice, the Court must look at the totality of the available evidence. *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). "To assess the probability [of a different outcome under *Strickland*], this Court will consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding—and reweigh it against the evidence in aggravation." *Chamberlin v. State*, 55 So. 3d 1046, 1054 (Miss. 2010) (first alteration in original) (internal quotations omitted) (quoting *Sears v. Upton*, 561 U.S. 945, 955-56 (2010).

V. Grounds for Relief

A. Petitioner suffers from cognitive impairments that were not recognized by trial counsel at the time of his initial trial and that explain his obstreperous and difficult behavior. Had this information been developed and presented at his trial, the jury would not have returned a verdict of death at the conclusion of his sentencing proceeding. Trial counsel rendered ineffective assistance of counsel in failing to discover these issues and present them to the jury for its consideration. PCR counsel also rendered ineffective assistance of counsel by failing to discover and present this claim to the Court during Petitioner's initial post-conviction relief proceeding.

A fair reading of the record in this case shows that Petitioner has long had difficulties controlling his behavior during these proceedings. He acted out during his trial, and he and his initial post-conviction counsel apparently lacked a relationship that would have provided an opportunity for them to discover and then raise this issue during the course of his initial post-conviction relief proceeding.

The record is replete with examples of Petitioner's actions which clearly evinced significant cognitive problems. Even from the beginning of trial preparations, it was clear Petitioner had difficulty with impulse control. He elected not to attend some pre-trial status meetings, (October 12, 2012, Tr. 58, December 14, 2012, Tr. 62, January 28, 2013, Tr. 66, February 7, 2013, Tr. 132; and March 28, 2013, Tr. 178.) and he acted out at others he attended. At a status hearing on April 5, 2012, he was removed from the courtroom. Tr. 20-21. At another hearing on June 18, 2012, Tr. 39-40, he continued to act out as he informed the trial court he "wasn't crazy." Tr. 42. Again, on August 31, 2012, he was removed from the courtroom. Tr. 50-53. Trial counsel informed the court that Petitioner's conduct was unpredictable: "He's either the person who was in court today or he listens and talks or he refuses to come out altogether." Tr. 25. Petitioner was made to leave the courtroom during a pre-trial hearing. Tr. 111-112. It appears he was able to sit still in the courtroom for nearly an hour before he lost his ability to control his

impulses. Tr. 117. On March 14, 2013, Petitioner attempted to enter a guilty plea but was unable to make it through the colloquy. The State then revoked the plea offer. Tr. 139-150.

It was clear from the beginning, also, that Petitioner had difficulty working with mental health professionals. He was unable to participate in an assessment with Dr. Goff, a neuropsychologist. Tr. 161.

Petitioner's difficulties in processing the environment of his own trial continued to be apparent throughout these events. During a hearing on April 15, 2013, he told the trial court that he wanted the death penalty. He attempted to spit on people. He informed the trial court he did not want to be present for jury qualifications, and he was removed from the courtroom. Tr. 183-200.

After a competency hearing in which Dr. Storer, whose report concluded neither that Petitioner was competent nor incompetent, the trial court concluded Petitioner was competent. Tr. 223. Trial counsel remarked Petitioner had ended his earlier attempt at a guilty plea "with no apparent reason." Tr. 224.

Petitioner again acted out during his trial, rambling incoherently Tr. 227 ("That's why French Camp lost. Your son got caught in the orgy. That's why they didn't win."). Later, Petitioner fell to the floor and appeared to have a heart attack. Tr. 253. He later asked to be removed from the hearing. Tr. 281. At a motion hearing on April 30, 2013, Petitioner told everyone to make sure their insurance was paid up because they would not be able to get into Hell without it. Tr. 315. On May 6, 2013, Petitioner informed the trial court that he cannot hear very well because he has been hit in the head so many times. Tr. 393. He repeatedly informed the court that he could not hear. Tr. 399, 420, 469. At the beginning of his trial, Petitioner wanted to leave the courtroom. Tr. 420. He wanted to leave the May 9, 2013 hearing. Tr. 474. He left the

courtroom, during the trial, on May 13, 2013. Tr. 564. He reentered the courtroom during *voir dire*. Tr. 588.

On May 20, 2013, Petitioner indicated he did not feel well, and so he asked to be allowed to leave the courtroom. The trial court instructed the jury Petitioner did not have to be present at the trial. Tr. 1498-99.

During trial, the jury heard that, in Petitioner's third statement to law enforcement, Petitioner told the police that he can flip over cars, walk on hot asphalt and not burn. He referred to himself as Lucifer and "prince of hell." Tr. 1599. He said Charles Manson could not tote his gym bag. Tr. 1600, 1812.

Petitioner's irrational behavior continued through the trial. During Petitioner's ex-girlfriend's testimony, he became agitated and was upset that Lawson (the ex-girlfriend) was not asked about a rape charge she filed against him, but then spent time in a hotel with him. He told all the "mother____" they could go "straight to hell." Tr. 1715. Petitioner then indicated he wanted to conduct the cross-examination in the trial. The judge told him he would be allowed to do so. Tr. 1717.

Petitioner made a rude physical gesture towards the prosecutor and apparently attempted to accost an officer in the hallway. Tr. 1760.

Petitioner informed the officers while he was being interviewed that the victim came onto him in a sexual way. Tr. 1837.

During another witness's testimony, Petitioner again was incapable of controlling his impulses. In front of the jury, he yelled "F___ all of ya'll" and then, as the jury was being escorted from the courtroom, he yelled "there's other crimes, murders in Alabama and attempted murders and all that in Alabama." Tr. 2014-15. He told the trial court that "you can kill me today." Tr.

2016. The judge ended court for the day after the outburst. The prosecutor said that the jury was in the room during that outburst. Tr. 2019.

On May 23, 2013, defense counsel renewed its motion to have the trial court find Petitioner mentally incompetent. Tr. 2041. Petitioner objected to his lawyers raising the issue and indicated that he was seeking the death penalty. Petitioner then started lecturing the court on "karma" and told the court that he was not crazy. Tr. 2041-47. He remarked to the trial court: "Have I acted like a pompous ass or a prima donna?" and "Can we kill one bird with two stones?" Tr. 2049. Again, Petitioner indicated his belief that he was representing himself at trial- "But I'm representing myself. Remember in Raymond. They're just helping me." Tr. 2051. The judge stood by his initial determination that Petitioner was competent. Tr. 2049.

Petitioner then conducted the cross-examination of Jimmy Wilson, and Petitioner's confused behavior continued:

> Q: You just testified that the defendant, James Hutto, approached you with a car that he was going to sell for $500?
>
> A: Yeah.
>
> Q: Is that correct?
>
> A: Uh-huh (affirmative response).
>
> Q: Do you have any reason—I mean, do you—why—why would the defendant bring a car—a stolen car to you if, in fact—
>
> BY MR. YURTKURAN: Objection. Calls for speculation, Your Honor.
>
> A: I didn't know it was stolen.
>
> BY MR. YURTKURAN: Objection. Calls for speculation, Your Honor.
>
> BY THE COURT: Sustained…
>
> Q: Okay. All right. Have you ever bought any cars or trucks from the defendant, James Hutto?

A: No.

Q: Never?

A: Never.

Q: Do you—do you still drive a ’99 Dodge pickup?

BY MR. YURTKURAN: Objection, relevance.

A: I haven’t got no ’99 Dodge.

Q: You had one—

A: No, I hadn’t.

Q: -- that you bought. You bought numerous cars from me.

BY THE COURT: Whoa, whoa.

A: No, I didn’t.

Tr. 2093, l. 11- 2094, l. 20.

Petitioner also conducted the bizarre cross-examination of his aunt, Lois Rutledge:

Q: Could you state your name again for the record, ma’am?

A: Yes. Lois Rutledge.

Q: And how do you know the defendant, James Cobb Hutto? Jamie, is that what you said earlier?

A: How do I know you, is that what you said?

Q: How do you know me?

A: You’re my niece’s son.

Q: How long—how long have you known the defendant?

A: Do you expect—

BY MR. HUTTO: Finish that.

BY MR. KNAPP: Your Honor, please the Court. My name is Mike Knapp. I'm going to help him.

BY MR. HUTTO: I can finish it.

BY MR. HUTTO: (Continuing)

Q: Do you expect any benefits from law enforcement as a result of your testimony, Ms.—

A: Do I expect what?

Q: Do you expect any benefits from law enforcement as a result of your testimony?

A: No, sir, I do not.

Q: Yes, ma'am. Okay.

BY MR. HUTTO: I don't have any further—

BY THE COURT: You may sit down.

Tr. 2111, l. 9- 2122, l. 7.

Petitioner then indicated to the court that he did not feel well, and that he felt like he would lash out again if he remained in the courtroom and that he did not want to do that. Tr. 2125-2126. The court informed the jury that Petitioner waived his right to be present but did not further charge the jury that no adverse inferences were to be drawn from that fact. Tr. 2131.

During the playing of one of Petitioner's videotaped interrogations, Petitioner referred to himself as "Abaddon," a figure from Revelations. He also again referred to himself as Lucifer. Tr. 2188-89.

On May 24, 2013, Petitioner again did not want to be present for his capital trial. Tr. 2198-2219. The court again told the jurors that Petitioner waived his right to be present at his trial. Tr. 2222.

The next day, on May 25, 2013, Petitioner was back in the courtroom as Michael Ivy, an officer over correctional facilities, testified. Petitioner again could not control his impulses in the courtroom and yelled, "He's lying and the truth ain't in him. Son of a bitch." Tr. 2325, 2327. His outburst became even more irrational: "Can I get a bail bond? Would you sign me out? The pot runner got cut off, didn't it? Bail bond. For all your bonding needs, Ivy Bail Bonding Services is right across the street." Tr. 2331.

Petitioner's irrational behavior continued as he told the trial court judge that he looks like Colonel Reb. Tr. 2343. He yelled, "Went to Lafayette and got Rebels. What did y'all do to James Meredith up there? Then they're going to name Ross Barnett." Tr. 2343.

He continued to be unable to control his impulses. He made inappropriate remarks to the judge. Tr. 2343-44. With the jury still in the room, Petitioner remarked:

> Going straight to heaven, son of a b___. And if you go to heaven, I can't go to heaven. I know that. You bought your ticket to heaven. Make sure your insurance is paid up because you can't get into heaven without any insurance, Ivy, you son of a b___.

Tr. 2345.

During his lawyer's closing argument, Petitioner's difficult and irrational behavior was still on display for the jury to see. Tr. 2376-2377.

During the State's closing argument at the conclusion of the penalty phase, Petitioner's irrational behavior was apparent yet again. Tr. 2613. Then again when the verdict was read. Tr. 2646. In short, throughout his death penalty trial, Petitioner's psychological state was such that he was incapable of controlling his behaviors. What the jury did not know, though, was that there is a biological basis for Petitioner's unpredictable behavior. Petitioner suffers from a brain abnormality that affects his ability to control his impulses. Petitioner suffers from impaired

executive functioning. Had the jury known of this abnormality, it would have concluded Petitioner was not deserving of the death penalty and would have imposed a life sentence.

For significant periods of time, Petitioner did not communicate with his attorneys for reasons likely having to do with his brain impairment. Petitioner, consistent with his trial behavior, is deeply mistrustful of others and is incapable of assisting his lawyers in their representation of him. For some reason, however, Petitioner has been communicating with current counsel and agreed to participate in neuropsychological testing.

Petitioner was administered a battery of neuropsychological testing by Dr. Robert Ouaou of Naples Neuropsychology, P.A on March 29-30, 2023. The purpose of the testing was to assess Petitioner's neurocognitive functioning. Dr. Ouaou is a licensed psychologist in Florida, with temporary licensures in South Carolina and Mississippi. He provides clinical and adult services, and provides diagnoses, disease staging, treatment planning, cognitive rehabilitation, and behavior management for various etiologies of cognitive dysfunction. Dr. Ouaou administered the following neuropsychological tests to Petitioner: the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV), the Wechsler Memory Scale—Fourth Edition (WMS-IV), the Delis Kaplan Executive Function System (D-KEFS), and the Rey Complex Figure Test (RCFT) Copy and Memory.

Among other cognitive deficits, Petitioner has a terrible memory, scoring in the 10th percentile for recall of a complex geometric figure and at 30-minute, long delay, and he scored in the 1st percentile regarding his visual memory functions.

Dr. Ouaou identified a significant disparity between his semantic verbal fluency and his lexical verbal fluency which, he concludes, is likely a result of Petitioner's impaired executive functioning abilities.

Very significant deficits exist in Petitioner's executive functioning. Executive function refers to a constellation of cognitive abilities that enable and drive adaptive, goal-oriented behavior and includes the ability to generate thought and think flexibly, to update and manipulate information mentally, in inhibit what is irrelevant to current goals, to self-monitor, and to plan and adjust behavior as appropriate to the present context. Deficits in executive functioning can lead to disproportionate impairment in function and activities of daily living. Rabinovici, Gil D., MD, Stephens, Melanie L., PhD, and Possin, Katherine L. PhD, Executive Dysfunction, Continuum (Minneap Minn), 2015 Jun: 21 (3 Behavioral Neurology and Neuropsychiatry): 646. Executive dysfunction is a risk factor for committing violent crimes, which are characterized by higher impulsivity, tendencies to act out, violation of social norms, and disregard for others. The inability to modify behavior in response to environmental changes combined with inhibition deficits could contribute to significant difficulties in social situations, leading to increased violent responses. Cruz, Ana Rita, de Castro-Rodrigues, Andreia, Barbosa, Fernando. Executive dysfunction, violence and aggression. Aggression and Violent Behavior 51 (2020) *See* https://www.sciencedirect.com/journal/aggression-and-violent-behavior (*last visited* May 1, 2023).

Dr. Ouaou found Petitioner demonstrated learning and memory deficits as well as significant impairments on the measures of executive functioning strongly associated with damage to and/or diminished development of the frontal lobe region of the brain as well as general neurological disorders.

On the DKEFS[1], Petitioner demonstrated extremely low performance on the condition of Inhibition (2nd percentile) and significant impairment on other primary contrast measures of the Color Word Interference Test. DKEFS Number-Letter Switching was in the 5th percentile. DKEFS Verbal Fluency switching scores were in the 1st percentile. His performance on the DKEFS Design Fluency test was in the 4th percentile. His score on the DKEFS Proverbs test was in the 2nd percentile.

Dr. Ouaou's extensive neuropsychological testing has confirmed that Petitioner suffers from some organic brain dysfunction that renders him incapable of controlling his conduct to the same extent as other people in society. This information should have been presented to the jury for its consideration because this type of evidence is highly mitigating and would have provided a basis upon which the jury would have sentenced Petitioner to life.

As this Court has recently reaffirmed, in capital -murder cases, "[psychiatric and psychological evidence is crucial…". *Garcia v. State*, 356 So.3d 101, 112 (2023); *State v. Tokman*, 564 So.2d 1339, 1343 (Miss. 1990) (citing *Ake v. Oklahoma*, 470 U.S. 68, 80, 105 S. Ct. 1087 (1985). And "there is a critical interrelation between expert psychiatric assistance and minimally effective representation." *Id*. Evidence regarding Petitioner's cognitive limitations, including these significant deficits in executive functioning should have been presented to the jury. It was highly mitigating evidence and would have provided a basis upon which at least one juror would have concluded that the death penalty was not the appropriate sentence in this case.

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[1] The Delis-Kaplan Executive Function System (D-KEFS: Delis, Kaplan & Kramer, 2001) is a set of executive tests designed for the assessment of executive functions including flexibility of thinking, inhibition, problem solving, planning, impulse control, concept formation, abstract thinking, and creativity. This test provides a standardized assessment of executive functions in children and adults between the ages of 8 and 89. Susan Homack, Donghyung Lee, Cynthia A. Riccio, Test Review: Delis-Kaplan executive function system; *J Clin Exp Neuropsychol*. 2005 Jul; 27(5): 599-609.

Counsel Ineffectiveness

Both trial counsel and initial PCR counsel rendered ineffective assistance of counsel by failing to develop a functional relationship with their client such that Petitioner would have worked with them to assist them in understanding the importance of participating in neuropsychological testing. Both trial counsel and PCR counsels' efforts to earn the trust and cooperation of their client were insufficient and the jury was prevented from considering this highly mitigating evidence at Petitioner's trial. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) (31 Hofstra L. Rev. 913) Guideline 10.5, Relationship with the Client (A) Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client[2]. PCR counsel noted in their submission to this Court that "Mr. Hutto has not communicated with his post-conviction attorneys since late 2017" and "has not communicated with or responded to invitations to meet with post-conviction counsel." For that reason, counsel was unable to submit a verification required under Mississippi Code Annotated §99-39-9(f)(3). As the Guidelines make clear, counsel often must work with challenging and difficult clients due to the ubiquitous presence of mental health issues in capital cases. Both trial counsel and PCR counsel failed in their duty

[2] And see Commentary: Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired." There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers and assist counsel in establishing a rapport with the client.

towards their client to have him participate in the kind of testing that would have uncovered the information that current counsel have been able to uncover. Their performance was deficient, and Petitioner was prejudiced.

Penalty phase claims of ineffective assistance of counsel are reviewed under the familiar two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a petitioner to show that: (1) trial counsel's performance was deficient; and (2) the deficiency resulted in prejudice. *See also*, *Porter v. McCollum*, 558 U.S. 30, 38 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Whether an attorney's performance was deficient is determined by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis in original); *see also, Porter*, 558 U.S. at 39 ("It is unquestioned that under the prevailing professional norms…counsel's ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

It is well-established that trial counsel should be particularly diligent to investigate evidence of mental impairments, such as organic brain damage, because of its powerful mitigating effect. *See, e.g., Sears v. Upton*, 561 U.S. 945, 946 (2010) (holding evidence of brain damage was "significant mitigating evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 558 U.S. at 41 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of '"the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'") (*quoting Wiggins*, 539 U.S. at 535): *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome); *Tennard v. Dretke*,

542 U.S. 274, 287 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (stating that a competent attorney, aware of the defendant's history of diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding).[3]

Moreover, trial counsel must not "ignore[] pertinent avenues for investigation of which he should have been aware." *Porter*, 558 U.S. at 40. Where trial counsel fail to conduct a thorough mitigation investigation, they necessarily lack the information required to make reasonable strategic judgments concerning the selection and presentation of evidence, and deference to decisions made under such conditions is inappropriate. *See e.g., Sears*, 561 U.S. 945, 953 ("We reject[] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

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[3] Numerous lower courts have likewise recognized that brain damage is uniquely mitigating. *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action."); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (stating mental conditions "associated with abnormalities of the brain" are "likely to [be] regarded by a jury as more mitigating than generalized personality disorders."); *Bryan v. Mullin*, 335 F.3d 1207, 1244 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part) ("[Counsel's] performance left the jury no reason even to consider as a possibility that [the defendant] might not be morally culpable enough, as a result of his involuntarily adduced organic brain disorder, for the death penalty."); *Blystone v. Horn*, 664 F.3d 397 (3rd Cir. 2011) (trial counsel's deficient performance was prejudicial where counsel failed to investigate and present evidence that petitioner suffers from "untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse."); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (prejudice found where trial counsel failed to present evidence that, among other things, petitioner suffered a serious brain injury and functional brain impairment, which caused problems with impulsivity, judgment and problem solving); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [defendant's] behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.").

To establish prejudice, a PCR applicant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter,* 558 U.S. at 40 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel's deficient performance. As the United States Supreme Court reiterated in *Porter*:

> [w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.

558 U.S. at 44 (quoting *Strickland,* 466 U.S. at 693-94). The question is whether "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability." *Rompilla*, 545 U.S. at 393. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537. In a capital case, the question is "whether the changes to the mitigation case would have a reasonable probability of causing a juror to change his or her mind about imposing the death penalty." *Blanton v. Quarterman,* 543 F.3d 230, 236 (5th Cir. 2008).

In order to sustain a Sixth Amendment claim of ineffective assistance of counsel, Petitioner must also establish prejudice—that but for counsel's unprofessional performance, there is a reasonable probability the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding," because "[v]irtually every act or omission of counsel would meet that test." *Id*. at 693. However, a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. Rather, when a petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors the sentencer… would have concluded that the balance of aggravating and mitigating

circumstances did not warrant death." *Id*. at 695. Had trial counsel developed and introduced the evidence of Petitioner's organic brain anomaly that has significantly impaired his executive functioning, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537; *accord Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

B. Trial counsel rendered ineffective assistance of counsel when he failed to object to, and raise as an appellate claim, prosecutorial misconduct which resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the record. PCR counsel rendered ineffective assistance of counsel by failing to develop and present this claim during Petitioner's initial post-conviction relief proceeding.

Throughout his closing argument, the prosecutor improperly appealed to the jury to "send a message" with its punishment of death.

> Ladies and gentlemen, I guess sometimes we ask ourselves why do we have the death penalty. Well, the decision is both legal and it's moral. Legally, the law authorizes it. And y'all have been through this whole process and you've seen that, from what we have to do with the first week we're here during voir dire, weighing the aggravators and the mitigators and what—and now y'all are at that phase where you can back there and do that that.
>
> The moral position is that it's there to create deterrence, to send a message. Ladies and gentlemen, we have a duty to protect—
>
> BY MR. DE GRUY: Your Honor, the—
>
> [The objection was overruled]
>
> It's moral because we have a duty to protect the most vulnerable in our society. Again, the best example of that would be the elderly and children. We have a duty to protect them from being put in places like that in the middle of the night and being beat to death by people like James Hutto, being—being bewildered, befriended, being taken advantage of by people likes James Hutto.
>
> Ladies and gentlemen, a verdict of the death penalty will send a message that we—that we're not going to tolerate those types of crimes, that we're not going to allow the worst, most heinous, atrocious crimes to stand up, to be committed in our society, that we don't do that . . .
>
> I know that everybody talked about what are going to do about these killings, when is somebody going to do something about it. Ladies and gentlemen,

> here's your chance to do something about it. Don't walk out of here and ever say again if you don't choose to vote for the death penalty, why won't they do something about those killings. This is your chance to do something about it. Send a message that we won't stand for it.

App. 2637, l. 24- 2640, l. 3.

Due process is violated when a "prosecuting attorney overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Berger v. United States*, 295 U.S. 78, 84 (1935). A prosecutor's expression of personal opinion improperly "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 19 (1985). The United States Supreme Court also condemns arguments that are "wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." *Viereck v. United States*, 318 U.S. 236, 247 (1943). When the prosecutor crosses the line and makes such "indecorous and improper" arguments, "mild judicial action" will not remove "the evil influence upon the jury of these acts of misconduct." *Berger*, 295 U.S. at 85. "Prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Id*. at 89.

"The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone." *United States v. Young*, 470 U.S. 1, 7 (1985). Still, the Supreme Court has recognized that rules of professional conduct and the American Bar Association's Standards for Criminal Justice are useful guides. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 366 (2010); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Specifically, in *Young*, the Court noted the ABA Model Code of Professional Responsibility DR 7-106(C) (1980), which provides in pertinent part:

> In appearing in his professional capacity before a tribunal, a lawyer shall not…

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a case, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein.

Id. at 7 n.3. The Court also noted ABA Standards for Criminal Justice 3-5.8 (2d ed. 1980), which provides:

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Id. at 8 n. 5.

The State's closing argument in the sentencing phase of Petitioner's capital trial violated his Eighth Amendment right to have the jury consider an individualized sentence for him. It also violated Petitioner's Fourteenth Amendment rights by interposing an arbitrary factor into the proceeding. Trial counsel rendered ineffective assistance of counsel by failing to object to this improper argument so it could be raised as an issue on appeal. PCR counsel rendered ineffective assistance of counsel by failing to raise this claim during Petitioner's initial PCR case. The United States Supreme Court "has repeatedly said that under the Eighth Amendment, 'the qualitative

difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), *quoting California v. Ramos*, 463 U.S. 992, 998-99 (1983); *see also Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down death sentences because the jury might have relied on arbitrary factors in rendering their death sentence). A prosecutor may not tell the jury to consider arbitrary factors in its sentencing determination because it would "divert the jury's attention from the central issue of whether the State has satisfied its burden." *Beck v. Alabama*, 447 U.S. 625, 642 (1980). The only factors considered by the jury in rendering the defendant's sentence should be the defendant's character, the record, and the circumstances of the offense. *Woodson*, 428 U.S. at 304. The prosecutor's improper argument created the possibility that the jury returned a death sentence in order to deter other criminals, not because it deemed death the appropriate sentence for Petitioner in violation of the Eighth Amendment. *See Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) ("punishment should be directly related to the personal culpability of the defendant"); *see also California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (capital sentencers must make an "individualized assessment of the appropriateness of the death penalty").

The prosecutor's argument to the jury—that they, essentially, better not ever complain about another murder if they are not willing to sentence Petitioner to death—improperly inflamed the jurors' passions by virtually threatening them to impose the death penalty on Petitioner. The prosecutor, in his remarks, suggested the jurors were hypocrites if they claimed to care about community safety and did not wish to impose the death penalty in this case. The argument was wholly improper. Due process prohibits argument that inflames the passions of the jury. *See Payne v. Tennessee*, 501 U.S. 808, 831-32 (1991). Further, responsibility for ensuring that a death

sentence is not imposed under the influence of passion rests with the prosecutor, in that he must "confine argument to record evidence." *United States v. Young*, 470 U.S. 1, 10 (1985).

Neither trial counsel (who also handled Petitioner's direct appeal) nor PCR counsel raised this issue below. In failing to do so, they rendered ineffective assistance of counsel. This Court should grant Petitioner the right to proceed with a successor post-conviction relief action and grant relief.

C. Trial counsel rendered ineffective assistance of counsel by not using a peremptory challenge to remove juror Glenn Miller who was incapable of following the law and would have automatically imposed the death penalty upon a finding that Hutto was guilty of capital murder. PCR counsel rendered ineffective assistance of counsel by failing to raise this claim during Petitioner's initial PCR proceeding.

When Glenn Miller completed his capital questionnaire in this case, he indicated that he "strongly favor[ed]" the death penalty, the strongest level of support provided by the questionnaire. *See* Juror Questionnaire for Miller.

When he was asked to explain his "strongly favor" attitude towards the death penalty, he responded:

> Well, yes, sir. I mean I agree with the—with the death penalty in some instances. I guess it depends on the circumstances and what the crime is, you know. I feel like in my opinion that the sentence should fit the crime that's done. You know, if somebody takes a life and it's proven beyond a shadow of a doubt that they took that life, then I agree with the death penalty.

Tr. 1057, ll. 8-15.

After Mr. Miller seemed to concede that he could consider a life sentence, defense counsel additionally probed his beliefs on the issue:

> Q: So really your statement that you would automatically give the death penalty is not quite accurate?
>
> A: I don't think I said I would automatically.

Q: Correct me with what you said.

A: I said that I felt like if—if—if they were proven, and I know beyond a reasonable doubt is not your terminology, but if I said if he was proved or she was proved that—that I could go along with the death penalty or vote for that. I didn't say I would automatically do it though.

Q: Okay. Well, beyond a reasonable doubt is our terminology.

A: Okay.

Q: Okay. Thank you.

A: Yes, sir.

Tr. 1063, ll. 1-16.

Trial counsel rendered ineffective assistance of counsel by not challenging for cause or using a peremptory challenge to remove Mr. Miller from the venire when he was incapable of rendering a life verdict once it was shown that Hutto was guilty of murder.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). In capital cases, this right embraces the concomitant "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment…" *Uttech v. Brown*, 551 U.S. 1, 9 (2007) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). The "essential demands of fairness" require that criminal defendants be given the opportunity to assure themselves of this right through *voir dire* directed to uncovering bias. *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (holding that summarily dismissing defense counsel's request for supplemental *voir dire* on an issue of bias, the trial court violated the defendant's right to due

process). *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). The issue of a fair and impartial jury "becomes most grave when the issue is of life or death." *Aldridge*, 283 U.S. at 314. Both trial counsel and initial PCR counsel rendered ineffective assistance of counsel, and this Court should allow Petitioner to proceed with a successor PCR case and grant relief.

D. Trial counsel rendered ineffective assistance of counsel when he failed to object to the prosecution's closing argument that argued that Petitioner's mitigation should not be given any weight by the jury because it lacked a nexus to the crime. PCR counsel rendered ineffective assistance of counsel by failing to raise this claim during Petitioner's initial PCR proceeding.

During closing argument, the prosecution sought to discount Petitioner's mitigation evidence by arguing to the jury Petitioner did not prove a "nexus" between his history of childhood abuse and the crime he committed:

> And Dr. Schroeder harped on these allegations that James Hutto had been abused or molested as a child. And I want to clarify to you that those are—those are allegations. We don't know that those things happened. If they did happen, it's not okay, and the people that did it should be held accountable. However, what I want to propose to you is that victims of molestation, they may lose their innocence, sure. They don't lose their concept of right or wrong. They don't lose their concept of morality. They don't lose their conscience.
>
> James Hutto knows the difference between right or wrong, and he knew it in September of 2010 when he murdered Ethel Simpson. What I'm struggling with—what I'm struggling with what Dr. Schroeder says is what's the nexus between abuse as a child, if it happened, and getting the rage to kill an elderly woman that you just met? What's the nexus? There is no nexus, because how do you explain the dozens of successful men who were abused as children? How do you compromise that? That nexus has not been made for you and that is not mitigation.

App. 2619.

Trial counsel failed to object to this argument. PCR counsel failed to raise this claim during Petitioner's initial PCR proceeding. This requirement of a "nexus" between a defendant's proffered mitigation and the crime has never been acknowledged in the law and has been firmly rejected by the United States Supreme Court. *Tennard v. Dretke*, 542 U.S. 274 (2004). The Supreme Court addressed the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina*, 494 U.S. 433 (1990). There, the Court established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" and therefore the only evidentiary standard is that the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. at 440 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). Once this very low threshold of relevancy is met, the "Eighth Amendment requires that the jury be able to consider and give effect to "a capital defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (19820). *See also Payne v. Tennessee*, 501 U.S. 808 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death… [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, supra, at 114). *See also Hedlund v. Ryan*, 854 F.3d 557 (9th Cir. 2017) (granting habeas relief when the Arizona Supreme Court applied unconstitutional causal nexus test); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (noting that the reason for rejecting the nexus requirement is clear because it is contrary to the United States Supreme Court holdings in Eddings and quoting *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Trial counsel rendered ineffective assistance of counsel for failing to object to this improper argument and Petitioner was prejudiced because the argument undermined the jury's duty to consider all mitigation evidence offered by Petitioner. PCR counsel rendered ineffective assistance of counsel by failing to raise this issue during Petitioner's initial PCR proceeding. Respectfully, this Court should allow Petitioner to go forward with a successor PCR petition and ultimately grant Petitioner relief.

E. Petitioner remains incompetent.

At this time, Petitioner is incompetent. Although he speaks and meets with counsel, he remains incapable of assisting counsel with his defense. He lacks a "sufficient present ability to consult with his lawyer[s] with a reasonable degree of rational understanding." *Dusky v. United States*, 362 U.S. 402, 402 (*per curiam*).

VI. Conclusion

WHEREFORE PREMISES CONSIDERED, for the foregoing reasons, this Court is requested to grant the following relief:

(1) Vacate the conviction and sentence of death and dismiss the indictment with prejudice based upon the claims apparent from the face of the petition and accompanying materials. *See* Miss. Code Ann. § 99-37-27 (recognizing this Court's authority to grant post-conviction relief on the basis of the pleadings, exhibits, and trial records); Rule 22, M.R.A.P.; alternatively,

(2) Grant Petitioner a new trial based upon his established meritorious claims as set forth in his petition; alternatively,

(3) Grant Petitioner leave to file the Petition for Post-Conviction Relief in the Circuit Court of Hinds County, Mississippi; and,

(4) Grant such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on this the 8th day of May, 2023.

s/Caroline K. Ivanov
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CERTIFICATE OF SERVICE

I, the undersigned Caroline K. Ivanov, do hereby certify that I have filed the above and foregoing with the Court using the Court's electronic filing system (MEC) which automatically served all counsel of record.

And, that I have mailed, postage prepaid, a true and correct copy of the above and foregoing motion to the following unregistered user and party.

James Hutto, III
MDOC # L183663
MSP, Unit 29J
Parchman, MS 38738

This the 8th day of May, 2023.

s/Caroline K. Ivanov
Caroline K. Ivanov