

OCTOBER TERM 2026

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEREK SALES,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

— CAPITAL CASE —

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QUESTION PRESENTED

Does a defendant's representation by virulently racist trial counsel violate the Sixth Amendment?

PARTIES TO THE PROCEEDING BELOW

Petitioner Derek Sales was the Appellant/Petitioner in the court below and is an indigent prisoner within the Arkansas Division of Correction. The State of Arkansas is the Respondent and was the Appellee/Respondent below. No party is a corporation.

RELATED PROCEEDINGS

Bradley County Circuit Court:

State of Arkansas v. Derek Sales, No. 06-CR-05-24-3 (Bradley Cty. Cir. Ct. May 17, 2007) (entry of judgment).

Arkansas Supreme Court:

Derek Sales v. State of Arkansas, 289 S.W.3d 423 (Ark. 2008) (affirmance on direct appeal);

Derek Sales v. State of Arkansas, 441 S.W.3d 883 (Ark. 2014) (affirmance of denial of initial postconviction petition).

United States District Court for the Eastern District of Arkansas:

Derek Sales v. Payne, No. 5:15-cv-248, ECF 152 (E.D. Ark. March 31, 2025) (final judgment regarding dismissal of federal habeas petition).

United States Court of Appeals for the Eighth Circuit:

Derek Sales v. Payne, No. 26-1221 (8th Cir. docketed Feb. 9, 2026) (application for Certificate of Appealability pending).

United States Supreme Court:

Derek Sales v. Arkansas, 556 U.S. 1190 (2009) (denial of certiorari on direct appeal).

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PETITION FOR A WRIT OF CERTIORARI

Derek Sales respectfully petitions that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The formal order of the Arkansas Supreme Court denying Mr. Sales's Motion to Reinvest Jurisdiction in the Circuit Court to Petition for the Writ of Error Coram Nobis is unpublished but attached. Pet. App. 1a.

JURISDICTION

The Arkansas Supreme Court denied Mr. Sales's Motion to Reinvest Jurisdiction in the Circuit Court to Petition for Writ of Error Coram Nobis on April 23, 2026. *Id.* Justice Kavanaugh granted an extension of time to petition for the writ of certiorari to September 20, 2026. *See Sales v. Arkansas*, No. 26A56; *see also* Sup. Ct. R. 30.1. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

Additionally, this Court has jurisdiction to review the Arkansas Supreme Court's denial of Mr. Sales's coram nobis motion because there is no indication that the court denied the claims based on an independent state law ground in its unexplained order. *See Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025). Under Arkansas law, a coram nobis motion can be denied on procedural or merits grounds, and there's no presumptive rule or custom which dictates that an unexplained denial rests on a state procedural ground. Rather, it is the Arkansas Supreme Court's general practice to evaluate the merits of a claim sought to be raised through coram nobis, while leaving any procedural questions for the trial court in the first instance. *See Howard v. State*, 403 S.W.3d 38, 47–48 (Ark. 2012).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

The Fourteenth Amendment provides, in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

A. Previous proceedings.

In 2005, Derek Sales was charged with capital murder and related felonies in the Circuit Court of Bradley County, Arkansas. *State v. Sales*, CR-2005-24-3 (Bradley Cty. Cir. Ct.). He was represented at trial by attorneys G.B. ‘Bing’ Colvin and Gary Potts of the Public Defender’s Office for the 10th Judicial Circuit. Mr. Sales, a black man, was represented by two white attorneys and tried before and sentenced to death by an all-white jury.

At trial, the prosecution alleged that Mr. Sales killed Willie York while the two were alone in Mr. York’s living room around 11:30 p.m. on April 16, 2005. Around the time that Mr. York’s daughter joined the pair before leaving, TR 1077, Mr. Sales walked to an Exxon gas station to buy cigarettes, TR 1304.¹ According to witnesses, within approximately 10 minutes of Mr. York’s daughter leaving, members of the York family drove up to the house and saw Mr. Sales hunched over Mr. York through a front window. TR 1081. Mr. Sales was arrested at the scene with several coins in his pocket that the prosecution argued had been taken from Mr. York’s cigar box, TR

¹ Citations to the record on appeal for the direct appeal are “TR [page].” Citations to the postconviction record on appeal are “PCR [page].”

1028, and investigators later reported finding a slip of paper on Mr. Sales that came from the cigar box, TR 1128.² Mr. Sales told investigators that he had returned from the Exxon to find Mr. York gravely injured and tried to help him. TR 1315, 1552.

Mr. York had been strangled, beaten in the head and chest, and stabbed in the jugular vein. TR. 1243. He was found in a pool of blood. TR 986. The medical examiner testified that the infliction of these injuries would have taken “at least several minutes.” TR 1260. Despite the gruesome nature of the crime, the bloody scene, and the ten-minute window to commit the act, the State found no physical or forensic evidence tying Mr. Sales to the crime beyond his bloody footprints at the scene and a small amount of blood on his pants, one sock, and shoes, which the State’s lead investigator admitted was consistent with Mr. Sales’s explanation of finding and trying to assist Mr. York. TR 1205–07, 1218.

Additionally, contrary to the medical examiner’s testimony that the assailant likely would have had Mr. York’s skin cells or blood under their fingernails and bruising on their fists, TR 1261, neither were found on Mr. Sales. Indeed, Mr. Sales’s hands had no blood on them at all when he was arrested. TR 1205. Nor were there any scrapes or lacerations around the bruising consistent with the assailant wearing a ring, despite the medical examiner’s testimony that a ring would have torn the assailant’s skin and the fact that Mr. Sales was wearing one. TR 1262. Additionally, two knives were found near the scene; neither could be tied to Mr. Sales, and one had

² At trial, the defense was able to highlight numerous chain-of-custody problems with the slip of paper, including that it was not included in the original typewritten list of Sales’s property and the inconsistent accounts of investigators regarding when and where it was found. *See, e.g.*, TR 1034–35, 1187, 1207–08; State’s Trial Ex. 2.

an unknown fingerprint. TR 1147. The jury also learned that DNA testing of a clump of hair found on Mr. York matched neither Mr. Sales nor Mr. York. TR 1277.³

Although the State alleged that the motive was robbery, there was no evidence that Mr. Sales was even aware of any money in the house or that he attempted to take anything of substantial value. Indeed, although \$100 was missing from Mr. York's wallet, investigators did not find it on Mr. Sales or at the crime scene. TR 1035. Evidence developed after trial showed that in addition to being a bootlegger in a dry county, Mr. York had been a drug dealer and confidential informant, providing an obvious motive for a fellow drug dealer or customer, but the State did not disclose this information to the defense. *See* Petition to Reinvest Jurisdiction in the Circuit Court to Consider a Petition for Writ of Error Coram Nobis, *Sales v. State*, No. CR-07-1308 (Ark. filed July 28, 2017).

During the penalty phase, the State presented Mr. Sales's prior felonies, the fact that he was on parole, and victim impact testimony. TR 1435–36, 1438, 1440. The defense presented only one witness, Mr. Sales's sister. The defense's entire sentencing-phase presentation—including objections from and cross examination by the prosecution—covered fewer than nine transcript pages. TR. 1443–51.

The jury convicted Mr. Sales of aggravated robbery and capital murder, and he was sentenced to death. The convictions and sentences were upheld on direct appeal. *Sales v. State*, 289 S.W.3d 423 (Ark. 2008). The postconviction court found trial

³ The jury did not learn that the testing was conducted on the eve of trial and not disclosed to the defense until the second day of trial, despite a defense request that the hair be tested two years before trial. TR 1231–32, 1267.

counsel’s performance deficient in two respects—trial counsel (1) told the jury during the guilt phase that Mr. Sales previously escaped from jail, despite the trial court’s order prohibiting the State from mentioning the escape and (2) misinformed the jury during the penalty phase that Mr. Sales could be released from prison if he was not sentenced to death—but relief was denied at the conclusion of postconviction proceedings. *Sales v. State*, 441 S.W.3d 883 (Ark. 2014). Mr. Sales filed a federal habeas corpus petition in the Eastern District of Arkansas, the denial of which is currently on appeal. *Sales v. Payne*, No. 26-1221 (8th Cir. docketed Feb. 9. 2026).

B. Proceedings below.

On February 9, 2026, Mr. Sales moved the Arkansas Supreme Court to reinvest jurisdiction in the Bradley County Circuit Court so that he could petition for the writ of error coram nobis. Pet. App. 2a–11a.⁴ The motion was based on the newly acquired declaration of Lisa Croy, the mitigation specialist at trial, disclosing for the first time the pervasive and extreme racial prejudice displayed by lead counsel G.B. ‘Bing’ Colvin in this case.

As explained in the motion and in her declaration, Colvin hired Croy in February 2007, just months before trial was set to begin. Pet. App. 16a ¶ 2. Despite joining the case so late, Croy witnessed “multiple occasions when Bing used the word ‘n-----’ when he talked about Black people involved in the case.” Pet. App. 18a ¶ 11. During a trip to interview a member of the decedent’s family, Colvin referred to him

⁴ Mr. Sales initially moved, in relevant part, for authorization to file a coram nobis petition in December 9, 2024, which remained outstanding pending the appointment of counsel and a motion to file an overlength motion.

as a “full-fledged n-----[.]” Pet. App. 18a–19a ¶¶ 12–13 (“I remember Bing called Ricky Hampton a ‘full-fledged n-----’ while we were sitting in the parole officer’s office, and I shushed him because I didn’t know if we were being recorded.”). After the decedent’s wife testified, Colvin said that “she got ‘n----- rich off Mr. York.” Pet. App. 19a ¶ 15. Colvin referred to Mr. Sales’s wife, who could have been called as a witness on his behalf during the guilt phase to provide exculpatory testimony, as “a dumb n-----.” Pet. App. 19a ¶ 14. Additionally, Colvin referred to Shaun Hildreth, the lead law enforcement investigator in this case, as a “damn n-----’ as he testified for the state during trial.” Pet. App. 19a ¶ 16.

In light of this new evidence, Mr. Sales proffered three legal theories under which he was entitled to relief under the Sixth Amendment: his representation by trial counsel who harbors extreme racial prejudice constituted (1) the constructive denial of counsel or (2) a conflict of interest or (3) resulted in prejudicially ineffective counsel. Pet. App. 5a–9a. Following the State’s response to Mr. Sales’s *coram nobis* motion, it was denied by the Arkansas Supreme Court without explanation on April 23, 2026. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD ADDRESS WHETHER A DEFENDANT’S REPRESENTATION BY RACIST TRIAL COUNSEL VIOLATES THE SIXTH AMENDMENT.

A. This Court should recognize that the Sixth Amendment is violated when trial counsel’s performance is hamstrung by racial animus.

Racial bias against one’s client has no place at the counsel table. *See Buck v. Davis*, 580 U.S. 100 (2017). This petition asks this Court to address a question that

sits at the crossroads of two issues central to this Court’s criminal jurisprudence: the right to counsel under the Sixth Amendment and the threat that racial prejudice could undermine public confidence in the criminal justice system—specifically, whether a defendant’s Sixth Amendment right to counsel is violated when he is represented at trial by an attorney whose representation was corrupted by extreme racial prejudice.

Over the last century, this Court has zealously guarded the right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”). “The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” *Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 154 (2000). This right exists “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). Even when trial counsel is present, a defendant is denied the right to counsel when he is left to fend for himself without the guiding hand of counsel. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (“The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters.”).

In order to safeguard the right to counsel, this Court has established three tests to guide a reviewing court's evaluation of a potential Sixth Amendment violation: (1) the actual or constructive denial of counsel, (2) counsel's conflict of interest, and (3) the ineffective assistance of counsel. Each reflects the same core principle: the Sixth Amendment demands a lawyer who is able and willing to serve as a loyal and effective advocate on behalf of his client.

First, the denial of counsel occurs when counsel is actually or constructively absent during a critical stage of proceedings. *Bell v. Cone*, 535 U.S. 685, 696 (2002). A defendant is constructively denied counsel when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thereby making “the adversary process itself presumptively unreliable,” or under circumstances in which “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 659–60. The denial of counsel is structural error. *Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017).

Second, “[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.” *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). The presence of an attorney does not fulfill the Sixth Amendment when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters. *Holloway*, 435 U.S. at 490. The undivided loyalty of appointed counsel to their client is essential to due process. *See MacKenna v. Ellis*, 280 F.2d

592, 599–600 (5th Cir. 1960) (“The right to assistance by counsel means effective assistance by an attorney who gives the accused his complete loyalty and whose service is of such character as to preserve the essential integrity of the proceedings.”). After trial, a defendant “must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance,” but “need not demonstrate prejudice.” *Cuyler v. Sullivan*, 446 U.S. 335, 348–50 (1980). Once an actual conflict and an adverse impact are established, reversal is required. *Holloway*, 435 U.S. at 489.

Third, the familiar *Strickland* test governs all other claims of trial counsel ineffectiveness are governed by the familiar *Strickland* test, under which a defendant must establish that his trial counsel’s performance was deficient and that but for counsel’s performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

This Court has enforced these standards out of a recognition that a conviction cannot stand if the accused was not provided with effective representation as required by the Sixth Amendment:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the [right to counsel]. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id. at 685.

This Court has also been stalwart in confronting and rooting out racial bias in the criminal justice system. Unsurprisingly, given the importance of the right to counsel, this Court has previously endeavored to address the profound impact that racial bias can have when it comes from counsel table. *See Buck v. Davis*, 580 U.S. 100 (2017). In granting habeas relief based on trial counsel’s presentation of expert testimony that his client was more likely to be a future danger because of the color of his skin, this Court noted “it stretches credulity to characterize” such a claim as “run of the mill.” *Id.* at 123–24 (internal quotation omitted). As this Court explained, “[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.” *Id.* at 124 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). The injection of racial bias into the courtroom “poisons public confidence in the judicial process” and “injures not just the defendant, but the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts.” *Id.* (cleaned up).

In *Buck*, this Court addressed the situation in which trial counsel, although otherwise operating with his client’s interests in mind, suggested to jurors that his client was worthy of being sentenced to death based on the color of his skin. Given that there was no allegation there that trial counsel’s actions were motivated by racial animus, this Court simply applied *Strickland* prejudice. But this Court has not yet addressed the situation in which trial counsel’s representation—and all actions and decisions that comprise the representation—is directly hindered by his own racial bias. Given the principles explained above, this Court should grant certiorari to

address whether one's right to counsel under the Sixth Amendment is violated when he is represented (at his capital trial, no less) by an attorney who exhibits extreme racial prejudice, and the Court should provide clarity to lower courts regarding which framework governs such a claim.

B. The impact of trial counsel's racism in this case is manifest.

The impact of Trial counsel's extreme racial prejudice was profound in Mr. Sales's death penalty case. On April 18, 2005, the trial court appointed Colvin, the managing attorney for the Public Defender's Office for the 10th Judicial Circuit, to represent Mr. Sales. TR 13–15. Colvin was briefly relieved by a private attorney before being reappointed. TR 367. Colvin would remain lead attorney through trial, assisted by Gary Potts as co-counsel. TR 364. Both attorneys were white. Colvin assigned himself the guilt phase and Potts the penalty phase. PCR 178–79. Colvin hired Croy as the mitigation specialist, PCR 110, and he retained one expert mental health witness, PCR 172.

As noted above, in 2024, Croy executed a signed declaration disclosing for the first time the pervasive and extreme racial animus openly displayed by lead attorney Colvin in this case. After joining the case months before trial, Croy witnessed “multiple occasions when Bing used the word ‘n-----’ when he talked about Black people involved in the case,” including calling Mr. Sales's wife “a dumb n-----,” remarking that the decedent's wife got “n----- rich off” of him after she testified, calling another member of the decedent's family who testified at trial a “full-fledged n-----,”

and referring to the lead law enforcement investigator in this case as a “damn n-----” as he testified for the state during trial.” Pet. App. 18a–19a.

Colvin’s repeated use of the slur and accompanying racial stereotypes unequivocally demonstrates that he harbored racial animus. Courts have long recognized that it is difficult to accept “that, at this time in our history, people who use the word ‘n-----’ are not racially biased.” *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001); *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) (“The use of the word . . . is discrimination per se.”). The use of the slur reflects hostility and racial animus, and its usage “cannot be characterized as harmless or casual.” *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 514–15 (6th Cir. 1991). Indeed, even Jim Crow courts reversed criminal convictions over a century ago based on the use of the slur in front of the jury. *See Collins v. State*, 56 So. 527, 528 (Miss. 1911) (“The appellant may be a bad negro, and a very undesirable member of society, yet he is entitled to go before the jury of the land untrammelled by voluntary epithets.”).

The violation of Mr. Sales’s right to counsel is evident from the impact of trial counsel’s extreme racial prejudice before and during each phase of trial.

First, before trial, Colvin failed to investigate whether Mr. Sales was intellectually disabled based on a racial stereotype that he later presented to the jury. Although Dr. Bob Gale, the defense mental health expert, acknowledged that testing showed Mr. Sales had a pre-adjustment 76 IQ score in his testimony during the guilt phase, Dr. Gale told the jury his “view of [Mr. Sales] was that had he had the right

cultural and environmental influence, he probably would have shown to be a little bit brighter than that” because “a lot of that is cultural and environment.” TR 1342. It is wholly improper to “artificially raise” an IQ score based on racial stereotypes. Robert M. Sanger, *IQ, Intelligence Tests, “Ethnic Adjustments” and Atkins*, 65 AM. U. L. REV. 87 (2015) (explaining that it is improper to “artificially raise” an IQ score based on perceived stereotypes regarding black test takers). Not only did trial counsel accept this racial stereotype as an explanation for Mr. Sales’s low IQ score, he allowed it to be presented to the jury.

Because trial counsel appears to have accepted the racial stereotype provided by Dr. Gale, he failed to investigate further. Had he done so, he would have discovered that, in light of appropriate diagnostic adjustments, Mr. Sales’s IQ score meets the first prong of intellectual disability. Pet. App. 73a–80a. As a result, counsel failed to adequately investigate Mr. Sales’s intellectual disability, which could have exempted Mr. Sales from the death penalty or, at the very least, served as compelling mitigation. Instead, and jurors were invited to discount the accuracy of Mr. Sales’s low IQ score. Consequently, despite pre-adjustment IQ score bordering intellectual disability, not a single juror found low IQ as a mitigating circumstance. TR 489. Thus, even if an unclouded investigation would not have established intellectual disability as a bar to execution, trial counsel’s actions resulted in compelling mitigation being undermined by the defense’s expert witness. *Cf. Buck*, 580 U.S. at 121–22 (explaining that self-inflicted harm from a defense expert is prejudicial twice over given that it is essentially a statement against interest wrapped in the cloth of an expert).

Second, Colvin's racial prejudice reared its ugly head during jury selection when he engaged potential jurors in a bizarre, racially charged rant in which he shared his belief that non-white countries inherently value life less than the United States:

If you've ever been in Vietnam, if you've ever been in Central and South America, you see on television, Africa, life doesn't mean as much in those countries as it does here. So would you agree with me that in the United States we do take life seriously? And if we're going to try to take a man's life, we need to be very careful about that. Would you agree with that? Ma'am?

TR at 682. This rant came after he admitted to believing that "defendants in criminal cases today have too many rights," TR 681–82, and was made in front of a voir dire panel that produced two jurors, TR 694. When an attorney makes statements laying bare their own prejudice during jury selection, the attorney "unnecessarily tend[s] either to alienate jurors who [do] not share [such] animus . . . or to legitimize racial prejudice" of those who do in the jury pool. *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004).

Third, the effects of Colvin's racial prejudice were evident during the guilt phase. Trial counsel failed to reasonably investigate Burt Threlkeld, a white alternative suspect who had been with the victim earlier in the day and had no alibi for the time of murder. Colvin testified during postconviction that he was never able to find Threlkeld. PCR 177. That explanation is not plausible: Threlkeld was a neighbor of the Yorks who lived a couple doors down. PCR 120–21. Croy testified that at least once she went to his house and it appeared that someone was living there but no one answered the door. PCR 121. Colvin admitted he did no independent

investigation to find Threlkeld himself. PCR 177. Although Croy told him that she needed more time to find Threlkeld before trial, PCR 120, Colvin represented to the court in a continuance motion that he was ready to try the guilt phase but needed more time to prepare the penalty phase, PCR 192. The trial court granted Colvin a continuance but did not use that time to find Threlkeld. *Id.*

The evidence suggests that Colvin did not properly investigate because counsel allowed racial bias—whether conscious or unconscious—to take over and he simply assumed that a black victim was killed by a black perpetrator. *Cf. Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) (explaining the unconscious influence of the racial stereotype that black men are violence prone). Threlkeld was easily tracked down during Mr. Sales’s federal habeas proceedings. In a sworn statement, Threlkeld admitted that on the day of the crime, he bought beer from Mr. York and spent time with him at the York house. Pet. App. 99a. Threlkeld also admitted that no one can account for his whereabouts at the time of the offense. *Id.* Even though he was an obvious potential eyewitness—let alone an alternative suspect—Threlkeld was never spoken to or interviewed by law enforcement. TR 1203–04. Despite this gap in the State’s investigation and prosecution of this case, trial counsel did nothing.

Trial counsel also failed to argue to the jury that a clump of hair found on the victim that did not match Mr. Sales supported the alternative suspect defense. Testing, which was not conducted until the eve of trial, concluded that the root of the hair contained unknown female DNA. TR 1277. During the postconviction evidentiary hearing, trial counsel dismissively explained:

- Q. And you actually do that? Did you emphasize [the hair] to the jury?
- A. No, sir.
- Q. Why not?
- A. Because Mr. York's wife was prepared to say that she had picked her granddaughter's hair and whatever they do to making [sic] corn rows or whatever, you know, and that the hair came from the granddaughter.

PCR 185. In reality, two of the Yorks' granddaughters received a perm over eight hours before the crime, TR 1074, not cornrows, which is a chemical hair treatment that would not have resulted in a "clump" of loose hair. Nor would that explain how the clump of hair ended up on the victim after he was killed. Indeed, the State neither conducted testing nor presented any evidence showing that the source of the DNA was even related to Mr. York. Trial counsel's reference to a different hairstyle traditionally associated with black hair—that "she had picked her granddaughter's hair and whatever they do to mak[e] cornrows or whatever"—was nothing more than a racist stereotype to justify not pursuing this avenue.

Colvin's specific animus towards Mr. Sales's wife, Gail Sales, whom he referred to as "a dumb n-----," Pet. App. 19a ¶ 14, unquestionably impacted the defense at trial. Colvin did not call her to testify despite her ability to provide an important detail in support of the defense. As noted above, Mr. Sales was found with change in his pocket, which the prosecution argued he stole from the decedent during the alleged robbery-murder. *Sales*, 289 S.W.3d at 428 (noting that, as part of evidence supporting the jury's verdict, "a large number of coins consistent with what was kept in the cigar box was found in Sales's possession at the time of his arrest"). Mrs. Sales could have testified that the pair had gone to a coin laundromat that day, explaining why he had

coins and where they came from. Pet. App. 17a–18a ¶¶ 9–10, 101a. Although counsel knew of this information, he did not call Mrs. Sales as a witness.

Trial counsel's own racial animus is the only plausible explanation for his decision to forego calling her. *See Davis*, 872 So. 2d at 257 (finding decision by counsel not to call black witnesses who could have supported theory of innocence indicated that counsel's judgment was clouded by racial prejudice). In addition to countering the State's argument regarding Mr. Sales's ostensible motive for the murder, this testimony would have refuted the State's robbery case. In denying the defense's motion for a directed verdict on the charge of aggravated robbery, the trial court agreed that the State's robbery case was weak but found that it could go before the jury based on the circumstantial evidence that change was taken from the cigar box. TR 1366–67. Crucially, as the jury instructions explained, if the State failed to prove the crime of robbery, Mr. Sales could not have committed capital murder and therefore would not have been eligible to face the death penalty. TR 1378. Counsel's refusal not only resulted in him being eligible for the death penalty but also made the death penalty *more likely*: without Ms. Sales's testimony the pecuniary-gain aggravating circumstance was uncontradicted during the penalty phase.

Finally, although Potts was penalty phase counsel, Colvin's prejudice still impacted Mr. Sales's capital sentencing proceeding given that he was managing attorney for the office, lead counsel in this case responsible for the hiring of the mitigation specialist and expert witness, and an active participant in penalty phase decisions and discussions. For example, Colvin's decision-making resulted in the

failure to investigate Mr. Sales's intellectual disability and the presentation of the expert mental health testimony undercutting Mr. Sales's low IQ score and the failure to present Mrs. Sales's testimony, which would have rebutted the robbery charge and pecuniary-gain aggravating circumstance.

As Potts made clear, Colvin made the ultimate decisions with respect to the penalty phase. Pet. App. 102a (“Q: Would you have deferred to Mr. Colvin regarding the mitigation investigation as well? Would that have been his call? A: It would have been his call, if that’s what happened. I mean, he’s the lead attorney and the head of the office, and the more experienced in capital punishment.”) (quoting federal deposition of Potts). Evidence developed after trial shows the depth and breadth of compelling mitigation that could have been presented regarding Mr. Sales’s intellectual disability and that he suffers from fetal alcohol spectrum disorder (FASD) and the profound trauma and neglect he suffered as a child, including physical and sexual abuse, which resulted in post-traumatic stress disorder (PTSD). Pet. App. 52a–85a, 103a–10a. As a result, the defense’s entire sentencing-phase presentation, which spans fewer than nine pages of transcript, was likewise compromised by extreme racial prejudice.

In light of these actions, Mr. Sales was denied his Sixth Amendment right to the assistance of counsel due to trial counsel’s extreme racial prejudice. This Court should grant certiorari to confirm that the Sixth Amendment protects against at least that much. Additionally, given the pervasive impact of trial counsel’s racial prejudice at Mr. Sales’s capital trial, this case provides this Court with the ideal vehicle to

determine which framework applies to such a claim. Although this Court has not specifically expounded upon what circumstances would warrant the presumption of prejudice such that “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial,” *Cronic*, 466 U.S. at 659–60, it is hard to imagine that counsel’s extreme racial prejudice would not be such a circumstance. Nor could it be said that an attorney is “devoted solely to the interests of his client,” *Gillies*, 332 U.S. at 725, if racial bias clouds his actions and judgments. This holds true particularly here, where Mr. Sales can show that such bias has resulted in adverse effects throughout his capital trial. Finally, even if this Court does not find that extreme racial prejudice rises to the level of the constructive denial of counsel or a conflict of interest, this Court can and should provide guidance to lower courts regarding how such prejudice impacts a *Strickland* inquiry, particularly where the prejudice is pervasive during all phases of trial.

II. LOWER COURTS ARE CONFLICTED OVER WHETHER REPRESENTATION BY A RACIST ATTORNEY VIOLATES THE SIXTH AMENDMENT AND, IF SO, WHAT STANDARD APPLIES.

Lower courts have taken three different approaches to claims like the one brought here. One view, adopted by the Ninth Circuit, recognizes counsel’s racism as tantamount to the constructive denial of counsel. A second view, adopted by the supreme courts of Nevada and Florida, evaluates such claims under the *Strickland* framework. A third view, endorsed by the Eleventh Circuit and the Louisiana

Supreme Court, recognizes no Sixth Amendment violation at all from trial counsel's racial animus, unless the specific animus exhibited by counsel itself directly impacted the representation.

A. The Ninth Circuit holds that racial animus can constitute the constructive denial of counsel and later accepted a concession to relief under this standard.

In *Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994), the Ninth Circuit recognized that “if the Sixth Amendment itself protects an accused from a lawyer with a traditional conflict of interest, and from a lawyer who is asleep, completely disinterested, or so unprepared that his appearance is merely pro forma, surely it must protect the indigent from an appointed lawyer who calls him to his face a ‘stupid n----- son of a bitch’ and who threatens to provide substandard performance for him if he chooses to exercise his right to go to trial.” *Id.* at 783. “To hold otherwise in this case would reduce a sacred right to worse than a sham. It would be astonishing to hold that the Sixth Amendment right to appointed counsel is satisfied by the provision of an attorney who explicitly assaults his client with racial slurs and makes threatening and improper statements to the client capable of overriding the client’s own judgment as to how he should exercise his various rights.” *Id.* at 784. The court remanded for an evidentiary hearing because “the facts as alleged in this case, if proved, would render so defective the relationship inherent in the right to trial counsel guaranteed by the Sixth Amendment that Mr. Frazer would be entitled to a new trial with a different attorney.” *Id.*⁵

⁵ In contrast, in *Mayfield v. Woodford*, 270 F.3d 915, 924–25 (9th Cir. 2001) (en banc), the court denied a Certificate of Appealability on a claim that counsel’s racial animus constituted

In *Ellis v. Harrison*, 947 F.3d 555 (9th Cir. 2020) (en banc), the court accepted the state of California’s waiver of procedural defenses and concession to relief in light of the evidence that “Ellis’s lawyer . . . was a virulent racist who believed in the inferiority of racial minorities. Worse, he allowed his repugnant views to infect his professional life—African American clients, court personnel, and lawyers were ‘n-----’, and an Asian American judge was a ‘fucking Jap’ who should remember Pearl Harbor. [The attorney] was disloyal and entirely indifferent to the fate of his non-white clients, convinced that they were all stupid and deserved to be convicted.” *Id.* at 556 (Nguyen, J., concurring).

Although the Ninth Circuit did not provide a consensus opinion regarding which specific legal theory entitled Ellis to relief, a majority of the court explained over two concurrences that trial counsel was per se ineffective, with one finding that relief was warranted on Ellis’s exhausted claim under 28 U.S.C. § 2254(d)(1), *Ellis*, 947 F.3d at 556–64 (Nguyen, J., concurring), and another finding that relief was due on his unexhausted *Cronic* claim, *id.* at 564 (Watson, J., concurring). As one of the concurrences explained in presuming prejudice, a “trial is fundamentally unfair if defense counsel harbors extreme and deep-rooted ill will toward the defendant on account of his race. . . . While the impact of some such failings can be objectively analyzed—an inadequate investigation, for example, can be judged by what it left undiscovered—for the most part we can only speculate how the result might have

a conflict of interest given that “Mayfield submitted . . . six declarations indicating that [his attorney] was racially prejudiced” but none “alleged that [the attorney] used racial epithets to describe Mayfield or that [the] alleged prejudice affected his representation of Mayfield.”

changed if counsel had performed his obligations with due vigor.” *Id.* at 562 (Nguyen, J., concurring). As such, “in some cases . . . a lawyer’s racial bias against racial minorities is so extreme and deep-rooted that it would be impossible for him to fairly represent a non-white defendant. Where there is clear and convincing evidence of such bias, we must presume that counsel’s racism prejudiced the result. ‘To hold otherwise . . . would reduce a sacred right to worse than a sham.’” *Id.* at 564 (quoting *Frazer*, 18 F.3d at 784).

For her part as the sole dissenter, Judge Callahan agreed that “the abhorrently racist statements of [the attorney], as evidenced by the record, ma[de] this a difficult case,” but believed that relief should have been denied under § 2254(d)(1). *Id.* at 564–74 (Callahan, J., dissenting) (“To any extent that [counsel’s] racism rendered his representation of Ellis at trial prejudicially deficient, we certainly have an obligation under the Sixth Amendment to correct it. But where, as here, a habeas petitioner fails to show that his trial counsel’s racist beliefs adversely affected his performance at trial, as required under [*Sullivan* or *Strickland*,] we are bound under AEDPA and the Sixth Amendment to deny Ellis’ request for habeas relief.”).

B. The supreme courts of Nevada and Florida have granted relief on such claims under *Strickland*.

The supreme courts of Nevada and Florida have each granted relief on Sixth Amendment claims related to a trial attorney’s racial animus using the traditional *Strickland* framework, both holding that such animus constitutes deficient performance and analyzing the prejudicial impact of that animus on the trial.

In *Dean v. Narvaiza*, 502 P.3d 177 (Nev. 2022), the Nevada Supreme Court found trial counsel prejudicially ineffective based on his comments during jury selection regarding “African Americans having certain attributes,” including “lik[ing] watermelon,” being “sneaky,” and being “violen[t].” *Id.* at 178–79. First, the court found deficient performance given that “among the numerous problematic comments, counsel suggested that all African Americans, and Dean himself, had an ‘attribute’ of being sneaky and violent,” despite the fact that he “faced charges involving violence.” *Id.* at 180. Second, the court found that Dean was prejudiced during the guilt phase by these voir dire comments given that: (1) “counsel’s repeated suggestion that African Americans are inherently violent severely compromised Dean’s defense that he did not wield a knife during the altercation and the victims stabbed each other,” (2) “counsel’s suggestion that African Americans are ‘sneaky’ potentially undermined his own client’s credibility,” and (3) “counsel created an unacceptable risk of infecting the jury’s deliberations because his statements appealed to a powerful racial stereotype—that of black men as violence prone.” *Id.* at 180 (cleaned up).

To similar effect is *State v. Davis*, 872 So. 2d 250 (Fla. 2004), in which counsel stated during voir dire that, “Sometimes I just don’t like black people. Sometimes black people make me mad just because they’re black.” *Id.* at 252. The Florida Supreme Court held that the “explicit expression of racial prejudice [cannot] be considered a legitimate tactical approach” and concluded that “the expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings” that relief was warranted under *Strickland*. *Id.* at

252–53. First, the court held that “counsel’s admission of his own racial prejudice constituted deficient performance.” *Id.* at 255. Second, the court found prejudice during both phases of trial given that: (1) “[i]n the guilt phase, trial counsel rested without presenting a case,” which included “opt[ing] not to present two African–American witnesses whose testimony would have implicated others in the murder” because counsel did not believe they were credible; and (2) “improper racial considerations compromised counsel’s representation” during the penalty phase because “[t]here is simply no explanation why trial counsel would not have explored . . . standard mitigation testimony by visiting Davis’s nearby family or neighborhood.” *Id.* at 256–57.

C. The Eleventh Circuit and Louisiana Supreme Court hold that racial animus does not constitute a Sixth Amendment violation absent a showing that it directly impacted the representation.

The Eleventh Circuit and the Louisiana Supreme Court have denied Sixth Amendment claims related to a trial attorney’s racial animus. These courts have taken a cramped view of racial bias, in which a court considers only the use of a slur or epithet itself (rather than the animus it evinces), the specific context in which it was used, and the impact of any word used itself.

In providing alternative merits review to a claim that it otherwise found procedurally defaulted, the Eleventh Circuit denied relief after it found that “[t]here [wa]s no evidence to support Jones’s allegation that [his attorney’s] alleged racist attitude toward him affected [his] representation to the extent that Jones was denied the right to counsel guaranteed by the Sixth Amendment” where there was “no

evidence that [the attorney] ever made a derogatory racial remark to Jones[, t]he alleged racial remark was made to a legal secretary, not to Jones, and the alleged comment was made after [his] representation of Jones.” *Jones v. Campbell*, 436 F.3d 1285, 1304–05 (11th Cir. 2006).

In *State v. Brown*, 347 So. 3d 745, 812–14 (La. 2022), the Louisiana Supreme Court found that trial counsel was neither per se nor prejudicially ineffective for calling his 38-year-old client—the only black defendant in a case with four white co-defendants—“boy” in front of the jury. In doing so, the court rejected the argument that per se prejudice applied without explanation and found that counsel was not prejudicially ineffective because “[d]efense counsel focused on the weakness in the state’s argument . . . and counsel’s use of the term ‘boy’ arguably did not draw the jury’s attention to the issue of race.” *Id.* at 814.

D. This Court should grant certiorari to resolve the split and provide clarity as to which test governs.

Despite the split, this Court “has not yet articulated the extent to which prejudice can be presumed from counsel’s extreme racism.” *Ellis*, 947 F.3d at 560 (Nguyen, J., concurring). This Court should grant Mr. Sales’s petition to address the question that has divided lower courts on two interrelated faultlines—whether an attorney’s extreme racism results in a cognizable Sixth Amendment violation and, if so, what standard applies. Given the clear and profound impact that trial counsel’s racial prejudice had in this case, this petition is the ideal vehicle to take up the question and provide clarity as to which framework—presumptive prejudice, conflict of interest, or *Strickland*—applies when a criminal defendant is denied his Sixth

Amendment right to counsel due to his attorney's racial prejudice. Because the "perception of unfairness and racial bias[] can undermine confidence in and respect for the criminal justice system," "this Court has emphasized time and again the imperative to purge racial prejudice from the administration of justice." *Ramos v. Louisiana*, 590 U.S. 83, 128–29 (2020) (Kavanaugh, J., concurring) (cleaned up). This Court should once again heed that call.

CONCLUSION

For these reasons this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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