

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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Dated: September 21, 2026

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FORMAL ORDER

STATE OF ARKANSAS,)
)
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT
BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 23, 2026, AMONGST
OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-07-1308

DEREK SALES

PETITIONER

V. APPEAL FROM BRADLEY COUNTY CIRCUIT COURT – 06CR-05-24

STATE OF ARKANSAS

RESPONDENT

PETITIONER'S MOTION TO REINVEST JURISDICTION IN THE CIRCUIT COURT
TO PETITION FOR WRIT OF ERROR CORAM NOBIS IS DENIED. SPECIAL JUSTICE
MARY CAROLE YOUNG AGREES. BRONNI, J., NOT PARTICIPATING. PETITIONER'S
MOTION TO TAKE APPLICATION TO PETITION FOR WRIT OF ERROR CORAM NOBIS
AS A CASE IS DENIED. SPECIAL JUSTICE MARY CAROLE YOUNG AGREES.
WOMACK, J., WOULD MOOT. BRONNI, J., NOT PARTICIPATING. PETITIONER'S
MOTION FOR LEAVE TO FILE REPLY IS DENIED. SPECIAL JUSTICE MARY CAROLE
YOUNG AGREES. BAKER, C.J., AND HUDSON, J., WOULD GRANT. WOMACK, J.,
WOULD MOOT. BRONNI, J., NOT PARTICIPATING.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF
THE ORDER OF SAID SUPREME COURT, RENDERED IN
THE CASE HEREIN STATED, I, KYLE E. BURTON,
CLERK OF SAID SUPREME COURT, HEREUNTO
SET MY HAND AND AFFIX THE SEAL OF SAID
SUPREME COURT, AT MY OFFICE IN THE CITY OF
LITTLE ROCK, THIS 23RD DAY OF APRIL, 2026.


CLERK

ORIGINAL TO CLERK

CC: LEE D. SHORT
PAMELA RUMPZ, SENIOR ASSISTANT ATTORNEY GENERAL

THIS IS A CAPITAL CASE

IN THE ARKANSAS SUPREME COURT

DEREK SALES,

Movant/Appellant,

v.

Case No. CR-07-1308

STATE OF ARKANSAS

Respondent/Appellee.

**MOTION TO REINVEST JURISDICTION IN THE CIRCUIT COURT TO PETITION
FOR THE WRIT OF ERROR CORAM NOBIS**

Without this Court’s intervention, Derek Sales faces a miscarriage of justice based on new evidence that has come to light that his trial counsel harbored racial animus and used the word “‘n-----’ when he talked about Black people involved in the case,” including members of Mr. Sales’s family, the decedent’s family, and law enforcement investigators. Counsel used the racist slur to describe at least one witness while they testified. Mr. Sales moves for this Court to reinvest jurisdiction in the circuit court so that he may petition for the writ of error coram nobis.

I. Procedural History

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. At trial, Mr. Sales, a Black man, was convicted of capital murder and aggravated robbery and sentenced to death and a concurrent life sentence by an all-white jury. The convictions and sentences were upheld on direct appeal, *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008), and at the conclusion of postconviction proceedings, *Sales v. State*, 2014 Ark. 384, 441 S.W.3d 883. Mr. Sales moved to proceed under coram nobis in 2017, which this Court denied. *See Sales*, CR-07-1308 (Ark. Sept. 14, 2017). On July 30, 2015, Mr. Sales filed a federal habeas corpus petition. *Sales v. Payne*, No. 5:15-CV-248 (E.D. Ark.).

II. Standard of review

Coram nobis exists “to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court, and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment.” *Sanders v. State*, 374 Ark. 70, 72, 285 S.W.3d 630, 632 (2008). Because the writ is addressed to the court that rendered the original judgment, the only question for this Court is whether to reinvest jurisdiction to the circuit court to consider a petition in the first instance. *See State v. Larimore*, 341 Ark. 397, 406, 17 S.W.3d 87, 92 (2000). This Court only looks “to the reasonableness of the allegations . . . and to the existence of the probability of the truth thereof.” *Newman v. State*, 2009 Ark. 539, at 5, 354 S.W.3d 61, 65. The writ should be granted if there is “a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented” had the factual basis been known to the trial court. *Larimore*, 341 Ark. at 408, 17 S.W.3d at 94 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

This Court has held that the writ may provide a remedy in at least four circumstances, “(1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime[.]” *Howard v. State*, 2012 Ark. 177, at 4, 403 S.W.3d 38, 43. “But these categories are not set in stone.” *Strawhacker v. State*, 2016 Ark. 348, at 6, 500 S.W.3d 719. This Court has expanded these grounds when necessary “to ensure due process and to provide a state remedy where none exists,” as required by Ark. Const. art. II, § 13. *Id.* “Even if the claims in the petition did not fall neatly within one of the four recognized categories of error, the writ may be used to fill a procedural gap if, under the unique circumstances at hand, the rule of reason calls for a grant of the writ to prevent a miscarriage of justice.” *Pitts v. State*, 2020 Ark. 7, at 5, 591 S.W.3d 786, 790–91 (Ark. 2020). A miscarriage of justice is established if

the evidence is material—*i.e.* there is a reasonable probability of a different result. *Strawhacker*, 2016 Ark. at 7, 500 S.W.3d at 720.

Finally, due diligence is established if: “(1) the defendant [was] unaware of the fact at the time of the trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; and (3) the defendant, after discovering the fact, did not delay bringing the petition.” *Newman*, 2009 Ark. at 5, 354 S.W.3d at 65. Unless diligence can be determined “as a matter of law,” the circuit court is better positioned to make factual findings and determine the timeliness of the petition. *Howard*, 2012 Ark. at 14, 403 S.W.3d at 48. Thus, where a claim has “apparent merit,” this court will leave the factual issue of diligence to the circuit court. *Id.* at 47.

III. This Court should allow Mr. Sales to petition for the writ of error coram nobis.

a. Newly disclosed evidence of trial counsel’s racism.

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. 13–15.¹ Following the brief appointment of a private attorney, Colvin would remain lead attorney through trial, assisted by Potts as co-counsel, both of whom were white. TR. 364. Colvin assigned himself the guilt phase and Potts the penalty phase. PCR. 178–79. To round out the defense team, Colvin hired Croy as the mitigation specialist, PCR. 110, and one expert mental health witness, PCR. 172.

On August 20, 2024, Croy executed a signed declaration disclosing for the first time the pervasive racial animus displayed by Colvin in this case. *See* Exhibit A. Croy was appointed to the case in February 2007, just months before trial was set to begin. *Id.* at 1. Croy witnessed “multiple occasions when Bing used the word ‘n-----’ when he talked about Black people involved in the case.” *Id.* at 3 ¶ 11. During a trip to interview a member of the decedent’s family, Colvin referred

¹ Citations to the record on appeal for the direct appeal, CR-07-1308, are ‘TR. [page].’ Citations to the postconviction record on appeal generated for CR-10-53 are ‘PCR. [page].’

to him as “full-fledged n-----[.]” *Id.* at 3–4 ¶ 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 Gracie York, the decedent’s wife, testified, Colvin said that “she got ‘n----- rich off Mr. York.’” *Id.* at 4 ¶ 15. Colvin referred to Mr. Sales’s wife as “a dumb n-----.” *Id.* at 4 ¶ 14. Additionally, Colvin referred to Shaun Hildreth, the lead law enforcement investigator in this case, as a “‘damn n-----’ as he testified.” *Id.* at 4 ¶ 16.

Colvin’s repeated use of the slur and accompanying racial stereotypes is unquestionable evidence 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, e.g., 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.”).

b. Mr. Sales’s right to counsel was violated by Colvin’s racism.

“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); *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, 489 (1978) (“The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel.”).

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,” rendering “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.

Separately, “[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 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.” *MacKenna v. Ellis*, 280 F.2d 592, 599–600 (5th Cir. 1960). A defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Prejudice is presumed when “an actual conflict of interest adversely affected [the] lawyer’s performance.” *Nelson v. State*, 344 Ark. 407, 415, 39 S.W.3d 791, 797 (2001). Adverse effects are shown when counsel does not “explore all avenues in developing his trial strategy to present the best possible defense.” *Rackley v. State*, 2014 Ark. 39, at 9 (finding adverse impact where counsel failed to present testimony through a witness due to conflict). Once an actual conflict and an adverse impact are established, reversal is required. *Holloway*, 435 U.S. at 489.

If this Court does not find the constructive denial of counsel or a conflict of interest, the claim is reviewed under *Strickland*. See *Drennan v. State*, 2021 Ark. 206, 632 S.W.3d 753.

Given the insidious nature of racial animus, lead trial counsel's prejudice constitutes the constructive denial of counsel because its effects are immeasurable and inherently pernicious. See *Weaver v. Massachusetts*, 582 U.S. 286, 287 (2017) (noting that errors are considered structural "if the effects of the error are simply too hard to measure"); *Sullivan v. Louisiana*, 508 U.S. 275, 28182 (1993). Alternatively, this Court should find that openly harboring such racial animus constitutes a circumstance in which the likelihood that even a fully competent lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate. See *Cronic*, 466 U.S. at 659–60. Under these circumstances, no attorney, regardless of competence, could provide effective assistance given their racial prejudice.

Colvin was both the lead attorney in this case and the Managing Attorney for the entire Tenth Judicial District Public Defender's Office, PCR. 158, 161, meaning that he was responsible for decisions broadly and when it came to this case. He was involved in all strategic discussions and decision-making in this case regarding the pretrial investigation and all phases of trial. Racial animus "creates an egregious circumstance that warrants the *Cronic* presumption of prejudice without searching the record, especially given the many invisible ways in which counsel's bias could have affected the trial." *Ellis v. Harrison*, 947 F.3d 555, 563 (9th Cir. 2020) (en banc) (Nguyen, J., concurring). Therefore, given Colvin's role as both lead attorney and managing attorney for the jurisdiction, Mr. Sales was constructively denied counsel.

Moreover, Colvin's racial animus also meant that he was not able to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Given Colvin's prejudice, he could not meaningfully cross-examine Black witnesses, even going so far as to refer

to the lead investigative officer using the slur. As laid out below, Colvin’s racial prejudice interfered with his ability to call witnesses on Mr. Sales’s behalf. And, given his prejudice, it stretches credulity to believe that he could consult with Mr. Sales with unclouded judgment, depriving Mr. Sales of the “guiding hand of counsel.” *Powell*, 287 U.S. at 69.

Second, trial counsel’s racism constituted a conflict of interest under *Cuyler* and *Holloway*. A conflict of interest can arise from a lawyer’s personal interests. *See, e.g., United States v. Scarfo*, 41 F.4th 136, 189 (3d Cir. 2022); *United States v. Sayan*, 968 F.2d 55, 64–65 (D.C. Cir. 1992); *see also MacKenna*, 280 F.2d at 599–600 (“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.”). If the “advocate’s conflicting obligations have effectively sealed his lips on crucial matters,” there exists a conflict. *Holloway*, 435 U.S. at 490. Courts have recognized that racial prejudice is a conflict. *Ellis v. Harrison*, 947 F.3d 555 (9th Cir. 2020); *Commonwealth v. Dew*, 210 N.E.3d 904, 906 (Mass. 2023).

Trial counsel’s conflict had several adverse impacts on Mr. Sales’s case:

- Counsel failed to properly investigate and raise a claim of intellectual disability based on a racially prejudiced belief that Mr. Sales’s IQ score was artificially low because of the color of his skin. *See Exhibit B*, at 75-76.
- During jury selection, counsel made a racially charged rant in front of a voir dire panel that included two members who would sit on the jury. *Id.* at 77-78.
- During the guilt phase, trial counsel failed to investigate a white alternative suspect, failed to argue exculpatory physical evidence based on a racial stereotype, and failed to call at least one exculpatory witness against whom he held specific racial animus. *Id.* at 78-81.
- Although Colvin was not primarily responsible for the penalty phase, his racial animus still likely had adverse impacts on the investigation and presentation of the penalty phase case, especially given that he was the managing attorney and lead counsel responsible for making the ultimate decisions regarding the penalty phase and an active participant in penalty phase decisions and discussions. *Id.* at 81-82.

Therefore, trial counsel had an actual conflict of interest that adversely impacted Mr. Sales’s trial

in violation of the Sixth Amendment.

Finally, even if this Court disagrees that this amounted to the denial of counsel or a conflict of interest, in light of the new evidence, this Court must take a fresh look at trial counsel's performance and the resulting prejudice and allow Mr. Sales to proceed forward on the claim that trial counsel provided ineffective assistance of counsel. *Drennan*, 632 S.W.3d at 759.

c. This Court should reinvest jurisdiction in the Circuit Court.

This Court should allow Mr. Sales to proceed forward on the three claims proffered above through a petition for writ of error coram nobis. Trial counsel's racial animus constitutes a previously undiscovered extraordinary circumstance extrinsic to the trial record that Mr. Sales has diligently pursued.

Mr. Sales has exercised diligence. Mr. Sales was not aware of Colvin's use of racial slurs at the time of trial, and he was not in a position to discover it during the time he was represented by Colvin or from Colvin himself after the representation ended. *Cf. Christeson v. Roper*, 574 U.S. 373, 378 (2015) (attorney cannot be expected to advance client's interest at the expense of denigrating themselves or making an admission that "threatens their professional reputation and livelihood"). Moreover, given that Croy was hired for this case by Colvin and retained by the Arkansas Public Defender Commission on a contract basis, she was not in a position to come forward with this information during trial. Finally, Mr. Sales has not delayed bringing the petition since discovering the information. Croy disclosed trial counsel's racist statements for the first time in the August 20, 2024, declaration, and Mr. Sales has since presented the declaration to both this Court and the federal district court. Therefore, this Court should find that Mr. Sales was diligent, or, at the least, reinvest jurisdiction in the circuit court because the proffered claims have apparent merit. *See Howard*, 2012 Ark. at 14, 403 S.W.3d at 47–48.

Although Mr. Sales's proffered claims do "not fall neatly" under the four oft-repeated

circumstances, this Court nevertheless should allow Mr. Sales to proceed forward through a coram nobis petition. *Pitts*, 2020 Ark. at 5, 591 S.W.3d at 790–91. As this Court has done in the past, the writ should be expanded here “to ensure due process and to provide a state remedy where none exists.” *Strawhacker*, 2016 Ark. at 6, 500 S.W.3d at 719. Mr. Sales only recently discovered trial counsel’s racial animus. The rule of reason calls requires the writ in this case “to fill a procedural gap” and “prevent a miscarriage of justice.” *Pitts*, 2020 Ark. at 5, 591 S.W.3d at 790–91.

This Court has extended coram nobis to claims of judicial and prosecutorial bias, *McArthur v. State*, 2017 Ark. 120, at 8–9, 515 S.W.3d 585, 591–92; *Chatmon v. State*, 2015 Ark. 417, 3, 473 S.W.3d 542, 545; *Turner v. State*, 2012 Ark. 357, and juror bias, *Goins v. State*, 2018 Ark. 312, 6, 558 S.W.3d 872, 875 (2018). To proceed on such a claim, the petitioner must show actual bias, *Chatmon*, 2015 Ark. at 3, 473 S.W.3d at 545, and that the bias “manifested in a manner that was hidden and could not have been challenged at the time of trial,” *McArthur*, 2017 Ark. at 9, 515 S.W.3d at 591. The Court should apply that reasoning here. Trial counsel’s racism was extrinsic to the record and previously unknown to Mr. Sales. As noted above, Colvin was not in a position to disclose his own racial animus, and Mr. Sales could not bring these claims until Croy disclosed the factual basis.

Allowing Mr. Sales to proceed would align this Court with courts that have recognized the use of coram nobis to correct errors related to the representation of counsel when a petitioner has no other available remedies. *See United States v. Denedo*, 556 U.S. 904, 911 (2009) (noting that “a writ of coram nobis can issue to redress a fundamental error” including “a deprivation of counsel in violation of the Sixth Amendment”); *United States v. Morgan*, 346 U.S. 502, 512 (1954). No judge would have rendered the judgment had these facts come to light at trial. *Sanders v. State*, 285 S.W.3d at 632. The denial of the assistance of counsel creates an invalid judgment. *Martinez*,

528 U.S. at 154 (“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.”).

That the claims are based on trial counsel’s racism is itself an extraordinary circumstance justifying the writ. In the habeas context, the Supreme Court found that the injection of racial prejudice into a death penalty trial by trial counsel constituted an “extraordinary circumstance” justifying the reopening of a post-judgment case. *Buck v. Davis*, 580 U.S. 100, 123 (2017). “It stretches credulity” to characterize a claim as “run-of-the-mill” when the gravamen is that there is even a possibility that counsel injected racial prejudice into the case. *Id.* at 123–24. That possibility “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 processes of our courts.” *Id.* at 124; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (racial bias “raises serious questions as to the fairness of the proceedings” and calls into question the “integrity of the judicial system”).

To bar Mr. Sales from the writ would deny him his right to a remedy under Article 2, § 13 of the Arkansas Constitution. In *Strawhacker*, for example, the petitioner’s claim did not “neatly fall within one of the four established categories,” but this Court allowed him to proceed because “expanding the grounds for the writ was necessary . . . to provide a state remedy where none exists.” 2016 Ark. at 6, 500 S.W.3d at 719–20. Similarly, this Court should allow Mr. Sales to proceed so that he is not deprived of a remedy for previously unavailable claims that he was represented by trial lawyer affected by racial animus—an unquestionable miscarriage of justice.

CONCLUSION

Mr. Sales respectfully moves this Court to reinvest jurisdiction of this case in the circuit court to entertain a petition for writ of error coram nobis.

Respectfully Submitted,

/s/ Lee D. Short

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of Court using the eFlex electronic filing system, which shall send notification of such filing, which is deemed service, to:

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/s/ Lee D. Short
Lee D. Short

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Exhibit A – Declaration of Lisa Croy Bartlett (August 20, 2024)

Exhibit B – Third Amended Petition for Habeas Corpus (November 12, 2024)

EXHIBIT A

**DECLARATION OF LISA CROY BARTLETT
PURSUANT TO 28 U.S.C. § 1746 AND A.C.A. § 16-2-204**

I, Lisa Croy Bartlett, do hereby declare and verify the following:

1. My name is Lisa Croy Bartlett. I was involved in the trial of Derek Sales as an investigator and mitigation specialist.
2. One of Derek's lawyers, Bing Colvin, called me in February 2007 and told me I had been appointed to the case. At that time Bing Colvin and another attorney, Gary Potts, had been appointed to represent Derek. I didn't meet Bing until the end of March, and I was only given a small amount of information on the case at that time. There was a pre-trial hearing in April and the case went to trial in May.
3. I was responsible for investigating both guilt phase and penalty phase issues for Derek's trial. As far as I'm aware Bing never requested or asked that a separate fact investigator be assigned to the case, even though there was a lot of work to be done. I told Bing I needed help.
4. I felt as though Bing was overloaded and understaffed when it came to this case. I was responsible for talking to witnesses and even those witnesses that testified during trial didn't have an opportunity to meet with Bing or be prepped by him. When we were in court for trial, I introduced Bing to Derek's family and friends. He wouldn't have known who they were had I not told him.
5. I decided to pay out of pocket to have the police interviews with witnesses transcribed. I was later reimbursed for this expense, but from my perspective these interviews were important when it came to cross examining witnesses and identifying inconsistent

Initials: LCB

statements. Bing never reviewed the transcripts of the interviews. To my knowledge he also never watched the videos of the interviews because we picked up the videos together and he handed them off to me. As Bing questioned witnesses, I would compare what they said to the transcriptions, and I would hand notes to Bing with the questions I thought he needed to ask. Throughout the trial Bing would approach me at counsel's table and I would rip pages from a yellow legal pad and hand them to him. Sometimes he would ask the question I had written down, other times he wouldn't, and he would skip over questions I suggested, and he would say let's wait and see where this goes. Through the whole trial he would come up and ask me if there was anything else he needed to ask. He put so much pressure on me.

6. Bing relied solely on me, and he didn't know the case at all.
7. There were a lot of things Bing didn't want to try. He wouldn't ask the court for things and would say that there was no point in asking because he wouldn't be given the funds. I remember having a fight with the prosecutor to obtain certain pieces of physical evidence that I thought we needed to have tested. This was an issue when it came to the hair found on the victim's body. I had to push Bing to do this and explain to Bing why the testing mattered.
8. I remember multiple times suggesting Bing move for a mistrial and he never did.
9. This was also true of calling witnesses. Derek's wife at the time, Gail Sales, had been with him the day of the incident and they'd gone to the laundromat together. Gail had an

Initials: LRB

explanation for the change Derek had on him at the time of the incident and could have testified about this. Bing refused to call her as a witness.

10. One thing I investigated was the height of the windows at the victim's house. Witnesses said that they could see Derek crouching over the victim when they looked through the windows. I went to the house and measured the height of the windows to see if what witnesses had told the police was accurate. There was also a couch placed in front of the windows that impacted what could be seen from outside. There are photographs that document me measuring the height of windows and I also got a statement from a gentleman that worked at the fruit stand next door because he observed and assisted me. I also looked in the window and could not see the floor, I could only see the other side of the room. I remember discussing this with Bing and he said what you could see through the windows was a non-issue. I was willing to testify to what I observed when I measured the height of the windows.
11. There were multiple occasions when Bing used the word "nigger" when he talked about Black people involved in the case.
12. On one occasion we had to travel to Colorado to interview a witness, Ricky Hampton. Bing brought his wife along, although she did not participate in interview. Ricky Hampton was the victim's nephew, and he was present at the victim's house on the night of the incident. Ricky Hampton was on parole in Colorado, and we had to coordinate the interview through his parole officer because he did not want to speak with us. He was unhappy when he showed up and saw us. I remember Bing called Ricky Hampton a

Initials: LRB

13. “full-fledged nigger” while we were sitting in the parole officer’s office, and I shushed him because I didn’t know if we were being recorded.
 14. I remember being in Bing’s office discussing Gail Sales, Derek’s wife at the time and him calling her “a dumb nigger”.
 15. During trial the victim’s wife, Gracie York, testified. I remember Bing saying she got “nigger rich off Mr. York”.
 16. Bing also called Shaun Hildreth, the lead investigator with the Warren Police Department, a “damn nigger” as he testified for the state during trial. Bing said to me that Shaun was lying but Bing also said we weren’t worried about Shaun Hildreth lying.
 17. I do believe Derek’s case was winnable had there been someone to properly present it.
- I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746 and A.C.A. § 16-2-204.

Dated: August 20, 2024



Lisa Croy Bartlett

EXHIBIT B

****THIS IS A CAPITAL CASE****

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

DEREK SALES

PETITIONER

v.

Case No. 5:15-cv-248-BSM

**DEXTER PAYNE, Director,
Arkansas Division of Correction**

RESPONDENT

THIRD AMENDED PETITION FOR HABEAS CORPUS

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Counsel for Petitioner Derek Sales

INTRODUCTION

Petitioner Derek Sales, a death-sentenced Arkansas prisoner, petitions this Court for a writ of habeas corpus. Mr. Sales's state conviction, death sentence, and continued custody violate the United States Constitution. The Court should grant the writ and vacate his conviction and death sentence.

As discussed below, counsel for Mr. Sales, who have only recently appeared in the case, have undertaken an extensive preliminary investigation of the case. This investigation has uncovered previously unpresented claims and evidence. In the interest of brevity, Mr. Sales has only included claims and arguments that have been amended, rather than reproducing all other unchanged sections and claims raised in the previous petition.¹ Mr. Sales adopts and incorporates all previous claims and arguments not inconsistent with the below amended claims.

PROCEDURAL HISTORY

Mr. Sales was sentenced to death by the Circuit Court of Bradley County, Arkansas, in 2007, following his conviction for capital murder. The Arkansas Supreme Court affirmed his conviction and sentence on direct appeal, *Sales v. State*, 289 S.W.3d 423 (Ark. 2008), and affirmed the denial of postconviction relief, *Sales v. State*, 441 S.W.3d 883 (Ark. 2014).

¹ Mr. Sales has filed this abbreviated petition for the ease of the parties and the Court. Should this Court prefer a full amended petition, Mr. Sales could provide one.

Following state court proceedings, Mr. Sales timely filed an initial petition for federal habeas relief under 28 U.S.C. § 2254 in this Court on July 30, 2015, which was immediately amended four days later. Doc. Nos. 1, 3. In his reply in support of the petition, Mr. Sales requested that the Court stay federal habeas proceedings so that he could return to state court to exhaust a claim under *Brady v. Maryland*. Doc. No. 21, at 26-27. The Court granted the stay and ordered Mr. Sales to exhaust his *Brady* claim in Arkansas state court. Doc. No. 35. Mr. Sales promptly did so, but the Arkansas Supreme Court declined to allow Mr. Sales to proceed in the circuit court. Mr. Sales filed a motion to reopen federal habeas proceedings and, per this Court's order staying the case, filed a Second Amended § 2254 Petition. Doc. Nos. 41, 43.

In the amended petition and subsequent replies, prior counsel focused on the need for fact-development. Prior counsel expressly deferred briefing on several issues, including procedural default, deference to state-court adjudications under 28 U.S.C. § 2254(d), and the merits of Mr. Sales's claims, asking that Mr. Sales be permitted to brief those issues if and when the Court denied fact-development. *E.g.*, Doc. No. 57, at 16 ("Should the Court deny fact-development, Sales requests the Court set a briefing schedule for the merits of the claims on the existing record."); *id.* at 113 ("As explained with regard to Claim 2.5, Sales requests full briefing on the question of whether the state court adjudication of this claim was reasonable under 2254(d)").

Mr. Sales filed motions for discovery, to expand the record, and for an evidentiary hearing. Doc. Nos. 58, 72, 79, 83. This Court mostly granted these

motions, including granting a deposition of penalty-phase trial counsel and an evidentiary hearing on two claims of ineffective assistance of counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012). Doc. Nos. 65, 77, 91. Then, in 2022, the Court ordered the parties to file briefing regarding the impact of *Shinn v. Martinez*, 596 U.S. 366 (2022), on the prior grant of discovery and an evidentiary hearing. In that briefing, prior counsel again deferred addressing the merits of Mr. Sales's claims, requesting that the Court grant counsel leave to do so after resolving whether *Shinn* invalidated the order granting an evidentiary hearing. Doc. No. 119.

This Court found that *Shinn* indeed foreclosed the possibility of an evidentiary hearing, but, notwithstanding counsel's requests, it did so in the same order dismissing Mr. Sales's habeas petition. Doc. No. 129. The Court denied all of Mr. Sales's claims without ever having received the benefit of briefing on a myriad of questions and without Mr. Sales's new counsel having adequate time to learn the case and file any pleadings needed to address the issues that prior counsel continuously deferred in reliance on *Martinez-Trevino*. Mr. Sales promptly filed a Rule 59(e) motion to alter or amend the judgment, which is pending before the Court at this time. Doc. No. 131. The State filed its response on October 28, 2024. Doc. No. 135. Mr. Sales now files the Third Amended Petition for Habeas Corpus.

STATEMENT REGARDING COUNSEL'S ONGOING INVESTIGATION

These federal habeas proceedings have been marked by incredible turnover in counsel. Though the Capital Habeas Unit of the Federal Public Defender for the

Eastern District of Arkansas has represented Mr. Sales throughout these proceedings, six different individual lawyers have intermittently entered and then withdrawn their appearances, through no fault of Mr. Sales. Doc. Nos. 13, 14, 52, 68, 94, 95, 96, 99, 100, 115, 116, 118, 121. Most recent counsel for the Arkansas CHU appeared in the case in November 2023. Doc. No. 120. And given a staffing shortage, the Arkansas CHU sought co-counsel who only entered his appearance in May 2024. Doc. No. 126. Given counsels' complete unfamiliarity with the case, Mr. Sales moved to defer rulings for six months so that counsel had an opportunity to "learn the case file, establish a relationship with the client, and prepare themselves for whatever subsequent litigation this Court's orders may require." Doc. No. 127. Two months later, this Court denied the motion as moot in light of this Court's order denying Mr. Sales federal habeas petition. Doc. No. 129.

As Mr. Sales noted in his Rule 59(e) motion, counsel has continued to review and investigate the case. Doc. No. 133, at 2-4. Counsel's investigation is still ongoing, but counsel has already discovered meritorious claims and evidence that have not been presented before this Court or Arkansas state courts. In light of counsel's preliminary investigation, Mr. Sales has moved to amend his federal habeas petition within the original six-month time frame he requested for counsel to familiarize themselves with the case. Moreover, although prior counsel relied on prior circuit precedent in not exhausting claims and evidence in state court in furtherance of procedurally defaulted *Martinez* claims, undersigned counsel has discovered a

potentially meritorious avenue through which to exhaust the claims in state court. *See* Doc. No. 138.

NEW EVIDENCE REGARDING THE PROCEDURAL DEFAULT, FAILURE TO DEVELOP THE FACTUAL BASIS FOR, AND LACK OF EXHAUSTION OF TRIAL COUNSEL INEFFECTIVENESS CLAIMS

As Mr. Sales has argued, this Court can and should consider his procedurally defaulted claims of trial counsel's ineffectiveness pursuant to the gateway provided by *Martinez v. Ryan*, 566 U.S. 1 (2012), *Trevino v. Thaler*, 569 U.S. 413, 416 (2013), and *Sasser v. Hobbs*, 735 F.3d 833, 852-53 (8th Cir. 2013), because the attorneys who represented Mr. Sales in state postconviction proceedings provided ineffective assistance of counsel. Likewise, *Shinn v. Ramirez*, 596 U.S. 366 (2022), does not prohibit this Court's consideration of the defaulted claims of trial counsel's ineffectiveness, because Petitioner cannot be held responsible under 28 U.S.C. § 2254(e)(2) for postconviction counsel's failure to develop the evidentiary basis of those claims in state postconviction proceedings.

New evidence further establishes that Mr. Sales's postconviction lawyers effectively abandoned him from the beginning of their representation by abdicating the duties and function of capital postconviction counsel. Counsel's pattern and practice of postconviction representation moved cases like Mr. Sales's through the state system as quickly as possible without expending time or resources, rather than providing zealous advocacy and the comprehensive state court review of their client's claims that Arkansas Rules of Criminal Procedure Rule 37.5 contemplates. *See Lee v.*

State, 238 S.W.3d 52, 56 (Ark. 2006) (“The purpose of the exacting requirements of Rule 37.5 is to provide a comprehensive state-court review of a defendant’s claims and, therefore, eliminate the need for multiple postconviction actions in federal court.”) (citations omitted). This practice fundamentally undermined their duty of loyalty to Mr. Sales. With postconviction counsel having undertaken capital postconviction representation under such disqualifying circumstances, Mr. Sales cannot justly be held to account for counsel’s pervasive failure to represent his interests.

Mr. Sales was represented during Rule 37.5 proceedings by lead attorney Jeffrey Harrelson and co-counsel Jason Horton. PCR 22.² Federal counsel’s investigation has uncovered evidence regarding postconviction counsel’s performance in this case. First, although prior counsel referenced some materials from Harrelson’s other cases, a more comprehensive collection of records from all cases in which Harrelson was appointed Rule 37.5 counsel establishes a pattern and practice of representation in which Mr. Harrelson, for example, failed to engage in meaningful consultation with his client, failed to undertake appropriate and necessary investigation to identify and support claims, artificially limited his brief “investigation” to select members of the trial legal team and some family members, relied principally on the existing record, raised claims in boilerplate and often generic terms without first obtaining his client’s

² References to the trial record are designated “TR. [page].” References to the Record on Appeal for Petitioner’s postconviction proceedings are designated “PCR [page].”

verification, called few witnesses at hearings (usually, prior counsel), and overall failed to advocate on his client's behalf.. Second, Harrelson and Horton have now signed declarations confirming that their representation of Mr. Sales's was carried out consistently with their constricted view of state postconviction.

I. New Evidence Regarding Postconviction Counsel.

a. Rule 37.5 Counsels' Capital Postconviction Pattern and Practice.

On May 11, 2009, pursuant to Rule 37.5, the Bradley County Circuit Court appointed attorney Jeff Harrelson as postconviction counsel for Mr. Sales and attorney Jason Horton as co-counsel. PCR 22-25. The order was prepared and written by Harrelson. Harrelson relied on his apparent capital postconviction experience as proof that he met the requirements for appointment of postconviction capital counsel under Rule 37.5: Harrelson represented that he served as "co-counsel" in *State v. Howard*, No. CR-97-105 (Little River Cty. Cir. Ct.), and that "he currently serves as lead counsel" in *State v. Anderson*, No. CR-2005-342-2 (Miller Cty. Cir. Ct.) and *State v. Thomas*, No. CR-2004-52 (Sevier Cty. Cir. Ct.). PCR 23.

An examination of the chronological relationship of these cases to Mr. Sales's case, and counsel's overall performance in them, demonstrates that Harrelson was not competent or qualified to accept the representation of Mr. Sales. Additionally, a comparison of his practice in all cases in which he was appointed as "lead" counsel reveals that the same pervasive failure to honor fundamental obligations of capital postconviction counsel infected each case. His pattern and practice across these cases

establishes that Harrelson's failures in Mr. Sales's case were not the product of mere oversight or neglect, or even egregious neglect. Rather, the comparison indicates that he accepted representation in each case to follow a blueprint for representation that called for the bald assertion of inadequately pleaded, undeveloped, uninvestigated claims. This was antithetical to established standards of care for postconviction capital counsel and antithetical to his clients' interests.

In *Howard*, Harrelson was appointed in December 2002 as co-counsel to lead counsel Dale Adams. His time records suggest that the 66 hours that Harrelson spent on the case over the course of his two years and eight months' involvement was fairly limited. For example, he reported that he reviewed the record and the Rule 37.5 petition and amended petitions, but he did not report drafting the Rule 37.5 petition. He did not report meeting with or communicating with Mr. Howard or participating in meetings or calls of any significant duration with trial attorneys or witnesses. On information and belief, Harrelson did not participate in Mr. Howard's appeal. *See* Exhibit A (March 24, 2006, Harrelson letter enclosing time record). Notably, many of the claims raised were errors that could have been raised at trial and on direct appeal but were not. The Arkansas Supreme Court rejected these claims as not reviewable in Rule 37.5 proceedings. *Howard v. State*, 238 S.W.3d 24, 31-35 (Ark. 2006). There were no related claims of ineffective assistance of trial or appellate counsel raised to encompass the errors and render them reviewable. Despite this ruling, Harrelson fully embraced that practice in subsequent cases in which he was lead counsel.

The ***Anderson*** Rule 37.5 petition –Harrelson’s first as lead counsel, see Exhibit B (Appointment Order for *State v. Anderson*)—provides something of a template for the petitions later filed in *Thomas* and *Sales*. Claims were raised in boilerplate, undeveloped fashion, and many consisted of a single sentence. Some of those boilerplate claims would later appear in identical form in the petition in Mr. Sales’s case. Some claims were vaguely stated record-based claims of error that pointed to nothing specific in the record. Others were record-based claims of ineffectiveness. Unlike later cases, some of these claims asserted appellate counsel’s ineffectiveness. Where a claim of ineffective assistance of trial counsel was raised based upon inadequate investigation or presentation, no new evidence was proffered to demonstrate how Mr. Anderson had been harmed. Exhibit C (Rule 37.5 Petition and First Amended Rule 37.5 (with client verification) in *State v. Anderson*). Harrelson did not support any of these allegations at the postconviction evidentiary hearing. The only witnesses were trial and direct appeal counsel. At the court’s request, a witness was called to address questions regarding the mental health of one of the attorneys. No evidence was presented to support claims that challenged trial counsel for failing to present evidence or testimony. In denying relief, the court repeatedly noted instances in which no evidence had been presented to support the claims. Exhibit D (Rule 37.5 ruling in *State v. Anderson*).

Harrelson’s billing records suggest the reason. Harrelson spent a total of 102.9 hours on the case through the notice of appeal. Generously viewed, he spent about

10.0 hours investigating, including speaking with prior counsel, the trial investigator, the client's family, and his client (for one hour). Drafting the petition and amendment took about 4.5 hours combined, with approximately 1.0 hour listed for legal research. He spent a total of 12.5 hours preparing for and attending the hearing. There was no investigator or mitigation specialist consulted or retained; no independent collection of records relating to his client's life history; and no experts consulted to identify, develop, or support claims that required such evidence. Exhibit E (Billing records in *State v. Anderson*).

Harrelson's work on appeal was so lacking that the Arkansas Supreme Court removed him. After Harrelson filed a substituted initial brief, the court found it "woefully deficient" and ordered Harrelson to refile. *Anderson v. State*, 2010 Ark. 138 (2010). The Court's admonishment warned Harrelson against briefing issues as to which no evidence had been presented:

Finally, we note that our review of the circuit court's order reveals that the circuit court denied several of Anderson's claims based upon a failure to present facts or evidence or a lack of citation to authority in support of those claims. We, therefore, request that appellate counsel, should he choose to appeal those rulings, point this court specifically to the evidence or argument raised to the circuit court that would support a reversal of each of those rulings.

Id. at 3. The second substituted brief was rejected, prompting the court to remove Harrelson and refer him to the Committee on Professional Conduct. *Anderson v. State*, 2010 Ark. 375 (2010). Writing separately, Justice Brown called for an order for Harrelson "to show cause why he should not be held in contempt" for failing to

provide Mr. Anderson with the “comprehensive state-court review” that Rule 37.5 mandates. *Id.* at 2 (Brown, J., dissenting in part).

In *Sales*, Harrelson repeated these practices despite the adverse rulings. The Rule 37.5 petition was eight pages long and was not initially verified by Mr. Sales as required by Arkansas rules. It consisted largely of boilerplate, single-sentence claims, many of which were copied and pasted from petitions Harrelson filed in other cases. The asserted claims were predominantly record-based, including claims of ineffective assistance of counsel. And those that did take issue with trial counsel’s investigation and deficient presentation were equally spare, with no proffer of evidence that he faulted trial counsel for failing to develop and present. PCR 28-36 (Rule 37.5 Petition), 45-54 (Amended Rule 37.5 Petition).

Counsel never corrected these defects. Harrelson excused them by dropping the claims into the category of “preservation purposes:”

As the Court’s aware, for preservation purposes in the event that this proceeding is not successful to the Arkansas (unintelligible) then Supreme Court, we are required to preserve issues for federal review and many of the grounds that we’ve listed are for preservation purposes.

PCR 80; *see also* PCR 81 (noting that the *Atkins* claim was only raised for preservation purposes). While discussing the claims, counsel struggled to explain or support some, PCR 88-92, and in other instances he conceded or withdrew claims for which he had no support all. PCR 82, 103. For example, Harrelson told the court that it could

disregard the claim that counsel was ineffective for failing to properly investigate and present (unspecified) mitigating evidence. PCR 100-01.

Counsel's evidentiary presentation was limited to the testimony of mitigation specialist Lisa Croy and lead trial counsel Bing Colvin. He did not call penalty-phase counsel. Harrelson's examination of counsel was not only selective as to which claims were pursued, but it was far from a pressing inquiry designed to show deficiencies. Counsel neither made an argument to explain how he had proved any one of the claims he pursued at the hearing, nor did he file any post-hearing brief. Harrelson's work was so rushed in this case that the initial Rule 37.5 proceeding lasted only 90 days from the filing of the petition through the order denying relief.

The time records in *Sales* look much like the *Anderson* time records, and they explain the pitiful performance. Together, Harrelson and Horton spent just over 150 hours on Mr. Sales's case in the Circuit Court through the notice of appeal (77.4 hours for Harrelson, and 73.8 hours for Horton, including travel). As for investigation, after reviewing the record, they met with Croy on August 3, 2009, for 1.5 hours and Colvin for 2.5 hours two days later. Horton drafted the Rule 37.5 petition that day. The next day they spent 2.6 hours with Mr. Sales's "family" and 2.4 hours with Mr. Sales. This meeting with Mr. Sales was the first meeting with him since Harrelson's half hour introductory meeting on the day Harrelson was appointed. The next day, Horton spent a half hour revising the petition and Harrelson spent a half hour reviewing it.

Exhibit F (Harrelson's billing records in *State v. Sales*) & Exhibit G (Horton's billing records in *State v. Sales*).

On August 7, 2009, the day after meeting with Sales, Harrelson signed off on an eight-page Rule 37.5 petition, containing twenty claims and various subclaims, many of which were a single sentence. PCR 28-36. The petition was unverified and amended a few days later to include Mr. Sales's signature.³ PCR 45-54. In preparing the petition, neither Harrelson nor Horton spoke with penalty phase counsel, the single defense expert that was called at trial, or with the psychologist who conducted the pretrial IQ testing. Harrelson never sought to hire an investigator or mitigation specialist or any expert. He did not undertake his own collection of records or seek discovery from the State. Each lawyer spent 3.5 hours preparing for the hearing and 4.5 hours on the case the day of the hearing.

Harrelson's performance on appeal was again inept. After moving for two extensions, Harrelson missed the deadline to file the initial brief. He submitted a brief two months later with a motion to accept the belated filing. The court granted the motion but referred him to the Committee on Professional Conduct again—less than a year after referring him in *Anderson*. *State v. Sales*, 2010 Ark. 320 (2010). Harrelson's belated brief was again deemed unacceptable, prompting the court to order re-briefing and refer Harrelson to the Commission yet again. *State v. Sales*, 2011 Ark. 402 (2011):

³ Harrelson's only written correspondence to Mr. Sales before the Rule 37.5 hearing consisted of the petition and a request that Mr. Sales sign the requisite verification.

Without question, Harrelson is aware of this court's position on his responsibilities concerning the appeal of a denial of postconviction relief in a case where the death penalty has been imposed.

Once again, we are presented with a brief that is woefully deficient, with conclusory arguments lacking in authority or development. A number of the points on appeal consist of single-sentence statements of the allegation. For example, appellant's complete argument concerning his fourth claim of ineffective assistance of counsel consists of the statement, "Trial counsel was ineffective for failing to object properly to the seating of an all-white jury, when Petitioner is African-[A]merican."

As a consequence, we must order rebriefing in this case. Because Harrelson has previously been advised of the exacting requirements concerning briefs in Rule 37.5 proceedings, we once again refer him to our Committee on Professional Conduct.

Id. at 2-3. Justice Brown again stated that he would remove Harrelson. *Id.* at 3-4

("Harrelson has demonstrated a casual disregard for the magnitude of the stakes that were entrusted to him and his obligations in representing a petitioner who is subject to the most severe penalty that our law recognizes."). After all of that, Harrelson's accepted brief consisted of two record-based claims of ineffective assistance regarding statements made by counsel in each phase of trial. *Sales v. State*, 441 S.W.3d 883, 885 (Ark. 2014).

In *Thomas*, Harrelson's performance was much the same. Although his appointment in *Thomas* preceded his appointment in *Sales* by eighteen months⁴ and was cited to support Harrelson's appointment in *Sales*, work on *Thomas* had not proceeded beyond the initial pleading stage when Harrelson accepted the *Sales*

⁴ See Exhibit H (Harrelson Appointment Order in *State v. Thomas*).

appointment.⁵ Harrelson's representation followed the same blueprint. The Rule 37.5 petition was barebones, consisting largely of record-based claims, and ineffectiveness claims unsupported with any investigation that could establish prejudice. It was originally filed without Mr. Thomas's verification. Exhibit I (Petition and Amended Petition (with client verification)). Even though the Rule 37.5 hearing was not held until after the Rule 37.5 hearing in Mr. Sales's case, Harrelson's claims were again undeveloped and lacked evidentiary support.

Over the course of more than two years, Harrelson spent 93.6 hours on the case through the notice of appeal. He met with his client twice: an initial half hour meeting on the day of his appointment and later for 2.0 hours. His investigation, including phone calls with prior attorneys, was 3.4 hours. He spent a total of 5.0 hours drafting the petition and amended petition, 4.0 hours on hearing preparation, and, on the day of the hearing, 5.0 hours total with his client, with witnesses, and attending the hearing. He never consulted an investigator, mitigation specialist, or expert. Exhibit J (Harrelson's billing records in *State v. Thomas*). Horton's fee petition is equally remarkable. Horton spent 46.9 hours on the case at the Circuit Court level. He drafted the petition without even reading the trial record after only having spent 2.0 hours with Mr. Thomas jointly with Harrelson. After nearly seven months with virtually no

⁵ Indeed, Mr. Sales's case proceeded to the hearing and appeal before Mr. Thomas's. Given these circumstances, *Thomas* does not provide experience that could support a finding of Harrelson's or Horton's competency or qualification to represent Mr. Sales.

additional work on the case, Horton spent less than 15.0 hours reviewing the record and preparing an amended petition. He spent 8.2 hours preparing for the hearing and worked a total of 5.0 hours on the day of the hearing. Exhibit K (Horton's billing records in *State v. Thomas*).

Harrelson's reputation for being little more than an apparition was conveyed to the Arkansas Supreme Court in a pro se motion filed by Mr. Thomas. Among other things, Mr. Thomas noted that Harrelson had not spoken to him in over three years, had given him no phone number to contact him, and had "abandoned" him as counsel. Exhibit L (Pro Se Motion for New Attorney, *Thomas v. State*, No. CR-10-545 (Aug. 30, 2013)). The court denied the motion.

Decay would be Harrelson's (and Horton's) final capital postconviction appointment. *See* Exhibit M (Appointment Order and Nunc Pro Tunc Substituted Appointment Order)); *see also State v. Decay*, No. CR-07-999-1 (Washington Cty. Cir. Ct.). There was little difference between their representation of Mr. Decay and *Anderson, Sales, and Thomas*. Once again, they relied almost exclusively on errors in the trial record filed in a barebones unverified petition, *see* Exhibit N (Rule 37.5 Petition in *State v. Decay*), had a brief consultation with their client, never consulted an investigator or mitigation specialist, conducted no search for records or discovery, and did not consult with any potential expert witnesses. There was a total absence of independent investigation to identify and develop claims or to support claims that averred a deficiency in trial counsel's performance. Within five months of

appointment, the case was before the circuit court for the Rule 37.5 hearing. At the hearing, at which Harrelson had Mr. Decay verify the Rule 37.5 petition, *see* Exhibit O (late-filed Verification in *Decay*), the only witnesses called were trial counsel. Given the absence of evidence, the court denied every claim in conclusory fashion. Exhibit P (Order, *State v. Decay*, No. CR-07-999-1 (August 27, 2010)).

Time records again show just how limited their representation was. Each reviewed the record. They met with their client only once, almost three months after their appointment. Harrelson recorded a 3.0-hour visit; Horton recorded a 2.0-hour visit. The next day, Horton spent some time on the telephone with one of the trial lawyers regarding the “trial and issues on appeal.” The day after that, they spent a combined 11.1 hours drafting the petition. Before the Rule 37.5 hearing, they spent less than an hour in telephone conversations with each trial lawyer. On the day of the hearing, they worked 3.0 hours, including the 2.0-hour hearing. Combined, Harrelson and Horton worked 107.2 hours. *See* Exhibit Q (Harrelson’s billing records in *State v. Decay*) & Exhibit R (Horton’s billing records in *State v. Decay*).

On March 27, 2012, while on appeal, Mr. Decay filed a pro se motion for new counsel. He catalogued Harrelson’s failures: Harrelson had failed to provide prompt notification of his appointment, instead appearing one day at the prison unannounced; Harrelson had not added his phone contact to Mr. Decay’s list at the prison, so Mr. Decay could not call him; Mr. Decay learned of the Rule 37.5 hearing when he was pulled from his cell and told that he was to go to court, and Mr. Decay

was never prepared for that hearing; Mr. Decay was first given a copy of the Rule 37.5 petition in court, when he was also asked to read it and sign the verification; Harrelson had followed his own agenda rather than Mr. Decay's expressed wishes about how he wanted his case to proceed; and, because Harrelson did not communicate with him, whatever Mr. Decay knew of the developments in his case he learned through other means. Exhibit S (Pro Se Motion for New Attorney, *Decay v. State*, No. CR07-999-1 (Ark. March 27, 2012)). The Arkansas Supreme Court granted the motion and appointed replacement counsel in May 2013, nineteen months before the court would deny Mr. Sales's similar request to replace Harrelson.

As for the Arkansas Supreme Court's referrals of Harrelson to the Committee on Professional Conduct, the Committee reprimanded and fined Harrelson for his conduct in *Anderson*, finding that Harrelson violated Arkansas Rule of Professional Conduct Rule 1.1 because he was not thorough enough in his representation and Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice during his representation of Mr. Anderson. *In re Jeff Harrelson*, CPC Docket No. 2001-002 (Apr. 26, 2011). On February 29, 2012, the Committee reprimanded and fined him for his conduct in Mr. Sales's case, finding again that he violated Rules 1.1 & 8.4(d). *In re Jeffrey Scott Harrelson*, CPC Docket No. 2011-088 (Feb. 29, 2012).

b. The Recent Declarations of Harrelson and Horton.

In recent declarations, Harrelson and Horton describe their short-lived capital postconviction practice. Their declarations confirm what their performance in all four

postconviction cases Harrelson handled as lead attorney show: Harrelson's understanding of and position toward the postconviction process and his role in it was so fundamentally flawed that his representation, from the start, was never intended to advance Mr. Sales's interests.

Harrelson volunteered to accept representation in capital postconviction cases because of the dearth of lawyers available in Arkansas, and Mr. Sales's case was one of five such cases he accepted, four of which he was appointed as lead attorney. *See* Exhibit T, ¶¶ 2-3 (Declaration of Jeffrey Harrelson). "In hindsight, the whole experience of working on these postconviction cases is a bad memory in terms of my practice." *Id.* at ¶ 3. As he has now acknowledged, "It would be fair to say I was not as knowledgeable about these types of cases as I likely should have been, especially having multiple similar cases at or near the time period." *Id.* at ¶ 5.

The declaration shows that he accepted the representation laboring under a fundamental misunderstanding of the law, the purpose and procedural mechanisms of postconviction capital defense, and counsel's duties within it. Thus, even if he may have technically met Arkansas's criteria for capital postconviction counsel on paper, it was never his intent to undertake the competent and thorough representation that is contemplated by Rule 37.5 or that would have met the prevailing standards for counsel in representing death-sentenced prisoners in postconviction proceedings.

Two related beliefs shaped how Harrelson approached capital postconviction cases. First, Harrelson had a diminished view of the importance of state

postconviction review and believed his principal role be preserving claims for federal court, rather than representing his client's interests through the state postconviction process. Second, he apparently believed that claims could be preserved merely by reciting them, and thus lacked even a basic understanding of the requirements for exhausting a claim for federal review that somehow remained uncorrected throughout several years. Mr. Harrelson states:

I spoke with Didi Sallings, the Executive Director of the Arkansas Public Defender Commission at the time about continuing legal education is [sic]this area of practice and attended a capital habeas conference in Nashville, Tennessee to learn about these types of cases. One of the main lessons I remember from the conference was that I was unlikely to prevail in state court and instead **the goal was to preserve issues for federal habeas review.**

Understanding that I was unlikely to prevail in state court, I understood my role was to mainly preserve issues for federal review. ... On several claims, I simply pled them in my Petition in a few sentences, sometimes a single sentence, solely in an effort to preserve the issues for federal court review.

Id. at ¶¶ 4, 6. This view was corroborated by Horton. Exhibit U, ¶ 4 (Declaration of Jason Horton) (“Jeff and I discussed that the main purpose of an Arkansas Rule 37 proceeding was to find any errors or instances of ineffective assistance of counsel and point those out in the Rule 37 petition so the record would be preserved for federal review.”). Harrelson’s diminished view of his obligations is reflected in the methodology behind his “preservation” approach. He raised myriad one-line claims unsupported by evidence, and then, when called to advocate for his claims at the Rule

37.5 hearing, he produced no evidence or argument to support most of them and instead brushed many aside as present merely for “preservation purposes.”

Additionally, postconviction counsel conducted a barely perfunctory investigation. But any investigation was artificially limited from the start by his asserted lack of knowledge that investigative resources and other expert assistance/witnesses were available for the postconviction process:

I was not aware I could hire an investigator or mitigation specialist to assist me with Mr. Sales’s case and I did not hire such an investor or mitigation specialist. I was unaware I could ask the court for funds of investigators or experts.

Ex. T, ¶ 5. And, indeed, Harrelson did not ask for these resources in *any* of the four cases in which he was lead counsel. Not surprisingly, Harrelson’s ‘factual investigation’ consisted of nothing more than one conversation with one trial attorney, one conversation with the trial investigator, and one conversation with some members of Mr. Sales’s family.

Instead, the postconviction ‘investigation’ was essentially limited to issues that were apparent from the trial and appellate record. Ex. T, ¶ 6 (“I did an investigation . . . but did not discover much information that wasn’t already in his trial and appellate record that significantly factually developed any of Mr. Sales’s claims that were raised in state court.”). Horton corroborated that the approach was almost exclusively record-based:

Jeff allowed me to draft Derek Sales’s Rule 37 petition with his guidance. I largely focused on research and writing. My efforts were focused on

reviewing the trial and direct appeal records for objections and any other possible issues. I was given other Rule 37 petitions for reference on how to plead Derek Sales's claims, and I recall reading some type of Arkansas Rule 37 manual as a supplement.

Ex. U, ¶ 5. Under this approach, counsel had no need to consult with his client or investigate beyond the absolute bare minimum.

Harrelson also declined to seek assistance through the appointment of a co-counsel with experience in capital postconviction representation. Instead, Harrelson secured the appointment of a lawyer from his own practice who had little criminal experience:

Jason Horton, an attorney working with me at the time, assisted me with Derek Sales's case, as well as a few other cases. I don't remember assigning Jason specific tasks. He had been in civil practice and wanted to do criminal work and he started to do that with me.

Ex. T, ¶ 7. Similarly, Mr. Horton stated:

I started working with Jeff in 2008. Jeff was lead counsel on Derek Sales's case and the other capital postconviction cases we worked on together. To the best of my recollection, the only time in my career I worked on Arkansas Rule 37 cases is when I worked with Jeff. I stopped working with Jeff and went out on my own in October 2010.

Ex. U, ¶ 2. Despite Horton's complete lack of experience, Harrelson designated him to draft the Rule 37.5 petition. *Id.* at ¶ 5 ("Jeff allowed me to draft Derek Sales's Rule 37 petition with his guidance.").

c. As a result of this pattern and practice, Harrelson effectively abandoned Mr. Sales from the moment he was appointed.

Harrelson's beliefs and views led to a dismissive understanding of the importance of the postconviction process and to what can at best be termed a casual

treatment—or mistreatment—of his clients and their best interests. This is reflected in his overall practice across all capital postconviction cases, and in his performance in Mr. Sales’s case in particular. Harrelson’s limited understanding of his function as postconviction counsel shows itself through: barebones record-bound postconviction petitions that were peppered with perfunctory, undeveloped and canned claims; the failure to spend time with his clients in order to build the relationship of trust that is essential to open communication; the chronic failure to conduct independent investigation that would allow him to find and develop claims for relief; the failure to gather records or request discovery beyond the court record or attorney files; the failure to hire a single investigator or mitigation specialist or expert; the lackluster examination of attorney witnesses he presented at Rule 37.5 proceedings and failure to call lay and expert witnesses who could support claims; and, the failure to actually advocate the claims he did raise, with cogent legal or factual argument, either written or oral.

This style of litigation was consistent in all four cases in which he was lead counsel. Overall, Harrelson’s view of postconviction representation excused the basic tenet that a lawyer owes a duty of loyalty to his client and to advocate zealously on his behalf. It led not only to a self-fulfilling prophecy that his client would not prevail in state court, but also to the failure to preserve his clients’ claims for later federal review by failing to fairly present his claims in state court, to preserve them through appellate review, or to develop the factual basis supporting them. Simply stated, the entirety of

Harrelson's representation was an effective abandonment of Mr. Sales from the beginning and a failure to pursue Mr. Sales's interests.

II. Mr. Sales is neither at fault for the procedural default of his claims nor is he at fault for the failure to develop the record under § 2254(e)(2).

Given the effective abandonment established by the above facts, Mr. Sales is not at fault for his lawyer's failures. Harrelson's conduct—which severed the agency relationship—constitutes ineffective assistance of postconviction counsel and procedural default is excused.

Likewise, 28 U.S.C. § 2254(e)(2) does not preclude this Court from hearing Mr. Sales's defaulted claims of trial counsel's ineffectiveness or the evidence supporting them. In attributing fault under § 2254(e)(2), guidance comes from the single common denominator animating the Supreme Court's federal habeas cases: the rule of principal-agent relationship. If such a relationship exists, then the lawyer's (the agent's) unhelpful or negligent actions will be imputed to his client (the principal). *See, e.g., Shinn* 142 S.Ct. 1718, 1734, 1735, 1738. But Supreme Court precedent also recognizes circumstances in which a petitioner is not responsible for his lawyer's conduct: where the lawyer's actions are such that they effectively sever the agency relationship or if the lawyer is not meaningfully functioning as an agent, then the lawyer no longer serves the client's interests, and his acts are not imputed to the client. *Maples v. Thomas*, 565 U.S. 266 (2012); *Holland v. Florida*, 560 U.S. 631 (2010); *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991).

Maples and *Holland* are instructive. In *Maples*, the Court excused the petitioner from blame where postconviction counsel had ceased representing their client without advising the client or the court they had done so. As a result, when the state postconviction petition was denied, no one filed a notice of appeal. Distinguishing such a situation from an instance of attorney error, such as miscalculation of a statute of limitations deadline, the Court wrote:

A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative. *See* 1 Restatement (Third) of Law Governing Lawyers § 31, Comment *f* (1998) (“Withdrawal, whether proper or improper, terminates the lawyer’s authority to act for the client.”). His acts or omissions therefore “cannot fairly be attributed to [the client].” *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Maples, 565 U.S. at 281 (cleaned up).⁶

Under agency rules, the agent's effective abandonment is just one way in which professional misconduct may sever the agency relationship. For example, the Court in *Maples* cited *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992), for the

⁶ *Maples* itself does not suggest that literal “abandonment” is the only way to sever an agency relationship. *Maples*, 565 U.S. at 282 (noting that *Holland* was an agency case given that “the gravamen of [Holland’s] complaint” was that his lawyer effectively abandoned him by “detach[ing] himself from any trust relationship with his client”) (quoting *Holland*, 560 U.S. at 637); *see also Maples*, 565 U.S. at 290–91 (Alito, J., concurring) (joining majority in finding petitioner was not at fault where attorneys “effectively abandoned” petitioner which “effectively deprived petitioner of legal representation”). *Cf. Cadet v. Fla. Dep’t of Corr.*, 853 F.3d 1216, 1232 (11th Cir. 2017) (“Abandonment denotes renunciation or withdrawal, or a rejection or desertion of one’s responsibility, a walking away from the relationship.”).

proposition that “attorney conduct may provide cause to excuse a state procedural default where, as a result of conflict of interest, the attorney ceased to be the petitioner’s agent.” *Maples*, 565 U.S. at 281. In *Jamison*, the Eighth Circuit recognized that the conflict of interest alleged by the petitioner “could have been so inimical to Jamison’s interests that [the lawyer] effectively ceased to be Jamison’s agent.” 975 F.2d at 1380. Likewise, the Eleventh Circuit has recognized that agency attribution may be precluded where an attorney acts in bad faith, violates his duty of loyalty to a client, is dishonest, or acts to further his own interests. *See Thomas v. Att’y Gen. of Florida*, 992 F.3d 1162 (11th Cir. 2021); *Cadet*, 853 F.3d at 1229 (“[T]he agency relationship between an attorney and his client can be severed . . . when, for example, the attorney actually abandons his client or purposely acts adversely to his client’s interests or commits another serious breach of loyalty to his client.”).

Applying these principles to Mr. Sales’s case, this Court should conclude that Harrelson’s conduct severed the agency relationship, whether because he effectively abandoned his client, because he was not candid that his plan for representation gravely risked the default of substantial claims of error, or because his representation reflected a serious breach of his duty of loyalty to his client and his duty to zealously represent his client’s interests. Harrelson’s legal practice was so inimical to Mr. Sales’s interests that he never was, or at the very least effectively ceased to be, Mr. Sales’s agent.

First, in volunteering to be part of the appointment panel for capital postconviction cases and in drafting the appointment orders setting forth his “qualifications,” Harrelson implicitly represented that he was knowledgeable, qualified, and willing and able to undertake the duties of postconviction counsel. But Harrelson had minimal experience as a capital postconviction litigator, and he never undertook the duties associated with the role. Rather, as his performance in all four cases shows, his paradigm for representation eschewed central duties—consultation with his client and conducting a thorough investigation. Consistently across all four cases, Harrelson did neither. He barely met with his client and limited the scope of his work to collecting and reviewing the trial record and counsel files in order to raise claims that were essentially record-based or claims that were extra-record but stated in single sentence and without evidentiary support. As a general rule, Harrelson limited his investigation to a small collection of people: his client, during a single short interview; some, but not necessarily all, prior counsel (for example, in this case, he did not interview penalty-phase counsel or direct appeal counsel; and a few family members who could be gathered at one time and in one place for a brief interview. He engaged in no ongoing dialogue or correspondence with the client. In fact, in this case, the petition was drafted before he even interviewed his client.

Harrelson’s own description of his practice shows his fundamentally faulty perspective on the postconviction process, his role in it, and his duty to his client. Believing that it was unlikely his client would prevail in state court, and that his job

then was simply to “preserve claims” for later federal court review, Harrelson proceeded to not take the steps necessary to actually preserve claims for later review, by properly pleading them, by conducting thorough investigation to support them at a hearing, or by raising them on appeal. As lead postconviction counsel, he never once retained an investigator or mitigation specialist or conducted the investigation himself outside of the brief interviews mentioned above. He never consulted with an expert of any kind. He never engaged in any effort to seek further discovery or request records beyond the trial record and prior counsel’s file. In short, consistent with the perspective from which he began, Harrelson followed a plan for representation that was virtually guaranteed to produce the state court loss that he expected. But worse yet, he executed it in a manner that did not even fulfill its supposed purpose of “preserving” claims for federal review by never fairly presenting or appealing the claims. Thus, Harrelson from the start never undertook the duties of qualified, competent capital postconviction counsel.

Even when an attorney is purportedly working to advance their client’s interest, those (in)actions are not attributed to the client when they are not intended to advance the client’s objectives. For example, in *Thomas*, 992 F.3d 1162, Mr. Thomas was excused from his attorney’s failure to timely file a federal habeas petition because the attorney had never disclosed to him that she deliberately filed the petition months late to pursue her own plan to mount a constitutional challenge to the statute of limitations. On remand, the district court held, and on appeal the Circuit affirmed,

that the attorney violated her duty of loyalty to her client because she had not pursued her client's interest and was therefore not acting as his agent. *Id.* at 1184. Although Harrelson's idiosyncratic plan to skip any investigation and just plead boilerplate claims as if they would "preserve" Mr. Sales's claim for federal review was not identical to the attorney actions in *Thomas*, Harrelson's approach was equally disloyal to his client as it, too, sunk his client's ability to secure full and fair review of his claims in state *and* federal court.

In short, Harrelson's script for representation failed to honor the purpose of his appointment without disclosing to his client the risks associated with his "barebones" approach to representation. He abdicated his role as counsel, abandoned his duty to zealously represent his client, and breached his duty of loyalty to his client. Under the circumstances, it does not matter that Harrelson performed some work for Mr. Sales and raised and litigated some claims. He failed *ab initio* to perform the tasks he was appointed to perform, jeopardized his client's ability to have meritorious claims heard in state or federal court without explaining the risks of the plan to his client, and at nearly every turn failed to promote his client's interests. Harrelson was not meaningfully acting as Mr. Sales's agent and had effectively abandoned his client.⁷ Therefore, Mr. Sales is not at fault for his lawyer's failures with respect to the

⁷ As Mr. Sales has argued before, Mr. Sales was diligent in attempting to remedy the failings of Harrelson in state court by moving to have Harrelson be relieved and that he be appointed new counsel for a full Rule 37.5 proceeding raising any new issues, a procedure endorsed by the Arkansas Supreme Court.

procedural default of and failure to develop the facts in support of Mr. Sales's claims of trial counsel ineffectiveness.

III. Trial counsel's effective abandonment renders the claims of trial counsel ineffectiveness unexhausted.

As noted above, Mr. Sales has concurrently moved to stay proceedings in this Court so that he may exhaust the below claims in state court given that the conduct of Harrelson constitutes a breakdown in the appellate process. *Lee*, 238 S.W.3d at 55 (noting that "until [the petitioner] has been afforded a new Rule 37 proceeding, he has potential state claims that remain unexhausted" when postconviction counsel's failures result in a breakdown in the appellate process); *see also Roberts v. State*, 426 S.W.3d 372, 376 (Ark. 2013) (Arkansas supreme court will recall the mandate "so that a petitioner whose first postconviction proceedings were procedurally flawed may file a new petition and receive the procedural safeguards of Rule 37.5."). Therefore, postconviction counsel's abdication of his responsibilities and duties in this case also render Mr. Sales's claims unexhausted because Mr. Sales now has a remedy through which these claims can be exhausted, and this Court should stay proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). *see also Armstrong v. Iowa*, 418 F.3d 924, 926 (8th Cir. 2005) ("When a state court remedy is available for a state prisoner's unexhausted claim, the federal habeas court must defer action until the claim is exhausted[.]").

AMENDED CLAIMS FOR RELIEF

Mr. Sales’s state convictions and sentence violate the Constitution of the United States. Under § 2254, Mr. Sales is entitled to federal habeas corpus relief from his unconstitutional confinement. All facts, allegations, and claims set forth in this amended petition and the other submissions made in this litigation are intended to be incorporated into each of the individual claims and allegations pleaded below.

Claim 3.1: Trial Counsel Was Ineffective for Failing to Investigate and Present Mitigation Related to Mr. Sales’s Childhood Abuse and Consequent Post-Traumatic Stress Disorder.

Trial counsel failed to discover and present readily available mitigating evidence that could have convinced at least one juror to spare Mr. Sales’s life. Mr. Sales’s childhood was filled with the kind of traumatic experiences that have long been recognized as mitigating: severe neglect and abandonment by his drug-addicted father, physical and emotional abuse by his stepfather, a chaotic home life marked by sudden and frequent moves between multiple states, domestic violence, and sexual abuse by multiple perpetrators. And yet, after Mr. Sales was convicted of capital murder, his attorneys offered only a single witness—Mr. Sales’s sister—during the sentencing phase. Her testimony, including cross-examination, spans a mere nine transcript pages. TR 1443-51. In closing argument, counsel did little more than implore the jury that there was “still some good” in Mr. Sales and he was “not a total monster.” TR 1470.

Strickland v. Washington, 466 U.S. 669 (1984), provides the governing legal standards for ineffective assistance of counsel claims. Under *Strickland*, an ineffective assistance of counsel claim requires showing that (1) counsel’s performance was deficient, and (2) that deficient performance prejudiced the defense. *Id.* at 687. Counsel’s performance is deficient when it falls “below an objective standard of reasonableness,” defined as “reasonableness under prevailing professional norms.” *Id.* at 688; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). With to prejudice, the test is whether there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *see also Williams v. Taylor*, 529 U.S. 362, 370-71 (2000).

Applying *Strickland*, the Supreme Court has repeatedly held that reasonable performance by capital defense counsel includes investigation into the client’s background, life history and mental health for “all reasonably available mitigating evidence.” *Williams*, 529 U.S. at 362; *Wiggins*, 539 U.S. at 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam). This principle must guide a court’s assessment of the “reasonableness of counsel’s conduct in light of prevailing professional norms.” *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 521.

As a result of trial counsel’s deficient performance at the sentencing phase, the jury never learned of Mr. Sales’s childhood filled with trauma, neglect, and physical and sexual abuse, or the impact of these adverse experiences on his life trajectory. Had trial counsel investigated, interviewed, and prepared witnesses with knowledge of

Mr. Sales’s childhood, there is a reasonably probability that at least one juror would choose life instead of death. *See Wiggins*, 539 U.S. at 536.⁸

I. Deficient performance: the total failure of trial counsel to investigate any mitigating evidence.

In preparation for the sentencing phase, counsel in capital cases have an “obligation to conduct a thorough investigation of the defendant’s background” for “all reasonably available mitigating evidence.” *Wiggins*, 539 U.S. at 522, 524 (quoting *Williams*, 529 U.S. at 369); *see also Porter*, 558 U.S. at 38. Failure to conduct a thorough investigation constitutes deficient performance under *Strickland*. *See Wiggins*, 539 U.S. at 523. Counsel may not “ignore[] pertinent avenues for investigation of which he should have been aware.” *Porter*, 558 U.S. at 39.

The Supreme Court’s cases on the failure to investigate and present mitigation have stressed the importance of developing a thorough social history that will shed light on the defendant’s mental health at the time of the capital offense. *See Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam); *Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 382; *Wiggins*, 539 U.S. at 534-35; *Williams*, 529 U.S. at 370-71. In *Andrus v. Texas*, the Supreme Court cited each of these precedents, underscoring this core requirement for effective representation in death-penalty cases. 590 U.S. 806, 813-23 (2020). To

⁸ This Court previously found that an evidentiary hearing on this claim was warranted. Doc. No. 91, at 4–5. For the reasons explained above, *Shinn* does not bar further evidentiary development of this claim, and Mr. Sales is entitled to present evidence under § 2254(e)(2).

adequately prepare for the penalty phase of trial, counsel should have obtained complete and accurate information relevant to Mr. Sales's medical history, educational history, juvenile court proceedings, correctional history, institutional history, mental health history, criminal record, and family and social history.

Here, trial counsel failed to interview *any* family history witnesses prior to the sentencing phase. There is no question that trial counsel's abject failure to conduct any investigation into potential mitigating circumstances was deficient under *Strickland*. The defense's single witness's testimony, including cross-examination, spanned a mere nine pages of transcript. TR 1443-51. The defense introduced no exhibits. This is manifestly a case where "the scope of [trial] counsel's [mitigation] investigation' approached nonexistent." *Andrus*, 590 U.S. at 817 (alterations in original) (quoting *Wiggins*, 539 U.S. at 528).

Investigator Lisa Croy, assigned to the case just two months prior to the start of trial, describes a troubling dynamic on the defense team: "I had to run the whole show. Bing and Gary were not familiar with the facts of Derek's case and I had to tell them everything. I was the investigator, the mitigation specialist, and the lawyer." Doc. No. 72-16 at 2. At the time, Croy had twelve other capital cases and primarily focused on guilt phase investigation in this case. *Id.* If she had had more time, she "would have also looked more into Derek and his family's educational background and their medical background to see if there was anything there. I just did not have enough time. I was doing the job of an investigator, mitigation specialist and

lawyer[.]” *Id.* at 4. In a more recent declaration, Croy further explains that even those witnesses who did testify during trial did not have a chance to meet with trial counsel or be prepped by them. Exhibit V (Declaration of Lisa Croy, Aug. 20, 2024).⁹ She explains, “When we were in court for trial, I introduced Bing to Derek’s family and friends. He wouldn’t have known who they were had I not told him.” *Id.* at 1.

Thus, no one investigated Mr. Sales’s background and childhood at all. This failure to present any mitigation evidence based on a wholesale failure to investigate is patently unreasonable under Supreme Court precedent. *See Sears*, 560 U.S. at 953 (“[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel’s failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudice [the defendant].”); *Wiggins*, 539 U.S. at 523 (“Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . *was itself reasonable.*”) (emphasis in original). Because trial counsel had done no investigation, they were in no position to make a strategic decision regarding whether to present mitigating evidence of Mr. Sales’s childhood. Trial counsel had no reasonable basis for failing to uncover and present the compelling mitigation outlined below. *Strickland*, 466 U.S. at 695. Counsel’s performance, based on a complete failure to investigate, was deficient under *Strickland* and its progeny.

⁹ Although she now goes by Lisa Croy Bartlett, she will be referred to as ‘Croy’ throughout for ease of reference.

II. Prejudice: mitigating evidence of Mr. Sales’s horrific childhood and resulting PTSD could have been presented to the jury.

Mr. Sales was prejudiced by counsel’s deficient performance. Prejudice is established at the penalty phase of a capital trial if there is a reasonable probability that, but for counsel’s ineffectiveness, a single juror would have voted for life. To “assess that probability, we consider ‘the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding’—and ‘reweig[h] it against the evidence in aggravation.’” *Porter*, 558 U.S. at 41 (quoting *Williams*, 529 U.S. at 397-98). To assess prejudice, one must consider not only the evidence and argument presented at the penalty phase, but also the evidence and argument that would have been presented at trial had counsel been effective. “That prejudice inquiry ‘necessarily require[s] a court to speculate as to the effect of the new evidence’ on the trial evidence, ‘regardless of how much or little mitigation evidence was presented during the initial penalty phase.’” *Andrus*, 590 U.S. at 823 (quoting *Sears*, 561 U.S. at 956). In *Andrus*, the Supreme Court cautioned that a proper prejudice assessment cannot focus solely on the State’s aggravating evidence at trial, and it cannot ignore how trial counsel’s deficient performance shaped the trial record.

Repeatedly, the Supreme Court has found deficient investigations prejudicial because counsel failed to uncover mitigating mental health evidence. *See, e.g., Rompilla*, 545 U.S. at 391 (constitutionally sufficient investigation would have disclosed mental health mitigation); *Wiggins*, 539 U.S. at 535 (constitutionally sufficient investigation

would have uncovered petitioner’s “diminished mental capacities”); *Williams*, 529 U.S. at 369 (constitutionally sufficient investigation would have disclosed that petitioner was “borderline mentally retarded”); *Porter*, 558 U.S. at 41 (deficient investigation prejudicial, in part, because it failed to uncover petitioner’s “brain abnormality.”).

Dr. Matthew Mendel, a clinical psychologist with a specialization in “evaluating the impact of childhood trauma, particularly sexual abuse, upon later functioning[,]” has completed a forensic evaluation of Mr. Sales. Exhibit W (Report of Matthew Mendel, Ph.D.), at 1. Dr. Mendel reviewed a multitude of records, including mental health records, education records, and declarations of family and friends. He also interviewed Mr. Sales and administered the Clinical Administered Post-Traumatic Survey (CAPS-5). Based on all of the above, he concludes that Mr. Sales had Post-Traumatic Stress Disorder (“PTSD”) in the period leading up to and including the killing of Willie York. *Id.* at 11-12.

Dr. Mendel emphasizes that sexual abuse and physical abuse do not occur in a vacuum: “the entire context of a child’s life is critical in understanding the impact of such abuse upon him; two individuals subjected to identical sexual maltreatment may respond very differently, depending on the degree of protective factors and severity of other risk factors they have in their lives.” *Id.* at 5.

Childhood Abuse. Dr. Mendel describes the severity of physical beatings and emotional abuse meted out by Sam Jenkins (Mr. Sales’s stepfather) as “the extreme end of the spectrum of abuse.” *Id.* at 6. Dr. Mendel notes the consistency between

Zachary Sales’s account and Mr. Sales’s account as to the “severity of the abuse and the fact that it was targeted especially at Derek.” Dr. Mendel further notes that, “because Derek refused to cry and cower in front of him, [Sam’s] abuse and attempts to intimate Derek escalated.” *Id.* Both Mr. Sales and Zachary recount the same incident involving a missing bathroom tile:

Once, Sam beat Derek for more than two hours because a bathroom tile fell off the wall onto the floor. Sam beat Derek with a belt and hit him anywhere he could. Derek fell to the floor trying to get out of reach of Sam’s belt, but he couldn’t. Sam just kept beating him. Derek was crying and yelling, but Sam kept beating him. Sam whipped Derek so long that Derek couldn’t sit down. Derek’s back and butt had whelps all over it. Sam only stopped beating Derek because he could no longer lift the strap to hit Derek anymore. Sam beat my brother until he bled and was bruised over a tile that fell off the wall in the bathroom. Sam beat Derek many times when we were kids, but this particular beating was the most severe.

Id. at 12; *see also* Exhibit X (Declaration of Zachary Sales, Aug. 24, 2024), ¶ 2.

Notwithstanding the fact that Derek “apparently rarely showed [his terror] to Sam,” the brothers never told their mother about the abuse “for fear that this would only escalate it.” Ex. W at 6. Dr. Mendel states that “Sam reportedly made frequent, and quite believable threats of severe physical consequences, if they said anything to their mother about the whippings.” *Id.*

As Dr. Mendel highlights, another consequence of Sam’s physical abuse was that Derek began regularly skipping school, reportedly never attending three consecutive days. *Id.* at 7. Mr. Sales described one particular incident around first grade, at age 6 or 7, when:

[S]am had beaten him severely with an extension cord, leaving him with welts all over his body, quite visible to teachers. He was sent to the principal who asked him about it and then called his house and sent Derek home. . . [T]his would have simply meant returning to Sam, the source of the beatings and welts, so he skipped school and roamed the streets instead.

Id. at 6-7. From this point forward, Derek was chronically truant from school.

Dr. Mendel also highlights Sam's emotional abuse, including "multiple reports" that Sam placed a padlock on the refrigerator to keep Derek, Zachary, and Derek's half-brother Michael from eating food. *Id.* at 7. In a recent declaration, Zachary described scrounging through the kitchen cabinets with Derek to find cans of peas and black-eyed beans to eat. Ex. X, ¶ 3. Dr. Mendel notes that "[b]oth boys, as well as their mother recount how they would search their neighborhood for cans and bottles they could return for money." Ex. W at 7.

Dr. Mendel describes how the "extreme physical abuse at the hands of [Sam] set the stage for the subsequent sexual abuse by their maternal uncle, Linton Spivey."

Id. at 7. As Zachary described in his 2020 declaration,

When Uncle Harvey left, our other uncle, Linton, came to stay with us while our mother worked. My memories of our time with Uncle Linton are not so fond. When I was 9 years old, Uncle Linton sexually molested me and Derek. He fondled my genitals and made me perform oral sex on him. Then he made Derek perform oral sex on him too. Derek and I were together when we were sexually molested, so I witnessed Uncle Linton sexually abuse Derek. It only happened to me one time, but I am not sure how many times he molested Derek. I tried to stay away from him. I didn't know what we were doing, but somehow I knew that it was wrong. I felt different after that happened. I looked up to him and respected him before that happened. I hated Uncle Linton after that.

Exhibit Y (Declaration of Zachary Sales, Feb. 20, 2020), at 9-10. Dr. Mendel indicates that Mr. Sales's description of the sexual abuse by Linton is "virtually identical," though Mr. Sales disclosed that it happened to him on two or three occasions. Ex. W at 7.

Dr. Mendel suggests that one reason for the "complete secrecy" both Mr. Sales and Zachary maintained about Linton's sexual abuse over the course of decades is that male survivors of sexual abuse "tend to be consumed with feelings of shame and humiliation." *Id.* at 7-8. But Dr. Mendel further identifies the cascading effects of Sam's abuse, and how this left Derek vulnerable to further abuse by his uncle:

But beyond this source of their secrecy, the brothers' refusal to disclose stems from an already existent culture of secrecy, one which was literally beaten into them by their stepfather, Sam. He brutally warned and threatened the boys against telling their mother about his abuse. This set the stage for their subsequent sexual abuse by Linton. Derek spoke of how Linton used the physical abuse by Sam as leverage to get the boys to participate in the sexual abuse as well as to refrain from telling anyone about it. He said that from the time Linton got to their home, he would tell them that he could take them away from there, rescuing them from Sam's beatings. The sexual interactions were seen as the price of this hoped-for rescue and a consequent cessation of the whippings. Moreover, Linton used the fact of Sam's abusiveness as a means of preventing the boys from telling anyone about the molestation. He stated that if they told their mom, Sam would do something to prevent them from coming to live with him.

Id. at 8.

Such a history of child abuse and exposure to violence constitutes classic mitigating evidence. Justice Rehnquist once explained the obvious relevance of a history of abuse for understanding adult behavior: "A stable, loving home life is

essential to a child's physical, emotional, and spiritual well-being. It requires no citation to authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens."

Santosky v. Kramer, 455 U.S. 745, 789 (1982). In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), Justice Kennedy noted, "Rape has a permanent psychological, emotional and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape." *Id.* at 435. (internal citations omitted). In dissent, Justice Alito added: "Long term studies show that sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.'" *Id.* at 468-69 (internal citations omitted).

PTSD. Dr. Mendel could have explained to trial counsel and the jury that PTSD is a clinically significant term defined in the DSM-V (the Diagnostic and Statistical Manual used by mental health professionals to assess mental health disorders). Dr. Mendel writes that:

[F]or an individual to meet criteria for diagnosis, he or she must have a significant antecedent trauma, consisting of something that is, or is perceived to be lifethreatening, or an experience of sexual violence. Then, he or she must have at least a specified number of symptoms in each of four domains: Re-experiencing symptoms, such as intrusive memories, nightmares, and flashbacks; Avoidance symptoms, including efforts to avoid reminders of the trauma; Hyper-Arousal symptoms, such as increased watchfulness, an inflamed startle response, and an ongoing state of physiological arousal; and negative cognitions and mood related to the trauma. The diagnosis of PTSD may be further sub-divided into PTSD, with- or without Dissociation.

Ex. W at 9. Dr. Mendel notes that during the “period when [Mr. Sales] was out of prison in the months leading up to the death of Willie York,” he “was drinking very heavily and his alcohol consumption was escalating” because he was working “right next door to Sam Jenkins’ home, so Derek saw Sam Jenkins and his son, Harvey, quite frequently and was not able to avoid them.” *Id.* at 10-11. Dr. Mendel further notes, “This served as a constant reminder of his earlier trauma and led him to his increased drinking,” and “[w]hile he could not avoid the reminders *physically*, he attempted to do so via alcohol.” *Id.* at 11. Dr. Mendel identifies “the physical abuse at the hands of his stepfather, Sam Jenkins and the sexual abuse by his uncle, Linton Spivey” as “two series of events [that] are intimately interconnected, with the presence of the former allowing for the onset of the latter.” Dr. Mendel describes them as “pivotal sets of events in Derek’s life” and “the antecedent trauma in examining the degree of post-traumatic symptoms.” *Id.*

Dr. Mendel writes, “Derek indicated the presence and severity of PTSD symptoms in 2005, in the months leading up to April, 2005,” with “sufficient symptoms in each of the four domains, at a severity that warrants the diagnosis of PTSD.” *Id.* Mr. Sales “described the presence of severe flashbacks, as if the abuse was actually happening at the time of his recall, along with intrusive memories of the abuse, and both psychological and physiological distress in response to recall or reminders of the abuse.” *Id.* Mr. Sales also “attempted to avoid both memories of the

abuse and external reminders of it,” and had a “persistent negative emotional state, along with impaired ability to experience positive emotion” and “an exaggerated sense of negative beliefs and expectations.” *Id.* Mr. Sales also had at the time in 2005 “numerous symptoms of arousal and reactivity, including irritability and anger, hyper-vigilance, sleep disturbance, and a highly pronounced startle response.” *Id.* Mr. Sales described himself to Dr. Mendel “during that period as ‘walking along, watching myself do [things]... like I was living a life I totally wasn’t a part of. I felt disconnected to myself and everybody and everything.” *Id.* Dr. Mendel thus concludes, “[i]n my opinion, based on these interviews and on administration of the CAPS5, Derek had PTSD, with Dissociation, in the period leading up to and including the killing of Willie York.”

Through an expert such as Dr. Mendel, trial counsel could have provided important context for how Mr. Sales’s traumatic childhood was contributing to his dissociative PTSD during the time leading up to the death of Willie York. This diagnosis would have provided important mitigating context for the jury to consider when deciding whether to sentence Mr. Sales to death.

Adverse Childhood Experiences (ACE’s). A clinical psychologist with an expertise in childhood trauma, such as Dr. Mendel, also could have provided trial counsel and the jury with an assessment of the scope and intensity of the adverse childhood events sustained by Mr. Sales that are considered clinically “traumatic,” and

he could have explained the various effects these events had on Mr. Sales's development and subsequent behavior.

Dr. Mendel's review supports the conclusion that Mr. Sales was exposed to clinically significant Adverse Childhood Experiences (ACE's). Dr. Mendel states that "[i]t has long been accepted in the fields of psychology and psychiatry that early experiences of trauma are associated with negative developmental outcomes and that the broader the range and greater the severity of such experiences, the worse the likely prognosis becomes." Now, that understanding has been "amply demonstrated and quantified via the ACE's studies of the Center for Disease Control and the Kaiser Permanente Foundation, and by multiple additional research programs building upon the ACE's model." *Id.* at 5.

The ACE's studies utilized ten adverse childhood experiences: (1) physical abuse, (2) sexual abuse, (3) emotional abuse, (4) physical neglect, (5) emotional neglect, (6) parental divorce, (7) mental illness within the family, (8) substance abuse within the family, (9) domestic violence, and (10) incarceration of a family member. *Id.* Based on Dr. Mendel's assessment, Mr. Sales was subjected to multiple adverse experiences identified in the ACE's studies. Dr. Mendel notes:

Derek's parents divorced while he was very young and he experienced extreme parental substance abuse as well as parental incarceration. He was the victim of severe physical abuse as well as emotional abuse and sexual abuse. Both emotional and physical neglect were present. Domestic violence between Derek's mother, Erma, and stepfather, Sam, was also extreme, culminating in Erma shooting Sam.

Id. Dr. Mendel further notes that “the sole exception,” mental illness within the family, should be viewed “as a tentative or provisional omission” and “it is, in my opinion, quite likely that mental illness does exist.” *Id.* Thus, Mr. Sales was subjected to at least nine and possibly ten of the ACE’s identified in the original studies.

Exposure to adverse childhood experiences is significant because it is predictive of long-term problems in psychological, physical, or emotional development. Dr. Mendel explains that there is a demonstrated correlation between the number or intensity of ACE’s to which a person has been exposed and various negative outcomes. Individuals exposed to four or more ACE’s are at a significantly higher risk of drug abuse and addiction, criminal behavior, and incarceration. *Id.* at 6. Mr. Sales “is clearly in this latter group, but his degree of maltreatment and distress is far beyond the level suffered by most others in this extreme group.” *Id.*

Mr. Sales suffered physical, sexual, and psychological abuse at the hands of multiple perpetrators. The jury never learned that the neglect, abuse, and deprivation at home sent Mr. Sales on a course that would change his life. This is the type of evidence that the United States Supreme Court has held to be relevant to a defendant’s moral culpability. *See Wiggins*, 539 U.S. at 525 (finding mother’s alcoholism, foster home placement, neglect, school absence and deprivation of food to be relevant at the sentencing stage); *Williams*, 529 U.S. at 395 (finding sentencing jury should have been informed of criminal neglect and severe abuse of defendant); *Rompilla*, 545 U.S. at 391-92 (finding trial counsel deficient for not examining the

defendant's file from a prior conviction, which would have led to the development of evidence of parental alcoholism, abuse of his mother by his father, verbal abuse, and conditions of extreme poverty, as well as proof that defendant's father had locked him in a dog pen). Whether introduced through lay witnesses, an expert such as Dr. Mendel, or both, there is a reasonable probability that at least one juror would have voted to spare Mr. Sales's life had this evidence been presented at trial.

Further, because trial counsel failed to conduct a thorough investigation of Mr. Sales's background, trial counsel failed to elicit critically important mitigating information from the one witness who they called to testify: Mr. Sales's sister, Lisa Matheney. Ms. Matheney testified that their father left the family when Mr. Sales was young, he "never really had a good relationship" with their stepfather, and that she "hated" the way that their stepfather treated her brothers. TR 1444-45. She testified that she and her family loved Mr. Sales, and that he was turning his life around when he was found "at the wrong place at the wrong time." TR 1449. These vague generalities, offered without context or objective evidence, did not accurately reflect the tragedies suffered by Mr. Sales as a child. For example, at one point Lisa testified that her stepfather's "leg was messed up . . . I think he had been shot." TR 1446. Had counsel performed any investigation, he would have learned the story behind this: when Derek was six or seven years old, his mother shot his stepfather Sam; it was reported that she told him, "Don't think I don't know what you've been doing to Pete [Mr. Sales's nickname]." Ex. W, at 4.

Trial counsel's unprepped, last-minute presentation of a single witness in mitigation does not excuse his failure to investigate and present the evidence outlined above. For instance, in *Williams*, the Supreme Court noted that trial counsel had presented some mitigating evidence in the sentencing phase. This consisted of "the testimony of Williams's mother, two neighbors, and a taped excerpt from a statement by a psychiatrist." 529 U.S. at 369. The lay witnesses testified to Williams's non-violent nature, while the psychiatrist related that "in the course of one of his earlier robberies, [Williams] had removed the bullets from a gun so as not to injure anyone." *Id.* The Court then looked at the quantum and quality of mitigation amassed to support the ineffectiveness claim, implying that a finding that some mitigating evidence was before the jury did not end the inquiry. Similarly, in *Wiggins*, the Supreme Court acknowledged that trial counsel had obtained some mitigating evidence in the form of records describing Wiggins's difficult childhood and his time in foster care; but the Court then looked carefully at where those records could and should have led counsel in determining that the representation had been ineffective. *Wiggins*, 539 U.S. at 524.

Likewise, in *Rompilla*, the Supreme Court recognized that the jury had heard some mitigating evidence at trial—for instance, testimony from family members who "argued in effect for residual doubt, and beseeched the jury for mercy" and from Rompilla's 14-year-old-son, who testified to his love for his father. 545 U.S. at 378. In rejecting the state court's conclusion that defense counsel had been effective, the

Supreme Court emphasized that the IAC analysis needed to address reasonably available leads that trial counsel had failed to pursue. *Id.* at 389-90. *Rompilla*'s holding built logically on *Wiggins*, which had made clear that a lawyer charged with defending someone in a death-penalty case may not simply “abandon[] their investigation of [the client’s] background after having acquired only rudimentary knowledge of his history from a narrow set of sources.” *Wiggins*, 539 U.S. at 524. Yet that is exactly what trial counsel did to Mr. Sales.

Trial counsel was patently deficient in failing to investigate any case in mitigation. For the reasons discussed above, this claim is barred by neither procedural default nor § 2254(e)(2) given that the failure to raise the claim in state court is not attributable to Mr. Sales. As detailed above, during state postconviction proceedings, Mr. Sales’s attorneys effectively abandoned him, alleging in a single sentence, without any supporting evidence, that “[t]rial counsel was ineffective for failing to properly investigate and present mitigation evidence at the sentencing phase of the trial.” PCR 49. As this Court recognized, Mr. Sales’s postconviction counsel later abandoned the claim altogether, informing the court that he had “no additional mitigating evidence of [sic] circumstances that should have been offered or presented at the punishment stage but was not.” Doc. No. 77, at 13 (citing PCR 100–01). Mr. Sales is therefore before this Court without ever having had the opportunity to challenge his trial lawyers’ manifestly deficient penalty-phase representation on the merits. Mr. Sales is, at a minimum, entitled to an evidentiary hearing to prove this claim.

Claim 15.1: Mr. Sales Is Categorically Ineligible to Be Executed Because He Is Intellectually Disabled.

Atkins and its progeny categorically prohibit the execution of a person with intellectual disability under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). As detailed below, Mr. Sales qualifies as intellectually disabled. Mr. Sales was categorically exempt from the death penalty at the time of his sentencing, and he remains categorically exempt today. Mr. Sales’s capital sentence is therefore illegal, and he is entitled to habeas relief from this Court. *See, e.g., Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016) (“A conviction or sentence imposed in violation of a substantive rule [of the Eighth Amendment] is not just erroneous but contrary to law and, as a result, void,” so that “a court has no authority to leave in place a conviction or sentence that violates a substantive rule.”). The Court should grant Mr. Sales an evidentiary hearing to prove this claim.

While Mr. Sales has been intellectually disabled at least as of the age 18, he only began receiving the effective legal assistance necessary to allow him to assert this claim of categorical ineligibility for the death penalty recently in federal court. At trial, his attorneys failed to conduct any meaningful investigation into mitigating circumstances such as Mr. Sales’s intellectual disability. *See supra*. During state postconviction proceedings, Mr. Sales’s attorneys abandoned him, alleging in a single sentence, without any supporting evidence, that “Petitioner is a member of a class of persons for whom the Supreme Court of the United States banned execution in

Atkins v. Virginia, 536 U.S. 304 (2002).” PCR 47. State postconviction counsel now acknowledges he was not advocating for relief for Mr. Sales, but, in a wrong and misguided understanding of state postconviction law, merely preserving issues for federal review. State postconviction counsel admits, “On Several claims, I simply pled them in my Petition in a few sentences, sometimes a single sentence, solely in an effort to preserve the issues for federal court review.” Ex. T, at ¶ 6. While predecessor federal counsel developed this claim further, their allegations were not fully developed and spanned only two and a half pages. Doc. No. 43 at 147-50.

The claim that all prior counsel either abandoned or failed to develop is likely a meritorious, life-saving claim. Neuropsychologist Simone Viljoen, Ph.D. concludes in a preliminary report, based on review of the available records, that “the data on the whole is strongly suggestive of a diagnosis of intellectual developmental disorder of mild severity,” but “due to the limitations [of prior testing and available records] additional investigation and assessment is necessary to render this diagnosis.” Exhibit Z, at 12 (Report of Simone Viljoen, Ph.D.).

In *Atkins*, the Supreme Court held that it violates the Eighth Amendment to the United States Constitution to execute a prisoner with intellectual disability. *Atkins* referred to the prevailing clinical definitions as helpful in the task of determining whether an individual should be exempted from the death penalty. *Atkins*, 536 U.S. at 308 n.3, 317. The Supreme Court cited the definition for intellectual disability established by the American Association on Mental Retardation, which has since been

renamed the American Association on Intellectual and Developmental Disabilities (“AAIDD”).¹⁰ The Supreme Court also cited the definition contained in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders – 4th Edition – Text Revision (“DSM-IV-TR”), which was the most significant diagnostic guide for mental health practitioners in the United States at the time of the Supreme Court’s opinion. The DSM-IV-TR has since been replaced by the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition (“DSM-V”), and the DSM-V has been replaced by the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition – Text Revision (“DSM-V-TR”).

Although *Atkins* left to each state the task of formulating the definition of intellectual disability, states do not have “unfettered discretion to define the full scope of the constitutional protection.” *Hall*, 572 U.S. at 719; *Moore v. Texas*, 581 U.S. 1, 13 (2017) (same). “The medical community’s current standards supply one constraint on States’ leeway in this area. Reflecting improved understanding over time . . . current manuals offer ‘the best available description of how mental disorders are expressed and can be recognized by trained clinicians.’” *Moore*, 581 U.S. at 20 (quoting DSM-V). Accordingly, *Atkins* and its progeny do not “license disregard of current medical standards.” *Id.* at 13.

¹⁰ Although originally referred to as “mental retardation,” the Supreme Court has since acknowledged the change to “intellectual disability.” *Hall*, 572 U.S. 701.

Pursuant to the definitions set forth by the APA and the AAIDD and endorsed by the Supreme Court in *Atkins*, *Hall*, and *Moore*, there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) onset before age 18. *See* DSM-V-TR at 33; *Intellectual Disability: Definition, Classification, and Systems of Supports – 12th Edition*, American Association on Intellectual and Developmental Disabilities (2021) (“AAIDD-2021”) at 5; *Atkins*, 536 U.S. at 307 n.3 (enumerating the criteria for a diagnosis of intellectual disability as set forth by the AAIDD and the APA).

A capital defendant is entitled to *Atkins* relief if he “can prove [intellectual disability] *either* (a) at the time of committing the crime *or* (b) at the time of presumptive execution.” *Sasser v. Hobbs*, 735 F.3d 833, 846 (8th Cir. 2013); *see also id.* (“Arkansas may not execute an individual who sufficiently proves he met all four prongs of the Arkansas [intellectual disability] standard at *either* relevant time, even if the individual lacks proof he satisfied the standard at *both* relevant times”) (emphasis in original).

As set forth below, there are strong indications that Petitioner has mild intellectual disability, and Petitioner can establish that he meets the criteria for this diagnosis at an evidentiary hearing.

I. Mr. Sales is mildly intellectually disabled.

a. Deficits in Intellectual Functioning.

The pretrial WAIS-III IQ score of 76 by Dr. Charles Spellman, who evaluated Mr. Sales for his competency to stand trial, is the only full-scale IQ test available for

Petitioner. This test meets the basic diagnostic standard for deficient intellectual functioning as established by the AAIDD, the APA, and the Supreme Court of the United States in *Atkins* and its progeny, as discussed below. However, Dr. Viljoen concludes that because “the testing he has completed is either insufficient/unreliable, outdated, or ambiguous in its findings,” Dr. Viljoen recommends that “in order to clarify if Mr. Sales meets criteria A of the DSM-V-TR Diagnostic Criteria for ID it will be necessary for him to undergo intellectual testing using the most up to date gold standard intellectual assessment measure,” the WAIS-V that was just released last month. Ex. Z at 8.

Under the classification schemes outlined by the APA and the AAIDD, deficient intellectual functioning is defined as an intelligence quotient (“IQ”) of approximately 70 with a confidence interval derived from the standard error of measurement (“SEM”) taken into consideration. Because a 95% confidence interval on IQ tests generally involves a measurement error of 5 points, at a minimum, scores up to 75 also fall within the intellectual disability range. The DSM-V-TR states:

Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5).

DSM-V-TR at 37. Similarly, the AAIDD stated in 2002:

The 2002 AAMR System indicates that the SEM is considered in determining the existence of significant subaverage intellectual functioning (see above boxed statement). In effect, this expands the

operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.

Mental Retardation: Definition, classification, and systems of support (10th Ed.), American Association on Mental Retardation (2002) (“AAIDD-2002”), at 58-59. *See also* AAIDD-2021 at 35-36 (finding the consideration of the standard error of measurement or “SEM” and reporting an IQ score with a confidence interval deriving from the SEM to be critical considerations in the appropriate use of IQ tests).

Both the AAIDD and the APA have rejected fixed cutoff points for IQ in the diagnosis of intellectual disability and mandated that any test score must be considered in the context of clinical judgment and adaptive functioning. In its 2021 Guidelines, the AAIDD makes clear that historically, “deficits in intellectual functioning erroneously became the primary criterion used in the diagnosis of ID,” but “[t]his early erroneous view is now replaced with the modern view that equal weight and joint consideration are given to intellectual functioning and adaptive behavior in a diagnosis of ID.” AAIDD-2021 at 34. The AAIDD is also clear that clinical judgment is necessary in the diagnosis of ID, and for retrospective diagnoses, this judgment should, *inter alia*, consider the confidence interval and norm correction (Flynn effect) of prior IQ tests. *Id.* at 42.

Similarly, the DSM-V-TR states that “[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance.” DSM-V-TR at 37. This is the case, in part, because “IQ test scores are approximations of

conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks,” and an individual’s adaptive functioning may be far lower than his or her IQ score suggests. *Id.* Accordingly, “clinical judgment is needed in interpreting the results of IQ tests.” *Id.*

Furthermore, the DSM-V-TR emphasizes the value of neuropsychological testing when determining whether deficits in intellectual functioning exist, because “[i]ndividual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score.” DSM-V-TR at 37.

Consistent with the AAIDD and APA’s diagnostic criteria, in *Hall*, the Supreme Court held that, because the SEM is “a statistic fact, a reflection of the inherent imprecision of the test itself,” at a minimum, full-scale IQ scores of 75 or below will establish the diagnosis of intellectual disability if the other two prongs are met. *Hall*, 572 U.S. at 713; *see also Brumfield v. Cain*, 576 U.S. 305, 315 (2015) (IQ score of 75 was “squarely in the range of potential intellectual disability”).

The Supreme Court has similarly held that the diagnosis of intellectual disability in the *Atkins* context cannot employ hard-cutoffs and must be considered in the context of clinical judgment and adaptive functioning:

Intellectual disability is a condition, not a number. *See* DSM-V at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant’s eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those

who design and use the tests do, and understand that an IQ score represents a range rather than a fixed number.

Hall, 572 U.S. at 713.

Consistent with the directives of *Atkins*, *Hall*, and *Brumfield*, “[u]nder Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical ‘IQ score requirement.’” *Sasser*, 735 F.3d at 844. It is “legal error to read a strict ‘IQ score requirement’” into an *Atkins* analysis; instead, courts reviewing *Atkins* claims must consider *all* evidence of intellectual functioning “rather than relying solely on [a defendant’s] test scores.” *Id.* at 847.

IQ scores must also be corrected for the Flynn Effect. The Flynn Effect reflects a well-established finding that the average IQ score of the population increases at a rate of .3 points per year or 3 points per decade. Accordingly, best practices require that any IQ score be corrected downwards at a rate of .3 points per year since the test was normed. *See* DSM-V-TR at 37 (recognizing the Flynn Effect’s ability to affect test scores). The AAIDD states that, “Current best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the full-scale IQ score of 0.3 points since the test norms were collected is warranted.” AAIDD-2021 at 42.

While, as this Court has noted, the Supreme Court has recently in dicta in a per curiam opinion described “the so-called Flynn Effect” as “a controversial theory involving the inflation of IQ scores over time,” *Dunn v. Reeves*, 594 U.S. 731, 736

(2021) (per curiam), the medical community’s current standards establish that the Flynn Effect should be applied to Mr. Sales’s IQ score of 76. As noted above, the AAIDD-2021 is clear that the Flynn effect should be applied to retroactive consideration of IQ scores. The DSM-V in 2013 recognized “[f]actors that may affect test scores include practice effects and the ‘Flynn effect’ (i.e., overly high scores due to out-of-date test norms),” DSM-V at 37, and the AAIDD’s 2015 book *The Death Penalty and Intellectual Disability* (AAIDD-2015) recognized:

A consensus among the professional and scientific community of intelligence and ID scholars has emerged. This consensus is that given the high-stakes nature of *Atkins* cases and their tendency to artificially focus on specific “bright line” cutoff scores, a *Flynn effect correction to a person’s scores in this setting is now considered best or standard*.

Id. at 161 (emphasis added). *See also Sasser*, 735 F.3d at 839 n.1 (recognizing that the Flynn effect is “persistent and widely recognized”).

Even more, the DSM-V-TR recognizes that even raw IQ scores above 75 can support a diagnosis of intellectual disability:

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with deficits in intellectual functioning whose IQ score is somewhat above 65-75 may nevertheless have such substantial adaptive behavior problems in social judgment or other areas of adaptive functioning that the person’s actual functioning is clinically comparable to that of individuals with a lower IQ score. Thus, clinical judgment is important in interpreting the results of IQ tests, and using them as the sole criteria for the diagnosis of an intellectual developmental disorder is insufficient.

Id. at 42.

Moreover, Petitioner’s IQ score is even lower than the Flynn-corrected scores that are reported above. On Petitioner’s WAIS-III score, the Flynn-related inflation was compounded by inflation related to an error in the normative data for the WAIS-III test itself. In an attempt to correct for shortcomings in the norming of the Wechsler Adult Intelligence Scales – Revised (“WAIS-R”), which was caused by an absence of very low-functioning (i.e. severely intellectually disabled) subjects in the normative sample, too many severely low functioning subjects were included in the normative data of the WAIS-III. As a result, the WAIS-III produced IQ scores that were 2.34 points too high. *See* AAIDD-2015 at 145-46 (describing scholarship on this subject).

Considering all of this, three conclusions are evident: (1) Petitioner’s existing IQ score of 76, even without the proper adjustments, does not rule out a diagnosis of intellectual disability given the indications of Mr. Sales’s adaptive deficits; (2) Petitioner’s Flynn-adjusted IQ score of 73 is squarely within the range of IQ scores that support a diagnosis of ID; and (3) Petitioner’s Flynn-adjusted and corrected WAIS-III score of 71 is also plainly within the range of ID.

Indeed, Dr. Viljoen notes that Mr. Sales “was tested using the WAIS-III in 2005 and the results showed a FSIQ [Full Scale IQ] score of 76, one point away from the generally accepted cutoff score of 75,” but “test results should be reported in ranges to account for measurement error,” and “[h]is range of scores would almost certainly have

fallen below 75 at the low end.” Ex. Z at 8. “Additionally, when correcting for the Flynn effect his FSIQ would have been around 73-74.” *Id.* Moreover, “research has found that the WAIS-III specifically inflates scores around 1.65 points even at the time it was normed, which could further change Mr. Sales score to about 71-72.” *Id.* Dr. Viljoen even further notes that “[e]ven more unsettling, is research comparing the WAIS-III with Woodcock-Johnson III and Kaufman intelligence scales which found the WAIS-III results were 6.77 to 8.64 higher.” *Id.* Thus, the only available full scale IQ test available for Mr. Sales strongly indicates he satisfies the first prong of an intellectual disability diagnosis.

Dr. Viljoen recommends that Mr. Sales be retested using the WAIS-V that was just released last month, because “the raw test data [for the 2005 test] was unavailable for inspection and it is well known that scoring and administration errors occur frequently.” *Id.* Dr. Viljoen concludes that “there seems to be a high likelihood that Mr. Sales has significant deficits in intellectual functions,” but “Mr. Sales would need to be assessed using the WAIS-V, which utilizes the most up to date norms and reflects the most reliable method of assessing intellectual functioning.” *Id.* at 9.

b. Deficits in adaptive functioning.

Preliminary investigation has revealed that Petitioner has shown significant adaptive deficits from a very early age. The AAIDD has defined adaptive behavior as “the collection of conceptual, social, and practical skills that have been learned and performed by people in order to function in their everyday lives.” AAIDD-2021 at 29.

The DSM-V-TR describes adaptive deficits as “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-V-TR at 37. The focus in an adaptive behavior analysis is on *typical* performance, not *maximal* performance. AAIDD-2021 at 29.

The adaptive deficits prong is satisfied if there is a significant limitation in any one of the following three types of adaptive behavior: conceptual, social or practical. AAIDD-2021 at 31; DSM-V-TR at 37. Skills included in the conceptual realm are functional academics; language; reading and writing; money concepts; and self-direction. The social realm encompasses skills and characteristics like interpersonal responsibility; self-esteem; gullibility; naivete; following rules; obeying laws; and avoiding victimization. The practical realm refers to skills such as activities of daily living; instrumental activities of daily living; occupational skills; use of money; and maintaining safe environments. DSM-V at 37; AAIDD-2021 at 30-31.

As it is expected that strengths co-exist with weaknesses, analysis of adaptive behavior is based on the presence of weaknesses, not the absence of strengths. “[A]ll people with ID have strengths, but [] the diagnosis of ID focuses on their significant limitations.” AAIDD-2021 at 40. The Supreme Court has recognized that “intellectually disabled persons may have ‘strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.’” *Brumfield*, 576 U.S. at 320 (quoting

AAIDD-2002). Accordingly, in *Moore*, the Supreme Court found unconstitutional the Texas Criminal Court of Appeal's attempt to overcome deficits with perceived adaptive strengths because "the medical community focuses the adaptive functioning inquiry on adaptive *deficits*." *Moore*, 581 U.S. at 15 (citing AAIDD-2010, DSM-V, and AAIDD-2002).

Dr. Viljoen notes that "a formal, objective, and standardized measure of adaptive functioning is a crucial part of assessing whether an individual has ID (per both the DSM-V-TR and AAIDD)," but "it does not appear that this was ever done for Mr. Sales." Ex. Z at 9. She further states that "When he is not incarcerated, he has never lived alone," and he "never had a driver's license and despite several attempts to teach him he has never been able to master the skill of driving," "never had a bank account," and was "often taken advantage of financially, is not able to cook, and has difficulties with technology." *Id.* Dr. Viljoen notes that, "While his romantic and family relationships have been cited in a prior report as evidence of adaptive functioning, it should be noted that individuals with ID can have the capacity to enter into romantic relationships." *Id.* Mr. Sales's free world work history is extremely limited: "working part time at Pizza Hut for less than a month during his teen years," with Social Security records indicating "payment of \$52 from Job Corp, \$12614 from Creek Forestry, and \$25 from Lynn's restaurant." *Id.* at 9-10. Creek Forestry was a company owned by Mr. Sales's own family, so he was unlikely to be fired for poor performance. Dr. Viljoen states this "work history is consistent with what is known

about individuals with Mild ID.” *Id.* at 10. She concludes that “[o]n the whole there is evidence of deficits in adaptive functioning,” but “administering a formal, objective measure of adaptive functioning is essential when assessing this criterion.” *Id.* Thus, Dr. Viljoen concludes that “a formal, objective measure of adaptive functioning be administered to both Mr. Sales and also to collateral sources that known him well,” and that “[i]t is also important, to the extent possible, to assess his adaptive functioning both in custody and in the community.” *Id.*

c. Age of onset.

The third requirement for an intellectual disability diagnosis is that a petitioner’s deficits originate in the developmental period. Dr. Viljoen notes that “[t]here are limited records available for Mr. Sales prior to the age of 18,” but those that are available “generally reflect poor academic performance.” Ex. Z at 10. Dr. Viljoen notes that “it has been suggested that his mother drank alcohol during all her pregnancies, which is known to affect cognition and behavior,” and “[t]here are other indications that he struggled in school documented in prior evaluations based on his self-report and also documented in the declaration by his brother.” *Id.* Dr. Viljoen concludes, “in order to better assess whether he meets this criterion for ID additional collateral interviews would need to be completed in addition to a more detailed interview with Mr. Sales himself.” *Id.* at 10.

Furthermore, although etiology is not necessary for a diagnosis of intellectual disability, there are a number of causal risk factors that correlate with intellectual

disability and confirm the age of onset in Petitioner's case. These risk factors have been established by the AAIDD. *See* AAIDD-2021 at 129. The Supreme Court has recognized these risk factors and noted that "[c]linicians rely on such factors as cause to explore the prospect of intellectual disability further." *Moore*, 581 U.S. at 16. Many of these risk factors are present in Petitioner's social, medical and mental health history, including potential brain injury during the developmental period as a victim of physical abuse during childhood, family poverty, and impaired parenting.

II. Petitioner is entitled to an evidentiary hearing to establish that he is intellectually disabled.

Because Mr. Sales is an intellectually disabled person, he is entitled to an evidentiary hearing so that he may present evidence on the foregoing *Atkins* claim. Precluding such further development of this claim would violate *Atkins*, *Moore*, and the Eighth Amendment. *Atkins* held that "the Constitution 'places a substantive restriction on the State's power to *take the life*'" of an offender with intellectual disability. 536 U.S. at 321 (citation omitted); *Moore*, 581 U.S. 1. The Supreme Court in *Moore* prohibited any procedural scheme that would "create[e] an unacceptable risk that persons with intellectual disability will be executed," and rejected the use of out-of-date diagnostic standards in the adjudication of an *Atkins* claim as a violation of this rule and required that *current* standards be used. *Id.* at 6, 15-20 (citations and quotations omitted). Mr. Sales has proffered a claim of intellectual disability based on new evidence and diagnostic standards. Precluding additional evidentiary development

of this claim now would create an “unacceptable risk,” *Moore*, 581 U.S. at 6, that an intellectually disabled defendant will be erroneously denied relief and executed.

Denying him an evidentiary hearing on the new evidence and standards would similarly violate *Atkins* because it would lead directly to the execution of an intellectually disabled person.

Claim 21: Derek Sales’s Sixth Amendment Right to the Counsel Was Violated by the Representation of a Racist Trial Counsel.

In a newly executed declaration, trial investigator Lisa Croy has disclosed lead trial attorney Bing Colvin’s previously unknown use of the word “n-----” when he talked about Black people involved in the case.” Ex. V, ¶ 11. As the declaration lays out, Colvin was not sparing in his use of the racial slur—he used it to refer to members of Mr. Sales’s family, the decedent’s family, and even law enforcement investigators. *Id.* at 3-4. In fact, Colvin used the slur while sitting at counsel table to describe at least one witness while they were testifying. *Id.* at ¶ 11. Colvin, who is white, harbored abhorrent racist views and could not effectively represent Mr. Sales, who is black. Mr. Sales’s representation at his capital trial by a racist defense attorney violated his Sixth Amendment right to the assistance of counsel. This Court should grant relief because, “to [do] otherwise in this case would reduce a sacred right to worse than a sham.” *Frazer v. United States*, 18 F.3d 778, 784 (9th Cir. 1994) (“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[.]”).

I. Relevant standards of review.

“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). A criminal proceeding is fundamentally unfair when “the accused is denied counsel at a critical stage of his trial.” *Id.* at 659. “The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” *Avery v. Alabama*, 308 U.S. 444, 446 (1940). 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, 489 (1978) (“The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel.”).

The denial of counsel occurs when trial counsel is actually or constructively absent during a critical stage of trial. *Bell v. Cone*, 535 U.S. 685, 696 (2002). As relevant here, the Supreme Court has noted that 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.” *Cronic*, 466 U.S. at 659. Alternatively, a defendant has been constructively denied counsel 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.” *Id.* at 659-60. “Simply stated, the principle of constructive denial of counsel means that although defendant is represented by counsel, the circumstances of the representation are such that defendant, in effect, is lacking the assistance of counsel.” *State v. Young*, 316 So. 3d 843, 857 (La. App. 4 Cir. 2017). The constructive denial of counsel is structural error mandating automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *see also Weaver v. Massachusetts*, 582 U.S. 286 (2017).

Separately, “[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); *see also Glasser v. United States*, 315 U.S. 60, 76 (1942). The undivided loyalty of appointed counsel to their client is essential to due process. *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.”).

“In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). “The conflict of interest . . . must be actual, not merely theoretical. . . . [T]here must have been some actual adverse effect on the defendant’s case.” *Simmons v. Lockhart*, 915 F.2d 372, 378 (8th Cir. 1990). “Adverse effect is not the equivalent of prejudice.” *Williams v. Ludwick*, 761 F.3d 841, 845-46 (8th Cir. 2014). So, “[t]o demonstrate adverse effect, [a petitioner] must identify some actual and demonstrable adverse effect on the case, not merely an abstract or theoretical one.” *Id.* (internal quotations omitted). Adverse effects are shown when trial counsel did not “explore all avenues in developing his trial strategy to present the best possible defense . . . at trial.” *Rackley v. State*, 2014 Ark. 39, 9 (Ark. 2014) (unreported). For example, in *Rackley*, an adverse impact was shown where trial counsel failed to either cross-examine a witness or present testimony through that witness due to counsel’s conflict of interest. *Id.* (“Because [trial counsel] was prevented from developing an unimpeded trial strategy that was in [the defendant’s] best interest, the actual conflict of interest adversely affected counsel’s performance, and we reverse and remand this case for a new trial.”). Once an actual conflict of interest is established, reversal is required. Because “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising

from its denial,” trial counsel’s actual conflict of interest is never harmless error.

Glasser, 315 U.S. at 76; *see also Holloway*, 435 U.S. at 489.

If this Court does not find any actual conflict or adverse impacts, this Court reviews the claim under the familiar deficient performance and prejudice test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Caban v. United States*, 281 F.3d 778, 781 (8th Cir. 2002); *see also Drennan v. State*, 632 S.W.3d 753, 757 (Ark. 2021) (“[I]n the absence of an actual conflict, the defendant must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”).

II. Newly discovered evidence of trial counsel’s racism.

On August 20, 2024, trial investigator Lisa Croy, executed a signed declaration disclosing the racial animus openly displayed by lead attorney Colvin in this case. Ex. V. Croy was appointed to the case in February 2007, just months before trial was set to begin. *Id.* at 1. 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.” *Id.* at ¶ 11. During a trip to interview a member of the decedent’s family, Colvin referred to him as a “full-fledged n-----.” *Id.* at ¶ 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 Gracie York, the decedent’s wife, testified, Colvin said that “she got ‘n----- rich off Mr. York.’” *Id.* at ¶ 15. Colvin also referred to Mr. Sales’s wife as “a dumb n-----.” *Id.* at ¶ 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.” *Id.*, ¶ 16.¹¹

Colvin’s repeated use of the slur is unquestionable evidence 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 . . . automatically separates the person addressed from every non-black person; this is discrimination per se.”); *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 203 (Minn. 1976) (“We cannot regard use of the term . . . as anything but discrimination based on race. When a racial epithet is used to refer to a [Black] person, an adverse distinction is implied between that person and other persons not of his race. The use of the term . . . has no place in the civil treatment of a citizen.”) (cleaned up); *cf. Rodgers v. Western–Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (stating that the slur is unambiguously racist and holding that its use on even a few occasions affects the terms and conditions of a plaintiff’s employment severely enough to support a hostile work environment claim).

Unquestionably, the use of the slur reflects hostility and racial animus, *Bailey*, 583 F. Supp. at 930, 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.

¹¹ Because Croy had not previously disclosed the information contained in the declaration, Mr. Sales is concurrently moving to exhaust this claim in state court.

1991). Indeed, even Jim Crow courts reversed criminal convictions over a century ago based on use of the slur in front of the jury. *See, e.g., 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.”).

III. Mr. Sales’s Sixth Amendment rights were violated.

a. Trial counsel’s racism resulted in the constructive denial of counsel.

Colvin’s racial animus constituted the constructive denial of counsel under the Sixth Amendment. First, given the insidious nature of racial animus, lead trial counsel’s racial prejudice constitutes the constructive denial of counsel because its effects are immeasurable and inherently pernicious. Alternatively, this Court should find that openly harboring such racial animus against a defendant constitutes the circumstance recognized by the Supreme Court 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. Under these circumstances, no attorney, regardless of competence, could provide effective assistance given their racial prejudice. Therefore, this Court should find that trial counsel’s wanton and repeatedly displayed racial animus constituted the constructive denial of counsel.

In light of the pernicious nature of racial animus, this Court should find that Mr. Sales was constructively denied counsel. *Weaver*, 137 S. Ct. at 1908 (noting that errors are considered structural “if the effects of the error are simply too hard to measure.”); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (explaining that structural errors have “consequences that are necessarily unquantifiable and indeterminate”). Colvin was both the lead attorney in this case and the Managing Attorney for the entire Tenth Judicial District Public Defender’s Office, PCR. 158, 161, meaning that he was responsible for all hiring and staffing decisions broadly and when it came to this case. He was involved in all strategic discussions and decision-making in this case regarding the pretrial investigation and all phases of trial including jury selection, guilt phase, and penalty phase. In granting relief based on the racial animus of trial counsel, courts have noted the problem in reviewing such racism after the fact:

Counsel’s performance is the sum of countless discretionary actions—and inactions—on behalf of a client. Courts avoid second guessing these decisions when evaluating counsel’s performance because trial counsel is far better placed than judges reviewing a cold record to know what will serve the defendant’s interests. When defense counsel makes these discretionary decisions in disregard of the client’s interests on account of counsel’s racism, the cumulative effect will be to impair the defense, but there is no way to pinpoint how it does so.

An attorney’s nonverbal cues conveying racist contempt for the defendant—such as a sigh, a roll of the eyes, or a half-hearted closing argument—will never appear in the transcript but will no doubt influence the jury. Even harder to measure is the effect of actions that defense counsel fails to take for no reason other than racist indifference to the defendant’s fate. 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 changed if counsel had performed his obligations with due vigor.

Ellis v. Harrison, 947 F.3d 555, 562 (9th Cir. 2020) (en banc) (Nguyen, J., concurring) (internal citations omitted). Thus, racial animus “creates an egregious circumstance that warrants the *Cronic* presumption of prejudice without searching the record, especially given the many invisible ways in which counsel's bias could have affected the trial.” *Id.* at 563. This Court should find the same here, especially given Colvin’s role as both lead attorney responsible for the guilt phase and involved in the penalty phase in this case and managing attorney for the jurisdiction. *See* Doc No. 72-14 at 54 (Deposition of Gary Potts) (“[Colvin] was the top dog in the office. It was his office and it was a death penalty case.”).

It bears emphasizing that not only did Colvin openly display racial animus, but he did so as an officer of the court during court proceedings in a death penalty case. *Cf. Buck v. Davis*, 580 U.S. 100, 122 (2017) (finding that even a “*de minimis*” injection of racial stereotyping by trial counsel into capital sentencing proceeding to be unconstitutionally prejudicial because “some toxins can be deadly in small doses”). Courts have a “duty to confront racial animus in the justice system.” *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017); *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (“Because of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal

justice system.”) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). Although racial animus is “odious in all aspects,” it is “especially pernicious in the administration of justice.” *Peña-Rodriguez*, 580 U.S. at 209. Left unaddressed, racial animus is a “familiar and recurring evil that . . . would risk systemic injury to the administration of justice.” *Id.* This is especially so in death penalty cases. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (“The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.”); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (a defendant’s race is “constitutionally impermissible or totally irrelevant to the sentencing process”). In light of these principles, the Supreme Court has recognized that racial bias in the courtroom is a structural error because it “raises serious questions as to the fairness of the proceedings conducted there” and calls into question the “integrity of the judicial system.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

Colvin’s racial animus also meant that he was not able to “subject the prosecution’s case to meaningful adversarial testing,” thereby making “the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. Given Colvin’s openly displayed prejudice, he could not meaningfully cross-examine Black witnesses, even going so far as to refer to a lead investigative officer using the slur. Moreover, as laid out below, Colvin’s racial prejudice interfered with his ability to call witnesses on Mr. Sales’s behalf. For example, he did not call Mr. Sales’s wife, despite her ability to provide exculpatory testimony to the jury, because he harbored racial animus against

her. And, given that Colvin harbored animus against Mr. Sales's race, it stretches credulity to believe that he could consult with Mr. Sales with unclouded judgment, including on matters as fundamental as whether to plead guilty or testify at trial, depriving Mr. Sales of the "guiding hand of counsel" with respect to fundamental trial rights. *Powell*, 287 U.S. at 69. Thus, trial counsel's racism constituted structural error because it deprived Mr. Sales of "basic protections" without which the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Rose v. Clark*, 478 U.S. 570, 578 (1986). This Court should grant relief because Mr. Sales was constructively denied counsel in violation of the Sixth Amendment.

b. Trial counsel's racism created a conflict of interest.

If this Court does not find that trial counsel's racial animus constituted the constructive denial of counsel, this Court should find that trial counsel had a conflict of interest and presume that Mr. Sales was prejudiced considering the adverse effects trial counsel's racial animus had on all phases of trial. Trial counsel's racism constituted an actual conflict of interest given that he harbored prejudicial beliefs against Mr. Sales's race. As courts have long recognized, a conflict of interest can be based on a lawyer's personal interests. *See, e.g., United States v. Scarfo*, 41 F.4th 136, 189 (3d Cir. 2022) (criminal investigation of counsel, even when unrelated to defendant's case, creates conflict of interest when counsel may seek to curry favor with prosecution by pulling his punches); *United States v. Sayan*, 968 F.2d 55, 64-65 (D.C. Cir. 1992) (applying *Cuyler* to a conflict based on a lawyer's fear that despite being

unprepared for trial, the trial judge would take action against him if he requested a continuance). So long as the “advocate’s conflicting obligations have effectively sealed his lips on crucial matters” there exists an actual conflict of interest. *Holloway*, 435 U.S. at 490. Courts have therefore recognized that racial prejudice constitutes a conflict of interest. *Ellis v. Harrison*, 947 F.3d 555 (9th Cir. 2020); *Commonwealth v. Dew*, 210 N.E.3d 904, 906 (Mass. 2023) (“We conclude that the conflict of interest inherent in counsel’s bigotry against persons of the defendant’s faith and race, which manifested during counsel’s representation of the defendant, deprived the defendant of his right to effective assistance of counsel.”).

Trial counsel’s actual conflict of interest manifested through several adverse impacts before and during trial. Even before trial, Mr. Sales was adversely impacted by trial counsel’s lack of investigation into Mr. Sales IQ score, which appears to have been improperly tainted by racial stereotypes. Defense expert Dr. Bob Gale acknowledged that testing showed Mr. Sales had an unadjusted 76 IQ in his testimony during the penalty phase. TR 1342. However, as 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.” *Id.* 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 improper racial stereotype as an explanation for Mr. Sales's low IQ score, counsel allowed it to be presented to the jury.

Because counsel appears to have accepted the racial stereotypes provided by Dr. Gale, trial counsel failed to investigate further. Had trial counsel conducted an investigation into or beyond these stereotypes, he would have discovered that, in light of the diagnostic adjustments noted above, Mr. Sales has an IQ that meets the first prong of *Atkins*. Trial counsel's failure had two adverse impacts on Mr. Sales's capital trial. First, trial counsel failed to adequately investigate his intellectual disability, which could have exempted Mr. Sales from the death penalty, before trial based on racial stereotyping. Second, the jury was then invited to discount Mr. Sales's low IQ as a mitigating factor based on that same racial stereotyping that was presented to the jury through Dr. Gale. Not surprisingly, not a single member of the jury found as a mitigating circumstance that Mr. Sales had a low IQ. TR 489. So even if Mr. Sales would not have established intellectual disability as a bar to a death sentence, trial counsel's conflict adversely resulted in important mitigation being taken off the table by the defense's own witness.

Colvin's racial prejudice also had at least one apparent tangible adverse effect during jury selection. Colvin engaged potential jurors in a bizarre, racially charged rant in which he let slip his belief that predominantly 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 682. This rant was made in front of a voir dire panel that would go on to produce two members of the jury. TR 694. As courts have recognized, when trial counsel makes these kinds of statements laying bare their own racial prejudice during jury selection, trial counsel “unnecessarily tend[s] either to alienate jurors who [do] not share [trial counsel’s] animus against African Americans . . . or to legitimize racial prejudice” in the jury pool. *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004); *see also Dean v. Narvaiz*, 502 P.3d 177, 179 (Nev. 2022) (finding that “counsel’s method of broaching the subject of race during voir dire by asking the venire about offensive racial stereotypes constitutes ineffective assistance of counsel”).

Trial counsel’s racial prejudice had direct adverse impacts on how he litigated the guilt phase of trial as well. Notably, trial counsel failed to reasonably investigate Burt Threlkeld, a white alternative suspect who had been with the victim earlier on the day and had no alibi for the time of murder. Trial counsel 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 only a couple doors down the road. 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. Trial counsel admitted he did no independent investigation to find Threlkeld himself. PCR 177. Although Croy told trial counsel that she needed more time to find Threlkeld, PCR 120, trial counsel represented to the court in a continuance motion that he was ready to try the guilt phase, even though Threlkeld was never spoken to, PCR. 192.¹²

Instead, it is reasonably inferable that trial counsel 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. *See United States v. Young*, 6 F.4th 804 (8th Cir. 2021) (Kelly, J., concurring) (describing the impact of unconscious bias); *Cf. Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (recognizing the impact that both conscious and unconscious racism can have on decisions made by trial attorneys). Threlkeld was easily tracked down by prior federal habeas counsel. In a sworn declaration, Threlkeld admitted that on the day of the crime, he bought beer from the decedent and spent time with him at the York house. Doc. No. 43 at 69-71. Threlkeld also admitted that no one can account for his whereabouts at the time of the offense because he “was home alone.” *Id.* Despite being an obvious potential witness—let alone an alternative suspect—Threlkeld was never even spoken to or interviewed by law enforcement. TR 1203-04.

¹² Trial counsel was in fact granted a continuance to prepare the penalty phase, but did not use that extra time to find Threlkeld. *Id.*

Trial counsel also failed to argue to the jury that a clump of hair not matching Mr. Sales was found on the victim supported the alternative-suspect defense. The hair, which was not tested until the eve of trial, came from a female who was likely related to the decedent. 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 (emphasis added). In reality, the testimony was that the granddaughter had received a perm, not cornrows. Trial counsel's reference to a different hairstyle traditionally associated with black hair as "whatever they do" was nothing more than a racist stereotype. *Id.* Reliance on this stereotype prevented trial counsel from exploring this avenue during trial. *Rackley*, 2014 Ark. at 9.¹³

Third, trial counsel harbored racial animus against Mr. Sales's wife, Gail Sales, whom he referred to as "a dumb n-----." Exh. V, ¶ 14. Trial counsel did not call her to testify despite being able to provide an important detail in support of Mr. Sales's guilt

¹³ In considering whether Mr. Sales has established a Sixth Amendment violation based on trial counsel's conflict of interest, it does not matter what a jury might have made of the hair. The only relevant point for this Court is that trial counsel's racism prevented him from being able to reasonably investigate and make a strategic decision regarding whether or not to present the evidence at trial as part of the defense.

phase defense. Part of the prosecution's case against Mr. Sales was that he was found with change in his pocket, which the prosecution argued he took when he rummaged through the decedent's cigar box during the murder-robbery. *Sales v. State*, 289 S.W.3d 423, 428 (Ark. 2008) (noting that, as part of the evidence that supported 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 earlier in the day, thus explaining why he had coins on him. Exhibit AA (Declaration of Gail Sales), ¶ 14. Despite the trial team being aware of this exculpatory testimony, Mrs. Sales was never called as a witness. The most plausible explanation is that trial counsel refused to call Mrs. Sales as a witness due to his own racial animus. *See Davis*, 872 So. 2d at 257 (finding decision by trial counsel not to call black witnesses who could have supported defendant's theory of innocence as a plausible indication that trial counsel's judgment was clouded by racial prejudice). Trial counsel's refusal to investigate and present evidence of a white alternative suspect, failure to investigate a clump of hair found on the decedent, and failure to call Mrs. Sales as a witness establish adverse impacts during the guilt phase stemming from trial counsel's actual conflict of interest.

Finally, although Colvin was not the attorney responsible for the penalty phase, this Court still must consider whether his racial animus had any adverse impacts on the investigation and presentation of Mr. Sales's penalty phase case, especially given that Colvin was the managing attorney for the Public Defender Office, lead counsel in

this case responsible for the hiring of the mitigation specialist and defense expert witness, and an active participant in penalty phase decisions and discussions. As Potts made clear during his deposition, Colvin made the ultimate decisions with respect to the penalty phase. Doc No. 72-14 at 95 (“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.”). Therefore, this Court should allow Mr. Sales to proceed forward on this claim because Colvin had an actual conflict of interest that adversely impacted Mr. Sales’s trial in violation of the Sixth Amendment.

c. Trial counsel provided infective assistance of counsel.

Even if this Court does not find that trial counsel’s racial animus amounts to the constructive denial of counsel or a conflict of interest, this Court still must evaluate his performance under *Strickland* in light of that racial animus. *Cf. Hale v. Gibson*, 227 F.3d 1298, 1313–14 (10th Cir. 2000) (“[G]iven the concession by Hale’s counsel that he carried animosity towards Hale due to his suspicion that Hale might have previously burglarized his law office, we believe it is appropriate to scrutinize counsel’s performance with a somewhat more critical eye.”). As pleaded in the Second Amended Petition, and in this petition, trial counsel’s performance was unreasonable, and, but for trial counsel’s performance, the result of the proceedings would have been different. Therefore, this Court should find that in light of trial counsel’s racial

animus, Mr. Sales's right to the assistance of counsel under the Sixth Amendment was violated and grant relief.

Claim 22: Trial Counsel Was Ineffective for Failing to Investigate Petitioner's Brain Injuries and Dysfunction.

Trial counsel wholly failed to investigate and present evidence of Mr. Sales's cognitive difficulties, brain injuries, and brain dysfunction, despite the obvious indications that such avenues should be investigated. Evidence of brain injury and/or dysfunction is widely recognized as mitigating. *See Sears*, 561 U.S. at 956 (“[P]roper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' ‘significant’ mental and psychological impairments, along with . . . [other] evidence. . . .”); *Porter*, 558 U.S. at 36 (counsel failed to present neuropsychological evidence that “Porter suffered from brain damage that could manifest in impulsive, violent behavior” that “substantially impaired . . . his ability to conform his conduct to the law”); *Rompilla*, 545 U.S. at 392 (finding prejudice resulting in part from counsel's failure to discover and present evidence of defendant's organic brain damage and likely fetal alcohol syndrome); *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989) (holding “organic brain disorder” or brain damage was a mitigating circumstance that defendant was entitled to have jury consider: “Penry was suffering from an organic brain disorder at the time of the offense which made it impossible for him to . . . conform his conduct to the law.”).

For example, had trial counsel conducted even basic mitigation investigation, counsel would have uncovered obvious indicia that Mr. Sales suffers from a fetal alcohol spectrum disorder (FASD) due to in utero exposure to alcohol. Shirley Cline has declared that Mr. Sales’s mother “drank alcohol and drank heavily during her pregnancies,” as she “went from living with her parents and being sheltered to partying a lot when she was out on her own.” Exhibit BB, ¶ 5 (Declaration of Shirley Cline). This fact would have led any reasonable attorney to investigate further.

Dr. Julian Davies, a clinical professor “at the longest-running FAS diagnostic clinic in the country,” Exhibit CC, at 3 (Report of Dr. Julian Davies, M.D.), has prepared a medical expert review of his preliminary findings based on the information available so far, and notes that Mr. Sales “will probably meet criteria for moderate or severe brain dysfunction following a high-risk prenatal alcohol exposure,” *Id.* at 1. He states that “[f]urther evaluation is strongly recommended, including adaptive functioning assessments, comprehensive neuro-psychometric testing, and in-person medical evaluation.” *Id.*¹⁴

Any diagnosis of FASD and its effects on Mr. Sales’s cognitive ability and ability to function would have been relevant mitigating evidence. Dr. Davies notes:

The brain injuries caused by drinking during pregnancy are variable and unpredictable, but can include such outcomes as lower IQ, ADHD (attention deficit/hyperactivity disorder), language and social difficulties, learning disabilities, visuospatial deficits, motor and coordination

¹⁴ Undersigned counsel continues to diligently work towards a full diagnosis to support this claim.

challenges, memory problems, and impairments in executive functions—“higher-level” cognitive skills like flexibility, planning, organization, inhibition, judgment, and novel problem-solving.

Id. at 1. “Individuals with FASDs have daily functioning skills and life outcomes that are often more impaired than their IQ alone would predict.” *Id.* at 1-2. In finding that Mr. Sales likely has an FASD, Dr. Davies notes that “Derek’s reportedly high-risk level of prenatal alcohol exposure made it more likely that he would sustain *in utero* brain damage and elevates maternal drinking in the differential diagnosis of his brain impairments.” *Id.* at 4.

Dr. Davies notes that Mr. Sales’s WAIS-III Full Scale IQ of 76 is “an area of concern,” and notes that the available declarations “describe multiple adaptive deficits, including inability to drive, pump gas, cook safely, use cell phones/tablets, dress appropriately, and manage money.” *Id.* at 6. The “[a]vailable records contain quite limited neuro-psychometric testing,” and Dr. Davies states that “thorough functional assessments with comprehensive neuro-psychometric battery is essential” because “the impairments caused by maternal drinking are widespread, variable and unpredictable.” *Id.* at 6.

Dr. Davies further notes that he also needs to perform in-person measurement of Mr. Sales’s facial features and head circumference to analyze the potential for facial features and structural evidence of brain damage. *Id.* at 5. (Although these features are not necessary for an FASD diagnosis, they do aid in such a diagnosis.)

Although such further testing is needed, Dr. Davies preliminarily concludes that “Mr. Sales is likely to have a disorder under the umbrella of Fetal Alcohol Spectrum Disorders (FASD).” *Id.* at 6. Dr. Davies believes that Mr. Sales “will probably meet criteria for moderate or severe brain dysfunction following a high-risk prenatal alcohol exposure.” *Id.* Dr. Davies states, “Further evaluation of Mr. Sales is strongly recommended, including adaptive functioning assessments, comprehensive neuro-psychometric testing, and in-person medical evaluation.” *Id.* at 7.

Counsel should have known to investigate the potential effects of maternal drinking. An FASD diagnosis was widely available at the time of Mr. Sales’s trial, as “[t]he field of FASD is over 50 years old,” and the diagnostic criteria used by Dr. Davies “was developed over 25 years ago” and “is a comprehensive, evidence-based, and validated system used by diagnostic teams worldwide.” *Id.* at 3. Likewise, FASD had been recognized as part of capital defense practice before Mr. Sales’s trial. *See, e.g., Cole v. State*, 841 So. 2d 409, 421 (Fla. 2003) (denying claim of ineffective assistance of counsel based, in part, on pretrial investigation of FAS); *Williams v. Calderon*, 52 F.3d 1465, 1471 (9th Cir. 1995) (analyzing claim that trial counsel failed to present evidence of FASD to jury).

Mr. Sales’s FASD is a brain-based mental defect that has likely resulted in lifelong and significant impairments in several cognitive domains, including memory/learning, visuospatial processing, executive functioning, communication, daily living skills, and social cognition. Mr. Sales’s developmental trajectory also

reflects all eight secondary disabilities associated with FASD: disrupted education, mental health problems, substance abuse, trouble with the law, confinement, inappropriate sexual behavior, employment problems, and dependent living.

The mitigating value of an FASD diagnosis is well established, and trial counsel have been found ineffective for failing to investigate FASD. *See Williams v. Stirling*, 914 F.3d 302, 308-09, 314-15 (4th Cir. 2019) (finding ineffective assistance of counsel where counsel did not investigate an FASD diagnosis at all despite knowing that the defendant’s mother drank while pregnant with him). Since hardly any mitigating evidence was presented at Mr. Sales’s trial, any “new mitigating evidence relating to FASD” would have been “completely different in kind from any other evidence that the jury heard.” *Trevino v. Davis*, 138 S.Ct. 1793, 1799 (2018) (Sotomayor, J., dissenting from the denial of certiorari). “Had the jury learned of the FASD and related testimony, it would have had a much fuller perspective of his character and background.” *Id.* An FASD diagnosis would have provided important context for understanding Mr. Sales’s upbringing, and it would have informed the jury that Mr. Sales’s daily functioning skills are at the level of a person diagnosed with intellectual disability. *See id.* at 1800. This “new mitigating evidence” would have “had remarkable value, especially given [the Supreme Court’s] recognition that evidence relating to a defendant’s cognitive functioning plays an important role in a jury’s selection of a penalty.” *Id.*

This case is unlike *Anderson v. Kelley*, 938 F.3d 949 (8th Cir. 2019), where the Eighth Circuit rejected a claim that trial counsel was ineffective for failing to investigate their client's FASD. *Id.* at 957. Unlike here, the lawyers in *Anderson* "did conduct an investigation that comprised efforts to discover all reasonably available mitigating evidence," and "diligently consulted several experts, none of which diagnosed *Anderson* as brain damaged or expressed concerns about FASD." *Id.*; see also *Piper v. South Dakota*, No. 5:20-cv-050742024, WL 1348502, at *27 (D.S.D. Mar. 29, 2024) ("[T]his is not a case where counsel failed to investigate FASD altogether or somehow hampered their experts' investigation.")

Here, Mr. Sales's trial attorneys failed conduct anything approaching a reasonable investigation for mitigating evidence. Trial counsel did not devote any time to trial preparation until two months before trial, and did not ask for an investigator until a month before trial. Trial counsel did not even meet any of Mr. Sales's family until trial had begun. Trial counsel never talked to any of Mr. Sales's family, never relied on his investigator's truncated and insufficient investigation in any way, and never explored the possibility of conducting independent evaluative testing of his client for mitigating evidence. In the end, Mr. Sales's attorneys presented a single witness in mitigation, Derek's sister, and no other evidence, in less than nine transcript pages. Thus, unlike in *Anderson* and *Piper*, Mr. Sales's trial lawyers failed to investigate the possibility of FASD, or anything else mitigating, at all.

“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *see also Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (quoting *Strickland*). Thus, trial counsel here could have no reasonable basis for failing to investigate an FASD diagnosis because counsel wholly failed to investigate any mitigating evidence at all. “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Counsel failed this duty in this case. “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* Even under the double deference of AEDPA, it is evident that counsel did not make a reasonable decision to forgo investigating brain dysfunction and/or an FASD diagnosis; rather, counsel unreasonably failed to do the most basic investigation into Mr. Sales’s background that would have made any strategic decision not to investigate reasonable.

Here, it is evident that trial counsel had no strategy and made no strategic decisions. Trial counsel presented a single witness at the last possible minute, without communicating with Mr. Sales’s family or consulting his investigator prior to the sentencing phase. “Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel’s investigation to support that case was an empty

exercise.” *Andrus*, 590 U.S. at 815. Just as in *Andrus*, here too “counsel performed virtually no investigation, either of [the single witness] he called during the case in mitigation, or of the many circumstances in [Sales’s] life that could have served as powerful mitigating evidence.”¹⁵ *Id.* at 816.

Trial counsel was patently deficient in failing to investigate any case in mitigation. The mitigating evidence related to Mr. Sales’s organic FASD that would have been uncovered with basic investigation establishes that Mr. Sales was prejudiced by counsel’s deficiency. Mr. Sales is, at a minimum, entitled to an evidentiary hearing to prove this claim.

CONCLUSION

The errors that occurred during Mr. Sales’s trial and subsequent proceedings deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Each of the claims in this petition individually warrant relief. Even if the Court does not grant relief on any individual claim, it should consider the errors in the case cumulatively and grant relief. Considered individually and cumulatively, the federal constitutional errors in Mr. Sale’s case had structural and prejudicial effects on the outcome.

Mr. Sales requests that these proceedings be held in abeyance so that he may exhaust these claims in state court; that he be granted discovery for a full and fair

¹⁵ Counsel in *Andrus* at least called five witnesses – Andrus’s mother and father, one expert witness, a prison counselor, and Andrus himself. *Id.* at 809-10.

resolution of the claims in this petition; that leave to supplement the petition be granted as may be appropriate; that an evidentiary hearing be conducted on all claims involving disputed issues of fact; that Respondent be ordered to respond to Mr. Sales's claims; that Mr. Sales be allowed to respond to any affirmative defenses raised by Respondent or sua sponte by the Court; and that a writ of habeas corpus be granted and his conviction and death sentence vacated.

Respectfully submitted,

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