No. CR 17-654

IN THE ARKANSAS SUPREME COURT

Kenneth Reams, ***Appellant/Cross-Appellee,***

v.

State of Arkansas, ***Appellee/Cross-Appellant.***

On Appeal from Rule 37 Proceedings
Circuit Court of Jefferson County
Honorable John W. Cole

PROPOSED BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND DISTINGUISHED MEMBERS OF THE BAR

Danielle C. Gray*
John B. Hill*
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
T. (212) 326-2000
F. (212) 326-2061
dgray@omm.com
jhill@omm.com

Samantha M. Goldstein*
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
T. (202) 383-5304
F. (202) 383-5414
sgoldstein2@omm.com

* *Pro Hac Vice* pending

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INTEREST OF AMICI CURIAE

Amicus Curiae the National Association for Public Defense ("NAPD") is an association of more than 16,000 professionals, working in all U.S. states and territories, who have devoted themselves to representing criminal defendants. The NAPD's members are practitioners—including lawyers, social workers, experts, and teachers—engaged in every phase of criminal defense and who work collectively to ensure that defendants receive their constitutional right to effective assistance of counsel. They are advocates in jails, in courtrooms, and in communities, and they are therefore experts not only in theoretical best practices, but also in the practical, day-to-day delivery of criminal defense services. In addition, the NAPD's attorney members regularly represent and provide advice to clients in death penalty cases.

The individual *Amici Curiae* signatories—Sandy D'Alemberte, William C. Hubbard, and Herb Rule—are all distinguished attorneys with many years of experience as counsel in the State of Arkansas and across the country. Having served as the President of the American Bar Association ("ABA"), been a law school dean, and held elected office, the individual *Amici* have a unique understanding of the importance of constitutionally effective representation. Together, *Amici* understand that the American criminal justice system does not function optimally without effective and adversarial representation, and that the prejudice resulting from

ineffective representation does not—and cannot—comport with the Sixth Amendment.

Given the NAPD's mission and membership, and *Amici*'s collective devotion to upholding the standards for performance of counsel, they have a strong interest in ensuring that the Sixth Amendment, and its guarantee of effective assistance of defense counsel, is properly enforced. Drawing on their broad perspective and expertise, *Amici* are also ideally situated to explain why the representation of the Appellant in this capital case fell far below the well-established standards and prevailing norms that are essential to ensure competent, effective, and constitutionally adequate representation.

ARGUMENT

The Sixth Amendment demands that all criminal defendants receive effective assistance of counsel. It therefore imposes on defense counsel certain minimum performance thresholds. In particular, to provide constitutionally adequate representation, an attorney must satisfy his "overarching duty to advocate the defendant's cause and . . . bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This obligation is especially vital in capital cases. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) (trial counsel in capital case ineffective because they "did not fulfill their obligation" to test the prosecution's case); *accord Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). As this Court has made clear time and again, "death is different." *Pedraza v. Cir. Ct. of Drew Cnty.*, 426 S.W.3d 441, 447 (Ark. 2013) (collecting cases).

Courts have emphasized that defense counsel must be more than merely *present* to fulfill the constitutional requirement of adequate representation. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685. Rather, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, *who plays the role necessary to ensure that the trial is fair*." *Id.* (emphasis added).

In determining whether defense counsel has served this role, courts regularly look to "[p]revailing norms of practice as reflected in American Bar Association standards and the like," as "guides to determining" whether the constitutional minimum has been met. *Id.* at 688; *accord Rompilla*, 545 U.S. at 387 & n.7; *Wiggins*, 539 U.S. at 522; *see also* American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (the "Guidelines"), *available at* https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf.

Of course, the Guidelines are not only useful to courts when adjudicating ineffective-assistance claims. Because the Guidelines reflect prevailing professional norms, they are an indispensable resource for public defenders, private practitioners, and others who represent criminal defendants. In fact, over the past few decades, the Guidelines have ensured both the consistency and efficacy of representation by "enumerat[ing] the minimal resources and practices necessary to provide effective assistance of counsel" for lawyers nationwide. Guidelines, Introduction. As a result, the Guidelines describe defense counsel's obligations "in terms no one could misunderstand . . . ." *Rompilla*, 545 U.S. at 387.

Additionally, the U.S. Supreme Court has long made clear that the minimum constitutional standard for adequate representation of defendants facing the death

penalty are coextensive with "prevailing professional norms" and "standard practice . . . in capital cases," including the Guidelines. *Wiggins*, 539 U.S. at 523–24. And the Court has not hesitated to enforce these standards. For example, citing the Guidelines, the Court has held that all capital defendants are entitled to adequate investigation during the sentencing phase, including into evidence of aggravation, *Rompilla*, 545 U.S. at 387, and the defendant's social history, *Wiggins*, 539 U.S. at 523–26; *see also Williams*, 529 U.S. at 395–97 (counsel ineffective where he did not prepare for sentencing phase until a week before trial and failed to uncover extensive evidence of neglect and abuse in defendant's childhood). Put simply, an attorney's failure to comport with these professional norms not only defies common sense; it also violates the Constitution. *See Rompilla*, 545 U.S. at 387.

That is precisely what happened here. By the time the Appellant's defense attorney accepted appointment as trial counsel in this case, the 1989 iteration of the Guidelines had been the benchmark for adequate representation in capital cases for nearly five years. But from the moment he took on Appellant's defense, trial counsel failed to fulfill even the most basic expectations for effective assistance. During the guilt phase, trial counsel failed to investigate and interview key exculpatory witnesses, and did not lodge critical objections to otherwise inadmissible hearsay testimony and prior crimes evidence. And during the sentencing phase, trial counsel improperly prepared and presented witnesses and conducted what can only be

described as a superficial mitigation investigation. The Sixth Amendment, well-established case law, and prevailing professional norms do not—and should not—countenance such representation, particularly in capital cases.

I. TRIAL COUNSEL'S PERFORMANCE FELL FAR BELOW PREVAILING NORMS OF PRACTICE AS SET FORTH IN THE AMERICAN BAR ASSOCIATION'S GUIDELINES FOR CAPITAL DEFENSE

In 1993, when trial counsel was appointed to represent Appellant in this case, the prevailing standards for capital defense were embodied within the Guidelines. The objective of defense counsel, according to the Guidelines, is "to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during *all* stages of the case." Guideline 1.1 (emphasis added). To that end, the Guidelines cover an array of topics concerning capital defense, including "eligibility, training, support services, trial preparation, the sentencing phase and appeals." Guidelines, Introduction. Each of those topics, in turn, offers specific and practical instruction for ensuring the efficacy of counsel's representation. Indeed, each "black letter guideline" includes only the necessary "mandatory" language describing those "activities [that] are minimum requirements" for effective representation. *Id.*

The Guidelines are thus an important—and often dispositive—benchmark for determining whether defense counsel's performance is effective. In *Wiggins*, for example, the Court held that defense counsel was ineffective where his "conduct fell

far short of the standards for capital defense work articulated by the . . . ABA[]-standards to which [the Court] long ha[s] referred as 'guides to determining what is reasonable.'" 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688); *see also Rompilla*, 545 U.S. at 387 (citing the ABA Capital Defense Guidelines and commenting that the Court "'long ha[s] referred to these ABA Standards as guides to determining what is reasonable'" (quoting *Wiggins*, 539 U.S. at 524)).

Courts nationwide have followed the Supreme Court's lead by relying on and applying the Guidelines to determine whether counsel has provided effective assistance. By 2014, for example, at least 76 different cases had cited to the 1989 Guidelines,[1] and an additional 59 had cited to the 2003 Revised Guidelines.[2] The Eighth Circuit in particular has relied on the Guidelines where, as here, they "describe the professional norms prevailing when the representation took place."

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[1] List of Cases Citing to the 1989 ABA Guidelines, American Bar Association (Mar. 26, 2014), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989list.authcheckdam.pdf.

[2] List of Cases Citing to the 2003 ABA Guidelines, American Bar Association (Mar. 26, 2014), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003summary.authcheckdam.pdf.

Sinisterra v. United States, 600 F.3d 900, 908 (8th Cir. 2010) (quoting *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009)).

Here, trial counsel's failure to follow even the Guidelines' most basic commands underscores counsel's constitutionally deficient performance at every stage of the Appellant's case, as well as the prejudice that resulted.

A. Appellant Was Deprived Of His Right To Constitutionally Adequate Counsel Throughout The Guilt Phase

The Guidelines provide vital and instructive context to guide this Court's analysis of the Appellant's ineffective-assistance claim. As explained below, at each stage of the guilt phase, trial counsel's performance fell short of the minimum standards set forth by the Guidelines for capital cases.

i. Counsel's Inexperience

To begin with, "prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought" is one of the primary criteria that an attorney must satisfy to be eligible for capital defense appointment. Guideline 5.1.1(A)(iii).[3] At the time trial counsel was appointed to represent Appellant,

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[3] Based on the record, it does not appear that trial counsel would have satisfied the "alternative procedures" for eligibility listed under Guidelines 5.1.1(C) and 5.1.2(C). He did not have any death penalty experience, nor did he

however, trial counsel had *never* tried a death penalty case. Record on Appeal ("ROA") 902–03. Indeed, nearly half of trial counsel's practice was devoted to civil matters, rather than criminal cases. *Id.* at 899. Notwithstanding his lack of death penalty experience, trial counsel simultaneously took on at least five death-eligible cases, two of which were scheduled back-to-back. *Id.* at 924.[4]

ii. Counsel's Failure to Obtain Co-Counsel

In addition, Guideline 2.1 asserts that, in capital cases, "*two* qualified trial attorneys should be assigned to represent the defendant." Guideline 2.1 (emphasis added). The Guidelines' commentary underscore that this requirement is not arbitrary, but an essential function given the unique demands of capital defense:

> Because many of the duties of defense counsel in capital cases are definably different from those performed by counsel in criminal cases generally,

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have "ongoing consultation support from experienced death penalty counsel." Guideline 5.1.1(C). He, at most, exchanged several letters and calls with attorneys at the Arkansas Death Penalty Resource Center. *See* ROA 926–28.

[4] Trial counsel did not testify at the Appellant's Rule 37 hearing as to why he began accepting death-eligible cases in 1993. He did, however, state that beginning in 1993, Jefferson County offered him a contract under which he would receive a $5,000 bonus for each capital case that he was appointed to handle. ROA 937–38.

> because there are many rapid developments in the complex body of law affecting death penalty cases, and especially because of the harsh and irrevocable nature of the potential penalty, the responsibilities of trial counsel are sufficiently onerous to require the appointment of two attorneys as trial counsel [in the capital context].

Id. (Commentary).

In this case, despite the fact that trial counsel had never handled a case eligible for the death penalty, he did not seek the assistance of experienced co-counsel. The refusal to seek assistance is particularly puzzling given that an attorney with the Arkansas Death Penalty Resource Center explicitly recommended to trial counsel that he move the court for additional counsel and even offered advice on the content of such a motion. ROA 2578. Instead, trial counsel alone took on Appellant's case and, in so doing, contravened prevailing professional norms.

iii. Counsel's Caseload

The Guidelines also state unambiguously that "[c]apital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations." Guideline 6.1. Here, however, trial counsel was overextended when representing Appellant: at the time he represented Appellant, trial counsel was simultaneously working on at least *five* death-eligible cases, two of which were scheduled back-to-back. *See supra* at 8.

Additionally, trial counsel was already overworked because of his non-capital defense work. In fact, trial counsel recalled receiving assignments from one appointing judge for "virtually every case that [the judge] had." ROA 1112. As capital defense litigation expert David Ruhnke[5] testified at Appellant's Rule 37 Evidentiary Hearing, "somebody who's handling hundreds of felony cases clearly has too big a caseload to be handling a capital case under prevailing professional norms," *id.* at 2432, let alone five of them concurrently.

iv. Counsel's Pretrial Performance

Guideline 11.4.1 states that defense counsel must "immediately" and "expeditiously" conduct an "independent investigation" into the defendant's guilt. Guideline 11.4.1(A); *see also Rompilla*, 545 U.S. at 387 n.7 (describing the 1989 Guidelines as having set forth "clear requirements for investigation . . . and imposed

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[5] David Ruhnke testified at Appellant's Rule 37 evidentiary hearing as an expert in the preparation and trial of capital cases, and in the professional norms for capital defense that prevailed in 1993 during Appellant's trial. *See* ROA 2416. In his testimony, Ruhnke explicitly said that the prevailing norms defining adequate representation in capital cases spring from "the American Bar Association's 1989 guidelines on the—on capital defense and trying capital cases," as well as "from a series of United States Supreme Court opinions." *Id* at 2428.

a . . . forceful [investigative] directive"). As the relevant facts and law demonstrate, trial counsel's pretrial investigation was deficient from the start.

For example, trial counsel did not interview or call to testify two key witnesses who would have corroborated Appellant's defense that he never planned, intended, or agreed to shoot anyone. Trial counsel did not interview or call to testify Appellant's alleged accomplice, Alford Goodwin, who later admitted that he had committed the shooting that occurred during the robbery at issue here. ROA 1954. Trial counsel likewise failed to call to testify Goodwin's best friend, Phillip Curry, to whom Goodwin had confessed. *Id.* at 1856–58. And there is little evidence, aside from trial counsel's vague and ambivalent recollection, that he interviewed Curry at all.

When conducting his investigation, trial counsel was required to "seek information concerning the incident or events giving rise to the charges" and "explore the existence of other potential sources of information relating to the offense [and] the client's mental state." Guideline 11.4.1.2(B). During his trial, Appellant maintained that Goodwin—and not, as the State claimed, Appellant—was the shooter during the at-issue robbery. ROA 5315, 5321–22. Trial counsel was also acutely aware that Goodwin had received a plea bargain—trial counsel even brought it up in his closing statement—and therefore Goodwin faced no jeopardy from providing honest testimony. *Id.* at 5481–82. Thus, had trial counsel called

Goodwin as a witness, Goodwin would have testified to two critical details that he was uniquely situated to confirm: (i) Goodwin was the shooter; and (ii) immediately before the shooting, Appellant had attempted to ensure that the first chamber was empty in the revolver used during the robbery. *Id.* at 1954–55, 2022. Nonetheless, the jury never heard either fact from anyone other than Appellant. Indeed, at the Rule 37 Evidentiary Hearing, Goodwin testified that trial counsel never so much as contacted him or his attorney. *Id.* at 1999–2000.[6]

Before trial, the State also gave trial counsel a copy of Phillip Curry's statement, *id.* at 1032–35, in which Curry (Goodwin's best friend) detailed Goodwin's confession: Goodwin—and not Appellant—had been carrying and fired the gun during the robbery, according to the account provided by Goodwin to Curry. *Id.* at 1856–58. Especially in light of Curry's close relationship with the confessed shooter, the jury more than likely would have credited Curry's statement, since he had no apparent incentive to lie or to otherwise incriminate Goodwin.

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[6] Trial counsel testified at Appellant's Rule 37 Hearing that, although he could not be positive whether he approached counsel for Goodwin, "I know that I did not have a good working relationship with counsel for Mr. Goodwin. So, I don't know whether I did or didn't. I don't recall them ever asking to talk to my client either." ROA 1030.

Curry testified in the Rule 37 Evidentiary Hearing that he would have been willing to serve as a witness on Appellant's behalf and would have testified that Goodwin, not Appellant, was the shooter. *Id.* at 1865. But, according to Curry, trial counsel did not attempt to interview him, let alone offer him as a trial witness in support of Appellant's assertion that Goodwin was the shooter. *Id.* at 1862–63.[7] That decision was particularly inexplicable given that trial counsel already had a relationship with Curry and thus easily could have contacted him. *See id.* at 1870 (highlighting that trial counsel represented Curry in a prior, unrelated matter).[8]

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[7] Trial counsel's testimony at the Rule 37 Evidentiary Hearing was equivocal as to whether he interviewed Curry. He said: "I said I seem like I remember interviewing—I feel confident that I interviewed [police informant] [Jermaine] Brown. It seems like I interviewed Mr. Curry." ROA 1032. Curry's testimony, however, was unambiguous. "Q: Have you ever spoken to [Appellant's trial counsel] about anything related to the May 5th robbery and homicide? A: No, I haven't." *Id.* at 1862.

[8] Indeed, trial counsel went so far as to procure an order for Curry to be delivered to testify at Appellant's trial—yet he apparently failed to follow through on speaking with Curry, let alone on having him testify. ROA 1862. And at the post-conviction hearing, even trial counsel acknowledged how simple it would

Nor is there any suggestion that the failure to introduce testimony from Goodwin and Curry was a tactical choice or a reasonable professional judgment. *See Wiggins*, 539 U.S. at 526. To the contrary, at the Rule 37 hearing, trial counsel conceded he should have wanted to talk to these witnesses. ROA 1035. When a lawyer "does not probe, does not inquire, and does not seek out all the facts relevant to his client's case," he is "prepared to do little more than stand still at the time of trial." *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974). As noted above, trial counsel's entire guilt-phase defense was that Appellant was not the shooter and in fact tried to empty the gun's chamber before the robbery so as to "make sure that nobody got hurt." ROA 5382. And one of trial counsel's primary directives as defense counsel was to "seek information concerning the incident or events giving rise to the charge[s]." Guideline 11.4.1.2(A). But trial counsel let Goodwin's and Curry's potential testimony slip through his fingers; he provided the jury only with Appellant's testimony, giving the jury no reason to believe Appellant beyond his say-so. The prosecution emphasized just that, impugning Appellant's credibility by saying that Appellant was "lying about how much he participated in this crime," *id.*

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have been for him to interview Curry, saying it "would have probably moved real quickly to find him and get him up there." *Id.* at 1041.

at 5389, and that instead "what happened was . . . Kenneth Reams came up there with that gun . . . [a]nd he shot [it]," *id.* at 5391.

Both Goodwin's and Curry's testimony would have directly undermined the State's theory of the case. Years later, when Goodwin testified at Appellant's Rule 37 Evidentiary Hearing, he stated that "[d]uring the process of that robbery, *I shot [the victim]*." *Id.* at 1954 (emphasis added). Goodwin also confirmed critical details supporting Appellant's claim that he had attempted to rig the gun so that it would not shoot: (i) the gun "was always on an empty chamber," *id.* at 2022; (ii) Appellant was the one who attempted to set the gun to an empty chamber, *id.*; and (iii) Goodwin had never intended to shoot the victim, *id.* at 1983–84. Curry's testimony, as evidenced by his statement to the police, would have corroborated that Goodwin was the shooter and that the shooting was accidental. *Id.* at 1856–58.

Had the jury heard Goodwin and Curry testify that Goodwin was the shooter and that Appellant had indeed attempted to ensure the gun did not shoot, it is highly likely that at least one juror would have had reasonable doubt concerning whether Appellant's conduct was sufficient to warrant a death-eligible conviction. And in such circumstances, the resulting "prejudice is plain," because "[t]he jury might have acquitted [Appellant] of capital murder . . . by finding him guilty of a lesser charge . . . ." *Chambers v. Armontrout*, 907 F.2d 825, 832 (8th Cir. 1990).

vi. Counsel's Motions Practice

The Guidelines also underscore the extent to which trial counsel's performance during motions practice fell short of professional standards. Specifically, the Guidelines mandate that defense counsel file pretrial motions "whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made and the law should provide the requested relief." Guideline 11.5.1(A).

As with trial counsel's deficient pretrial investigation, his attempt at motions practice was also entirely inadequate when compared to the Guidelines. Trial counsel omitted several motions listed by the Guidelines as particularly critical to the defense—including challenges to venue, the sufficiency of the charging document, and the inadmissibility of evidence. Guideline 11.5.1(B).

Trial counsel made only a handful of other motions, nearly all of which were filed on the same day, November 30, less than two weeks before the beginning of trial, leaving the judge little time to consider their merit. *See generally* ROA 4579–4668. Moreover, the bulk of the motions trial counsel did make contained little more than boilerplate assertions. *See id.*

For example, while trial counsel made a motion to have the jury include a fair cross-section of the community, his three-paragraph motion requested only that the court select jurors using a "nondiscriminatory pattern." *Id.* at 4605–06. That motion

did not make any of the showings necessary under *Duren v. Missouri*, 439 U.S. 357 (1979)—the seminal case about fair cross-section challenges that had already governed the field for nearly 15 years by that time. Moreover, Appellant had a very strong fair cross-section challenge claim on the basis of African American underrepresentation in the jury pool: At the Rule 37 Evidentiary Hearing, the Circuit Court heard testimony that only 10-20% of jury venires were African Americans, despite nearly 50% of Jefferson County's population being African American. *See* Petitioner Kenneth Reams' Post-Hearing Memorandum of Law in Support of His Previously Filed Petition for Relief Pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, *Reams v. State*, No. CR-1993-301-3, at 86–93 (Ark. Cir. Ct., 6th Div., Sept. 30, 2015). Trial counsel's motions practice, in short, rendered Appellant's representation not just inadequate but effectively nonexistent.

v. Counsel's Failure to Object to Hearsay Evidence

Trial counsel was also obligated to "take steps . . . to preserve, on *all* applicable state and Federal grounds, any given question for review." Guideline 11.7.3 (emphasis added). Indeed, the Guidelines demand that capital counsel be especially generous in their objections: "Counsel should not refrain from objecting to or otherwise bringing to the attention of the court a perceived injustice not addressed by existing law." *Id.* (Commentary).

Nevertheless, throughout Appellant's trial, trial counsel subjected the State's case to essentially no adversarial testing. Throughout the guilt phase, trial counsel made only five objections and cross-examined only one witness. *See generally* ROA 5183–5396. Indeed, trial counsel did not object to the testimony of multiple witnesses who offered plainly inadmissible hearsay testimony. A police captain, for example, testified (without any objection from trial counsel) that a witness told him he had seen Appellant carrying a stolen .32 caliber pistol and that the same witness had overheard Appellant talking about his involvement in the murder at issue here. *Id.* at 5219–20. Likewise, trial counsel failed to object when the State elicited the testimony of another police officer about statements made to him by a supposed witness to the robbery in question who claimed that two African American males, including Appellant, had participated in the robbery. *Id.* at 5202–05. Both of these statements were quintessential hearsay: they were not made by the declarant while testifying at trial or a hearing and were nonetheless offered in evidence to prove the truth of the matter asserted. *See* Ark. R. Evid. 801(c). And neither decision to forego objection can be explained as a tactical decision made with a "reasonable basis." *See Riley v. Wyrick*, 712 F.2d 382, 385 (8th Cir. 1983) (tactical decisions ineffective where they had no reasonable basis). Trial counsel had no possible advantage to gain from allowing hearsay testimony potentially implicating Appellant as the shooter.

On the other hand, the prejudice that resulted is undeniable. Indeed, where there are a "variety of inferences from the evidence in the record possible without [the hearsay] statement, [it] require[s] a determination that the statement was prejudicial to [the defendant]." *Bolander v. State of Iowa*, 978 F.2d 1079, 1084 (8th Cir. 1992). And here, the hearsay statements were key evidentiary support for the State's claim that Appellant was the shooter.[9] Trial counsel's failure to object to this hearsay testimony constituted constitutionally deficient performance.

vi. Counsel's Failure to Object to Prior Crimes Evidence

The same Guideline provision, Guideline 11.7.3, also impugns trial counsel's failure to object to the State's solicitation of testimony regarding Appellant's prior crimes. *See* Guideline 11.7.3 ("[C]ounsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review."). Under the Arkansas Rules of Evidence, it is undeniable that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Ark. R. Evid. 404(b). Nonetheless, trial counsel failed to object when the State presented evidence that

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[9] The State also offered the testimony of the coroner, who testified that it was likely the shot came from a position closest to where Appellant was located during the robbery. *See* ROA 5242–43.

Appellant had previously committed other crimes. Trial counsel did not object when the State repeatedly elicited testimony from police officers about a robbery that Appellant had earlier committed at a Greyhound Bus Station. ROA 5252–53. Nor did trial counsel object when the State proffered testimony from law enforcement about Appellant's participation in robberies and burglaries at a local bank and dry cleaner. *Id.* at 5252–53, 5275–80.

Upon a sufficient showing, prior crimes evidence may be admissible to show a defendant's *modus operandi*. But none of the prior crimes testimony here even arguably falls within the narrow confines of this exception. *See Williams v. State*, 343 Ark. 591, 599 (Ark. 2001) (the two requirements for *modus operandi* evidence are that "(1) both acts must be committed with the same or strikingly similar methodology; and (2) the methodology must be so unique that both acts can be attributed to one individual"). Because allowing this evidence served no possible strategic function, trial counsel was undeniably deficient in failing to object to its admission.

That deficiency, moreover, materially prejudiced Appellant, as it allowed the State to portray Appellant as a habitual offender who repeatedly committed violent crimes. Prior bad act evidence is usually inadmissible precisely because of the inherent danger that the jury will rely upon it to find criminal propensity. *See* Dent Gitchel, *The Admissibility (and Inadmissibility) of Character Evidence*, Ark. Law,

at 10 (Fall 2012) ("Our system of justice is based on the premise that a person should be held guilty or liable only if he or she committed the act with which he or she is charged—not because of the kind of person he or she is.").

B. Appellant Was Deprived Of His Right To Constitutionally Adequate Counsel Throughout The Sentencing Phase

As the Circuit Court correctly held, trial counsel's deficiencies in the sentencing phase severely hindered his representation of Appellant during the sentencing phase. Trial counsel's failures "cast doubt on the reliability of [Appellant's] death sentence." Order Granting Petitioner's Motion in Part, at 5, *Reams v. State*, No. CR-1993-301-3-2 (Ark. Cir. Ct., 2d Div., Apr. 13, 2017). As the court recognized, trial counsel put on essentially no mitigation evidence, directly in contravention of the Guidelines and prevailing professional norms. In light of these failures, this Court should affirm the lower court's decision with respect to the sentencing phase.

Guideline 11.4.1 imposes an obligation on defense counsel to conduct an "independent investigation[]" relating to the sentencing phase, with a particular eye towards evidence that would mitigate against a death sentence. *See* Guideline 11.4.1(A). Likewise, Guideline 11.8.6 requires that defense counsel "present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." Guideline 11.8.6(A). This rule lists examples of mitigation evidence that defense

counsel should pursue, including medical and mental-health history, educational history, family and social history, rehabilitative potential, and expert testimony in support thereof. Guideline 11.8.6(B).

Importantly, courts have repeatedly embraced these straightforward Guidelines as setting forth a minimum standard for determining the adequacy of defense counsel's mitigation efforts. *See, e.g., Sinisterra*, 600 F.3d at 908. Specifically, courts have relied upon "[t]he ABA Guidelines[']provi[sion] that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Ortiz v. United States*, 664 F.3d 1151, 1163 (8th Cir. 2011) (quoting *Wiggins*, 539 U.S. at 524). As explained below, trial counsel consistently failed to meet these minimum standards, and those failures demonstrably prejudiced Appellant.

i. Counsel's Failure to Properly Investigate Mitigation Evidence

At least four separate provisions of the Guidelines required that trial counsel, once he took on Appellant's case, "begin immediately" with his investigation and preparation for the sentencing phase. *See* Guideline 1.1 (Commentary); Guideline 2.1 (Commentary); Guideline 11.4.1(A); Guideline 11.8.3(A). The commentary to Guideline 11.4.1 also explicitly warns that inexperienced counsel might underestimate the necessity of a thorough, searching mitigation investigation: "The

need for a standard mandating investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation." Guideline 11.4.1 (Commentary).

As with the guilt phase, trial counsel's lack of experience and resources plagued the mitigation investigation from the outset. For instance, trial counsel was appropriated only a "limited amount" for an investigator and, as trial counsel acknowledged, that investigator did not have "very much to do in the penalty phase." ROA 1021.[10]

Overworked and with little help coming from his investigator, trial counsel turned to his legal assistant for additional aid in his mitigation investigation. *See generally id.* at 1067–79. Trial counsel acknowledged that his legal assistant did not have "any familiarity or . . . background or training in the field of investigation." *Id.* at 1067. Nonetheless, trial counsel sent his assistant to interview potential mitigation witnesses alone.[11]

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[10] According to his invoice, that investigator spent only a total of 12 hours working on Appellant's case.

[11] Even at the time, the decision was controversial. An attorney from the Arkansas Death Penalty Resource Center testified at Appellant's Rule 37

Trial counsel's legal assistant was not qualified as an "investigator or mitigation specialist." *See* Guideline 11.4.1.3. It thus comes as little surprise that, according to her own testimony at the Rule 37 Evidentiary Hearing, "there were deficiencies" in the legal assistant's interviews, ROA 2157, including interviewing many of the interviewees as a group in one conference room, *id.* at 2131. Trial counsel's legal assistant also videotaped the interviews, which, Appellant's expert testified during the Rule 37 Evidentiary Hearing, tends to have a "chilling effect" on interviewees. *Id.* at 1253. The videotaping thus likely explains why, according to trial counsel, many of the individuals the legal assistant interviewed "got cold feet and were less inclined to testify than they were before," *id.* at 1079, costing trial counsel access to potentially critical mitigation witnesses.

As this Court itself has recognized, "defense counsel have an obligation to conduct a thorough investigation into issues relating to both guilt and penalty, including investigation 'to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Pedraza*, 426 S.W.3d at 447 (quoting *Wiggins*, 539 U.S. at 524 (quoting Guideline 11.4.1(C))). "Despite these well-defined norms, however," trial

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Evidentiary Hearing that she recalled being "flabbergasted" when she heard that trial counsel's legal assistant had conducted the interviews. ROA 1350.

counsel here effectively "abandoned [his] investigation of [Appellant's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. As in *Wiggins*, that failure constituted constitutionally ineffective assistance.

ii. Counsel's Failure to Adequately Present Mitigation Witnesses

According to Guideline 11.8.6, it is vital that, as part of the mitigation investigation, counsel investigate the defendant's family and social history. This is in large part because the "goal at the sentencing phase is to help the jury see the client as someone they do not want to kill." Guideline 11.8.6 (Commentary).

Trial counsel should have, but did not, develop significant information about Appellant's background. For instance, Mike Moss, one of Appellant's youth detention center counselors, would have testified about Appellant's difficult upbringing, and the behavioral effects that resulted. *See* ROA 2276–77 (describing behavioral issues). For example, Moss could have testified that: (i) as a young man, Appellant had witnessed the murder of one of his friends, *id.* at 2224; (ii) staff members at the detention center, including Moss, suspected that Appellant had been sexually abused as a child, *id.* at 2229–30; and (iii) Appellant had taken to stealing in part because he did not have any other way to get food, *id.* at 2217. But while trial counsel initially listed Moss as a sentencing phase witness, Moss was never

called to testify and never even spoke with anyone from the defense team after initially being interviewed by trial counsel's legal assistant. *Id.* at 2267.

Appellant's mother, Beatrice Reams Whiteside, could have been a crucial witness for the mitigation case, too. She could have helped to humanize Appellant, and she could have contextualized his abusive upbringing and the various difficult circumstances in his life that had put him on a path towards crime. *See id.* at 1695–1702; *see generally* Guideline 11.8.6. Nevertheless, according to trial counsel's own recollection, he only briefly met with Appellant's mother on one occasion. ROA 1090–91; *see also id.* at 1771 (Appellant's mother estimated that in total she spent less than half an hour communicating with either trial counsel or someone else from his office). Trial counsel did not substantially prepare Appellant's mother for her testimony, and trial counsel and Appellant's mother never discussed the sort of questions that he would ask her at trial. *Id.* at 1770–71. Therefore, although she did testify during the sentencing phase, Appellant's mother was unprepared to answer questions in a manner that sympathetically but vividly described the traumatic events Appellant had endured; instead, she recalled her testimony as "one of the worst experience[s] . . . in [her] whole life." *Id.* at 1774.

Finally, trial counsel's failure to call exculpatory witnesses—Goodwin and Curry—was every bit as impactful an error at the sentencing phase as it was at the guilt phase. And as the Circuit Court specifically held after the Rule 37 Evidentiary

Hearing, "[t]he . . . testimony [of Goodwin and Curry] . . . left the Court with doubts that the [Appellant] fired the fatal shot[,]" and "those doubts as demonstrated at the hearing would have caused at least one reasonable juror to have doubt that the [Appellant] should be sentenced to death." Order Granting Petitioner's Motion in Part, at 6, *Reams v. State*, No. CR-1993-301-3-2 (Ark. Cir. Ct., 2d Div., Apr. 13, 2017).

iii. Counsel's Failure to Collect Medical Records or Offer Psychological Evidence

The mitigation investigation also must include any and all "confidential records relating to any of the relevant histories" of the defendant. Guideline 11.4.1.2(D). "Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including . . . reports[,] . . . letters[,] and public records," the Guidelines state. Guideline 11.8.6(C). Trial counsel, however, failed to request *any* of Appellant's medical records, ROA 1083, despite the fact that there was substantial history of mental-health issues in the family, *see id.* at 1701. The medical and mental-health records could have helped to establish Appellant's ability to discern right from wrong and to place his decisions in context. But trial counsel did not even ask for that critical information, let alone offer it as evidence. *Id.* at 1083.

The Circuit Court was correct to identify the fatal flaws in trial counsel's representation of Appellant during the sentencing phase. The same kinds of flaws

that plagued the sentencing phase, however, were also present in the guilt phase. It was therefore error for the Circuit Court to determine that trial counsel was *only* ineffective in the sentencing phase but not also in the guilt phase.

II. UNDER WELL-ESTABLISHED PRECEDENT, APPELLANT IS ENTITLED TO RELIEF FOR TRIAL COUNSEL'S INEFFECTIVENESS DURING BOTH THE GUILT AND SENTENCING PHASES

The Supreme Court has repeatedly affirmed that there are at least two, independent ways that counsel's performance can violate the Sixth Amendment. Trial counsel's performance in this case embodies both types of constitutional ineffectiveness.

First, under *Strickland*, a criminal defendant's right to counsel is violated where (1) defense counsel's performance was "deficient," 466 U.S. at 687, and (2) that deficiency caused prejudice, *i.e.*, it creates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The Circuit Court rejected Appellant's *Strickland*-based claim of ineffective assistance of counsel solely because Appellant admitted at trial that he had participated in the robbery in question. As the Circuit Court put it, "there simply [wa]s nothing to suggest [that Appellant would have been] . . . acquit[ted] of capital murder." Order Granting Petitioner's Motion in Part, at 3, *Reams v. State*, No. CR-1993-301-3-2 (Ark. Cir. Ct., 2d Div., Apr. 13, 2017). The Circuit Court, however, entirely overlooked that acquittal of capital murder was *not* the *only* possible

"different outcome" favorable to Appellant that could have resulted had he been given constitutionally adequate representation: Appellant could have been convicted of a lesser offense had even a single juror harbored reasonable doubt that Appellant committed capital murder. *See Chambers*, 907 F.2d at 832 ("[P]rejudice is plain" where "[t]he jury might have acquitted [the defendant] of capital murder, *either* by finding him guilty of a lesser charge *or* by finding that he acted in self-defense[.]" (applying *Strickland*)).[12]

Second, the Supreme Court has also held that a defendant's right to counsel is *per se* violated where an attorney's failings are so inescapable that "no actual [a]ssistance for the accused's defence [has been] provided." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (internal quotations omitted). If a defendant has been constructively denied the assistance of counsel altogether, prejudice is "legally presumed." *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 659 & n.25); *see also id.* at 703 n.2 (Brennan, J., concurring) ("[C]ounsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can

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[12] As noted above, *see supra* at 25, the Circuit Court appeared to apply this analysis to the sentencing phase in determining that Appellant should not have been sentenced to death. The Circuit Court offered no explanation, however, for why the same analysis was inapplicable to the guilt phase.

constitute constitutional error without any showing of prejudice." (citing *Cronic*, 466 U.S. at 659–60)).

In this case, trial counsel's performance was deficient at every stage—from the initial investigation, to motions practice, and to the assembly of mitigation evidence for sentencing. Trial counsel did not develop Appellant's defense, and he did not subject the State's case to meaningful testing at all, "fail[ing] to oppose the prosecution throughout the proceeding as a whole." *Freeman v. Graves*, 317 F.3d 898, 900 (8th Cir. 2003). Appellant's Sixth Amendment right to effective assistance of counsel "cannot be satisfied by [trial counsel's] mere formal appointment." *Cronic*, 466 U.S. at 655. Appellant was constructively denied any counsel whatsoever, rendering the prejudice to him legally unquestionable.

CONCLUSION

For the foregoing reasons, this Court should: (i) reverse the Circuit Court's denial of Appellant's claim of ineffective assistance of counsel during the guilt phase of trial; and (ii) affirm the Circuit Court's decision to vacate Appellant's death sentence because of trial counsel's ineffective assistance during the sentencing/penalty phase of trial.

Dated: November 6, 2017

Danielle C. Gray*
John B. Hill*
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
T. (212) 326-2000
F. (212) 326-2061
dgray@omm.com
jhill@omm.com

Samantha M. Goldstein*
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
T. (202) 383-5304
F. (202) 383-5414
sgoldstein2@omm.com

**Pro Hac Vice* pending

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2017, a copy of the foregoing was served on the following:

Kent Holt, Esq.
David Raupp, Esq.
Arkansas Assistant Attorney General
Criminal Department
323 Center Street, Suite 200
Little Rock, AF.72201

Jin Hee Lee
Ajmel Quereshi
Christopher Kemmitt
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY
Tel.: (212) 965-2200
Fax; (212)226-7592

George Kendall
Corrine Irish
Squire Patton Boggs (U.S.) LLP
30 Rockefeller Plaza, 23 f1.
New York, NY 10035
Tel. (212) 872-9834
Fax. (212) 872-9815

Danielle C. Gray

Case Name: *Reams v. State*
Docket Number: CR-17-654
Title of Document: Motion for Leave to File Brief of Amici Curiae

IV. CERTIFICATE OF COMPLIANCE AND IDENTIFICATION OF PAPER DOCUMENTS NOT IN PDF FORMAT

Certification: I hereby certify that:

I have submitted and served on opposing counsel an unredacted and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

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The following original paper documents are not in PDF format and are not included in the PDF document(s): N/A

Danielle C. Gray

Danielle C. Gray

O'MELVENY & MYERS LLP

November 6, 2017