APPEAL NO. 20-10873

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATHANIEL WOODS,

Plaintiff-Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, HOLMAN CORRECTIONAL FACILITY, ATTORNEY GENERAL, STATE OF ALABAMA,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. 2:16-cv-01758-LSC

PETITIONER'S EMERGENCY MOTION FOR SUBSTITUTION OF COUNSEL AND A LIMITED STAY OF EXECUTION UNDER 28 U.S.C. § 2251(a)(3)

EXECUTION SCHEDULED FOR MARCH 5, 2020 AT 6:00 P.M.

Alicia K. Haynes
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PETITIONER-APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. Proc. and Eleventh Circuit Rule 26.1-1, the undersigned counsel of record for the Petitioner-Appellent Nathaniel Woods hereby certifies the following as a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal (including subsidiaries, conglomerates, affiliates, parent corporations, and any publically held corporation that owns 10% or more of a party's stock), and other identifiable legal entities related to a party that have an interest in this case.

1. Briles, Rita – Trial counsel for Appellant;
2. Carroll, John – Counsel for Appellant in state post-conviction proceedings;
3. Collins, Michael – Victim;
4. Coogler, L. Scott – United States District Court Judge;
5. Davis, LaJuana – Counsel for Appellant in state post-conviction proceedings;
6. Dunn, Jefferson – Appellant; Commissioner, Dept. of Corrections;
7. King, Troy – Counsel for State in direct appeal and post-conviction proceedings and former Attorney General of Alabama;

8. LaCour Jr., Edmund G. – Counsel for State in federal habeas appellate proceedings and Alabama Solicitor General;
9. Lloyd, J.D. – Counsel for Appellant in federal habeas proceedings and § 1983 litigation;
10. Marks, Emily C. – United States District Judge;
11. Marshall, Steve – Appellant; Attorney General for the State of Alabama; counsel for State in federal habeas appellate proceedings and § 1983 litigation
12. Matthews, Robert – Counsel for Appellant in federal habeas appellate proceedings; McCammon, Shane – Counsel for Appellant;
13. Nail, Tommy – Trial Judge, Jefferson Circuit Court;
14. Roberts, Jasper B., Jr. – Counsel for State on direct appeal and Assistant Attorney General of Alabama;
15. Reiland, Stephanie E. – Assistant Attorney General and counsel for State in state post-conviction relief proceedings;
16. Shapiro, Marc R. – Counsel for Appellant;
17. Simpson, Lauren A. – Assistant Attorney General of Alabama; counsel for State in state post-conviction relief and federal habeas proceedings; counsel for Appellees in § 1983 litigation;
18. Stewart, Cynthia – Appellee; Warden, Holman Correctional Facility;

19. Strange, Luther – Counsel for State in state post-conviction relief proceedings;

20. Threatt, Glennon Fletcher, Jr. – Counsel for Appellant on direct appeal;

21. Umstead, Cynthia – Trial counsel for Appellant.

Pursuant to Fed. R. App. P. 26.1, counsel also makes the following disclosures:

1. No publically-traded company or corporation has an interest in the outcome of this case of appeal.

Respectfully submitted,

/s/ Alicia K. Haynes
Alicia K. Haynes
Attorney for Plaintiff-Appellant
For A Limited Purpose

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PETITIONER'S EMERGENCY MOTION FOR SUBSTITUTION OF COUNSEL AND A LIMITED STAY OF EXECUTION UNDER 28 U.S.C. § 2251(a)(3)

Nathaniel Woods is scheduled to be executed today, **Thursday, March 5, 2020**, for the shooting deaths of three Birmingham police officers: Carlos Owen, Harley Chisholm III, and Charles Bennett. (Docket 2:16-cv-01758 (hereinafter "Dkt.") 40). It is uncontested that Nathaniel Woods did not kill the officers. Mr. Woods was nevertheless convicted of four counts of capital murder and sentenced to death on a theory of accomplice liability. *Woods v. State*, 13 So.3d 1, 17 (Ala. Crim. App. 2007). Mr. Woods has steadfastly maintained his innocence in any plan to entice the three officers to enter the house that day.

A review of the case by clemency counsel, discussed in more detail below, throws into grave doubt the constitutionality of his conviction and death sentence and requires a limited stay of execution under 28 U.S.C. § 2251(a)(3) be granted so that Mr. Woods can seek appointment or substitution of conflict-free counsel capable of adequately investigating and presenting his case. To execute Mr. Woods when the record in his case reflects a breakdown in the adversarial process denying Mr. Woods the assistance of competent federal counsel as guaranteed by 18 U.S.C. § 3599 and the Sixth Amendment would constitute a grave miscarriage of justice and therefore warrants extraordinary intervention in this case.

I. This Court has Jurisdiction to Hear This Motion

Under 28 U.S.C. § 2251(a)(3), a "court that would have jurisdiction to entertain a habeas corpus application regarding that sentence…may stay execution of the sentence of death" pursuant to a state prisoner's application for appointment of counsel pursuant to 18 U.S.C. 3599 (a)(2). Because this Court has jurisdiction to hear habeas corpus petitions under 28 U.S.C. § 2254 (a)[1], this Court has jurisdiction to rule on a Motion for Substitution of Counsel and Limited Stay under 28 U.S.C. § 2251(a)(3).

On March 3, 2020, Petitioner moved the District Court for the Northern District of Alabama (Southern) to permit a Motion for Limited Appearance in order to file a Motion for Substitution of Counsel & Stay of Execution Pursuant to 28 U.S.C. § 2251(a)(3) ("Motion for Substitution") (Dkt. 41). The District Court promptly denied the Motion for Substitution on the grounds that it was a second or successive application under 28 U.S.C. § 2244 (Dkt. 42). Petitioner subsequently moved to Alter or Amend Judgment under the Federal Rules of Civil Procedure 59(e) to obtain a new order from the District Court granting or denying the Motion to Substitute and Stay the Execution. (Dkt. 43).

[1] "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254.

This morning, the District Court issued an Order (Dkt. 44) denying the Motion to Amend or Alter the Judgment explaining that the "request for substitution" under 18 U.S.C. § 3599 is without merit because Mr. Woods has adequate representation. Petitioner disagrees. As the facts herein explore more fully, Attorney Lloyd only came on to Mr. Woods's federal habeas case when it was already two-thirds complete, in large part due to an unreasonably expedited briefing schedule imposed by the District Court leaving no time for the investigation necessary to maintain confidence in the integrity of the proceedings. The District Court, in appointing Mr. Lloyd, did not do so with the expectation that this appointment would fundamentally alter or improve the nature of Mr. Woods's conflicted representation. (Dkt. 22). Furthermore, Attorney Lloyd indicated to clemency counsel that he had no intention of pursuing any other actions in Mr. Woods's case when certiorari was denied and the State requested an execution date be set (Affidavit of Lauren Faraino ("Faraino Affidavit"), Exhibit ("Exh.") 1 ¶28), contrary to Mr. Woods's wishes and Attorney Lloyd's duties under 18 U.S.C § 3599. *See Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016). Mr. Woods has also expressed a request for new counsel upon learning that he was so entitled. ("Nathaniel Woods Letter," Exh. 3).

The District Court also concludes that "while it is for the Eleventh Circuit to decide" whether to appoint new counsel to this case, "it appears to this Court that Woods states no new grounds that were not available…during his first § 2254

motion." (Dkt. 44). This finding demonstrates precisely the paradox that inadequate representation created in this case. Without time, resources, and the counsel willing to undertake the investigation ethically required of capital habeas attorneys in federal proceedings, the ability to demonstrate new grounds on which to reopen federal habeas proceedings via a second or successive petition is necessarily constrained. Nevertheless, there is new information that has been uncovered by clemency counsel in only the last few weeks seemingly demonstrating that state habeas counsel for Mr. Woods's performed ineffectively by failing to investigate numerous grounds of trial counsel ineffectiveness. Faraino Affidavit ¶¶ 14-24, 27, 28. In a case where the triggerman codefendant who shot three police officers received recommendations of *life sentences* by the jury (overrode by the trial court to impose death), questions of trial counsel ineffectiveness and potential prejudice therefrom are clearly substantial.

Finally, undersigned counsel recognizes that the timing of bringing the instant motions is far from perfect. As the counsel history and recent efforts in this case described herein demonstrate, however, undersigned counsel and Mr. Woods's pro bono clemency counsel have made all reasonable efforts pursuant to their limited and recent involvement in this case to bring these matters before the Court as expeditiously as their limited experience in these matters allows. While it is in the interests of finality and judicial expediency to typically impute the failures of counsel to the failures of diligence on the part of a petitioner, in a death penalty case

such as this, those interests must yield to the interest in ensuring no person is put to death without meaningful representation.

Because time is of the essence, Petitioner moves this Court to consider the instant Motion and the compelling grounds on which Petitioner seeks new counsel be appointed to his case.

II. Appointment of Substitute Counsel & Stay of Execution Are Warranted Because Mr. Woods Faces Imminent Execution Without Ever Having Received Representation from Competent, Conflict-free Counsel

Over the past 15 years, Mr. Woods has been denied constitutionally adequate legal representation and has been abandoned by counsel or represented by counsel with an actual conflict of interest compromising the representation, resulting in numerous potentially meritorious claims for relief having been waived, defaulted, or insufficiently pled. These claims include, but are not limited to, factual evidence contradicting the prosecution's narrative of a plot engineered by Mr. Woods to ambush the officers, including evidence of police misconduct and evidence that the prosecution coerced witness testimony; trial counsel and *all subsequent counsel's* failure to investigate and present mitigating evidence of Mr. Woods's childhood abuse and neglect that may have weighed against a death sentence; and the failure to investigate and properly plead a claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). (Dkt. 1; "Faraino Affidavit", Exhibit ("Exh.") 1 ¶¶ 14-24, 27, 28).

Because of counsel's failures at every stage of this case, and contrary to U.S. Supreme Court precedent in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), **Mr. Woods never received conflict-free representation capable of investigating new claims for relief or seeking to resuscitate these and other important claims through adequately pleading state habeas counsel and trial counsel's ineffectiveness.** Instead, Mr. Woods was represented by the same counsel during both state post-conviction proceedings under Rule 32 and throughout two-thirds of his initial federal habeas proceedings, creating an inescapable conflict in representation—particularly given that the Rule 32 filing was insufficiently pled and litigated, rendering the ineffectiveness of Rule 32 counsel a crucial claim to explore and attempt to substantiate in federal habeas proceedings. *See Gray v. Pearson*, 526 F. App'x 331, 332 (4th Cir. 2013) (citing *Martinez v. Ryan* to hold that a conflict exists when state and federal habeas counsel are the same); *Harris v. Comm., Ala. Dept. of Corr.*, 874 F.3d 682, 689 (11th Cir. 2017) (noting that conflict of interest exists where counsel "would be tasked with asserting their own constitutional deficiency").

a. Mr. Woods Brought These Issues Before the Court as Quickly as They Were Identified and Capable of Being Adequately Briefed

Mr. Woods's current clemency counsel, Lauren Faraino, reviewed the issues in his case. Faraino Affidavit, ¶¶ 7-12. This review has revealed the significant and

potentially meritorious claim that the conflicts and ineffectiveness pervading Mr. Woods' habeas proceedings are so profound as to constitute a fundamental defect in the integrity of the proceedings, thus warranting relief. Ms. Faraino contacted the American Bar Association (ABA) Death Penalty Representation Project only one week ago to assist with identifying qualified counsel with the availability and resources necessary to present these claims to the courts. *Id*. at ¶ 3.

A cursory review of the record in this case reveals that Mr. Woods has never had the benefit of competent, conflict-free representation as guaranteed by the Sixth Amendment to the U.S. Constitution and 28 U.S.C. §3599 and, as a result, his case has never been properly subjected to the adversarial testing needed to maintain confidence in the outcome of the judicial proceedings. Had Petitioner known of his right to conflict-free representation under *Martinez* he would have pressed the District Court to vindicate this right from the start; similarly, had Petitioner better understood the obligations of counsel to adequately investigate his case, he would have moved the District Court for substitution of counsel immediately upon realizing that Attorney Lloyd did not intend to conduct any investigation. (Farraino Aff. ¶ 27). Instead, pro bono clemency counsel, who is not a capital practitioner or criminal defense attorney identified these issues in the last three weeks and then undertook an unprecedented effort to identify counsel to vindicate Mr. Woods's constitutional rights to representation in the federal court, culminating in this appeal.

b. Conflict-Free Counsel Capable of Representing Mr. Woods Is Available to Seek Appointment if a Limited Stay is Granted

With sufficient time to complete the notification and approval process for an out-of-district appointment, a Capital Habeas Unit ("CHU") for a federal defender organization (FDO) will be able to seek appointment to this case and undersigned counsel will move to withdraw. Because both the Alabama-Middle and Alabama-Northern FDOs have a conflict that precludes them from taking on this representation, the CHU for the Middle District of Florida has agreed to seek out-of-district appointment if a stay of execution is granted. Allowing Mr. Woods's execution to proceed without affording him the "guiding hand of counsel" in more than name alone would, under the circumstances described more fully below, constitute a grave miscarriage of justice. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Strickland v. Washington*, 467 U.S. 1267 (1984).

Therefore, Mr. Woods respectfully moves this Court for a 90-day limited stay of execution pursuant to 28 U.S.C. § 2251(a)(3) to allow substitution of conflict-free counsel to seek appointment to the case and then investigate and adequately plead, in the first instance, significant and potentially meritorious claims for relief.

III. PROCEDURAL BACKGROUND

a. Trial & Direct Appeal

Before trial, the State offered Mr. Woods a plea deal of 20-25 years for the murder of the three officers. Mr. Woods made the disastrous decision to proceed to trial, and on October 10, 2005, Mr. Woods was convicted of three counts of capital murder for the deaths of the three officers, and one count of capital murder for the murder of two or more persons by one act or pursuant to one scheme or course of conduct.[2]

The State's case against Mr. Woods included testimony from 31 witnesses, including more than 25 law enforcement officers. *Woods v. Stewart*, No. 2:16-CV-01758-LSC, 2018 WL 3455686, at *11 (N.D. Ala. July 18, 2018), certificate of appealability denied sub nom. *Woods v. Holman*, No. 18-14690-P, 2019 WL 5866719 (11th Cir. Feb. 22, 2019). At the conclusion of the trial proceedings, the jury was split but recommended that Mr. Woods be sentenced to death by a vote of

[2] Information about this plea deal first appears in Mr. Woods's amended federal habeas petition (Dkt. 23). While it is summarily denied by the State in its response (Dkt. 28), it was denied on the grounds that it was insufficiently pled. Recently, in a response to clemency efforts on Mr. Woods's behalf, the Attorney General has denied that a plea deal for Mr. Woods was ever in place. On the eve of filing the instant Motion, clemency counsel spoke with trial counsel, who confirmed that there was a plea deal on the table for Mr. Woods. (Email from Rita Briles, Exh. 2). This factual dispute, which is still unfolding on the day of Mr. Woods's scheduled execution, further underscores the need for a stay so that counsel can properly investigate this case.

10-2.[3] *Id.* On December 9, 2005, the judge accepted the jury's sentencing recommendations and sentenced Mr. Woods to death.[4]

The court appointed Attorney Glennon Threatt to serve as Mr. Woods's appellate counsel, despite the fact that Threatt had an actual conflict because he had served as counsel for Mr. Spencer before withdrawing on the eve of trial. According to Mr. Woods's Rule 32 Petition,

> After receiving multiple extensions of time appointed counsel missed the deadline for filing Mr. Woods's brief to the Court of Criminal Appeals. Despite a strongly-worded reprimand and the threat of removal and bar discipline, appointed counsel missed two subsequent deadlines for filing Mr. Woods's brief. Nonetheless, the Court of Criminal Appeals did not remove appointed counsel from the case and accepted the untimely brief, which was filed seventeen days later.
>
> (Petition for Relief from Judgment Pursuant to Rule 32, Dec. 30, 2008, at 4 ¶9 (hereinafter "Rule 32 Petition").

On August 31, 2007, the Alabama Court of Criminal Appeals ("ACCA") denied Mr. Woods's direct appeal and, after a remand to correct the sentencing order, affirmed Mr. Woods's conviction on December 21, 2007. *Woods* at 1.

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[3] Undersigned counsel has filed a separate motion for authorization to file a second or successive petition pursuant to 28 U.S.C. 2244(2)(a) in anticipation of the forthcoming Supreme Court opinion on the 6th Amendment requirement of jury unanimity in *Ramos v. Louisiana*.

[4] It is a testament to the difference in representation that Mr. Spencer, who freely admitted to shooting the three officers to death but was able to submit evidence tending to suggest that he may have acted in self-defense, received a recommendation of life without parole from the jury, whereas Mr. Woods's jury returned a recommendation of death, despite the fact that the State admitted that Woods did not kill any of the officers. This fact alone goes to the likelihood of prejudice from any identified trial counsel ineffectiveness and underscores the importance of Mr. Woods being able to adequately raise such claims and evidence in his post-conviction appeals.

Mr. Threatt then abandoned his representation of Mr. Woods. He did not inform his client that he would not be filing an application for rehearing or otherwise pursuing the remaining avenues of review available through the direct appeal process. (Rule 32 Petition at 5 ¶ 10.) As such, the ACCA issued a Certificate of Judgment finalizing the trial and appellate proceedings against Mr. Woods on January 9, 2008, rapidly propelling the case into postconviction proceedings. (Dkt. 1 at 2). The repercussions of Mr. Threatt's abandonment were felt throughout all subsequent proceedings in the case.

b. Rule 32 Proceedings and State Collateral Appeals

Upon discovering that Mr. Woods's direct appeal counsel had deserted Mr. Woods, the nonprofit legal group the Equal Justice Initiative ("EJI") stepped in to represent Mr. Woods on an emergency basis, and on April 29, 2008, submitted a motion for an out-of-time appeal to the Alabama Supreme Court in an attempt to vindicate Mr. Woods's right to challenge the dismissal of his direct appeal. (Dkt. 1 at 3). On December 30, 2008, while the motion for an out-of-time appeal was pending, Mr. Woods—through EJI—filed a shell Rule 32 petition, to be held in abeyance pending resolution of the direct appeal claims. (Dkt. 1 at 4). Despite raising various points of error and claims for relief, the 2008 Rule 32 petition failed in various places to plead new facts or evidence, as is required to make a colorable claim for postconviction relief under Alabama law. *Boyd v. State*, 746 So.2d 364,

406 (Ala. Crim. App. 1999). As noted in the petition itself, EJI filed the Rule 32 petition in an effort to ensure Mr. Woods did not forego his opportunity to seek state post-conviction relief but clearly intended for the claims to be substantiated or amended through additional investigation and pleading when the motions regarding the abandonment of the direct appeal were concluded and new counsel was appointed.[5] (Dkt. 1 at 15).

The Alabama Supreme Court denied the petition for an out-of-time appeal on August 24, 2009, and the U.S. Supreme Court denied a petition for certiorari on February 22, 2010. *Woods* v. *Alabama*, 559 U.S. 942 (2010). On February 10, 2010, attorneys LaJuana Davis and John Carroll entered a notice of appearance as counsel for Mr. Woods's Rule 32 proceedings, and on April 1, 2010, EJI formally withdrew from representation. *See Woods v. Stewart* at *12. Davis and Carroll did not amend the petition originally filed by EJI in 2008.

On July 21, 2010, the State filed an answer to the 2008 Rule 32 petition prepared by EJI and then filed an amended answer six days later. *Id*. In both July

[5] In EJI's Rule 32 Petition, EJI stated in a footnote: "Because Mr. Woods was unaware that appellate counsel abandoned him, and because Alabama does not provide counsel for death row inmates, Mr. Woods has been unable to obtain counsel to file his Rule 32 Petition. Undersigned counsel has therefore agreed to file this Rule 32 Petition on Mr. Woods's behalf in order to protect his right to challenge his conviction and death sentence as well as to ensure that Mr. Woods is not placed in jeopardy of execution when his twelve-month statute of limitations for filing a Rule 32 petition lapses on January 9, 2009. We have intervened in this case only because of the exigent circumstances surrounding Mr. Woods's appeals. Because we are currently providing legal assistance to dozens of other death row prisoners, it is uncertain whether we will be able to continue representing Mr. Woods for subsequent Rule 32 litigation." (Rule 32 Petition at 3 FN 1).

2010 submissions, the State refuted each of Mr. Woods's Rule 32 claims regarding trial counsel ineffectiveness on the basis that they were insufficiently pled:

> Because it is the relationship of the facts to the claim asserted that is important, mere 'notice pleading' is obviously insufficient. Rather, as noted above, a Rule 32 claim must plead specific facts which, if true, would be sufficient to establish every element of the claim and entitle the petitioner to relief.
> (Attorney General's Response to Rule 32 Petition, July 20, 2010, at 13 ¶19).

New counsel for Mr. Woods was thus aware that the State's position on EJI's 2008 Rule 32 petition was that it failed to adequately provide the factual bases needed to substantiate the numerous claims pled—something which should have signaled to Rule 32 counsel to amend and perfect the pleadings on precisely those grounds.

Attorneys Davis and Carroll did nothing in response. They did not seek to amend the petition. They did not reply to the State's Answer. They failed to submit any responsive pleading to the court.[6]

Five months later, on December 1, 2010, the circuit court dismissed the Rule 32 petition without an evidentiary hearing. Only then did Rule 32 counsel for Mr. Woods re-emerge to file a nine-page Motion for Reconsideration on December 30, 2010, which the circuit court denied on January 25, 2011. Counsel for Mr. Woods

[6] As evidence uncovered by Mr. Woods's clemency counsel suggests, the failure to substantiate the allegations made in the Rule 32 petition or amend the Rule 32 petition with additional facts was due to Rule 32 counsel's failure to investigate the case, as numerous witnesses were available to provide relevant information to substantiate claims of trial counsel ineffectiveness. Faraino Aff. ¶¶ 13-24, 27.

appealed the dismissal of the Rule 32 Petition and Motion for Reconsideration in November 2011, but the ACCA affirmed the dismissal on April 29, 2016. *Woods v. State*, 221 So. 3d 1125 (2016).

In discussing the dismissal of the Rule 32 petition, the ACCA specifically noted Mr. Woods's failure—following the submission of the 2008 petition by EJI and the appointment of new counsel to carry on the Rule 32 proceedings in 2010—to amend the petition with the facts needed to sufficiently plead the claims. Thus, the specter of Rule 32 counsel ineffectiveness had been raised.

> Woods also argues that the circuit court unfairly dismissed the postconviction petition without giving him notice of the insufficiency of the petition. Here, the State filed its response to Woods's petition on July 21, 2010, and filed an amended response on July 27, 2010. However, the circuit court did not issue its order dismissing Woods's petition until December 1, 2010. *Woods had more than an ample opportunity to respond to the State's answer*.
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> *Woods v. State*, 221 So. 3d 1125, 1135 (2016) (emphasis added).

The ACCA denied rehearing of the decision on September 2, 2016, and the Alabama Supreme Court denied certiorari October 21, 2016. Rule 32 counsel for Mr. Woods did not pursue an appeal in the United States Supreme Court.

c. Federal Habeas Proceedings

On October 27, 2016, Attorney Davis submitted notice to initiate federal habeas proceedings for Mr. Woods. (Dkt. 1). Together with that first submission, Attorney Davis specifically requested that the Court "appoint counsel for Woods in

this action" and "afford Woods an opportunity to amend his habeas petition with new counsel," thus indicating that she did not intend to pursue federal habeas relief on his behalf. *Id* at 16. It is here where the integrity of federal habeas proceedings began to break down.

Although Attorney Davis was not seeking appointment in the federal habeas proceedings, the District Court issued a briefing order instead of promptly appointing conflict-free counsel under 18 U.S.C. § 3599 capable of exploring all the potentially meritorious issues for federal habeas relief. On December 19, 2016, *making no mention of the October 2016 request for the appointment of new counsel*, the District Court set out the deadlines for the submission of pleadings and gave counsel just 30 days to amend the petition, despite the fact that counsel had not even requested funding for an investigation. (Dkt. 2).

On January 20, 2017, without renewing her request for new counsel to be appointed, and without explicitly advising the District Court of the actual conflict her continued representation caused (and which had been explicitly identified by the ACCA), Attorney Davis filed a Notice of Appearance to represent Mr. Woods along with a motion for a deadline extension. (Dkts. 3 and 4). On February 2, 2017, and without having conducted any investigation appropriate to a federal habeas petition, Attorney Davis submitted an amended petition, followed, the next day, by a Motion to Withdraw as Counsel and a Motion to Appoint New Counsel under 28 U.S.C. §

3599. (Dkts. 7, 11 and 12). In her February 3, 2017 Motion to Withdraw Attorney Davis said,

> Counsel represented Woods in state habeas proceedings with co-counsel, but that co-counsel had to withdraw from Woods case. *Undersigned counsel lacks adequate resources and assistance to represent Woods in federal habeas corpus proceedings, particularly given the serious nature of the offense and sentence.*
> Motion to Withdraw, Feb. 3. 2017 (emphasis added). (Dkt. 12).

The District Court again took no action on the Motion to Withdraw.

On February 17, 2017, the State submitted its Answer to the Amended Petition. (Dkt. 14). On March 7, 2017, Attorney Davis, *still* serving as counsel for Mr. Woods, moved to expand the time in which to submit the reply brief. In this motion, Attorney Davis again noted that without co-counsel, she would have "no assistance in preparing the brief." (Dkt. 18). Ten days later, March 17, 2017, without the resources that would have been authorized under 18 U.S.C. § 3599, and without any response from the District Court as to her now-multiple requests to appoint Mr. Woods new federal counsel, Attorney Davis filed the Petitioner's reply brief. (Dkt. 19).

On April 28, 2017, more than a month following the submission of Petitioner's Reply Brief, the court issued an order granting Attorney Davis's motion to withdraw, denying the motion for extension of time as moot, and appointing J.D. Lloyd as counsel. (Dkt. 20). On May 4, 2017, Mr. Lloyd submitted an unopposed Motion for Extension of Time, requesting 60 days to review the case and file any

necessary motions. (Dkt. 21). On May 8, 2017, this Court issued an order granting and denying the motion in part. (Dkt. 26). Of note, this Court observed:

> Mr. Lloyd now seeks an additional sixty (60) days in which to review the record and determine whether he will seek leave to amend the Amended Petition. (Doc. 21.*) Mr. Lloyd is advised that this is not a case in which new counsel must decipher a pro se habeas corpus petition and determine from the outset which constitutional claims are worth raising. Competent counsel has already filed two petitions and a reply brief.* The motion is thus hereby GRANTED IN PART and DENIED IN PART. Mr. Lloyd shall have twenty-one (21) days from the date of entry of this Order in which to file an amended petition, if he so chooses.
>
> (emphasis added) Dkt. (26).

In finding that Mr. Lloyd did not require 60 days in which to investigate or brief the matter and noting that counsel had already filed two petitions and a reply brief, the Court clearly identified no conflict under *Martinez* in the proceedings on account of Attorney Davis's appointment. Nor did it seek to cure this conflict—or allow this conflict to be cured—with the appointment of Mr. Lloyd. Mr. Lloyd did not appeal this order or move for any investigative funds or resources.

On May 30, 2017, Attorney Lloyd filed an Amended Petition for Writ of Habeas Corpus. (Dkt. 29). The State filed a Response (Dkt. 28) and Mr. Woods filed a Reply. (Dkt. 29). This Court denied Mr. Woods's petition on July 18, 2018. (Dkt. 31; *Woods v. Stewart*, at *12). On August 15, 2018 Mr. Lloyd submitted a Motion to Amend/Correct the petition, which was denied five days later, on August 20, 2018. (Dkts. 32 and 33. On February 22, 2019, Mr. Woods's Motion for a Certificate

of Appealability ("COA") was denied. *Woods v. Holman*, 2019 WL 5866719 (11th Cir. 2019). On October 9, 2019, the United States Supreme Court denied Mr. Woods's Petition for Writ of Certiorari. (Dkt. 39). On January 30, 2020, the Supreme Court of Alabama issued a warrant for Mr. Woods's execution for March 5, 2020.[7] (Dkt. 40).

IV. THE COURT SHOULD APPOINT NEW COUNSEL AND GRANT A LIMITED STAY OF THE EXECUTION FOR NINETY DAYS.

Mr. Woods was deprived of conflict-free counsel throughout his initial federal habeas proceeding, which was completed in large part by counsel unable to argue her own ineffectiveness. To date, no attorney has identified or investigated Mr. Woods's potential meritorious guilt phase or penalty phase claims, nor has any attorney investigated and established the factual support necessary to raise the patently clear claims of ineffective assistance of appellate and state habeas counsel. Faraino Affidavit, ¶¶ 13-17. These claims, which a cursory review reveals are substantial, were never presented to the state or federal courts because of ineffective state habeas representation in conjunction with conflicted federal habeas

[7] On January 23, 2020, Orrick filed a Complaint under 42 U.S.C. § 1983 in the Middle District of Alabama, Case No. 2:20-cv-00058-ECM.

representation. Mr. Woods has viable avenues to obtain relief, discussed in detail below.

Mr. Woods seeks the appointment of counsel under 18 U.S.C. § 3599 to correct the error of his conflicted legal representation, and a limited stay of execution to make representation in that endeavor meaningful. *See, e.g., McFarland McFarland v. Scott*, 512 U.S. 849, 858 (1994). This Court has the power to order the substitution of counsel and to issue a stay pursuant to § 2251(a)(3) and *McFarland*, even after habeas has been completed and an execution nears. *See, e.g., Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

d. Conflict Requires Appointment of New Counsel

"Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The use of the same counsel during both state post-conviction proceedings and to initiate federal habeas proceedings creates a conflict of interest which precludes bringing claims of ineffective assistance of state habeas counsel. *See, e.g., Gray v. Pearson*, 526 F. Appx 331, 332 (4th Cir. 2013) (citing *Martinez*).

As detailed above, Mr. Woods was represented by conflicted counsel at the appellate stage because Attorney Threatt had actively represented the co-defendant, Kerry Spencer, until the eve of trial. He was then represented by Attorney Davis in

state habeas counsel, who was explicitly on notice from the ACCA that she was conflicted and then filed a federal habeas petition that omitted the appropriate claim of her own ineffectiveness. Finally, Attorney Lloyd, laboring without resources and under an inexplicably expedited briefing schedule, failed to raise the issue of Davis's conflict and ultimately brought Mr. Woods's initial federal habeas proceedings to a close in under three months from appointment.

New counsel would investigate the grounds for filing a motion for relief from judgment based upon a defect in the integrity of the proceeding, among other potential claims and avenues for relief. This motion will relate to the application for writ of habeas corpus which this Court has continuing jurisdiction to hear.

e. A Limited Stay of Execution is Authorized under 28 U.S.C. § 2251(a)(3)

This Court has discretion to stay Mr. Woods's execution for up to 90 days after the appointment of new federal habeas counsel. *See* 28 U.S.C. § 2251(a)(3);[8] *McFarland v. Scott*, 512 U.S. 849 (1994). "The federal habeas corpus statute grants any federal judge 'before whom a habeas corpus proceeding is pending' power to stay a state-court action 'for any matter involved in the habeas corpus proceeding.'"

[8] Section 2251(a)(3) applies. While section 2251(a)(l) specifies that a court may issue a stay only when "a habeas corpus is pending," and section 2251(a)(2) clarifies that "a habeas corpus proceeding is not pending until the application is filed," section 2251 (a)(3) in contrast allows for a ninety-day stay to issue after the appointment of counsel. 28 U.S.C. § 2251(a)(3).

McFarland v. Scott, 512 U.S. 849, 857 (1994). A district court that would have jurisdiction to entertain a habeas corpus application regarding that sentence "may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed." 28 U.S.C. § 2251(a)(3); *see Dailey v. Secretary*, No. 8:07-cv-1897, 2019 WL 5423314, at *2 (M.D. Fla. Oct. 23, 2019) (In a case in which initial habeas proceedings had concluded, the district court "has jurisdiction to entertain habeas corpus applications" and thus may stay execution for up to 90 days after appointment of counsel under 28 U.S.C. § 2251(a)(3)"). As the Eleventh Circuit has recognized, this statute "explicitly authoriz[es] [a federal] court to grant [a] stay to allow for appointment of counsel under § 3599(a)(2)." *Bowles v. DeSantis*, 934 F.3d 1230, 1243 (11th Cir. 2019).

Under 18 U.S.C. § 3599(e), capitally sentenced prisoners have the right to assistance of counsel "throughout every . . . stage of available judicial proceedings . . . including all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." 18 U.S.C. § 3599(e). The plain language of the statute reflects that the right should be construed robustly. Interpreting the predecessor statute to § 3599, the Supreme Court remarked, "Congress' provision of a right to counsel . . . reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the seriousness of the possible penalty and . . . the unique and complex nature of

the litigation." *McFarland*, 512 U.S. at 855 (discussing 21 U.S.C. § 848(q)). "By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *Christeson v. Roper*, 574 U.S. 373 (2015) (citing *McFarland*). In *McFarland*, the Supreme Court held that a stay of execution is warranted to ensure that a petitioner's right to counsel is respected, regardless of whether an application for writ of habeas corpus is pending. Thus, *McFarland* has instructed federal courts to grant a stay when a petitioner has insufficient time to meaningfully exercise his right to counsel because of an impending execution.

The right to counsel applies to "all available post-conviction process," not merely the initial federal habeas corpus proceedings. 18 U.S.C. § 3599(e). This includes proceedings to reopen under Rule 60(b), second-in-time petitions, motions for stays of execution, applications to file a second or successive petition, petitions for executive clemency, and original writs in the United States Supreme Court. The right to counsel does not merely mean filing a pleading on the petitioner's behalf; instead, the right to counsel "necessarily includes the right for that counsel *meaningfully to research and present* a defendant's habeas claims." *McFarland*, 512 U.S. at 858 (emphasis added). Otherwise, the right to counsel would be an "empty promise." *In re Hearn*, 376 F.3d 447, 457 (5th Cir. 2004). Accordingly, "the relief

recognized in *McFarland*" is *not* "limited to those capital prisoners who have not yet filed an initial habeas petition" and "no language in the Supreme Court's opinion limits its holding to initial petitions." *Id.*

Even a cursory review of the record in this case reveals that Mr. Woods was never afforded meaningful representation able to investigate and present his case in accordance with statutory and constitutional rights or professional norms. In less than one month, clemency counsel for Mr. Woods identified *numerous* witnesses with information relevant to the appropriate resolution of the constitutional issues in Mr. Woods's case—including whether he is intellectually disabled under *Atkins* and therefore constitutionally exempt from execution—*who had never before been contacted by counsel*. Faraino Aff. ¶¶ 14-19, 21-23, 27. By simply filing and refiling insufficiently pled and unsubstantiated pleadings, Mr. Woods's counsel has never afforded him meaningful representation as contemplated by the Sixth Amendment.

In cases like Mr. Woods's where an execution date is set, the statutory right to quality legal representation has at times come into conflict with a State's interest in carrying out a scheduled execution. The United States Supreme Court and other federal courts have held that the right to counsel trumps the State's interest in a speedy execution. For example, in *McFarland*, the petitioner sought the appointment of counsel in federal court five days before his scheduled execution, having failed to secure a stay or counsel from the state courts, and the United States Supreme Court

issued a stay after it was denied by the lower federal courts. *McFarland*, 512 U.S. at 852. The "appointment [of counsel] would have been meaningless unless McFarland's execution also was stayed." *Id*. at 857. Likewise, in *Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016), applying *McFarland* in interpreting the mandate of § 3599, the Fifth Circuit reversed the district court's denial of Battaglia's motion for the appointment of counsel and granted him a stay of execution. *Battaglia*, 824 F.3d at 471. Battaglia had filed his motion twenty days before his scheduled execution, seeking counsel to investigate the possibility of a *Ford* claim that he was incompetent to be executed. *Id.* Similarly, in *Dailey v. Secretary,* Middle District of Florida Judge William Jung recognized the "scant prejudice" to the State of a limited stay of execution in a case with no pending action, especially where a petitioner has been on death row for years. No. 8:07-cv-1897, 2019 WL 5423314, at *2 (M.D. Fla. Oct. 23, 2019). The prejudice to the State is essentially nonexistent here, where the actual shooter, Mr. Spencer, is still years away from execution.

In *Christeson v. Roper*, the United States Supreme Court also stayed an execution under circumstances similar to Mr. Woods's case without an open habeas petition. *See* 135 S. Ct. 891 (2015) (per curiam). The petitioner sought new counsel to replace conflicted counsel in order to file a motion for relief from judgment. *Id.* at 893. The Court granted a stay of execution while considering whether the lower court had denied the petitioner the right to meaningful assistance of counsel in post-

judgment proceedings. The petitioner had sought appointment of conflict-free counsel, as the only remaining avenues for relief in his case would require his current counsel to "denigrate their own performance." The Court explained that "[c]ounsel cannot reasonably be expected to make such an argument." *Id.* This created a clear conflict of interest which could not be resolved short of appointing new counsel. *Id*. The Court determined that substitution of counsel was appropriate, despite the "host of procedural obstacles" the petitioner faced. *Id.* at 895.

District courts have routinely granted motions to stay execution under similar circumstances in cases with similar procedural postures. *See, e.g.*, *Dailey v. Secretary*, No. 8:07-cv-1897, 2019 WL 5423314, at *2 (M.D. Fla. Oct. 23, 2019) ("While this Court takes no position on any potential habeas application that Dailey's new counsel might file between now and the due date set below—or even if such application would be reviewable on its merits without approval from the Eleventh Circuit Court of Appeals—it is in the interests of a just and fair system for Mr. Dailey's new counsel to have the statutory grant of time to review and present habeas issues to this Court."); *Johnson v. Davis*, No. 4:11-cv-2466, Doc. 84 (S.D. Tex. Apr. 30, 2019) ("The Court appointed supplemental counsel on February 5, 2019. Section 2251(a)(3) then allowed for a stay of execution until May 6, 2019."); *Gutierrez v. Davis*, Slip Op., No. 18-70028 (5th Cir. 2018) (concluding district court did not abuse its discretion by granting a stay at the time of appointment of counsel,

which "serves the purpose of allowing counsel time to determine if an application for habeas corpus relief is appropriate"); and *Ramirez v. Davis*, 675 F. App'x 478 (5th Cir. 2017) ("Reviewing the grant of stay for abuse of discretion, we find no reversible error on the part of the district court. Moreover, the district court did not lack jurisdiction under these circumstances to grant a stay.").

As would be the primary reason to appoint new counsel and grant the stay for Mr. Woods, the court in *Johnson* granted a stay to allow newly appointed, conflict-free counsel to determine whether *Martinez* offered an avenue of relief. *Johnson v. Davis*, No. 4:11-cv-2466, Doc. 84, at 8. The court found that the "limited time since the appointment of [supplemental] counsel ha[d] not provided a full opportunity for litigating undeveloped issues." The Court found the conflict issue in *Johnson* to raise "troubling concerns" needing "resolution to preserve his rights before execution." *Id.* This Court should accordingly grant Mr. Woods a stay of up to 90 days.

f. Possible Claims for Relief

An initial cursory review of the available materials has brought to light numerous possible claims for relief. Further investigation, records review, and development are required before the identified claims can be substantiated with sufficient evidence to prevail, and they are therefore not ripe for judicial review.[9] If

[9] Because these claims are not yet ripe for judicial review, this Court cannot and should not consider the merits of these claims, and a merits review is not necessary under 2251(a)(3); in fact, it would be counterintuitive given the new appointment of counsel and additional development

and when new counsel presents these claims depends on additional time necessary for investigation and development. Additionally, more claims may arise as new counsel continues its work reviewing and investigating this case. With that caveat, a brief summary of the potential claims identified for further development are listed below:

1. State habeas counsel was ineffective for failing to investigate and plead trial counsel ineffectiveness at the guilt phase of trial, violating Mr. Woods's Sixth Amendment right to counsel under *Strickland*.
2. State habeas counsel was ineffective for failing to investigate and plead trial counsel ineffectiveness at the penalty phase at trial, violating Mr. Woods's Sixth Amendment right to counsel under *Strickland*.
3. Counsel failed to investigate and properly plead that Mr. Woods is intellectually disabled, rendering his death sentence an Eighth Amendment violation under *Atkins v. Virginia*, 536 U.S. 304 (2002).

These claims will introduce new grounds, facts and evidence, including affidavits from new lay and expert witnesses. As described in detail above, in both

necessary to make the appointment of counsel meaningful. *See Battaglia*, 824 F.3d at 475 (where petitioner had just received new counsel under 28 U.S.C. § 3599, "a declaration that the [contemplated claim for relief] is unlikely to succeed" would be "premature"); *Johnson v. Davis*, No. 4:11-cv-2466, Doc. 84 (S.D. Tex. Apr. 30, 2019) (finding "because supplemental counsel has had little time to investigate potential issues, and conflict has apparently compromised Johnson's legal representation, it would be premature to decide whether Johnson may succeed in any future ground for relief.").

the state and federal habeas proceedings, counsel only nominally included the above claims, failing to plead facts and evidence necessary to substantiate the allegations or make the required prejudice argument. The *Strickland* and *Atkins* claims will therefore not be the same as the wholly unsupported claims adjudicated on the merits by the state and federal courts. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (limiting federal habeas review under § 2254(d) to "the record that was before the state court that adjudicated the claim on the merits"); *id*. at 186 n.11. The "specific factual foundation" grounding the above claims will necessarily be different than the shell *Strickland* claims as to both guilt and punishment and mention of intellectual disability in the previous pleadings, because state and federal habeas counsel did not include *any* factual foundation to ground their claims. *Kelley v. Sec'y, Dept. of Corr*., 377 F.3d 1317, 1344-45 (11th Cir 2004) (state-court exhaustion exists only where a claim's particular legal and factual bases are the same as presented to the state court). The procedural default of these distinct new claims is further excused under *Martinez*, and new counsel can request that this Court stay and abey the unexhausted claims under *Rhines v. Weber*, 544 U.S. 269 (2005), for state-court exhaustion.

Procedures exist in the federal courts, including this Court, to litigate these potentially meritorious claims. Those procedures may include but are not limited to a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (including a second-in-time petition); a successive petition for writ of habeas corpus under 28 U.S.C.

§ 2244, including a claim under 2244(b)(2)(B) predicated on newly discovered evidence of actual innocence; a motion for relief from judgment under Federal Rule of Civil Procedure 60(b); a motion for relief from judgment under Federal Rule of Civil Procedure 60(d); an original writ petition in the United States Supreme Court, and/or a federal 42 U.S.C. § 1983 action.

It is patently clear from the record before this Court that Mr. Woods's claims of ineffective assistance of state-postconviction counsel pursuant to *Martinez* are likely meritorious, given the absolute failure of any of Mr. Woods's postconviction attorneys to investigate this case. Farraino Aff. ¶ 14-25, 27-28. The professional norms for capital defense at the time of Mr. Woods' trial and subsequent proceedings called for "counsel at every stage . . . to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1015 (Feb. 2003) ("ABA Guidelines"). The ABA Guidelines further specify multiple specific categories of fact and mitigation evidence that the defense team should investigate. Cmt. to ABA Guideline 10.7, *id*. at 1018-27. The assistance of investigators, a mitigation specialist, and experts as part of the defense team is paramount to discharging investigative duties in accordance with professional norms. *See* ABA Guideline 4.1, *id*. at 952-64. The duty to "continue an aggressive investigation of all aspects of the

case" then extends to post-conviction counsel. ABA Guideline 10.15.1, *id*. at 1080. The Supreme Court has made clear that counsel may not simply shirk investigation; decisions narrowing investigation must themselves be reasonable. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Given the serious nature of the woefully deficient representation chronicled here and the federal procedures in place to bring such claims, future litigation is not a "wholly futile enterprise." *See Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016). Nor are Mr. Woods's claims "*indisputably* barred." *Id.* (emphasis added). As the Fifth Circuit recently recognized, it is only in a "rare circumstance" that an inmate's claims would be wholly futile. *Id.* It is certainly not the case here; the State's conviction rests upon weak and possibly tainted evidence supporting the prosecution theory that Mr. Woods enticed the officers to enter the house to serve a warrant on him, so that another person—Kerry Spencer—could then ambush and kill them. No attorney conducted a thorough investigation in this case to counter that narrative, as counsel was required to do under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. Thus, it would be "improper to approve his execution before his newly appointed counsel has time to develop his . . . claim[s]." A stay is required to make Mr. Woods's right to counsel meaningful. *Id.*

Respectfully Submitted,

/s/ Alicia K. Haynes
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CERTIFICATE OF COMPLIANCE

I certify this response complies with the length limitations set forth in Fed. R. App. Proc., Rule 27(d)(2)(a) because it contains 8,500 words, excluding the documents authorized by Fed. R. App. P. 27(a)(2)(B).

I further certify this response complies with the type-style requirements of Fed. R. App. P. 27(d)(1)(E) in that this documents has been prepared using Microsoft Word in 14-point font in Times New Roman.

/s/ Alicia K. Haynes
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Attorney for Plaintiff-Appellant
For Limited Purpose

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Alicia K. Haynes
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For Limited Purpose

EXHIBIT 1

State of Alabama
County of Jefferson

AFFIDAVIT OF LAUREN ELAENA FARAINO

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1. My current full legal name is Lauren E. Faraino, SSN: XXX-XX-X151, born April 10, 1991.

2. My current address is 1321 Parliament Lane, Birmingham, AL 35216.

3. I am aware that Nathaniel L. Woods has been convicted of capital murder for the deaths of three Birmingham police officers, and that he was sentenced to death. I currently represent Nathaniel Woods in seeking executive clemency. I have been asked by attorneys from the American Bar Association ("ABA") Death Penalty Representation Project to provide this statement detailing my knowledge of and involvement in Nathaniel's case. I have provided this statement voluntarily and of my own free will.

4. I began reaching out to attorneys around the country about Nathaniel Woods's death penalty case on or around February 20, 2020. It is my understanding that on February 25, 2020, an email I sent to various contacts asking them to please refer me to attorneys who could review the issues in Nathaniel's case was forwarded to attorneys at the ABA Death Penalty Representation Project. These attorneys contacted me and requested that I send them any case information and records I had in my possession. I sent them various files, transcripts, and pleadings associated with Nathaniel's case.

5. I have been a member of the New York State Bar since April 2017. I am currently licensed to practice in New York State. My legal background is in corporate and antitrust law as an associate at Wachtell, Lipton, Rosen & Katz, where I worked for nearly three years. In February 2019 I joined the investment practice Starr Enterprises, where I

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currently work. Since leaving corporate law, I have continued to accept certain limited pro bono projects.

6. I first learned about Nathaniel's case on February 5, 2020 through a news article regarding his pending execution date of March 5, 2020. After reading that Nathaniel had been sentenced to death despite not having shot the three police officers who were killed in the crime, I became curious about the grounds on which he was convicted and sentenced.

7. With the help of my legal assistant, Elaena Starr, I began conducting research into the case, including pulling court documents and news articles available online. The more I learned about the case, the more concerned I became about whether Mr. Woods was in fact guilty of capital murder and/or whether he had received competent legal representation.

8. Ms. Starr went to the Jefferson County Courthouse, where she read every page of the 22 volumes of transcripts from Nathaniel's trial. Ms. Starr paid to have copies made of each of these files so that she could continue to study them and pass them to me to evaluate possible legal claims. Through this research, we began to identify what appeared to be numerous critical errors and inconsistencies in Nathaniel's case and the evidence presented at trial.

9. On February 7, 2020, I contacted LaJuana Davis, whom I saw had been Nathaniel's state post-conviction lawyer. On February 8, 2020, Ms. Davis directed me to contact Marc Shapiro of Orrick Herrington & Sutcliffe in New York, New York, whom I learned was representing Nathaniel in a 42 U.S.C. § 1983 case in the Middle District of Alabama regarding method of execution.

10. I contacted Mr. Shapiro, offering to support the existing legal efforts. On February 10, 2020, I spoke with Mr. Shapiro and his colleague, Mr. Shane McCammon. They informed me that their team was only representing Nathaniel in connection with the §1983 complaint in federal district court regarding the execution protocol to be used

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during Nathaniel's execution but was not going to be able to investigate or bring any other litigation on behalf of Nathaniel.

11. Mr. Shapiro and Mr. McCammon asked me if I would be interested in drafting Nathaniel's clemency petition. I thought this was odd, as they did not mention whether Nathaniel's local counsel J.D. Lloyd had begun a clemency petition or would be involved in the drafting efforts. Because I wanted to help, I agreed to seek Nathaniel's consent to begin clemency efforts on his behalf.

12. Beginning on February 11, 2020, I began going to the Jefferson County Courthouse to read the files in Kerry Spencer's case. Kerry Spencer is Nathaniel's co-defendant and the confessed shooter in the murders of June 17, 2004. He has always proclaimed Nathaniel is innocent of any plot to murder the officers, and that he only shot the officers in self-defense. Inconsistencies in the testimony at Spencer's trial in June 2005 and Nathaniel's' trial in October 2005 became apparent the more I read. This was interesting because I hadn't seen the inconsistencies in this testimony explored in any of the legal appeals filed in Nathaniel's case.

13. It was also on this day that I first read an affidavit signed in 2012 by Tyran "Bubba" Cooper, which stuck out to me, because I know he was mentioned as a potential witness during Nathaniel's trial. Bubba was a drug dealer in Birmingham in 2004. His affidavit (on file at the courthouse) detailed payments that he made to Officer Carlos Owen and Officer Harley Chisholm (two of the victims) in exchange for not interfering in his illegal activity and for protection of his "drug house," known as the "Green Apartments" at 1619 18th Ave. N. Ensley in Birmingham. This is where the shooting took place. None of this information appeared in Nathaniel's trial record, which I found troubling. Nathaniel was convicted of capital murder based on evidence that he enticed the police officers to enter the apartment. If the police officers had their own motives to be at the Green Apartments that day and were not enticed there by Nathaniel, that would mean Nathaniel is innocent of capital murder.

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14. On February 12, 2020, I spoke by phone to Pamela Woods, Nathaniel's sister. Ms. Woods told me that she would convey my desire to assist with clemency to her brother and would obtain his consent to undertake clemency efforts on his behalf. Ms. Woods told me that she was in contact with certain witnesses in his case and would provide my phone number to them. She also told me that she would attempt to locate other witnesses that she was not currently in contact with, but who might provide useful information in support of clemency. She told me that it had been years since anyone representing her brother had reached out to her in connection with his case. She told me that Nathaniel was offered a plea deal of 20-25 years before going to trial and after Mr. Spencer had received a recommendation of Life Without Parole from the jury—which was overrode by the judge to impose death.

15. On February 12, 2020, I spoke by phone to Allen Smith, who was Bubba's colleague in illegal drug activities. I identified him as a potential witness to Nathaniel's case via Bubba's affidavit. Mr. Smith told me that he used to sell drugs out of the Green Apartments where the shooting took place. Mr. Smith had direct knowledge of Bubba's payments to Officers Owen and Chisholm. He told me that a "public defender" representing Nathaniel contacted him once to learn what he knew about the police officers who were killed and their activities at the Green Apartments. Mr. Smith told this attorney that Detective Russell called him by phone after the shooting at the Green Apartments. Detective Russell told Mr. Smith that, if he testified that Bubba was at the Green Apartments and involved in the shooting, then Detective Russell would give Mr. Smith all of the drugs and money that were recovered from the scene of the crime. Mr. Smith said that Nathaniel's attorney never contacted him again after this first meeting. Mr. Smith never heard from another one of Nathaniel's attorneys.

16. On February 14, 2020, I spoke by phone to Courtney Spencer, Kerry Spencer's brother. He did not testify at Nathaniel's trial. In my conversation with him, I learned that he was a witness to the interactions between Nathaniel and the police officers on the day of the shooting, and that he saw one of the officers with his gun drawn before

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he (the police officer) entered the Green Apartments. He told me that no one representing Nathaniel had ever contacted him to learn what he knew.

17. On February 15, 2020, I spoke by phone to Bubba, who confirmed the accuracy of the affidavit he provided to Mr. Spencer's counsel in 2012. I was amazed that this affidavit was never used in any of the appeals in Nathaniel's case to support his claims that he did not plan to entice any of the officers into the Green Apartments that day. Mr. Cooper provided additional details about how and when he paid officers Owen and Chisholm. He was never contacted by any attorney or investigator working on behalf of Nathaniel.

18. On February 16, 2020, I spoke by phone to Nathaniel Woods, Sr., Mr. Woods' father. Mr. Woods detailed extensive abuse that Nathaniel suffered at the hands of his mother growing up. He told me about once taking Nathaniel to the local police precinct to have the injuries inflicted by his mother's beatings photographed because they were so severe. Nathaniel's mother was arrested for the abuse but told the officers that Nathaniel had fallen out of the car. Nathaniel's father reported that, after this incident, Nathaniel was never the same and suffered from nervous habits like biting his fingers. My research and careful reading of the trial transcripts and post-conviction claims revealed that none of this information had been presented to any court.

19. Mr. Woods also told me that he ran into a Birmingham police officer at a dentist's office who told him that Mr. Woods needed to find an "Officer White" to uncover information that could lead to Nathaniel getting a new trial. Mr. Woods overheard this officer speaking in the dentist office about doing ministry work within prisons. Mr. Woods approached the officer to ask whether he had ever done prison ministry work at Holman Prison in Atmore, AL. The officer responded that no, he had not been there. Mr. Woods then told the officer that his son was in Holman Prison on death row and began to detail his case. This officer then responded that he was very familiar with the case. The officer told Mr. Woods that he could not tell him his name because he was about to retire and would lose his pension if he spoke out, but he told Mr. Woods to find "Officer White."

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20. According to Mr. Woods, the police officer he encountered at his dentist office told him that the police had been at the Green Apartments on the day of June 17, 2004 for a squad killing. Mr. Woods explained that a squad killing is when police officers go to a home with the intention of killing the occupants. To my knowledge, Mr. Woods was not able to follow up on this information.

21. On February 16, 2020, I again spoke by phone to Pamela Woods. Ms. Woods confirmed the story of repeated abuse that Mr. Woods had told me about Nathaniel's life growing up. She provided the additional details that their mother punished them by making them sleep in the car outside in the middle of winter. Ms. Woods further told me that she and her sister had to call the police to intervene in the episodes of abuse. Finally, Ms. Woods told me that the day after Nathaniel's father brought him to the police station, Nathaniel developed the nervous habit of chewing on his knuckles so much that the bone would show through. Ms. Woods told me that Nathaniel's school Parkview in Tuscaloosa, AL later observed this habit and sent him to therapy at Indian Rivers Mental Health Center, also in Tuscaloosa, AL. Ms. Woods also told me that J.D. Lloyd never spoke to her about Nathaniel's case other than when she emailed him for information, and neither he, nor any of Nathaniel's previous postconviction attorneys ever interviewed her or members of their family.

22. On February 16, 2020, I spoke by phone to Jackie Walters, the sister of Shantae Walters. Shantae Walters was the mother of Nathaniel's three children. Shantae Walters died of lung cancer on March 17, 2017. Jackie Walters told me that she accompanied her sister Shantae in February 2004 to withdraw charges related to a domestic disturbance that occurred at Shantae's home between Nathaniel and Shantae. Ms. Jackie Walters detailed that the domestic disturbance was related to destruction of property but not physical violence. A few days after this domestic disturbance event, Shantae decided that she did not want to pursue charges against Nathaniel. She asked Ms. Jackie Walters to accompany her to the Fairfield Police Department to drop all charges. The two went to the Fairfield Police Department, where Shantae signed a form indicating

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her desire to withdraw the warrant for his arrest. Ms. Jackie Walters states that the Fairfield Police Department gave a copy of this signed form to Shantae. Shantae's family was unable to locate this form in her belongings. Ms. Jackie Walters has expressed a willingness to sign an affidavit detailing the above facts. I also believe that Fairfield Police Department should have record of the signed document withdrawing these charges. It is my understanding that this is the warrant that the police stated they were attempting to serve on JD, and that discovery that it was no longer active would be critical information in his case. None of Nathaniel's attorneys ever reached out to Jackie or Shantae Walters for information prior to my contacting them.

23. On February 16, 2020, via Pamela Woods, I spoke by phone to Wanda Bryant, the Ensley Constable, who was a resident of the Ensley community at the time of the shooting. Ms. Bryant was not a direct witness to the shooting of June 17, 2004, but she and her sons had direct knowledge of Officer Owen and Officer Chisholm stealing and planting drugs on individuals from the community. Ms. Bryant's son, who wished to remain anonymous, briefly got on the phone during this call with some friends to detail their own interactions with these officers. One man reported that Officer Owen planted drugs on him, and that he went to prison as a result. Based on my review of the trial transcripts, none of these witnesses testified at Nathaniel's' trial or were mentioned in later appeals.

24. On February 17, 2020, Pamela Woods told me that she had corresponded with Mr. Lloyd, Nathaniel's appointed attorney, in November 2019 about her concerns that there were no other plans for litigation in Nathaniel's' case after the petition for certiorari was denied by the U.S. Supreme Court. She told me that her boyfriend again reached out to Mr. Lloyd on February 3, 2019, with information that a witness who testified at Nathaniel's' trial—Marquita McClure—would be willing to speak with him. Mr. Lloyd never responded to this message. According to my conversations with Nathaniel's family members, Mr. Lloyd did not contact Nathaniel or his family after

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Nathaniel's execution date was set on January 30, 2020. He received notice of his execution date in a letter delivered to his cell by the Warden at Holman Prison.

25. On February 17, 2020, I again spoke by phone to Orrick attorney Marc Shapiro. Mr. Shapiro told me that his team was at maximum capacity in handling the § 1983 motion and that they would not be able to investigate the information I was discovering or bring other motions in this case.

26. On February 19, 2020, I spoke by phone to Marquita McClure. Ms. McClure reported that she had been intimidated by the prosecution into lying on the stand. Specifically, she told me she untruthfully testified that she had observed Mr. Kerry Spencer and Nathaniel unloading weapons from the car into the Green Apartments on the morning of June 17, 2004. In truth she had not seen that that morning. None of Nathaniel's postconviction attorneys had ever contacted her about the case.

27. On February 20, 2020, I spoke by phone to JD Lloyd, Nathaniel's local attorney. Mr. Lloyd told me that he was first appointed to Nathaniel's case by a magistrate judge. This judge told Mr. Lloyd that he would only have to be on the case for a few weeks, and then the Federal Public Defender in Montgomery, AL would take over the case. Mr. Lloyd told me on this call that he believed he had been ineffective in representing Nathaniel. I asked Mr. Lloyd whether he would be comfortable with me bringing on additional outside counsel to support any filing efforts. Mr. Lloyd told me that he would be comfortable with finding another person to do this work. **Mr. Lloyd told me that he did not have any current plans to file any motions in connection with Nathaniel's case, despite the new evidence I was uncovering from witnesses who never spoke to an attorney for Nathaniel, and despite Nathaniel's clear wishes to continue challenging his conviction and sentence**.

* * *

3/3/2020

I hereby state that the information is true, to the best of my knowledge. I also confirm that the information here is both accurate and complete, and relevant information has not been omitted.

Signature

Lauren G. Faraino

Name (Printed)

March 3, 2020

Date

State of Alabama

County of Jefferson

Signed and sworn to (or affirmed) before me on March 3, 2020 (date)

By Lauren G. Faraino (name(s) of individual(s) making statement.

Signature of notarial officer Julie D. Waddell

Stamp

JULIE D. WADDELL
My Commission Expires
December 13, 2022

Title of office

My commission expires:

LIMITED REPRESENTATION AGREEMENT

I am pleased to offer you limited legal representation on a pro bono basis. This Limited Representation Agreement explains your rights and obligations in our attorney-client relationship. Please read it carefully and keep a copy in a safe place.

This Limited Representation Agreement (hereafter, Agreement) is between **NATHANIEL L. WOODS** (hereafter, Client) and **LAUREN E. FARAINO**, the attorney (hereafter, Attorney).

Attorney will represent Client in the following matter(s) only:

1. investigative work in preparation of clemency petition;
2. drafting and editing of clemency petition; and
3. advocacy regarding clemency representation.

Specifically, litigation is not included in this Agreement. Attorney makes no guarantees with regard to the value or outcome of the case.

LEGAL SERVICES PROVIDED BY ATTORNEY

1. Client recognizes an attorney-client relationship exists between Client and Attorney.
2. Client recognizes that Attorney will not provide representation in any litigation and Attorney is not barred in the state of Alabama.
3. Client recognizes that Attorney will consult with the American Bar Association (ABA) Death Penalty Representation Project, and attorneys JD LLOYD, MARC SHAPIRO and SHANE MCCAMMON as necessary to further representation. Client consents to the disclosure of information to these parties to further Attorney's representation of Client.

ATTORNEY RESPONSIBILITIES

4. To keep Client informed about any important developments in his/her case.
5. To consult Client before taking any significant action or decision on his/her behalf.
6. To pursue the case with all reasonable diligence and maintain the confidentiality Client shares with Attorney.

ATTORNEY FEES

7. Client will not be charged for my attorney's services.
8. Attorney will attempt to have fees waived whenever possible, and in its sole discretion may choose to absorb any cost or expense.

COMMUNICATION

9. Attorney will keep the Client informed of developments in my matter(s) and consult with Client about how to respond to any offers. No settlement will be made without Client approval.

TERMINATION

10. Attorney may terminate services (subject to Court approval, if required), upon written notice to Client of the reasons for termination. Such reasons may include failure to cooperate with Attorney, misrepresentation to Attorney, the existence of a conflict of interest, if Client requests the attorney to engage in frivolous or unlawful actions, or if representation would not help achieve Client objectives.
11. Client may terminate the relationship with Attorney for any reason at any time. Client will provide Attorney notice of the termination in writing.
12. During your representation, a number of files may be created by Attorney. After the completion of your representation, upon your request, these files will be returned to you or forwarded to another attorney designated by you. Attorney files, including, for

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F: (205) 969-0101

2647 Rocky Ridge Lane
Birmingham, AL 35216
LFaraino@gmail.com

example, administrative records, time and expense reports and the like, will be retained by Attorney.

13. Upon termination of this representation, all documents containing confidences, secrets and/or privileged information shall be sealed.

I have read the Agreement, had an opportunity to ask any questions about the Agreement, and understand it to be the full Agreement for representation in this case.

Nathaniel Woods
CLIENT'S SIGNATURE

2/26/2020
DATE

ATTORNEY'S SIGNATURE

2/26/2020
DATE

EXHIBIT 2

From: Rita Briles <briles@goldenkeylawgroup.com>
Date: March 5, 2020 at 7:36:37 AM CST
To: Will.Parker@governor.alabama.gov, Erika.McKay@governor.alabama.gov, Pam.Chesnutt@governor.alabama.gov, Lauren Faraino <lfaraino@gmail.com>
Subject: NATHANIEL WOODS

Dear Mr. Parker,

My name is Rita Briles, and I was trial counsel for Nathaniel Woods in his 2005 trial. There are a number of details from that trial that I would like to have the opportunity to speak about, but there is one thing I want to make abundantly clear in light of Attorney General Steve Marshall's statement to the Governor's Office this evening: **Nathaniel was offered a plea deal by the District Attorney's office prior to the start of his trial.**

Attorney General Marshall states that Woods's prosecutors-former Jefferson County District Attorney David Barber and Assistant District Attorney Mara Sirles Russell-vehemently and unequivocally deny that such an offer was ever made. I confidently and unequivocally state that they *did* offer a plea deal of 20-25 years to Nathaniel. I specifically recall speaking with Ms. Mara Sirles about the terms of this plea deal. I met at least once with Ms Sirles in person at the courthouse to discuss the terms of the plea deal they were offering. After this meeting, I remember going back to Nathaniel with the terms of the plea deal to discuss.

I am signing an affidavit in the morning stating these facts. As soon as it is notarized first thing in the morning, I will immediately send it to you.

Sincerely,
Rita Briles

Sincerely,
RITA M. BRILES
Attorney-at-Law
Golden Key Law Group, PLLC
5030 78th Ave. Suite 13
Pinellas Park, FL 33781
Phone: 727-317-4738
Fax: 727-362-1357

Please copy my paralegal, Ms. Charin Campbell, at la@goldenkeylawgroup.com on all legal correspondence. Thank you.

EXHIBIT 3

March 2, 2020

Dear Judge,

Throughout the appellate process, I've been unhappy with my counsel, including my current counsel. He rarely visited or contacted me. After I received notice of my execution date, I did not hear from him. My family and I haven't been able to contact him. I would like a new counsel from The Capital Habeas Unit of the Federal Defenders for the Middle District of Florida to represent me in my case.

Thanks

Nathaniel Woods