

Verified Surreponse to State’s Response
in Opposition to Request for Permission
to File Successive Petition for Post-Conviction
Relief – Benjamin Ritchie

**In the
Indiana Supreme Court
No. 24S-SD-00342**

Benjamin Ritchie,)	Appeal from the
Appellant,)	Marion Superior Court
)	
v.)	No. 49G04-0010-CF-172900
)	
State of Indiana,)	The Honorable Patricia Gifford,
Appellee.)	Judge.

**Benjamin Ritchie’s Verified Surreponse to State’s Response
in Opposition to Request for Permission to File Successive
Petition for Post-Conviction Relief**

Petitioner Benjamin Ritchie, by counsel, submits this surreponse to the State’s Response in Opposition to Request for Permission to File Successive Petition for Post-Conviction Relief.

This Court should grant Ritchie’s successor request and allow him to develop the facts and law showing that death is an inappropriate penalty in this case. Ritchie has shown a “reasonable possibility” he is entitled to relief on these claims. Indiana Post-Conviction Rule 1(12)(b).

The State requests this Court deny Ritchie’s request for an opportunity to prove his claims on the basis that, according to the State, Ritchie has not proven his claims. E.g., p25: “Ritchie does not attempt to prove” that post-conviction counsel fell below the *Baum v. State* standard; p26: “Ritchie has not proven”

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ineffective assistance; p27: “[Ritchie] has not proved” deficient performance.

The State asks the Court to decide before the facts are developed and presented in a successive petition setting. The purpose of a pleading—the purpose of a proposed successive post-conviction petition—is to set out the facts which, *if proven*, merit a remedy. The question before the Court is whether Ritchie has shown facts that *if proven* would have a reasonable possibility of success.

Ritchie has shown a reasonable possibility of success on the merits of the claims presented regarding brain damage due to FASD.

The State devotes significant space to out-of-context excerpts from the trial record which, the State asserts, show that the *effect* of Ritchie’s mother’s alcohol abuse has been presented. This assertion is contradicted by the State’s penalty phase argument that “no evidence of fetal alcohol syndrome or fetal alcohol effect has been introduced.” Trial Record (TR) 2576. (Fetal alcohol syndrome is now commonly considered “fetal alcohol spectrum disorder,” or FASD.)

Testimony of Ritchie’s exposure to prenatal alcohol is useless without evidence of the effect on Ritchie due to that exposure. Defense trial expert Dr. Michael Gelbort identified brain damage. Gelbort was not qualified to explain the effects of that damage on Ritchie’s behavior. Gelbort admitted that diagnosing FAE or FAS “is not my job. It’s not the thing that I’m trained in.” TR 2551.

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Gelbort specifically denied being able to help the jury understand “the nature or extent of [Ritchie's] difficulties. Gelbort identified “something wrong” in an area of Ritchie’s brain but said he “didn’t really know the nature, extent, depth and breadth of it.” TR 2498-99. Counsel’s decision to use an expert unqualified for this case deserves no deference. As in *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003), instead of securing proper expert assistance, trial counsel “chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.”

Ritchie’s request, amply supported by preliminary assessments from respected experts, involves evidence which has not been presented. If allowed to proceed on a successive petition, Ritchie will develop and present the effects and severity of FASD at the time of the crime. Neither his trial attorneys nor his post-conviction attorneys effectively pursued the clear indicators of FASD-related brain damage.

Prior counsel unreasonably focused on perceived facial characteristics and neglected the clear scientific evidence. Those failures occurred despite established knowledge at the time of Ritchie’s trial that harmful effects on a fetus did not always manifest in facial abnormalities. Impairments attributable to FASD exacerbated Ritchie’s conduct at the time of the crime. The causes and extent of

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the impairments also constitute strong mitigating evidence which was not presented by the trial attorneys.

Post-conviction counsel Brent Westerfeld will testify that, “Mr. Ritchie was provided inadequate post-conviction representation because we failed to investigate a claim of ineffective assistance of trial counsel for failure to present evidence to Benjamin Ritchie’s jury and trial judge that was both evident and likely to succeed.” Exhibit F to the Proposed Successive Petition. At the time of Ritchie’s post-conviction proceeding, fetal alcohol syndrome had been identified by the American Bar Association as an issue which should be considered in every death penalty case. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). *See also Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

Ritchie is prepared to present evidence from experienced and qualified experts regarding the nature and extent of Ritchie’s brain damage. Dr. Paul Connor will have conducted a neuropsychological evaluation which will allow him to offer an opinion about the effect of Ritchie’s brain damage. Based on Dr. Connor’s evaluation, Dr. Ken Jones will be able to provide specific diagnosis on the FASD spectrum. Dr. Theodore Lidsky will have reviewed the physical and behavioral effects of Ritchie’s lead exposure. Dr. Megan Carter, after record review, interviews of Ritchie and appropriate witnesses, and review of the

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opinions of Drs. Connor, Jones, and Lidsky, will be able to explain how Ritchie's prenatal and early childhood brain damage contributed to Ritchie's behavior before and at the time of this crime. Ritchie believes that together, the experts will explain how the dual injuries to Ritchie's brain diminish the weight of the aggravating circumstances and increase the weight of the mitigating circumstances. All experts have confirmed their ability to complete examinations by March of 2025.

In *Rompilla v. Beard*, *supra*, the Supreme Court reversed the denial of habeas corpus relief because, in part, trial counsel failed to recognize and follow-up on "red flags" which, once properly investigated, showed that the petitioner "suffer[ed] from organic brain damage." That brain damage "relate[d] back to [Rompilla's] childhood, and [was] likely caused by fetal alcohol syndrome" and "Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Rompilla v. Beard*, 545 U.S. at 392 (quoting *Rompilla v. Horn*, 355 F.3d 233, 279-80 (3d Cir. 2004) (Sloviter, J., dissenting)). See also *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (because of inadequate investigation, counsel "failed to uncover and present" evidence of Porter's mental health or mental impairment), and *Sears v. Upton*, 561 U.E. 945, 949-51 (2010) (inadequate investigation resulted in failure

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to discover mitigating evidence, including “significant frontal lobe abnormalities”).

In *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), cited in Ritchie’s proposed successive post-conviction petition, the United States Court of Appeals for the 4th Circuit affirmed the District Court’s grant of habeas corpus relief.

Williams’s trial attorneys both testified at the state post-conviction hearing, “but neither could recall a mitigation investigation into FAS, or why such an investigation was not conducted.” *Id.* The post-conviction court denied relief, concluding that trial counsel “‘*made a strategic decision* not to present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (*though trial counsel was unable to articulate the reasons for that strategic decision*).’” 914 F.3d at 310 (quoting state post-conviction order) (emphases added in *Williams v. Stirling*).

The district court granted habeas corpus relief in *Williams*, and the 4th Circuit affirmed. Even though Williams’s trial attorneys “consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments” 914 F.3d at 313-14, sentencing relief was required by the United States Constitution. Relief was necessary because “[A]s *Wiggins [v. Smith]*, 539 U.S. 534 (2003) makes abundantly clear, an

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inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance.” *Williams, supra*, 914 F.3d at 314.

Gelbort, the only witness called to provide a scientific reason for Ritchie's behavior, testified that he was unable to determine the etiology of Ritchie's frontal lobe damage. TR 2498-99. Ritchie's trial counsel failed to adequately investigate, and completely failed to present evidence of, FASD, which is “evidence of an overarching neurological defect that *caused* [Ritchie's] criminal behavior.” *Williams*, 914 F.3d at 315 (emphasis in original). FASD is both *cause and effect* of criminal behavior. *Id.* (emphasis in original).

FASD provides the missing nexus for Ritchie's behavior. A nexus between mitigation and the crime “may well affect the weight” the mitigation is given. *Bivins v. State*, 735 N.E. 2d 1116, 1126 (Ind. 2000). At Ritchie's trial, the State's ballistics and firearms expert acknowledged that evidence from the scene was consistent with Ritchie's assertion that he did not intend to hit Officer William Toney when he shot. As Post-Conviction Judge Patricia Gifford found, “[The State's expert's] testimony did not exclude [Ritchie's] version of events.” Petitioner's Post-Conviction Appendix, 453 (Findings of Facts, Conclusions of Law and Judgment on Petition for Post-Conviction Relief at 25). Rather, Ritchie said that he shot wildly, in a panic, hoping Officer Toney would stop chasing him.

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Ritchie's guilt was not disputed. The only issue at trial was whether Ritchie should be sentenced to death. Evidence that behaviors associated with Ritchie's brain damage were consistent with Ritchie's version of the crime is reasonably likely to have persuaded the jury that Ritchie need not die. Even if the jury chose to believe the State's version of events, a diagnosis of FASD, and expert description of the effects of the disorder, would have provided an explanation of Ritchie's behavior. Trial counsel's failure to provide this evidence is prejudicial. Post-conviction counsel should have investigated this issue but did not. The resulting record does not satisfy the Indiana standard for who should be executed.

As in *Rompilla v. Beard*, Ritchie's trial attorneys' performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). Mirroring *Rompilla*, Ritchie's attorneys failed to follow up on signs of organic brain damage. Counsel's failures deprived the jury and the judge of evidence of an "overarching neurological defect" which lessens Ritchie's moral culpability. *Williams v. Stirling, supra*, 914 F.3d at 315. This neurological defect diminished Ritchie's "capacity to appreciate the criminality of his conduct or to conform his conduct to the law . . . at the time of the offense." *Rompilla v. Beard, supra*, 545 U.S. at 392 (internal quotation marks omitted). Prior counsel completely missed the sentencing impact of the fact that Ritchie's version of events is consistent with the impaired impulse control associated with FASD.

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Had counsel done an adequate investigation, they would have been able to argue the significant impacts of Ritchie's FASD as opposed to the weak defense closing argument the State quoted in its Response, that "Ben Ritchie had a few brain cells killed already, before he was even born." Response at 17-18 (quoting TR 2842). The State argued in penalty phase closing, "[I]f you look at the Defendant you don't see the signs of fetal alcohol syndrome or even fetal alcohol effect. And you have a full scale IQ at the age of 9 of 101. . . . If at birth he had been affected by alcohol that badly, he would not have had that mid-average IQ." TR 2804-05. *See also* TR 2816-17. Had counsel gotten appropriate experts, they could have told the jury the "signs" of FASD instead of leaving it up to the jury to "see" for themselves. An appropriate expert could have explained that, depending on Ritchie's specific FASD diagnosis, he may or may not have associated physical features.

An appropriate expert also could have explained that (contrary to the State's argument), Ritchie's IQ did not rule out FASD. "FASD increases the risk for intellectual disability by 23 times. However, the most typical presentation of FASD is not intellectual disability... People with FASD ... frequently have higher IQs but much lower adaptive skills." Larry Burd & William Edwards, *Fetal Alcohol Spectrum Disorders Implications for Attorneys and the Courts*, *Crim. Just.*, Fall 2019, at 21, 27. *See also* N.N. Brown et al. *A Proposed Model Standard*

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for Forensic Assessment of Fetal Alcohol Spectrum Disorders, 38 J. Psychiatry & L. 383, 386-87 (2010) ("Other misconceptions [of FASD] ... include: ... persons with IQs in or near the average range couldn't have FASD and/or couldn't have neurocognitive deficits that cause them to function at levels similar to those with intellectual disabilities[.]").

An appropriate expert also could have explained that Ritchie's adult IQ testing, administered by Gelbort, was significantly lower than childhood testing with the WISC-R and such age-related decline in functioning is typical in people with FASD. Connor, P., Streissguth, A., (1996) Effects of Prenatal Exposure to Alcohol Across the Life Span, *Alcohol Health Res World*, 20(3): 170-174. Cognitive abilities develop more slowly, and over time impairments become more pronounced. At the time of the crime, Ritchie's IQ was in the low average range and reflected "deficits in functional mental control." See Gelbort's report at 2. Not only did Ritchie's IQ not rule out FASD, but the fall in his IQ score was consistent with the cognitive impairments that result from prenatal alcohol exposure.

Post-conviction counsel's failure to identify and present this significant failure by trial counsel renders post-conviction counsel's performance deficient under *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989). The Court should allow development of the evidence that Ritchie's brain damage may merit a sentence

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other than death. *See Hendrix v. State*, 557 N.E.2d 1012, 1014 (Ind. 1990) (allegation of failure to provide adequate assistance in post-conviction can be “an avenue” to avoid an answer raising procedural default) (DeBruler, J., concurring, joined by Shepard, C.J., and Dickson, J.).

Ritchie requests additional post-conviction review that would take very little time to complete in order to exhaust all claims that have a reasonable possibility of success prior to his execution.

Ritchie has shown a reasonable possibility of success on the merits of the claims presented regarding brain damage due to lead poisoning.

Ritchie's post-conviction attorneys exacerbated the deficient performance of trial counsel by inadequately investigating and presenting the compounding brain injury present due to lead poisoning. Post-conviction counsel presented an affidavit regarding an analysis of Ritchie's baby teeth, but nothing more. Ritchie was exposed to enough lead as a child that it can be presumed he suffers brain damage. Inexplicably, counsel called no witness regarding lead-based brain damage, neglected to present any evidence specific to damage to Ritchie's brain, and made no effort to connect the brain damage to Ritchie's crime. Counsel's proposed post-conviction judgement included 15 pages regarding the performance of Ritchie's trial counsel, in which post-conviction counsel made no mention of Ritchie's brain damage. Petitioner's Post-Conviction App. 400-415.

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By the time of Ritchie's trial, Indiana death penalty attorneys were on notice that, when possible, mitigation must be connected to the crime. *Bivins, supra*, 735 N.E.2d at 1126 noted that though a circumstance “need have no particular causal connection to the crime” to be given mitigating weight, “the extent to which there is a causal connection may well affect the weight it is given.” 755 N.E.2d at 1126. In *Thornell v. Jones*, 602 U.S. 154, 169 (2024), the United States Supreme Court allowed that mitigating evidence not “causally connected” to the murder may be “discount[ed].” No causal connection was established, ever, for Ritchie's behavior.

The possible link between Ritchie's lead toxicity and his behavioral problems was readily available. According to the World Health Organization,

Lead exposure can have serious consequences for the health of children. At high levels of exposure to lead the brain and central nervous system can be severely damaged causing coma, convulsions and even death. Children who survive severe lead poisoning may be left with permanent intellectual disability and behavioural disorders. At lower levels of exposure that cause no obvious symptoms, lead is now known to produce a spectrum of injury across multiple body systems. In particular, lead can affect children's brain development, resulting in reduced intelligence quotient (IQ), behavioural changes such as reduced attention span and increased antisocial behaviour, and reduced educational attainment. Lead exposure also causes anaemia, hypertension, renal impairment, immunotoxicity and toxicity to the reproductive organs. The neurological and behavioural effects of lead are believed to be irreversible.

[Lead poisoning \(who.int\)](https://www.who.int/lead-poisoning)

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Ritchie acknowledged shooting Officer Toney. The only issue at his trial was whether Ritchie *meant to shoot* Officer Toney. Ritchie's earliest statements regarding his crime focused on his lack of murderous intent. The facts of the crime allowed for evidence and argument that Ritchie never intended to shoot Officer Toney. In fact, the State's trial expert did not contradict Ritchie's assertion that he shot wildly and in a panic. E.g., TR 1761-62 (expert could not say what the trajectory was for the fatal shot). Petitioner's Post-Conviction Appendix, 453 (Findings of Fact, Conclusions of Law and Judgment on Petition for Post-Conviction Relief at 25).

In the guilt phase of Ritchie's trial, his attorneys pursued a defense that Ritchie did not intend to hit Officer Toney. Despite that, at the penalty phase they never explained to the jury that Ritchie's assertion—that he fired shots in Officer Toney's direction in a panic, hoping to persuade a police officer to give up the chase—was evidence of a lack of intent to kill. This alone would have been sufficient reason for the jury to recommend against death. Post-conviction counsel failed to connect lead-based brain damage to Ritchie, and also failed to provide a nexus between the damage and Ritchie's behavior. Allowing for Ritchie's brain damage to be discounted as a sentencing consideration constitutes performance below Indiana's standard for post-conviction litigation in a death penalty case.

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Ritchie's experts will, in a reasonable time, adequately assess Ritchie for these separate yet compounding injuries to Ritchie's brain. The evaluation Gelbort completed for Ritchie's trial should have alerted trial and post-conviction counsel to the need for investigation into FASD. The impairments caused by Ritchie's specific combination of brain damage is exacerbated under stressful situations. Drs. Jones, Connor, Lidsky, and Carter agree current evaluations are necessary and appropriate. In short order, all four doctors are prepared to conduct necessary evaluations should the successor be granted.

The combined mitigating weight of these two significant sources of brain damage is reasonably likely to "present[] a considerably different picture" of Ritchie. *Burris v. State*, 558 N.E.2d 1067, 1076 (Ind. 1990). In addition to mitigating weight, the permanent, organic damages to Ritchie's brain also lessen the weight of the serious aggravating circumstance of killing a police officer. Before Ritchie is executed, proper evaluation of the issues and analysis of the impact on Ritchie's behavior the night of Officer Toney's murder and on the appropriateness of Ritchie's sentence should be undertaken. There is a "reasonable possibility" that Ritchie is entitled to relief on this claim. Indiana Post-Conviction Rule 1(12)(b).

In deciding whether to allow Ritchie to file a successive post-conviction petition, the Court should consider the relevant mitigating evidence not yet

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presented. The effect of these missing elements of the nature of the offense and the character of the offender is assessed aggregately. In *Charles Smith v. State*, 547 N.E.2d 817, 819-20 (Ind. 1989), the Court held that, in the context of ineffective assistance of counsel claims, the “compilation of counsel’s errors” is assessed cumulatively.

If allowed to proceed, Ritchie will be able to show that “there is a reasonable probability he would have received a different sentence. To assess that probability, [the Court] consider[s] the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Porter v. McCollum*, *supra*, 558 U.S. at 41 (internal quotation marks and alterations omitted).

**Developments in law and science require consideration
of Ritchie’s age at the time of the crime.**

Ritchie’s crime was in 2000, his trial in 2003, and his post-conviction litigation in 2005. As noted in Ritchie’s proposed successive petition, in 2012, *Miller v. Alabama*, 567 U.S. 460 revolutionized the demands of the 8th Amendment when a 17-year-old is sentenced for a crime. Ritchie remains constitutionally eligible for execution. *Roper v. Simmons*, 543 U.S. 551 (2005). In its opinion affirming the denial of post-conviction relief, this Court found Ritchie’s death sentence appropriate for purposes of Indiana Appellate Rule 7(B).

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Ritchie v. State, 875 N.E.2d 706, 724-726 (Ind. 2007). Ritchie acknowledges that the Court held in *Wilson v. State*, 157 N.E.3d 1163, 1176 (Ind. 2020), that *Miller's* 8th Amendment analysis would be limited in Indiana to juveniles given actual life without parole sentences. However, the Court has not been asked in a death penalty case whether the Indiana constitution demands consideration of age slightly older than the constitutional floor. Neither direct appeal nor post-conviction counsel could have presented this issue.

Ritchie recognizes that, as explained in *Roper v. Simmons*, 543 U.S. at 574, “a line must be drawn” to identify those to whom categorical rules apply. Ritchie is beyond the age at which *Roper*, *Miller*, *Brown v. State*, 10 N.E.3d 1 (Ind. 2014), and many other cases, apply different rules in sentencing. However, the developmental age of Ritchie's brain, given his brain damage, should be considered under Indiana constitution Article 1 Section 16. So far, incomplete presentations have not allowed that analysis.

Brown, supra, at 7, noted that *Miller* and *Graham v. Florida*, 560 U.S. 48, 68 (2010), identified three differences between juveniles and adults. Two of those are relevant to considering whether to execute Ritchie for a crime he committed when he was 20 years old. Specifically, *Miller* recognizes that juveniles have “an underdeveloped sense of responsibility,” and a “child's character is not as well formed as an adult's; his traits are less fixed, and his actions less likely to be

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evidence of irretrievabl[e] deprav[ity].” 567 U.S. at 471 (alterations in *Miller*, citations omitted). These traits apply to Ritchie, who is neurodevelopmentally delayed due to organic brain damage from an FASD and lead ingestion.

In *Graham* and *Miller*, the United States Supreme Court first applied the relatively new understanding of human brain development to review of a criminal sentence. The scientific understanding of human brain development has continued to evolve since *Graham* and *Miller*.

Science shows that the frontal lobe of the human brain does not fully develop until early adulthood. The frontal lobe controls high-cognition functions such as judgment, impulse control, planning, and abstract reasoning.

The development of Ritchie's brain was further delayed by prenatal exposure to alcohol and lead.

Courts around the nation have expanded *Graham* and *Miller* to cases involving lengthy terms-of-years for those who committed crimes when they were under 18. *Brown, Fuller v. State*, 9 N.E.3d 653 (Ind. 2014), *State v. Stidham*, 157 N.E.3d 1185 (Ind. 2020), and *Banks v. State*, 228 N.E.3d 528 (Ind. Ct. App. 2024) (sentence for a 16-year-old convicted of 4 murders reduced from 225 years to 135 years) acknowledge *Miller's* impact on lengthy term-of-years sentences for those Indiana prisoners whose crimes were committed while they were juveniles.

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Through its post-conviction rules and cases interpreting those rules, Indiana has long recognized the importance of newly discovered evidence in criminal cases. Ind. Post-Conviction Rule 1(1)(a)(4) provides, “[E]vidence of material facts, not previously presented and heard, [which] requires vacation of the conviction or sentence in the interest of justice” provides grounds for post-conviction relief.

Fox v. State, 568 N.E.2d 1006, 1007 (Ind. 1991), sets out the criteria for finding that newly discovered evidence warrants a remedy. Those criteria are: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial; and (9) it will probably produce a different result at retrial. *Id.* Ritchie can present evidence satisfying these criteria.

At a hearing on his successive post-conviction petition, Ritchie can present evidence, including expert testimony, showing that the damage caused by his mother's alcohol abuse, the damage caused by his ingestion of large amounts of lead, and the characteristics common to young people are not independent, but rather amplify each other. These circumstances shed light on Ritchie's prior behavior resulting in his status as a probationer, and his illogical reaction to the

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reality that he would be arrested for stealing a vehicle. There is a “reasonable possibility” that Ritchie is entitled to relief on this claim. Indiana Post-Conviction Rule 1(12)(b).

The misconduct by the State during the guilt and penalty phase of Ritchie's trial constitutes fundamental error.

In its Response, the State notes that Ritchie's proposed successive petition for post-conviction relief failed to show how Ritchie's claims of prosecutorial misconduct violate *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). *Cooper* was decided while Ritchie's post-conviction appeal was pending and therefore was legal authority that could not have been considered.

Cooper's jury recommended life without parole. The Court found the prosecutor's repeated remarks effected whether the jury gave appropriate weight to the aggravating circumstance and was able to properly weigh that against available mitigating evidence. While the State insists any claim based on *Cooper* is defaulted, that ignores the fact that the errors raised in *Cooper* were found to be fundamental errors. The Supreme Court found that the cumulative weight of the errors deprived Cooper of a fair chance of persuading the jury to decide against the enhanced sentence. *Cooper*, 854 N.E.2d at 835. The State also ignores that until *Cooper*, the cumulative effects of repetitive misconduct had not resulted in fundamental error.

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The damage from the drumbeat repetition assailing Ritchie's character—as well as the defense team's—in both opening statement and closing argument hampered the jury's ability to decide dispassionately whether Ritchie deserved death.

Cooper's trial counsel did not object to the State's improper comments. Where a claim of prosecutorial misconduct is not preserved, the petitioner must show error, as well as showing that the cumulative error amounted to fundamental error. *Id.* at 835. The following comments were made in guilt phase closing argument in the *Cooper* trial.

...
You can tell what kind of person Curtis Cooper is, he's a back shooter and a woman beater. It didn't mean anything to him to shoot Selena in the back, he'd used her as a punching bag before. So why not? Why not? When he shot the life out of her and left her dead there on the ground—Lord only knows where, we'll never find the spot—he silenced her voice.

...
Whatever lies he tells—and he is a liar, the truth is not in this man, he is a liar.

...
You know what kind of person Curtis Cooper is. Now I'll admit he's probably one of the finest liars that I've ever heard testify in the courtroom but he's a liar nonetheless and each one of you I know has paid attention and there have been times when I've seen on your faces that you grasp the lie and you've seen how he's attempted to weave his version of the story, into the fabric of this case, into the truth.

...
From what we know today, we would have predicted that, his behavior was predictable. Look at how he behaved.... Well, I'll tell you what, the things that he did reflect on his character. He's an adult, all right? Anything that we do as adults reflects upon our character and it reflects upon what we are capable of.... That tells you about his character...

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Id. at 835-36 (quoting trial transcript).

During the penalty phase, the prosecutor continued arguing uncharged aggravating factors and encouraged the jury to consider Cooper's unsavory character in sentencing.

You have got to look back over the last four days when you are judging that man's character.

...

[T]here are three things about the Defendant that you can consider....
You can consider his character

Id. at 839-40 (quoting trial transcript).

Cooper vacated the life without parole sentence, in part because, "Neither the circumstances of the crime ("any aspect of the offense itself"), the defendant's condition ("his mental state, his life, his background"), nor his character is a proper consideration in determining whether a death sentence or life without parole should be imposed. *Id.* at 840.

The excerpts from Ritchie's trial mirror the excessive arguments made in Cooper's trial. Just as in *Cooper*, the prosecutor wove a theme throughout the trial and throughout the guilty phase which prejudiced Ritchie. The State claims that the prosecutor had to respond in prejudicial fashion to defense's closing argument. While the State is incorrect in its characterization of the cumulative misconduct present, this viewpoint underscores the ineffectiveness of trial counsel in representing Ritchie in a death penalty case. Regardless, this is

contradicted by the record that displays a clear theme that the prosecutor used throughout the proceedings, placing Ritchie in grave peril.

***Baum* should not be the standard for death penalty cases.**

The failures of post-conviction counsel in Ritchie's case rise to the levels seen in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989). Ritchie's post-conviction counsel missed, failed to develop, and failed to show the relevance of claims that had a substantial likelihood of relief. Ritchie now is in the position that he would have been better off not filing for post-conviction at all. That is to say, the post-conviction hearing was fundamentally unfair and constitutionally deficient due to counsel's inadequacies. Should this Court find that Ritchie waived or procedurally defaulted the claims rather than allow them to be investigated, counsel's errors will result in Ritchie being executed without the layers of review to which he is entitled under the law.

Under current law, post-conviction counsel can default a claim and there is no state-law remedy if counsel was merely present in a procedurally fair setting during post-conviction. *Baum*, 533 N.E.2d at 1201.¹ Whether a meritorious claim

¹ Ritchie's claims are cognizable under Indiana Post-Conviction Rule 1, Section 1(a). Section 8 of Post-Conviction Rule 1 generally precludes a petitioner from litigation in a successive petition grounds for relief that were available at the time of prior proceedings. However, the rule also provides that a court may authorize a subsequent petition upon a showing of "sufficient reason" to excuse the failure to raise the grounds earlier.

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or defense was defaulted through deficient performance does not garner consideration. The analysis of whether counsel was present for “*a procedurally fair setting*” is wholly inadequate without consideration of counsel’s competency in a capital case. The standard, as applied to-date, survives by the fallacy that a warm body equates to a functional one.

There is no greater need to ensure effective counsel than in the final review of a capital case. After all, this Court has recognized, “the effectiveness of [Indiana’s] legal safeguards depends largely—if not entirely—on meaningful adversarial testing by professionally trained counsel.” *Wright v. State*, 168 N.E.3d 244, 262 (Ind. 2021). Note that Ind. Code Section 35-50-2-9 “precludes any waiver of a review of the *sentencing* in a death penalty case.” *Vandiver v. State*, 480 N.E.2d 910, 911 (Ind. 1985) (emphasis in original). The mandatory review is consistent with the state’s interest in assuring, “consistency, fairness, and rationality in the evenhanded operation of the death penalty statute.” *Judy v. State*, 416 N.E.2d 95, 108 (Ind. 1981) (citations omitted).

This Court has long recognized that unlike the typical defendant, the state has greater interests at stake when seeking to impose the ultimate punishment. “The state has a vested interest in—indeed, a constitutional duty to ensure—the reliability and integrity of a capital-murder trial.” *Wright, supra*, at 261. *See Judy*, 416 N.E.2d at 102 (emphasizing that a death sentence must comport with

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“principles of our state and federal constitutions”). The state also has an interest from the public perspective that not only should the proceedings be fair, but they should also appear fair. *Indiana v. Edwards* 554 U.S. 164, 177 (2008).

Regarding perceived fairness in capital cases, the interest of finality must be fairly weighed against the substantial deprivation of liberty that is at stake. If the “warm body” of counsel is considered a lifeboat protecting the petitioner from the ocean of procedural hurdles involved in death penalty litigation, the analysis should include whether the boats ineffectiveness rendered it useless. It stands against logic that on the eve of execution, the Court’s review is merely whether an attorney appeared to review the death sentence. The Court is faced with errors bearing a reasonable possibility of relief that were not presented due solely to prior counsel’s ineffectiveness. Allowing an execution before these errors are presented and reviewed contradicts this Court’s heightened standard for capital cases.

Ritchie does not argue that *Baum* is inadequate in every request for a successive petition for post-conviction relief. The rules regarding waiver and default, and the *Baum* standard, mean to protect against serial re-litigation. In *Corcoran v. State* 820 N.E.2d 655, 663-64, (Ind. 2005), Justice Sullivan noted that as litigation continues through the different stages, the likelihood of finding a flaw diminishes. But the error in applying the *Baum* standard for those facing capital

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punishment is that a death-sentenced person, but for counsel's error, would never have been sentenced to die. The legitimate purpose behind the rules regarding waiving/defaulting claims is lost when mechanistically applied to defeat the ends of justice. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). It is an inconsistent conclusion to reach that the interest of finality is not weighted differently in a capital case.

Indiana's historic commitment to ensuring fairness when imposing the ultimate punishment is consistent with a higher standard of review for capital post-conviction counsel. "Finality and fairness are both important goals. When faced with an apparent conflict between them, this Court unhesitatingly chooses the latter." *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994). In *Schiro v. State*, 669 N.E.2d 1357 (Ind. 1996), the Court allowed a successive post-conviction petition which challenged whether Schiro should be executed even though his jury unanimously recommended against death. Later, in *Saylor v. State*, 808 N.E.2d 646 (Ind. 2016), the Court considered a successive post-conviction request filed by a man who was sentenced to die though his jury unanimously recommended against death. Based on changes in the law, the Court revised Saylor's death sentence to the maximum term of years. Footnote 1 of the Saylor opinion noted that two other men, William Minnick and Obadyah Ben-Yisrayl were similarly situated and would receive the same relief. While Ritchie

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recognizes the issues in these cases are not claims he is raising, he provides them to illustrate the proper balancing of fairness and finality in death penalty cases. A level of review higher than the *Baum* standard is necessary for capital post-conviction counsel.

Other courts, since *Baum*, have applied the *Strickland* standard in situations where, under a statute, counsel is appointed for post-conviction proceedings. *See, e.g., People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 199); *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818, 821 (1992); *Stovall v. State*, 144 Md.App. 711, 800 A.2d 31, 38 (2002); *Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D.2001) *Johnson v. State*, 681 N.W.2d 769, 776 (ND 2004). “The typical reasoning for applying *Strickland* is that ‘[i]t would be absurd to have the right to appointed counsel who is not required to be competent,’ and a statute providing for appointment of counsel ‘would be meaningless if it did not embody a requirement that counsel be effective as well as merely present.’” *Lozada*, 613 A.2d at 821 (quoting *United States v. Wren*, 682 F.Supp. 1237, 1241–42 (S.D.Ga.1988)).

Should this Court not consider elevating the standard for those facing capital punishment to the level of *Strickland*, then Ritchie requests the Court follow the juvenile standard for assessing procedural fairness during post-conviction proceedings. The right to post-conviction counsel comes from statute and court rule, protected by due process and due course of law rather than the 6th

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Amendment or Article 1, Section 13. But when the petitioner has been sentenced to death, Ritchie suggests, at the very least, capital punishment requires a standard like the one applied to juveniles, who also have different interests from standard civil proceedings.

Both post-conviction and juvenile processes are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). This Court decided in *A.M. v. State*, 134 N.E.3d 361, 367 (Ind. 2019) that “a test founded in due process that ensures the juvenile fundamental fairness must be applied to assess counsel’s effectiveness in a disposition-modification hearing.” Recognizing the *Baum* standard was insufficient in ensuring fundamental fairness for the specific interests of juveniles, the standard for juveniles became whether counsel’s performance was defective enough to undermine the confidence in the disposition being consistent with the best interests of the child. This standard for capital cases would at least inquire into whether counsel’s performance was defective enough to undermine confidence in the conviction or penalty.

Closing

Ritchie, by counsel requests that the Court grant his request that this successive post-conviction petition be filed. Ritchie asks the Court to allow him to develop claims that are obvious, but were missed or raised so incompletely that

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they were useless. Ritchie can show that counsel's errors amounted to procedural abandonment at the post-conviction stage.

Alternatively, Ritchie requests that the Court review whether the *Baum* standard is adequate as applied to the limited number of defendants sentenced to death. While the interest of finality is significant, it should be fairly weighed against the deprivation of life, the ultimate liberty. A capital post-conviction hearing is meaningless if procedural safeguards in place to ensure justice are not enforced to their fullest extent.

In a recent death penalty case, the Court commented that the petitioner did not “raise claims involving previously undiscovered evidence through a written petition under Section 35-50-2-9(k), raise constitutional claims through a successive petition for post-conviction relief under Post-Conviction Rule 1(12), or raise challenges to an execution protocol through a civil lawsuit[.]” *Corcoran v. State*, 24S-SD-222, Order dated September 11, 2024. Ritchie believes the unique combination of factual, scientific, and legal development and errors calls for successive post-conviction litigation and review before an execution is scheduled.

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Respectfully submitted,

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Verification

I affirm under the penalties for perjury that the foregoing representations are true to the best of my knowledge and belief.

/s/ Steven H. Schutte
Deputy Public Defender

Verification of Word Count

Benjamin Ritchie, by counsel, files this verified certification that the total amount of words in the Surreponse has not exceeded 7,000 words.

/s/ Steven H. Schutte
Steven H. Schutte
Deputy Public Defender

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Certificate of Service

I hereby certify that I have, this 2nd day of December, 2024, served upon Tyler Banks, Supervising Deputy Attorney General, a copy of the above and foregoing **Benjamin Ritchie's Verified Surreponse to State's Response in Opposition to Request for Permission to File Successive Petition for Post-Conviction Relief**, by electronic service through the Indiana E-filing System, filed electronically in the Indiana Supreme Court in the above-captioned cause of action.

/s/ Steven H. Schutte
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