

SUPREME COURT OF ARKANSAS

No. CR 10-53

DEREK SALES

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 29, 2011

APPEAL FROM THE BRADLEY
COUNTY CIRCUIT COURT, CR
2005-24, HON. ROBERT BYNUM
GIBSON, JR., JUDGEREBRIEFING ORDERED.

PER CURIAM

Appellant Derek Sales brings this appeal from the denial of his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.5 (2011). As the brief provided by counsel is inadequate for our review, we order rebriefing.

A jury found appellant guilty of capital murder and aggravated robbery. The jury imposed sentences of death for the capital murder and life for aggravated robbery. This court affirmed. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008). The mandate issued, and, following a hearing as required by Rule 37.5(b), the trial court appointed Jeff Harrelson as counsel to represent appellant.

After a hearing on appellant's Rule 37.5 petition, the trial court denied the petition, and this appeal followed. This court previously referred Mr. Harrelson to the Committee on Professional Conduct over this matter after the brief was filed late. *Sales v. State*, 2010 Ark. 320 (per curiam). The brief has now been filed, but the argument portion of that brief is not sufficient for the comprehensive state-court review required under our postconviction rules

for capital cases. See Ark. R. Crim. P. 37.5(a); see also *Ward v. State*, 347 Ark. 515, 65 S.W.3d 451 (2002) (per curiam).

Appellate counsel has a duty to file a brief that adequately and zealously presents the issues and that cites us to persuasive authority. *Anderson v. State*, 2010 Ark. 138 (per curiam). Further, death-penalty cases require a heightened standard of review to provide the necessary comprehensive state-court review of the petitioner's claims. See *id.*

In *Anderson*, this court instructed Mr. Harrelson, who was representing another prisoner convicted of a capital crime in Rule 37.5 proceedings, to specifically articulate the appellant's allegations of error, support each allegation with applicable citation to recent authority, apply the authority cited to the facts of each claim, thoroughly analyze the issues, and advocate for a result that would benefit his client. Despite our order, Mr. Harrelson filed another defective brief, and this court was forced to relieve Mr. Harrelson from the case and appoint other counsel. *Anderson v. State*, 2010 Ark. 375 (per curiam). Without question, Mr. Harrelson is aware of this court's position on his responsibilities concerning the appeal of a denial of postconviction relief in a case where the death penalty has been imposed.

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

As a consequence, we must order rebriefing in this case. Because Mr. Harrelson has previously been advised of the exacting requirements concerning briefs in Rule 37.5 proceedings, we once again refer him to our Committee on Professional Conduct. Counsel's revised brief is due in sixty days. The State may then respond to the revised brief within thirty days, and appellant will thereafter have fifteen days in which to file a reply brief. No extensions will be granted except upon good cause shown.

Rebriefing ordered.

Brown, J., concurs.

ROBERT L. BROWN, Justice, concurring. I agree that the brief in this case is woefully deficient and that we must order rebriefing. I would go further, however, and relieve Mr. Harrelson as counsel in this case.

As the majority opinion notes, Mr. Harrelson has previously been cited for failure to adhere to our instructions concerning the proper representation of a death-penalty petitioner. He has also previously been deficient in his representation of Mr. Sales through his failure to file a timely brief. Mr. Harrelson has demonstrated a casual disregard for the magnitude of the stakes that were entrusted to him and his obligations in representing a petitioner who is subject to the most severe penalty that our law recognizes. He simply should not be further entrusted with performing those duties before this court in this case.

Other postconviction proceedings do not invoke the right to counsel, but this court has recognized that qualified and competent counsel must represent indigent defendants under a sentence of death in Rule 37.5 proceedings. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52

(2006). As the majority notes, and as I emphasized in my separate opinion that advocated contempt proceedings on relieving Mr. Harrelson from his representation of Mr. Anderson, death-penalty cases require a heightened standard of review to provide the necessary comprehensive state-court review of the petitioner's claims. See *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003). Because we must require a higher standard, it is vital that the attorneys practicing before this court who represent petitioners who are subject to the death penalty must exhibit an understanding of the grave responsibilities that duty requires.