United States Court of Appeals
For the Eighth Circuit

No. 15-3849

Timothy Wayne Kemp

Plaintiff - Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: September 20, 2017
Filed: May 16, 2019

Before WOLLMAN, MELLOY, and GRUENDER, Circuit Judges.

WOLLMAN, Circuit Judge.

Timothy Wayne Kemp was convicted of four counts of capital murder and sentenced to death on each count. The Supreme Court of Arkansas affirmed the convictions and sentences on direct review and subsequently affirmed the denial of his motion for postconviction relief. Kemp petitioned for a writ of habeas corpus in

federal district court under 28 U.S.C. § 2254. The district court[1] denied relief, but certified the following issue for appeal: whether trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence related to Kemp's childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder. We affirm.

I. Background

On October 4, 1993, Kemp spent the day drinking beer with his girlfriend, Becky Mahoney (Becky). They stopped to visit David Wayne Helton (Wayne), Robert Phegley (Sonny), and Cheryl Phegley (Cheryl) at Wayne's trailer, where all of them drank more beer and danced as Sonny played the guitar. Also present was a man named Richard Falls (Bubba). As will be seen, Wayne, Sonny, Cheryl, and Bubba were soon to lie dead, victims of Kemp's anger-fueled fusillade.

Kemp became angry with Becky, and she refused to leave the party with him. Cheryl intervened, asking Kemp to leave two or three times before he complied. Becky testified that as he left, Kemp threatened that she would be sorry for not leaving with him. "Becky became upset and planned to have Cheryl take her home because she was afraid [Kemp] would return, and she didn't want any trouble." Kemp v. State, 919 S.W.2d 943, 946 (Ark. 1996) (Kemp I).

Kemp either drove around the neighborhood or back to his mother's house, where he and Becky lived. He returned to the trailer with his .22 caliber rifle and knocked on the door. When the door opened, Kemp shot Wayne and kept shooting. When Becky heard the shots being fired and saw two victims fall, she ran to the bedroom and hid in a closet. As Becky later testified, "The gun was going off. It just

[1]The Honorable D.P. Marshall, Jr., United States District Judge for the Eastern District of Arkansas.

kept going off." Becky left the closet after the gunfire had ceased and found the victims' bodies on the floor of the living room. She dialed 911 and thereafter heard the distinctive sound of Kemp's truck starting up. Becky testified that although she and Kemp each had consumed approximately one case of beer that day, "she did not consider [Kemp] 'drunk,' as it was not unusual for him to drink a lot of beer in the course of a day." Id.

Kemp drove to his friend Bill Stuckey's residence and confessed to killing Wayne, Sonny, Cheryl, and Bubba, whom he did not know. Kemp told Stuckey that after "they ran him off and kept Becky there," he went home, retrieved his rifle, and returned to the trailer. Kemp said that Wayne hit the ground "[l]ike a sack of taters" and that Bubba was "just in the wrong place at the wrong time." According to Kemp, Cheryl had "started all the argument," so when she crawled down the hallway trying to get away from Kemp and saying "that she was afraid she was going to die," Kemp "assured her that, yes, she was going to die" and then shot her. Stuckey recognized that Kemp had been drinking, but he had no trouble understanding Kemp and testified that Kemp was not "knee-wobbling" drunk.

Upon arriving at the scene in response to Becky's 911 call, law enforcement officers found the bodies of the four victims and twelve spent .22 caliber shell casings. Officers soon located Kemp and arrested him without incident. After being advised of his Miranda rights, Kemp told an officer that "these people beat his ass and threatened him and he was just defending himself." Id. Officers found a .22 Ruger semi-automatic rifle during a search of Kemp's mother's home. A box of .22 Remington shells was found on the front seat of Kemp's truck.

Kemp escaped from county jail shortly after his arrest. He was apprehended one month later in Texas. In February 1994, Kemp was charged with four counts of capital murder. Attorney Jeffrey Rosenzweig was appointed to represent him. The court granted Rosenzweig's motion for the appointment of Judy Rudd as co-counsel.

Rosenzweig sought an evaluation of Kemp at the Arkansas state hospital in anticipation of a defense of not guilty by reason of mental disease or defect. The state forensic psychologist found that Kemp was competent to stand trial, was able to appreciate the criminality of his conduct, was able to conform his conduct to the requirements of the law, and was able to assist with the preparation of his defense. Kemp was diagnosed with alcohol abuse, alcohol dependence, cannabis abuse, and personality disorder, not otherwise specified, and was found to possess an IQ of 90. Rosenzweig thereafter renewed an earlier motion for the appointment of an independent mental health expert, which the court granted.

Rosenzweig retained psychologist James Moneypenny, Ph.D., to evaluate Kemp. After interviewing Kemp and Kemp's mother and reviewing the state hospital file, the criminal history report, and Kemp's school records, Dr. Moneypenny diagnosed Kemp with alcohol abuse and personality disorder with prominent antisocial features.

In late September 1994, the state disclosed that it would present evidence at the penalty phase of trial that Kemp previously had committed another violent felony. In response to Rosenzweig's motion, the court ordered the state to provide information about any such felonies. The state then disclosed the following incidents: in December 1986, Kemp struck Becky in the nose, causing it to break; in late 1986, Kemp struck Becky in the face, causing a cut near her eye that required five stitches; on an unspecified date, Kemp struck Becky in the face and broke her nose for a second time; weeks before the murders, Kemp pulled a gun on Becky and his mother, threatening to kill them; and two weeks before the murders, Kemp dragged a woman with his car. Rosenzweig moved for a continuance or, in the alternative, to exclude any evidence of prior violent felonies. During a pretrial hearing, the court decided to exclude the evidence because the state had not prosecuted Kemp for any of the offenses, rejecting the state's argument that the law did not require that Kemp be prosecuted or convicted for the evidence to be admissible.

Trial began on November 28, 1994. Defense counsel pursued a theory of imperfect self-defense: that Kemp had overreacted to what he perceived to be a threat because he was intoxicated and suffered from alcoholism and a personality disorder, such that, in Rosenzweig's words, the murders were "a grossly aberrational event in Mr. Kemp's life fueled by alcohol."

In his opening statement, Rosenzweig told the jury that the evidence would show that Kemp did not act with premeditation and deliberation, but rather that he mistakenly believed that he was acting in self-defense. The state called Becky Mahoney and Bill Stuckey to testify about what had occurred the night of the murders. On cross-examination, Becky testified that she and Kemp together had consumed approximately two cases of beer on the afternoon of October 4, 1993, and that they drank even more after arriving at Wayne's trailer. Stuckey testified on cross-examination that Kemp had been drinking heavily and that Kemp had said that he was threatened. The state presented evidence that the bullets from the bodies of three of the victims had been fired from the .22 Ruger semi-automatic rifle found in Kemp's residence and that the .22 caliber shell casings recovered from Helton's trailer were the same brand as the shells that were located in Kemp's truck. The state forensic pathologist who performed the autopsies testified that Wayne had been shot four times; Cheryl, five times; Sonny, twice; and Bubba, once. Rosenzweig did not call any witnesses.

The jury returned guilty verdicts on each of the four counts of capital murder, and the case proceeded to sentencing. The state sought the death penalty on each count of conviction based on two aggravating circumstances: (1) that in the commission of capital murder, Kemp knowingly created a great risk of death to a person other than the victim, and (2) that the capital murder was committed for the purpose of avoiding or preventing arrest.

In Kemp's penalty phase opening statement, co-counsel Rudd reiterated the defense theory that Kemp had been threatened and was under mental distress when he thought that he was acting in self-defense. She explained that Kemp's "abusive childhood resulted in the type of person that [Kemp] is today," as reflected in the diagnoses of alcoholism and personality disorder with antisocial features.

Kemp's former employer testified that Kemp had been a good worker and a skilled cabinetmaker. Kemp's mother Lillie then took the stand and explained that Kemp's father Verlon was a mean alcoholic, who seemed to hate Kemp, always referring to him as dumb, stupid, and lazy and calling him a "[s]tupid little son of a bitch or stupid little . . . jackass." When Kemp was an infant, Verlon would spank him if he cried or "pick him up and just shake him good and throw him back down on the bed." Lillie explained that Verlon whipped Kemp and his brother Brad with a belt if they were too loud, with the result that they learned to stay away from him. Lillie recounted the following incident, which occurred when Kemp was a teenager:

> [H]is father got up and run after [Kemp], grabbed him around the neck, and was choking him. And he choked [Kemp] until he turned blue and [Kemp] almost quit breathing. . . . And we were begging [Verlon] to turn him loose, that he was hurting him. And [Verlon] would not. He just kept on. So, I just picked up this Pepsi bottle and hit him right over the head with it and made him turn my son loose, because that's all I could do. I laid his head open.

Lillie further testified that Verlon had threatened to kill Kemp, that Verlon did not think the boys should complete school, and that Verlon had started giving Kemp beer when he was only seven or eight years old.

Dr. Moneypenny testified that Kemp was an alcoholic and manifested a personality disorder with prominent antisocial features, which is characterized by "an inability to manage impulses" and "an inability to identify with other peoples'

emotions." He explained that the disorder is often a coping mechanism for individuals who have been abused, allowing them to deal "with their own terror, their own turmoil, their own problems." Dr. Moneypenny testified that a person with Kemp's diagnoses has a heightened sense of danger and is sensitive to perceiving threats, with alcohol intoxication increasing the likelihood of misperception. Dr. Moneypenny opined that Kemp was under a great deal of pressure at the time of the murders and that his ability to conform his conduct to the requirements of the law was impaired by the individual and combined effects of his mental condition and his intoxication. During closing argument, co-counsel Rudd discussed the relationship between the abuse Kemp had suffered as a child, his alcoholism and personality disorder, and his impaired ability to act in a rational manner.

The jury unanimously found that both aggravating circumstances existed. The jury also unanimously found that two mitigating circumstances existed: that Kemp had grown up in an environment of abuse and neglect and that his father had provided an example of extreme violent reactions to situations. After weighing the aggravating and mitigating circumstances, the jury determined that death was the appropriate sentence on each count of conviction.

On direct appeal, the Arkansas Supreme Court affirmed the convictions, but reversed three of the death sentences, concluding that the evidence was insufficient to support the "avoiding arrest" aggravating circumstance on the counts related to Wayne, Cheryl, and Sonny. Kemp I, 919 S.W.2d at 955. On remand, the circuit court scheduled the resentencing trial for June 1997. Attorney Willard Proctor served as Rosenzweig's co-counsel during the resentencing proceedings.

At resentencing, the state relied solely on the aggravating circumstance that Kemp had knowingly created a great risk of death to another person. In his opening statement, Rosenzweig conceded the aggravating circumstance and set forth the defense theory that Kemp mistakenly believed he was acting in self-defense. The

evidence presented at resentencing was similar to that from the original trial, but less effective. Kemp's employer's earlier testimony was read to the jury. Lillie Kemp and Dr. Moneypenny testified in person. As the district court observed, "Perhaps it was the passage of time, or the fact that the proceeding was the second time through. But the transcript shows counsel working harder and getting less from both these witnesses." D. Ct. Order of Oct. 6, 2015, at 30 (citations omitted).

On each of the three remaining counts, the jury unanimously found that Kemp had created a great risk of death to another person. Although the jury did not unanimously find any mitigating circumstances, one or more jurors found that the following circumstances probably existed: that the capital murders were committed while Kemp was under extreme mental or emotional disturbance, that Kemp had the ability to be a productive member of society in prison, and that Kemp grew up in an environment of abuse and alcoholism. The jury concluded that the aggravating circumstance outweighed any mitigating circumstances and that death was the appropriate sentence on each count.

After the Arkansas Supreme Court affirmed the three additional death sentences, Kemp v. State, 983 S.W.2d 383 (Ark. 1998), Kemp moved for postconviction relief under Rule 37.5 of the Arkansas Rules of Criminal Procedure. Postconviction counsel obtained several boxes comprising Rosenzweig's file on the case.[2] In deciding which claims to raise in the motion, postconviction counsel relied entirely on Rosenzweig's advice and did not plead a claim of ineffective assistance of trial counsel for failing to adequately investigate or present mitigating evidence. The circuit court denied relief after an evidentiary hearing, and the Arkansas Supreme Court ultimately affirmed the denial of postconviction relief. See Kemp v. State, 60 S.W.3d 404 (Ark. 2001) (remanding for findings of fact and conclusions of law);

[2]Postconviction counsel died in 2007. Rosenzweig's file has not been located.

Kemp v. State, 74 S.W.3d 224 (Ark. 2002) (affirming amended order denying postconviction relief).

With the assistance of new counsel, Kemp timely filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal district court in February 2003. Federal proceedings were stayed and held in abeyance while Kemp exhausted state court remedies on an amended petition for postconviction relief. The Arkansas circuit court denied Kemp's motion for leave to file an amended petition, and in December 2009, the Arkansas Supreme Court dismissed Kemp's appeal for lack of jurisdiction because the mandate from his previous postconviction proceeding had not been recalled. Kemp v. State, 2009 WL 4876473, *1 (Ark. Dec. 17, 2009). The Arkansas Supreme Court later denied Kemp's motion to recall the mandate and his application to reinvest the circuit court with jurisdiction to consider a petition for writ of error *coram nobis*.

Having exhausted his state court remedies, Kemp filed an amended petition for a writ of habeas corpus in federal district court in December 2010, and he thereafter filed a second amended petition. Kemp argued, among other things, that he was denied effective assistance of trial counsel based on Rosenzweig's failure to adequately investigate and present mitigating evidence related to childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder. That claim was procedurally defaulted, however, because it had not been asserted in state postconviction proceedings. Kemp thus argued that the default should be excused based on postconviction counsel's constitutionally deficient performance in failing to assert the claim in state court.

The district court initially determined that any ineffective assistance of postconviction counsel could not constitute cause to excuse the procedural default. See D. Ct. Order of June 28, 2012, at 27-28 (citing Dansby v. Norris, 682 F.3d 711, 729 (8th Cir. 2012), *vacated*, 569 U.S. 1015 (2013), *remanded to* 766 F.3d 809 (8th

Cir. 2014)). But in light of Trevino v. Thaler, 569 U.S. 413 (2013), the district court granted Kemp's motion to reconsider, D. Ct. Order of Mar. 17, 2014, and also granted an evidentiary hearing to decide whether the procedural default should be excused, see D. Ct. Order of Aug. 14, 2014, at 4 (citing Sasser v. Hobbs, 735 F.3d 833, 853-54 (8th Cir. 2013)).

Over the course of eight days, Kemp presented thirteen witnesses and 145 exhibits. Kemp's two half-sisters, an aunt, a cousin, and a friend from his teenage years testified in person. Among those who testified by affidavit were Kemp's mother, his brother, his ex-wife, a former longtime girlfriend, and several other family members. Kemp presented volumes of documentary evidence, including a 1961 emergency petition for divorce that Lillie brought against Verlon, medical records from Verlon's 1977 overdose of barbiturates and alcohol, and court records and newspaper articles describing Verlon's criminal conduct in the 1950s and early 1960s. The district court summarized the evidentiary hearing as follows: "Kemp presented compelling evidence not introduced at trial: a deep family history of poverty and mental illness; a routine of trauma during childhood; and Kemp's mother, Lillie, drank alcohol heavily when she was pregnant with him." D. Ct. Order of Oct. 16, 2015, at 26.

Kemp also offered the opinions of the following experts: Dr. Paul Connor, a neuropsychologist; Dr. Richard Adler, a psychiatrist; Dr. Natalie Novick Brown, a psychologist; and Dr. George W. Woods, a psychiatrist. They diagnosed Kemp with partial fetal-alcohol disorder based on Lillie's alcohol consumption during her pregnancy; Kemp's facial anomalies and childhood developmental difficulties; and Kemp's deficits in cognitive functioning. The experts testified that his *in utero* exposure to alcohol has left Kemp with organic brain damage, which impairs his executive functioning and behavior control, especially in unfamiliar and stressful situations. Dr. Woods also testified that Kemp suffers from post-traumatic stress

disorder caused by a childhood filled with physical, psychological, and emotional abuse.

Former attorney Rosenzweig testified over the course of three days. With respect to trial strategy, he explained that he had decided to concede that Kemp had killed the four victims and to focus on reducing the charges from "capital murder to something less." Rosenzweig was well aware that Arkansas did not recognize voluntary intoxication as a defense to a criminal charge, and he knew that the case did not present "a completely legitimate self-defense argument." In light of Kemp's explanation that he had been threatened before he left the trailer and that Wayne had confronted him with a gun, as well as Kemp's intoxication and his mental health diagnoses, Rosenzweig decided to proceed with an imperfect self-defense theory.

Rosenzweig testified that he had primarily relied upon Kemp, Lillie, and Kemp's aunt Glenavee Walker to gain an understanding of Kemp's social history. Rosenzweig also interviewed a former employer and a childhood friend of Kemp's. Kemp's brother Brad refused to talk to Rosenzweig, despite requests by Rosenzweig and Lillie, telling Rosenzweig that Kemp should die for what he had done. Rosenzweig traveled to Houston, Missouri, to gather Kemp's school records, talk to potential witnesses, and visit the local courthouse. Rosenzweig also conferred with Dr. Moneypenny.

During his investigation, Rosenzweig learned that Kemp's father was deceased and that he had been an alcoholic who had physically and emotionally abused his wife and children. Rosenzweig also learned that although Kemp was an alcoholic, he had been a good worker. Rosenzweig did not get the impression that Lillie had been a heavy drinker, nor did he "pick up on any fetal alcohol issues." In deciding whom to call as witnesses during the penalty phase, Rosenzweig decided against calling Glenavee Walker, who had helped Kemp after his escape from jail, lest her testimony open the door to the state's presentation of evidence regarding the escape,

which Rosenzweig believed would be disastrous to the defense. Rosenzweig also was careful to avoid opening the door to evidence of Kemp's prior violent felonies.

For resentencing, Rosenzweig relied on his knowledge of Kemp's case and the investigation that he had completed prior to the first trial. He believed that the first jury had found Lillie credible, based on its unanimous mitigation findings. Rosenzweig believed that Dr. Moneypenny also had been a good witness, testifying that he was one of the few psychologists at that time who were willing to testify in capital-murder cases. Accordingly, he decided to have Lillie and Dr. Moneypenny testify at resentencing, and he obtained funds for Dr. Moneypenny to reevaluate Kemp. Rosenzweig tried again to talk with Kemp's brother, who again refused to do so. Rosenzweig remained concerned about opening the door to evidence regarding Kemp's escape or his prior violent felonies.

Rosenzweig acknowledged that he had failed to take steps that would have helped Kemp's mitigation case. He testified that, in retrospect, his investigation was not comprehensive and "certainly not anywhere near as full as I would . . . do now." Rosenzweig faulted himself for not seeking funds for an investigator, for not fully researching Kemp's family history, and for not discovering that Lillie drank alcohol excessively while pregnant with Kemp.

As set forth more fully below, the district court concluded that there were no substantial claims of deficient performance and that Kemp thus could not overcome the procedural default. As set forth earlier, the district court dismissed the petition for a writ of habeas corpus and issued a certificate of appealability.

II. Discussion

We review *de novo* the question whether Kemp's claim is procedurally defaulted. Arnold v. Dormire, 675 F.3d 1082, 1086 (8th Cir. 2012). "Ordinarily, a

federal court reviewing a state conviction in a 28 U.S.C. § 2254 proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules." Id. (quoting Beaulieu v. Minnesota, 583 F.3d 570, 573 (8th Cir. 2009)); see Martinez v. Ryan, 566 U.S. 1, 9 (2012) ("[A] federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."). It is undisputed that the constitutional claim at issue here is procedurally defaulted because Kemp's state postconviction counsel did not present it to any Arkansas state court in accordance with state procedural rules. See Barrett v. Acevedo, 169 F.3d 1155, 1161 (8th Cir. 1999) (en banc) ("If a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted.").

"A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." Martinez, 566 U.S. at 10. Ineffective assistance of state postconviction counsel generally does not provide cause to excuse a procedural default. See Coleman v. Thompson, 501 U.S. 722, 752-55 (1991). A narrow exception to this general rule permits federal courts to find cause to excuse procedural default in Arkansas where:

> (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; and (3) the state collateral review proceeding was the "initial" review proceeding with respect to the "ineffective-assistance-of-trial-counsel claim."

Dansby, 766 F.3d at 834 (quoting Trevino, 569 U.S. at 423); see Sasser, 735 F.3d at 853 (applying this exception to cases arising from Arkansas). For purposes of these federal habeas proceedings, the state has not disputed that Kemp had ineffective counsel during state postconviction review or that those proceedings were the initial

review proceedings with respect to Kemp's claim of ineffective assistance of trial counsel. In determining cause, then, the issue before the district court was whether Kemp had presented a substantial claim of ineffective assistance of trial counsel. A "substantial" claim is one that has "some merit." Martinez, 566 U.S. at 14.

To determine whether Kemp had presented a substantial claim, the district court considered the merits of Kemp's underlying ineffective assistance of trial counsel claim. To establish the underlying claim, Kemp was required to demonstrate that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The district court concluded that Kemp had presented a substantial claim of prejudice, but not of deficient performance. The certificate of appealability addresses only deficient performance—that is, whether trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence related to childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder. Because the Arkansas state courts did not consider or decide the issue, we review *de novo* the district court's determination that Kemp's trial counsel was not deficient. See Porter v. McCollum, 558 U.S. 30, 39 (2009) (per curiam) (citing Rompilla v. Beard, 545 U.S. 374, 390 (2005)). Our review of counsel's performance is highly deferential. Strickland, 466 U.S. at 689.

Counsel's performance was deficient if it fell below an objective standard of reasonableness. Id. at 688. We measure reasonableness under the prevailing professional norms at the time of counsel's performance. Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam); Strickland, 466 U.S. at 688. We make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 at 689.

Kemp argues that Rosenzweig failed to conduct the thorough investigation required in death penalty cases and failed to continue the investigation into promising areas of mitigation. Trial counsel has a duty to conduct a reasonable investigation or to make a reasonable determination that an investigation is unnecessary. Id. at 691. When counsel makes strategic choices after a thorough investigation of law and facts, those decisions are "virtually unchallengeable." Id. at 690. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91.

We first consider whether it was reasonable for trial counsel to complete the mitigation investigation without the help of an investigator or mitigation specialist. Kemp contends that "[p]revailing professional norms in 1994 and 1997 called for 'a fully staffed defense team [with] two lawyers and an investigator and a mitigation specialist.'" See Appellant's Br. 59 (alteration in original) (quoting the testimony of defense witness Professor Sean O'Brien). Kemp argues that in light of these norms, as well as a 1991 Arkansas Supreme Court decision overruling a statute that limited attorney fees and expenses to $1,000, "it was unreasonable for trial counsel not to request funds to pay an investigator and/or mitigation specialist." Appellant's Br. 62 (citing Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991)). In support of this argument, Kemp relies on Professor O'Brien's expert opinion and the 1989 American Bar Association's (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which commentary states that counsel cannot adequately perform the necessary background investigation without the assistance of investigators and others.

"No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89; see Rompilla, 545 U.S. at 381 ("A standard of

reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules . . . ."). Although the Supreme Court has looked to sources such as the ABA Standards in assessing the reasonableness of counsel's performance, see Rompilla, 545 U.S. at 387; Wiggins v. Smith, 539 U.S. 510, 524 (2003), the Court has emphasized that such sources serve only as guides, Strickland, 466 U.S. at 688. In 1994 and 1997, there was no absolute requirement that counsel hire—or seek funds to hire—an investigator or mitigation specialist. Cf. Strong v. Roper, 737 F.3d 506, 520 (8th Cir. 2013) (concluding that trial counsel made a reasonable decision in 2001 to forgo hiring a mitigation specialist and instead develop the capital defendant's mitigation case themselves). Rather, prevailing professional norms required trial counsel "to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000); see Van Hook, 558 U.S. at 9 ("[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." (citation omitted)).

We conclude that Rosenzweig's investigation into Kemp's background satisfied his Strickland obligation, and thus his decision to complete the investigation himself was reasonable. Rosenzweig learned of Verlon's abuse from Kemp himself, as well as from his mother. As the district court explained, "Brad would have been an excellent source" of information on Kemp's tumultuous childhood, "[b]ut he closed the door hard on helping." D. Ct. Order of Oct. 6, 2015, at 40. Rosenzweig spoke with Kemp's childhood friend who knew of Verlon's abuse, but decided that Lillie's testimony would adequately describe Kemp's life history. As earlier set forth, Rosenzweig also met with Kemp's aunt, but decided against calling her as a witness for fear of opening the door to evidence of Kemp's escape from jail. Dr. Moneypenny's evaluation and description of the adverse mental health effect of Kemp's violence-filled childhood enabled counsel to better explain it to the jury. At sentencing and resentencing, Rosenzweig capably presented the evidence of that childhood abuse through Lillie Kemp's and Dr. Moneypenny's testimony.

We further conclude that the decision not to interview more distant family members was reasonable. Among the witnesses interviewed by habeas counsel were Kemp's ex-wife and an ex-girlfriend, as well as his step-mother, half-siblings, step-siblings, cousins, aunts, an uncle, and a friend from his teenage years. The information gathered provided a more detailed view of the abuse Kemp and Lillie had endured at Verlon's hands and of the terror and violence that permeated Kemp's childhood. Some family members also testified about Lillie's heavy drinking while pregnant. Hindsight may suggest that Rosenzweig should have interviewed more witnesses and sought additional documents, but when we consider the circumstances of the investigation and evaluate the investigation from Rosenzweig's perspective in 1994 and 1997, we conclude that it was not unreasonable of him to forgo seeking out further sources. See Van Hook, 558 U.S. at 11 ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.").

Rosenzweig was faced with the burden of preparing a defense in a quadruple-murder trial. His goal was to reduce the penalties to anything less than death sentences. He conducted an investigation that was thorough in the then-extant circumstances and reasonably decided to pursue a theory of imperfect self-defense. He capably presented evidence of Kemp's traumatic childhood and its effect on Kemp's ability to perceive and react to threats and danger. He convinced the sentencing jury that Kemp had been reared in an environment of abuse and alcoholism and that his father had provided a living example of extremely violent reactions to situations. At resentencing, Rosenzweig's advocacy again convinced some members of the jury that Kemp had grown up in an environment of abuse and alcoholism. He also effectively kept from both juries evidence regarding Kemp's escape from prison and his prior violent felonies.

That Rosenzweig did not discover a potential diagnosis of partial fetal-alcohol disorder did not render his investigation inadequate or his performance deficient.

Rosenzweig testified that he had attended a conference in 1991 that included a plenary session on fetal-alcohol exposure as a mitigation defense. But Lillie had described her pregnancy as unremarkable and did not disclose that she had consumed alcohol while pregnant with Kemp. We agree with the district court that Rosenzweig's investigation revealed "hints, though, not red flags" of Kemp's possible fetal-alcohol exposure, but that "[w]hat was missing in 1994 and 1997 was any solid indication that Lillie drank alcohol heavily while pregnant." D. Ct. Order of Oct. 6, 2015, at 37. In the context of what was known in the mid-1990s of fetal-alcohol exposure as a mitigation defense and the information Rosenzweig discovered in his background investigation, we cannot say his performance was deficient for not pursuing evidence that might have led to a diagnosis of partial fetal-alcohol disorder.

We conclude that Rosenzweig's decision to hire Dr. Moneypenny to evaluate the effect of Kemp's abusive childhood on his mental health was reasonable in the circumstances. Rosenzweig provided to Dr. Moneypenny Kemp's school records, criminal history report, and a copy of the state forensic evaluation report. Dr. Moneypenny evaluated Kemp and interviewed Lillie, and thereafter conferred with Rosenzweig. Although Dr. Woods testified at the habeas hearing that the information available to Dr. Moneypenny in 1994 and 1997 indicated that Kemp suffered from post-traumatic stress disorder, we agree with the district court that

> Dr. Moneypenny's diagnosis of antisocial personality disorder was not so lacking in factual basis that Kemp's lawyer's work was constitutionally defective. Worthington v. Roper, 631 F.3d 487, 502 (8th Cir. 2011). Many of the PTSD indicators are similar to those for antisocial personality disorder. Without the diagnosis or the label, the essence of PTSD was put before the juries in Dr. Moneypenny's testimony as well as the abuse evidence.

D. Ct. Order of Oct. 6, 2015, at 39.

Rosenzweig did not fail "to act while potentially powerful mitigating evidence stared [him] in the face." Van Hook, 558 U.S. at 11. Nor did he fail to locate witnesses or obtain documents that any reasonable attorney would have pursued. See id. His decision not to seek mitigating evidence in addition to that "already in hand fell well within the range of professionally reasonable judgments." Id. at 11-12 (internal quotation marks and citation omitted). The additional evidence presented during the evidentiary hearing confirmed Lillie's description of Verlon Kemp as an especially mean child-hating, pain-inflicting alcoholic, evidence that Rosenzweig himself now understandably regrets that he did not obtain and present. When viewed in light of the circumstances that he was faced with at the time, however, we cannot say that his performance fell below constitutional requirements. See Strickland, 466 U.S. at 689 (explaining that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," but rather "to ensure that criminal defendants receive a fair trial."); see also Burger v. Kemp, 483 U.S. 776, 794 (1987) (reiterating that "in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled'" (alteration in original) (quoting United States v. Cronic, 466 U.S. 648, 665 n.38 (1984)).

We affirm the dismissal of Kemp's second amended petition for a writ of habeas corpus. We decline to consider the following issues, which Kemp raised on appeal but are beyond the scope of the certificate of appealability: whether Kemp suffered prejudice at the guilt phase by his counsel's failures and whether the district court's finding of prejudice at the penalty phase renders Kemp's death sentences unreliable. See Armstrong v. Hobbs, 698 F.3d 1063, 1068-69 (8th Cir. 2012) (recognizing this court's discretion to consider issues beyond those specified in a certificate of appealability, but declining to do so).

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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May 16, 2019

Ms. Julie Vandiver
FEDERAL PUBLIC DEFENDER'S OFFICE
Suite 490
1401 W. Capitol
Little Rock, AR 72201-3325

RE: 15-3849 Timothy Kemp v. Wendy Kelley

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

CMD

Enclosure(s)

cc: Mr. Kent G. Holt
Mr. Timothy Wayne Kemp
Mr. Jim McCormack
Mr. David Raupp

District Court/Agency Case Number(s): 5:03-cv-00055-DPM

United States Court of Appeals
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May 16, 2019

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RE: 15-3849 Timothy Kemp v. Wendy Kelley

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Julie Vandiver, AFPD, of Little Rock, AR.

Counsel who presented argument on behalf of the appellee was David Raupp, AAG, of LIttle Rock, AR. The following attorney(s) appeared on the appellee brief; Kent G. Holt, AAG, of Little Rock, AR.

The judge who heard the case in the district court was Honorable D. Price Marshall. The judgment of the district court was entered on October 6, 2015.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

CMD

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 5:03-cv-00055-DPM

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

TIMOTHY WAYNE KEMP **PETITIONER**

v. **No. 5:03-cv-55-DPM**

WENDY KELLEY, Director, ADC **RESPONDENT**

ORDER

1. Background. The overarching question is whether Tim Kemp is entitled to a writ of *habeas corpus* invalidating his capital murder convictions or his death sentences. In 1994, a jury convicted Kemp of murdering Wayne Helton, Richard "Bubba" Falls, Robert "Sonny" Phegley, and Sonny's daughter, Cheryl Phegley. The jury imposed four death sentences. On direct appeal, the Arkansas Supreme Court affirmed all the convictions and the Falls death sentence. The Court reversed the remaining three sentences. *Kemp v. State (Kemp I)*, 324 Ark. 178, 919 S.W.2d 943 (1996). At Kemp's 1997 resentencing, a second jury decided that death was the appropriate punishment for the other three murders too; and the Supreme Court affirmed. *Kemp v. State (Kemp II)*, 335 Ark. 139, 983 S.W.2d 383 (1998). This Court's Orders, *№ 68* and *107*, summarize the evidence and the procedural history. Having exhausted his state remedies, Kemp seeks federal *habeas* relief. The

Court is proceeding on Kemp's second amended petition for the writ, *№ 81*, a paper of many interwoven claims and subclaims. Appendix A lists them.*

In June 2012, the Court dismissed Claims I.H, VII, VIII, XIII, XIV, XV, XVI on the merits and rejected three arguments for excusing procedural default on some of the remaining claims. *№ 68*. In light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court granted reconsideration and vacated the parts of Order *№ 68* holding that ineffective assistance of trial counsel can never excuse procedural default. *№ 101*. In August 2014, the Court partly granted and mostly denied Kemp's motion for an evidentiary hearing on cause to excuse procedural default. The Court granted the hearing solely on Kemp's claims of ineffective assistance of trial counsel arising from alleged mental illness, organic brain damage, and childhood trauma. The Court also granted Kemp's motion to reconsider Claim XIV on two intertwined issues. *№ 107*. The Court heard eight days of evidence, received post-hearing briefs, and heard oral argument.

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*The Court has revised Appendix A. The final version is more specific in some places than the original, which was appended to the Court's August 2014 Order, *№ 107*.

Kemp's many intertwined claims, which have been ably and zealously pressed by his current lawyers, and the onion-like layers of *habeas* law, have necessitated a long opinion. A summary in plain words is needed.

2. Summary. No one has ever really disputed that Kemp killed four people. The essentially undisputed evidence about what happened that night makes this conclusion inescapable. After a day of drinking heavily and partying, Kemp and Becky Mahoney, his girlfriend, got into it. They fussed about whether it was time to leave a gathering at Wayne Helton's trailer. Drinking excessively and carousing had long been part of Kemp's life. As he told an examiner at the Arkansas State Hospital, "[t]hat's the way I was raised. My daddy drank and everything, and got away with it all. I thought I could too." Petitioner's Exhibit 104 at 28. Jealously was another subtext—Becky and Helton had been paying attention to each other. Cheryl Phegley sided with Becky and encouraged her to stay; the others pushed Kemp to go. Given that everyone was intoxicated from one thing or another, these exchanges were undoubtedly rough, not gentle. According to Becky, "before [Kemp] drove out, he hollered and said I'll be sorry for not leaving." Resentencing Record, 885.

Kemp acted on his words. He drove around—either around the area, or back to his mother's house, where he and Becky lived. He got his .22 rifle. He went back to the trailer. His truck was loud, with a recognizable sound, so he parked some distance away, walked to the trailer door, and knocked.

When Helton opened the door, Kemp shot him four times. As Kemp would tell his friend Bill Stuckey later that night, Helton hit the ground "like a sack of taters." Resentencing Record, 1034. Kemp then shot Sonny Phegley and Bubba Falls, whom Kemp told Stuckey was just in the wrong place at the wrong time. Trial Record, 1549. Kemp went after Cheryl, who was crawling down the hall. She was screaming, "Oh God, she was gonna die." Kemp responded—again as related by Stuckey—by assuring her that "Yes, she was going to die." Resentencing Record, 1034. Becky was hiding in a closet. Kemp didn't find her. As he left, he heard some of the victims "gasping for breath." Trial Record, 1552. Kemp drove to Stuckey's house to get gas money to leave town. The police arrested him there a few hours later.

Faced with these facts, Kemp's lawyers essentially conceded guilt, focusing instead on what degree of murder, and what punishment, fit the crimes. In the resentencing proceeding, again the lawyers' focus was securing

a punishment less than death based on all the circumstances. All this was understandable and reasonable. The defense theory was that a heavily intoxicated person, whose personality had been misshapen by an abusive and violent upbringing, overreacted and lashed out in imperfect self-defense. The juries rejected this defense. They adopted the State's view: Kemp deserved to lose his life for choosing to take four lives.

To tell the story of this case is to answer many of Kemp's arguments. He's not actually innocent of capital murder or the death penalty. The Arkansas Supreme Court's rejection of the various errors presented to it, and related points, wasn't contrary to clearly established federal law or an unreasonable application of that law. Kemp's many arguments about things said and done, and things not said or done, are at the margin. Kemp's new arguments, which he didn't make to the state courts, fail for the reasons explained below. Most importantly, none of these points would've made any difference in the verdicts; they cannot overcome the undisputed, powerful, and sad story of what happened that night. In the law's word, omitting the new arguments worked no prejudice.

Guided by recent United States Supreme Court decisions, this Court held the evidentiary hearing to determine if Kemp's trial lawyers were constitutionally ineffective for not sufficiently investigating or presenting evidence about Kemp's abuse-permeated childhood, fetal-alcohol exposure, or post-traumatic stress disorder. The record presented was compiled in a decade-plus effort. It is compelling. But there's no reasonable possibility that all this new evidence would have changed the original jury's guilty verdicts. The facts of that night are simply more compelling than Kemp's background. On the penalties, all the new mitigating evidence probably would have avoided the death sentences by persuading one or more jurors to insist on life without parole. One vote would have made the difference.

Stepping back in time, though, into the place of trial counsel in 1994 and 1997, they performed adequately, not deficiently. There wasn't enough information at hand to prompt counsel to investigate fetal-alcohol exposure. The lawyers found evidence of child abuse and presented it capably. The situation was much worse than they discovered. But not broadening their investigation to collateral family members was reasonable in the circumstances. Kemp's brother refused to cooperate at all; his mother

cooperated, but didn't tell the whole story; Kemp cooperated; and the lawyers presented what they had, which persuaded some jurors in part. None of the surrounding circumstances would have alerted a reasonable lawyer that more investigation of Kemp's father and his various families was needed or that post-traumatic stress disorder should have been pursued.

One might conclude, especially with a person's life in the balance, that a new trial on sentencing is the best way to make sure of a just result under law. That conclusion has pull. But it avoids the hard question: setting aside what we know now, did Kemp's lawyers act so unreasonably and deficiently in the circumstances then presented that the Constitution was violated? The answer to that hard question is, in this Court's opinion, no. And because his trial lawyers were not constitutionally ineffective, the law bars Kemp from making new arguments about his childhood now, even though those arguments probably would have changed his sentences. The Court will enter judgment denying Kemp's petition for the writ.

3. Resolution Of Claims On The Merits. The merits standard is settled law. *№ 68 at 8-10.* The Court will address parts of Claims IV.A and IX.A on the merits because Kemp fairly presented these arguments to Arkansas

courts. The rest of these two claims, as well as Claims XI.A and XII.D, raise tangled issues of procedural default. Because resolving them on the merits is more efficient, the Court takes that route. 28 U.S.C. § 2254(b)(2); *McKinnon v. Lockhart*, 921 F.2d 830, 833, n.7 (8th Cir. 1990) (*per curiam*).

A. Did The Prosecutor's Remarks At The 1994 Trial Deny Kemp A Fair Trial?

Kemp argues the prosecutor said things at the guilt phase of his 1994 trial that were overwhelmingly prejudicial, rendering his trial fundamentally unfair. This is Claim IV.A.

First, during closing, the prosecutor referred to Helton's family having heard Dr. Frank Peretti's testimony. Dr. Peretti was the forensic examiner. The prosecutor said:

> Wayne Helton is shot twice in the body and he's going to die from those gunshot wounds. And I know that his family, when they heard Dr. Peretti testify, that they just prayed he was already dead . . .. Trial Record, 1760.

Outside the jury's presence, defense counsel immediately moved for a mistrial or an admonition. He argued the impropriety of invoking someone's feelings who may or may not have heard Dr. Peretti's testimony. The prosecutor responded that she was merely arguing that Helton's wounds

were fatal. The trial court denied a mistrial and admonished the jury to disregard references to anyone's feelings that weren't in evidence.

Kemp now contends that the prosecutor's remarks were improper and misleading because Helton's family wasn't even at the trial. He argues that the trial court's statement was insufficient to cure the resulting prejudice and a mistrial was required. In *Kemp I*, the Arkansas Supreme Court held that the prosecutor's statement wasn't serious enough to require a mistrial and that the admonition cured any prejudice. *Kemp I*, 324 Ark. at 197-98, 919 S.W.2d at 952.

The Arkansas Supreme Court's decision wasn't contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Habeas relief is appropriate only when "the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quotation omitted). The prosecutor's comments must be "so egregious that they fatally infected the proceedings and rendered [Kemp's] entire trial fundamentally unfair." *Stringer v. Hedgepeth*, 280 F.3d 826, 829 (8th Cir. 2002). The prosecutor slipped here. But the remark was marginal, not egregious; it

didn't deprive Kemp of a fair trial. The trial court's admonition was sufficient.

Second, Kemp contends that the prosecutor made other inflammatory remarks during opening statement and rebuttal closing, which rendered his 1994 trial fundamentally unfair. Here's Kemp's list.

- Describing the murders as a "slaughter" of unsuspecting victims, who couldn't defend themselves. Trial Record, 1287-88.

- Stating that Stuckey's testimony will "make your blood chill." Trial Record, 1292.

- Responding to Kemp's closing argument with a personal assault and sarcasm—"I couldn't wait to hear—I absolutely could not wait to hear the reason [Kemp's counsel] was going to give you why this should not be premeditation and deliberation. I was on the edge of my seat over there, dying to hear what reason he was going to give you . . .." Trial Record, 1752-53.

- Stating that there is "absolutely no excuse" for the "slaughter" that occurred in the trailer. Trial Record, 1755.

- Repeatedly stating that Cheryl was brave on the night of the murders—for standing up to Kemp, for defending Mahoney, and for fighting for her life after Kemp shot her. Trial Record, 1758.

- Asking why Kemp shot Cheryl and referring to her as a "little girl," though she was in her twenties. Trial Record, 1758.

Kemp didn't challenge any of these statements on direct appeal. And the Arkansas Supreme Court didn't rule on whether the comments deprived him of a fair trial. His claims related to them are thus defaulted. There's no need, however, to analyze whether his default may be excused: each comment was minor, not egregious. None of them made Kemp's trial fundamentally unfair. It was the prosecutor's duty to zealously press the charges. She did. Claim IV.A fails.

B. Did The Prosecutor's Remarks At Resentencing Deny Kemp A Fair Trial?

Kemp also argues that the prosecutor said things that made his resentencing trial fundamentally unfair. This is Claim IX.A.

First, Kemp contends that the prosecutor twice injected her personal opinion in closing. The Arkansas Supreme Court addressed these remarks in *Kemp II*, 335 Ark. at 144, 983 S.W.2d at 385-86. The prosecutor referred to Kemp's pattern of not taking responsibility for his actions: "And I think that is one of the most telling things about this defendant." Resentencing Record, 1167-68. Counsel moved for a mistrial or an admonition. The trial court rejected a mistrial, but admonished the jury not to be persuaded by any lawyer's opinion. The prosecutor later argued that, because all twelve shots

Kemp fired hit a victim, he wasn't acting like someone who was "intoxicated or blacked out or just shooting wild." The prosecutor then stated, "and I know you already figured that out. So, I know that when you go back with these forms and you check . . .." Resentencing Record, 1172-73. Counsel made the "same objection" as before, and the trial court overruled it. *Ibid.*

The Arkansas Supreme Court rejected Kemp's contention that the opinion statements justified a mistrial. The Court held the comments were harmless and the admonition sufficient. *Kemp II*, 335 Ark. at 144, 983 S.W.2d at 386. That ruling wasn't contrary to, or an unreasonable application of, clearly established federal law. Because the comments aren't egregious, they didn't make Kemp's resentencing fundamentally unfair. *Stringer*, 280 F.3d at 829.

Second, Kemp argues that the prosecutor made other prejudicial remarks. He says that, with these comments, the prosecutor preyed on the jurors' fears, kindled their passions, disparaged mitigation notwithstanding supporting evidence, or argued facts not supported by evidence. Here's Kemp's list on this point.

- "It's hard to take these pictures and look at each one of them . . .. It's safer to be at home or be at work or be

somewhere other than here looking inside this trailer, looking into what happened to these people . . .. It's one of those things you don't want to know about." Resentencing Record, 1163-64.

- "I think [the mitigation evidence] is so incredible . . .." Resentencing Record, 1166.

- Kemp's statement that he was threatened by the victims was a "pack of lies." Resentencing Record, 1167.

- Kemp left the trailer to go home and get his gun. Resentencing Record, 1170.

Kemp's claims about these comments are defaulted because he didn't object. And the Arkansas Supreme Court didn't rule on whether the comments deprived him of a fair trial. Again, though, addressing whether Kemp can overcome the default is unnecessary. None of these comments is so egregious that they made Kemp's resentencing fundamentally unfair. *Stringer*, 280 F.3d at 829. Claim IX.A lacks merit.

C. Was Trial Counsel Ineffective By Not Challenging Victim-Impact Testimony?

Kemp next attacks his trial lawyers' decisions about victim-impact testimony during the 1994 penalty phase and the 1997 resentencing. These are Claims XI.A and XII.D.

At the penalty phase, the prosecutor offered testimony from five family members: Roberta Sullivan and Jerri Fletcher (Sonny Phegley's sisters and Cheryl Phegley's aunts); Rhonda Darby (Sonny's daughter and Cheryl's sister); and Kelly and Kerri Falls (Richard Falls' sisters). In *Kemp I*, the Arkansas Supreme Court held that the testimony of all these witnesses was not so unduly prejudicial that it made Kemp's trial fundamentally unfair. *Kemp I*, 324 Ark. at 205-06, 919 S.W.2d at 957. Only two of these family members—Sullivan and Fletcher—testified at resentencing. In *Kemp v. State*, 348 Ark. 750, 766-67, 74 S.W.3d 224, 232-33 (2002) (*Kemp III*), the Supreme Court rejected Kemp's argument that the victim-impact testimony during both the penalty phase and resentencing made his trial fundamentally unfair. The Court held that it had decided the same issue in *Kemp I*, and declined to decide differently.

Kemp's argument in Claim XI.A—his lawyer was ineffective during the 1994 penalty phase for abandoning his sustained objection to Rhonda Darby's testimony—lacks any merit. Kemp himself agreed that Darby could testify even though the prosecutor hadn't listed her as a potential witness. Trial Record, 1793. Darby's testimony was brief and not particularly compelling:

she wasn't close to either her sister or her father. Trial Record, 1867-69. More importantly, Kemp's death sentences for both Phegleys were vacated in *Kemp I*; and Darby didn't testify in the 1997 resentencing trial, which produced the now-challenged death sentences for the Phegleys' murders. Claim IX.A fails.

In Claim XII.D, Kemp argues that counsel was ineffective at resentencing for not objecting to Sullivan's testimony or Fletcher's. Sullivan described her brother, Sonny Phegley, as one of the most important people in her life. She said that her niece, Cheryl, was more like a daughter to her. Cheryl lived with Sullivan for several years, beginning at age three. Fletcher testified that she was angry about Sonny's death and missed him. She referred to dealing with her mother's recent death and losing time with Sonny because of her military service. Kemp contends that counsel should have objected and argued that all this testimony was emotionally charged and unduly prejudicial. Fletcher's words, in particular, Kemp continues, inflamed the jury's passions and went beyond appropriate victim-impact evidence. Kemp says that, to the extent *Kemp III* has any bearing on this ineffectiveness claim, the Arkansas Supreme Court's decision was unreasonable.

Kemp is mistaken. First, trial counsel made several general challenges to all the victim-impact testimony, which the trial court rejected. Trial Record, 90-94, 282-87, 297, 1782, 1861; Resentencing Record, 68-73, 149-52. Second, Sullivan's testimony and Fletcher's was compelling because they lost close family members. By definition, victim-impact testimony is freighted with emotion in such circumstances. But the Phegley relatives' testimony was not "so unduly prejudicial that it render[ed] the [resentencing] fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The Arkansas Supreme Court's holding, therefore, was not contrary to, or an unreasonable application of, clearly established federal law. The Court need not analyze whether the Arkansas Supreme Court reached the specific issue raised here because Kemp can't show that counsel's decision amounted to deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The victim-impact testimony didn't exceed constitutional bounds. And counsel's failure to make a meritless objection wasn't ineffective assistance. *Dodge v. Robinson*, 625 F.3d 1014, 1019 (8th Cir. 2010). Claim XII.D fails.

4. Resolution Of Procedurally Defaulted Claims. Kemp's remaining claims are defaulted. These are claims of ineffective assistance, prosecutorial

misconduct, and trial error. Kemp's expanded procedural arguments on reply for excusing procedural default fail for the same reasons stated in the Court's Order *№ 68 at 25-26*. This Court may consider these claims only if Kemp can show (1) cause for the default and actual prejudice, or (2) that the default will result in a fundamental miscarriage of justice. *№ 68 at 8; Sawyer v. Whitley*, 505 U.S. 333, 338-39 (1992); *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991).

The Court's Order *№ 68* summarized the cause-and-prejudice standard. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991); *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). And the Court has recognized that cause may exist to excuse the default of an ineffective-assistance-of-trial-counsel claim if the claim is substantial and post-conviction counsel was ineffective in not raising it. *№ 101 at 2; Trevino*, 133 S. Ct. at 1921; *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012). A substantial claim is one that has "some merit." *Martinez*, 132 S. Ct. at 1318.

A. Claims Not Considered At The Evidentiary Hearing. Most of Kemp's defaulted claims weren't part of the hearing or related to hearing issues. They're listed in Appendix A: Claims I.C, D, E, F, G, I, J, K, and L; II,

III, IV. B, C, D, and E; VI; IX.B and C; X; XI.B and parts of E and F; XII.E and F, and parts of A and G; XIV (reconsidered claims); and XVII. To keep the analysis as clear as possible, the Court will deal with this thicket of claims out of order.

Assistance Of Competent Mental Health Expert. There is no cause to excuse Kemp's defaulted claim that he was denied the effective assistance of a competent mental health expert. This is Claim II. Kemp hasn't shown that "some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." *McCleskey*, 499 U.S. at 493 (quotation omitted).

Ineffectiveness Claims Rejected As Stand-Alone Claims. Kemp raises several ineffectiveness claims that the Court has already dismissed as stand-alone claims. *№ 68 at 15-22.* These are Claims I.L and parts of XI.F and XII.G. He argues that trial counsel didn't protect his right to a fair and impartial jury, or shield him from certain aggravating circumstances, and didn't fully litigate or preserve claims that Arkansas's capital sentencing scheme is unconstitutional.

Under *Martinez/Trevino*, Kemp must show that these claims have some merit under the *Strickland* standard of deficient performance and prejudice.

In making his ineffectiveness arguments, Kemp refers only to each rejected stand-alone claim; he hasn't shown how trial counsel's performance was deficient. Moreover, counsel's failure to raise a meritless claim was not ineffective performance. *Dodge*, 625 F.3d at 1019. These ineffectiveness claims aren't substantial; therefore, Kemp's procedural default is not excused. Claims I.L, and parts of Claims XI.F and XII.G fail.

Remaining Non-Hearing Claims. These claims fall in two groups: (1) ineffective assistance of trial counsel implicating *Martinez/Trevino*; and (2) prosecutorial misconduct, trial error, and ineffective assistance of appellate counsel. The threshold issue with all these non-hearing claims is prejudice.

No Prejudice. The record contains overwhelming evidence against Kemp on the elements of capital murder and the aggravating factors supporting the death sentences. *№ 68, 107.* This evidence is outlined at pages 3-4, *supra.* Kemp's trial strategy was that he acted in self-defense, imperfect self-defense, or under an extreme emotional disturbance. The core of Kemp's argument in these defaulted claims is that the jury was unable to consider evidence supporting his defenses, was exposed to prejudicial evidence and argument, and heard much evidence that wasn't credible. These interwoven

claims are based on unpresented evidence that Kemp argues would have changed the outcome of his case. Here's the evidence most emphasized by Kemp.

- Stuckey's and Mahoney's criminal records and motivation for aiding the prosecution;
- Mahoney's alleged incompetence—mental retardation, major depressive disorder, post-traumatic stress disorder, and severe substance abuse—that could have affected her ability to retain and recall events;
- Some victims' violent reputations;
- A rifle in the trailer that didn't belong to Kemp;
- No testing of the pistol found at the crime scene to determine whether it had been fired;
- Gunshot residue tests that the prosecution had, but didn't share, which showed residue on three of the four victims' hands;
- Statements that Mahoney made to the prosecution: Helton had been messing with Kemp on the night of the shooting; Helton had a pistol, which he planned to use to scare Kemp if he returned; and Kemp left the trailer for only a few minutes before returning to shoot the victims;
- Statements that Stuckey made to the prosecution about what Kemp told him: the people at the trailer ran him off and kept Becky; he was outnumbered; and he didn't want to leave town without Becky;

- Statements that Stuckey made to the prosecution showing that he included new details in his testimony;
- Lillie Kemp's undisclosed 1984 DWI conviction;
- The victims' families supported the imposition of life sentences; and
- Kemp's police statement, introduced only at the 1997 resentencing.

Kemp's claims also rely on arguments and evidence that he contends either shouldn't have been admitted or should have been addressed by trial counsel: the forensic examiner's testimony about how Helton may have been killed; the 911 call; and the argument about Kemp's future dangerousness.

This Court considered many of these claims when it denied Kemp's request for an evidentiary hearing on them. Kemp simply hasn't shown *Strickland* prejudice for most of these ineffectiveness claims. *№ 107 at 3.* And the Court couldn't hold a merits hearing on Claims III, IV, IX, and XVII because Kemp didn't present new facts establishing—by clear and convincing evidence—that no reasonable juror would have found Kemp guilty but for constitutional error. *№ 107 at 6-8*; 28 U.S.C. § 2254(e)(2).

The Court's prior Order reviewed much of Kemp's list of allegedly trial-changing evidence. Whether the group had been taunting and provoking

Kemp before he left the trailer is immaterial given the time Kemp had to cool off before returning to the trailer and shooting everyone. This conclusion holds whether Kemp just drove around a few minutes before returning (as Kemp told police) or went home, got his gun, and returned (as Kemp told Stuckey). There was more than enough evidence, even without Mahoney's testimony, for the jury to find Kemp guilty. The crime scene materials, coupled with Stuckey's testimony about Kemp's admissions that night, were the case. And the fact that there was gunshot residue on some of the victims' hands—without anything connecting that residue to some provoking event—wouldn't have changed the case's outcome. *№ 107 at 7-8.*

Ineffectiveness Claims. *Martinez/Trevino* applies to the first category of claims—ineffective assistance of trial counsel. A substantial ineffectiveness claim under *Martinez/Trevino* requires a showing of *Strickland* prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

For the purpose of this analysis, the Court assumes that Kemp has made a sufficient showing that post-conviction counsel was ineffective. His work was cursory; he relied almost exclusively on trial counsel's evaluations

without any independent investigation. There's no need, however, to tarry over post-conviction counsel's performance. To evaluate prejudice, the Court must press forward to trial counsel's work.

Kemp hasn't demonstrated that he was prejudiced in the *Strickland* sense by any of the alleged errors raised in these ineffectiveness claims. No reasonable probability exists that, absent these alleged errors, the outcome on guilt, sentencing, or resentencing would have been different. *Strickland*, 466 U.S. at 694. Even if the evidence and argument had been presented, or excluded, as argued by Kemp here, the juries' findings of guilt and on sentencing would have been the same. Kemp hasn't shown that any non-hearing ineffectiveness claim is substantial; and *Martinez/Trevino* therefore can't open the door for merits consideration of these claims.

Prosecutorial Misconduct, Trial Error, and Appellate Ineffectiveness Claims. The *Martinez/Trevino* equitable exception doesn't extend to the second category of claims—prosecutorial misconduct, trial error, or ineffective assistance of appellate counsel. *Martinez*, 132 S. Ct. at 1318-19; *Dansby v. Hobbs*, 766 F.3d 809, 833-34 (8th Cir. 2014), *cert. denied*, 2015 WL 5774557 (5 October 2015). On these claims, the procedural-default prejudice element

requires Kemp to show that the alleged errors "worked to his *actual* and substantial disadvantage, infecting his trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494 (emphasis original). The prejudice required to excuse a procedural default is either the same as *Strickland* prejudice or greater. *Armstrong v. Kemna*, 590 F.3d 592, 606 (8th Cir. 2010); *Clemons v. Luebbers*, 381 F.3d 744, 752, n. 5 (8th Cir. 2004). Kemp hasn't made a sufficient showing. He hasn't demonstrated that his trial, *or his appeal*, was "infect[ed] . . . with error of constitutional dimensions." *Murray*, 477 U.S. at 494. And, as with the non-hearing ineffectiveness claims, the outcome would have been the same even if the argument and evidence had been presented, or excluded, as Kemp argues. *Nims v. Ault*, 251 F.3d 698, 702-03 (8th Cir. 2001), *superseded on other grounds by* 28 U.S.C. § 2244(b)(2). He likewise hasn't made a sufficient showing about prejudice from alleged appellate ineffectiveness.

On reply, Kemp requests a stay to return to state court to seek *coram nobis* relief on claims of prosecutorial misconduct—Claims IV, IX, and XVII. *№ 109 at 3-4*. The Arkansas Supreme Court has already denied *coram nobis* relief without an opinion. *№ 42-12*. And this Court rejected Kemp's request

for an evidentiary hearing on Claims IV and IX. *№ 107.* Kemp hasn't established that he was unable to develop the new facts about alleged prosecutorial misconduct in state court despite diligent efforts to do so; and these facts wouldn't change the outcome of the case. *№ 107 at 6-8.* Kemp's request to return to state court is therefore denied as futile. Kemp hasn't provided good cause for his failure to exhaust, and these claims are "plainly meritless." *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

Claims I.C, D, E, F, G, I, J, K; III; IV.B, C, D, E; VI; IX.B, C; X; XI.B, parts of E and F; XII.E and F, and parts of A and G; XIV (reconsidered claims); and XVII fail.

B. Claims Considered At The Evidentiary Hearing. There are two questions on the remaining defaulted claims. First, did Kemp's trial lawyers meet "the constitutional minimum of competence" in investigating and presenting evidence of Kemp's alleged mental illness, organic brain damage, and childhood trauma? *Bobby v. Van Hook*, 558 U.S. 4, 5 (2009) (*per curiam*). Second, was Kemp prejudiced by any deficiency on this score during the guilt phase, the penalty phase, or at resentencing? *Strickland*, 466 U.S. at 692. The Court held a hearing on Claims I.A, XI.E, and XII.A. Related

ineffectiveness claims are Claims I.B, XI.C, D, and part of F, XII.B, C, and part of G.

At the hearing, Kemp presented compelling evidence not introduced at trial: a deep family history of poverty and mental illness; a routine of trauma during childhood; and Kemp's mother, Lillie, drank alcohol heavily when she was pregnant with him. Kemp offered new experts: Dr. Paul Connor, a neuropsychologist; Dr Richard Adler, a psychiatrist; Dr. Natalie Novick Brown, a psychologist; and Dr. George W. Woods, a psychiatrist. They testified that, as a result of *in utero* exposure to alcohol, Kemp has organic brain damage, which impairs his executive functioning and behavior control, especially in unfamiliar and stressful situations. At the time of Kemp's 1994 trial, the term for this diagnosis was fetal alcohol effects; by Kemp's 1997 resentencing, the term was partial fetal alcohol syndrome.

Dr. Woods also testified that Kemp suffers from post-traumatic stress disorder caused by a childhood filled with physical, psychological, and emotional abuse. This disorder, according to Dr. Woods, prompts dissociation, paranoid ideation, an exaggerated startle response, and hyperreactivity in Kemp. And there was evidence of Kemp's diagnosis of

depression and substance abuse. Dr. Woods concluded that, on the night of the murders, Kemp's organic brain damage and post-traumatic stress disorder caused him to lose contact with reality and respond irrationally. Dr. Brown echoed the point. She said the effects of fetal alcohol and post-traumatic stress disorder interacted synergistically, affecting Kemp's ability to control his thoughts and behavior.

On Guilt Or Innocence. Here, the answer to the prejudice question is dispositive. There is no reasonable probability that all this new evidence would have made any difference on Kemp's guilt or innocence. *Strickland*, 466 U.S. at 695. Even if Kemp's lawyers had presented it, there is no reasonable probability the trial court would have found that Kemp lacked the mental capacity to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct as a result of mental disease or defect. ARK. CODE ANN. § 5-2-313. Nor is there a reasonable probability that the jury would have found Kemp lacked the mental capacity to act with a premeditated and deliberate purpose. ARK. CODE ANN. § 5-10-101.

Overwhelming evidence existed that Kemp had the mental capacity to be tried for, and found guilty of, capital murder. His actions demonstrated

he could and did form the requisite intent. The jury heard all this: Kemp returned to Helton's trailer because he was angry at three of the victims, particularly Cheryl, for running him off; to avoid detection, he parked his truck down the road and came through the woods to the trailer with his rifle; he fired twelve shots into the four victims; he shot Helton four times, including once at close-range in the left lip; he followed Cheryl down the hall, and shot her five times, telling her that she was going to die; and then Kemp went to a friend's house to borrow gas money so he could leave town. *Kemp I*, 324 Ark. at 187-89; 919 S.W.2d at 946-48. These calculated actions are not those of a mentally incapacitated person. They bear the hallmarks of premeditation and deliberation.

Kemp hasn't demonstrated a substantial claim of prejudice in his conviction. The *Martinez/Trevino* exception therefore doesn't allow the Court to consider the related ineffectiveness claims on the merits.

On The Sentences. The harder question is whether Kemp's claims of ineffectiveness during the penalty phase and during resentencing are substantial. Again, Kemp must satisfy both the performance and prejudice elements under *Strickland*.

Kemp has, the Court concludes, demonstrated a substantial claim of prejudice during both sentencing proceedings. "[T]he Constitution requires that the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (*per curiam*) (quotation omitted). There's a reasonable probability that at least one juror would have voted for a life sentence if Kemp's lawyers had presented the expanded mitigation case during the penalty phase and at resentencing. *Strickland*, 466 U.S. at 695. Instead of arguing mitigation based on organic brain damage and PTSD, their theory was this was aberrational, drunken conduct. Hearing Record, 809-10.

Kemp's lawyers presented some mitigation evidence on the issues of Kemp's childhood trauma and diminished capacity. In the penalty phase, Lillie testified that Kemp's father, Verlon, physically abused him. And Dr. James Moneypenny, a psychologist, testified that he had diagnosed Kemp with substance abuse and a personality disorder with prominent antisocial features—characterized by poor impulse control, lack of empathy, and an inability or unwillingness to conform to behavior expectations. Dr. Moneypenny said that Kemp's disorder and intoxication affected his decision-

making on the night of the shootings; Kemp was less able than the average person to control his impulses, consider the consequences of his actions, or think through the situation logically and reasonably. According to Dr. Moneypenny, measured against someone else, Kemp was angrier and more hostile, more sensitive to insults, more likely to feel threatened, and more likely to act excessively against his best interests. Trial Record, 1900-11.

Both Lillie and Dr. Moneypenny testified similarly at resentencing, though much less effectively. Perhaps it was the passage of time, or the fact that the proceeding was the second time through. But the transcript, Resentencing Record, 1047-58, 1074-87, shows counsel working harder and getting less from both these witnesses.

Kemp's expanded evidence, however, is significantly more compelling than what was presented at either the first trial or the resentencing trial. By live testimony and affidavit, family members told a horrible story. Kemp's childhood was marked by constant abuse—physical, psychological, and emotional. This abuse was both more affecting and more severe than presented during either sentencing proceeding. One of Kemp's cousins aptly described Verlon as "like Satan alive" when he was drinking. Hearing

Record, 541. He got drunk almost every weekend. After he was disabled, Verlon drank every day, starting before noon. Petitioner's Exhibit at 11, 1-2; Exhibit 12 at 1-2. Kemp's older brother said their father was a "monster." Petitioner's Exhibit 12 at 5.

Lillie's 2003 affidavit provides a much clearer and more detailed picture of Kemp's horrific childhood than any of her testimony. She explained Verlon's constant abuse and threats, the isolation from outsiders, and the fearful chaos that permeated the household. Lillie said that Kemp drank alcohol when he was a "little boy" because "it was the only way to survive the hell we lived in." Petitioner's Exhibit 15 at 6. She recounted telling Kemp to "keep his eyes on his daddy all the time, to make sure his daddy didn't try and kill me or one of them." Petitioner's Exhibit 15 at 9. Brad said that Lillie was "just as much to blame" as Verlon. She drank and fought with him, enduring regular abuse. She once ran off with Verlon, leaving the boys to shift for themselves for three weeks. Petitioner's Exhibit 11 at 3. Drs. Woods and Brown linked Kemp's fetal alcohol exposure and post-traumatic stress syndrome diagnoses to his actions on the night of the shooting. These experts

described, with thoroughness, how the PTSD exacerbated the poor functioning of Kemp's alcohol-damaged brain.

Kemp has not, however, satisfied *Strickland*'s performance element. He hasn't demonstrated that his lawyers were so deficient in investigating and presenting mitigation evidence that they were "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Sixth Amendment isn't designed to "improve the quality of legal representation," but to make certain that a defendant gets a fair trial. 466 U.S. at 689. Kemp did.

Kemp offered published materials, including the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 1989), and the testimony of Professor Sean O'Brien, an experienced capital-defense attorney and law professor, as aids in evaluating attorney performance. As the Supreme Court has emphasized, however, the ABA standards are only guides. *Strickland*, 466 U.S. at 688-89; *Van Hook*, 558 U.S. at 8-9. "[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Van Hook*, 558 U.S. at 9. Professor O'Brien's testimony is admissible evidence on what a

reasonable capital defense attorney would have done in 1994 and 1997. But his testimony doesn't definitively answer the mixed question of constitutional law and fact that confronts the Court.

Kemp's lead lawyer candidly acknowledged that he failed to take steps that would have helped his client's mitigation case. He faulted himself for not digging deeper into family history and Lillie's drinking. He said, among other things:

- "I did not understand . . . how pervasive the abuse was." Hearing Record, 671.
- "I obviously didn't do enough and certainly didn't do what I would do nowadays, did not pick up the level of parent abuse that apparently there was." Hearing Record, 672.
- "I certainly didn't pick up on any fetal[-]alcohol issues, I can tell you that." Hearing Record, 677.
- "I clearly didn't ask the right questions [about fetal-alcohol issues] from what I understand you've now found, certainly didn't follow up enough on it." Hearing Record, 678.
- "Clearly my investigation, certainly looking back on it, was clearly insufficient and certainly not anywhere near as full as I would . . . do now." Hearing Record, 690.
- On not asking for money for an investigator: "[I]t's one of those things[,] looking back 20 years later, I cringe, I look at it and say I can't believe I didn't do that." Hearing Record, 710-11.

- "I did not pick up on the level of abuse, et cetera, that apparently you have . . . found, and clearly had I drilled down further, had enough time and resources, hopefully I would have." Hearing Record, 690-91.

In summary, as he confided in his colleague Professor O'Brien during a break in the evidentiary hearing, lead counsel now believes he mishandled this case. Hearing Record, 848-49. Acknowledging imperfect work is the honorable conclusion looking back across the much-expanded record. The Court must evaluate performance, though, without "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

Kemp's lawyers had an obligation to investigate their client's background thoroughly. *Porter*, 558 U.S. at 39. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In evaluating the reasonableness of the investigation, "a court must consider not only the quantum of evidence already known to counsel, but also

whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Kemp's lead counsel didn't fail to act "while potentially powerful mitigating evidence stared [him] in the face or would have been apparent from documents any reasonable attorney would have obtained." *Van Hook*, 558 U.S. at 11. This is not a case like *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), for example, where the lawyer knew the prosecutor was going to argue his client's criminal history as an aggravator, but didn't examine the available file on prior convictions.

Kemp's lead lawyer interviewed Kemp, his mother, one aunt (Glenavee Walker), his employer (Vernon Driskoll), and a childhood friend. And he went to Houston, Missouri, where Kemp spent part of his childhood. Trial counsel tried several times to interview Kemp's brother. He went to Brad's house and telephoned him. When Brad didn't want to talk, counsel asked Lillie to intervene. Brad still refused to cooperate. He was starting a new job and fed up with his brother's drinking and petty crimes. Brad was unequivocal, telling counsel that he "wanted Tim Kemp to die." Hearing Record, 710.

On his lawyers' motion, the Arkansas State Hospital evaluated Kemp for competency. His IQ tests showed intellectual ability in the low average range and his neurological examination was normal with no further testing recommended. Kemp's counsel also successfully moved the trial court to appoint Dr. Moneypenny for an independent psychological exam.

Kemp's lead lawyer uncovered several incidents of abuse from those who lived through it—Lillie and Kemp. He didn't fail to act on what he found. This mitigation evidence came in through Lillie's testimony and Dr. Moneypenny's. And it was convincing. The first jury unanimously found the mitigating circumstance that Kemp grew up in an environment of abuse and alcoholism. Trial Record, 1966, 1970, 1974, 1978. Moreover, in a handwritten notation, the jury unanimously found a mitigating circumstance that Kemp "grew up in an environment where his father provided an example of extreme violent reactions to situations." Trial Record, 1966, 1970, 1974, 1978. At resentencing, one or more jurors , though less than all, concluded that Kemp grew up in an environment of abuse and alcoholism. Resentencing Record, 1197, 1201, 1205.

At the evidentiary hearing, Dr. Brown testified that Kemp's intellectual deficits, delay in developing motor skills, and memory deficits should have alerted his lawyer to the possibility of a fetal alcohol effects (or partial fetal alcohol syndrome) diagnosis. Lillie's 1984 DWI was also on this expert's list. It's unclear whether Lillie told Kemp's lawyer about the DWI. Kemp now faults the prosecutor for not turning it over. Appendix A, Claim IV.E, IX.B, and XVII. Kemp also presented evidence that, at the time of Kemp's 1994 trial and 1997 resentencing, a capital defense lawyer should have been aware of the fetal-alcohol-related disorder's mitigating effect.

This record contained hints, though, not red flags. There just wasn't enough evidence to show that Kemp's lawyers failed to act on a potential fetal alcohol effects (or partial fetal alcohol syndrome) diagnosis. What was missing in 1994 and 1997 was any solid indication that Lillie drank alcohol heavily while pregnant. She was mum on this. Fetal alcohol exposure was in the air as a possible mitigator by 1994. *E.g.*, *Miller v. State*, 328 Ark. 121, 125-27, 942 S.W.2d 825, 827-29 (1997); *State v. S.S.*, 840 P.2d 891, 898-99 (Wash. App. 1992). And lead trial counsel attended the 1991 NAACP Legal Defense Fund Airlie Conference, which included a plenary session on this

developing defense. It's also undisputed, however, that there's been more education, and increased awareness of the effects of fetal alcohol exposure, along with the development of diagnostic criteria, since the mid-1990s. Petitioner's Exhibit 91 at 1-3; Exhibit 94 at 56-59. Viewed in context, lead counsel's not pursuing fetal-alcohol-related issues on the record he confronted in 1994 and 1997 does not create a substantial claim of deficient performance. *Martinez*, 132 S. Ct. at 1318.

There were more signs in the original record of post-traumatic stress disorder than the effects of fetal alcohol exposure. Dr. Woods testified at length about PTSD indicators available to Dr. Moneypenny—Kemp's experiencing deja vu, blacking out, missing developmental milestones, having a poor working memory, being severely abused, and showing avoidance and over-sensitivity in a personality test. Dr. Moneypenny concluded, however, that Kemp's actions on the night of the shooting were influenced by an antisocial personality disorder and intoxication. He based this diagnosis on his interviews with Kemp and Lillie, as well as Kemp's State Hospital records. Dr. Moneypenny testified during the penalty phase that Kemp was angrier and more hostile than the average person, more

sensitive to slights and insults, and likely to numb his responses as a way of coping with terror. Trial Record, 1904-05. Kemp's lawyer tried hard to elicit this same testimony from Dr. Moneypenny at resentencing. Dr. Moneypenny's testimony there was that Kemp got more upset than most people and became overwhelmed with frustration and anger. Resentencing Record, 1054-56.

Dr. Moneypenny's diagnosis of antisocial personality disorder was not so lacking in factual basis that Kemp's lawyer's work was constitutionally defective. *Worthington v. Roper*, 631 F.3d 487, 502 (8th Cir. 2011). Many of the PTSD indicators are similar to those for antisocial personality disorder. Without the diagnosis or the label, the essence of PTSD was put before the juries in Dr. Moneypenny's testimony as well as the abuse evidence. And counsel argued during the penalty phase that, because of the abuse, Kemp didn't know how to empathize, and his ability to act rationally was impaired. Trial Record, 1950-53. Though intoxication was the focus, counsel made this same point in passing at resentencing. Resentencing Record, 1182-83, 87. It had some traction. One or more jurors in each penalty proceeding found that Kemp committed the murders "under extreme mental or emotional

disturbance." Trial Record, 1966, 1970, 1974, 1978; Resentencing Record, 1197, 1201, 1205.

Counsel's "decision not to seek more mitigating evidence from [Kemp's] background than was already in hand fell within the range of professionally reasonable judgments." *Van Hook*, 558 U.S. at 11-12 (quotation omitted). "[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook*, 558 U.S. at 11. Kemp's lead counsel could reasonably conclude—at the time—that he'd reached that point. His performance was unlike the constitutionally ineffective work in *Wiggins*. There, the lawyer didn't investigate his client's background beyond a presentence investigation report and city social services records. 539 U.S. at 524.

More investigation would have revealed Lillie's drinking and more details of abuse. Kemp's counsel, however, uncovered stories of abuse from Lillie and Kemp. Brad would have been an excellent source on both issues. But he closed the door hard on helping. There was nothing to cause Kemp's lead lawyer to suspect Lillie had a drinking problem. He visited her many

times at home. She didn't tell him. One of her sisters-in-law, whom counsel drove to northeast Arkansas to interview, didn't tell him. He doesn't remember Lillie mentioning her 1984 DWI conviction. At Lillie's home, counsel didn't find her drunk, see a shelf covered in alcohol, or pass a garbage can full of empty liquor bottles and beer cans.

The information in Lillie's 2003 affidavit would have unquestionably warranted more investigation. Her many miscarriages, and excessive drinking while pregnant with Kemp, would have raised the fetal-alcohol-exposure issues. Petitioner's Exhibit 15 at 1-2. The extent of Verlon's chronic abuse, which started even before Kemp was born, would have become clear. Take two examples: skeptical about paternity, Verlon beat Lillie trying to end the pregnancy; and Verlon showed up so drunk at the hospital after Kemp's birth that he got arrested. Lillie, however, didn't reveal any of this before either trial. Instead, she told the State Hospital and Dr. Moneypenny that her pregnancy with Kemp was unremarkable. Petitioner's Exhibit 104 at 20, 75. She did describe some of Kemp's childhood abuse. And Dr. Moneypenny considered this trauma in addressing Kemp's alleged lack of capacity.

In hindsight, if Kemp's lead counsel had pressed further to collateral family members and Verlon's series of families, or done a more comprehensive records investigation, he probably would have uncovered evidence that Lillie was a heavy drinker and a fuller picture of the abuse. For example, Verlon's other sister living in northeast Arkansas knew about Lillie's drinking during pregnancy and Verlon's mean streak. Hearing Record, 560-61, 565-67, 569-75. Verlon's daughters from a prior marriage knew about Lillie's heavy drinking and Verlon's abuse. Hearing Record, 589-92, 595-600, 603; 614-16, 618-26. Those revelations, in turn, could well have led to diagnoses of fetal alcohol effects, partial fetal alcohol syndrome, or post-traumatic stress disorder.

But how hard to press Lillie, how many interviews of distant relatives to conduct, and how much research into records to do were judgment calls under the press of a quadruple murder trial. Contacting another of Kemp's aunts during counsel's visit to northeast Arkansas wouldn't have required much effort. On the other hand, getting past the bad blood between Lillie and Verlon's other wives, to reach them or their children in Illinois, Missouri, and Colorado would have been a time-consuming task with an uncertain

payoff. Trial counsel's decisions about the investigation, while mistaken in hindsight from 2015, do not raise a substantial claim of deficient performance in 1994 or 1997. *Strickland*, 466 U.S. at 689.

Kemp's lead counsel handled this case with marginal help from one lawyer during the first trial and another at resentencing. Co-counsel opened and closed the penalty phase, and examined Dr. Moneypenny. Trial Record, 1850-54, 1899-1909, 1925-26, 1948-56. Co-counsel also examined Lillie. Trial Record, 1881-91. She did all these things well. This lawyer, however, didn't do much else on the case. Co-counsel during the resentencing seems to have played only a supporting role. He did not take any witnesses or make any arguments. As lead counsel acknowledged at the evidentiary hearing, these circumstances were not ideal. Arkansas law requires co-counsel in appointment cases, and the ABA Guidelines recommend co-counsel in every case – with good reason: capital defense is a big job. ARK. CODE ANN. § 16-87-306(2)(A); ABA Guideline for the Appointment and Performance of Counsel in Death Penalty Cases 2.1 (1989). While Professor O'Brien's description of Arkansas as a "black hole" for capital defense in the 1990s is hyperbolic, resources were limited. Hearing Record, 1233. Kemp's lawyers

were working in those constrained circumstances. More hands are usually better than fewer. But the Court rejects Kemp's argument that the Constitution requires a large team of lawyers and support personnel in every case. Here, for example, Kemp's lead lawyer was able and experienced. He didn't neglect this case. He did his job adequately, though imperfectly, with modest help from co-counsel.

A final issue. Counsel's decision to try the case approximately nine months after appointment, rather than seeking a continuance to do more background investigation, was a reasonable choice in the circumstances. The prosecution made much noise about wanting to introduce evidence of Kemp's prior uncharged felony conduct. Trial Record, Defense Exhibit No. 2. The trial court blocked this effort—but did so based on a legal mistake. Trial Record, 257-58. The lack of formal charges wasn't a proper basis to keep this conduct out. ARK. R. EVID. 404(b). Deciding to move forward with trial, rather than risk reconsideration and reversal of this victory, was well within the range of reasonable judgment calls. *Strickland*, 466 U.S. at 690. The last thing the jury needed to hear was that, on other occasions, Kemp had broken Becky's nose, pulled a gun on Becky and Lillie, and dragged another

woman alongside a vehicle as he drove away angry from an argument with Becky. Trial Record, Defendant's Exhibit 2.

After a decade's worth of work by many good lawyers, the record overflows with proof about Kemp's extremely troubled background and significant mental challenges. All the new evidence would not have made any difference on the capacity-related guilt issues. It probably would have made a difference in Kemp's sentences. His lead trial lawyer, however, didn't stumble in the constitutional sense by not turning up all this new evidence. *Martinez* and *Trevino* therefore do not open the door to defaulted ineffective assistance claims considered at the hearing. Claims I.A, B; XI.C, D, E, part of F; and XII.A, B, C, and part of G, fail.

5. Claim Of Actual Innocence. Kemp argues that he's actually innocent of capital murder. His main point here is twofold: he lacked the mental capacity to commit the crime; or he has solid affirmative defenses. Kemp argues, alternatively, that he's innocent of the death penalty based on the undisclosed evidence. This is Claim V.

Actual innocence can be a gateway for Kemp's defaulted claims in certain circumstances. He must establish, based on new and reliable

evidence, that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Similarly, Kemp can challenge his innocence on the penalty if he shows, with clear and convincing evidence that "but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 336. The Supreme Court hasn't decided whether a freestanding claim of actual innocence "would render unconstitutional a conviction and sentence that is otherwise free of constitutional error." *Dansby*, 766 F.3d at 816. This Court need not reach that issue. Kemp hasn't shown that no reasonable juror would have voted to find him guilty of capital murder. And he hasn't shown that no reasonable juror would have found him eligible for the death penalty. Claim V fails.

* * *

Kemp's second amended petition for habeas corpus relief, *№ 81*, will be dismissed with prejudice. Reasonable judges could disagree about this Court's conclusion on three issues. 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*,

542 U.S. 274, 292 (2004). The Court therefore grants Kemp a certificate of appealability on those issues:

- Was Kemp's lawyers' work constitutionally defective in not investigating fetal-alcohol exposure, or in not presenting facts about this issue in mitigation?

- Was Kemp's lawyers' work constitutionally defective in not investigating Kemp's childhood abuse further, or in not presenting more abuse evidence in mitigation?

- Was Kemp's lawyers' work constitutionally defective in not investigating post-traumatic stress disorder, or in not presenting facts about this issue in mitigation?

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

6 October 2015

APPENDIX A

I. Kemp was denied the effective assistance of counsel at the guilt phase

A. Failure to adequately investigate and present Kemp's affirmative defense of not guilty by reason of mental disease and defect

B. Failure to ensure the appointment of a qualified and effective mental health expert

C. Failure to impeach witness Bill Stuckey

D. Failure to discover and present evidence supporting Kemp's claims of self-defense, imperfect self-defense, and extreme emotional disturbance

E. Failure to investigate and challenge the competency to testify of the prosecution's key witness, Becky Mahoney

F. Failure to impeach Mahoney's testimony

G. Failure to investigate and present Mahoney's criminal record

H. Failure to secure an imperfect self-defense instruction

I. Failure to object to or rebut forensic medical examiner's testimony and prosecution's misleading argument that Wayne Helton's facial wound was consistent with having been shot at close range while Helton was lying on his back

J. Failure to protect Kemp from prosecutorial misconduct

K. Failure to object to admission of Mahoney's 911 call

L. Failure to ensure a fair and impartial jury

II. Kemp was denied the effective assistance of a competent mental health expert

III. The prosecution's key witness, Mahoney, was not competent to testify

IV. Kemp was denied a fair trial by misconduct of the prosecutors during the guilt phase

A. Improper argument

B. Failure to disclose material exculpatory statements by Mahoney and Stuckey supporting Kemp's defense theory

C. Knowing presentation of false testimony

D. Failure to disclose results showing gunshot residue on three victims' hands

E. Failure to disclose exculpatory evidence

V. Kemp is actually innocent of capital murder

VI. Kemp's constitutional rights were violated by the erroneous admission of Mahoney's 911 call

VII. The trial court's failure to excuse for cause jurors who were unqualified to serve denied Kemp his right to a fair and impartial jury in violation of his constitutional rights

VIII. Kemp's death sentences are supported solely by unconstitutionally vague, overbroad, and unworkable aggravating circumstances that lack evidentiary support

IX. Kemp was denied a fair trial by misconduct of the prosecutors during resentencing

A. Improper argument

B. Failure to disclose material exculpatory evidence

C. Knowing presentation of false testimony

X. Kemp's 1997 death sentences are based on inadmissible predictions of his future dangerousness and improper arguments at resentencing in violation of his constitutional rights

XI. Trial counsel rendered constitutionally ineffective assistance at the penalty phase of Kemp's 1994 trial

A. Withdrawal of objection to victim-impact testimony

B. Failure to introduce Kemp's exculpatory statement to police

C. Presentation of Dr. James Moneypenny's testimony about Kemp's diagnosis of substance abuse and personality disorder with antisocial traits

D. Failure to provide Dr. Moneypenny with an adequate history

E. Failure to adequately investigate and present evidence in mitigation

F. Failure to protect Kemp's rights during trial and to preserve errors for appeal

XII. Trial counsel rendered constitutionally ineffective assistance at Kemp's resentencing proceeding

A. Failure to investigate, develop, and present mitigating evidence

B. Presentation of Dr. Moneypenny's testimony about Kemp's diagnosis of substance abuse and personality disorder with antisocial traits

C. Failure to provide Dr. Moneypenny with an adequate history

D. Failure to object to victim-impact testimony

E. Failure to impeach Stuckey

F. Failure to investigate and challenge Mahoney's competency or impeach her

G. Failure to protect Kemp's rights during resentencing and preserve errors for appeal and post-conviction proceedings

XIII. Arkansas's capital murder and death penalty statutes violate the U.S. Constitution

XIV. Kemp was denied the effective assistance of counsel as well as conflict-free counsel, on direct appeal

XV. Kemp was deprived of his right to effective assistance of counsel during his first state post-conviction proceeding

XVI. The Court should conduct a cumulative assessment of whether constitutional errors occurred and whether those errors were prejudicial

XVII. Kemp was denied a fair trial by misconduct of the prosecutors at the penalty phase of the 1994 trial, primarily based on the failure to disclose exculpatory evidence

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3849

Timothy Wayne Kemp

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:03-cv-00055-DPM)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Judge Kelly would grant the petition for rehearing *en banc*.

August 28, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3849

Timothy Wayne Kemp

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:03-cv-00055-DPM)

ORDER

Appellant's motion to expand the certificate of appealability has been considered by the court and the motion is denied.

Appellant's opening brief is due June 1, 2016.

April 22, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

324 Ark. 178

Timothy Wayne KEMP, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR95-549.

Supreme Court of Arkansas.

April 22, 1996.

Defendant was convicted in the Circuit Court, First Division, Pulaski County, Marion Humphrey, J., of four counts of capital murder and was sentenced to death on each count. He appealed. The Supreme Court, Jesson, C.J., held that: (1) evidence was sufficient to support findings of premeditation and deliberation; (2) trial court had jurisdiction over case; (3) defendant was not entitled to "imperfect self-defense" instructions; (4) juror's answers did not render her unfit to serve on jury; (5) prosecutor's remarks during closing argument did not require mistrial; (6) aggravating circumstance that murders were committed for purpose of avoiding or preventing arrest or affecting escape from custody was not supported by evidence with respect to three victims but was supported by evidence with respect to one victim; and (7) admission of testimony of victims' family members was appropriate.

Affirmed in part; reversed and remanded in part.

Glaze, J., concurred in part and dissented in part and filed opinion in which Corbin and Brown, JJ., joined.

Brown, J., concurred in part and dissented in part and filed opinion in which Glaze, J., joined.

1. Criminal Law ⇐1134(3)

When defendant challenges sufficiency of evidence, Supreme Court addresses that issue prior to all others.

2. Criminal Law ⇐1159.2(5)

Test for determining sufficiency of evidence is whether there is substantial evidence to support jury's verdict; "substantial evidence" is that which is forceful enough to compel a conclusion one way or another which goes beyond mere speculation or conjecture.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1144.13(3, 6)

In reviewing challenge to sufficiency of evidence, Supreme Court reviews evidence in light most favorable to the State and considers only that evidence that support verdict.

4. Homicide ⇐145

Intent to commit murder may be inferred from type of weapon used, and nature, extent, and location of wounds.

5. Homicide ⇐232

Jury's finding that capital murder defendant's killings of four victims were premeditated and deliberate acts was supported by evidence that three victims received multiple gunshots wounds, some of which were at close range, and several of which were fatal, and by witness' testimony that defendant admitted to killing three of the victims because he was angry at them and the fourth because victim was "at the wrong place at the wrong time."

6. Criminal Law ⇐97(.5)

Judicial subdistricts created by consent decree solely to facilitate election of minority judges were not separate judicial districts limited in territorial jurisdiction to trial of crimes committed in particular subdistrict.

7. Criminal Law ⇐808.5

In capital murder trial, defendant was not entitled to self-defense instruction regarding use of reckless or negligent force that mostly tracked statutory language but omitted phrase limiting applicability of statute to subchapter pertaining to justification. A.C.A. § 5-2-614.

8. Constitutional Law ⇐268(11)
Homicide ⇐294.2

In capital murder trial, defendant's due process rights were not violated by trial court's refusal to give proffered instruction that merely emphasized defendant's theory of the case that his intoxication should have

been considered as diminishing his capacity to form requisite intent to commit capital murder; jury was instructed as to state's burden to prove premeditated and deliberated murder beyond a reasonable doubt and was also instructed on lesser included offenses. U.S.C.A. Const.Amend. 14; A.C.A. § 5–2–206(d).

9. Jury ⇐108

Standard for determining if prospective juror should be excused for cause from death penalty case is whether juror's views about death penalty would prevent, or substantially impair, performance of juror's duties in accordance with instructions and oath taking.

10. Criminal Law ⇐1166.18

A claim of error relating to challenge for cause is only preserved regarding jurors who actually sat on jury after challenge for cause was denied.

11. Jury ⇐132

It is presumed that persons comprising venire are unbiased and qualified to serve.

12. Criminal Law ⇐1152(2)

Absent abuse of discretion, Supreme Court will not disturb trial court's ruling on issue of whether prospective juror should be excused for cause.

13. Jury ⇐108

Juror's remarks regarding death penalty did not render her unfit to serve on jury in capital murder case; juror indicated that death penalty would be proper if accused was guilty beyond any doubt, that defendant was not required to put on any proof at all, that she could be an impartial, fair juror and follow law as given to her by trial court, that knowledge that alcohol was involved in case did not cause her to feel prejudiced toward either party, that she would not automatically be for death penalty, and that she did not think she would be leaning toward death penalty in case.

14. Criminal Law ⇐730(14)

In capital murder trial, prosecutor's remark during closing arguments about feelings of victim's family during pathologist's testimony regarding additional gunshots, after victim had been shot twice, was not of such magnitude as to require mistrial; trial court instructed jury that closing arguments were not evidence, which cured any prejudice.

15. Criminal Law ⇐867

A mistrial is a drastic remedy to which court should resort only when there has been an error so prejudicial that justice cannot be served by continuing trial.

16. Criminal Law ⇐867

Mistrial should be ordered only when fundamental fairness of trial itself has been manifestly affected by error.

17. Criminal Law ⇐867, 1155, 1174(1)

Trial court has wide discretion in granting or denying motion for mistrial, and its discretion will not be disturbed except where there is an abuse of discretion or manifest prejudice to complaining party.

18. Criminal Law ⇐730(14)

An admonition to jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing trial.

19. Criminal Law ⇐412(4)

Defendant's incriminating statement to police officer was not invalidated by fact that defendant was allegedly intoxicated at time he made statement. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 8.

20. Criminal Law ⇐394.5(3)

Defendant's argument that he was too intoxicated to make an intelligent waiver to search of his vehicle went to weight rather than admissibility of evidence. U.S.C.A. Const.Amend. 4.

21. Criminal Law ⇐713

Defendant was not prejudiced by prosecutor's claim to represent "the People," even though prosecutions within state are made in name of the state rather than "the People."

22. Criminal Law ⇐1166.16

Defendant was not prejudiced by prospective juror's statements that his wife worked with someone who was related to witness who hid in closet during shootings;

because there was going to be testimony that witness did hide in closet, panel did not hear anything that it would not have heard had prospective juror been selected as a juror.

23. Criminal Law ⇐709

In capital murder trial, trial court did not abuse its discretion in denying defendant's motion for mistrial based on prosecutor's remark during closing arguments that referred to an intoxication defense, notwithstanding defendant's claim that he had not stated that intoxication was a defense.

24. Criminal Law ⇐708.1

Leeway is given to both sides during closing argument.

25. Criminal Law ⇐1144.17, 1159.5

On appeal of finding that aggravating circumstances existed, Supreme Court reviews sufficiency of state's evidence in light most favorable to state to determine whether a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt.

26. Homicide ⇐358(1)

Evidence did not support aggravating circumstance that murders were committed for purpose of avoiding or preventing arrest or effectuating escape from custody with respect to three of defendant's four victims; state argued that jury could have inferred that victims were shot to prevent them from having defendant arrested if he used force to remove his girlfriend from home, but there was no evidence that defendant made any attempt to forcibly remove girlfriend from home or that he shot and killed victims in order to prevent them from having him arrested if he used force to remove girlfriend. A.C.A. § 5–4–604(5).

27. Homicide ⇐357(8)

Aggravating circumstance that murders were committed for purpose of avoiding or preventing arrest or effecting escape from custody was supported with respect to one of defendant's four victims by evidence that defendant stated to witness that victim was "in the wrong place at the wrong time"; jury could have inferred that defendant killed victim for no logical reason such as revenge or accident. A.C.A. § 5–4–604.

28. Criminal Law ⇐1177

Supreme Court can perform statutory harmless error analysis in death penalty phase only if jury found no mitigating circumstances. A.C.A. § 5–4–603(d).

29. Homicide ⇐351

Definition of "victim" in victim impact statute relating to capital murder trials is not so vague as to render statute void for vagueness. U.S.C.A. Const.Amend. 14; A.C.A. § 5–4–602(4).

30. Criminal Law ⇐1213.7

Admission of victim impact testimony in death penalty phase does not violate Eighth Amendment or State Constitution provision prohibiting cruel or unusual punishment. U.S.C.A. Const.Amend. 8; Const. Art. 2, § 9; A.C.A. § 5–4–602(4).

31. Constitutional Law ⇐268(10)

When evidence is introduced that is so unduly prejudicial that it renders trial fundamentally unfair, due process clause provides mechanism for relief. U.S.C.A. Const. Amend. 14.

32. Homicide ⇐358(1)

Admission of testimony from families of victims during penalty phase of capital murder trial was not so unduly prejudicial that it rendered defendant's trial fundamentally unfair; family members testified as to the loss they felt after victim's deaths, one member testified that she would be denied the privilege of having her father escort her down the aisle at her wedding, and one member testified that her family experienced disbelief and anger and was "torn apart." U.S.C.A. Const. Amend. 14; A.C.A. § 5–4–602(4).

33. Homicide ⇐311

In penalty phase of capital murder trial, defendant was not entitled to non-model instruction that jury could return verdict of life imprisonment without parole whatever jury found regarding aggravating and mitigating circumstances; another model instruction permitted jury to show mercy, as it allowed

jury to find that aggravating circumstances did not justify sentence of death.

34. Criminal Law ⇐805(1)

Non-model instructions are to be given only when trial court finds that model instructions do not accurately state the law or do not contain the necessary instruction on the subject.

35. Criminal Law ⇐796, 1213.7

Model jury instruction allowing jury to impose death penalty if "[t]he aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstance found by any juror to exist" is not phrased in such a way as to inform each juror that he or she may not consider evidence of a mitigating circumstance unless all other jurors unanimously agree that the evidence supported the finding of mitigating circumstance, and thus does not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

Jeff Rosenzweig, Judy Rudd, Little Rock, for appellant.

Clint Miller, Dep. Atty. General, Little Rock, for appellee.

JESSON, Chief Justice.

On October 4, 1993, police found the bodies of David Wayne Helton, Robert "Sonny" Phegley, Cheryl Phegley, and Richard "Bubba" Falls in a trailer on Highway 107 in Jacksonville. Each had been shot, and all but Falls had been shot more than once. Becky Mahoney, who had been hiding in a bedroom closet during the shootings, phoned 911. Shortly thereafter, her then-boyfriend, appellant Timothy Wayne Kemp, was arrested and charged with four counts of capital murder. He was convicted and sentenced to death by lethal injection on each count. He appeals from these convictions. We affirm the conviction and sentence pertaining to victim Falls, and affirm the convictions only as to the remaining three counts. We must reverse the death sentences as to these counts and remand for resentencing, as there was insufficient evidence to support the trial court's instruction to the jury with respect to the statutory aggravating circumstance that the murders were committed for the purpose of avoiding arrest.

Sufficiency of the evidence

[1–4] Appellant asserts that there was insufficient evidence of premeditation and deliberation to prove the four capital murder charges, particularly in light of the evidence presented that he acted in self-defense. When an appellant challenges the sufficiency of the evidence, we address that issue prior to all others. *Misskelley v. State,* 323 Ark. 449, 915 S.W.2d 702 (1996). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the jury's verdict. *Id.* Substantial evidence is that which is forceful enough to compel a conclusion one way or another and which goes beyond mere speculation or conjecture. *Id.; Davis v. State,* 317 Ark. 592, 879 S.W.2d 439 (1994). We review the evidence in the light most favorable to the appellee and consider only that evidence which supports the verdict. *Misskelley v. State, supra; Moore v. State,* 315 Ark. 131, 864 S.W.2d 863 (1993). Intent to commit murder may be inferred from the type of weapon used, and the nature, extent, and location of the wounds. *Dansby v. State,* 319 Ark. 506, 893 S.W.2d 331 (1995); *Allen v. State,* 310 Ark. 384, 838 S.W.2d 346 (1992).

[5] The State elicited the following testimony at trial. Becky Mahoney, who had been living with appellant for eight years, testified that she and appellant were riding around in appellant's truck drinking beer on the date in question when they stopped at Wayne Helton's trailer to visit Helton and Sonny and Cheryl Phegley. Once inside, they all drank beer and danced as Sonny picked the guitar. Also present in the trailer was a man Becky knew only as "Bubba," who was later identified as Richard Falls. A couple of hours had passed before appellant became angry with Becky and asked her to leave with him. She refused, as she was scared of the appellant. After Cheryl asked appellant "two or three times" to leave, he complied. Becky became upset and planned to have Cheryl take her home because she was afraid appellant would return, and she didn't want any trouble.

Before Cheryl could take Becky home, someone knocked on the door. Becky "had a feeling" it was the appellant. As she was standing in the hallway between the kitchen and the living room, she heard a gun go off and saw "Bubba" fall. Cheryl then fell, yelling "oh, my God. Oh, my God." Becky then ran to a bedroom and hid in the closet. The gun kept going off. After the gunfire ceased, Becky left the closet and went into the living room, where she saw three of the victims on the floor. She dialed 911, and while on the telephone, she "heard [appellant's] truck start up." She was positive it was the appellant's truck because she had been around it so long. While Becky estimated that she and the appellant had consumed approximately one case of beer apiece on the date in question, she did not consider the appellant "drunk," as it was not unusual for him to drink a lot of beer in the course of a day.

Officers arrived at the scene to find the bodies of the four victims, twelve spent .22 caliber shell casings, and a .32 caliber pistol. Based on Becky's description of the appellant and his truck, they located and arrested appellant at the residence of Bill Stuckey in Cabot. Officer David Adams testified that, after he orally advised appellant of his *Miranda* rights, appellant stated that "these people beat his ass and threatened him and he was just defending himself." Pursuant to a consent form signed by the appellant's mother, Lillie Kemp, officers searched her residence at 7710–D Swaggerty Road in Jacksonville, where appellant and Becky also resided. A box of ammunition and a blue shirt were retrieved from appellant's bedroom. Pursuant to appellant's written consent, officers recovered a .22 Ruger semi-automatic rifle in Lillie Kemp's closet and a box of .22 Remington shells in the front seat of appellant's vehicle.

Bill Stuckey testified that he had been appellant's best friend for some seven or eight years. Appellant and Becky dropped by his residence during the afternoon hours of October 4 and stayed approximately one hour. According to Stuckey, appellant returned to his home and awakened him at approximately 2:00 a.m., asking to borrow $20.00 for gasoline. Appellant was going to leave town and told Stuckey that he had shot Helton and some other people at Helton's residence, including the two Phegleys and another man he did not know. Appellant told Stuckey that "the other guy was just in the wrong place at the wrong time." Appellant stated that the people in the trailer ran him off, kept Becky at the trailer, and would not let her leave with him. Appellant then went home, got his gun, went back to the trailer, and shot them. Particularly, appellant told Stuckey that he had parked down the road behind the store and walked up through the woods about 50 yards to the porch of the trailer. Appellant knocked on the door, and when Helton answered, appellant shot him. Appellant then went in and shot the other people. When Cheryl tried to go down the hallway to one of the bedrooms, he followed her down the hall and shot her again, assuring her that, "yes, she was going to die." Appellant told Stuckey that Cheryl had started all the argument, and that he could "hear [the victims] gasping for breath as he was leaving." It was Stuckey's testimony that appellant was drinking when he came to his trailer, but was not "knee-walking" drunk, as he had seen him drunk before. Stuckey clarified that he had no trouble understanding appellant, who was confused because he could not find Becky.

Dr. Frank Peretti, a forensic pathologist with the State Crime Lab, performed autopsies on all four victims. He observed five gunshot wounds on Cheryl's body, which included wounds to the right scalp, left arm, left midback, and left fifth finger. According to Dr. Peretti, either the wound to the arm or back could have killed her. Richard Falls died from a single gunshot wound to the right chest. On Robert Phegley's body, Dr. Peretti observed wounds to the head and left arm. As Robert would have died from the head wound alone, the wound to the arm, according to Dr. Peretti, was defensive in type and the first wound sustained, as Robert could not have raised his arm if he had been initially shot in the head. Finally, Dr. Peretti opined that Wayne Helton could have died from any of four gunshot wounds he sustained to the right upper chest, right mid chest, right forehead, and left lip. Regarding the lip wound, there was evidence of close

range firing, estimated at one-quarter to one-half inch, due to the presence of soot around the wound. The wound to the right forehead also exhibited evidence of close-range firing, and the trajectory of this wound was consistent with Helton being on his back when the bullet was delivered.

Ronald Andrejack, a firearms expert with the State Crime Lab, testified that the bullets recovered from the bodies of both Phegleys and Richard Falls were fired from the .22 Ruger rifle recovered from appellant's residence. All twelve of the .22 caliber shell casings retrieved from the trailer were Remingtons, the same brand located in appellant's vehicle.

When considering Dr. Peretti's testimony regarding the nature, extent, and location of the victim's wounds, the jury could have easily inferred that appellant fired the shots into the victims in a premeditated and deliberated manner. Also significant was Bill Stuckey's testimony that appellant admitted to killing three of the victims because he was angry at them for running him off and not letting Becky leave with him, and a fourth because he was "at the wrong place at the wrong time." In light of this evidence, the State's proof was sufficient that the appellant's killings of the four victims were premeditated and deliberate acts.

Hunt Decree

[6] Appellant argues that his case was not properly triable in the First Division of the Pulaski County Circuit Court. Asserting that the Consent Decree entered by the United States District Court in *Hunt v. State*, No. PB–C–89–406 (Nov. 7, 1991), divided the Sixth Judicial District (Pulaski and Perry Counties) into two separate judicial districts, he claims that the murders occurred outside the area from which First Division Circuit Judge Marion Humphrey was elected; therefore, Judge Humphrey was without territorial jurisdiction to hear his case.

Very recently, in *State v. Webb*, 323 Ark. 80, 913 S.W.2d 259, 261 (1996) a case involving the territorial jurisdiction of municipal courts, we reviewed the law on this subject as follows:

> If the allegation of a charging instrument were that an offense occurred outside the territorial jurisdiction of the court, then a judgment rendered by the court would be void. *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993); *Williams v. Reutzel*, 60 Ark. 155, 29 S.W. 374 (1895); RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982).
>
> The law in this State is that a criminal trial must be held in the county in which the crime was committed, provided that venue may be changed, at the request of the accused, to another county in the judicial district in which the "indictment is found." Ark. Const. art. 2, § 10; *Waddle v. Sargent, supra.* These authorities limit a circuit court to trying a criminal case in the county in which the crime was committed unless the accused requests the trial be moved to another county which, in any case, must be a part of the judicial district served by the court.
>
> [O]ur circuit courts are thus limited to trying accusations of crimes which occurred in the counties, or judicial districts, in which they sit. . . .

323 Ark. 80 at 83, 913 S.W.2d 259. In *Caldwell v. State*, 322 Ark. 543, 910 S.W.2d 667 (1995), we addressed, for the first time, whether the electoral subdistricts contemplated in the *Hunt* Consent Decree are judicial districts under our Constitution and statutes. Appellant Caldwell, convicted of first-degree murder, argued that the jury venire in his case should have been quashed because it was not made up solely of registered voters from the judicial district where the crime was committed. According to Caldwell, the *Hunt* Decree, while establishing new judicial districts favoring the election of minority judges, also required that juries be selected from registered voters who lived in these new districts when crimes were committed there. Caldwell further argued that while the offense was committed in a new district, only three jurors who were registered voters of the new district served on his jury, which violated Arkansas law and the Sixth Amendment to the United States Constitution. In rejecting Caldwell's argument, we stated:

The Consent Decree invoked by Caldwell in this appeal did have as its purpose "to provide African American voters improved and equal access to the political processes for electing judges to the trial courts of general jurisdiction in the State of Arkansas and to enhance the political participation and awareness of all citizens." The Consent Decree also states that the lines of existing judicial districts will not be disturbed by the remedy except to the extent that electoral subdistricts are created. The Decree then goes forward and creates "majority African American and majority white population electoral subdistricts in Judicial Districts One, Two, Six, Ten, and Eleven West...."

....

In the case at hand, there is no constitutional or legislative provision that divides the Tenth Judicial District into two judicial districts. Added to this point is the fact that the language of the Consent Decree states that its remedy is directed at violations of the United States Voting Rights Act, and it specifically states that it "will not disturb existing district lines of the present judicial districts except to the extent that it creates electoral subdistricts...." Other than inserting this new electoral district for the purposes of electing minority judges, no other aspects of the Tenth Judicial District were to be affected. According to the Consent Decree, the judges elected from the electoral subdistricts would exercise jurisdiction district-wide, and there was no requirement that each judge reside within the electoral district.

322 Ark. 543 at 548–549, 910 S.W.2d 667.

In this case, the appellant argues that, under the Arkansas Constitution, the "defining characteristic of a circuit judge" is that he or she be chosen by all and not merely some of the qualified electors of the judicial district in which he or she is to presides. In support of this argument, appellant cites Ark. Const. art 7, § 17, which states:

> The judges of the circuit court shall be elected by the qualified electors of the several circuits, and shall hold their offices for a term of four years.

As we recognized with respect to the Tenth Judicial District in *Caldwell*, there is no constitutional or legislative provision that divides the Sixth Judicial District into two judicial districts. We see nothing in the plain language of Ark. Const. art. 7, § 17, that effects such a division.

Appellant further relies on our decision in *Riviere v. Hardegree*, 278 Ark. 167, 644 S.W.2d 276 (1983). In that case, we considered whether the General Assembly, in passing Act 432 of 1977, had created one or two separate judicial circuits to serve the area of Garland, Polk, and Montgomery counties. The Act stated that one circuit, Eighteenth Circuit–East, would be composed of Garland County, and the other, Eighteenth Circuit–West, would be composed of Polk and Montgomery counties. However, in a separate act, the General Assembly had made an appropriation for only one prosecuting attorney. Adhering to the "plain meaning rule" of statutory interpretation, we held that the clear language of the Act created two circuits, and that Ark. Const. art 7, § 24,[1] plainly requires each circuit to have an office of prosecuting attorney. *Riviere* is distinguishable, as it involved statutory interpretation of an act of the General Assembly. We recognized in *Caldwell* that

> [t]here simply has been no effort by the General Assembly to convert the electoral subdistricts [created in *Hunt*] into entirely separate and self-contained judicial districts with all the attendant ramifications. We hold that the electoral subdistricts within the Tenth Judicial District are not judicial districts and that the venire in this case was properly drawn from Drew County as a whole.

322 Ark. 543 at 549, 910 S.W.2d 667. Appellant also maintains in his opening brief that his Sixth Amendment rights were violated by his prosecution in the First Division of Pulaski County Circuit Court. Similarly, the ap-

1. This provision provides that: "The qualified electors of each circuit shall elect a prosecuting attorney, who shall hold his office for the term of two years, and he shall be a citizen of the United States, learned in the law, and a resident of the circuit for which he may be elected."

pellant in *Caldwell* maintained that he had a Sixth Amendment [2] right to have the jurors in his case selected from the electoral subdistrict where the crime was committed. In rejecting Caldwell's claim, we reasoned that

> we do not perceive the new subdistricts as having been created for reasons other than for the elections of minority judges. We hold that the Tenth Judicial District remains intact under state law and that the state's judicial districts are the districts referenced in the Sixth Amendment as opposed to the electoral subdistricts established in the Consent Decree.

Id. at 549–550, 910 S.W.2d 667 (Emphasis added). In sum, we see no reason to depart from our recent decision in *Caldwell*, and conclude that territorial jurisdiction was proper in this case.

Proffered instructions on "imperfect" self-defense

[7] Appellant next asserts that the trial court erred in refusing his proffered instructions on what he terms "imperfect self-defense." Neither of appellant's proffered instructions is an AMCI Instruction. We can easily dispose of appellant's argument as to one of these instructions, which reads as follows:

> When a person believes that the use of force is necessary in defense of himself but that person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the defense of justification—use of deadly physical force in self-defense—is unavailable as a defense to any offense for which recklessness or negligence suffices to establish culpability.
>
> Source: Ark.Code Ann. § 5–2–614.

While appellant contends that this instruction is an accurate statement of the law as found in Ark.Code Ann. § 5–2–614 (Repl.(1993), the instruction omits the phrase "is necessary for any of the purposes justifying that use of force under this subchapter," which appears in § 5–2–614(a). Thus, because appellant's proffered instruction did not correctly state the law, the trial court did not err in refusing to give it. *See Pickett v. State*, 321 Ark. 224, 902 S.W.2d 208 (1995).

[8] Appellant also proffered the following instruction based on Ark.Code Ann. § 5–2–206(d) (Repl.1993), regarding ignorance or mistake:

> It is a defense to a prosecution that Timothy Wayne Kemp acted under a mistaken belief of fact that he was justified in using deadly physical force in self defense.
>
> Although mistake of fact would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the mistake of fact of the defendant shall reduce the class or degree of the offense of which he may be convicted to those of the offense he would be guilty of had the situation been as he supposed.
>
> Source: Ark.Code Ann. § 5–2–206.

While the trial court did instruct the jury as to self-defense, appellant asserts that his federal and state due process rights were violated as a result of the trial court's refusal to give his proffered "imperfect self-defense" instruction. We do not agree. Appellant's proffered instruction merely emphasizes his theory of the case that his intoxication should be considered as diminishing his capacity to form the requisite intent to commit capital murder. *See Caldwell v. State, supra.* Yet the trial court's refusal to give appellant's requested instruction did not eliminate the State's burden to prove premeditated and deliberated murder beyond a reasonable doubt. The jury was instructed in this respect, and was also instructed on the lesser-included offenses of first-degree murder, second-degree murder, and manslaughter. In short, the evidence relating to the element of premeditated and deliberated murder was for the jury to weigh and evaluate in light of the State's burden to prove that intent be-

2. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation....

yond a reasonable doubt. As it is clear that this burden remained with the State, we cannot agree that the trial court's refusal to give appellant's proffered instruction violated his due process rights.

For-cause challenges

Appellant contends that his federal and state due process rights were violated when the trial court refused to strike certain potential jurors for cause, namely Annette Waters, Larry Cheatham, Cecilia Baca, Carol Stroman, Catherine Dumas, Felix Clark, Billy Trimble, and Ray Keech. He asserts that he was forced to "waste" peremptory challenges on these persons.

[9–12] The standard for determining if a prospective juror should be excused for cause is whether the juror's views about the death penalty would prevent, or substantially impair, the performance of the juror's duties in accordance with the instructions and the oath taken. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995). A claim of error relating to a challenge for cause is only preserved regarding jurors who actually sat on the jury after a challenge for cause was denied. *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993); *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341 (1990), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3257, 111 L.Ed.2d 766 (1990), *citing Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). In Arkansas, it is presumed that persons comprising the venire are unbiased and qualified to serve. *Franklin v. State, supra, citing Fleming v. State*, 284 Ark. 307, 681 S.W.2d 390 (1984). It was appellant's burden to prove otherwise. *Id.* We will not disturb a trial court's ruling on this issue absent an abuse of discretion. *Id.; Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

[13] In this case, only one potential juror, Judy Cook, was seated after appellant's peremptory strikes were exhausted and his challenge for cause denied. In his brief, appellant merely states that he challenged Cook on "a totality of the circumstances" test, and that he identified her as one against whom he would have exercised a peremptory challenge had he had one remaining.

During voir dire, when initially questioned by the deputy prosecutor whether she thought there were cases where the death penalty was a proper punishment, Ms. Cook responded that, in a capital murder trial, if the accused is guilty beyond any doubt, the death penalty would be proper. After the prosecutor explained that the State had the burden of proving aggravating circumstances during the separate penalty phase, Ms. Cook stated that she understood that at the end of the guilt phase, the death penalty could not be imposed unless and until the State puts on further proof. She stated she understood that the defendant was not required to put on any proof at all, and that she could be an impartial, fair juror and follow the law as given to her by the trial court.

During appellant's questioning of Ms. Cook, she responded that she had no problem with the fact that the evidence in the case would deal with the use or abuse of alcohol, and stated that the knowledge that alcohol was involved did not cause her to feel prejudiced toward either party. Regarding the death penalty, Ms. Cook stated that her opinion had background from the Old Testament, particularly the book of Exodus, "where you have to make equal recompense for whatever your offense was," and from obedience to civil laws. She specifically stated that if a case were fully planned and premeditated, she would not automatically be for the death penalty, as "[i]t would have to meet all the rules. I mean whatever rules were given or set down, it would have to meet all those circumstances." She further stated that she did not think she would be leaning toward the death penalty in such a case, and that "it would be up to the State to prove" that a person should receive the death penalty. She concluded that both life without parole and the death penalty were very harsh punishments. When examining Ms. Cook's remarks, we agree that her answers did not render her unfit to serve on the jury. Thus, we reject appellant's argument on this point.

Overlap of offenses

Next, appellant argues that the capital murder statute is unconstitutionally vague in

violation of the Eighth and Fourteenth Amendments because it provides no meaningful distinction between "premeditation and deliberation" and the definition of "purpose" in the first-degree murder statute. We have rejected this argument on several occasions. *See e.g., Nooner v. State, supra; Dansby v. State, supra; Sheridan v. State,* 313 Ark. 23, 852 S.W.2d 772 (1993); *Ward v. State,* 308 Ark. 415, 827 S.W.2d 110, *cert. denied,* 506 U.S. 841, 113 S.Ct. 124, 121 L.Ed.2d 79 (1992).

Prosecutor's closing argument

[14] Appellant alleges that the trial court erred in denying his motion for mistrial after the deputy prosecutor made an improper remark during closing arguments in the guilt-innocence phase of the trial. The remark at issue is as follows:

> Wayne Helton is shot twice in the body and he's going to die from those gunshot wounds. And I know that his family, when they heard Dr. Peretti testify, they just prayed he was already dead . . .

Appellant objected to the remark, and counsel for both parties approached the bench. He argued that it was improper for the prosecutor to refer to the reaction of someone who may or may not have been in the audience, especially when he had agreed to allow the family members to remain in the courtroom as a courtesy. Appellant requested a mistrial and without waiving this request, asked the trial court to admonish the jury to disregard the comment. The trial court denied the motion to mistrial, but admonished the jury as follows:

> The jury is instructed to disregard references to feelings of persons where there is no evidence before this Court through testimony and exhibits.

On appeal, appellant argues that this admonition was insufficient to cure the prejudice caused by the prosecutor's blatantly improper argument. In support of his position, he cites *Timmons v. State,* 286 Ark. 42, 688 S.W.2d 944 (1985). *Timmons* is clearly distinguishable. In that case, the prosecutor called a witness to the stand when he knew that the witness could not give valid, relevant testimony, and then argued that it was the appellant who prevented the jury from hearing the evidence. The prosecutor had earlier admitted that the witness, a forensic serologist from the state crime lab, could not connect the chain of custody about the materials she had examined in appellant's rape case. The prosecutor's "desire for success" caused him to use improper strategy to try to obtain the appellant's conviction. *Id.* at 44, 688 S.W.2d 944.

[15–18] Here, the prosecutor's statement was not of such magnitude to require a mistrial. A mistrial is a drastic remedy to which the court should resort only when there has been an error so prejudicial that justice cannot be served by continuing the trial; it should only be ordered when the fundamental fairness of the trial itself has been manifestly affected. *King v. State,* 317 Ark. 293, 877 S.W.2d 583 (1994). The trial court has wide discretion in granting or denying a motion for a mistrial and its discretion will not be disturbed except where there is an abuse of discretion or manifest prejudice to the complaining party. *Id.* An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Id.* Recently, we reiterated that attorneys are given leeway in closing remarks. *Bowen v. State,* 322 Ark. 483, 911 S.W.2d 555 (1995). Moreover, the trial court instructed the jury that closing arguments were not evidence. In this case, we conclude that the admonition cured any prejudice.

Other guilt-innocence-phase objections

[19, 20] In addition to the allegations of error discussed above, appellant presents brief arguments in support of six other assignments of error which he claims occurred during the guilt-innocence phase of his trial. First, he claims that the trial court refused to suppress the oral statement he made to Officer David Adams that the victims "beat his ass and threatened him and he was just defending himself." His argument is that, since he had consumed at least a case of beer in the eight to twelve hours prior to offering this statement, he was so intoxicated that he did not knowingly, intelligently, and voluntarily waive his rights under the Fifth

Amendment to the United States Constitution and Ark. Const. art. 2, § 8. We have held that, whether an accused had sufficient mental capacity to waive his constitutional rights, or was too incapacitated due to drugs or alcohol to make an intelligent waiver is a question of fact for the trial court to resolve. *Phillips v. State,* 321 Ark. 160, 900 S.W.2d 526 (1995). The fact that the accused might have been intoxicated at the time of his statement, alone, will not invalidate that statement, but will only go to the weight accorded it. *Id.* Thus, appellant's argument is meritless. Appellant makes similar objections in favor of suppression of the box of .22 Remington shells seized from his truck. Likewise, appellant's argument that he was too intoxicated to make an intelligent waiver to the search of his vehicle goes to weight rather than admissibility.

[21] Appellant further argues that the trial court erred in refusing to enjoin the prosecutor from claiming to represent "The People," as Arkansas has specifically rejected this formulation and prosecutions are made in name of the State. Appellant cites no authority nor makes a convincing argument in support of his assertion of error. Moreover, we can see no prejudice in the trial court's failure to so enjoin the prosecutor, and will not reverse in the absence of prejudice. *Misskelley v. State, supra; citing Berna v. State,* 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied,* 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 145 (1985).

[22] Prior to individual voir dire, the prospective jurors were asked some questions as a group. One prospective juror, Dewey Harvey, stated that his wife worked with someone who was related to one of the witnesses, particularly, "the girl that was hid in the closet," obviously referring to Becky Mahoney. Appellant moved to quash the panel on the grounds that this statement was prejudicial. The prosecutor responded that since there would be testimony that Becky hid in the closet, the panel did not hear anything that they would not hear if Harvey were selected as a juror. The trial court denied the motion to quash. At trial, Becky Mahoney testified that she hid in a closet in the trailer during the shootings. Again, the appellant cannot show he was prejudiced by the trial court's ruling. *Id.*

[23, 24] The trial court also denied appellant's motion for mistrial, which was based on the following remark made by the prosecutor during closing arguments:

> If you find an instruction in there that says intoxication is a defense to the slaughter that this man committed in this trailer that night, then you find him guilty of....

Appellant argued that he had not stated that intoxication was a defense; rather, he had argued "the mental state." According to appellant, the prosecutor's remarks were so misleading that a mistrial should be declared. The trial court denied the motion for mistrial, and refused appellant's request to admonish the jury. While appellant cites no authority for this allegation of error, he asserts that the "greater prejudice" resulted from the denial of his requested "imperfect self-defense" instructions. As discussed above, we rejected appellant's allegation of error concerning the trial court's denial of his proffered instructions. Regarding the deputy prosecutor's argument here, we repeat that leeway is given to both sides during closing argument. *See Bowen v. State, supra.* The prosecutor was simply arguing her case to the jury. We conclude that the trial court did not abuse its discretion in denying appellant's motion for mistrial. *King v. State, supra.*

"Avoiding arrest" aggravating circumstance

[25] We now consider the assignments of error involving the penalty phase. Appellant argues that there was insufficient evidence of the aggravating circumstance that the murders were committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody as set forth in Ark. Code Ann. § 5-4-604(5) (Repl.1993). On appeal, we review the sufficiency of the State's evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Coulter v. State,* 304 Ark. 527, 533, 804 S.W.2d 348, 351–52, *cert. denied,* 502 U.S. 829, 112 S.Ct. 102, 116 L.Ed.2d 72

(1991) (citing *Lewis v. Jeffers*, 497 U.S. 764, 780–82, 110 S.Ct. 3092, 3102–03, 111 L.Ed.2d 606 (1990)). Whenever there is any evidence of an aggravating or mitigating circumstance, however slight, we have held that the matter should be submitted to the jury for consideration. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430, *cert. denied* 450 U.S. 1035, 101 S.Ct. 1750, 68 L.Ed.2d 232 (1981).

At least one commentator has recognized that the statutory aggravating circumstance at issue is "apparently designed to deter deliberate murderous acts subversive of the criminal justice system in particular and social order in general, and to protect certain persons deemed especially important to the integrity of both, including law enforcement officers, prison guards, and actual or potential witnesses in judicial proceedings." *See* Thomas M. Fleming, Annotation: *Sufficiency of the Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that Murder Was Committed to Avoid Arrest or Prosecution, to Effect Escape from Custody, to Hinder Governmental Function or Enforcement of Law, and the Like—Post–Gregg Cases*, 64 A.L.R.4th 755, 763 (1988 and Supp.1995) (footnotes omitted). Many courts, according to this commentator, follow the rule that, where the victim is not a law enforcement officer, the State must clearly show that prevention of detection and arrest for the offense was the dominant or only motive for the killing. *Id.* at 766 (footnotes omitted).

We recognize that a consequence of every murder is the elimination of the victim as a potential witness. However, avoiding arrest is not necessarily an invariable motivation for killing. *See Whitmore v. Lockhart*, 834 F.Supp. 1105 (E.D.Ark.1992), *aff'd* 8 F.3d 614 (8th Cir.1993). A common thread in many of our prior decisions involving the "avoiding arrest" aggravating circumstance is that the murder was committed in order to avoid arrest or eliminate a witness to another offense committed in connection with the murder. *See e.g., Porter v. State*, 321 Ark. 555, 905 S.W.2d 835 (1995) (the jury could have found beyond a reasonable doubt that appellant killed victim to avoid being arrested for robbery due to nature of victim's head wound and the fact that appellant had spoken to victim, who could have identified him as one of the robbers); *Coulter v. State, supra* (child victim obviously knew appellant and would have been able to identify him as the man who raped her; the ends to which appellant went in trying to hide the body, coupled with his almost immediate departure from the area where the offense occurred, was clear evidence of his other efforts to avoid arrest); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420, *cert. denied* 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1990) (sufficient evidence presented where appellant had prior dealings with the victim, and knowing his name, the victim could have identified appellant as having committed the robbery); *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, *cert. denied* 484 U.S. 917, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987) (overwhelming evidence that appellant and his accomplices intended to kill their victims in order to avoid identification, apprehension, arrest and conviction for the robbery where they fatally shot a store customer during the robbery and wounded several other people as they lay helplessly on the floor; one of the surviving victims testified that after appellant was told there was no place in the store in which the victims could be locked up, the robbers commented that they would have to "do away" with the victims because "if they get loose they'll burn us"); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983) (the jury was justified in finding that petitioner shot victims Teague and Ward to increase his chances of avoiding arrest after he had robbed Ward's service station); *Miller v. State, supra* (sufficient evidence that appellant killed the deceased to eliminate a witness and thus hopefully avoid arrest for robbery where he confessed that immediately prior to the shooting, thoughts of being identified by the victim ran through his mind, and no evidence was discovered to corroborate appellant's explanation that he shot the victim because the latter reached for an iron pipe). In at least one case, the victim had knowledge regarding an offense not committed in connection with the murder. *Sheridan v. State, supra* (overwhelming evidence that appellant killed the victim because she had informed narcotics agents that he was involved in drugs).

[26] The Attorney General asserts that, based on Bill Stuckey's testimony, the jury could have inferred that appellant returned to Helton's trailer for the purpose of retrieving his girlfriend, Becky Mahoney, and that he shot and killed the four victims at issue in order to prevent them from having him arrested if he used force to remove Mahoney from the trailer. To accept the State's argument would require an exercise in speculation as to appellant's motive, and is contrary to Stuckey's testimony during the penalty phase:

DEPUTY PROSECUTOR: Did he tell you who he shot?

WITNESS: Yes ma'am.

DEPUTY PROSECUTOR: Whom did he shoot?

WITNESS: Wayne and Sonny and Cheryl and some guy that he didn't know.

DEPUTY PROSECUTOR: Okay. Specifically with reference to the guy he didn't know, did he make any comments about that particular person?

WITNESS: Yeah. He said that he was in the wrong place at the wrong time.

DEPUTY PROSECUTOR: Did he give you any particular reason for shooting these people?

WITNESS: Yes.

DEPUTY PROSECUTOR: What was that?

WITNESS: That they had run him off and kept Becky and wouldn't let him take Becky with him.

DEPUTY PROSECUTOR: Was he looking for Becky?

WITNESS: Yes.

In addition to the quoted passage, our review of the record reveals no testimony at trial, from Stuckey, Mahoney, or any other witness, that appellant made any attempt to forcibly remove Mahoney from the trailer, or that he shot and killed the four victims in order to prevent them from having him arrested if he used force to remove Mahoney from the trailer. Moreover, the State's argument contains an obvious flaw—the appellant never used force to remove Mahoney from the trailer, thus the killings could not have been committed to avoid being arrested for an offense that did not occur. To accept the State's argument would be to ignore the evidence of appellant's motive that is in the record—that appellant killed the victims because they had run him off and kept Mahoney and would not let him take Mahoney with him.

[27] However, with respect to victim Richard Falls, the jury could take into account Stuckey's testimony that appellant had stated to him that Falls was "in the wrong place at the wrong time." In light of this evidence, the jury could have inferred that appellant killed Falls, a person he did not know, for no logical reason such as revenge or accident. *See Miller v. State, supra.* Thus, while we conclude that there was insufficient evidence to support the submission of the "avoiding arrest" aggravating circumstance to the jury on the counts relating to Wayne Helton, Cheryl Phegley, and Robert Phegley, we find no error in the submission of this aggravator on the count relating to victim Falls.

[28] We can perform the statutory harmless error analysis in the penalty phase only if jury found no mitigating circumstances. *Greene v. State,* 317 Ark. 350, 878 S.W.2d 384 (1994); Ark.Code Ann. § 5–4–603(d) (Repl. 1993). Here, the jury unanimously found two mitigating circumstances on each count: (1) Appellant grew up in an environment of abuse and alcoholism; and (2) Appellant grew up in an environment where his father provided an example of extreme violent reactions to situations. Thus, we must reverse for resentencing the death sentences on the counts relating to Wayne Helton, Cheryl Phegley, and Robert Phegley.

Victim-impact statute

[29] We discuss appellant's remaining penalty-phase arguments should they arise upon remand. Appellant challenges Arkansas's victim-impact statute, codified at Ark. Code Ann. § 5–4–602(4) (Repl.1993), as being void-for-vagueness. Particularly, appellant claims that this statute fails to define who is a "victim." This statute provides in pertinent part as follows:

> In determining sentence, evidence may be presented as to any matters relating to aggravating circumstances enumerated in § 5–4–604, any mitigating circumstances, or any other matter relevant to punishment, including, but not limited to, victim impact evidence, provided that the defendant and the state are accorded an opportunity to rebut such evidence. (Emphasis added.)

Recently, we rejected a similar vagueness challenge to this provision in *Nooner v. State, supra,* stating as follows:

> The United States Supreme Court permits the States to authorize victim-impact testimony. *Payne v. Tennessee,* 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] (1991). The Court referred specifically to who might qualify as being impacted by a victim's death and to the State's legitimate interest in counteracting the defendant's mitigating evidence and in reminding the jury that the victim was a person "whose death represents a unique loss to society and in particular to his family." 501 U.S. at 825 [111 S.Ct. at 2608]. Thus, the testimony may range from the victim's family to those close to that person who were profoundly impacted by his death. In the case before us, only [the victim's mother] gave impact testimony. We decline to hold Act 1089 of 1993 to be impermissibly vague.

That our victim-impact statute is not void for vagueness only resolves part of appellant's argument. He further contends that, because there is no place in the Arkansas statutory weighing process for the jury to consider victim-impact evidence, our victim-impact statute is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Ark. Const. art. 2, § 9. Particularly, appellant contends that the victim-impact statute conflicts with Ark.Code Ann. §§ 5–4–603 and –604 (Repl.1993), which direct the jury to determine whether aggravating circumstances exist, to weigh any aggravating circumstances against any mitigating circumstances, and to determine whether the aggravating circumstances justify a death sentence beyond a reasonable doubt. Again, we find appellant's argument unpersuasive.

In our decision in *Nooner,* we alluded to "the State's legitimate interest in counteracting the defendant's mitigating evidence." *Id.* at 109, 907 S.W.2d 677, *citing Payne,* 501 U.S. at 825, 111 S.Ct. at 2608. As the United States Supreme Court recognized in *Payne,* "there is nothing unfair about allowing the jury to bear in mind [the specific harm caused by the defendant] at the same time it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. at 2609. The Court recognized that a misreading of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), had "unfairly weighted the scales in a capital trial," as there are "virtually no limits placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." 501 U.S. at 822, 111 S.Ct. at 2607, *citing Mills v. Maryland,* 486 U.S. 367, 397, 108 S.Ct. 1860, 1876–77, 100 L.Ed.2d 384 (1988) (Rehnquist, C.J., dissenting). As such, the Court held that "a State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827, 111 S.Ct. at 2609.

[30] Regarding appellant's Eighth Amendment claim, the United States Supreme Court has held that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California,* — U.S. ——, ——, 114 S.Ct. 2630, 2638, 129 L.Ed.2d 750 (1994). In so holding, the Court recognized that a contrary rule

> would force the States to adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than mitigating factors. The States are not required to conduct the capital sentencing process in that fashion.

Id. at ——, 114 S.Ct. at 2639, *citing Gregg v. Georgia,* 428 U.S. 153, 199–200, n. 50, 96 S.Ct. 2909, 2937, n. 50, 49 L.Ed.2d 859.

Appellant also asserts that the victim-impact statute violates Art. 2, § 9, of the Arkansas Constitution, yet he has failed to present us with any argument showing us why we should interpret this provision in manner contrary to that of the Eighth Amendment to the United States Constitution. *See, e.g., Diffee v. State,* 319 Ark. 669, 894 S.W.2d 564 (1995); *Ridenhour v. State,* 305 Ark. 90, 805 S.W.2d 639 (1991).

[31] While the Eighth Amendment erects no per se bar to the introduction of victim-impact testimony, this rule is not without limits. When evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process clause of the Fourteenth Amendment provides a mechanism for relief. *Payne,* 501 U.S. at 825, 111 S.Ct. at 2608; *Darden v. Wainwright,* 477 U.S. 168, 179–183, 106 S.Ct. 2464, 2470–72, 91 L.Ed.2d 144 (1986). After reviewing the victim-impact evidence presented in this case, we conclude that this line was not crossed here.

[32] Initially, we note that there was no victim-impact testimony offered at trial pertaining to victim Helton. Roberta Sullivan and Jerri Fletcher, sisters of Robert Phegley, both testified as to the loss they felt after their brother's death. Particularly, Roberta described her brother as "her best friend." She further described Cheryl as more like a daughter than a niece, as Cheryl had lived with her from age three to age fourteen. Jerri testified that she was angry over her brother's death and that he and Cheryl were a "duo" in the family. Since Jerri lived in Mississippi, she described her loss as "not a day-to-day thing [like] what the other sisters feel." Rhonda Darby, Robert's daughter and Cheryl's sister, testified that while she has never been really close to Cheryl, she was just starting to get close with her father again prior to his death. A high school senior at the time of the incident, Rhonda stated her grades fell and she quit basketball. As she was to be married in three weeks, she would be denied the privilege of having her father escort her down the aisle.

Kelly and Kerri Falls, sisters of Richard Falls, testified that they were very close to their brother. As Kelly was the first person in her family notified of her brother's death, she experienced difficulty in having to inform her other family members. According to Kelly, her family experienced disbelief and anger and was "torn apart." Kerri used to see her brother every day, and her three-year-old son did not understand his uncle's death. We cannot say that this testimony was so unduly prejudicial that it rendered appellant's trial fundamentally unfair; thus, we reject his argument.

Jury's ability to show mercy

[33, 34] Appellant contends that the trial court erred in refusing to give to the jury his proffered penalty-phase instruction, which reads as follows:

> Whatever the jury finds regarding aggravating and mitigating circumstances, the jury may still return a verdict of life imprisonment without parole.

We have held that AMCI2d Form Three, Section (C) permits the jury to show mercy, as it allows the jury to find that the aggravating circumstances do not justify a sentence of death. *Dansby v. State, supra.* Non-model instructions are to given only when the trial court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject. *Hill v. State,* 318 Ark. 408, 887 S.W.2d 275 (1994); *Misskelley v. State, supra.* Thus, we conclude that it was not error to refuse the appellant's proffered instruction.

Proffered verdict form

[35] Kemp asserts that the trial court erred in refusing his proffered instruction, a modification of AMCI 2d Form 3, which states as follows:

> You are instructed that in consideration of mitigating circumstances each juror is to make his or her own weighing of aggravating circumstances with the mitigating circumstances that he or she has personally found, and is not restricted to those unanimously found by the jury.

The trial court denied appellant's proffer, and instructed the jury with AMCI2d Form 3, which includes the following:

(b) (____) The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist.

Relying on *Mills v. Maryland, supra,* appellant asserts that Form Three is violative of the Eighth Amendment because it is phrased in such a way so as to inform each juror that he or she could not consider evidence of a mitigating circumstance unless all other jurors unanimously agreed that the evidence supported the finding of the mitigating circumstance. We recently rejected this argument in *Bowen v. State, supra:*

> This same argument was made in *Pickens v. State,* 301 Ark. 244, 783 S.W.2d 341 (1990), on the basis of a Maryland case. We decided the argument lacked merit. We wrote:
>
> Our Form 2, which accompanies AMCI 1509, expressly allows the jury to list mitigating circumstances which were found by some, though not all, of its members. Form 3 then allows the jury to determine if the aggravating circumstances outweigh any mitigating circumstances. Nothing in the forms indicates to the jury that a mitigating circumstance must be found unanimously before it may be considered in the weighing process. The potential for misunderstanding is not present in the Arkansas forms as it is in the Maryland forms.

322 Ark. 483 at 511, 911 S.W.2d 555.

In his reply brief, appellant maintains that this court's decision in *Willett v. State,* 322 Ark. 613, 911 S.W.2d 937 (1995), further demonstrates that his proposed instruction should have been granted. However, in *Willett,* the jurors completed AMCI2d Form 2 in a contradictory manner, finding unanimously that three circumstances were mitigators in one section of the form, while indicating in another section that they had unanimously agreed that the same three circumstances were *not* mitigating circumstances. No such contradiction exists in this case.

Other penalty-phase objections

Appellant briefly submits three other points of error which he alleges occurred during the penalty-phase. He asserts that the trial court erred (1) in refusing his proffered modified version of AMCI2d Form Three, which would inform the jury that they "may" but were not required to give death even if all the interrogatories were answered in the affirmative; and (2) in refusing to modify Form Three to read, "[t]he aggravating circumstances, when weighed against the mitigating circumstances, justify beyond a reasonable doubt a sentence of death." He concedes that these two assignments of error are likely foreclosed by the United States Supreme Court's decision in *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). We agree that they are.

Appellant further contends that the trial court erred in refusing to strike the "risk of death to others" aggravating circumstance, and asks us to overrule our decision in *Cox v. State,* 313 Ark. 184, 853 S.W.2d 266 (1993), in which we held that the killing of more than one person "automatically" converts a case into a death case because the "risk of death to others" aggravating circumstance also covers actual deaths. We decline the invitation to overrule our precedent.

The record has been examined in accordance with Arkansas Supreme Court Rule 4–3(h), and it has been determined that there were no errors with respect to rulings on objections or motions prejudicial to the appellant not discussed above.

Affirmed in part; reversed and remanded in part.

GLAZE, CORBIN and BROWN, JJ., concur in part and dissent in part.

GLAZE, Associate Justice, dissenting in part.

In my view, the majority opinion's reasoning is seriously erroneous in finding, on the one hand, the state's evidence is *insufficient* to support the "avoiding arrest" aggravating circumstances given the jury for Kemp's murders of Wayne Helton, Cheryl Phegley and Robert Phegley, but at the same time, finding the evidence *sufficient* to prove the "avoiding arrest" aggravating circumstance for the murder of Richard Falls. Kemp

killed *all four* of these *victims at the same time and place.*

The majority opinion states the record shows that Kemp killed Wayne Helton and the Phegleys, who had earlier "run Kemp off" without letting him take his girlfriend, Mahoney. From the evidence, the jury could have found this to be *one* reason why Kemp killed these three victims, but the jury had every right to find another reason for Kemp's having killed all four victims—so no witnesses would be left to identify him. In this respect, Kemp stated that the other victim, Falls, was "in the wrong place at the wrong time," which statement, I suggest, meant Kemp had returned to murder everyone he found inside the trailer. The jury could have reasonably concluded from Mahoney's testimony that Kemp killed Falls first as Falls opened the trailer door, then, after killing Falls, a man he did not personally know, Kemp obviously had no intentions of leaving anyone found alive who could identify him.[1] Once Falls was murdered, Kemp's motive to rid the trailer of all witnesses became self-evident. Whether Kemp had additional reasons for killing some of the victims is irrelevant. By its reversal, this court robs the jury of its factfinding responsibility. Therefore, I respectfully dissent from the court's decision to reverse and remand the matter for resentencing.

CORBIN and BROWN, JJ., join this dissent.

BROWN, Associate Justice, concurring in part; dissenting in part.

I agree with the majority that the death sentence relating to the murder of Richard "Bubba" Falls must be affirmed, but I would affirm the other death sentences as well.[1]

The majority reverses because it discerns insufficient proof of aggravating circumstances in this case. The two aggravators found by the jury to outweigh mitigating factors are these:

> (1) The capital murder was committed for the purpose of avoiding or preventing an arrest.
>
> (2) In the commission of the capital murder, Timothy Wayne Kemp knowingly created a great risk of death to a person other than the victim.

Under our statutes, aggravating circumstances must exist beyond a reasonable doubt, and they must outweigh mitigating circumstances beyond a reasonable doubt. Ark.Code Ann. § 5–4–603 (Repl.1993). We have held that the finding of an erroneous aggravating circumstance by the jury constitutes reversible error and grounds for resentencing. *Bowen v. State,* 322 Ark. 483, 911 S.W.2d 555 (1995).

I have concluded that the jury reasonably could have decided that Kemp killed all four victims to avoid arrest. The pivotal testimony at trial on why Kemp committed the murders came from his friend, Bill Stuckey:

> He [Kemp] gave as a reason for shooting these people that they had run him off and kept Becky and wouldn't let him take Becky with him. He was looking for Becky.

So, armed with a .22 Ruger semi-automatic rifle, Kemp returned to Wayne Helton's trailer to retrieve Becky Mahoney. It was obvious in light of the semi-automatic rifle that he planned to take her away by force, which is a crime. But he was confronted at the door of the trailer by Helton and the others. The shooting ensued, and all were killed except for Mahoney, who hid in a closet.

The majority engages in a metaphysical exercise when it speculates on which of the victims died first and for what reason. The evidence supports the jury's finding that Kemp returned to take Mahoney away at gunpoint and that he murdered everyone who was in his way. The truth of the matter

1. I note that another witness indicated that Kemp later said that Wayne Helton had opened the trailer door upon Kemp's return. Who opened the door and which victim was first shot was clearly a factual question for the jury to decide. In any event, Mahoney's testimony vividly supports the finding that Falls was shot first.

1. There appears to be a discrepancy over the number of death sentences. The judgment and commitment order filed December 5, 1994, shows three capital murder convictions. The parties, however, agree that there were four murders, and the evidence and verdict forms substantiate that fact.

is that all four people shot were Kemp's victims and all four were eliminated as potential witnesses. The number of gunshot wounds is instructive. Richard Falls, whose murder the entire court agrees warrants the death penalty, was shot only once, but Cheryl Phegley was shot five times, Robert Phegley was shot twice, and Wayne Helton received four gunshot wounds to the chest. Cheryl Phegley was chased down the hall and killed. Wayne Helton had two close-range wounds that support the State's theory that gunshots for the purpose of executing Helton were fired. An elimination of witnesses under these facts is a more than reasonable conclusion. Moreover, it is patently obvious that opening fire with a semi-automatic weapon caused a risk of death to others, thereby satisfying the second aggravating circumstance which the jury found.

In my judgment, the jury was well within the bounds of reasonable inference in concluding that the aggravators existed and that they outweighed evidence of mitigating factors.

There is a second reason why reversal and remand for resentencing involving three capital murder convictions is suspect. To remand for resentencing on concurrent offenses seems something of a bizarre exercise when one death sentence has been affirmed. *State v. Dawson*, 1995 WL 411372 (Del.Super. June 9, 1995). Parole eligibility will not be affected because the jury, on resentencing, can only consider death or life without parole. Even if the Governor eventually commuted an assessed death sentence, this would not enhance parole eligibility because persons serving commuted death sentences are not eligible for parole. Ark.Code Ann. § 5–4–607(c) (Repl.1993). It could be argued that the possibility of commutation by the Governor might be increased if only one death sentence was involved as opposed to three or four. But that seems exceedingly speculative since the Governor would have the full array of the circumstances depicting Kemp's crime before him regardless of whether one death sentence was at issue or more.

I respectfully dissent from that part of the majority opinion which requires reversal and a remand for resentencing.

GLAZE, J., joins.

335 Ark. 139

Timothy Wayne KEMP, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 98–463.

Supreme Court of Arkansas.

Nov. 19, 1998.

Defendant was convicted in the Circuit Court, Pulaski County, Marion Humphrey, J., of four counts of capital murder and was sentenced to death on each count. He appealed. The Supreme court, 324 Ark. 178, 919 S.W.2d 943, reversed three of the death sentences and remanded. Following resentencing, the Circuit Court again sentenced defendant to death on each count. Defendant appealed. The Supreme Court, Arnold, C.J., held that: (1) law-of-the-case doctrine barred defendant's challenge to constitutionality of victim-impact statute, and (2) prosecutor's alleged expression of opinion was harmless.

Affirmed.

1. Criminal Law ⇐1193

Under law-of-the-case doctrine, defendant was precluded on his second appeal from challenging constitutionality of victim-impact statute; defendant merely reargued the merits of his former constitutional challenges to statute. A.C.A. § 5–4–602(4).

2. Criminal Law ⇐1192, 1193

The doctrine of the law of the case provides that the decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review.

3. Courts ⇐99(6)

The law-of-the-case doctrine extends to issues of constitutional law.

4. Criminal Law ⇐730(7), 1171.1(3)

Prosecutor's remarks, "I think that is one of the most telling things about this defendant," and, "So I know that when you go back with these forms and check . . .," were harmless, and trial court's admonition to jury cured any prejudice.

5. Criminal Law ⇐867

A mistrial is an extreme remedy that is rarely granted and only when an error is so prejudicial that justice cannot be served by continuing the trial.

6. Criminal Law ⇐867

A mistrial should only be ordered when the fundamental fairness of the trial itself has been manifestly affected.

7. Criminal Law ⇐867, 1155

The trial court has wide discretion in granting or denying a motion for mistrial; except where there is an abuse of discretion or manifest prejudice to the complaining party, the appellate court will not disturb the trial court's discretion.

8. Criminal Law ⇐730(1)

Generally, an admonition to the jury cures a prejudicial statement by counsel unless it is so patently inflammatory that justice could not be served by continuing the trial.

Jeff Rosenzweig, Little Rock, for appellant.

Winston Bryant, Att'y Gen., Todd L. Newton, Asst. Att'y Gen. and Kelly K. Hill, Deputy Att'y Gen., Little Rock, for appellee.

W.H. "Dub" ARNOLD, Chief Justice.

In October of 1993, police found the bodies of David Wayne Helton, Robert "Sonny" Phegley, Cheryl Phegley, and Richard "Bubba" Falls in a trailer in Jacksonville, Arkansas. All four victims had been shot, and all but Falls had been shot more than once. Another victim, Becky Mahoney, was also shot but hid in a bedroom closet during the shootings and survived. Mahoney later identified her boyfriend, Timothy Wayne Kemp, as the perpetrator. In November of 1994, Kemp was convicted of four counts of capital murder and sentenced to death on each count. On appeal, this court affirmed all four convictions but reversed three of the death sentences, leaving one intact. *Kemp v.*

State, 324 Ark. 178, 919 S.W.2d 943 (1996). Following a resentencing hearing in October of 1997, Kemp was again sentenced to the three death penalties. From these three sentences, Kemp brings the instant appeal challenging the admissibility of victim-impact evidence, the constitutionality of the victim-impact statute, and the applicability of the law-of-the-case doctrine. Our jurisdiction is authorized pursuant to Ark. Sup.Ct. Rule 1–2(a)(2) (1998), because this is a criminal appeal involving the death penalty. We find no merit in appellant's arguments, and we hold that the law-of-the-case doctrine controls this case. Accordingly, we affirm the appellant's three death sentences.

I. Constitutionality of the victim-impact statute and the law-of-the-case doctrine

In his first trial and appeal, Kemp challenged the constitutionality of Arkansas's victim-impact statute, Ark.Code Ann. § 5–4–602(4) (Repl.1997). This court rejected his arguments and declared the statute constitutional. *Kemp,* 324 Ark. at 203–06, 919 S.W.2d 943. During Kemp's resentencing trial, he renewed his constitutional objections to the statute, and his motion was again rejected by the trial court. Victim-impact testimony was introduced at the resentencing hearing through two relatives of victims Robert Phegley and Cheryl Phegley. In the instant appeal from the three death sentences, Kemp reargues that the victim-impact statute is void for vagueness, facially and as applied, and is substantively and procedurally unconstitutional, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Ark. Const. art. 2, § 8.

Arkansas's victim-impact statute provides, in part:

> In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5–4–604, or any mitigating circumstances, or any other matter relevant to punishment, including, but not limited to, victim impact evidence, provided that the defendant and the state are accorded an opportunity to rebut such evidence.

Further, the publisher's notes to section 5–4–602 indicate that the statute's enacting clause provided: "It is the express intention of this act to permit the prosecution to introduce victim impact evidence as permitted by the United States Supreme Court in *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, [reh'g denied, 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1110] (1991)."

In *Payne,* the United States Supreme Court overruled the *per se* bar to victim-impact evidence, established in *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and upheld a state's choice to permit the admission of victim-impact evidence and prosecutorial argument on that subject. Significantly, the *Payne* Court noted that:

> the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, 501 U.S. at 827, 111 S.Ct. 2597.

[1] In response to the appellant's renewed constitutional objections to Arkansas's victim-impact statute, the State contends that our review of these arguments is barred by the law-of-the-case doctrine. We agree. We also note that we have upheld the constitutionality of the victim-impact statute on many occasions. *See Noel v. State,* 331 Ark. 79, 960 S.W.2d 439 (1998); *Lee v. State,* 327 Ark. 692, 942 S.W.2d 231 (1997); *Kemp v. State,* 324 Ark. 178, 919 S.W.2d 943 (1996); *Nooner v. State,* 322 Ark. 87, 907 S.W.2d 677 (1995). However, because we considered and decided in Kemp's prior appeal the same constitutional arguments raised in the instant appeal, our prior decision with regard to those matters is binding in this subsequent appeal from the appellant's resentencing hearing.

[2, 3] The doctrine of the law of the case provides that the "decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review." *Washington v. State,* 278 Ark. 5, 7, 643 S.W.2d 255 (1982) (citing *Mayo v. Ark. Valley Trust Co.,* 137 Ark. 331, 209 S.W. 276 (1919)). Although we noted in *Washington* that the doctrine is not inflexible and does not absolutely preclude correction of error, *id.* (citing *Ferguson v. Green,* 266 Ark. 556, 557, 587 S.W.2d 18 (1979)), we have also held that the doctrine prevents an issue raised in a prior appeal from being raised in a subsequent appeal "unless the evidence materially varies between the two appeals." *Fairchild v. Norris,* 317 Ark. 166, 170, 876 S.W.2d 588 (1994). We adhere to this doctrine to preserve consistency and to avoid reconsideration of matters previously decided. *Id.* Significantly, the doctrine extends to issues of constitutional law. *Id.; Findley v. State,* 307 Ark. 53, 818 S.W.2d 242 (1991).

Here, there is neither an allegation for correction of an error nor of evidence that materially varies from the prior appeal. Kemp merely reargues the merits of his former constitutional challenges to the victim-impact statute. Kemp's argument that the statute is void for vagueness and is unconstitutional, substantively and procedurally, facially and as applied, was addressed and rejected by this court in his prior appeal. Likewise, we considered and rejected Kemp's argument that the statute violates due process and the protection against cruel and unusual punishment because it does not give sufficient guidance to the jury and judge about how to consider such evidence. Pursuant to the law-of-the-case doctrine, we hold that the appellant's arguments provide no basis for relief in the instant appeal.

II. Other issues

On appeal, Kemp also discusses several issues that he raised at the resentencing trial and that were adversely ruled upon by the trial court, including a ruling authorizing the appellant's shackling at trial, overruled voir dire objections, a proffered but rejected jury instruction on mercy, a denied directed-verdict motion, and other preserved guilt-phase claims. First, Kemp acknowledges that although the trial court authorized his shackling during the trial, Kemp was never actually shackled. Given the lack of prejudice, the issue is moot. Second, Kemp raised some objections during jury voir dire but admits that he did not exhaust his peremptory challenges and announced that his jury was satisfactory. Similarly, this point is moot.

Third, Kemp contests the trial court's rulings on several objections previously considered and rejected by this court in Kemp's prior appeal. For example, the trial court overruled Kemp's proposed jury instruction, based upon the authority of *Duncan v. State,* 291 Ark. 521, 726 S.W.2d 653 (1987), permitting the jury to show mercy. This court considered and rejected this argument in the prior appeal, and the law-of-the-case doctrine controls. *See Kemp,* 324 Ark. at 206–07, 919 S.W.2d 943; *Fairchild,* 317 Ark. at 170, 876 S.W.2d 588. Accordingly, we will not revisit this point in the instant appeal. Likewise, we decline to consider Kemp's objection to the admission of autopsy photographs previously introduced at the original trial and whose introduction this court affirmed in his prior appeal. Notably, Kemp also concedes that the resentencing statute permits the photographs' reintroduction. Similarly, Kemp again objects to the sufficiency of the aggravator concerning "risk of death." We rejected this argument in the prior appeal, and the law-of-the-case doctrine controls. *See id.* at 208, 919 S.W.2d 943.

[4] Fourth, Kemp moved for a mistrial based upon the prosecuting attorney's expression of opinion during closing argument. Specifically, the appellant objected to the prosecutor's remark: "And I think that is one of the most telling things about this defendant." Although the trial court denied the motion for mistrial, he granted the request for an admonition to the jury. Kemp also objected to the prosecutor's statement: "So I know that when you go back with these forms and you check. . . ." The trial court again overruled appellant's objection.

[5–8] This court has long held that a mistrial is an extreme remedy that is rarely granted and only when an error is so prejudi-

cial that justice cannot be served by continuing the trial. A mistrial should only be ordered when the fundamental fairness of the trial itself has been manifestly affected. *Kemp,* 324 Ark. at 198, 919 S.W.2d 943 (citing *King v. State,* 317 Ark. 293, 297, 877 S.W.2d 583 (1994)). Moreover, the trial court has wide discretion in granting or denying a motion for mistrial. Except where there is an abuse of discretion or manifest prejudice to the complaining party, we will not disturb the trial court's discretion. *Id.* Generally, an admonition to the jury cures a prejudicial statement unless it is so "patently inflammatory" that justice could not be served by continuing the trial. *Id.* Significantly, we noted in *Kemp* that attorneys are given leeway in closing remarks. *Id.* (citing *Bowen v. State,* 322 Ark. 483, 911 S.W.2d 555 (1995)). Here, we conclude that the prosecutor's comments were harmless, and, in any event, the trial court's admonition to the jury cured any prejudice.

III. Rule 4–3(h)

In accordance with Ark. Sup.Ct. Rule 4–3(h), the record has been reviewed for adverse rulings objected to by appellant but not argued on appeal, and no reversible errors were found. In light of the foregoing, we affirm the appellant's three death sentences.

Affirmed.

335 Ark. 267

James L. EFURD, Qujette Efurd, Quinton V. Brandon and Joyce L. Brandon, Appellants,

v.

Lee HACKLER and Patricia Hackler, Kenneth Ross, Sheriff of Franklin County, Appellees.

No. 98–480.

Supreme Court of Arkansas.

Dec. 3, 1998.

Judgment debtors sought judgment against sheriff based on allegations that sheriff did not return writ of execution within required time period and did not sell property seized from them. The Chancery Court, Franklin County, Richard E. Gardner, Jr., J., dismissed. Judgment debtors appealed. After certification, the Supreme Court, Arnold, C.J., held that statute authorizing "person aggrieved" to bring action against officer for failure to make timely return of writ of execution or to make sale of seized property did not provide judgment debtors with standing to sue noncomplying sheriff.

Affirmed.

1. Appeal and Error ⇨919

Supreme Court reviews a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and viewing them in the light most favorable to the plaintiff.

2. Pretrial Procedure ⇨681

Trial judge must look only to the allegations in the complaint to decide a motion to dismiss.

3. Sheriffs and Constables ⇨128

Statute authorizing "person aggrieved" to bring action against officer for failure to make timely return of writ of execution or to make sale of seized property would have allowed judgment creditors to maintain such action but did not provide judgment debtors with standing to sue noncomplying sheriff. A.C.A. § 16–66–118.

See publication Words and Phrases for other judicial constructions and definitions.

4. Officers and Public Employees ⇨119

Statute authorizing aggrieved party to maintain an action against an officer who fails to timely return the writ or to make a sale of the seized property is highly penal in nature, and the person seeking to enforce the penalty thus must bring himself within both the letter and the spirit of the statute. A.C.A. § 16–66–118.

ond, the current Arkansas law on this matter is the *Mings* objective standard. Third, there was a valid reason for the stop and for the arrest; therefore, the officer's motivation is irrelevant under both *Whren* and *Mings*.

IMBER, J., joins this dissent.

348 Ark. 750

Timothy Wayne KEMP

v.

STATE of Arkansas.

No. CR 00–482.

Supreme Court of Arkansas.

May 16, 2002.

After death sentences for capital murder convictions were affirmed on direct appeal, 335 Ark. 139, 983 S.W.2d 383, petitioner sought postconviction relief. The Pulaski Circuit Court denied relief. Petitioner appealed. The Supreme Court, 347 Ark. 52, 60 S.W.3d 404, reversed and remanded for specific factual findings on petitioner's ineffective assistance of counsel claims. On remand, the Pulaski Circuit Court, Marion A. Humphrey, J., again denied petition. Petitioner appealed. The Supreme Court, Ray Thornton, J., held that: (1) failure to investigate ownership of gun found at murder scene did not constitute ineffective assistance of counsel; (2) "imperfect self-defense" instruction was not warranted; (3) failing to file a motion to sever, which motion would have been denied, was not ineffective assistance of counsel; and (4) arguments raised and considered on direct appeal were not cognizable in postconviction relief proceeding.

Affirmed.

1. Criminal Law ⚿1158(1)

On appeal from a trial court's ruling on a petition for postconviction relief, the Supreme Court will not reverse the trial court's decision granting or denying postconviction relief unless it is clearly erroneous. Rules Crim.Proc., Rule 37.1 et seq.

2. Criminal Law ⚿1158(1)

A finding is "clearly erroneous" when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⚿641.13(6)

Defense counsel's failure to investigate ownership of gun found at murder scene did not constitute ineffective assistance of counsel; determining who owned weapon would not have changed outcome of trial, in that defense trial counsel fully developed self-defense claim without knowing identity of gun's owner, informing jury that a gun was found at scene and that gun did not match weapon that was used to commit murders. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⚿641.13(6)

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

5. Criminal Law ⚿641.13(6)

A decision not to investigate, which is the subject of an ineffective assistance of counsel claim, must be directly assessed

for reasonableness under all the circumstances, applying a heavy measure of deference to defense counsel's judgments. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⚿772(6)

A party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction.

7. Criminal Law ⚿772(6)

Where a defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction.

8. Homicide ⚿799

A person may not use deadly physical force in self-defense if he knows that he can avoid the necessity of using that force with complete safety by retreating. A.C.A. § 5–2–614.

9. Homicide ⚿697

The defense of "imperfect self-defense" is not applicable when one arms himself and goes to a place in anticipation that another will attack him. A.C.A. § 5–2–614.

10. Homicide ⚿1484

"Imperfect self-defense" instruction was not warranted, even though defendant had been drinking prior to the murders, where there was testimony that he was not drunk, that he left residence, armed himself with a gun, returned to residence, and opened fire upon entering the front door, such that he could not have rationally argued that he recklessly or negligently formed the belief that the use of deadly force was necessary to protect himself. A.C.A. § 5–2–614.

11. Criminal Law ⚿641.13(2.1)

Defense counsel's failing to file a motion to sever murder counts, which motion would have been denied, was not ineffective assistance of counsel; four murders, which occurred at the same location, at the same time, were clearly the result of a single scheme or plan, and evidence offered at trial to establish each offense would have been identical. U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rules 21.1, 22.2.

12. Criminal Law ⚿1433(2)

Arguments involving issues that were direct attacks on the judgment in capital murder prosecution, rather than collateral attacks, and that were already considered on direct appeal were not cognizable in postconviction relief proceeding. Rules Crim.Proc., Rule 37.1 et seq.

13. Sentencing and Punishment ⚿1626

Victim-impact statute was constitutional. A.C.A. § 5–4–602(4).

14. Sentencing and Punishment ⚿1789(9)

Utilization of victim-impact evidence presented by the State in the sentencing phases of capital murder trials was not so unduly prejudicial that it rendered trials fundamentally unfair in violation of defendant's due process rights. U.S.C.A. Const. Amend. 14.

Sam T. Heuer, Little Rock, for appellant.

Mark Pryor, Att'y Gen., by: Michale C. Angel, Ass't Att'y Gen., Little Rock, for appellee.

RAY THORNTON, Justice.

This appeal arises from a trial court's denial of the Rule 37 petition. Appellant, Timothy Kemp, was arrested and charged with four counts of capital murder. He was convicted and sentenced to death by lethal injection on each count. The factual background surrounding appellant's conviction was outlined in *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996)(*Kemp I*).

In *Kemp I*, we affirmed the conviction and sentence pertaining to one victim, Richard Falls, and affirmed the convictions only as to the remaining three counts. We reversed the death sentences as to the three remaining counts and remanded for resentencing, as there was insufficient evidence to support the trial court's instruction to the jury with respect to the statutory aggravating circumstance that the murders were committed for the purpose of avoiding arrest. *Id.*

Following resentencing, the trial court again imposed the death sentence as to each of the three counts. Appellant then appealed to this court. *See Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998), *cert.* denied 526 U.S. 1073, 119 S.Ct. 1471, 143 L.Ed.2d 555 (1999) ("*Kemp II*"). On appeal, he challenged the admissibility of victim-impact evidence, the constitutionality of the victim-impact statute, and the applicability of the law-of-the-case doctrine. We affirmed appellant's three death sentences. *Id.*

Thereafter, appellant filed a petition for postconviction relief pursuant to Ark. R.Crim. P. 37. After a hearing on the matter, the trial court denied the Rule 37 petition. This order was appealed to our court in *Kemp v. State*, 347 Ark. 52, 60 S.W.3d 404 (2001)("*Kemp IV*")[1]. We determined that the trial court's order did not comply with the requirements of Rule 37.5(i) of the Arkansas Rules of Criminal Procedure, and remanded the matter to the trial court for specific factual findings. On April 5, 2002, the trial court's amended order, denying appellant's petition for postconviction relief, was filed.

It is from that order that appellant brings this appeal. Finding no reversible error, we affirm the trial court.

[1, 2] On appeal from a trial court's ruling on Rule 37 relief, we will not reverse the trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). A finding

1. We note that the procedural argument raised by the State was addressed in *Kemp IV, supra*. Specifically, we held:

> In its brief, the State argues that appellant's claims pertaining to the death sentence for one victim, Richard Falls, should be procedurally barred because the Rule 37 petition was untimely. However, the State overlooks our decision of *Kemp v. State*, 326 Ark. 910, 934 S.W.2d 526 (1996) (*per curiam*) ("*Kemp III*"), where we concluded:
>
> > We recall the portion of the mandate affirming the conviction and death sentence and stay it until such time as a final disposition of the remaining counts is complete. As such, any petition under Ark.R.Crim.P. 37.2(c) must be filed within sixty days of a mandate following an appeal taken after re-sentencing on the remaining counts. If no appeal is taken after re-sentencing on these counts, the petition must be filed with the appropriate circuit court within ninety days of the entry of judgment.
>
> *Kemp III*.
>
> Here, appellant timely filed his Rule 37 petition. The mandate of our court was returned to the trial court on April 29, 1999, and on May 18, 1999, appellant appeared before the trial court, at which time the trial court appointed Mr. Heuer, counsel for appellant, who met the qualifications set forth in Rule 37.5(b)(2). On August 11, 1999, appellant filed his Rule 37 petition. Therefore, appellant's Rule 37 petition was not untimely with regard to the Falls's sentence.
>
> *Kemp IV*.

is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

The criteria for assessing the effectiveness of counsel were enunciated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which provides that when a convicted defendant complains of ineffective assistance of counsel he must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors the result of the trial would have been different. *Id.* We have adopted the rationale of *Strickland* and held that:

> To prevail on any claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Secondly, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial.

Thomas v. State, 330 Ark. 442, 954 S.W.2d 255 (1997)(internal citations omitted). In *Thomas,* we further held:

> In reviewing the denial of relief under Rule 37, this court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt in that the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

Id. (internal citations omitted). Remaining mindful of the applicable standard of review, we turn now to appellant's points on appeal.

[3] For his first allegation of error, appellant argues that trial counsel was ineffective for failing to investigate the ownership of a weapon found at the crime scene. Specifically, he argues that a further investigation into this matter would have had bearing on his "imperfect self-defense" claim.

[4, 5] Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Dumond v. State,* 294 Ark. 379, 743 S.W.2d 779 (1988). A decision not to investigate must be directly assessed for reasonableness under all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* (*citing Strickland, supra*).

At the hearing on appellant's petition, trial counsel testified that the "imperfect self-defense" was the heart of appellant's defense in the mitigation phase of the trial. Specifically, in mitigation, trial counsel argued that appellant believed, because he was intoxicated, that he acted in self-defense. At the hearing, trial counsel also offered his rationale for not investigating the gun's ownership. He testified that:

> In the penalty phase in the first trial, the jury made a finding, and I do not recall whether it was unanimous or not unanimous, but the record would reflect whatever it was—that—with my proposed mitigator—our proposed mitigator of he believed he was acting in self-defense.

* * *

> There was a weapon found that was not associated with Mr. Kemp. And he had indicated—he had indicated to me in the trial preparation that one of the people had a weapon, and of course, there was a weapon found. We did elicit that fact, which again played into our he thought he was acting in self-defense. * * *
>
> In terms of presenting this, of course Mr. Kemp did not testify.

* * *

So, we had—we—we had some limitations on exactly what we could allege that Mr. Kemp perceived when he did not testify.

* * *

It [the weapon that was found] was a different caliber from the weapon that was the homicide weapon.

* * *

> No, [I did not take steps to ascertain ownership of the weapon] I don't recall having done so. Of course, it was present at the scene and which for our purposes was—it was present at the scene; it was associated with one of the deceased individuals. And, for our purposes, that—that's what we needed—needed to know.

On this issue, the trial court found:

> in light of the circumstances of this case, the decision of Kemp's counsel not to further investigate the ownership of the weapon was not unreasonable. For example, as explained previously by this court at Kemp's postconviction relief hearing, the issue of ownership of the weapon was raised at trial, and the jury had ample opportunity to consider that issue as part of Kemp's self-defense claim. Further, Kemp failed to articulate how he was prejudiced by the fact that his attorney failed to further investigate the ownership of the weapon. Kemp merely states that had his attorney further investigated this matter, it would have affected his self-defense claim.

After reviewing the facts surrounding this issue, we conclude that trial counsel's failure to investigate the ownership of the gun found at the crime scene did not constitute ineffective assistance of counsel. Specifically, we hold that determining who owned the weapon would not have changed the outcome of the trial. Moreover, we note that trial counsel fully developed appellant's self-defense claim without knowing the identity of the gun's owner. The jury was informed that a gun was found at the scene and that the gun did not match the weapon that was used to commit the murders. From this evidence, the jury could have determined that one of the victims had a gun and that appellant was forced to use his gun in self defense. Accordingly, the trial court's finding on this issue was not clearly erroneous.

For his second allegation of error, appellant argues that trial counsel was ineffective for failing to correctly cite Ark.Code Ann. § 5–2–614 (Repl.1997), the statute regarding the "imperfect self-defense," in a proffered jury instruction. Specifically, he argues that omitting a phrase from the statute constituted ineffective assistance of counsel.

The statute provides:

> (a) When a person believes that the use of force is necessary for any of the purposes justifying that use of force under this subchapter but the person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the justification

afforded by this subchapter is unavailable in a prosecution for an offense for which recklessness or negligence suffices to establish culpability.

(b) When a person is justified under this subchapter in using force but he recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this subchapter is unavailable in a prosecution for such recklessness or negligence toward the third party.

Ark.Code Ann. § 5–2–614.

The instruction that trial counsel proffered at trial on the issue of appellant's claim of self-defense is as follows:

When a person believes that the use of force is necessary in defense of himself but that person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the defense of justification—use of deadly physical force in self-defense—is unavailable as a defense to any offense for which recklessness or negligence suffices to establish culpability.

The trial court refused the proffered jury instruction.

At the Rule 37 hearing, when asked about the jury instruction, trial counsel testified:

> There were two statutory provisions dealing with what amounts to mistakenly, recklessly, or negligently forming the belief that one is acting in self-defense. They're in the statutes. They are not in the AMCI jury instructions. So, I proposed instructions based upon the statutes which deal with this precise situation. They were rejected by this court. We appealed on this basis and pointed out that they were specifically relevant because of the jury's findings in the penalty phase that Mr. Kemp felt he was acting in self-defense.
>
> * * *
>
> Judge Humphrey turned these instructions down on the basis they weren't in the AMCI.
>
> * * *
>
> What I did was I tried to make the jury instruction fit. You know, I used language that would be appropriate for a jury instruction.
>
> * * *
>
> It was an instruction that went to the heart of our defense which was that Mr. Kemp had—had thought, perhaps wrongfully or mistakenly, that he was acting in self-defense.

On this issue, the trial court found:

> the failure of Kemp's counsel to properly cite the model jury instruction was reasonable in light of the circumstances of this case, and that Kemp has failed to prove that he was prejudiced by his counsel's action. In so finding, the court notes that at trial, the jury heard evidence as to the amount of force used by Kemp and the reasonableness of his belief that such force was justified under the circumstances. Thus, that counsel omitted the phrase, "... is necessary for any of the purposes justifying that the use of force under this sub-chapter" does not amount to a showing that Kemp was denied a fair trial or that the trial would have been different but for counsel's error. Indeed, there is no showing that the court would have given this instruction even if counsel had cited it properly.

[6, 7] We must determine whether trial counsel's failure to cite Ark.Code Ann. § 5–2–614 correctly in the proffered jury

instructions constituted a deficient performance that so prejudiced appellant that he was deprived of a fair trial. We have held that there must be a rational basis in the evidence to warrant the giving of an instruction. *Allen v. State,* 326 Ark. 541, 932 S.W.2d 764 (1996). A party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Yocum v. State,* 325 Ark. 180, 925 S.W.2d 385 (1996). Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *Id.*

[8, 9] A person may not use deadly physical force in self-defense if he knows that he can avoid the necessity of using that force with complete safety by retreating. *See* Ark.Code Ann. § 5–2–607(b)(1) (Repl.1997). Additionally, this defense is not applicable when one arms himself and goes to a place in anticipation that another will attack him. *See Girtman v. State,* 285 Ark. 13, 684 S.W.2d 806 (1985).

[10] In the present case, there was no basis to provide the jury instruction for the "imperfect self-defense." At trial, the State established that appellant and his girlfriend, Becky Mahoney, rode around Little Rock drinking beer, before they stopped at the home of one of the victims, David Wayne Helton. After spending time at the residence, appellant asked Ms. Mahoney to leave with him. She declined, and another victim, Cheryl Phegley, asked him to leave as well. The evidence revealed that appellant left the crime scene, returned with a weapon, and killed the four victims while Ms. Mahoney hid in a closet. During the course of the shooting spree, appellant followed Cheryl Phegley down the hallway and shot her a second time. There was a total of twelve spent shell casings at the crime scene.

Additionally, Bill Stuckey, appellant's best friend, testified that appellant told him that Cheryl Phegley had started all the argument. Mr. Stuckey also testified that appellant was drinking when he came to his trailer, but that he was not as drunk as he had seen him before.

Based upon the evidence presented at trial, we conclude that there was no rational basis for the "imperfect self-defense" instruction. Although appellant had been drinking prior to the murders, there was testimony that appellant was not drunk. More significantly, we note that appellant left the residence, armed himself with a gun, returned to the residence, and opened fire upon entering the front door. Therefore, appellant could not rationally argue that he recklessly or negligently formed the belief that the use of deadly force was necessary to protect himself.

After reviewing the record before us, we cannot say that the trial court's finding that a different sentence would not have resulted if trial counsel had accurately cited Ark.Code Ann. § 5–2–614 in his proffered jury instruction was clearly erroneous. Accordingly, we hold that appellant failed to establish a claim for ineffective assistance of counsel on this point.

[11] For his third allegation of error, appellant contends that trial counsel was ineffective for failing to request a severance of the trial. Specifically, he argues that counsel should have requested a severance of the separate counts of capital murder because a severance would have allowed the jury to consider each offense separately and would have ensured that there was no spilling-over of victim-impact testimony.

At the Rule 37 hearing, trial counsel offered an explanation as to why he chose not to request a severance. He stated:

> I did not [move to sever the four counts] because inasmuch as they were all at the same time. I mean they were—they were—the four people who were killed were killed one right after the other in the same place, at the same time. And I did not perceive any ground for a successful severance.

On this issue, the trial court found:

> Kemp's attack on the strategy of his trial counsel is not persuasive, and does not state a ground for Rule 37 post-conviction relief.
>
> * * *
>
> The decision to ask for severance is generally a matter of trial tactics and hence, not reviewable under Rule 37. Further, this court finds that Kemp has failed to demonstrate how he was prejudiced, or that he was denied a fair trial due to counsel's failure to request and/or obtain severance.

Rules 21.1 and Rule 22.2 of the Arkansas Rules of Criminal Procedure discuss the procedures whereby offenses are either joined or severed in criminal cases. Rule 21.1 provides:

> Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Id. Rule 22.2 provides:

> (a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.
>
> (b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

Id. (emphasis added). We have explained that the decision to sever offenses is discretionary with the trial court. *Henry v. State,* 309 Ark. 1, 828 S.W.2d 346 (1992). We have also held that we will affirm a trial court's denial of a motion to sever if the offenses at issue were part of a single scheme or plan or if the same body of evidence would be offered to prove each offense. *Id. See also Passley v. State,* 323 Ark. 301, 915 S.W.2d 248 (1996).

After reviewing the evidence surrounding the crimes, we conclude that if trial counsel had filed a motion to sever the offenses his motion would have been denied. Specifically, the four murders, which occurred at the same location, at the same time, were clearly the result of a single scheme or plan. Moreover, the evidence offered at trial to establish each offense would be identical. Accordingly, a severance of the offenses was not proper. Be-

cause trial counsel's severance motion would not have been successful, appellant has failed to support a claim of ineffective assistance of counsel. *See Sanford v. State,* 342 Ark. 22, 25 S.W.3d 414 (2000)(holding that trial counsel cannot be ineffective when he fails to make an argument which has no merit). Therefore, the trial court properly denied appellant's claim of ineffective assistance of counsel on this point.

Additionally, as noted by the trial court, it can be argued that whether or not to move for a severance is a matter of trial strategy. We have held that matters of trial strategy and tactics, even if arguably improvident, are not grounds for a finding of ineffective assistance of counsel. *Williams v. State,* 347 Ark. 371, 64 S.W.3d 709 (2002).

[12] For his fourth point, appellant reargues several issues which we have previously addressed. Rule 37 does not allow appellant to reargue points decided on direct appeal. In *Davis, supra,* we discussed the nature of Rule 37 and the type of claims which may or may not be pursued in this type of action. We explained:

> Rule 37 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State,* 343 Ark. 22, 31 S.W.3d 826 (2000). The rule does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Weaver v. State,* 339 Ark. 97, 3 S.W.3d 323 (1999). Rule 37 does not permit a petitioner to raise questions that might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Neal v. State,* 270 Ark. 442, 605 S.W.2d 421 (1980). Postconviction relief is not intended to permit the petitioner to again present questions that were passed upon on direct appeal. *Hulsey v. State,* 268 Ark. 312, 595 S.W.2d 934 (1980). Rule 37 is a narrow remedy designed to prevent incarceration under a sentence so flawed as to be void. *Bohanan v. State,* 336 Ark. 367, 985 S.W.2d 708 (1999).

Davis, supra.

Because appellant's arguments involve issues that are direct attacks on the judgment rather than collateral attacks, and because these issues have already been considered on direct appeal, these issues are not cognizable under Rule 37. However, in *Kemp IV,* out of an abundance of caution, and because this appeal involved a case in which the death penalty was imposed, we directed the trial court to make specific findings with regard to these issues that we now briefly address.

[13] First, appellant challenges the use of victim-impact testimony. Specifically, he argues that the victim-impact statute, Ark.Code Ann. 5–4–602(4) (Repl.1997), is unconstitutional. Appellant notes that we addressed this issue in his prior appeals. In *Kemp I, supra,* appellant challenged the constitutionality of Arkansas's victim-impact statute. We rejected his arguments and declared the statute constitutional. *Id.* In *Kemp II, supra,* appellant attempted to reargue this issue, and we held that, pursuant to the law-of-the-case doctrine, appellant's arguments provided no basis for relief. *Id.* In *Kemp II,* we also noted that we have upheld the constitutionality of the victim-impact statute on "many occasions." Because appellant has failed to provide us a reason to depart from our previous holdings, we once again conclude that the Arkansas victim-impact statute is constitutional.

[14] Appellant also argues that "the utilization of victim-impact evidence pre-

sented by the State in the sentencing phases of *Kemp I* and *Kemp II* was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment." Appellant once again notes that "this argument was considered in *Kemp I* and rejected." In that case, we held:

> When evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. After reviewing the victim-impact evidence presented in this case, we conclude that this line was not crossed here.
>
> * * *
>
> We cannot say that this testimony was so unduly prejudicial that it rendered appellant's trial fundamentally unfair; thus, we reject his argument.

Id. (internal citations omitted). After reviewing our prior holding on this matter, we decline to reach a contrary result on the same issue in this appeal.

Next, appellant seeks to reargue whether the trial court should have given certain proffered jury instructions. Specifically, appellant contends that the trial court erred in denying proffered jury instructions on the issues of "imperfect self-defense," based on Ark.Code Ann. § 5–2–614 and "mistaken belief of fact," based on Ark.Code Ann. § 5–2–206(d) (Repl.1997). These instructions were written by trial counsel and rejected by the trial court. As noted by appellant, we addressed this issue in *Kemp I, supra.* We conclude that the analysis and reasoning articulated in *Kemp I* disposes of this issue.

Finally, appellant argues that the First Division of the Pulaski County Circuit Court was without territorial jurisdiction to preside over his case. This issue was decided in *Kemp I, supra,* where we held that territorial jurisdiction in the First Division of the Pulaski County Circuit Court was proper. We decline the request that we overturn our holding that venue was proper in the First Division of the Pulaski County Circuit Court.

Affirmed.

348 Ark. 610

Elizabeth STROM,

v.

STATE of Arkansas.

No. CR 01–933.

Supreme Court of Arkansas.

May 16, 2002.

After defendant was convicted in the trial court of manufacturing controlled substance and possession of drug paraphernalia, and pro se petition for postconviction relief was denied, defendant filed motion to vacate or set aside convictions alleging that attorney failed to file direct appeal despite request to do so, and subsequently filed motion for belated appeal. The Supreme Court held that remand for findings. On remand, the Pulaski Circuit Court, John B. Plegge, J., entered order concluding that defendant did not inform attorney of her desire to appeal. Defendant appealed. The Supreme Court, Tom Glaze, J., held that evidence supported finding that attorney acted reasonably under circumstances and did not render ineffective assistance of counsel.