Cite as 2019 Ark. 360

SUPREME COURT OF ARKANSAS

No. CR-18-206

	Opinion Delivered: December 5, 2019
NICHOLAS ROOS APPELLANT	
V.	APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT [NO. 03CR-15-358]
STATE OF ARKANSAS APPELLEE	HONORABLE GORDON WEBB, JUDGE
	AFFIRMED.

COURTNEY RAE HUDSON, Associate Justice

Appellant Nicholas Roos appeals from the Baxter County Circuit Court's denial of his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. For reversal, Roos argues that (1) the circuit court clearly erred by finding that trial counsel's failure to obtain a forensic evaluation prior to his pleading guilty was not ineffective assistance; (2) the circuit court clearly erred in finding that trial counsel was not ineffective by failing to file any pretrial motions to suppress or motions in limine before allowing him to enter his plea; and (3) the circuit court erred by applying the wrong legal standard in ruling on his petition. We affirm.

Roos was charged on December 4, 2015, with two counts of capital murder, two counts of arson, aggravated robbery, Class B theft of property, and Class D theft of

property. The criminal information alleged the following facts in support of the charges. On November 7, 2015, Baxter County law enforcement responded to reports of a residential fire in Midway. Human remains that were later identified as the homeowners, Donald and LaDonna Rice, were found at the residence. One of the Rices' vehicles was also missing from the residence, and it was discovered the next day in a field, abandoned and burned. On November 11, 2015, Mike Pierson, who lived near where the vehicle was found, notified law enforcement that two males had approached his residence on the afternoon of November 7 and asked for a ride. They claimed that a girlfriend had dropped them off nearby to look for a "fishing hole," although Pierson noticed that they were not carrying any fishing equipment. Pierson gave them a ride home. After hearing about the burned residence and vehicle a couple of days later, Pierson became suspicious and decided to notify police. He took officers to the house where he had dropped off the two males, and as they drove by, Pierson saw one of those males getting into a car with a female. When officers turned around to get the license plate number of the car, it drove off at a high rate of speed. The officers eventually caught up to the vehicle and conducted a traffic stop. The driver was identified as Mikayla Mynk, and the passenger was Roos.

A search warrant was obtained for the vehicle and for Mynk's residence. Officers located numerous pieces of jewelry, a large-screen television, a .32-caliber pistol, and multiple items of drug paraphernalia at the home. Additional pieces of jewelry, including two rings with the initials "DRD," a .38 caliber revolver, and power tools, among other items, were found in the vehicle.

On November 13, 2015, Roos agreed to give a statement to police. He admitted that Mynk had dropped him and Zach Grayham off at the victims' house and that Roos had shot the victims with a Canik 9 mm pistol that a friend had purchased. Roos and Grayham then loaded items from the Rices' home, such as a large-screen television, valuables from the victims' safe, tools, a .38-caliber revolver, and other possessions into the Rices' truck, set the home on fire, and drove the truck to Mynk's house, where they unloaded the stolen items. Roos indicated that they had abandoned the truck and set it on fire, then got a ride from an elderly gentleman back to Mynk's residence. According to Roos, Mynk and Grayham buried the Canik 9 mm pistol near a shed on Roos's father's property. Officers later located this pistol, along with a box of ammunition, near where Roos had described. The criminal information further alleged that Grayham had given a statement to police that was virtually identical to Roos's confession.

Roos entered a negotiated plea of guilty to all charges on May 24, 2016. He was sentenced to concurrent sentences of life without parole for the capital murders, and he received 30 years' imprisonment for each count of arson, 30 years for aggravated robbery, 20 years for Class B theft of property, and 6 years for Class D theft of property, with these sentences to be served concurrently to each other and to his life sentences.[1]

[1]As part of his negotiated plea, Roos also pled guilty to burglary charges in a separate case, and his sentences for those charges were ordered to run concurrently to his life sentences in this case. In addition, other criminal charges unrelated to this case were nolle prossed by the prosecution as part of the plea deal.

On July 27, 2016, Roos filed a motion for appointment of counsel and a Rule 37.1 petition for postconviction relief. He claimed in his petition that his due process rights were violated because a witness's identification of him was unduly suggestive and that his guilty plea was coerced. Roos further argued that his attorneys were ineffective for not obtaining a mental evaluation, not investigating the prosecution's evidence, and not filing motions to suppress.

The circuit court granted Roos's motion for appointment of counsel, and a hearing was held on his Rule 37.1 petition on March 28, 2017. Roos presented three witnesses on his behalf at the hearing, in addition to his own testimony. Levi Clipper and Zach Alexander, two of Roos's longtime friends, testified that Roos had suffered from extreme paranoia in the months preceding the murders and believed that people were following him. Clipper stated that when Roos stayed with him for a few days in September 2015, he noticed Roos's unusual behavior, such as looking out the window every time he heard a noise and believing that there were people on the roof attempting to break in to the apartment. Clipper admitted, however, that Roos was "certainly high on something," which he assumed was methamphetamine, and that people who use methamphetamine often behave in a paranoid manner.

Alexander testified that Roos had stayed with him during the nine-month period prior to the murders. Alexander stated that Roos's behavior changed after he returned from the mental-health facility in April 2015 and that Roos suffered from paranoia and hallucinations that people were out to get him. Alexander agreed that Roos was drinking

heavily during this time and using methamphetamine on a daily basis. Alexander indicated that he did not see Roos in the two weeks prior to the murders.

Mary Hauf, Roos's grandmother, testified that in April 2015, Roos attempted to commit suicide and was taken to the hospital. She further testified that she had witnessed his paranoia. After he was arrested, Roos tried to harm himself in jail, and Hauf stated that she had asked Roos's trial counsel to have him undergo a mental evaluation, although one was never performed. Hauf testified that Roos had admitted using "all kinds of different drugs."

Roos stated that he was admitted to a psychiatric treatment facility for several days in April 2015 after his suicide attempt and that he had also tried to kill himself in jail and was subsequently held in solitary confinement on suicide watch. He testified that he had never had a mental evaluation subsequent to his arrest despite requesting one from his trial attorneys. Roos stated that he entered his guilty plea despite not having had the evaluation because he was told by his attorneys that his plea bargain would not be accepted if he raised the issue. He further testified that he had asked his counsel to file motions to suppress, claiming that the traffic stop was not based on probable cause and that he had only given a statement to police based on a promise that Mynk would be released from jail.

On cross-examination, Roos admitted that his trial counsel had discussed the plea agreement with him and that he understood that he would receive a life-without-parole sentence instead of facing a possible death sentence. When asked about his mental condition, Roos agreed that his diagnosis in April 2015 was depressive disorder and that

his medical records showed no impairment with regard to his comprehension or oral and written expression. He testified that he had started drinking heavily and using drugs after he separated from his children's mother; however, he described himself as "very intelligent" and adequate at problem-solving. Roos further agreed that he was able to effectively assist his attorneys and understand the criminal proceedings, such that his fitness to proceed was not an issue. He instead claimed that his symptoms of "paranoid schizophrenia" resulting from his use of methamphetamine had damaged his brain and had affected his ability to decipher right from wrong.

The State also presented four witnesses at the Rule 37.1 hearing. Special Agent David Smalls with the Arkansas State Police testified to the details of Roos's custodial statement, and Mike Pierson described his encounter with Roos and Grayham on the day of the murders and the circumstances leading up to Roos's arrest. Katherine Streett and Teri Chambers, Roos's trial counsel, also testified. Both Streett and Chambers indicated that they had extensive experience with death-penalty cases. With respect to Roos's claim that he should have received a mental evaluation, trial counsel testified that they would have requested such an evaluation if they had any doubt as to Roos's fitness to proceed. Chambers noted that there was never a question whether Roos understood the charges against him or what she was telling him and that he was able to provide information and make suggestions regarding his defense. Streett and Chambers further indicated that they had not witnessed the paranoid behavior that Roos complained about in his petition.

In addition, counsel testified that they did not believe that Roos had a viable mental-disease-or-defect defense based on his medical records and their conversations with him and with his family members. They indicated that Roos's prior suicide attempts and depression would have been useful only during the penalty phase of the trial and that they did not obtain an independent mental examination for mitigation purposes because Roos chose to plead guilty early in the trial-preparation process. Counsel noted that methamphetamine use was not a defense in Arkansas and that paranoia caused by such drug use would not be a valid basis for a plea of not guilty due to mental disease or defect. Chambers explained that, after reviewing the evidence provided in discovery, she knew there was no way that an insanity defense would work based on the goal-oriented behavior that Roos demonstrated before and during the commission of the murders and while attempting to cover up the crimes. For example, she indicated that the State would have presented evidence to show that Roos enlisted a friend to buy the gun the day before the murders and that he had planned to rob someone that day in order to obtain money for a lawyer to represent him in his custody dispute.

Regarding Roos's claim that trial counsel should have filed motions to suppress his statement and the evidence before advising him to plead guilty, Streett and Chambers testified that neither motion would likely have been successful. Although Roos alleged that he had only confessed to police in order to obtain his girlfriend's release from jail, Agent Small testified that Roos had voluntarily requested to make a statement and that he had waived his *Miranda* rights before doing so. More importantly, Streett indicated that

Roos had made other statements, both before his arrest and during his phone calls from jail, in which he had admitted his involvement in the murders. Similarly, Streett testified that a motion to suppress the evidence found in the vehicle during the traffic stop would also likely not be granted as there would be testimony from a law-enforcement officer that the car had been speeding and that incriminating evidence was found in plain view following the stop. Finally, Street again emphasized that Roos had urged them to pursue plea negotiations well before the deadline to file pretrial motions; she stated that even though it might not have been successful, she probably would have pursued a motion to suppress his statement if he had chosen not to plead guilty and the case had proceeded to trial.

Following the submission of posthearing briefs by both parties, the circuit court entered an order denying Roos's Rule 37.1 petition on November 27, 2017. The court concluded that Roos's trial counsel were not deficient in their representation, and further, that there was no indication that their actions resulted in prejudice to Roos. The circuit court specifically noted that it found Streett and Chambers to be more credible in their testimony than Roos. Roos filed a timely notice of appeal of the circuit court's order on December 11, 2017.[2]

On appeal, Roos first argues that the circuit court erred by finding that his trial counsel's failure to obtain a forensic evaluation prior to permitting him to plead guilty was

[2]Roos filed a motion for reconsideration of the circuit court's order on November 29, 2017. However, it was never ruled on by the circuit court, and Roos did not file an amended notice of appeal from the deemed denial of this motion.

not ineffective. He contends that the failure to investigate his mental-health issues was objectively deficient based on prevailing standards in a capital case and the "significant neurological red flags" in his background and family history and that he was prejudiced as a result.

A circuit court's denial of a Rule 37.1 petition will not be reversed unless the court's findings are clearly erroneous. *Williams v. State*, 2019 Ark. 129, 571 S.W.3d 921. 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 made. *Id.* When a defendant pleads guilty, the only claims cognizable in a Rule 37.1 proceeding are those that allege the plea was not made voluntarily and intelligently or that it was entered without the effective assistance of counsel. *True v. State*, 2017 Ark. 323, 532 S.W.3d 70.

The benchmark for judging a claim of ineffective assistance of counsel, as derived from *Strickland v. Washington*, 466 U.S. 668 (1984), is whether counsel's conduct so undermined the proper functioning of the adversarial process that the proceeding cannot be relied on as having produced a just result. *Williams, supra.* We assess the effectiveness of counsel under the two-prong standard adopted in *Strickland. Id.* First, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Woods v. State*, 2019 Ark. 62, 567 S.W.3d 494. In other words, the petitioner must show that his counsel's performance fell below an

objective standard of reasonableness. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Woods*, *supra*. The burden is on the petitioner to overcome this presumption and to identify specific acts and omissions by counsel that could not have been the result of reasoned professional judgment. *Sims v. State*, 2015 Ark. 363, 472 S.W.3d 107. Conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. *Id.*

Second, the petitioner must show that counsel's deficient performance prejudiced his or her defense. *Rasul v. State*, 2015 Ark. 118, 458 S.W.3d 722. In the context of a guilty plea, the petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Mancia*, *supra*. We have held that an appellant who has pleaded guilty necessarily has difficulty in establishing prejudice given that the plea is premised on an admission of guilt of the crime charged. *True*, *supra*. Unless a petitioner can satisfy both prongs of the *Strickland* standard, it cannot be said that the conviction resulted from a breakdown in the adversarial process that rendered the result unreliable. *Id.*

Roos contends that counsel's failure to obtain a forensic evaluation prior to permitting him to plead guilty was objectively deficient based on prevailing standards in capital cases and on what he refers to as "neurological red flags" in his background and family history. He cites the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* and argues that these guidelines emphasize the

importance of investigating possible affirmative defenses and consulting with mental-health experts.

As Roos indicates, however, these guidelines are merely "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Roos's trial counsel testified that they obtained his medical records from April 2015 and spoke with his family and friends, in addition to meeting with Roos on multiple occasions and reviewing the evidence in the case. Both Streett and Chambers stated that after performing this investigation, they had no doubt as to Roos's mental competency. They testified that they noticed no signs of paranoia or hallucinations during their representation of Roos and that he fully understood the charges against him, the legal process, and the potential sentence that he faced. Furthermore, counsel stated that while they were aware of Roos's depression, prior suicide attempts, and claims of paranoia symptoms, there was no indication that he was suffering from a mental disease or defect at the time of the murders. They noted that Roos's actions leading up to, during, and after the crimes revealed a high level of planning and goal-oriented behavior. Streett and Chambers testified that Roos's paranoid behavior was instead a result of his drug and alcohol use, which is not a valid defense to the crimes. *See* Ark. Code Ann. § 5-2-207(a) (Repl. 2013) (stating that self-induced intoxication is not an affirmative defense to a prosecution). While counsel agreed that a mental evaluation from their own mental-health expert would have been necessary for mitigation purposes if the case had proceeded to trial, they stated that Roos was "adamant" that he wanted to pursue a guilty plea as soon as they discussed with him the

evidence that was provided in discovery, which was within six months of the charges being filed.

Having taken into account the evidence in the record, as well as the testimony and its own observation of Roos at the hearing, the circuit court concluded that there was no reasonable basis to request a mental examination of Roos to establish either his unfitness to proceed or to assert a plea of not guilty by reason of mental disease or defect. The circuit court further found that trial counsel were not deficient for not requesting a mental evaluation when they were following Roos's direction to seek a guilty plea in order to avoid the death penalty. We have held that an attorney's performance is not deficient for following his or her client's wishes. *Sykes v. State*, 2011 Ark. 412 (per curiam). In addition, as the State asserts, the commentary to Guideline 10.9.1 of the 2003 ABA Guidelines states that a plea is the optimal outcome in many death cases and that it is an obligation of counsel to seek such an agreed-upon disposition throughout all phases of the case. *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.9.1 cmt. (2003).

Given the evidence discussed above, we cannot say that the circuit court's conclusion that trial counsel were not ineffective for failing to obtain a mental evaluation was clearly erroneous. Accordingly, there is no need to discuss the second prong of the *Strickland* analysis, which is whether Roos was prejudiced by this failure. *True, supra.* We affirm the circuit court's denial of relief on this claim.

Roos next argues that the circuit court erred by finding that trial counsel was not ineffective for failing to file any pretrial motions to suppress or motions in limine before permitting him to plead guilty. In his petition, Roos alleged only that counsel were deficient for not filing a motion to suppress his confession and a motion to suppress evidence seized as a result of the traffic stop. An appellant is limited to the scope and nature of the claims raised below in a Rule 37.1 proceeding and cannot raise new arguments on appeal. *Reams v. State*, 2018 Ark. 324, 560 S.W.3d 441. Thus, we address counsels' alleged deficient performance only with respect to the motions to suppress that were raised in Roos's petition.

With regard to Roos's claim that a motion to suppress his confession should have been filed, Streett testified that she did not believe such a motion would have been successful in light of Agent Small's testimony that Roos had requested to speak with Small and that Roos had indicated that he was voluntarily waiving his right to remain silent. Furthermore, Streett noted that Roos had made other statements in which he admitted his participation in the crimes and that these statements would have been admitted at trial even in the absence of his confession.

In addition, Streett testified that she had discussed with Roos his concern that there was no probable cause for the traffic stop. However, the discovery provided by the State indicated that the police stopped the vehicle because it was speeding and then found incriminating items in plain view. As a result, Streett did not believe that a motion to suppress the evidence would be successful either.

It is not ineffective assistance if counsel fails to file a motion that would not be meritorious. *Rea v. State*, 2016 Ark. 368, 501 S.W.3d 357. As with the request for a mental evaluation, the circuit court also found that Roos had instructed his counsel that he wished to plead guilty months before the pretrial deadline to file motions had expired and that it was not objectively deficient for counsel to have failed to file such motions by the time of the plea hearing. Roos argues that regardless of the plea negotiations, counsel should have investigated potential claims that could be raised in pretrial motions. However, testimony by Streett and Chambers indicated that counsel did, in fact, investigate potential claims, including the motions to suppress discussed above. It was not until discovery had been received and reviewed that counsel discussed a possible plea deal with Roos, and he chose at that time to pursue a guilty plea in order to avoid the death penalty. As noted above, it is not deficient performance for an attorney to follow the wishes of a client. *Sykes*, *supra*. Thus, the circuit court was not clearly erroneous in finding that trial counsel were not ineffective by failing to file pretrial motions to suppress, and a discussion of potential prejudice is unnecessary. *True*, *supra*. We affirm the denial of this Rule 37.1 claim as well.

Finally, Roos argues that if this court does not reverse the circuit court's rulings with respect to the claims discussed above, we should reverse and remand for the circuit court to apply the correct legal standard to his Rule 37.1 petition. Specifically, he contends that the circuit court "misconstrued *Strickland*," "placed far too much weight on Roos's plea colloquy," "misapplied the standard for prejudice," misunderstood "the effects long-term

drug use and repeated suicide attempts can have on an individual's competency and mental health," and erred by relying "on two lay witnesses for the finding that Roos's paranoid behavior . . . was due to methamphetamine abuse."

Essentially, Roos challenges the weight and credibility of the evidence, which is the circuit court's province to determine, not this court's. *See Williams v. State*, 2017 Ark. 123, 517 S.W.3d 397. Furthermore, the circuit court's detailed order correctly discussed and analyzed the evidence under the *Strickland* two-prong analysis, and Roos's argument that the court applied the wrong standard is without merit. To the extent that Roos is challenging whether his plea was entered intelligently and voluntarily, the circuit court rejected this argument as well after reviewing the transcript of the plea hearing and observing Roos testify at the Rule 37.1 hearing. In fact, Roos admitted at the postconviction hearing that he was competent, able to assist counsel, and understood the charges he was facing. We have held that a plea of guilty that is induced by the possibility of a more severe sentence does not amount to coercion. *Wood v. State*, 2015 Ark. 477, 478 S.W.3d 194. In sum, the circuit court did not clearly err by finding that Roos did not meet his burden to demonstrate that he received ineffective assistance of counsel pursuant to *Strickland*, and we affirm the denial of Roos's Rule 37.1 petition.

Affirmed.

Special Justice JOSHUA M. OSBORNE joins in this opinion.

HART, J., dissents.

WOMACK, J., not participating.

not reasonably adequate representation.[12] This satisfies the first prong of *Strickland v. Washington* for ineffective assistance of counsel. *See* 466 U.S. 668, 688 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness."); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.") (citing *Strickland*, 466 U.S. at 689).

To assess the second prong of *Strickland*, which asks whether Roos was prejudiced by the deficient representation, we should remand to the circuit court with instructions to order the forensic examination that Roos should have received before trial. The results of that examination would illuminate whether Roos could have had a viable defense for mental disease or defect.

I dissent.

James Law Firm, by: *Michael K. Kaiser* and *William O. "Bill" James, Jr.*, for appellant.

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[1]As to the guilt phase, capital-defense counsel must investigate possible affirmative defenses such as insanity. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), Guideline 1.1, commentary. "The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses [and] decisions about the need for expert evaluations." *Id.* at Guideline 10.7, commentary. "Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary." *Id.* at Guideline 4.1, commentary (internal citations omitted).

[2]The majority's disregard for the ABA Guidelines is a bad recipe. Looking beyond the circumstances of this particular case (as set forth herein, I offer no opinion as to whether Roos was actually prejudiced here), I implore our defense bar to hold itself to higher standards than what this court's Rule 37 jurisprudence has come to allow.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.

IN THE CIRCUIT COURT OF BAXTER COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS	NO. CR 2015-358-4	PLAINTIFF
VS.		
NICHOLAS ROOS	RULING ON RULE 37 PETITION	DEFENDANT (Male)

FACTS

1. On or about November 7, 2015, two individuals who are believed to have been dropped off by a female in the Baxter County rural community of Midway, Arkansas, knocked on the door of the Rice home in rural Baxter County. When the door was opened, one of the individuals shot both Mr. and Mrs. Rice and entered the residence. They burglarized the premises, stealing numerous items which were loaded into the Rice's pick-up truck. They then set the home on fire, burning it to the ground and incinerating these victims' bodies. The stolen items were taken in the pickup to the home of one of the individuals and then the pickup was taken to another area of Baxter County and burned.

2. On or about November 7, 2015, Michael Pierson was at his home in rural Baxter county (not too far from where the burned truck from the Rice home would be found), when two young men came walking up to his porch. They told the story that a girl friend had dropped them off to go fishing. They said they had walked to Mr. Pierson's home and were looking for a way to get to their home. Mr. Pierson noted they had no fishing gear with them, but agreed to drive them home. He dropped them off at a residence in rural Baxter County near where Mr. Pierson's sister lived so he later remembered the residence. A day or two later, after Mr. Pierson heard about the fire at the Rice home and the burned pickup near to his home, he heard that the pickup was stolen from the Rice home, and decided to call law enforcement about the two young men.

3. After sheriff's deputies came to Mr. Pierson's home, he told them about the young men and the fact that they claimed to be fishing but had no fishing equipment. Mr. Pierson agreed to ride with the sheriff's deputies to show them where he had dropped the young men off. As they were passing the residence

where he had let off the two young men, a man and woman came out of the house, got into their vehicle and drove off. Mr. Pierson immediately recognized the man as one of the two young men. This individual was subsequently identified as Nicholas Roos, the Rule 37 petitioner in this case.

4. The officers followed the vehicle containing Mr. Roos and his female companion, ultimately resulting in a stop. The stop led to the search of the vehicle and arrest of Mr. Roos and his girlfriend. This arrest focused the investigation of the killing of Mr. and Mrs. Rice, and the burning of their home and pickup truck, on Mr. Roos as a suspect. An intense investigation over the next few days resulted in charges being filed against Mr. Roos for Capital Murder (2 counts), Arson (2 counts), Aggravated Robbery, and Theft, on November 18, 2015. Both Mr. Roos' girlfriend and another male individual were charged with related crimes and Mr. Roos was separately charged with other burglaries and theft charges on two separate cases.

COURT PROCEDURES

5. The Court arraigned Mr. Roos on the cases on November 15, 2015, with attorneys, Katherine Streett and Teri Chambers, from the State Public Defender's office present. Formal written entry of appearance by Katherine Streett and Teri Chambers was filed on December 3, 2015. Several defense motions were filed and responded to by the State in December, 2015.

6. On January 7, 2016, the Court entered a scheduling order that set the following dates:

Reappearance Date: April 28, 2016 (to check status of discovery)
Pretrial Motions, from Defense to State, will be filed before July 1, 2016.
Date of Omnibus Hearing: Tuesday, October 4, 2016
Jury Trial: Monday, October 17, 2016

7. Both the State and the Defense began working to prepare the case for trial. In February, 2016, the State sent full discovery to the Defense. On or about March 9, 2016, Mr. Roos met with his attorneys, was shown the discovery, and began to go over the evidence with counsel. According to testimony (at the March 28, 2017 hearing) the Defense attorneys met with Mr. Roos ten times between December, 2015, and May 24, 2016. Defense counsel had also talked to his family and potential witnesses.

8. In late March or early April, the Court was told informally that discussion of a plea had started. The Court was told so the Court could plan into its schedule a possible plea. The original indication was that a plea could be ready by the April 28, 2016, reappearance date. Both sides, in the testimony presented on March 28, 2016, indicated that plea discussions were underway in April. As April 28, 2016, approached, the Court's Court Manager was told that a plea would not occur in April, but was asked to find a date to schedule a plea in May. The Court set May 24, 2016, for the plea to be entered with no advance knowledge of the agreement's substance.

9. On May 24, 2016, Mr. Roos appeared with his two attorneys and entered his plea of guilty to two counts of Capital Murder, two counts of Arson, Aggravated Robbery, Theft of Property (B felony) and Theft of Property (D felony). In a separate case he pled guilty to other Burglary charges and, on a third case, the State moved to dismiss charges (Nolle Prosequi) which was granted. The Court sentenced the Defendant on all the charges, running the sentences concurrent with the two sentences of Life Without Parole on the Capital Murder charges. Sentencing Orders were prepared and entered on all charges. State's Exhibit No. 1 is the Record of Proceedings in the plea entered by Nicholas Roos on May 24, 2016. The Court takes judicial notice of the Signed Sentencing Order in the file, entered also on May 24, 2016.

10. On June 20, 2016, pro se and from prison, the Defendant filed a Notice of Appeal, a Motion to Withdraw his guilty plea, and a Motion raising issues under Rule 37. The State responded pointing out the Defendant could not appeal and it was too late to withdraw the guilty plea. The State also filed an answer to the Rule 37 petition. On July 22, 2016, the Defendant withdrew his Notice of Appeal. On July 27, 2016, Defendant withdrew his previous Rule 37 Petition, filed a Petition for Relief Pursuant to A.R. Cr.P. Rule 37 (Arkansas Rules of Criminal Procedure), and asked for appointed counsel.

11. The Petitioner's Petition for Relief Pursuant to A.R. Cr.P. Rule 37 specifically alleged that Arkansas Public Defender Commission Counsel, Katherine S. Streett and Teri L. Chambers, did not provide effective assistance as guaranteed by the Sixth Amendment of the United States Constitution and Article 2 § 10 of the Arkansas Constitution.

12. The petition argues Due Process Violations, first by an impermissibly suggestive viewing by a witness, and second by the failure to conduct a hearing

after the Defendant told his lawyer he suffered from "severe paranoia schizophrenia causing auditory and visual hallucinations".

13. The Petition went on the "Mental Incompetence" issue and alleged he was denied mental health treatment citing suicide attempts while in jail and another suicide attempt six months before the crime. The Petition alleged that Counsel allowed the process to proceed and an "illegal sentence" to be imposed due to not investigating the mental health issues and failure to seek a "competency test".

14. In a third area of the Petition, it is alleged that Defendant's counsel coerced his guilty plea. The specific allegations are that Counsel told Defendant he was facing the death penalty and had no defense. They are alleged to have done this without investigating the case.

15. The final claim of ineffectiveness suggests counsel failed to investigate the case and act as advocate, and failed to file motions to suppress evidence or challenge or impeach witnesses. Once again, the Petition asserted the attorney's actions (or inactions) forced the Defendant to plead guilty.

16. On August 17, 2016, based on the filing of this written Petition for Relief pursuant to A.R.Cr.P Rule 36, the Court set the matter for hearing and arranged for the Defendant to be brought from prison to Court. To clarify the record, the Court addressed the Defendant's previously filed motions. Specifically, the Court denied and dismissed the Defendant's Motion to Withdraw his guilty plea. The Court granted Defendant's Motion to Withdraw his Notice of Appeal. The Court acknowledged the Defendant's Petition for Relief pursuant to Rule 37 and the request for appointment of counsel. The Court announced that counsel would be appointed.

17. On September 8, 2016, the Court entered an order appointing John Crain and Justin Downum as attorneys to represent Mr. Roos in pursuing his Petition. A hearing was set for October 25, 2016. At Defense request, the Court twice continued the date for the hearing; First, it was continued to January 24, 2017, and later it was continued to March 28, 2017.

RULE 37 HEARING

18. On March 28, 2017, this Court conducted a hearing on the Defendant's Petition for Relief Pursuant to A.R.Cr.P Rule 37. At the outset of the

hearing, the Court ruled on two pending issues in the case and then admitted by agreement two exhibits for the Defense and one exhibit for the State.

19. The first issue the Court ruled on was an objection by the State to a motion filed by the Defendant to be provided with jail records of Mr. Roos. The State had objected to the motion, saying it had no obligation to give discovery in a Rule 37 proceeding. The Court ruled the issue was moot based on the fact the Defense had acquired the records, 300 pages, by filing a Freedom of Information request in the Sheriff's office.

20. The second issue was a motion to strike an amended answer filed by the State to the Defendant's Petition for Relief filed on July 29, 2016, on the grounds that the amended answer, filed September 15, 2016, was untimely. The Court noted that the State had earlier responded timely to a previous petition filed by the Defense. The Court also noted that there was no actual requirement to respond at all to a Rule 37 Petition. The Court denied the Motion to Strike and found that the amended answer was timely.

21. Before the testimony began, the Court admitted into evidence Defendant's Exhibit #1, Records of White River Medical Center – Bridgeway Program for 4/7/15-4/9/15 for Inpatient Treatment following suicide attempt (158 pages). The Court also admitted Defendant's Exhibit #2, Jail Records of the Baxter County Detention Center for Nicholas Roos held from 11/11/15-5/24/16 on murder charges and others (approximately 300 pages). Finally, the Court admitted State's Exhibit #1, Transcript of Defendant's Court Plea in Court, 5/24/16 (19 pages).

22. At the hearing on March 28, 2017, eight witnesses were called to testify; four by the Defense, including the Defendant, and four by the State, including the two attorneys accused of inadequate representation.

23. The first witness for the Defense was Levi Clipper, a friend of the Defendant since fifth grade (13 years). He said he and Mr. Roos were like brothers. His primary testimony centered on a day around September 15, 2015, when Mr. Roos' grandmother brought Mr. Roos to Washington County where Mr. Clipper lived. The visit was to last a few days. Mr. Clipper described his friend as acting very paranoid. He said Roos said people were "after him". Levi said he had never before seen his friend act the way he acted that night. He said Mr. Roos reacted to every sound in the apartment complex and at one point claimed there were "people on the roof". Mr. Roos' behavior so frightened Mr.

Clipper that he took Mr. Roos back to his grandmother in Mountain Home the next day.

24. On cross examination, Mr. Clipper clarified the times the two friends were around each other. They were in school together from fifth grade until Mr. Roos dropped out of school in high school. Mr. Clipper graduated from Mountain Home High in 2010 and then moved with his family to Colorado until 2012. In 2012, Mr. Clipper moved to West Plains, Missouri, which is close to Mountain Home, and they visited each other. Mr. Clipper learned that Mr. Roos had a child between 2012 and 2014. Mr. Clipper moved from West Plains to Northwest Arkansas in April, 2014. They texted, exchanged email and phone calls, but rarely saw each other.

25. Mr. Clipper said his friend was "normal" and happy throughout all of their friendship until September, 2015. It was during the September visit, when Mr. Roos was acting so different and strange, Mr. Clipper said he found out his friend used methamphetamine. Mr. Clipper said his friend was high on what he believed was "meth" during the visit. That is when he said he acted paranoid. Mr. Clipper said he knows other "meth users" and that being paranoid is common among meth users.

26. The second witness for the Defense was another high school friend of Mr. Roos, Zachary Alexander. At the time of the Rice homicide, in November of 2015, Mr. Roos was staying with Mr. Alexander "sometimes" and had been since February, 2015. This relationship caused him to be interviewed as a suspect in the homicide. Zach testified about Mr. Roos' suicide attempt in April, 2015, and said Mr. Roos spiraled down after being in a mental hospital in Batesville for the suicide attempt. Mr. Alexander stated Mr. Roos drank heavily. He said his friend was extremely paranoid and had hallucinations that "people were out to get us". He said Mr. Roos acted this way two or three times per week.

27. On cross examination, Mr. Alexander said Mr. Roos was very concerned about his children who were with their mother. He described Mr. Roos as upset over the fact that he did not get to see his children very often. Mr. Alexander said Mr. Roos used methamphetamine "daily" during this time and Mr. Alexander recognized his paranoia as a symptom of meth use. Mr. Alexander testified at the time of the Rice homicide he had not seen Mr. Roos for the two weeks previous to the crime. He stated the two of them had gone fishing together around October 24, 2015. That was the last time he had seen Mr. Roos.

28. The third witness for the Defense at the hearing was Mr. Roos' grandmother, Mary Hauf. She told that she was very concerned about Mr. Roos' suicide attempt on April 7, 2015. She related he called her and told her he was trying to kill himself. Ms. Hauf said he had taken some kind of drugs and had a belt around his neck to strangle himself. When she got to where he was, he stood up and then fell flat. She called 911 and got him taken to the hospital in Mountain Home. From there he was transferred to the Bridgeway Mental Health unit at the White River Medical Center in Batesville, Arkansas.

29. Ms. Hauf described Mr. Roos as having "Psychotic Moods" when he acted very paranoid. She told of him thinking there were "people in the woods" and that someone was chasing him or watching him everywhere. She said she took him to see his friend, Levi Clipper, to get him out of Mountain Home because of his paranoia.

30. After Mr. Roos' arrest, Ms. Hauf visited with his defense attorneys about his suicides and paranoia, and repeatedly asked for a mental evaluation and treatment. She said she was disappointed the lawyers never got him evaluated. Ms. Hauf told that her grandson told her he had tried to kill himself while in jail by throwing himself off the top bunk in his cell. She did not understand why he was held in solitary confinement and not treated for mental issues.

31. On cross examination, Ms. Hauf said she did not know if the defense attorneys obtained the records of Mr. Roos' treatment in Batesville. She said she did not go to the Batesville hospital when he was discharged. Her husband picked up Mr. Roos and brought him back to Mountain Home. Ms. Hauf stated Mr. Roos had told her that he used all kinds of different drugs. She remembered he said he took mushrooms and "Molly", but she did not know if he used methamphetamine. She estimated he told her about his drug use within one year of the Rice homicide.

32. Mr. Roos himself testified next. He started by talking about the April, 2015, suicide attempt and his treatment at the White River Medical Center. He named his doctor, Dr. Bultz, and referred to a page in the hospital records, page 139 of Defendants Exhibit #1, as showing a diagnosis of a "history of psychosis". He also told that he was kept four or five days and released because he requested release. Upon release he said he went back to Mountain Home and lived with his mother.

33. The next part of Mr. Roos' testimony focused on his suicide attempts while in jail after his arrest. He referred to the jail records, Defendant's Exhibit #2, and talked about an attempt to kill himself on November 11, 2015, by pushing himself backwards off the top bunk in his cell to land on his head. He did this twice, he said, and "appeared knocked out" but received no medical treatment. Mr. Roos also referred to other parts of the jail records, where on December 15, 2015, a jailer referred to a suicide reference in a note. Mr. Roos said he was put on suicide watch and checked on frequently. He complained about being held in solitary confinement.

34. Mr. Roos stated he talked to his lawyers about a mental evaluation. He also said his family had asked the lawyers for an evaluation. He said it was clear to him that his mental condition "was not part of my defense". He knew the lawyers got his records from the White River Medical Center, because they brought him papers to sign so they could get the records. Mr. Roos was asked by his attorney on direct why he did not ask for a mental evaluation during his guilty plea on May 24, 2016. His response was that his lawyers told him that if he did that the plea would fail and he would be back facing the death penalty.

35. On cross examination, Mr. Roos stated he had reviewed the transcript of his May 24th plea, State's Exhibit #1, and he was asked by the attorney for the State if he had been given multiple opportunities by the Court to bring up any objections he had to entering the plea of guilty, and if he was freely and voluntarily pleading guilty and giving up his rights. He acknowledged that he was not under the influence of anything when he entered his plea of guilty. He stated he talked to his attorney on the day before the plea for about 30 minutes, and the day of the plea for about 30 minutes. In a series of leading questions on cross examination, Mr. Roos acknowledged his attorneys were not "rookies" and that they had thoroughly discussed his guilty plea with him.

36. On the subject of his mental issues, Mr. Roos admitted that he had never been committed to a mental health facility other than the one time after his suicide attempt on April 7, 2015, when he went to the White River Medical Center. The State questioned Mr. Roos about his "after care plan" at page 93 of Defendant's Exhibit #1, which shows he was released from Bridgeway at White River Medical Center on April 9, 2015. These documents reflect that "triggers and stressors" were "drugs" and "not being able to see my kids". The Defendant admitted to being a "severe alcoholic" and to long term multiple drug abuse. He

said after the mother of his children left him taking his kids in 2014, he had resorted to methamphetamine and alcohol. He admitted to being a seller of meth before, but said over the last year before the crime he only used meth. He also said he drank to get drunk every night.

37. Mr. Roos was questioned regarding his comprehension from records that say there was "no impairment" of comprehension. He testified that he was "very intelligent" and had adequate problem solving skills. He said he understood court procedures, had read the law and that he knew right from wrong. He asserted his mental problems were from his drug use.

38. Mr. Roos admitted he has not sought mental health help in prison, calling that a "joke". He also admitted he and his present attorneys did not have any doctor coming to testify to his mental health at the hearing on March 28, 2017.

39. Mr. Crain, his attorney at the hearing, redirected Mr. Roos about his mental health at the time of the plea on May 24, 2016. Mr. Roos stated he had been held in solitary confinement, he was not sleeping and not eating. He said he was looking forward to getting out of isolation, suggesting that was why he pled guilty.

40. Mr. Carter recrossed the Defendant and asked Mr. Roos about his confession shortly after his arrest. Mr. Roos responded that he had asked for a lawyer before confessing and that he was promised his girlfriend's release from jail before he would confess. Mr. Roos then stated he asked his attorneys for a plea bargain because he thought they were doing nothing for him. He testified he wanted to avoid the death penalty and hoped to get a term of years as a sentence. These statements were made in reference to his plea on May 24, 2016.

41. On redirect, Mr. Roos testified he asked his attorneys to file a motion to suppress evidence and a motion to suppress statements. Finally, Mr. Roos' current attorneys asked a series of summarizing questions to which he replied that at the time of his plea, May 24, 2016: he was in isolation, solitary confinement; had asked for a mental evaluation which he had not received; had asked for medical care which he had not received. He stated he had no alternative but to accept the plea offer.

42. Following Mr. Roos' testimony the Defense rested. Mr. Carter on behalf of the State made a motion for a directed verdict. The State asserted the defendant had made allegations with no factual showing in the motion or

testimony in regard to the Motion to Suppress. Mr. Carter argued that the Defense had failed to show sufficient facts to raise an issue, so the Motion to Suppress part of his motion should be dismissed. As to the allegation that the defense attorneys were ineffective because they had failed to request a mental evaluation, Mr. Carter argued that the evidence did not show either that Mr. Roos was not fit to proceed or that he was mentally ill to the extent that he did not understand the criminality of his conduct or could not control his actions. Therefore, the State asked that the whole Rule 37 claim be dismissed. The Court denied the State's motion.

43. The State called as its first two witnesses, Ms. Katherine Streett and Ms. Teri Chambers. Both of these women testified that they were employed with the State Public Defender's office in the Capital Conflicts Division where they handled primarily Capital Cases. Ms. Streett has been licensed to practice law 26 years and has been in Capital Conflicts for over 10 years during which time she has defended more than 30 capital cases. Ms. Chambers testified she has also been a lawyer for over 26 years. She has worked for the State Public Defender in Capital Conflicts Division for 23 years and has handled over 75 capital cases. Both of these lawyers hold state certification to try death penalty cases.

44. These two lawyers testified that they were appointed to Mr. Roos' case. They explained that in accordance with procedures of the State Public Defender's Office they were part of a five person team assigned to each capital case. The two lawyers assigned share the trial responsibility with one lawyer taking the lead on preparing the guilt and innocence portion of the trial, and the other lawyer preparing the penalty phase defense. They also have a paralegal to assist with legal research and preparation of pleadings; an investigator to locate and interview witnesses, and otherwise check out the evidence and locate additional evidence; and a mitigation specialist to work on all the issues of punishment with special attention to defending against the death penalty.

45. Ms. Streett testified that she had the lead to prepare to defend Mr. Roos in the first phase of the trial, but she said both attorneys had worked on the case together for all court appearances including the arraignment in mid-November, 2015. Her testimony was that they met with Mr. Roos at least 10 times before he pled guilty. She said they received discovery starting in February, 2015, and completed discovery in early March, 2016. They immediately, on March 9, 2016, shared the discovery with Mr. Roos and went through it page by

page with him. Ms. Streett told that they (the team) had begun interviewing family members and witnesses, and, once they had discovery, they were working to understand the State's case so they could prepare a defense. She testified that they showed Mr. Roos all of the crime lab evidence.

46. Ms. Streett related that Mr. Roos early on, about February or March, asked about the possibility of a plea. She stated he brought it up by asking how often do cases like this one, capital cases, enter a plea. She stated he was eager to talk about a plea and asked questions. She said he was concerned about the death penalty. Ms. Streett explained that, once they saw the State's evidence in March, they knew the State had pretty compelling evidence, certainly evidence that would support the imposition of the death penalty. She stated that they were aware of potential testimony of his codefendants. She noted that the state had evidence of his guilt and that there were two or three possible "aggravators" to justify consideration of the death penalty. One aggravator was the crime was done for pecuniary gain and a second was more than one person was killed during the crime.

47. She testified they had more than one discussion with Mr. Roos of the evidence. He saw all the evidence she said. They also had multiple discussions about a plea. In the end, he authorized the lawyers to talk to the prosecutor, David Ethredge, about a plea. Ms. Streett said the prosecutor would not make a specific offer, telling her to get Mr. Roos to say what he would be willing to do to avoid the death penalty. She said that they offered a term of years, as Mr. Roos suggested, but the state would not agree. In the end, they asked if the prosecutor would take an arrangement for a life sentence. As the Court understands the negotiation, Ms. Streett said the prosecutor said "if he (Mr. Roos) agrees to do life without parole, I will agree to that plea."

48. Ms. Streett testified that the plea was in place in April, 2016, with the date from the Court's Scheduling Order, April 28, 2016, as the expected date. However, Mr. Ethredge postponed the plea to check with the victims' family. Ms. Streett testified that Mr. Roos was prepared to enter his plea in April, describing him as "ready" and waiting to take the plea. The plea was rescheduled to May 24, 2016. Ms. Streett stated that on the morning of his plea in May, when they met with him, Mr. Roos said he was "ready". Ms. Streett testified that she saw no evidence of hesitancy on his part or any evidence to suggest he was not able to

make a plea, which the Court understood to mean there were no signs of mental impairment.

49. With respect to the mental health issues raised by the defense in this case, Ms. Streett approached the subject in her testimony as any lawyer would. Her statements focused on the two aspects of criminal mental competency: the issue of the defendant's fitness to proceed to trial and assist his attorney at trial and, the issue of the defendant's competency at the time of the commission of the crime. The question in the latter instance is did the defendant suffer from mental disease or defect and did this effect the defendant to such an extent that he did not understand the criminality of his actions or that he could not control his behavior.

50. In her testimony, Ms. Streett repeatedly states that she saw no evidence upon which to question Mr. Roos' fitness to proceed. In all her dealings with him, Mr. Roos clearly understood the charges against him and could intelligently discuss the case and understood the court procedures. There was simply no reason to think he could not fully and competently participate in his own defense because he did.

51. In her testimony, Ms. Streett also discussed, after having reviewed all the State's discovery, that there was no evidence of mental illness in Mr. Roos' behavior in the commission of the crime to suggest to Ms. Streett that he was acting as a result of a mental illness. She stated there was nothing in the mental history that was close in time to the crime. The suicide attempt for which he was hospitalized preceeded the crime by six months and the attempts in jail were after the fact and after he was already arrested. In response to a question on cross examination by Mr. Crain asking about a history of psychosis and paranoia, based on P. 139 of the White River Medical Records (Defense Exhibit #1), Ms. Streett stated "we did not see any evidence of paranoia or evidence of psychosis". She said there was no basis for a mental defense.

52. In her testimony, Ms. Streett stated that Mr. Roos was not the one raising the mental health issue when they talked to him about the case. Ms. Streett said it was his grandmother who repeatedly raised mental health issues, citing the suicide attempts. The lawyer says they repeatedly explained the facts of this case did not give a reasonable basis for a defense based on mental illness.

53. Ms. Streett stated that if the plea had not happened so fast, they would have pursued both the issues of a mental health evaluation and issues of suppression of evidence or statements. She indicated they would have had their

own mental health expert do an examination in order to develop evidence to mitigate the defendant's guilt or for use in the penalty phase. She said as a matter of trial strategy she preferred to not file a motion for mental evaluation that resulted in the state's doctor doing the evaluation because she had had a bad experience in another case that resulted in hurting her client's case in court.

54. On the suppression issues, she said motions would have been filed before the matter went to trial. From examination of discovery she was not sure their motions would have prevailed, but they would allow the defense to gather information useful in the trial. She had heard Mr. Roos' version of the facts upon which the motions would have been made and knew what the State's version was from the discovery. It was her testimony that these motions would have been filed closer to trial, but that possibility was ended by his plea. Her testimony was that Mr. Roos' interest in getting a plea and agreeing to plea prevented these motions from being filed.

55. The testimony of Ms. Teri Chambers was very similar to the testimony of her co-counsel. On the issue of why not seek a mental evaluation, she stated there was no basis for a motion for evaluation to determine Mr. Roos' fitness to proceed. She said based on his interaction with the attorneys, he had no problem communicating and he understood the process. In going over the evidence with him, he understood the evidence and its significance to the issues in the case. He made rational suggestions and asked reasonable questions. Likewise on the issue of mental disease or defect as a defense. He fully understood the consequences of the testimony of the witnesses who were revealed by discovery. He understood the issues well enough, she said, to complete his lawyer's sentences. The evidence established that the crimes were done in a rational way by a person aware of what he was doing, giving no basis for an "insanity defense".

56. In answering questions about the significance of the suicide attempt by Mr. Roos in April of 2015, Ms. Chambers said it gave no basis for asserting a defense to the murder crimes. She referred to Defense Exhibit #1, the records from the White River Medical Center, to point out the discharge diagnosis was a Depression Disorder and substance abuse, not any type of psychosis.

57. On the suppression issues, Ms. Chambers stated Ms. Streett would have filed motions on these issues prior to trial. Ms. Chambers then explained that "Nick" had called asking for a plea after they had gone over the discovery.

She stated Mr. Roos was upset about testimony of an aunt who had implicated him. He wanted a deal for a term of years, removing the death penalty. Ms. Chambers indicated that it was the strength of the State's case as revealed by the discovery that they went over with him, that caused him to be so interested in a plea.

58. On cross examination Ms. Chambers answered questions about getting or not getting a mental evaluation. She said based on her personal interactions with Mr. Roos there was "no reasonable basis" to claim he was unfit or to believe he suffered from mental disease or defect, and acted out of his mind when he committed the crimes. She also emphasized that it was his grandmother and aunt that were asking for the mental evaluation. She said they were really asking for treatment for him. Ms. Chambers explained that they made efforts to arrange for Mr. Roos to see local doctors, but were unsuccessful.

59. During cross, Ms. Chambers also stated this plea "came quicker than most". That fact cut off the filing of motions before the July 1st deadline set by the Court. Like Ms. Streett, Ms. Chambers emphasized that, while there was no basis to expect to have a Court find Mr. Roos unfit to stand trial or not guilty by reason of insanity, the suicide evidence was potentially useful in a penalty phase. She also stated that she had had a bad experience by filing such a motion for evaluation that resulted in examination by the state's doctor that hurt her client. On this basis, she suggested that they would have had an evaluation done by their own expert closer to trial.

60. On redirect, Ms. Chambers was given the opportunity to say why the evidence would have precluded a not guilty by reason of mental disease or defect. Her response was that the evidence was that this was a carefully planned crime. She cited the fact that the evidence showed that he told people he was going to get a gun and then bought the gun within a few days of the crime, showing premeditation and planning.

61. The third witness called by the State was Mr. Michael Pierson, the non-law enforcement person who gave Mr. Roos and his co-defendant a ride from Mr. Pierson's house, near where the Rice's stolen truck was burned, to a home in another part of Baxter County on the day of the crime. Mr. Pierson identified Mr. Roos as one of two young men who came walking up to his house on the day of the crime. Mr. Pierson stated that Mr. Roos said he and his friend had been dropped off to fish in the area, but had no fishing equipment with them.

He told of giving them a ride to a specific house, which he could identify because it was close to where Mr. Pierson's sister lived.

62. Mr. Pierson explained that a couple of days after he drove Mr. Roos and the other young man to the house they wanted to go to, he, Mr. Pierson, had heard sufficient details about the murders of Mr. and Mrs. Rice and the burning of their home and the theft of their truck which was found burned near Mr. Pierson's home to be suspicious of the "two young men". He called law enforcement. He then described that the sheriff deputies came to his house and had him show the officers to which house he had taken the young men. He told that as they drove by the house, a man and woman came out of the house and got in a car and drove away. He said he was able to recognize Mr. Roos as one of the "young persons" he had given the ride to and he also identified Mr. Roos in the courtroom as the same person.

63. Mr. Pierson described that the officers followed the car, eventually stopped the car, and searched the car, and arrested the two people in the car. When asked, on cross examination, about the search, Mr. Pierson said he observed but could not hear what was said or seen in the car.

64. The final witness called by the State was Special Agent David Small with Arkansas State Police Criminal Investigation Unit (CID). Agent Small told that he was called in by the Baxter County Sheriff's Office on November 13, 2015, two days after Mr. Roos' arrest, to interview the defendant. Agent Small said he was told Mr. Roos had asked to speak to him. Agent Small said he was present on November 11, 2015, when Mr. Roos was first arrested and had asked for an attorney and, therefore, was not interviewed.

65. Agent Small related that on November 13, 2015, Mr. Roos formally "recanted" his request for a lawyer. Agent Small then read his Miranda Rights, even though Mr. Roos told him he knew his rights and tried to stop Small from going over all of this. After the rights reading, Agent Small said Mr. Roos made a full and complete statement. According to Agent Small, Mr. Roos admitted to doing the shooting of the Rices, the burglary and theft from the house, the burning of the house, the taking of the stolen property in the Rice's pickup truck, and, after unloading the stolen property, burning the stolen truck. He admitted to getting the ride from Mr. Pierson, though he did not know his name, after burning the truck. He admitted to speeding when the officers pulled him over leading to the arrest. Agent Small said he even admitted to other burglaries and thefts.

66. On cross examination, Agent Small said he understood that the sheriff had talked to Mr. Roos before he made his statement. Agent Small said he thought that Roos made his statement to try to exonerate his girlfriend, but he was not part of the discussion with the sheriff.

THE LAW

67. Following the hearing, both sides submitted briefs providing law to the Court and arguing their respective sides of the facts. On the law, there is substantial agreement. Both sides cited the recent Arkansas Supreme Court Case, Beverage v. State, 2017 Ark. 23 (February 9, 2017) for the law that applies to Rule 37 cases:

> This Court has adopted the United States Supreme Court's test from Strickland v. Washington, 466 U.S. 699 (1984), to determine whether or not counsel was ineffective. Taylor v. State, 2013 Ark. 146, at 5,427 S.W. 3d 29, 32. The Strickland test requires both (1) that petitioner's counsel's performance was deficient and (2) that the petitioner was prejudiced by that deficient performance. Strain v. State, 2012 Ark. 42 at 2, 394 S.W. 3d 294, 297 (per curiam).

The **Beverage** decision goes on to state that to show that counsel's performance was deficient, the petitioner must show counsel acted "outside" the "wide range of reasonable professional assistance". Sec, e.g. Russell v State, 2016 Ark. 190 at 2, 490 S.W. 3d 654, 658. To show the petitioner was prejudiced, the petitioner would have to demonstrate that there was a reasonable probability he would have been found incompetent had he had the examination.

68. Beverage is a case where, like Mr. Roos, the defendant pled guilty and then filed under Rule 37 petition to claim his counsel rendered ineffective assistance by failing to seek a competency hearing. The trial judge denied the defendant relief under Rule 37 and the Arkansas Supreme Court affirmed the trial court. The State cited the Beverage decision for the law it sets out and for its holding that counsels' not seeking a competency evaluation is not ineffective assistance of counsel. The Defense distinguishes the facts of Beverage from the facts of the present case and argues under other facts not asking for a mental evaluation could be a deficient performance and prejudice the petitioner.

69. The State has provided a Federal Eighth Circuit Court of Appeal case, Slocum v. Kelley, _____F 3rd _____(8th Cir, 2017) that deals with the issue of effective assistance of counsel for not having sought mental evaluation or competency hearing. The Slocum decision sets out the two pronged test from Strickland v. Washington, 466 U.S. 668, in slightly different language.

> To prove deficient performance, Slocum must show that counsel's representation fell below an objective standard of reasonableness. "Id. At 688. To prove prejudice, Slocum "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." id. at 694." To satisfy Strickland, the likelihood of a different result must be 'substantial', not just conceivable.'" Williams v. Roper, 695 F 3d 825, 831 (8th Cir. 2012) (quoting Harrington v. Richter, 562 U.S. 86, 112 (2011)).

In Slocum, the Court found: "Having reviewed the record, we conclude that Austin [Defendant's counsel] was not deficient for failing to request a competency hearing."

RULING OF COURT

70. This Court has carefully reviewed the entire court file and all of the pleadings therein. The Court has read its own notes of the testimony given by each witness at the hearing conducted on March 28, 2017. To be certain the Court had not missed anything in its note taking, the Court listened twice to the court reporter's recorded testimony of the hearing. The Court has reviewed State's Exhibit #1, the transcript of the petitioner's Guilty Plea proceedings on May 24, 2016, when the Court found the defendant (now petitioner) "freely and voluntarily" entered his plea of guilty. The Court has also read through every page of both defendant's Exhibit #1 and defendant's Exhibit #2. From this review of all of the record before the Court, the Court finds there is no significant evidence that the defense attorneys were deficient in any way in their representation of the defendant. Nor is there any indication that their actions caused the defendant/petitioner any prejudice.

71. From all of the records, and particularly from having heard the testimony at the hearing on March 28, 2017, the Court finds these attorneys acted professionally and systematically in gathering evidence about their case and their client. The evidence shows they had sought and obtained discovery, reviewed it themselves and reviewed it with their client. They had met with their client frequently and had begun a thorough and complete investigation of the case. In addition to talking regularly with their client, the defendant's counsel had begun interviewing family and friends of the defendant to try to prepare a case.

72. The primary complaints against the defense attorneys are that they were ineffective because they had not filed (1) a motion for a mental evaluation, and (2) had not filed motions to suppress evidence gathered from an illegal search nor had they filed a motion to suppress the defendant's own statement or confession. For a variety of reasons, the Court cannot find that the fact these motions had not been filed in the first six months of this case is a "deficiency" on the part of these attorneys. The Court had entered a scheduling order for the case, setting the trial date (October 25, 2016) and an omnibus pretrial hearing date (October 4, 2016). The Court set a date by which defense counsel was to file its pretrial motions, July 1, 2016. Using the Court's scheduling order as "an objective standard of reasonableness", it can hardly be said these attorneys had been deficient in not filing these pretrial motions by the time the defendant chose to enter his guilty plea on May 24, 2016, more than five weeks before the Court imposed deadline.

73. This Court listened to the testimony of the witnesses with particular attention to the two defense attorneys who are accused of "ineffective assistance" to the defendant. The Court finds both of these attorneys to be very experienced. Both attorneys have been licensed over 26 years. They are also experienced in their specialty of defending defendants facing the death penalty. They are both state certified to handle death penalty cases, "death qualified". Ms. Streett has over 10 years with the State Public Defender's Office Division handling capital cases and has been involved in more than 30 cases. Ms. Chambers has been in the division since its formation 23 years ago and has handled over 75 cases. They are part of a professional team set up to handle death penalty cases, with two lawyers working in tandem, but focused on separate parts of the trial process. The team also has an investigator to work on

the evidence and the witnesses, and a paralegal to do legal research and assist in preparation of motions and briefs. Finally, each team has a mitigation specialist who is specialized to focus on factors to reduce the likelihood of the client receiving the death penalty.

74. Not only are these two attorneys experienced, the evidence from the hearing show they worked diligently on behalf of the defendant, starting ten days after the crime and continuing until he entered his plea of guilty on May 24, 2016. Having heard both Ms. Streett and Ms. Chambers testimony and having heard the testimony of the defendant, this Court specifically finds the credibility of the two attorneys to be superior to the defendant's credibility on issues where their testimony conflicts.

75. Mr. Roos attempts to say he did not freely and voluntarily plead guilty. He asserts he was coerced into pleading by his attorneys. This Court finds this assertion without any credibility. The Court finds the two attorneys' version of how the plea came about to be far more believable. They testified that early on Mr. Roos wanted to know if he could get a deal that would avoid the death penalty. Ms. Streett answered that question by saying they would discuss it with the prosecutor. When all three of them were reviewing the State's discovery and Mr. Roos understood how strong the evidence against him was, then he wanted his attorneys to pursue a discussion about a plea with Mr. Ethredge, the prosecutor. In fact, Mr. Roos authorized them to discuss a plea, hoping for a term of years. Ms. Streett told how the plea negotiations proceeded. The Court came to understand, by listening to Mr. Roos' testimony at the March 28, 2017, hearing, just how intelligent and articulate Mr. Roos is. The Court does not believe Ms. Streett and Ms. Chambers would try to coerce him into a plea and the Court does not believe Mr. Roos would accept a plea he was not willing to accept.

76. The Court is convinced by the evidence that Mr. Roos initiated the plea discussion to avoid the death penalty. The Court is also convinced that Mr. Roos agreed to the plea with a full understanding of the evidence against him. At the plea, on May 24, 2016, the Court took his plea and found it was entered "freely and voluntarily" just as Mr. Roos said it was. After hearing the testimony of Ms. Streett and Ms. Chambers about the plea, and after observing Mr. Roos and hearing his testimony at the March 28, 2017, hearing, the Court is

even more convinced that Mr. Roos chose to plead guilty and he was not coerced in any fashion

77. At the hearing on March 28, 2017, both attorneys testified that Mr. Roos' decision first to seek a plea and then to accept the plea, once the State agreed to remove the death penalty, was the primary reason that pretrial motions to suppress or in the area of mental health were not filed. The Court finds that testimony very credible and further finds the lawyers, rather than being "ineffective" on their client's behalf were carrying out what he wanted. The Court finds no "deficiency" in their representation by assisting his wish for a plea that prevented the possibility of Mr. Roos receiving the death penalty. The attorneys acted effectively on his behalf and their actions did not prejudice him.

78. In their trial brief the defense urged strenuously that Mr. Roos should have had a mental evaluation, asserting that he was diagnosed a "paranoid schizophrenic with hallucinations". The defense pointed to suicide attempts, one in April 2015, (six months before the crime) and others after the crime when the defendant was in jail as showing he was clearly mentally ill. Again, with what the Court finds to be great credibility, Ms. Streett and Ms. Chambers testified that from their investigation of the case, they could find no reasonable basis in law to find Mr. Roos was mentally ill so as to render him unfit to assist in his own defense. In fact, they both testified they found him to be intelligent and articulate. He understood his legal predicament and discussed both law and procedures with them. One of the reasons the Court finds their testimony so credible on this subject is that the Court observed Mr. Roos testify at the March 28, 2017, hearing and found him to be exactly what they said he was: intelligent, articulate and clearly not mentally ill.

79. This Court gives due consideration to the testimony of Mr. Roos' two friends and his grandmother at the March 28, 2017, hearing. The two young men, Levi Clipper and Zach Alexander, described him as someone acting extremely paranoiac with imagined persons chasing him. Yet both young men also described him as someone using methamphetamine on a "daily" basis. They acknowledged that the drug usage, in their experience, could produce paranoia. Ms. Hauf, his grandmother, was appropriately horrified by his suicide attempts as any loving family member would be. She wanted him to have

mental health treatment and, therefore, wanted him to be evaluated mentally. Yet she too testified that Mr. Roos told her he was using lots of drugs.

80. The defense argument that he was a diagnosed Paranoid Schizophrenic comes primarily from Mr. Roos' testimony and his Rule 37 appointed attorneys in court and in the trial brief. They offer as evidence Defendant's Exhibit #1, the records Mr. Roos' stay at the White River Medial Center in Batesville, Arkansas. These records do not by any stretch of the imagination bear out the defense's claimed diagnosis. The discharge diagnosis is: "Depressive Disorder NOS and Amphetamine Abuse". The records show he was admitted on April 7, 2015, after an apparent attempted suicide. The records also show, under "past psychiatric history" no past hospitalization and no prior outpatient treatment. The "trigger" for this one hospitalization was one suicide attempt based on a domestic dispute that prevented him from seeing his children as often as he wanted, and drug use. The records show Mr. Roos was discharged two days later with the diagnosis stated above and no significant "psychosis" observed.

81. This Court finds that nowhere in all of the records introduced or the testimony received was there any basis for his defense attorneys on the Capital Murder charges to have reasonably filed for a ~~medical~~ mental health evaluation to establish his unfitness to proceed or to assert a not guilty by reason of mental disease or defect. In fact as the two attorneys testified it may well have been contrary to their client's best interest, because those motions potentially put the defendant under the examination of a psychiatric examiner who may bring to light incriminating evidence. It is this Court's finding that Ms. Streett and Ms. Chambers employed a trial strategy to not expose their client to that risk by not immediately seeking a mental evaluation.

82. As regards the "failure to file motions to suppress" evidence and/or confessions, the Court finds that these attorneys did not act contrary to any "objective standard of reasonableness" in not having filed a motion to suppress five months before the trial date and five weeks before the court imposed deadline for filing motions. The attorneys were still investigating the State's case. Holding off filing a motion to suppress until an attorney knows everything about the case they can know is generally a good idea. It is certainly a matter of trial strategy where each attorney can use his or her best judgment. In any case, the defense has failed to show how their client is prejudiced by not having filed

the motion(s). As both attorneys testified, they planned to file motions to suppress but were prevented from doing so by the Defendant's request for a plea agreement that removed the death penalty, which they negotiated for him and he accepted.

83. The Defendant filed his Petition for Relief Pursuant to A.R.C.P. Rule 37 prior to the Court appointing counsel, Mr. Crain and Mr. Downum, to represent him during the Rule 37 proceedings. The Defense brief filed after the Rule 37 hearing conducted March 28, 2017, focuses primarily on the issues that the Court has already addressed. For the most part these are the same issues raised in Mr. Roos' pro se petition. However, to insure that the Court has addressed each issue raised by Defendant, the Court will make additional findings in respect to the Defendant's petition.

84. In his Pro Se Petition, Mr. Roos alleged his "due process" rights were violated when the law enforcement exposed him to a witness resulting in an "identification impermissively suggestive" at the time of his initial arrest. The State put on the witness, Michael Pierson, at the March 28, 2017, hearing where testimony clearly establishes the non-suggestive nature of the identification and factually distinguishes this case from the case cited to by Mr. Roos in his petition, U.S. v. Brownlee (3rd Cir. 2006). The Court finds no merit to the claim and the Court believes this matter would have been covered by Ms. Streett and Ms. Chambers by appropriate motions if Mr. Roos had not chosen to enter his plea.

85. Mr. Roos' next claim that his due process rights were violated stated that he told "Katherine Streett, that I suffer from severe paranoia schizophrenia" and asserting "due process was violated by failure to conduct a hearing". This issue has been thoroughly discussed above and the Court finds that Ms. Streett and Ms. Chambers did investigate his claim. The Court further finds there is no evidence in the record to support his claim of mental illness of the nature stated and counsel acted appropriately to investigate his claim The Court has specifically ruled Ms. Streett and Ms. Chambers did not act outside "the wide range of reasonable professional assistance" in dealing with Mr. Roos' claim of severe mental illness.

86. The next section of Mr. Roos' petition makes claims of inadequacy on Mr. Roos' "mental incompetency" claim. First, he tells of telling his attorney about his suicide attempts, both in jail and six months previous, and asserted

they failed to conduct a "competency hearing". Next, Mr. Roos' petition asserts that despite their knowledge of his mental health problems, his lawyers allowed the process to continue and an illegal sentence to be imposed, because "no lawful examination was performed". The Court has already reviewed the evidence of "mental illness", the testimony from the Rule 37 hearing (3/28/18) and defendant's Exhibit #1 (Records of White River Medical Center), and finds it does not establish any indication of mental health unfitness to proceed or of severe mental disease or defect upon which to build an insanity defense. The Court also finds there is no reasonable basis in the evidence for any motion for a criminal law evaluation to be requested. The lawyers gave the Court in their testimony clear, credible explanations for why they had not made a motion for an evaluation. Once again, the Court finds the lawyers were not acting "ineffectively" as counsel in not requesting an evaluation. The Court also finds, based on the evidence, Nicholas Roos was competent to enter his plea of guilty and did so freely and voluntarily of his own choosing.

87. The next section of Defendant's Petition is entitled "Coerced Guilty Plea". In this section, it is asserted by Mr. Roos that the lawyers failed to investigate his case, and, therefore, were ineffective by not developing a defense and by advising him to plead guilty The Court has previously addressed these issues. The Court finds: 1} the evidence does not support the claim Mr. Roos was "coerced" into pleading guilty by Ms. Streett and/or Ms. Chambers; 2) the evidence clearly establishes both attorneys did investigate to determine if the defendant had defenses and what they were; and 3) the credible evidence is that Mr. Roos wanted to enter a plea of guilty if he could get the death penalty removed, and that, when offered such a plea, he took it. The plea was something he sought and chose to take. Counsel rendered effective assistance to get him what he wanted.

88. The rest of the Defendant's Petition goes on to reiterate the same claims against Ms. Streett and Ms. Chambers: that they did not investigate the State's case or witnesses, they did not develop his mental health issues and they did not file motions to suppress or for a mental evaluation. The record and evidence before the Court establishes that Ms. Streett and Ms. Chambers are very experienced attorneys in the specialty of handling death penalty cases. They were actively in the process of investigating all aspects of the State's case and the possible defense options, and had a grasp on what the State's case was

based on. Ms. Streett and Ms. Chambers were proceeding diligently to prepare their client's case for trial when Mr. Roos asked about a plea. Mr. Roos then authorized them to discuss the plea with the prosecutor. They did as he requested and brought back the prosecutor's answer. After several discussions and more than a month for Mr. Roos to consider the plea, Mr. Roos chose to enter is plea of guilty on May 24, 2016.

Wherefore it is the finding of this Court that Nicholas Roos received effective assistance of counsel from Katherine Streett and Teri Chambers up to and through the time he chose to enter his plea of guilty on the charges in this case. The Court denies the relief sought by the defendant in his Petition for Relief Pursuant to A.R.Cr.P. Rule 37.

Gordon Webb
Circuit Judge