Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2513

Roderick Williams

Plaintiff - Appellant

v.

Dexter Payne

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cv-00083-BRW)

JUDGMENT

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 01, 2020

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

RODERICK WILLIAMS
ADC #111674 **PETITIONER**

CASE NO. 4:20-CV-83-BRW-BD

WENDY KELLEY, Secretary,
Arkansas Department of Correction **RESPONDENT**

ORDER

I have reviewed the Recommended Disposition (Doc. No. 13) filed by Magistrate Judge Beth Deere and the timely objections. I have also performed a *de novo* review of the record. After careful consideration, I approve and adopt the Recommendation in all respects.

Accordingly, Mr. Williams's petition for writ of habeas corpus (Doc. No. 1) is DISMISSED, with prejudice.

IT IS SO ORDERED this 22nd day of June, 2020.

Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

App. B,

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United States District Court
Eastern District of Arkansas
Central Division

2020 JUN 19 A 9:38

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JUN 19 2020
JAMES W. McCORMACK, CLERK
By: DEP CLERK

Roderick Williams #111674 Petitioner

vs, Case No. 4:20-CV-83-BRW-BD

Wendy Kelley, Secretary of the
Arkansas Department of Correction Respondent

Objections To Recommended Disposition

Comes now the Petitioner and for his objections states the following;

I. The Sufficiency Of The Evidence Is NoT The Issue Here. The Issue Is That Petitioner Is "Actually Innocent" Of Capital Murder

(A) Arkansas' Capital Murder Statute 49

(1) Arkansas Code Annotated 5-10-101 provides that a person commits capital murder if he, acting alone or with one(1) or more other persons, commits one or more of the offenses enumerated in subsections (A)(i)-(xi). One of those offenses is kidnapping.

(2) Petitioner does not go into detail in this section regarding this due to his filing this claim in a supplemental habeas petition being sent in conjunction with these objections. Suffice it to say, however, Petitioner was acquitted of kidnapping, thereby eliminating the underlying offense requirement.

(3) In A.C.A. 5-10-101, in order to sustain a conviction for capital murder, Petitioner must have been convicted of at least one of the listed underlying offenses. He was not. The statute uses commanding

and conjunctive language in this regard.

(B) "Actual Innocence" Of Capital Murder Standard

(4) In order for Petitioner to establish "actual eligibility" vs. "legal eligibility" for the imposition of a sentence, he must show that he is ineligible for an adjudication of guilt- either by virtue of a (correct or incorrect) finding of innocence, or through objective facts that prove that a guilty verdict was wrong because the defendant did not commit each and every element of the crime charged. (Dugger vs. Adams, 489 U.S. 410 n.6) The sentenced defendant must demonstrate not merely that

the error affected the sentencing outcome, but that the error resulted in a sentencing outcome for which the defendant is not eligible by virtue of his conduct.

(5) Petitioner contends that as an independent basis for habeas relief, as a matter of federal common law, he is actually innocent of capital murder and ineligible for a life without parole sentence due to the fact that he was acquitted of the underlying offense of kidnapping.

(6) The Supreme Court held in McQuiggin vs. Perkins, 569 U.S. 383, 395-96, 2013, that although AEDPA, specifically 28 U.S.C. Sections 28 U.S.C. 2244 (b)(2)(B) and 2254(e)(2), "constrained the application of the miscarriage of justice exception",

those provisions "reflect Congress' will to modify the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court." (569 U.S. 383) However, with respect to "a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." (Id. at 397)

(7) As this is Petitioner's first federal habeas, the miscarriage of justice exception applies here.

II. Dr. Lonzelman Testified Regarding Ballistics For Which He Was Not Qualified Pursuant To Daubert vs. Merrell Dow Pharmaceuticals, 509 U.S. 579 and Rule 702 Of The Arkansas Rules Of Evidence

(8) Dr. Lonzelman testified that the shot was

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fired at a range of "1-8 feet," which contradicted other testimony. However, Dr. Konzelman is an Associate Medical Examiner, not a ballistics expert.

(9) Dr. Konzelman's opinions regarding ballistics trajectory and distance are not reliable and should have not been admitted pursuant to Rule 702 of the Arkansas Rules of Evidence. His opinions also do not qualify as expert ones pursuant to Daubert vs. Merrell Dow Pharmaceuticals

(10) In addition to a lack of personal knowledge of ballistics, other than what police told him, which is governed by A.R.E. 602, the doctor's testimony is subject to the provisions of A.R.E. 702 + 703.

(11) A.R.E. 702 states: If scientific, technical,

or other specalized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

(12) The Arkansas Supreme Court has adopted the U.S. Supreme Court's interpretation in Daubert of F.R.E. 702. (See Britt vs. State, 2019 Ark. App. 145)(citing Coca-Cola Bottling Co. vs. Gill, 352 Ark. 240, 2003) So, both A.R.E. 702 and F.R.E. 702 incorporates the principles announced in Daubert vs. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579, 1993 and its progeny, including Kumho Tire Co. vs. Carmichael, 526 U.S. 137, 1999.

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(13) Rule 703 governs the basis of opinion testimony by experts and provides as follows in pertinent part: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. (See Miller vs. State, 2010 Ark 41) Here, Dr. Lonzelman had to have a working knowledge of ballistics and be an expert so qualified in this field. (See A.R.E. 901) He was not qualified as an expert by the State and should not have testified about ballistics. He had no personal knowledge of the distance and trajectory of a shotgun shell and therefore his opinion on the matter should have been discounted by the magistrate.

(14) In Daubert vs. Merrell Dow Pharmaceuticals, 509 U.S. 579, 1993, the Supreme Court instructed

Courts to function as gatekeepers in determining whether an expert's testimony should be presented to the jury (Id. at 590-93) "The objective of that requirement is to ensure the reliability and relevancy of expert testimony," and "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." (Kumho Tire Co. vs. Carmichael, 526 U.S. 137, 1999) The Eighth Circuit has also stressed the importance of the gatekeeper function. (See Arkwright Mut. Ins. Co. vs. Gwinner-Oil, Inc., 125 F.3d 1176, 8th Cir. 1997)

(15) Expert testimony should be admitted if (a)

it is based on sufficient facts; (b) it "is the product of reliable principles and methods" and (c) "the witness has applied the principles and methods reliably to the facts of the case." (See U.S. vs. Vesey, 338 F.3d 913, 8th Cir. 2003)

(16) Dr. Lonzleman should have never been allowed to testify as a ballistics expert. He is an Associate Medical Examiner. Allowing him to opine bullet trajectory and distance misled the jury and additionally, he was not qualified to testify on these matters.

(17) The Recommendation should be rejected.

III. The Failure Of The State To Turn Over The Snyder Memorandum To Petitioner Resulted In A Brady Violation

(18) At Petitioner's first trial, no mention was made

of Desha County Sheriff Jim Snyder's Memorandum (Hereafter "Snyder Memo") to the Dumas Police Department in 2010 that authorized them to act as deputy sheriffs outside the Dumas city limits. The Snyder memo came to light after a Motion In Limine was filed to suppress Officer Bearden's testmony based on the fact that Arkansas law requred a written policy authorizng police to act as law enforcement offizers outside of their jurisdictional limits. The Memo was written in 2010, but not revealed to the defense at either the first or second trial. In fact, Petitioner himself discovered it after the fact when he receved a box of discovery materials in preparation for the filing of the instant habeas petition.

(19) The State has long had an obligation under Brady vs. Maryland and its progeny to disclose evidence known to it that is favorable to a defendant's guilt or punishment or whether such is material and whether or not the defendant requests it. (See Strickler vs. Greene, 527 U.S. 263, 1999) This duty encompasses both impeachment and exculpatory evidence. (Id.) Prosecutors have a duty to learn of Brady evidence known to others acting on the State's behalf in a particular case. (See Kyles vs. Whitley, 514 U.S. 419, 1995)

(20) In order for Petitioner to prevail on a post-conviction Brady claim, three essential components of Brady prosecutorial misconduct must be proven. First, the evidence at issue

must be favorable to the accused, either because it is exculpatory or impeaching. ("Youngblood vs. West Virginia, 547 U.S. 867, 2006 (per curiam)- "the Brady duty extends to impeachment evidence as well as exculpatory evidence.") (citing U.S. vs. Bagley, 473 U.S. 667, 1985)

(21) Exculpatory evidence is not confined to evidence that affirmatively proves a defendant innocent. (Brady vs. Maryland, 373 U.S. 83, 1963; see also Strickler vs. Greene, 527 U.S. 263, 1999) Rather, it extends to "evidence favorable to [the] accused" and "material either to guilt or to punishment." (Id. Brady) It consists of materials that "go to the heart" of the defendant's guilt or innocence." (U.S. vs. Ramos,

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27 F.3d 65, 3d Cir. 1994) Material must be disclosed under Brady even if the information has inculpatory, as well as exculpatory aspects. (DiSimone vs. Phillips, 461 F.3d 181, 2d Cir. 2006) The standard is whether the evidence is exculpatory, not whether the prosecutor recognized it as exculpatory at the time it was withheld. (Grube vs. Blades, 2006 WL 297203, D. Idaho 2006)

(22) Secondly, the evidence must be impeaching. Impeaching evidence must be disclosed if it is favorable to the accused. (Youngblood) "Impeachment evidence" has been described as evidence "having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (U.S. vs. Avellino,

136 F.3d 249, 2d. Cir. 1998)

(23) Third, Petitioner must prove that the evidence was suppressed if it is favorable. (Bell vs. Howes, 703 F.3d 848, 6th Cir. 2012) While Brady used the term "suppression", it should not be understood to require active removal or hiding of evidence by the State - the issue is whether the prosecution revealed the evidence in a timely manner, regardless of intent or negligence. (Cone vs. Bell, 556 U.S. 449, 2009) Once Petitioner meets this burden by producing evidence, the burden then shifts to the State to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from others

acting on the government's behalf. (U.S. v. Price, 566 F.3d 900, 9th Cir. 2009)

(24) Brady places an affirmative obligation on prosecutors "to learn of any favorable evidence known to the others acting on the State's behalf in the case" and requires disclosure by the prosecution not only of information actually known to the prosecutor, but of all information in the possession of the prosecutor's office, the police, and others acting on behalf of the prosecution." (Kyles vs. Whitley, 514 U.S. 419, 1995) This also applies to post conviction Brady obligations.

(25) Petitioner meets the first prong of Brady by showing that the evidence was favorable to him. In this case, the Snyder memorandum

was generated before the second trial in 2010. Up to that point, it appears that city police routinely went outside their jurisdiction in violation of A.C.A. 16-81-106. This was never brought out in the first trial. In the second trial, in response to a motion in limine filed by the defense, Jim Snyder hastily drew one up to attempt an end run around the law. The fact that Officer Bearden arrested Petitioner in violation of that law establishes an illegal arrest.[FN1] The illegal arrest resulted in a conviction that imprisoned Petitioner in violation of the Constitution and Laws of the United States.

(26) The second prong of Brady requires that

FN1- Officer Bearden only investigated the scene. The actual arrest was handled by others.

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the evidence be impeaching. This has already been shown above. Had the State turned the Snyder memorandum over to the defense under its Brady obligations, counsel could have established that an illegal arrest occurred. The memo was not even generated until before the second trial.

(27) Third, Petitioner must prove that the evidence was, in fact, suppressed. He meets the requirement because the Snyder memo was never turned over until Petitioner found it in a box of legal documents that he received in lieu of the filing of the instant habeas petition. The State intentionally withheld that document, plain and simple.

(28) Arkansas adopted the approach described

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In Kyles before it was decided. The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the State's behalf in the case, including police. (Lewis vs. State, 691 S.W.2d 864, 1985; Williams vs. State, 593 S.W.2d 8, 1980)

(29) Kyles did establish that a "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. None of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency)

is the touchstone." (Id.)

(30) The Recommended Disposition should be rejected in its entirety in all respects.

IV. Trial Counsel Rendered Ineffective Assistance And Committed A McCoy Violation

(31) The Sixth Amendment guarantees in both state and federal prosecutions, that "the accused shall enjoy the right... to have the assistance of counsel for his defense." (U.S. Const. Amend. VI) (See Kansas vs. Ventris, 556 U.S. 586, 2009) This right extends to both retained and appointed counsel and is examined using the same standards. (Mickens vs. Taylor, 535 U.S. 162, 2002) The violation of the Sixth Amendment right

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to the effective assistance of counsel may constitute grounds for federal habeas relief. (Strickland vs. Washington, 466 U.S. 668, 1984) The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. (United States vs. Morrison, 449 U.S. 361, 1981) Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. (Anders vs. California, 386 U.S. 738, 1967)

(32) The right to counsel extends to all stages of the criminal process. (Iowa vs. Tovar, 541 U.S. 77, 2004) It also extends through the first appeal. In deciding what qualifies as a

"critical stage", courts have "recognized that the period from arraignment to trial is 'perhaps the most critical period of the proceedings.'" (U.S. vs. Wade, 388 U.S. 218, 1967) If the defendant is denied the right to counsel at a "critical stage" of trial, there is per se prejudice and reversal is automatic. (Hamilton vs. State of Alabama, 368 U.S. 52, 1961)

(33) On May 14, 2018, the United States Supreme Court decided McCoy vs. Louisiana, 138 S.Ct. 1500. In that case, the Court ruled that with individual liberty at stake, it is petitioner's perogative to decide on the objective of this defense, not his counsel's,

It went on to say that some decisions are reserved for the client, such as the decision to testify or not in one's own behalf, (34) In McCoy, the Supreme Court ruled that the ineffective assistance of counsel jurisprudence of Strickland vs. Washington does not apply where the client's autonomy, not counsel's competence, is in issue. Violation of a defendant's 6th Amendment secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless error review. (Id.)

(35) Under the Sixth Amendment, "the right to defend is personal." (Faretta vs. California, 422 U.S. 806, 1975) The U.S. Supreme Court has

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repeatedly recognized "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." (Weaver vs. Massachusetts, 137 S.Ct. 1899, 1908, 2017) Counsel "had no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action," (See Restatement (Third) of the Law Governing Lawyers Section 23 cmt.c)

(36) Even the dissenters in Faretta recognized that a defendant who lost a constitutional right because of "such overbearing conduct by counsel" against the wishes of the defendant

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would have the remedy of a new trial. (422 U.S. at 848) (Blackmun, J., dissenting) [citing federal habeas cases granting new trials]

(37) When a lawyer goes against his client's stated wishes, such as here, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial rights') without regard to [its] effect on the outcome." (Neder vs. United States, 527 U.S. 1, 7) (quoting Fed. R. Crim. P. 52(a)) That is because the "constitutional deprivation" is not "simply an error in the trial process", but "affects the framework within which the trial proceeds." (Arizona vs. Fulminante, 499 U.S. 279, 1991) (quoting

Rose vs. Clark, 478 U.S. 570, 1986)

(A) Failure To Impeach Witness

(38) Petitioner realleges and reincorporates by reference herein the allegation made in his reply brief.

(39) Suffice it to say conducting cross-examination is one of trial strategy. (See United States vs. Orr, 636 F.3d 944, 8th Cir. 2011) A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had reasonable doubt of the Petitioner's guilt. (Id. at 1018) (See also Walker vs. Cassady,

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Case No. 4:13CV2422HEA, U.S.D.C., E.D.Mo., E.D.Div., January 20, 2017)

(40) In this case, Harris had credibility problems at the outset. She testified falsely at the first trial that Petitioner had been convicted of terroristic threatening, yet at the second trial, counsel failed to impeach her on her false testimony in a prior proceeding. Even though courts in this case have opined that counsel would have drawn the jury's attention to the fact that Petitioner had previously had terroristic threatening charges dismissed (DE #13, Section III(C), pg. 11), counsel still could have asked generic questions regarding prior false or inconsistent testimony.[FN2]

FN2- Counsel did not ask for a curative instruction here. She should have requested one.

(41) Counsel's performance in this regard was deficient and Petitioner was prejudiced as a result. (See Sweeney vs. United States, 766 F.3d 857, 8th Cir. 2014)

(42) Additionally, Petitioner instructed counsel to impeach Harris, yet she did not do so. As a result, Petitioner's autonomy was taken from him, prejudice is therefore presumed, and a structural error occurred. This violates the reasoning and holding of McCoy vs. Louisiana.

(43) The Recommended Disposition should be rejected in its entirety in all respects.

(B) Failure To Impeach Expert Witness

(44) As stated earlier in these Objections,

Dr. Daniel Lonzleman was not a ballistics expert, yet he testified as one, opining on matters of trajectory and distance. Dr. Lonzleman is an Associate Medical Examiner, and he had no personal knowledge of these matters. In fact, he testified that he normally relied on the witness statements of others in forming his own opinions.

(45) Counsel should have impeached Dr. Lonzleman on his lack of credentials regarding ballistics, should have moved to exclude his testimony based on Daubert and A.R.E. 702, and should have required that the State call a ballistics expert to testify.

(46) Counsel's performance in this regard was deficient and Petitioner was prejudiced as a

result,

(47) Additionally, Petitioner instructed counsel to challenge Dr. Konzleman's lack of qualifications on ballistics, yet she did not do so. As a result, Petitioner's autonomy was taken from him, prejudice is therefore presumed and a structural error occurred. This violates the reasoning and holding of McCoy vs. Louisiana.

(48) The Recommended Disposition should be rejected in its entirety in all respects.

IV. Petitioner's Conviction And Sentence Violates International Law

(A) Petitioner's Conviction And Sentence Violates International Law

(49) International law binds each of the

States that comprise the United States. Arkansas is bound by international law whether found in treaty or in custom. Because the sentence and conviction violate international law, Petitioner's conviction and sentences cannot stand.

(B) International Law Binds The State Of Arkansas

(50) "International law is part of our law." (The Paquette Habana, 175 U.S. 677, 1900) A treaty made by the United States is the Supreme law of the land. (Article VI, U.S. Const.) Where state law conflicts with international law, it is the state law that must yield.

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(See Zschernig vs. Miller, 389 U.S. 429, 1968; Clark vs. Allen, 331 U.S. 503, 1947; United States vs. Pink, 315 U.S. 203, 1942; Kansas vs. Colorado, 206 U.S. 46, 1907; The Paquette Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 1815; Asakura vs. Seattle, 265 U.S. 332, 1924) International law creates remediable rights for United States citizens. (Filartiga vs. Pena-Irala, 630 F.2d 876, 2d. Cir. 1980; Forti vs. Suarez-Mason, 672 F. Supp. 1531, N.D. Cal. 1987)

(C) Arkansas' Obligations Under International Charters, Treaties, And Conventions

(51) The United States' membership and

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participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. (Art. 1(3)) The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. (OAS Charter, Art. 3)

(52) The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including:

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the International Covenant On Civil And Political Rights (ICCPR) ratified in 1992, the International Convention On The Elimination Of All Forms Of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Under the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. President Clinton reiterated the United States'

need to fulfill its obligations under these Conventions when he issued Executive Order 13107.

(53) Arkansas is not fulfilling the United States' obligations under these conventions. Rather, Petitioner's due process rights were violated and as a result, the conviction and sentence violates each convention's requirements and thus must yield to the requirements of international law.

(1) Petitioner's Conviction And Sentence Violates The ICCPR's And ICERD's Guarantees Of Equal Protection And Due Process

(54) Both the ICCPR, ratified in 1992, and

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the ICERD, ratified in 1994, guarantee equal protection of the law. (ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a)) The ICCPR further guarantees due process via Articles 9 + 14. However, Petitioner's conviction and sentence was obtained through the denial of due process. (iii) Petitioner was convicted and sentenced to a term of life w/o parole for capital murder even though he was acquitted of the underlying offense of kidnapping. Statutorily, this is improper. It should have been reduced to 1st Degree Murder, at the very least, because it did not have an underlying felony. However, Petitioner's due process rights under the ICCPR and ICERD were violated when he received a

sentence for capital murder, when the crime no longer qualified as capital. Also, his equal protection rights were violated when he did not receive the same sentence that others have received who did not qualify under the capital sentencing scheme. (56) Failure to rectify this situation is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

(A) Arkansas' Obligations Under The ICCPR, The ICERD, And The CAT Are Not Limited By The Reservations And Conditions Placed On These Conventions By The Senate

(57) While conditions, reservations, and understandings accompanied the United

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States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two (2) reasons. Article II, Section 2 of the U.S. Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will follow. Its role is to simply advise and consent.

(58) The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of

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of reservations. It allows reservations unless they are prohibited by the treaty, the treaty provides that only specified reservations not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. (Art. 19(a)-(c)) The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. (Id.) Further, the ICCPR's purpose is to protect life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, the United States' reservations cannot

stand under the Vienna Convention as well.

(59) The Recommendation should be rejected in its entirety in all respects.

V. Petitioner's Illegal Arrest Claim Is Cognizable In Habeas

(60) The standard in habeas petitions is whether Petitioner is held in custody "in violation of the Constitution, Laws, or Treaties of the United States." (28 U.S.C. Section 2254) Illegal arrest implicates important Fourth Amendment concerns, thereby invoking federal constitutional protections. Therefore, this claim is properly before this Court.

(61) The Recommendation should be rejected

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in its entirety in all respects

VI. Evidentiary Hearing

(62) The criterion for determining when an evidentiary hearing is appropriate is found in the U.S. Supreme Court's twin decisions of Townsend vs. Sain, 372 U.S. 293, 1963 and Keeney vs. Tamayo-Reyes, 504 U.S. 1, 1992, Petitioner must allege a colorable claim for relief and must show that the allegations of fact in the petition, if true, would entitle him to relief, (Schriro vs. Landrigan, 550 U.S. 465, 2007) The evidence must be plausible. (Id. Tamayo-Reyes) The Petitioner must explain

how evidence presented at the hearing will further his claim. (Cardwell vs. Greene, 152 F.3d 331, 4th Cir. 1998) It is sufficient that the petitioner's allegations "would entitle him to relief and the hearing is likely to elicit the factual support for those allegations" (Tetis vs. Bender, 507 F.3d 50, 1st Cir. 2007)

(63) The McCoy claims would be relevant in an evidentiary hearing. In fact, a hearing would most likely be required in order to hear from Ms. Copelin-Neely in the first instance as to what transpired. It cannot be decided on this record alone.

(64) There is also the issues of actual innocence to explore as well.

(65) Petitioner moves that a hearing be

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enacted so that he can further develop his claims.

VII. Appointment of Counsel

(66) This Court has the authority to appoint counsel in this case "if the interests of justice so require." (18 U.S.C. Section 3006A(a)(2)(B))

(67) Petitioner has had no counsel through any attempts at post-conviction relief. He had assistance from a jailhouse lawyer in the preparation of this petition. He needs the assistance of counsel to help him develop his claims. The Court is required to appoint counsel in cases where an evidentiary hearing is set. (Rule 8(c), Rules Governing Section

2254 Cases) He seeks a hearing in this matter and counsel to represent him at the hearing in order to fully develop his claims.

Conclusion

The Court should reject the Recommended Disposition in its entirety in all respects, enact an evidentiary hearing, and appoint counsel to assist him at the hearing.

Respectfully submitted,

Roderick Williams

Roderick Williams #
Maximum Security Unit
2501 State Farm Rd.
Tucker, AR 72168

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

RODERICK WILLIAMS **PETITIONER**
ADC #111674

CASE NO. 4:20-CV-83-BRW-BD

WENDY KELLEY, Secretary,
Arkansas Department of Correction **RESPONDENT**

RECOMMENDED DISPOSITION

I. Procedure for Filing Objections:

This Recommendation for dismissal has been sent to Judge Billy Roy Williams. Any party to this suit may file objections if they disagree with the findings or conclusions set out in the Recommendation. To be considered, objections must be filed within 14 days. Objections should be specific and should include the factual or legal basis for the objection.

If parties do not file objections, they risk waiving the right to appeal questions of fact. And, if no objections are filed, Judge Wilson can adopt this Recommendation without independently reviewing the record.

II. Background:

A. Trial and Direct Appeal Proceedings

In September 2008, petitioner Roderick Williams was tried before a Desha County, Arkansas jury and was convicted of capital murder, kidnapping, first-degree domestic battering, endangering the welfare of a minor, and being a felon in possession

of a firearm. *Williams v. State*, 2010 Ark. 89 at 1 (*Williams I*). On direct appeal, Mr. Williams argued that the trial court erred by refusing to grant a mistrial after a witness testified that Mr. Williams had previously been convicted of terroristic threatening. *Id.* at 2-3. The Arkansas Supreme Court agreed and reversed and remanded for a new trial. *Id.*

Two years later, Mr. Williams was retried, and a jury convicted him of capital murder, first-degree domestic battering, endangering the welfare of a minor, and possession of a firearm by a felon.[1] (Doc. No. 8-5 at 182-85) The jury sentenced Mr. Williams to a term of life without parole, plus 82 years. (Doc. No. 8-5 at 1372-81)

The Arkansas Supreme Court described the evidence presented at trial as follows:

> Appellant [Roderick Williams] had a turbulent relationship with Kerman Harris, who testified that appellant was the father of her nine-month-old daughter. The couple ended their relationship, and Harris filed an order of protection against him. Nevertheless, on the afternoon of April 26, 2007, appellant attempted to contact Harris at her cousin's residence in McGehee when appellant approached the home and demanded entry. Harris called 911 for police assistance, but appellant left the premises before the police arrived.
>
> At approximately 10:30 that evening, appellant went to Harris's home where she lived with her baby and her parents. Harris's mother, Clara Cobb, came onto the front porch to speak to appellant while Harris was on the phone inside the home. After her phone conversation, Harris, while holding the baby, went toward the porch to see who was there. At that time, she saw appellant loading a shotgun while talking to Cobb. Cobb threw up her hands, and appellant shot her in the stomach. Harris stood within a foot of her mother behind a screen door. Still armed, appellant took Harris and her baby, dragging Harris by her hair to a car where his uncle, Alonzo Williams, was waiting. Appellant drove away with Harris and the baby. During the car ride, appellant hit Harris, and she and Williams attempted to shield the baby from appellant's blows. Appellant pulled over and left his uncle and the baby on the side of the road. Appellant then forced Harris to remain with him. After getting the car stuck, appellant and Harris caught a ride to a trailer where they stayed until a SWAT team apprehended him the following day. As a result

[1] Mr. Williams was acquitted of kidnapping. (Doc. No. 8-5 at 1381)

> of appellant's beating, Harris suffered a broken arm and wrist and injuries to her face.
>
> Police discovered three unspent shotgun shells on the porch near Cobb's body. A medical examiner performed an autopsy and stated that Cobb suffered a gunshot wound to the upper part of her stomach. The examiner found shotgun shell pellets and a shot cup inside Cobb's body. Based upon these findings, the examiner confirmed that Cobb was shot at close range. Police officers found the broken shotgun and a spent shell near a bridge in close proximity to the Cobb house where appellant stopped to leave his uncle and baby.

Williams v. State, 2011 Ark. 432, 1–3 (2011) (*Williams II*).

Mr. Williams appealed his convictions to the Arkansas Supreme Court, claiming that the trial court erred by denying his motion for directed verdict on capital murder, by denying his directed verdict motion for child endangerment, and by failing to declare a mistrial after Ms. Harris mentioned Mr. Williams's first trial during her testimony. *Williams II*, at 3.

The Arkansas Supreme Court affirmed. It held that substantial evidence supported Mr. Williams's convictions for capital murder with premeditation and deliberation and for child endangerment. *Id.* at 6-7. It also held that the trial court did not err in denying Mr. Williams's motion for mistrial. *Id.* at 10.

B. Post-conviction Proceedings

Mr. Williams filed a timely petition for post-conviction relief under Arkansas Rule of Criminal Procedure 37.1. He claimed that his trial counsel was constitutionally ineffective for failing to request a jury admonition after Ms. Harris referred to the first trial and for failing to impeach Ms. Harris with the "false" testimony she gave at the first trial. *Williams v. State*, 2019 Ark. 129 at 3 (*Williams III*). (Doc. No. 8-8 at 68-69) He also

claimed that his appellate counsel was ineffective for failing to challenge various adverse evidentiary rulings by the circuit court that limited his trial counsel's ability to cross-examine Ms. Harris about personal issues with another woman with whom he also had a child. *Id.* (Doc. No. 8-8 at 69-70)

The trial court denied Mr. Williams's petition without a hearing. *Id.* (Doc. No. 8-8 at 98) In a written order, it found that defense counsel had made reasonable tactical decisions; that Mr. Williams had effective assistance of counsel during his trial; and that he was afforded due process. (Doc. No. 8-8 at 98)

Mr. Williams appealed to the Arkansas Supreme Court. *Id.* (Doc. No. 8-9) He raised the same three ineffective-assistance-of-counsel claims that he had raised in his Rule 37 petition. (Doc. No. 8-9 at 4-9) Additionally, he claimed that his conviction violated due process because there was insufficient evidence of premeditation and deliberation to support his capital-murder conviction. (Doc. No. 8-9 at 9-11)

The Arkansas Supreme Court applied the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984) to assess Mr. Williams's ineffective-assistance-of-counsel claims. It found that trial counsel's decision not to request an admonition was a reasonable trial strategy designed to avoid calling further attention to the remark rather than ineffective assistance of counsel. *Williams III.* at 6. It also found counsel's decision not to question Ms. Harris about what Mr. Williams characterizes as perjury was also a reasonable trial tactic. Questioning along that line could have led to testimony about the previous terroristic-threatening charges against Mr. Williams that had been dismissed. *Id.* Finally, the court found that Mr. Williams had failed to meet his burden of showing that

appellate counsel could have made showing of error by the trial court. *Id.* at 7. The court refused to address the due process claim because Mr. Williams had not raised that issue with the trial court, and it was not cognizable in a Rule 37 petition. *Id.* at 8.

C. Federal Habeas Petition

Mr. Williams raises four claims in his timely federal habeas petition. First, he claims that there was insufficient evidence to support his conviction for capital murder. (Doc. No. 1 at 5) Second, he claims that his trial counsel was ineffective for failing to ask for a jury admonition after Ms. Harris's remark about his first trial; and third, he faults his trial counsel for failing to impeach Ms. Harris on her previous trial testimony, which he characterizes as "false." (Doc. No. 1 at 7-9) Finally, he claims that a Dumas police officer illegally arrested him outside of his jurisdiction in violation of Arkansas law. (Doc. No. 1 at 10)

Director Payne responds that Mr. Williams's insufficient evidence and ineffective-assistance-of-counsel claims were reasonably adjudicated on the merits in state court, noting that the state-court decisions are entitled to deference. (Doc. No. 8 at 7-18) Further, he contends that Mr. Williams's claim that he was illegally arrested fails because the claim is not cognizable in a habeas petition. (Doc. No. 8 at 18-19)

In his reply, Mr. Williams argues: that the State failed to present sufficient evidence of premeditation; that he was prejudiced by counsel's failure to impeach Ms. Harris; and that his arrest violated the jurisdictional limits set out in Arkansas Code Annotated § 16-81-106. (Doc. Nos. 11 and 12)

III. Discussion:

A. Standard

A federal habeas petitioner challenging a matter adjudicated by a state court on the merits must show that the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To decide whether a state court's decision involved an unreasonable application of federal law or was based on an unreasonable determination of fact, this Court must "train its attention on the particular reasons—both legal and factual—why state courts rejected the state prisoner's federal claims." *Wilson v. Sellers*, __U.S. __, __, 138 S.Ct. 1188, 1191-92 (2018) (quoting *Hittson v. Chatman,* 576 U.S. __, __, 135 S.Ct. 2126, 2126 (2015)). The Court must also give appropriate deference to the state court's decision. *Id.* (citing *Harrington v. Richter,* 562 U.S. 86, 101–02 (2011)).

For purposes of the statute, "contrary to" and "unreasonable application" have "independent meaning." See *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The "contrary to" clause "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.* (defining "contrary" as "diametrically different," "opposite in character or nature," or "mutually opposed"). "An 'unreasonable application' of Supreme Court precedent occurs when a state court correctly identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context."

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Munt v. Grandlienard, 829 F.3d 610, 614 (8th Cir. 2016), *cert. denied,* 137 S. Ct. 821 (2017) (citing *Williams*, 529 U.S. at 407).

B. Sufficiency of the Evidence

In this habeas petition, Mr. Williams claims that there was insufficient evidence to support his capital-murder conviction. (Doc. Nos. 1 at 5, 11 at 1-2) He raised a claim of insufficiency-of-evidence on direct appeal when he challenged the trial court's denial of his motion for a directed verdict. *Williams II* at 3-6. The Arkansas Supreme Court considered the evidence in a light most favorable to the State to determine whether there was substantial evidence to support the jury's verdict. *Id.* at 3. This standard is not contrary to, or an unreasonable application of, Supreme Court precedent. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt) (other citation omitted).

Under Arkansas law, a defendant commits capital murder if, with the premeditated and deliberate purpose of causing the death of another, he causes the death of any person. ARK. CODE ANN. § 5-10-101(a)(4). Further, as the Arkansas Supreme Court has observed, under Arkansas law, premeditation can be formed in an instant; and intent can be inferred from the circumstances of the crime. *Williams II* (citing *Pearcy v. State*, 2010 Ark. 454 at 6-7). Premeditation and deliberation can also be inferred from the type and character of the weapon used; the way the weapon was used; the nature, extent, and

location of a victim's wounds; and the accused's conduct. *Id.* (citing *Robinson v. State*, 363 Ark. 432 (2005)).

Mr. Williams admits that he shot and killed the victim. He argues, however, that the State did not produce enough evidence to show that he acted with premeditation and deliberation. *Williams II*, 2011 Ark. at 4, (Doc. Nos. 1 at 5, 11 at 1-2) Specifically, he argues that the state did not introduce evidence of "motive or intent to kill." (Doc. No. 1 at 5)

In his reply, Mr. Williams claims that Dr. Daniel Konzleman, Associate Medical Examiner, who testified that the shot had been fired at "close range," previously testified that the shot was fired at a range of one to eight feet. (Doc. No. 11 at 1)

In affirming the trial court's ruling that sufficient evidence supported the capital murder conviction, the Arkansas Supreme Court relied on both Ms. Harris's eyewitness testimony and Dr. Konzleman's testimony to establish premeditation. The court wrote:

> Harris testified that she had filed an order of protection against appellant for harassing her; however, appellant appeared at her cousin's house and left after she called 911. Later that night, Harris heard her mother talking to someone on the porch, and when she got off the phone, she went to the door and saw appellant loading a shotgun. Harris stated that she saw her mother throw up her hands as if to say, "I give up," and she witnessed appellant shoot her mother with the shotgun at close range. According to Harris, she stood near her mother on the inside of a screen door, about one foot away, while she held her child in her arms.
>
> Dr. Daniel J. Konzleman, an associate medical examiner at the Arkansas State Crime Laboratory, testified about the nature, extent, and location of Cobb's wounds. The doctor testified that he performed the autopsy on the victim and discovered that she suffered a shotgun wound to her abdomen. Dr. Konzleman further testified that a shot cup will enter a wound if the shot is fired within approximately eight feet. He stated that he recovered small birdshot-type pellets and a shot cup from the victim's body. Based upon his

> findings, Dr. Konzleman estimated that the shooting could have taken place within a range of one to two feet.

Williams II, at 5-6.

The Court has reviewed the evidence presented at trial and finds that the Arkansas Supreme Court's determination of the facts was not unreasonable. The Arkansas Court acknowledged Mr. Williams's testimony that the gun "went off" when he grabbed it from Ms. Cobb and that the shooting was an accident. But as the Arkansas Court explained, the jury resolved the inconsistencies between testimony it heard from Mr. Williams and Ms. Harris, and "the jury believed Harris and found appellant acted with premeditation and deliberation by taking the shotgun to the house, walking to the porch, loading the gun, and firing at the victim after she threw her hands in surrender." *Id.* The Arkansas Supreme Court held that the jury found sufficient evidence to compel a conclusion, and its decision was not contrary to, or an unreasonable application of, clearly established federal law. *Id.* at 4.

In his reply to the response, Mr. Williams argues that his counsel failed to impeach Dr. Konzleman on key points, and that as a result, his testimony misled the jury. (Doc. No. 11 at 1) In an attempt to bring this claim under the umbrella of a due process claim, Mr. Williams asserts that his counsel's failure to impeach Dr. Konzleman violated his due process rights. Mr. Williams did not properly raise this point, however, as either an ineffective-assistance-of-counsel claim or a due process claim in his habeas petition or with the state courts. See *Williams II* at 6-8; *Williams III* at 3, 8. Accordingly, the Court will not address the novel claim here.

The Arkansas Supreme Court appropriately viewed the evidence in a light most favorable to the State. It held that a reasonable jury could have found the essential elements of capital murder beyond a reasonable doubt from the evidence presented at trial. Accordingly, Mr. Williams's challenge to the sufficiency of the evidence fails.

C. Ineffective Assistance of Counsel

To prove his ineffective-assistance claims, Mr. Williams must show that his counsel was deficient and that he suffered prejudice as a result of this deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). In other words, Mr. Williams must show that his counsel fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 688, 694.

Mr. Williams contends that his trial counsel was ineffective for failing to ask for a jury admonition when, during cross-examination, Ms. Harris referred to the earlier trial. As the Arkansas Supreme Court pointed out, asking for an admonition might well have been counter-productive, because an instruction would have drawn attention to the fact that this was a second trial. The court concluded that counsel's decision was a tactical decision that fell within the wide range of "reasonable professional judgment." *Williams III*, 2019 Ark. at 5-6; see also *Strickland*, 466 U.S. at 689 (holding counsel's "strategic choices" after a thorough investigation are "virtually unchallengeable").

Mr. Williams also complains that his trial counsel was ineffective for failing to impeach Ms. Harris with her previous testimony. Mr. Williams raised this claim in his Rule 37 petition and on appeal of the denial of the petition. The Arkansas Court found

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that trial counsel's decision not to question Ms. Harris about the statement she made in the first trial that led to a mistrial was another "professionally reasonable tactic" given that reference to the remark would have made the jury aware of terroristic-threatening charges against Williams that were dismissed. *Id.* at 6. The court's decision was not an unreasonable determination of the facts or an unreasonable application of federal law.

D. Illegal Arrest

Finally, Mr. Williams claims he was illegally arrested by a Dumas police officer outside of Dumas city limits, in violation of Arkansas law. This claim cannot be heard in this federal habeas case because it asserts a violation of state law. A federal habeas petition is limited to challenges to the application of federal law. 28 U.S.C. § 2254(d); see also *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to re-examine state-court determination on state-law questions").

IV. Certificate of Appealability:

When entering a final order adverse to a petitioner, the Court must issue or deny a certificate of appealability. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Court. The Court can issue a certificate of appealability only if Mr. Williams has made a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c) (1)-(2). In this case, Mr. Williams has not provided a basis for the Court to issue a certificate of appealability. Accordingly, a certificate of appealability should be denied.

V. Conclusion:

The Arkansas Supreme Court's decisions denying Mr. Williams relief were neither unreasonable applications of federal law nor unreasonable determinations of facts in the light of the evidence presented at trial. The Court recommends that Mr. Williams's petition for writ of habeas corpus (Doc. No. 1) be DISMISSED, with prejudice.

DATED this 11th day of May, 2020.

UNITED STATES MAGISTRATE JUDGE

AO 241 (Rev. 09/17)

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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Eastern District of Arkansas
Name (under which you were convicted): Roderick Williams	Docket or Case No.: 4:20CV-83-BRW-JJV
Place of Confinement : Arkansas Department of Corrections, Tucker Maximum Security Unit	Prisoner No.: 111674
Petitioner (include the name under which you were convicted) Roderick Williams	Respondent (authorized person having custody of petitioner) Wendy Kelley, Secretary Arkansas Department of Correction
The Attorney General of the State of: Arkansas	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Circuit Court of Desha County, Tenth Judicial Circuit
P.O. Box 309
Arkansas City, 71630

(b) Criminal docket or case number (if you know): CR-2007-050-4

2. (a) Date of the judgment of conviction (if you know): 09/17/2010

(b) Date of sentencing: 09/17/2010

3. Length of sentence: Life without parole consecutive to Counts 2-4

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:

Count 1 - Capital Murder
Count 2 - Domestic Battering in the First Degree
Count 3 - Endangering Welfare of a Minor
Count 4 - Possession of Firearms by Certain Persons

This case assigned to District Judge Wilson
and to Magistrate Judge Deere

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Not Applicable

(c) If you went to trial, what kind of trial did you have? (Check one)

☑ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☑ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Arkansas Supreme Court

(b) Docket or case number (if you know): CR11-64

(c) Result: Affirmed

(d) Date of result (if you know): 04/08/2011

(e) Citation to the case (if you know): 385 S.W.3d 157 (Ark. 2011)

(f) Grounds raised: 1. Sufficiency of the evidence claims as related to Capital Murder where State failed to show premediation and deliberation.

2. Trial court's failure to grant a mistrial after witness improperly testified as to the previous trial of Williams on the same charges which was reversed and remanded for a new trial.

3. Sufficiency of the evidence claims as related to first degree child endangerment.

(g) Did you seek further review by a higher state court? ☐ Yes ☑ No

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

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(4) Date of result (if you know):

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☑ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Desha County Circuit Court

(2) Docket or case number (if you know): CR 2007-50-4

(3) Date of filing (if you know): 12/19/2011

(4) Nature of the proceeding: Post-Conviction Relief (Habeas) (Ark. R. Crim P. 37.1)

(5) Grounds raised: 1. Ineffective Assistance of Counsel - Failure to Admonish Jury

2. Ineffective Assistance of Counsel - Failure to Impeach Witness

3. Due Process - Court improperly restricted defense counsel from questioning State's witness and limited defendant's ability to quesiton the credibility of the witness before the jury and impeach the witness

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☑ No

(7) Result: Denied

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(8) Date of result (if you know): 01/26/2018

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Not Applicable

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Not Applicable

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☑ Yes ☐ No

(2) Second petition: ☐ Yes ☑ No

(3) Third petition: ☐ Yes ☑ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Arkansas State Supreme Court affirmed denial of the post-conviciton petition (first petition) at 571 S.W. 3d 157 (ark. 2011) on April 25, 2019.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Due Process violations - Capital Murder - Insufficiency of the Evidence as to premeditaiton and deliberation

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The testimony and evidence submitted at trial failed to show that the defendant acted wtih premeditation and deliberation. The evidence failed to meet the elements of the crime alleged. The State's evidence did not include any motive or intent to kill. The defendant had no prior ill-will or animous towards Mrs. Cobb, the victim. The defendant presented evidence of an encounter with the boyfroend of his child's mother, who had brandished a weapon at defendant earlier that day. There was no evidence to support any intent by the defendant to kill any person on the date of the crime. The element of the crime was not found by the jury.

(b) If you did not exhaust your state remedies on Ground One, explain why: Exhausted

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☑ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

This issue was not raised as it had been exhausted by appeal to the Arkansas Supreme Court. The post-conviction motion only raised issues of ineffective assistance of counsel.

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: Due Process violations - Ineffective Assistance of Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Trial Court failed to declare mistrial after witness testified to previous trial which conviciton was reversed and remanded. Defendant's counsel failed to seek an admonishing instruciton to jury to disregard the testimony. The failure to declare a mistrial or admonish the jury concerning the previous trial improperly prejudiced the defendant by allowing the jury ot improperly consider that the defendnat had been previously tried and convicted on the same charges and facts. This would lead a reasonable juror to harbor a belief that the defendant had obtained a retrial on a "technicality." The defendant's trial counsle was deficient in opening the door to such testimony and then failing to request admonishment whichn allowed the improper testimony, which the court had expressed reservations about prior to trial, to go to the jury unfettered and without explanation.

(b) If you did not exhaust your state remedies on Ground Two, explain why: Exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☑ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-Conviciton Ark. R. Crim. P. 37.1

Name and location of the court where the motion or petition was filed:

Desha County Circuit Court

Docket or case number (if you know): CR 2007-50-4

Date of the court's decision: 01/26/2018

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Arkansas Supreme Court

Docket or case number (if you know): CR 18-207

Date of the court's decision: 04/25/2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Not Applicable

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : All state remedies exhausted.

GROUND THREE: Ineffective Assistance of Counsel - Witness Impeachment - Due Process

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Defendant's trial counsel failed to impeach Harris on her previous trial testimony that was found to be untrue by the Arkasnas Supreme Court and resulted in the conviction being reversed and remanded. Harris was the State's key witness in this trial and her testimony was key in obtaining a conviction. The failure to impeach her allowed the jury to rely on her credibility without knowledge of her previous false testimony. The Court would not allow defense counsel to question Harris about a relationship with Robinson, a motive for the false testimony. Counsel failed to properly preserve the issue and appellate counsel failed to brief the issue.

(b) If you did not exhaust your state remedies on Ground Three, explain why: Exhausted as to impeachment in regard to prior false testimony. Trial counsel failed to preserve the issue of not being allowed to question Harris about prior issues with Robinson as a motive for false testimony. Appeallate counsel failed to brief the issue of the trial court refusing to allow questioning about Harris' "issues" with Robinson and thereby improperly waived the claim.

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel was not raised on direct appeal as it is barred by Ark. R. Crim. P. 37 to be brought only after direct appeals are exhausted. "Issue" claim not briefed and imprpoerly waived by appeallate counsel.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-Conviction Ark. R. Crim. P. 37

Name and location of the court where the motion or petition was filed: Desha County Circuit Court

Docket or case number (if you know): CR 2007-50-4

Date of the court's decision: 01/26/2018

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Arkansas Supreme Court

Docket or case number (if you know): CR 18-207

Date of the court's decision: 04/25/2019

Result (attach a copy of the court's opinion or order, if available): Affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Not Applicable

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: Not Applicable

GROUND FOUR: Arrest Made without Jursidiction - Due Process Violation - Newly Discovered Evidence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The defendant was arrested by Dumas Police Officer Bearden outside of his jurisdictional limits set by Arkansas law. The alleged crimed was commited in the unincorporated jurisdiction of Desha County, Arkansas. The State improperly withheld material evidence and presented false testimony at a pre-trial hearing. The State purported to show that Bearden had been properly deputized prior to defendant's arrest. In fact, the policy which deputized Dumas Police Officer as Desha County Deputy Sheriffs was not implemented until August 25, 2010. No policy as required by Arkansas law was in effect at the time of arrest. The unlawful arrest coupled with the deliberate witholding of material evidence and false testimony violate the defendant's due process rights.

(b) If you did not exhaust your state remedies on Ground Four, explain why: Evidence of the actual implemented policy of August 25, 2010 was only recently discovered and constitutes newly discovered evidence.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: Newly discovered evidence.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Newly discovered evidence.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: Not applicable - newly discovered evidence.

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13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☑ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Newly discivered evidence grounds have not been presented as raised in Four of this petition.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground Four - newly discovered evidence of the witholding of material evidence by the State and the presentation of false testimony concerning the material evidence relating to the arrest of defendant by a law enforcement officer without jurisdiction.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. Not applicable

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. Not applicable

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Priscilla C. Neely, 152 S. Main St. Dumas, AR 71639

(b) At arraignment and plea: Priscilla C. Neely, 152 S. Main St. Dumas, AR 71639

(c) At trial: Priscilla C. Neely, 152 S. Main St. Dumas, AR 71639

(d) At sentencing: Priscilla C. Neely, 152 S. Main St. Dumas, AR 71639

(e) On appeal: Joseph Mazzanti III, PO Box 209, Lake Village, AR 71653

(f) In any post-conviction proceeding: Defendant proceeded pro se.

(g) On appeal from any ruling against you in a post-conviction proceeding: Defendant proceeded pro se.

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☑ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

Not Applicable

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

This petition is timely.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Issue a Writ of Habeas Corpus, vacate the judgment and conviction, remand fr proceedings consistent with the Court's opinion and all other relief necessary for the fair adminsitration of justice.

or any other relief to which petitioner may be entitled.

Not Applicable

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on January (month, date, year).

Executed (signed) on 22/2020 (date).

Rodericke Williams

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Cite as 2011 Ark. 432

SUPREME COURT OF ARKANSAS

No. CR11-364

RODERICK WILLIAMS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** October 13, 2011 APPEAL FROM THE DESHA COUNTY CIRCUIT COURT, [CR-07-50-4] HON. DON GLOVER, JUDGE AFFIRMED.

COURTNEY HUDSON HENRY, Associate Justice

Appellant Roderick Williams appeals an order of the Desha County Circuit Court convicting him of capital murder, first-degree domestic battering, endangering the welfare of a minor, and possession of a firearm by a felon. For those convictions, appellant was sentenced to a term of life imprisonment without parole plus a term of seventy-two years. For reversal, appellant argues that the circuit court erred in denying his motions for directed verdict on the capital-murder and child-endangerment charges and by denying his motion for mistrial. We have jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2011), as the jury imposed a sentence of life imprisonment. We affirm.

Appellant had a turbulent relationship with Kerman Harris, who testified that appellant was the father of her nine-month-old daughter. The couple ended their relationship, and Harris filed an order of protection against him. Nevertheless, on the afternoon of April 26, 2007, appellant attempted to contact Harris at her cousin's residence

in McGehee when appellant approached the home and demanded entry. Harris called 911 for police assistance, but appellant left the premises before the police arrived.

At approximately 10:30 that evening, appellant went to Harris's home where she lived with her baby and her parents. Harris's mother, Clara Cobb, came onto the front porch to speak to appellant while Harris was on the phone inside the home. After her phone conversation, Harris, while holding the baby, went toward the porch to see who was there. At that time, she saw appellant loading a shotgun while talking to Cobb. Cobb threw up her hands, and appellant shot her in the stomach. Harris stood within a foot of her mother behind a screen door. Still armed, appellant took Harris and her baby, dragging Harris by her hair to a car where his uncle, Alonzo Williams, was waiting. Appellant drove away with Harris and the baby. During the car ride, appellant hit Harris, and she and Williams attempted to shield the baby from appellant's blows. Appellant pulled over and left his uncle and the baby on the side of the road. Appellant then forced Harris to remain with him. After getting the car stuck, appellant and Harris caught a ride to a trailer where they stayed until a SWAT team apprehended him the following day. As a result of appellant's beating, Harris suffered a broken arm and wrist and injuries to her face.

Police discovered three unspent shotgun shells on the porch near Cobb's body. A medical examiner performed an autopsy and stated that Cobb suffered a gunshot wound to the upper part of her stomach. The examiner found shotgun shell pellets and a shot cup inside Cobb's body. Based upon these findings, the examiner confirmed that Cobb was shot at close range. Police officers found the broken shotgun and a spent shell near a bridge in

close proximity to the Cobb house where appellant stopped to leave his uncle and baby.

Appellant was subsequently tried by a jury and was convicted of capital murder, kidnapping, first-degree domestic battering, endangering the welfare of a minor, and being a felon in possession of a firearm. For those convictions, appellant received a sentence of life imprisonment plus seventy-two years. Appellant appealed to our court, and we reversed and remanded in *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168, holding that the circuit court abused its discretion in denying appellant's motion for mistrial because the State received the benefit of prejudicial testimony regarding an alleged prior conviction.

Upon remand, prior to trial, the State and defense counsel agreed to an order prohibiting the officers of the court or the witnesses from using the word, "trial," to prevent the jurors from learning that the case had already been tried. During Harris's testimony, she alluded to "the last trial." Appellant moved for mistrial, which the circuit court denied. After deliberations, the jury convicted appellant of capital murder, first-degree domestic battering, endangering the welfare of a minor, and being a felon in possession of a firearm. Appellant again received a sentence of life imprisonment without parole plus a term of seventy-two years. The circuit court entered an order reflecting the jury's conviction and sentence. From this order, appellant brings his appeal.

On appeal, appellant argues that the circuit court erred in denying his motions for directed verdict for the offenses of capital murder and endangering the welfare of a minor. Although appellant raises his challenges to the sufficiency of the evidence in his first and third points, double-jeopardy concerns require that this court review these arguments first. *Morgan*

v. State, 2009 Ark. 257, 308 S.W.3d 147.

We have held that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We have held that the credibility of witnesses is a matter for the jury's consideration. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). Where the testimony is conflicting, we do not pass upon the credibility of the witnesses and have no right to disregard the testimony of any witness after the jury has given it full credence, where it cannot be said with assurance that it was inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008).

With regard to the capital-murder conviction, appellant argues that the State provided insufficient evidence that appellant acted with premeditation and deliberation to commit the murder. Appellant admits to shooting and killing the victim, but he maintains that he did not do so with premeditation and deliberation.[1]

---

[1] We note that the jury was instructed on two alternate theories of capital murder: capital-felony murder involving kidnaping and capital murder committed by premeditation and deliberation. On appeal, both parties argued the sufficiency of the evidence under these theories. However, in *Williams v. State*, 2011 Ark. 389, after ordering appellant to include the jury-verdict forms in a supplemental addendum and record, we discovered that the jury

A defendant commits capital murder, if, with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person. Ark. Code Ann. § 5-10-101(a)(4) (Supp. 2011). Premeditated and deliberated murder occurs when the killer's conscious object is to cause death, and he forms that intention before he acts and as a result of a weighing of the consequences of his course of conduct. *Evans v. State*, 2011 Ark. 33, 378 S.W.3d 82. Premeditation is not required to exist for a particular length of time. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000). It may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime. *Pearcy v. State*, 2010 Ark. 454, 375 S.W.3d 622. Similarly, premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct. *Robinson v. State*, 363 Ark. 432, 214 S.W.3d 840 (2005).

Here, Harris testified that she had filed an order of protection against appellant for harassing her; however, appellant appeared at her cousin's house and left after she called 911. Later that night, Harris heard her mother talking to someone on the porch, and when she got off the phone, she went to the door and saw appellant loading a shotgun. Harris stated that she saw her mother throw up her hands as if to say, "I give up," and she witnessed appellant shoot her mother with the shotgun at close range. According to Harris, she stood near her mother on the inside of a screen door, about one foot away, while she held her

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convicted appellant on the second theory that appellant caused Cobb's death with premeditated and deliberated purpose. For that reason, we will only address the sufficiency of the evidence supporting that charge.

child in her arms.

Dr. Daniel J. Konzleman, an associate medical examiner at the Arkansas State Crime Laboratory, testified about the nature, extent, and location of Cobb's wounds. The doctor testified that he performed the autopsy on the victim and discovered that she suffered a shotgun wound to her abdomen. Dr. Konzleman further testified that a shot cup will enter a wound if the shot is fired within approximately eight feet. He stated that he recovered small birdshot-type pellets and a shot cup from the victim's body. Based upon his findings, Dr. Konzleman estimated that the shooting could have taken place within a range of one to two feet.

Appellant testified on his behalf. According to appellant, he was intoxicated as he approached the Cobb residence carrying a shotgun and laid the shotgun down. Appellant testified that Cobb saw the gun and grabbed it. Appellant stated that he took the gun from her and that it "went off." Appellant testified that he told Harris it was an accident. However, we have often stated that the jury weighs the credibility of the witnesses and resolves any conflicts or inconsistencies in the evidence. *Matthews v. State*, 2011 Ark. 397. Thus, when confronted with the inconsistencies between Harris's and appellant's testimony, the jury believed Harris and found that appellant acted with premeditation and deliberation by taking the shotgun to the house, walking to the porch, loading the gun, and firing at the victim after she threw her hands in surrender. Based upon our standard of review, we hold that substantial evidence supports appellant's conviction of capital murder with premeditation and deliberation.

With regard to the child-endangerment conviction, appellant argues that the circuit court erred in denying his motion for directed verdict because the evidence showed that appellant simply left the child on the side of the road with another family member and that the child was not harmed in any manner.

Arkansas Code Annotated section 5–27–205 (Repl. 2006) provides in pertinent part:

> (a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:
> (1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor[.]

Here, the testimony revealed that appellant fired a shotgun at the child's grandmother as Harris and the child stood approximately one foot away from the victim behind a screen door on the front porch. According to Harris's testimony, appellant dragged her by the hair to the car while she held the infant. He then beat Harris in the car while she and Williams tried to shield the baby from appellant's blows. Harris also testified that appellant knocked Williams unconscious and left him with the baby in the dark on the side of the road. Harris stated that the baby wore only a onesie in what Officer Jonathan Byrd described as "long-sleeve weather." According to Williams, who testified for the defense, appellant left the baby with him when he felt lightheaded and slumped over. Williams denied that appellant struck him; however, on cross-examination, he admitted that it "felt like a blow to my back." Thus, based upon this testimony, we conclude that appellant engaged in behavior that created a substantial risk of death or serious injury to his minor child. For these reasons, we hold that substantial evidence supports appellant's child-endangerment conviction.

For the final point on appeal, appellant argues that the circuit court erred in denying appellant's motion for mistrial when the State's witness referred to appellant's previous trial during her testimony. In response, the State contends initially that appellant's argument is barred by the doctrine of invited error. The State also asserts that appellant failed to request an admonition when the circuit court denied appellant's mistrial motion.

A mistrial is an extreme and drastic remedy when an error has been made that is so prejudicial that justice cannot be served by continuing the trial. *King v. State*, 361 Ark. 402, 206 S.W.3d 883 (2005). We have observed that a limiting instruction or admonishment by the court may serve to remove the prejudicial effect of evidence. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). Indeed, we have held that an admonition will usually remove the effect of a prejudicial statement unless the statement is so patently inflammatory that justice could not be served by continuing the trial. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). A party objecting to the testimony bears the burden of requesting an admonition sufficient to cure the prejudice. *Id.* The failure of the defense to request an admonition may negate the mistrial motion. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). The decision to deny a mistrial is within the sound discretion of the trial court, and its ruling will not be reversed in the absence of an abuse or manifest prejudice to the defendant. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002).

In the present case, during Harris's cross-examination, defense counsel asked Harris a series of questions about whether she recalled a time riding with appellant, who was pulled over by Officer Edgerson of the Dumas Police Department. Harris replied, "No, I don't."

Defense counsel responded, "Do you think he made that up?" The prosecutor objected on the grounds of speculation. Defense counsel responded that she was attempting to impeach the witness. The following colloquy then occurred:

> DEFENSE COUNSEL: You know there's an individual, Officer Edgerson out of Dumas, that's going to testify that after January 2007 he pulled you and Mr. Roderick Williams over, right?
>
> HARRIS: I remember him from the last trial.
>
> DEFENSE COUNSEL: Your Honor, may we approach?

At that time, the circuit court held a bench conference during which defense counsel moved for a mistrial on the basis that Harris referred to appellant's prior trial and tainted the jury. The prosecution argued that defense counsel "pushed" Harris into her statement. After the parties presented argument to the court, the court noticed it was 4:15 p.m., recessed, and asked the jury to return the following day. After hearing extensive argument from the parties, defense counsel stated, "Your Honor, you can consider [a mistrial]. If you think you can rehabilitate the jury, think about it, that's fine." The circuit court held its ruling in abeyance until the next morning. The following morning, the court stated in part:

> THE COURT: Good morning. I need to address my motion [for mistrial] that's under advisement. After due consideration, the court's of the opinion that the gravamen of the issue does not rise to that of a mistrial. Specifically the court acknowledges the existence of an order in limine that a particular word, "trial," is not to be mentioned during the course of this trial, in as much as this is a retrial.
>
> Secondly, the court recognizes that the witness was on cross-examination and was strenuously being and zealously being cross-examined by defense counsel over, you know, repeated objections by the State. But it was cross-examination and under those circumstances, whereas the court does not find that counsel invited the response, but things like this do happen under those circumstances.
>
> The court does not, is just not of the opinion that that sentence that concluded with the word "trial" is of significant, drastic enough to warrant a mistrial. And for that reason, I'll deny the motion for mistrial.

. . . .

I'm going to continue to admonish the lawyers to admonish their clients or their witnesses not to use the word "trial."

. . . .

THE COURT: Okay. I'm not of the opinion that that's – A lot of times you bring things like that to the attention of the jury.

DEFENSE COUNSEL: Sure. Sure.

THE COURT: I'm amenable to a suggestion from –

DEFENSE COUNSEL: I agree. I think maybe just leave it be and not bring the attention to the jury.

THE COURT: That's my sense of it.

As evidenced by the foregoing colloquy, appellant moved for a mistrial but declined any admonition to the jury, agreeing with the circuit court that Harris's comment about a previous trial should not be called to the attention of the jury. We have stated that the circuit court is in a better position to determine the effect of the remark on the jury. *Kimble, supra.* In this specific instance, Harris's comment was a brief and unsolicited remark that was not repeated. Therefore, we do not believe that Harris's statement was so patently inflammatory that it would cause the drastic relief of granting a mistrial. For these reasons, we hold that the circuit court did not abuse its discretion in denying appellant's request for a mistrial.[2]

Pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no prejudicial errors have been found.

Affirmed.

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[2] In its brief, the State contends that appellant's argument is barred by the doctrine of invited error. Because we dispose of appellant's argument on a different basis, we decline to address this specific argument.

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IN THE CIRCUIT COURT OF DESHA COUNTY, ARKANSAS

RODERICK WILLIAMS PLAINTIFF

VS. CASE # CR 2007-50-4

STATE OF ARKANSAS DEFENDANT

ORDER DENYING RULE 37 PETITION

COMES NOW, Roderick Williams' Rule 37 Petition for Post-Conviction Relief; and having thoroughly considered Mr. Williams' petition, the States response and all applicable law hereby makes the following ruling:

That Mr. Williams' Rule 37 Petition is wholly without merit. That defense counsel had made reasonable tactical decisions in the representation of Mr. Roderick Williams. Nothing raised in Mr. William' Rule 37 Petition demonstrates that his defense counsel was practicing below the standard of acceptable law practice. Thus, Mr. Williams did have effective assistance of counsel during his trial. Mr. Williams was accorded due process.

Therefore, the Rule 37 Petition for Post-Conviction Relief filed by Mr. Roderick Williams is hereby denied. Moreover, Mr. Williams' motion for a copy of the trial transcript and petition to proceed in forma pauperis are both likewise denied.

IT IS SO ORDERED THIS 26th **DAY OF** January, **2018.**

CIRCUIT JUDGE, STEVEN PORCH

Thomas Deen
Roderick Williams

FILED 1/31/18 BY HC
@ 900 O'CLOCK A M
KRISTIN CHRISTMAS - DESHA COUNTY
CIRCUIT COURT CLERK
ARKANSAS CITY, ARKANSAS

Cite as 2019 Ark. 129

SUPREME COURT OF ARKANSAS

No. CR-18-207

RODERICK R. WILLIAMS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** April 25, 2019 PRO SE APPEAL FROM THE DESHA COUNTY CIRCUIT COURT [NO. 21ACR-07-50] HONORABLE STEVEN PORCH, JUDGE AFFIRMED.

COURTNEY HUDSON GOODSON, **Associate Justice**

Roderick R. Williams appeals from the denial of his request for postconviction relief on a judgment convicting him of capital murder and other charges and imposing a life sentence without parole for the murder charge plus a consecutive term of years to be served on the other charges. Williams filed in the trial court a pro se petition under Arkansas Rule of Criminal Procedure 37.1 (2017) that the court denied without a hearing. Because we determine from the record before us that the trial court correctly found that the Rule 37.1 petition was wholly without merit, we affirm the denial of postconviction relief.

This court affirmed the judgment convicting Williams after his second trial on the charges. *Williams v. State*, 2011 Ark. 432, 385 S.W.3d 157 (*Williams II*). In the initial proceedings, this court reversed the convictions and remanded for a new trial, holding that

the denial of a motion for mistrial was an abuse of discretion. *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168 (*Williams I*).

The murder in this case occurred when Williams, in violation of an order of protection, had gone to Kerman Harris's home, where she lived with her parents and Williams's child. Harris's mother, Clara Cobb, was talking to Williams on the porch when Harris finished a phone conversation and walked toward the porch while holding the baby. Harris saw Williams load a shotgun and shoot Cobb in the stomach.

In *Williams I*, this court reviewed the denial of a motion for mistrial that was made following Harris's unsupported statement that Williams had been convicted of terroristic threatening for an incident involving her mother, and we reversed and remanded for a new trial. *Williams I*, 2010 Ark. 89, 377 S.W.3d 168. Prior to Williams's second trial, the State and the defense agreed that officers of the court and witnesses would refrain from using the word "trial" to prevent the jurors from learning that the case had already been tried. Despite the agreement, on cross-examination Harris alluded to "the last trial" during her testimony at the second trial. The trial court denied the defense motion for a mistrial that followed the remark. In *Williams II*, this court held that because the brief and unsolicited remark was not repeated, it was not so patently inflammatory that the trial court abused its discretion in failing to grant the motion for mistrial. *Williams II*, 2011 Ark. 432, 385 S.W.3d 157. We noted that, after the trial court denied the defense motion for mistrial, there was a discussion in which defense counsel agreed that no admonition should be given because it would only draw additional attention to the remark. *Id.*

In his Rule 37.1 petition, Williams alleged ineffective assistance of counsel on three bases. He asserted that trial counsel was ineffective for failing to request the admonition about Harris's remark referencing Williams's previous trial and for failing to question Harris about the statement that had warranted granting a mistrial in *Williams I*. Williams characterized Harris's statement in the first trial as perjury and contended that challenging Harris's incorrect statement that Williams was convicted of the charges was essential to discredit her testimony. Williams further alleged that appellate counsel was ineffective for failing to raise issues concerning adverse evidentiary rulings that limited trial counsel's cross-examination of Harris about her "personal issues" concerning another woman with whom Williams also has a child.

In its order denying postconviction relief, the trial court found that Williams's Rule 37.1 petition was wholly without merit, that defense counsel had made reasonable tactical decisions, and that Williams had effective assistance of counsel during his trial. The court additionally found that Williams was afforded due process.

On appeal, Williams reasserts his ineffective-assistance claims. He also raises an additional issue alleging a due-process violation because the evidence at trial was not sufficient to show premeditation and deliberation, and he alleges error in the trial court's failure to hold a hearing on the Rule 37.1 petition or to appoint counsel for the Rule 37 proceedings.

This court reviews the trial court's decision on Rule 37.1 petitions for clear error. *Gordon v. State*, 2018 Ark. 73, 539 S.W.3d 586. 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. *Lacy v. State*, 2018 Ark. 174, 545 S.W.3d 746, *petition for cert. filed* (U.S. Oct. 16, 2018) (No. 18-6344).

The trial court did not clearly err in denying the petition without a hearing and without appointing counsel. Rule 37.3(a) of the Arkansas Rules of Criminal Procedure (2017) delineates the procedure for summary disposition of a Rule 37.1 petition. Under Rule 37.3, the trial court has the discretion to deny relief without a hearing when it is conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259. If it is conclusive on the face of the petition that no relief was warranted, then the trial court did not err in declining to hold an evidentiary hearing on a claim for relief. *Beverage v. State*, 2015 Ark. 112, 458 S.W.3d 243. Because, as explained below, all of Williams's claims in the petition were clearly without merit, the trial court was not required to conduct a hearing in order to deny relief.

Likewise, the trial court had discretion to appoint counsel under Arkansas Rule of Criminal Procedure 37.3(b) (2017), and in order to demonstrate an abuse of discretion by the trial court in declining to appoint counsel, an appellant must have made a substantial showing that his petition included a meritorious claim. *Evans v. State*, 2014 Ark. 6. This court has rejected the argument that the cases Williams cites require appointment of

counsel, and because the petition was meritless, there was no abuse of discretion in that regard. *Mancia*, 2015 Ark. 115, 459 S.W.3d 259.

Williams raised three ineffective-assistance claims in the petition. Our standard for ineffective-assistance-of-counsel claims is the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Gordon*, 2018 Ark. 73, 539 S.W.3d 586. The benchmark for judging a claim of ineffective assistance of counsel must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Gordon*, 2018 Ark. 73, 539 S.W.3d 586. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Douglas v. State*, 2018 Ark. 89, 540 S.W.3d 685. Unless a petitioner makes both showings, the allegations do not meet the benchmark on review for granting relief on a claim of ineffective assistance. *McClinton v. State*, 2018 Ark. 116, 542 S.W.3d 859.

The trial court found that defense counsel had made reasonable tactical decisions in representing Williams. Strategic decisions are outside the purview of Rule 37 proceedings if supported by reasonable professional judgment. *Johnson v. State*, 2018 Ark. 6, 534 S.W.3d 143. Counsel is allowed great leeway in making strategic and tactical decisions, and claims based on such a decision that was professionally reasonable at the time made,

even when those decisions are improvident in retrospect, will not support relief. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43.

Counsel's basis for not requesting an admonition was clear on the record, and this court has said many times that the decision not to request an admonition is largely a matter of trial strategy. *Sims v. State*, 2015 Ark. 363, 472 S.W.3d 107. As this court held in *Williams II*, the remark was not so patently inflammatory that a mistrial was warranted, and having lost the argument that it was, trial counsel could reasonably conclude that highlighting the remark further would result in more harm than benefit to the defense. There was no clear error in the trial court's finding that the decision not to call further attention to the remark was not ineffective assistance when Williams did not show that the strategy was outside the bounds of reasonable professional judgment. *Id.*

Similarly, counsel's decision not to question Harris about what Williams characterizes as perjury was also a professionally reasonable tactic. Because the remark that Harris had made was sufficiently prejudicial to have warranted a mistrial, it was not unreasonable for counsel to conclude that the potential damage from raising the matter during her testimony in the second trial was too great. Making the jury aware of the terroristic-threatening charges against Williams, which had been nol-prossed, could have far outweighed any potential benefit derived from attacking Harris's credibility with the fact that Williams was not, as Harris stated, convicted.

Williams's last claim of ineffective assistance in the Rule 37.1 petition alleged appellate counsel was ineffective for failing to challenge on appeal adverse evidentiary

rulings that limited trial counsel's cross-examination of Harris about her "personal issues" concerning another woman with whom Williams had a previous relationship. The petitioner who claims that appellate counsel was ineffective bears the burden of making a clear showing that counsel failed to raise some meritorious issue on appeal. *State v. Rainer*, 2014 Ark. 306, 440 S.W.3d 315. The petitioner raising such a claim must establish that the issue was raised at trial, that the trial court erred in its ruling on the issue, and that an argument concerning the issue could have been raised on appeal to merit appellate relief. *Id.*

Williams identified certain objections made by the State at trial that the trial court sustained on the basis that the questions lacked relevance. He did not, however, set out an argument that appellate counsel could have made showing error by the trial court and establishing the relevancy of the questions; instead, he argues that counsel must have been permitted to fully develop any challenge to Harris's credibility. Williams made no showing that the relationship between Harris and the other woman would have any bearing on the issue of Harris's credibility, only making a vague statement that Williams's past relationship with the woman had some bearing on Harris's motivation to testify falsely. Williams did not show what evidence would have been elicited from Harris if the defense had been permitted to ask the questions in order to establish that the evidence would have had a bearing on Harris's credibility.

Under our rules of evidence, only relevant evidence—that is, evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence—is admissible. *Hill v. State*, 2018 Ark. 194, 546 S.W.3d 483; *see also* Ark. R. Evid. 401 & 402 (2017). Williams's vague conclusory claim that the evidence was relevant to Harris's credibility was not sufficient to show that appellate counsel could have made a meritorious argument in order to demonstrate prejudice and satisfy the second prong of the *Strickland* test.

On appeal, Williams raises an additional claim concerning the sufficiency of the evidence. The State addresses the issue in its brief and correctly asserts that this type of claim is not cognizable in Rule 37 proceedings. *See McClinton*, 2018 Ark. 116, 542 S.W.3d 859 (holding that a direct challenge to the sufficiency of the evidence is not cognizable in Rule 37 proceedings). The issue was not, however, raised in Williams's Rule 37.1 petition.

This court does not address arguments that are raised for the first time on appeal. *Swift v. State*, 2018 Ark. 74, 540 S.W.3d 288. Appellants are bound by the arguments raised in the trial court and the scope and nature of those arguments as presented to the trial court. *Id.* Williams has not shown clear error in the summary denial of postconviction relief by the trial court because it is clear that the Rule 37.1 petition failed to raise a meritorious claim.

Affirmed.

Roderick R. Williams, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Kent Holt*, Ass't Att'y Gen., for appellee.

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Dumas Police Department
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Dumas,Ar 71639

Re: Law Enforcement
City Of Mitchellville

Gentlemen:

Under authority of A.C.A 14-15-503,this letter will authorize and appoint each cerified officer employed by the Dumas Police Department to answer calls and to enforce the law in the city of Mitchellville as a lawfully authorized deputy acting under the purview of the office of the Sheriff of Desha County,Arkansas.

A copy of this letter shall serve as authority for each officer undertaking such law enforcement in the City of Mitchellville and surrounding areas.

Dated this 25th day of August,2010.

Jim Snyder,Desha County Sheriff

EXHIBIT
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App. F