

APPENDIX

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

JUNE 24, 2021

RE: SUPREME COURT CASE NO. CR-20-491
CHRISTOPHER W. TERRELL V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE
ABOVE STYLED CASE:

“APPELLANT’S PRO SE PETITION FOR REVIEW IS DENIED.”

SINCERELY,



STACEY PECTOL, CLERK

CC: CHRISTOPHER W. TERRELL
JOSEPH KARL LUEBKE, ASSISTANT ATTORNEY GENERAL
POINSETT COUNTY CIRCUIT COURT
(CASE NO. 56CR-15-21)

MANDATE

AFFIRMED

PROCEEDINGS OF APRIL 21, 2021

COURT OF APPEALS CASE NO. CR-20-491

CHRISTOPHER W. TERRELL

APPELLANT

V. APPEAL FROM POINSETT COUNTY CIRCUIT COURT
(56CR-15-21)

STATE OF ARKANSAS

APPELLEE

THIS APPEAL WAS SUBMITTED TO THE ARKANSAS COURT OF APPEALS ON THE RECORD OF THE POINSETT COUNTY CIRCUIT COURT AND BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED.

BARRETT, J., AUTHORED THE OPINION OF THE COURT, IN WHICH GLADWIN AND HIXSON, JJ., AGREE.

IT IS ALSO ORDERED THAT, IF THE APPELLANT IS FREE PURSUANT TO AN APPEAL BOND, THE APPELLANT SHALL IMMEDIATELY SURRENDER TO THE SHERIFF OF POINSETT COUNTY. IF THE SURRENDER IS NOT IMMEDIATE, APPELLANT'S BOND IS DECLARED FORFEITED AND A WARRANT SHALL ISSUE FOR APPELLANT'S ARREST.

IN TESTIMONY, THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE JUDGMENT OF THE ARKANSAS COURT OF APPEALS, I, STACEY PECTOL, CLERK, SET MY HAND AND AFFIX MY OFFICIAL SEAL, ON THIS 24TH DAY OF JUNE, 2021.



STACEY PECTOL, CLERK

2021 Ark. App. 179

NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTHWESTERN REPORTER.
SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF
OPINIONS.

Court of Appeals of Arkansas,
DIVISION IV.

Christopher W. TERRELL, Appellant

v.

STATE of Arkansas, Appellee
No. CR-20-491

Opinion Delivered: April 21, 2021

APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT [NO. 56CR-15-21],

HONORABLE KEITH L. CHRESTMAN, JUDGE

Attorneys and Law Firms

Christopher Terrell, pro se appellant.

Leslie Rutledge, Att'y Gen., by: Joseph Karl Luebke, Ass't Att'y Gen., for appellee.

Opinion

STEPHANIE POTTER BARRETT, Judge

*1 Christopher Terrell appeals the Poinsett County Circuit Court's order denying his Rule 37 petition for postconviction relief. Ark. R. Crim. P. 37.1 (2017). In his petition, Terrell argued his trial counsel was ineffective for three reasons: (1) failure to move for suppression of physical evidence on the basis of illegal entry into Terrell's residence; (2) failure to timely appeal his motion for new trial due to juror misconduct; and (3) failure to move for suppression of cell-phone site-location information. The circuit court denied Terrell's petition without a hearing. We affirm.

Terrell was convicted of first-degree murder in the November 29, 2014 death of James Hunt and sentenced to twenty-three years in prison. His conviction was affirmed by this court on direct appeal. *Terrell v. State*, 2019 Ark. App. 433, 587 S.W.3d 594.

*2 I. Standard of Review

We do not reverse the denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Slater v. State*, 2017 Ark. App. 499, 533 S.W.3d 84. A finding is clearly erroneous when, although there is evidence to support it, after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been committed. *Id.* In making a determination of a claim of ineffective assistance of counsel, this court considers the totality of the evidence. *Id.*

In *Kauffeld v. State*, 2019 Ark. App. 29, at 2–3, 569 S.W.3d 348, 351, this court set forth the framework for analyzing an ineffective-assistance-of-counsel claim:

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 v. Washington*, 466 U.S. 668 (1984). Pursuant to *Strickland*, we assess the effectiveness of counsel under a two-prong standard. First, a petitioner raising a claim of ineffective assistance of counsel must show that his counsel's performance fell below an objective standard of reasonableness. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Osburn v. State*, 2018 Ark. App. 97, 538 S.W.3d 258. Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact-finder would have

had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. Id. Additionally, conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. Id.

*3 II. Suppression Issues

On appeal, Terrell addresses his two suppression arguments—failure of his trial counsel to move to suppress physical evidence found at his residence and his cell-phone site-location information— together.

A. Physical Evidence

Terrell's first claim that he received ineffective assistance of counsel concerns counsel's failure to file a motion to suppress physical evidence.¹ The circuit court found two reasons to deny Terrell's Rule 37 petition on this point—(1) Terrell was on parole at the time of Hunt's murder, and as a parolee, he was subject to warrantless searches under Arkansas Code Annotated § 16-93-106,² and (2) Terrell could not demonstrate he was prejudiced by the failure to seek suppression of the physical evidence because this court's holding affirming the sufficiency of the evidence to support his conviction did not turn on evidence Terrell believed should have been suppressed.

The facts surrounding Hunt's murder were set forth in detail in Terrell's 2019 direct appeal to this court. Terrell and Hunt both had a sexual relationship with Betty Grant. When Hunt's body, which had sustained a shotgun wound to the head, was discovered by *4 law enforcement beneath his burned truck on a levee in Marked Tree, Terrell and Grant became persons of interest after Hunt's wife told law enforcement that they had been with her husband prior to his death,

and she had received a call from Terrell on November 27, 2014, asking if she knew where Grant was. Grant initially told the police that she had accidentally killed Hunt, but she later recanted and stated that Terrell had killed Hunt. Grant testified that on November 29, she saw Terrell holding something wrapped in a blue shirt; Terrell told her to get in her car; she and Terrell drove to the levee; Terrell called Hunt to bring gas to them at the levee; Grant fell asleep but awoke to a loud noise and saw Hunt bleeding from his face; and she then watched Terrell drag Hunt to the bottom of the levee, drive Hunt's truck to the bottom of the levee, pour gas on the truck, and set it on fire.

Joseph Wilson testified that Terrell had asked him on November 29 if he could get Terrell a gun, and he told Wilson that he was going to "take care of some business." Wilson later saw Terrell sitting in Grant's car at the levee.

Lloyd Watson³ testified that he heard a vehicle speed by his house on the night of November 29 and park next door at Terrell's brother's house. The next day, Watson observed Terrell remove items from that vehicle, including a tire, gas cans, and clothes, which Watson recognized as belonging to Grant. Watson also saw Terrell remove the door panels from the vehicle. Terrell placed all the items he removed from the vehicle in a detached garage on his brother's property. After obtaining a search warrant, police seized door panels, *5 a pair of jeans, and gas cans from the detached garage. A pair of boots was also taken from inside the residence. Although blood was found on the boots and jeans, there was insufficient DNA to determine to whom the blood belonged.

The State argues, and we agree, that even if the above items should have been suppressed, Terrell cannot show prejudice by the failure to file a motion to suppress because there was overwhelming evidence from witness testimony to support his conviction without the seized

items. This court, in recognizing that the jury was entitled to believe Grant's testimony that Terrell was the person who killed Hunt and in holding there was sufficient evidence to support Terrell's conviction, stated,

Although Grant did not see the shot being fired, she heard it and immediately thereafter saw Hunt dying from a gunshot wound to his face. She then saw Terrell drag Hunt's body, position Hunt's truck over the body, and light the truck on fire. Earlier that day, Terrell had asked Joseph Wilson for help acquiring a gun that he needed to "take care of some business." Wilson saw Terrell at the levee the afternoon of the murder. After the murder, Lloyd Watson saw Terrell disposing of items from Grant's car. A jury may properly consider an attempt to cover up one's connection to a crime as proof of a purposeful mental state. Stearns [v. State, 2017 Ark. App. 472, 529 S.W.3d 654].

Viewing the evidence in the light most favorable to the State, we hold that substantial evidence supports the conviction.

Terrell, 2019 Ark. App. 433, at 7, 587 S.W.3d at 600. Grant's eyewitness testimony identified Terrell as the person who murdered Hunt. None of the items Terrell claims were improperly seized provided any evidence linking Terrell to the murder since there was insufficient DNA to determine whose blood was on the boots and jeans. The circuit court was not clearly erroneous in denying Terrell's Rule 37 petition on this point.

B. Cell-Phone Site-Location Information

*6 Terrell argues in his Rule 37 petition that his counsel was ineffective for failing to move for suppression of his cell-phone site-location information because it was obtained without a warrant. He bases this contention on the United States Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that the government's seizure of cell-site location data is a Fourth Amendment search that requires a warrant. However, as Terrell admits,

Carpenter was not decided until June 22, 2018, more than two months after he was convicted and sentenced on April 12, 2018. In *Toledo v. United States*, 581 F.3d 678, 681 (2009), the Eighth Circuit Court of Appeals held:

We do not evaluate counsel's performance using "the clarity of hindsight, but in light of the facts and circumstances at the time of trial." *Carter v. Hopkins*, 92 F.3d 666, 669 (8th Cir. 1996) (citation omitted). Counsel is not accountable for unknown future changes in the law. See *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (not ineffective assistance of counsel to fail to foresee "a significant change in existing law."); *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999) (not ineffective assistance of counsel to "fail [] to anticipate a change in the law"). Failure to move to suppress cell-site location data at the time of trial cannot be ineffective assistance of counsel based on the decision in Carpenter because it was not the law at the time of Terrell's conviction. We therefore affirm the circuit court's denial of Terrell's Rule 37 petition on this point.

III. Motion for New Trial

In Terrell's remaining point on appeal, he argues that the circuit court erred in denying his claim for ineffective assistance of counsel because the denial of his motion for a new trial was not preserved for appellate review. To prevail on a claim of ineffective assistance of counsel on the basis of counsel's failure to preserve an issue for appeal, a petitioner must *7 show that had the issue been preserved, the appellate court would have reached a different decision. *Campbell v. State*, 2020 Ark. App. 480, 611 S.W.3d 230. Terrell cannot show that had his motion for new trial been preserved for appeal, it would have been granted; therefore, we affirm on this point. Terrell's sentencing order was filed of record on April 12, 2018. He timely filed a motion for new trial on May 9, 2018, alleging juror misconduct. He filed a notice of appeal from the sentencing

order on May 10. The circuit court held a hearing on Terrell's motion for a new trial on July 23 and denied the motion. Terrell then filed an amended notice of appeal on July 26 appealing both the April 12 sentencing order and the July 23 denial of his motion for new trial. This court declined to address Terrell's argument on direct appeal regarding his motion for new trial holding that he had failed to timely appeal that issue because pursuant to Arkansas Rule of Criminal Procedure 33.3(c), the motion was deemed denied on June 8 (the thirtieth day after the date it was filed), the circuit court had no jurisdiction to act on the motion on July 23, and Terrell had failed to timely amend his notice of appeal to include the "deemed denied" motion for new trial. Terrell, 2019 Ark. App. 433, at 11–12, 587 S.W.3d at 602.

Terrell argues on appeal he received ineffective assistance because "[t]rial counsel failed to file an amended notice of appeal within 30 days of the deemed denial of Terrell's motion for new trial, thus precluding direct review. This error was prejudicial because Terrell's argument would have been meritorious on direct appeal." In support of this assertion, Terrell states that he "filed an affidavit executed by juror Nicole Elsey stating that *8 'the jury was unable to determine who specifically shot and killed James Hunt, but that Christopher Terrell was convicted because he was found to have been involved in the commission of the crime.' "

The party alleging juror misconduct "bears the burden of proving both the misconduct and that a reasonable possibility of prejudice resulted from it; we will not presume prejudice in such situations." Campbell v. State, 2014 Ark. App. 171, at 8, 432 S.W.3d 673, 678. Elsey's affidavit states, "I Nicole Elsey, served as a juror in the trial of Christopher Terrell from April 10–12, 2018. I hereby state that the jury was unable to determine who specifically shot and killed James Hunt, but that Christopher Terrell was convicted because he was found to have been involved in the commission of the crime."

In denying this point in Terrell's Rule 37 petition, the circuit court found that even if a timely appeal had been made from the denial of the motion for new trial, the motion would have been denied. Rule 606(b) of the Arkansas Rules of Evidence provides,

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

The circuit court found that nothing in the affidavit triggered a Rule 606 exception because Terrell did not allege improper external influence, and the information contained in the *9 affidavit was not extraneous prejudicial information but rather a mere statement about an inability to reach a particular conclusion.

Terrell argues that he was not charged as an accomplice, and the jury was not instructed as to accomplice liability, but that in light of Elsey's affidavit, it was clear that the jury discussed accomplice liability and even though, according to Elsey, the jury was not able to determine if Terrell or Grant shot Hunt, Terrell was convicted because the jury believed Terrell was involved in the commission of the crime. In Campbell, *supra*, this court affirmed the circuit court's refusal to allow jurors to testify about what an allegedly improperly introduced jury instruction stated and whether the jurors discussed the appellant's intent to commit the crime:

Rule 606(b) states plainly that a juror may not testify as to the effect of anything upon his mind as influencing him to assent to the verdict. See *Veasey v. State*, 276 Ark. 457, 637 S.W.2d 545 (1982). Certainly, a juror's understanding of the jury instructions and its effect on her deliberation fall within this very prohibition. See also *Hall v. Levine*, 104 P.3d 222 (Colo. 2005) (observing that Colorado Rule of Evidence 606(b), which language mirrors that of Ark. R. Evid. 606(b), applied even if the affidavits showed that the jury misunderstood the law or facts, failed to follow instructions, or applied the wrong legal standard); 75B Am. Jur. 2d Trial § 1625 (2012) (“The rule applies even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard.”); 66 C.J.S. New Trial § 235 (2012) (“[O]rdinarily, a juror's claim that he was confused over the law or evidence and therefore participated in the verdict on an incorrect premise is a matter that inheres in or is intrinsic to the deliberative process and cannot be used to impeach the verdict.”). *Campbell*, 2014 Ark. App. 171, at 7–8, 432 S.W.3d at 678 (quoting *Arnold v. State*, 2012 Ark. 400, at 4–5 (emphasis in the original)). The purpose of Rule 606(b) “is to balance the freedom of jury deliberations with the ability to correct an irregularity in those *10 deliberations.” *Miles v. State*, 350 Ark. 243, 251, 85 S.W.3d 907, 912 (2002) (citation omitted). The information Terrell wanted to adduce at the hearing on his motion for new trial was exactly the type of testimony prohibited by Rule 606(b).

Terrell further argues on appeal that the jury deprived him of his due-process right to a fair trial by determining his guilt based on the theory of accomplice liability. This argument was not made to the circuit court. Nevertheless, the supreme court held in *Miles*, *supra*, that Rule 606(b) is not unconstitutional and serves the important functions of maintaining the privacy of jury deliberations and protecting the finality of judgments.

Affirmed.

Gladwin and Hixson, JJ., agree.

All Citations

Not Reported in S.W. Rptr., 2021 Ark. App. 179, 2021 WL 1558335.

Footnotes

1

We note that trial counsel filed a motion to suppress physical evidence on March 10, 2017, but this motion was withdrawn by counsel at a pretrial motion hearing.

2

Terrell argues that this statute was not in effect in 2014 when he was a parolee and his residence was searched. The State concedes that the statute, which was not enacted until 2015, was not in effect at the time in question and therefore has no applicability to this case. However, we will affirm the circuit court's decision if it reached the right result, albeit for the wrong reason.

Colston v. Kelley, 2019 Ark. 54, 568 S.W.3d 265.

3

Watson was deemed an unavailable witness, but his prior testimony was read into the record.

IN THE ARKANSAS SUPREME COURT

CHRISTOPHER TERRELL

APPELLANT

VS.

CASE NO. CR-20-491

STATE OF ARKANSAS

APPELLEE

PETITION FOR REVIEW

COMES NOW the Appellant Christopher Terrell, Pro Se, and for his petition for Review, states:

1. On April 21, 2021, a panel of the Court of Appeals affirmed the denial of his Rule 37 petition by the trial court. The panels decision erred with respect to several of the grounds listed in Sup. Ct. Rule 1-2(b).
2. The panel erred with respect to Sup. Ct. Rule 1-2(b)(1). Terrell made clear in his informational statement and appeal that there were extraordinary issues involving an issue of first impression that needed to be determined by the Arkansas Supreme Court. No where in this state's case law has a jury ever convicted a defendant as an accomplice or accessory when the defendant was not charged as such and the jury was not instructed on those theories of law. (R.1133;1136-38). This is why Terrell had to cite other State case law on this issue in his appeal. (See e.g., *People v. Milsap*, 724 N.E.2d 942 (2000); *People v. Morris*, 401 N.E.2d 284, (Ill. App. Ct. 1980); *State v. Ransom*, 785 P.2d 469 (1990); *State v. Williams*, 759 N.W.2d 438 (2009). Nor, is there anywhere in this state's case law an example of such egregious jury

misconduct as convicting a defendant of Purposeful First Degree Murder when jury misconduct evidence presented clearly shows that several members of the jury were unable to determine that the defendant actually committed the murder. (Add.2;R.1225;R183-85;Add.3).

3. The panel erred with respect to Sup. Ct. Rule 1-2(b)(2). The panel uses *Campbell v. State*, 2014 Ark. App. 171, 432 S.W.3d 673, to hold that Terrell is barred by Rule 606(b) of his inquiry into the jury misconduct issue of the jury convicting outside the instructions given to them which is clearly an irregularity in the deliberations. Case law in Arkansas makes clear that rule obviously has some further purpose, else the language used in the rule would have been omitted. The other language of the rule indicates it is proper to question jurors about matters being considered in deliberations which were improper. Case law also indicates the rule can be used to correct irregularities in those deliberations. (See e.g., *Veasey v. State*, 276 Ark. 457, 637 S.W.2d 545, concurring opinion; *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143; *Miles v. State*, 350 Ark. 243, 251, 85 S.W.3d 907, 912 (2002). Certainly, the jury considered matters not presented at trial to convict a defendant of shooting and killing someone, while possessing the inability to reach a particular conclusion as to who actually shot and killed the victim, constitutes, an act or practice that varies from the normal conduct of an action. (See Black's Law Dictionary, 11th Edition; Irregularity)).
4. The panel erred with respect to Sup. Ct. Rule 1-2(b)(3). Terrell explained in his appeal that Due Process means a jury capable and willing to uphold their constitutional sworn duty to apply the law as instructed to the facts of the

case. "Impartiality is presumed so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the case."

United States v. Wright, 340 F.3d 724, 733 (8th Cir. 2003). U.S. Const. Amend. VI, guarantees criminal defendants, "the right to a.....trial, by an impartial jury." Certainly, a jury voting guilty on First Degree Murder while being "unable to determine who shot and killed" the victim states in the affidavit or possessing the inability "to reach a particular conclusion" on this issue as acknowledged by the trial court and the panel in its decision, constitutes a degree of partiality that stands in direct conflict with the due process of a criminal defendants substantial rights afforded to him at trial.

5. The panel erred with respect tp Sup. Ct. Rule 1-2(b)(5). The panel states that Terrell did not make an argument to the circuit court about the jury depriving him of his due process right to a fair trial. However, record evidence shows that Terrell did state in his motion for new trial, the language of Ark. Code Ann § 16-89-130(c)(7). (R.184). At the hearing on the motion Terrell stated about "substantial" right being prejudiced and unable to receive a fair and lawful trial." (R.1235). The circuit court ruled upon the motion and the affidavit provided with the motion. (R.1238). The language of the affidavit clearly reveals the violation of this due-process right. Ineffectiveness of trial counsel is not preserving this issue was one of the points set out in the Rule 37 petition and the appeal. It is important to remember the underlying rationale concerning issues being raised for the first time on appeal. "Issues raised for the first time on appeal will not be considered because the circuit court never had an opportunity to make a ruling." *Johnson v. State*, 2009

Ark. 460, 344 3d 74 (per curiam), (citing *Green v. State*, 362 Ark. 459, 209 S.W.3d 339 (2005). Certainly, the test for preservation cannot hinge solely on whether the litigant used the correct "magic words" in citing to a violation that prejudiced his rights and that "while consideration of extraneous prejudicial information and improper outside influence affecting deliberations are the most common types of jury misconduct, they are not exclusive types of misconduct that warrant relief." *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354. Clearly the panel erred with the law of Ark. Code Ann § 16-89-130(c) (7), being that Terrell was charged with shooting and killing James Hunt and the affidavit clearly states under oath, "the jury was unable to determine who specifically shot and killed James Hunt." (Add.2;R.1225)

6. The panel erred with respect to Sup. Ct. Rule 1-2(b)(4). Terrell explained in his appeal, which is public record, the trial courts instructions to the jury concerning reasonable doubt on State's burden of proof on each element of the offense charged and on his charged of purposeful First Degree Murder. The panel's decision, also public record, sets out the details of the jurors affidavit and the trial courts ruling about the affidavit being an inability to reach a particular conclusion about the facts in issue of the case. Certainly, the citizens of Arkansas and their substantial public interests in the administration of the criminal law in this state, would not want to be adjudged guilty of First Degree Murder when the jury was "unable to determine" that they did in fact commit the murder. Especially given the fact that the trial court even conceded that the jury did possess, "an inability to reach this particular conclusion." This is exactly why the United States Supreme Court

ruled 50 years ago, "lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *re Winship*, 397 U.S. 358, at 364. Society has a substantial public interest in this fundamental right that dates from the common law. Jury misconduct evidence of Terrell's trial clearly reveals that the "every fact necessary to constitute the crime charged" requirement of the law was not reached concerning this fundamental substantial right. This right is also indispensable to command the respect and confidence of the community in the applications of the criminal law. The citizens of this State going about their ordinary affairs need to have confidence that their government cannot adjudge them guilty of First Degree Murder without convincing a proper fact finder that they did in fact commit murder.

7. Terrell respectfully requests this Court grant his Petition for Review so that the Court may correct the panel's errors.

WHEREFORE, Appellant prays that review be granted and the Court of Appeals reversed.

Respectfully Submitted



Christopher Terrell, Pro Se
P.O. Box 1630
Malvern, AR, 72104

IN THE CIRCUIT COURT OF POINSETT COUNTY, ARKANSAS
POINSETT CO. CIRCUIT CLERK
MISTY RICHARDSON, PLAINIFF
FILED
STATE OF ARKANSAS

vs.

Case No. 56CR-15-21 AM

MAR 23 2020

CHRISTOPHER TERRELL

8/9/10/11/12/17/21/3/4/5 PM DEFENDANT

ORDER DENYING RULE 37 PETITION

A jury found Christopher Terrell guilty of James Hunt's 2015 murder. Terrell appealed, but the *Terrell v. State*¹ court affirmed. Under Ark. R. Crim. P. 37, Terrell now challenges his conviction, making multiple ineffective-assistance-of-counsel claims. First, his attorney didn't move to suppress illegally seized evidence and cell-site location information. But Terrell was a parolee and had a diminished privacy expectation, so there was no improper search and seizure. And second, his attorney didn't appeal the circuit court's denial of his jury-misconduct new trial motion. But Ark. R. Evid. 606 prevents the inquiry Terrell seeks, so he suffered no prejudice. The Court, therefore, denies Terrell's Rule 37 Petition.

¹ 2019 Ark. App. 433.

Under Rule 37, a defendant can collaterally challenge their conviction. If the petition, files, and case records show—conclusively—that the petitioner is entitled to no relief, the trial court can summarily deny. Ark. R. Crim. P. 37.3(a). The trial court, however, must make written findings to that effect, specifying the files or records upon which it relied to sustain its finding. *Ibid.*

Terrell makes three ineffective-assistance-of-counsel claims. An ineffective-assistance claim must satisfy two elements. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, counsel's performance was deficient, depriving the claimant of the guaranteed Sixth Amendment's counsel right. *Ibid.* And second, because of counsel's deficient performance, the defense was prejudiced. *Ibid.*

The Court reviewed Terrell's Rule 37 Petition, the 1,243-page appeal record (CR-18-921), and the *Terrell* court's decision. A review of these items shows—conclusively—that Terrell is entitled to no relief. And in reaching this no-relief conclusion, the Court makes four specific factual

findings:

- Finding № 1: At the time of Hunt's murder, Terrell was on parole. R. 213, 222, 234, 236, 257.
- Finding № 2: Terrell's Rule 37 Petition fails to state the illegally seized items. Rule 37 Pet. at 1-3. But in Terrell's pro se Motion to Suppress (filed 29 September 2016), he listed some seized items, including boots, women's pants, car door panels, mobile phone, wallet, and phone records:

8. Boots allegedly belonging to [Terrell], and a pair of womens blue-jeans were found in the residence; two car door panels were found in the detached garage behind the residence. The boots, womens blue-jeans, and the two car door panels; are requested to be and should be suppressed as to the cause of the [search] warrant that is the fruit of the poisonous tree, due to [Terrell's] illegal arrest and seizure. ...

10. The 1996 Mercury four door car belonging to Betty Grant that was illegally seized from [Terrell's] residence, along with the cell-phone and bill-fold that was seized from inside the 1996 Mercury; are requested to be and should be suppressed as to the cause of the [search] warrant that is the fruit of the poisonous tree, due to [Terrell's] illegal arrest and seizure.

-page 3 of 10 pages-

11. Any and all phone records belonging to (870)-882-3494 which was illegally seized, is requested to be and should be suppressed as to the cause of the fruit of the poisonous tree, due to [Terrell's] illegal arrest and seizure.

R. 64-65 (internal citations omitted).

• Finding № 3: The *Terrell* court held that the evidence was sufficient to support the jury's conviction. And in reaching this holding, the *Terrell* court relied on neither evidence seized from Terrell's residence nor his cell-site location information. The *Terrell* court instead concluded that Betty Grant, Joseph Wilson, and Lloyd Watson's combined testimonies were sufficient evidence to prove Terrell's guilt:

Terrell was charged with causing the death of another person "with a purpose of causing the death of another person." A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. It is axiomatic that one is presumed to intend the natural and probable consequences of his or her actions. Furthermore, the intent necessary for first-degree murder may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds.

-page 4 of 10 pages-

Terrell relies on Grant's changing statements to police, but this court does not weigh the evidence presented at trial or weigh the credibility of witnesses, as these are matters to be resolved by the finder of fact. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. The jury credited Grant's testimony, as it was entitled to do, and we hold that her testimony along with the testimony of other witnesses constitutes substantial evidence to support Terrell's conviction.

Although Grant did not see the shot being fired, she heard it and immediately thereafter saw Hunt dying from a gunshot wound to his face. She then saw Terrell drag Hunt's body, position Hunt's truck over the body, and light the truck on fire. Earlier that day, Terrell had asked Joseph Wilson for help acquiring a gun that he needed to "take care of some business." Wilson saw Terrell at the levee the afternoon of the murder. After the murder, Lloyd Watson saw Terrell disposing of items from Grant's car. A jury may properly consider an attempt to cover up one's connection to a crime as proof of a purposeful mental state. Viewing the evidence in the light most favorable to the State, we hold that substantial evidence supports the conviction.

2019 Ark. App. 433, at 6-7 (internal citations omitted).

- Finding № 4: On 23 July 2018, someone filed in the above-styled case an affidavit, stating:

AFFIDAVIT

I, [juror's name], served as a juror in the trial of [Terrell] from April 10-12, 2018. I hereby state that the jury was unable to determine who specifically shot and killed [Hunt], but that [Terrell] was convicted because he was found to have been involved in the commission of the crime.

R. 1225.

Based on these four findings, the Court makes a no-relief determination.

Points One (*Failure to suppress illegally seized evidence*) and Three (*Failure to suppress cell-site information*): Under Ark. Code Ann. § 16-93-106, Terrell was—as a parolee—subject to warrantless searches. So items seized weren't obtained illegally. *Cherry v. State*, 302 Ark. 462, 466-68, 791 S.W.2d 354, 356-57 (1990). Trial counsel's failure to seek the suppression of items seized and cell-site information thus wasn't deficient. And since the *Terrell* court's sufficiency holding didn't turn on evidence that Terrell believes should've been suppressed, he can't say he was prejudiced. So under *Strickland*'s two-pronged test, neither Terrell's first

-page 6 of 10 pages-

nor third points warrants Rule 37 relief.

Concerning Terrell's cell-site argument, his parolee status is determinative. He argues that, given the *Carpenter v. United States*² Court's decision, his trial counsel was ineffective. Rule 37 Pet. at 9-10. True, the *Carpenter* Court held that the Fourth Amendment protects a person's cell-site information. 138 S. Ct. at 2217-19. But Timothy Carpenter wasn't a parolee. Nor was he someone who had, for any reason, a lowered privacy expectation. He lived in an unconditional state of liberty, enjoying all constitutional protections. But Terrell was different. As a parolee, he lived in a conditional state of liberty. And one condition was his constant exposure to possible warrantless searches. So *Carpenter* is distinguishable and provides Terrell no relief.

Point Two (Failure to appeal new trial motion): About three months after the Sentencing Order was filed, someone filed a juror's affidavit. R. 180-81, 1225. In this affidavit, the juror simply claimed that the jury was

² 138 S. Ct. 2206 (2018).

unable to determine Hunt's killer. Based on this affidavit, Terrell moved for a new trial, alleging jury misconduct. **R. 183-86.** The circuit court (Fogleman, J.) found that the affidavit didn't contain the type of information that Rule 606 contemplates. **R. 1237-40.** So the circuit judge denied Terrell's new trial motion. *Ibid.* But because the new trial motion had already been deemed-denied, the circuit court, at the time of its ruling, no longer had jurisdiction. 2019 Ark. App. 433, at 11-12. Still, the circuit court's legal conclusion was right.

Rule 606 generally bars a juror's testimony about a verdict's validity. There's, however, an exception. If the juror's testimony concerns extraneous prejudicial information or outside influence, they can testify:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information

was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Ark. R. Evid. 606(b).

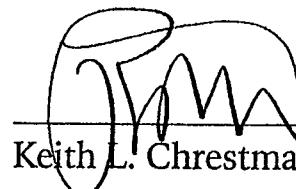
Here nothing in the affidavit triggered a Rule 606 exception. Terrell doesn't allege improper external influence, so the outside-influence exception didn't apply. And extraneous prejudicial information isn't a mere statement about an inability to reach a particular conclusion. It instead is "outside information being brought to the attention of the jurors concerning some issue or matter in the action pending before the court."

Watkins v. Taylor Seed Farms, Inc., 295 Ark. 291, 293, 748 S.W.2d 143, 144 (1988). Since the affidavit concerns neither outside influence nor outside information, Rule 606(b)'s exceptions didn't apply. Any deficiency in Terrell's trial counsel thus wasn't prejudicial. Under *Strickland*'s second prong, Terrell's ineffective-assistance-of-counsel claim fails. So he's entitled to no Rule 37 relief.

* * *

Christopher Terrell's Rule 37 Petition (filed 24 February 2020) is denied. And Christopher Terrell's Motion for Appointment of Counsel in Rule 37 Proceeding (filed 24 February 2020) is denied.

It is so ordered.



Keith L. Chrestman, Circuit Judge

Date: 19 March 2020

cc: Mr. Christopher Terrell
Mr. Scott Ellington
Mr. Val P. Price

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IN THE COURT OF POINSETT COUNTY, ARKANSAS
EIGHT DIVISON

Christopher Terrell

Vs.

State of Arkansas

Petitioner

Case No. 56Cr-15-21

Respondent

POINSETT CO. CIRCUIT CLERK
MISTY RICHARDSON-RUSSELL
FILED
FEB 24 2020

8/9/10/11/12/1/2/3/4/5 PM

RULE 37 PETITION

Comes now, Christopher Terrell, indigent pro-se petitioner, and hereby moves this Honorable Court for Rule 37 post-conviction relief, and in support of his petition states:

The United States Constitution and the Arkansas Constitution each guarantee the right to counsel. U.S. Const. Amend. VI; Ark. Const. Art. 10§2. This means the right to effective assistance of counsel.

In considering ineffectiveness of counsel under Ark. R. Crim. P. 37, the Arkansas Supreme Court in **Dumond v. State**, 294 Ark. 379, 743 S.W. 2d 779 (1988), adopted the two-prong test set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). First, there must be a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and second, there must be showing that the defendant was prejudiced by the errors. *Id.*

When trial counsel's performance is so deficient as to deny the defendant a fair trial, both prongs of Strickland are met. **Flores v. State**, 350 Ark. 198 (2002). All that is necessary is a reasonable probability of prejudice as to the sentences if not the finding of guilt. **Lasiter v. State**, 290 Ark. 96, 100, 717 S.W. 2d 198, 200 (1986).

Point 1: Failure to move for Suppression of Physical Evidenced based on Initially Illegal Entry in Terrell's Residence.

Trial counsel was ineffective by failing to file and litigate a motion to suppress all of the physical evidence found inside the residence where Terrell was arrested. Had trial counsel done so, all physical evidence would have been suppressed. Trial counsel was successful in achieving suppression of Terrell's statement based on law enforcement illegally arresting him at the residence at issue. On March 30, 2018, trial court suppressed Terrell's statement in its entirety, ruling that law enforcement's seizure of Terrell at his residence was inappropriate due to the lack of probable cause and a warrant or any exception to the warrant requirement. The same arguments would have applied to law enforcement's subsequent seizure of physical evidence at the residence. On January 3, 2018, at a hearing to suppress Terrell's statement; Detective Ron Martin testified that he ordered officer to stay on scene and keep an eye on the house (R. 212). The officer who stayed would not let Keith Terrell, Terrell's brother, enter back into the home, nor allow him access to his own vehicle. Keith Terrell testified in April 2016 at Terrell's first trial that he had to walk down the road to a neighbor's house after being released from a set of handcuffs.

The Arkansas Court of Appeals in **Robbins v. State**, 94 Ark. App. 393, 231 S.W. 3d 79, reversed the trial court's denial of a motion to suppress evidence. In Robbins, officers forced the occupants to leave the residence while officers remained at the residence to secure the premises until a search warrant was obtained. The court ruled a seizure occurred and that the illegality continued even after occupants were required to vacate their premises and did not end until execution of the search warrant some five hours later. The court stated: "Therefore, we think it's clear that although no evidence was seized during the initial illegal seizure; the subsequent

findings of evidence was the result of the exploitation of the initial illegal seizure. Under these circumstances the fruits of the illegal seizure were poisoned by the officer's unlawful warrantless entry." **Robbins v. State**, 231 S.W. 3d 79, at 5. The same result is warranted in Terrell's case as his residence was illegally seized approximately nine hours until execution of a search warrant. This is a greater exploitation of the illegal seizure. Trial counsel was deficient by seeking and achieving suppression of Terrell's illegally obtained statement; yet inexplicably failing to raise the same argument to seek suppression of the illegally obtained physical evidence gleaned from the very same illegal seizure. There can be no sound legal, factual basis or any strategic reason for this failure.

On January 17, 2017, upon learning from Terrell of his grievance to the Arkansas Supreme Court's Board of Professional Conduct, the trial court held a private hearing. The trial court agreed with Terrell that Ben Bristow, Terrell's appointed counsel, was prejudicing of Terrell's defense by not filing and litigating a motion to suppress Terrell's custodial statement due to the circumstances surrounding Terrell's arrest. Trial court then permitted Terrell to relieve appointed counsel due to this prejudicial error. (See record in 56 CR-15-21, January 17, 2017). The Supreme Court of the United States observed in **Crane v. Kentucky**, "The Constitution guarantees criminal defendant a meaningful opportunity to present a complete defense" 476 U.S.683,690 (1986). The error of not filing and litigating a motion to suppress the illegally obtained physical evidence is unquestionably an incomplete defense. Also, based upon trial court's prior ruling in the case, this decision could not have been the result of reasonable professional judgement. This error was highly prejudicial because without such physical evidence, the only evidence of Terrell's guilt would have been the flawed and ever-changing testimony of Betty Grant, which the jury evidently gave no credence to, As it is clear from juror

Nicole Elsey's affidavit and the statement made to Terrell's trial counsel outside the courthouse following his conviction by Juror Robinson, that the jury convicted Terrell as an accomplice of Grant. There is a reasonable probability that the consideration of the illegally obtained evidence from Terrell's residence by the jury was the basis for doing so. There is also a reasonable probability that Terrell would not have been convicted but for trial counsel's failure to seek suppression of the illegally obtained physical evidence. Accordingly, a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Strickland, Supra.*

Point 2: Failure to Timely Appeal Deemed-Denial of Motion for New Trial Based on Extraneous Prejudicial Influence on Jurors.

Trial counsel and appellant counsel were deficient by failing to timely appeal the deemed denial of Terrell's motion for new trial. This prejudiced Terrell's case as the issue would have been meritorious on direct appeal. In raising an ineffectiveness claim against appellant counsel, a petitioner must show there could have been a specific issue raised on appeal that would have resulted in the appellant's court declaring reversible error. See *State v. Rainer*, 2014 Ark.306, 440 S.W. 3d 31. The petitioner must show the issue was raised at trial, that the trial court erred in its ruling on the issues, and that an argument concerning the issue could have been raised on appeal to merit appellant relief. *Walton v. State*, 2013 Ark. 254 (per curiam). The Arkansas Court of Appeals refused "to reach the merits of this argument because Terrell failed to timely appeal the denial." *Terrell v. State*, 2019 Ark. App. 433, at 11. Trial counsel failed to file an amended notice of appeal within 30 days of the deemed denial of Terrell's motion for a new trial, this precluding direct review. This error was prejudicial because Terrell's argument would have been meritorious on direct appeal.

Following Terrell's conviction at jury trial, Terrell filed a motion for new trial alleging juror misconduct (Add. 12-15; R. 183-86). Terrell alleged that Juror Robinson informed defense counsel immediately after trial that the jury had convicted Terrell as an accomplice rather than a principle despite Terrell not being charged under an accomplice theory of liability (Add 12-14; R. 183-85). Terrell subsequently filed an affidavit executed by juror Nicole Elsey stating that "the jury was unable to determine who specifically shot and killed James Hunt, but that Christopher Terrell was convicted because he was found to have been involved in the commission of the crime" (Add 37; R. 1225). At the hearing on the motion for new trial, the trial court denied Terrell's motion for new trial, ruling that the information provided in Elsey's affidavit did not constitute the type of extraneous prejudicial information that Rule 606 contemplates (Ab. 168-69; R. 1240). The trial court also denied defense counsel's request to proffer the testimony of several jurors who were subpoenaed to the hearing (Ab. 168; R. 1240).

Rule 606 (b) states: Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental process in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror.

Rule 606 (b)'s, "extraneous prejudicial information" exception encompasses assertions derived from an external source, rather than bare, speculative assertions derived from a juror's personal experiences. See **Blake v. Shellstrom**, 2012 Ark. 428 at 10, 424 S.W. 3d 830 and 836.

A juror dissemination their prior knowledge of the specific facts of a case to other jurors constitutes “extraneous prejudicial information.” See **Witherspoon v. State**, 322 Ark. 376, 909 S.W. 2d 0314 (1995). However, jurors making disparaging remarks about one of the party’s attorneys do not. See **Watkins v. Taylor Seed Farms, Inc.**, 295 Ark. 291, 748 S.W. 2d 143 (1988). In construing the virtually identical Fed. R. Ev. 606, the Eighth Circuit defines “extraneous prejudicial information” to “include publicity received and discussed in the jury room, matters considered by the jury but not admitted into evidence, and communications or other contact between jurors and outside persons.” **Hiser v. XTO Energy, Inc.**, 768 F.3d 773 (2014). Here, the matter considered by the jury which was not admitted into evidence was the accomplice theory of liability.

The trial court manifestly abused its discretion by finding that the jury’s possible consideration of an uninstructed legal theory did not constitute “extraneous prejudicial information” pursuant to **Rule 606 (b)** and by denying Terrell’s motion for new trial accordingly. Arkansas courts have not determined whether introduction of an uninstructed legal theory constitutes such “extraneous prejudicial information.” However, existing case law makes clear that this is precisely the type of outside information that falls squarely into **Rule 606 (b)**’s narrow exception.

Here the jury was explicitly instructed not to consider outside legal theories other than those instructed by the trial court. The trial court instructed the jury using **AMCI 2d 101 (b)**, specifically instructed them “not to consider any rule of law with which they may be familiar, unless it is included in the Court’s instructions” (Ab. 159; R. 1133). That same model instruction also instructed jurors not to “do any research on the internet or... any investigation about the case or the parties on your own” **AMCI 2d 101 (c)**. Jurors violating this portion of this

instruction by doing their own research or investigation into the case or parties would unquestionably constitute “extraneous prejudicial information” for which the Rule permits jurors to be questioned. See *Borden v. St. Louis S.W. Ry.*, 287 Ark. 316, 698 S.W. 2d 795 (affirming decision to grant a new trial after jurors were found to have independently investigated the accident scene during their deliberations). Similarly, the jury violating subsection (b)’s direction not to consider outside legal theories constitutes “extraneous prejudicial information” too.

It is clear from Elsey’s affidavit that the jury blatantly disregarded this jury instruction in considering Terrell’s liability as an accomplice rather than only as a principal as instructed. Just as with conducting their own investigation, introducing uninstructed legal theories into the jury’s deliberations involved the introduction of an “extraneous prejudicial influence.”

The note on use to **AMCI 2d 101** states that the instruction is based on a comparable civil instruction, which goes even further by instructing jurors not to “look for or receive any information whatsoever about the case other than the law” as instructed by the trial court. **AMI 3d 101** (a). Specifically, the instruction concludes as such: All of us are depending on you to follow these rules so that you will fairly and justly decide the case based solely on the evidence presented in court and the law as instructed by me, and not on any other sources of information. Violations of these rules can have serious consequences, including a mistrial, which would be very costly and wasteful. If you become aware of any violation of any of these rules at all, notify court personnel. **AMI 3d 101**. There can be no question that a jury considering uninstructed legal theories in its deliberations falls within the narrow exception announced in **Rule 606** (b) regarding “extraneous prejudicial influence.” That is precisely why the jury was instructed not to do so, and precisely why the model jury instructions in both criminal and civil cases specifically forbid jurors from doing so. The civil instruction, particularly, makes very clear that a violation

of the court's instructions by deciding the case based on uninstructed legal theories can lead to a mistrial. See **AMI 3d 101**.

Several courts have found similar juror misconduct in considering accomplice liability in cases where the theory was not instructed significant enough to warrant reversal and remand for retrial. In **State v. Williams**, the Minnesota Court of Appeals noted: "If appellant's conviction rest upon an aiding-and abetting theory without regard to the proper legal standard for accomplice liability, the fairness and integrity of the judicial proceedings are compromised" 759 N.W. 2d 438, 446 (2009).

The situation in this case correlates to that when a judge misstates the law in responding to a jury question about its instructions. For example, Illinois courts have routinely found that a trial court instruction a jury on an accomplice theory of liability when the state did not pursue such theory to constitute reversible error.

People v. Morris is particularly on point. 401 N.E. 2d 284, 285 (Ill. App.Ct. 1980). In Morris, the appellant was charged with residential burglary after being arrested while trying to drive away from the scene while in possession of the resident's bank book. Id. At trial, a law enforcement officer testified that Morris said he and another man had both been at the scene, that the other man had gone to the rear of the home, and that Morris left when he could not find the other man after a few minutes. Id. The jury was not instructed as to an accomplice theory of liability, although the jury was instructed that it could infer Morris's participation in the robbery from his unexplained possession of the recently stolen item. Id. During deliberations, the jury sent the trial judge a note with the following question: "If a person comes into possession of property obtained illegally by another can he be presumed guilty of burglary even though he, himself may never have illegally entered the building or removed the property?" Id. The trial

court responded that the jury should decide the case on the instructions given, and the jury subsequently returned a guilty verdict. Id. On appeal, the Appellate Court of Illinois reversed the conviction based on the trial court's failure to respond to the substance of the jury's question. Id. at 286. The Morris Court explained: "No instruction on accountability was given to the jury. Consequently, in order to obtain a conviction, the state was required to show that defendant entered the Bakshis home (**People v. Echols** (1978) 74 Ill. 2d 319, 326, 24 Ill. Dec. 50, 506, 385 N.E. 2d 644, 647). This showing could be by either direct proof or by the inference contained in people's instruction #10. The jury's question clearly evidenced confusion concerning the inference permitted by the possession of recently stolen property instruction and the possibility of convicting the defendant on an accountability theory. In the court's view, the trial courts admonition to merely follow the instruction was insufficient as there is no assurance that recourse to the instructions would resolve the confusion. Id. There, the jury's consideration of an accomplice theory of liability despite not being instructed regarding such was reversible error. The same result is warranted in this case, where the jury convicted Terrell as an accomplice despite not being instructed on the theory of liability.

In **People v. Millsap**, the Supreme Court of Illinois held that a supplemental jury instruction on liability for aiding and abetting was inappropriate when it introduced an entirely new theory of the case. 724 N.E. 2d 942 (2000). Millsap was charged with robbery and home invasion, and the state did not pursue a theory of accomplice liability or request a jury instruction regarding such. Id. at 945. The jury sent the judge a note asking, "is the accomplice just as guilty as the offender who causes injury in a home invasion?" Id. Over objection, the trial court gave the instruction on an accomplice liability. The Supreme Court of Illinois reversed, stating, "because the court in this case instructed the jury on accountability after the jury had begun its

deliberation, defendant's attorney was entirely deprived of an opportunity to defend against that theory." Id. at 947; also see **State v. Ransom**, 785 P. 2d 469, 470 (Wash.Ct. App. 1990) (instructing jury on accomplice liability in response to a jury question was reversible error because "accomplice liability is a distinct theory of criminal culpability" and "the effect was to add a theory that the State had not elected and that defense counsel had no chance to argue")

This court should rule similarly. Just as in the cases with Morris, Millsap, and Ransom, the introduction of an uninstructed and unargued legal theory into the jury's deliberations is reversible error. The only difference here is that the jury introduced the outside legal theory on its own rather than hearing it from the trial court. The result, however, should be the same. This is because regardless of how an uninstructed legal theory ends up in front of the jury, it is an "extraneous prejudicial influence" that deprives the defendant of any opportunity to defend against that theory.

While the jurors may have heard of the theory of accomplice liability based on their own life experiences, the introduction of an outside legal theory is not the same as speculation about likely insurance coverage or personal biases. First, it was expressly forbidden by the judge's instructions to the jury prior to retiring for deliberations. Second, it changed the entire nature of the case. Defense counsel did not make any arguments arguing against an accomplice theory of liability because Terrell was not charged as an accomplice and because the jury was not instructed as to the theory.

When the State attempted offered a jury instruction for Murder in the first degree, that permitted the language to be permitted to the jury to convict Terrell as an accomplice, defense counsel made an objection and the trial court agreed that Terrell had not been charged as an accomplice and that the accomplice language had to be stricken accordingly. (Ab.139-40; R.

1077-79). The trial court specifically stated, “There will not be an accomplice instruction as no one is charged as being an accomplice, either Mr. Terrell or anyone else.” (Ab.140; R. 1079). Terrell was prejudiced by the introduction of this extraneous legal theory into the jury’s deliberations because his attorney was entirely deprived of an opportunity to defend that theory. See Millsap, *supra*.

The trial court manifestly abused its discretion in denying Terrell the opportunity to discern the magnitude of this “extraneous prejudicial influence” on the jury in its deliberations. Terrell’s case must be remanded for rehearing on this issue, and he must be permitted to adduce testimony of jurors regarding their use of an accomplice theory of liability in determining Terrell’s guilt under the narrow exception contained in **Rule 606 (b)**. Trial counsel was ineffective for failing to preserve this meritorious issue accordingly.

Point 3: Failure to move for suppression of cell site location information based on *Carpenter v. United States*, which was pending at the time of Terrell’s trial.

Terrell’s trial was held on April 10-12, 2018. The opinion in Carpenter’s case was issued on June 22, 2018. The Carpenter case was argued at the United State Supreme Court on November 29,2017 and was thus pending a ruling at the time of Terrell’s hearing on January 16, 2018, concerning the CSLI information in his case and at the time of his trial. Trial counsel should have sought a continuance to await the opinion of Carpenter. Trial counsel was ineffective by failing to file a motion to suppress Terrell’s CSLI based on law enforcement lacking a search warrant to obtain such records. Trial counsel’s failure to raise this issue precluded direct review, as the Arkansas Court of Appeals noted, “because Terrell did not challenge the seizure of his records below, this argument is not preserved for appeal.” **Terrell v. State**, 2019 Ark. App. 433 at 10. Trail counsel’s failure was prejudicial, as the Supreme Court of

the United States subsequently ruled that a search warrant is required to seize such records in **Carpenter v. United States**, 138 S. Ct. 2206 (2018). The Supreme Court's opinion is binding upon Arkansas courts and an Appellate Court applies the law in effect at the time of its decision. Had trial counsel sought to suppress such records, the opinion would have applied to Terrell's case on direct review. **Whiteside v. State** 2013 Ark. 176, at 5, 426 S.W. 3d 917, 919 (citing **Schriro v. Summerlin**, 542 U.S. 348, 351 (2004)). Under the express holding from Carpenter, the process set forth by the State to attain the CSLI records of Terrell does not determine a targets expectation of privacy, the Fourth Amendment does. The Supreme Court ruled that accessing CSLI records constitutes a Fourth Amendment search. The acquisition of the CSLI records without a warrant based on probable cause violated Terrell's Fourth Amendment rights, and such records would have been suppressed. This error was prejudicial, as the CSLI was the State's strongest proof against Terrell at trial. There is a reasonably probability of a different outcome absent this evidence, which had the effect of placing Terrell at or near the scene of the shooting right around the timeframe when it occurred.

Wherefore, the Petitioner prays that this Honorable Court grant his motion for **Rule 37** post-conviction relief and for any and all just and proper relief to which he may be entitled.

Respectfully submitted,



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