THIS IS A CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

Timothy Wayne Kemp,

Petitioner

v.

State of Arkansas

Respondent

On Petition for Writ of Certiorari to the Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

Whether the October 7, 2021 decision of the Arkansas Supreme Court, finding that Timothy Kemp was not prejudiced under *Brady v. Maryland*, was in conflict with this Court's decision in *Cone v. Bell* where, in the words of the Arkansas court, "there is no prejudice under *Brady* and no reasonable probability that the outcome of the trial would have been different had defense counsel been provided with the evidence," but where that court did not distinguish between materiality of evidence with respect to guilt and materiality of evidence with respect to punishment, an omission which this Court has deemed "significant"?

PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *State v. Kemp*, No. CR 1993-2903 (Pulaski Cty.) (Dec. 5, 1994) (trial).
- *Kemp v. State*, No. CR 95-549 (Ark.) (Apr. 22, 1996) (direct appeal).
- *State v. Kemp*, No. CR 1993-2903 (Pulaski Cty.) (Nov. 5, 1997) (re-sentencing).
- *Kemp v. State*, No. CR 98-463 (Ark.) (Nov. 19, 1998) (direct appeal).
- *Kemp v. State*, No. CR 1993-2903 (Pulaski Cty.) (Oct. 23, 1999) (state postconviction).
- *Kemp v. State*, No. CR 00-482 (Ark.) (Nov. 29, 2001) (rev'd more specific findings).
- *Kemp v. State*, No. CR 1993-2903 (Pulaski Cty.) (Jan. 23, 2002) (state postconviction).
- *Kemp v. State*, No. 00-482 (Ark.) (May 16, 2002) (state postconviction).
- *Kemp v. State*, No. CR 1993-2903 (Pulaski Cty.) (Sept. 30, 2008) (state postconviction).
- *Kemp v. State*, No. CR 09-77 (Ark.) (Dec. 17, 2009) (state postconviction).
- *Kemp v. State*, No. CR 00-482 (Ark.) (Apr. 1, 2010) (denying motion to recall the mandate).
- *Kemp v. State*, No. CR 95-549 (Ark.) (Sept. 30, 2010) (denying *coram nobis*).
- *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.) (Oct. 6, 2015) (habeas).
- *Kemp v. Kelley*, No. 15-3849 (8th Cir.) (May 16, 2019) (habeas appeal).
- *Kemp v. Payne*, No. 19-7476 (U.S.) (May 18, 2020) (denying certiorari).
- *Kemp v. Arkansas*, No. CR-95-549 & CR-98-463 (Ark.) (Oct. 7, 2021) (denying application to proceed on writ of error coram nobis).

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PETITION FOR A WRIT OF CERTIORARI

Timothy Wayne Kemp respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

There are two opinions released on the same day at issue. The first opinion of the Arkansas Supreme Court is reported at 629 S.W.3d 804 (Ark. 2021). (App. A). The second related opinion is reported at 2021 Ark. 172. (App. B).

JURISDICTION

The judgment of the Arkansas Supreme Court entered its opinions on October 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XIV:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

Timothy Kemp shot four people in a rural Arkansas trailer in 1993. From the moment of his arrest, he told the police that "these people beat his ass and threatened him and he was just defending himself." R 1480; RS 984. At his trial, the prosecution vigorously disputed Kemp's claims of self-defense. A key witness who was at the trailer that night testified repeatedly that she did not see any of the victims with a gun. Decades later, notes from the prosecutor's file revealed that the witness lied on the stand and that she not only saw one victim with a gun, but he told her he planned to

use the gun to scare Kemp. Using the only state court avenue to vindicate a *Brady v. Maryland* claim discovered after trial, Kemp filed an application to reinvest the circuit court with jurisdiction to hear a writ of error *coram nobis*. The Arkansas Supreme Court held there was no reasonable probability of a different outcome and declined to reinvest jurisdiction. In doing so, the court failed to distinguish between the materiality of the suppressed evidence with respect to guilt and punishment, giving rise to the instant Petition.

STATEMENT OF THE CASE

Timothy Kemp and his girlfriend, Becky Mahoney, arrived on October 4, 1993, as visitors to Wayne Helton's trailer. After a day of steady drinking, Kemp and Mahoney joined Helton, Robert Phegley and Cheryl Phegley (father and daughter), in more drinking. At some point in the evening, Richard Falls joined the group. As the night wore on, Kemp wanted to leave but Mahoney did not. The group told Kemp to leave without Mahoney.

Shortly after his arrest, Kemp told the police that he did leave, but only briefly, and that he returned to see if Mahoney had changed her mind and wanted to leave too. According to Kemp, on his return he was greeted outside with taunts, physical violence, and threatened with a gun. Kemp grabbed his own gun out of his truck, grappled with Helton at the front door, and ended up shooting Helton, Robert Phegley, Cheryl Phegley, and Falls. Mahoney hid in the closet and was physically

unharmed. The police found a pistol between the bodies of Helton and Richard Phegley.

Kemp was charged with four counts of capital murder and the State sought the death penalty. The prosecution's theory of the case differed significantly from Kemp's. The State argued that Kemp left the trailer, drove home, retrieved his gun, parked a distance away from the trailer, skulked toward the front door where, after knocking, he unloaded his gun on the unsuspecting occupants.

To support the self-defense theory, the defense attorney questioned Mahoney about whether she saw a gun at the trailer that night. She flatly denied seeing a gun.

Q: And you say that Tim went out by himself?
A: Tim left by himself.
Q: Did you see a gun at that time?
A: No, sir.
Q: Did you ever see a gun?
A: No, sir.
Q: You didn't see a pistol at any time?
A: I don't remember.
Q: You don't remember. You don't recall if someone pulled a pistol on him?
A: No, sir.
Q: Okay. You just didn't see one?
A: Nobody pulled a pistol on him.
Q: Okay. You didn't see a pistol at all. Is that right? Is that what you're saying?
A: Yes, sir.

R 1415. Though there was a gun found near Helton's body, the jury heard no evidence that Helton intended to scare Kemp with the weapon. Kemp's self-defense arguments were unavailing in the guilt phase and the jury found Kemp guilty of four counts of capital murder.

At the penalty phase, the defense kept its focus on Kemp's claims of self-defense but tailored their presentation to the jury's task at penalty. The defense argued the statutory mitigating factor that "the capital murder was committed . . . under extreme mental or emotional distress" was established because "[h]e had been threatened." R 1950. The defense also argued that the statutory mitigating factor related to "unusual pressures or influences" was present because "[t]here was a gun. A gun found. . . It was at the foot of one of the people. . . He had been told that he was going to beat his ass. He was fearful. He was upset." R 1950. The defense also presented a mitigating circumstance that Kemp "believed he was acting in self-defense." R 1966.

The defense argued that these threats were particularly potent because of Kemp's psychological impairments. R 1950–51. Under this theory, and particularly relevant to the question presented, even if the provocation was insufficient to mount a guilt-phase defense, it still mitigated the crime. A defense psychologist testified that Kemp was "less able to control his impulses," "more likely to feel threatened by just about anything" but would respond to a significant threat "all the more strongly." R 1905–06. The psychologist based his opinion in part on "claims of threats from the other parties at the house that evening." R 1918. The prosecution criticized the psychologist for taking Kemp's word that he had any reason to be fearful. *Id.*

In her penalty phase closing, the prosecutor disputed each mitigating circumstance and argued there was "no evidence, no evidence, no evidence that he

was acting in self-defense." R 1944. Returning four death sentences, the jury only unanimously found two mitigating circumstances, both related to Kemp's upbringing.

On direct appeal, three of Kemp's death sentences were overturned due to an improper aggravating circumstance. The State sought to reimpose those death sentences. The parties largely repeated their presentations and Mahoney again lied:

> Q: Okay. Did you see a gun? Did you see any of them with a gun?
> A: No, sir.
> Q: Okay. If there was a gun there, you wouldn't be surprised to see it in the pictures though, would you?
> A: I didn't — — I never did see no gun.
> Q: You never saw a gun?
> A: No, sir.
> Q: But you're not denying that someone had a gun there. Is that right?
> A: I never seen no gun.

RS 914-15. The defense psychologist tempered his testimony about Kemp's perception of threats—explaining that Kemp may have "misperceived" a danger. RS 1056.

Using Kemp's longer statement to police, the defense again urged Kemp's belief in self-defense as a mitigating factor. The prosecution argued that the statement was "a pack of lies . . . all about he'd been beaten and threatened and they followed him out into the yard and they pulled their gun on him." RS 1167. Moreover, the prosecutor told the jury these lies showed that Kemp had "[n]o remorse. No feeling about the lives he's taken." *Id.* The defense conceded that Kemp "does not have a defense under our law to shooting those people" but argued that the jury's moral decision should be influenced by the circumstances of the offense—including whether Kemp committed

the crime under an emotional disturbance, unusual pressures, or a belief in self-defense. RS 1178–83. The prosecution responded she would not spend any time on the question of whether Kemp believed he was acting in self-defense because "[t]here's no evidence of that whatsoever," and Kemp's claims that he was threatened were "crazy lies." RS 1190. The jury found the presence of the single aggravating factor—that Kemp created a great risk of death to another person. The jury did not unanimously find any mitigating circumstances.

During discovery in federal habeas, Kemp received never-before disclosed parts of the prosecutor's file: a work-product file and a victim-assistance file. The work-product file contained notes taken by the prosecutor in her own witness interviews. There, Mahoney related that "Wayne showed Becky a pistol that he had + said he would use it to scare Tim." There is no dispute that these files had never previously been disclosed to Kemp.

Kemp raised a *Brady* claim based on this and other revelations in the prosecutor's file in habeas proceedings. The federal district court found the *Brady* claim to be inexcusably procedurally defaulted and declined to certify it for appeal. The Eighth Circuit Court of Appeals likewise did not certify the issue for appeal. Kemp included the procedural question in his petition to this court that otherwise dealt with an adjudicated *Strickland* issue. Certiorari was denied. *Kemp v. Payne*, No. 19-7476 (U.S.) (May 18, 2020).

Following denial of certiorari, and in line with Arkansas Supreme Court precedent, Kemp applied to the Arkansas Supreme Court to reinvest the trial court with jurisdiction to hear his *Brady* claims. After full briefing and oral argument, the Arkansas Supreme Court released two opinions regarding the case (one detailed opinion under the trial case number and another adopting that rationale in the resentencing case number). *See* Appendix A and B. While the State urged alternative grounds for denial, the court denied Kemp's application squarely on the merits of his *Brady* claim.

REASONS FOR GRANTING THE PETITION

At the application stage of *coram nobis* review, the Arkansas Supreme Court determined whether Kemp's *Brady* claim was potentially meritorious. To do this, the court considered the reasonableness of the allegations and the probability of their truth. A finding of actual prejudice or reasonable probability of a different outcome was not required. The court's decision, declining to reinvest jurisdiction, has barred consideration of the merits of Kemp's *Brady* claim, but this Court's precedent dictates that further review is warranted.

Though procedurally distinguishable, the instant case is factually analogous to this Court's decision in *Cone v. Bell*, 556 U.S. 449 (2009). By "[s]ummarily discounting" the contention that Kemp's *Brady* claim was potentially meritorious and material to his death sentence, the Arkansas Supreme Court's decision conflicts with this Court's holding in *Cone*. *Id.* at 464. Failing to distinguish between the materiality of suppressed

evidence at both guilt and sentencing is "an omission [this Court] find[s] significant." *Id.* at 476. "Because the evidence suppressed at [Kemp's] trial may well have been material to the jury's assessment of the proper punishment in this case, a full review of the suppressed evidence and its effects is warranted." *Id.* at 475.

I. The decision of the Arkansas Supreme Court presents a conflict with this court's decision in *Cone v. Bell*.

In *Cone v. Bell*, this Court emphasized a constitutional mandate that prejudice from suppressed *Brady* evidence must be examined for both the guilt and penalty phases of a capital murder trial. *Id.* at 469; *citing to Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression violates due process when the evidence is material to guilt *or punishment*) (emphasis added). Reasoning that evidence, while not exculpating, may play a mitigating role in the jury's sentencing recommendation, and because no court prior had "fully considered whether the suppressed evidence" may have swayed the jury at sentencing, this Court remanded for a "full review" of Cone's *Brady* claim. *Id.* at 475.

This case is plainly controlled by and analogous to *Cone*. Here, as in *Cone*, the prosecution suppressed a witness statement that would have corroborated Kemp's claims of self-defense and supported multiple mitigating factors at the penalty phase. Here, as in *Cone*, the prosecution not only presented Kemp as a remorseless killer, they discredited his defense by calling it "a pack of lies" and emphasized there was absolutely no evidence Kemp was threatened, while simultaneously sitting on the very evidence they claimed was missing. Here, as in *Cone*, the lower court only "passed

briefly on the merits" of Kemp's *Brady* claim and failed to distinguish between the materiality of the suppressed statement as to guilt and punishment. *Id.* at 452. Here, as in *Cone*, a full review of the penalty-phase prejudice is absent and warranted. This Court emphatically recognized in *Cone* that a *Brady* claim which fails with respect to guilt may still have merit as to sentencing. Failing to distinguish between the two is a constitutionally deficient analysis.

A. The Arkansas Supreme Court opinion rested solely on whether Kemp could establish Brady prejudice.

The writ of error *coram nobis* is the only practical vehicle by which a petitioner may present a *Brady* claim discovered after trial in Arkansas state courts. *See Buckley v. State*, 2007 WL 1509323 at *2 (Ark. 2007) ("[a] petitioner may seek relief for prosecutorial misconduct at trial, in a motion for new trial, or through error *coram nobis* proceedings"); J. Thomas Sullivan, Brady-*Based Prosecutorial Misconduct Claims,* Buckley*, and the Arkansas Coram Nobis Remedy*, 64 Ark. L. Rev. 561, 617 (2011) ("Brady-based misconduct violations must be litigated through the writ of error *coram nobis* process"). If a case has been affirmed on direct appeal, before a trial court may consider a writ of error *coram nobis*, the Arkansas Supreme Court must grant permission and reinvest the circuit court with jurisdiction. *Echols v. State*, 125 S.W.3d 153 (2003). That court will do so "when it appears the proposed attack on the judgment is meritorious." *Howard v. State*, 403 S.W.3d 38, 43 (Ark. 2012) (*citing Flanagan v. State*, 2010 Ark. 140, at *1 (Ark. 2010)).

The writ exists to address four categories of error—one of which is material evidence withheld by the prosecutor. *Id.* This category of error also covers witness testimony that "materially conflicts" with a statement "withheld or suppressed by the state." *Wallace v. Arkansas*, 545 S.W.3d 767, 770–71 (Ark. 2018). The Arkansas Supreme Court dubs this category of error a "*Brady* violation" and applies *Brady* and this Court's related precedents in adjudicating such claims. *Howard,* 403 S.W.3d at 44. Thus, the *coram nobis* "materiality" standard is equivalent to *Brady*'s: prejudice is established when there is a "reasonable probability" that the outcome of the trial would be different but for the state suppression of favorable evidence. *Id.* at 46.

At the application stage, Kemp needed only convince the Arkansas Supreme Court that his claims had "apparent merit." *Id.* at 47. The Arkansas Supreme Court assumed that Kemp had established the first *Brady* element—that the evidence was suppressed. Thus, the sole question before the Court was whether the "circuit court *could* find that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 45 (emphasis added). The ultimate merits of the claim—whether there was a "reasonable probability" of a different outcome—is left to the circuit court on reinvestment. *Id.* at 46 ("The reasonable-probability standard…applies to the circuit court's evaluation of the merits of the error *coram nobis* petition and not to this court's decision to grant or deny permission to proceed with filing the petition in circuit court."). Because the Arkansas Supreme Court reinvests jurisdiction whenever a *Brady* claim has "apparent merit," and because

on this record Kemp's claim does have merit, the court's "summary treatment" and rejection of Kemp's *Brady* claim warrants further review. *Cone*, 556 U.S. at 474.

B. The Arkansas Supreme Court violated *Cone v. Bell* and *Brady v. Maryland* by not distinguishing between the materiality of evidence with respect to guilt and the materiality of evidence with respect to punishment.

The Arkansas Supreme Court rejected Kemp's claims in two related opinions. The first opinion deals with Kemp's initial trial and sentencing—for which he has four capital murder convictions and one death sentence. Appendix A. The second opinion deals with Kemp's resentencing where he was resentenced to three death sentences. Appendix B. The Arkansas Supreme Court departed from this Court's precedent when it failed to separately analyze prejudice as to guilt or penalty. The court's first opinion fails to address the impact of the suppressed evidence on Kemp's mitigation case and simply concluded the new information could not have changed the outcome of Kemp's trial. Appendix A at 8. The court's opinion as to Kemp's resentencing likewise made no effort to distinguish between the impact of the suppressed evidence at the trial and original sentencing and Kemp's resentencing. Appendix B.

The Arkansas Supreme Court's equivocal treatment of the prejudicial impact of the suppressed evidence departs from this Court's precedent in *Cone v. Bell*. Gary Cone was sentenced to death for the murder of two people he claimed he committed while suffering from acute psychosis caused by drug addiction. *Cone*, 556 U.S. at 451. At trial, the defense's theory was that Cone's drug-induced psychosis rendered him

legally insane, or at least reduced his moral culpability for sentencing purposes. *Id.* at 454–55. The state discredited this theory by arguing there was no evidence that Cone was drug-addicted, and thus no evidence his actions were the result of drug-related psychosis. *Id.* The prosecutor described Cone's actions as "premeditated, cool, deliberate," and summarized his claims of drug addiction as "baloney." *Id.* at 455-56.

During postconviction proceedings, Cone was granted access to the prosecutor's file where he discovered numerous undisclosed witness statements corroborating his drug use. Armed with this new evidence, he argued the evidence was exculpatory to both guilt and punishment. The lower courts rejected the claim finding that the withheld statements would not have overcome the overwhelming evidence of Cone's guilt and discounting Cone's contention that the withheld evidence would have impacted his sentencing. The lower court reached the question of sentencing prejudice but summarily found evidence of Cone's drug use "did not mitigate his culpability sufficient to avoid the death sentence." *Id.* at 464.

It was under these circumstances that this Court granted certiorari and held that no lower court had "fully considered whether the suppressed evidence might have persuaded one or more jurors" to vote to imprison Cone for life rather than sentence him to death. *Id.* at 475. Although the evidence was immaterial to the jury's finding of guilt, it "may well have been material to the jury's assessment of the proper punishment in this case." As such, "a full review of the suppressed evidence and its effects" was warranted. *Id.*

Like *Cone*, "the distinction between the materiality of the suppressed evidence with respect to guilt and punishment is significant in this case." *Id.* at 473. Kemp has maintained since his arrest that he was threatened, that his actions were not premeditated, and that, even if his belief was unreasonable, he believed he was acting in self-defense thus mitigating the crime. Whereas the guilt phase of a capital trial requires a jury to objectively weigh facts in evidence, the penalty phase involves subjectively weighing mitigating and aggravating factors to arrive at a moral judgment. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (holding that a jury must be allowed to give effect to mitigating evidence and to express "its 'reasoned moral response' to that evidence") (*quoting California v. Brown*, 479 U.S. 538, 545 (1987)). Because the jury's job is different at each stage—the prejudice analysis, too, must be different.

This Court clearly recognized this distinction in *Cone*, where it noted a "critical difference" between the high standard Cone was required to satisfy to establish his insanity defense and the "far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case." *Cone*, 556 U.S. at 474. So too here. At guilt, the jury had to determine if facts were sufficient to support whether Kemp indeed acted in self-defense—either to establish an affirmative defense or to create a reasonable doubt as to whether the crimes were premeditated. But at penalty, the jury needed only to consider whether Kemp *believed* he was acting in self-defense. Even if Mahoney's statement would not have carried the day in the guilt-phase, her

suppressed statement supported Kemp's belief and provided crucial mitigating evidence of his mental state. As in *Cone*, there is a "critical difference" between what Kemp was required to present and prove to establish self-defense at the guilt phase and the "possible mitigating effect" evidence of threats would have had at his penalty phase. *Id.* at 474.

i. Guilt phase and penalty phase prejudice require separate analysis.

Whether Kemp was provoked or threatened before he shot his own gun was essential to his defense at both stages. Indeed, his attorney stated that imperfect self-defense was "the heart" of Kemp's defense in the mitigation phase of trial. *Kemp v. State*, 60 S.W.3d 404, 407 (Ark. 2001). Evidence that Kemp was threatened or provoked (or believed that he was) could have affected the jury's assessment of his moral culpability at sentencing. *See e.g., Tison v. Arizona*, 481 U.S. 137, 157 (1987) ("Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty—those that are the result of provocation.").

Specifically, there are two ways in which Mahoney's suppressed statement weighed differently in the penalty phase. First, and most obviously, the suppressed evidence would have supported Kemp's related mitigating circumstances. Second, the absence of the statement permitted the prosecution to push her theory that Kemp was a liar, he lacked remorse, and he was, as such, more deserving of the death penalty.

The defense offered three mitigating circumstances which would have been supported by the suppressed evidence: that the crime was committed while Kemp was under emotional distress; that the crime was committed while Kemp was under unusual pressures; and that Kemp believed he was acting in self-defense. To make their case during the penalty phase, the defense presented a psychologist who testified that Kemp's unique psychological profile made him more likely to overreact to threats. R 1905–10, RS 1054–58. Mahoney's statement would have supported these mitigating circumstances by bolstering Kemp's claim that he was threatened—or by establishing that the dynamics between Kemp and the victims were heated and more than simply a "fight with [his] girlfriend" as the prosecution contended R 1957.

On cross-examination, the prosecutor discredited the defense expert by exploiting her suppression. Evidence that Kemp was threatened or fearful was relevant to the psychologist's assessment and to Kemp's mitigation, but the prosecutor demeaned both this theory and the expert by claiming the "only basis" that Kemp was threatened was Kemp's own self-serving statement. R 1918. It is true, the psychologist (and the jury) had no other basis, because the evidence that would have supported Kemp's allegations was suppressed.

In *Cone*, defense counsel emphasized during penalty phase proceedings that the jury was required to consider whether Cone's capacity to appreciate the wrongfulness of his conduct was "substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which

substantially affected his judgment." *Cone*, 556 U.S. at 475. Like Kemp, the State discredited defense's experts by arguing their opinions were based solely on Cone's claims of drug use "rather than on any independently corroborated sources." *Id.* at 455. This Court held that corroborated evidence of Cone's drug addiction may have persuaded the jury that Cone did, as he alleged, have a serious drug problem, and that his drug use may have "played a mitigating, though not exculpating, role in the crimes he committed." *Id.* at 475.

This Court has long held that a jury considering the death penalty may not refuse to consider, or be precluded from considering, *any* relevant mitigating evidence with respect to "defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 437 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Mitigating evidence is evidence that reduces the defendant's moral culpability or blameworthiness and may include not just the circumstances of the offense but any aspect of a defendant's character, including their age, background, or mental state. *See e.g., Wiggins v. State*, 539 U.S. 510 (2003); *Sears v. Upton*, 561 U.S. 945, 951 (2010) (noting that while evidence of his mental condition "might not have made [defendant] any more likable to the jury… it might well have helped the jury understand [the defendant], and his horrendous acts."). Evidence of provocation was essential to Kemp's character, his mental state, and the circumstances of the offense. As such, Mahoney's suppressed statement was relevant mitigating evidence that the jury was

required to consider before imposing a sentence of death. *Abdul-Kabir*, 550 U.S. at 263-64 ("Before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.").

The prosecutor also exploited her suppression to hit at one of the core jury concerns in a sentencing phase—remorse. The prosecutor called Kemp's claims that he was threatened "a pack of lies" that demonstrated he had "[n]o remorse. No feeling about the lives he's taken." It was an egregious and unconstitutional act to not only suppress a statement which would have corroborated Kemp's claim, but to then argue his now-unsupported claim showed he was lying after-the-fact and thus had no remorse. That argument, and the suppression which allowed it, likely had a great impact on the jury's decision to return a death sentence. *See e.g.*, Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1157, 1558 (Sept. 1998) ("[J]urors frequently cited a defendant's lack of remorse as a significant factor in precipitating their decision to impose the death penalty."); Michael A. Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*, 43 Cath. Law 311, 322 (2004) ("The importance of a defendant's remorse in capital sentencing is well documented."); Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *But was he sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1633 (Sept. 1998) ("In short, if [South Carolina] jurors believed the

defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death.").

Recognition of the suppression's impact on the jury's moral decision is likewise dictated by *Cone*. There, the prosecutor discredited Cone's claims of drug addiction as "baloney," and emphasized that the jury was "not dealing with a crazy person, an insane man…" but "a murderer" whose actions were "premeditated, cool, deliberate." *Cone*, 556 U.S. at 455-56. At Kemp's trial, the prosecution's theory was that Kemp, unprovoked and unremorsefully, slayed four unsuspecting people. Just as this Court found in *Cone*, there is a reasonable probability that Mahoney's suppressed statement may have persuaded just one juror that Kemp was not lying, that he was under a sincere belief that they were threatening him, or at the very least, that he was not so remorseless as to deserve the death penalty. If there is a reasonable probability that at least one juror would have "struck a different balance regarding [Kemp's] moral culpability" at sentencing, then Kemp has established prejudice. *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020).

CONCLUSION

The petition for a writ of certiorari should be granted.

January 5, 2022

Respectfully submitted,
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Cite as 2021 Ark. 173

SUPREME COURT OF ARKANSAS

No. CR-95-549

	Opinion Delivered: October 7, 2021
TIMOTHY WAYNE KEMP PETITIONER V. STATE OF ARKANSAS RESPONDENT	PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR A WRIT OF ERROR CORAM NOBIS [PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION, NO. 60CR-93-2903] HONORABLE MARION A. HUMPHREY, JUDGE PETITION DENIED.

SHAWN A. WOMACK, Associate Justice

Nearly three decades have passed since Timothy Kemp murdered David Wayne Helton, Richard "Bubba" Falls, Robert "Sonny" Phegley, and Sonny's daughter Cheryl Phegley. Kemp has never denied killing his victims. The dispute has instead centered on what precipitated the shootings. From the time of his arrest, Kemp has insisted he acted in self-defense. The State of Arkansas, on the other hand, maintains that he slaughtered his victims in an anger-fueled rampage. The jury rejected Kemp's version of events and sentenced him to death for each murder.

Kemp now claims he was convicted and sentenced to death in violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to disclose evidence in its possession that is material to the defense. He accuses the prosecution of

withholding material evidence that would have prevented his convictions and sentences by bolstering his assertion of self-defense. To rectify the alleged *Brady* violations, Kemp asks this court to reinvest jurisdiction in the circuit court so that he may pursue a writ of error coram nobis. We decline to do so.

I.

Kemp spent the day of October 4, 1993, drinking and driving around with his longtime girlfriend, Becky Mahoney. That evening, the couple stopped by Wayne Helton's trailer to visit with Wayne, Sonny Phegley, and Cheryl Phegley. Bubba Falls, whom the couple did not know, was also there. After hours of dancing and drinking, Kemp became angry with Becky. Jealous that she had danced with Wayne, Kemp wanted her to leave with him. Fearing Kemp's temper, she refused. Cheryl intervened and told Kemp to leave. As he drove away in his truck, he warned Becky she would be sorry for not leaving.

Kemp made good on his threat. After driving—either around the neighborhood or to his mother's house, where he and Becky lived—Kemp returned to the trailer with his .22 rifle. His truck had a distinctive sound, so he parked roughly fifty yards away, walked to the trailer door, and knocked. When Wayne opened the door, Kemp opened fire. He shot Wayne four times: twice each in his face and chest. The facial wounds were at close range and consistent with Wayne lying face upward when shot. As Kemp recounted to his friend Bill Stuckey later that night, Wayne fell "like a sack of taters." Kemp then shot Sonny in the arm and head. Bubba, whom Kemp told Stuckey was "just in the wrong place at the wrong time," was shot in the chest. Kemp turned last to Cheryl. He followed her as she crawled down the hallway and into a nearby bedroom. As she screamed out for her life,

Kemp assured her that she was going to die before gunning her down. Kemp shot Cheryl five times, including twice in the back and once in the head.

Becky was the sole survivor. After hearing the knock at the door, she feared Kemp had returned for her. She was told to hide in the bedroom, and the others would tell Kemp she had walked home. As she headed toward the bedroom, she paused in the hallway. Once she heard gunfire and saw Bubba and Cheryl fall to the floor, she ran into the back bedroom closet. Kemp did not find her. Becky emerged after the gunfire ceased and saw Wayne, Sonny, and Bubba on the floor. She called 911. While on the phone, she heard Kemp's truck start up outside. Officers soon arrived and found the bodies of the four victims inside the trailer. Wayne and Sonny had been shot down near the front door. An unfired .32 caliber pistol was on the floor between them. The magazine contained seven live rounds but no round was chambered. Bubba's body was found on the other end of the living room. After following a trail of spent .22 casings, officers found Cheryl's body partially inside the front bedroom closet.

Meanwhile, Kemp went home, hid the rifle in his mother's closet, and changed clothes. He then drove to Stuckey's house for gas money to get out of town. Kemp told Stuckey he had shot Wayne, Sonny, Cheryl, and "some guy he didn't know" because "[t]hey ran him off and kept Becky there and wouldn't let her leave with him." He mentioned that Cheryl had "started all the argument" and "wouldn't let Becky leave with him or said that Becky did not have to leave with him and that he needed to leave." After that, Kemp said he went home, retrieved his gun, returned to the trailer, and shot everyone except Becky, who he was unable to find. Kemp told Stuckey he could hear his victims

gasping for breath as he left the trailer. Kemp was soon arrested at Stuckey's house and charged with four counts of capital murder.

Given the evidence of guilt, trial counsel strategically focused on a mitigation case at the 1994 trial. Counsel argued that a heavily intoxicated Kemp, whose personality had been misshapen by an abusive and violent upbringing, overreacted and lashed out in imperfect self-defense. The Pulaski County jury did not accept that argument as valid. He was convicted and sentenced to death for each murder. We affirmed the convictions but only affirmed the sentence for Bubba's murder based on issues surrounding the aggravating circumstances. *See Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996). On remand, the jury again imposed death. We affirmed. *See Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998).

We later affirmed the denial of Rule 37 relief. *See Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002). In 2005, the federal district court stayed Kemp's habeas case so he could return to state court to exhaust ineffective assistance claims. During the stay, Kemp filed a successive Rule 37 petition. We dismissed for lack of jurisdiction because the mandate had not been recalled. In 2010, we denied his motion to recall the mandate. Later that year, we denied by syllabus entry his request to reinvest jurisdiction in the circuit court for coram nobis relief. In that request, Kemp alleged the prosecution withheld evidence about Becky's medical and psychiatric history. He also alleged that the prosecution withheld collateral details of Stuckey's criminal convictions occurring after trial and before resentencing.

Kemp returned to federal court. He claimed that in 2013, he was given prosecutor notes that indicated the State gave false information and withheld evidence. According to

the notes, Becky stated Wayne had been "messing" with Kemp on the night of the murder and had a pistol, which he planned to use to scare Kemp if he returned. Kemp also claimed it showed there was a rifle in the trailer that did not belong to him. The federal district court concluded Kemp failed to demonstrate facts sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found him guilty absent the constitutional error. *See Kemp v. Kelley*, No. 5:03-cv-55-DPM, 2015 WL 5842538 (E.D. Ark. Oct. 6, 2015). The court observed that: (1) whether the group provoked Kemp was immaterial given the time Kemp had to cool off before returning to murder everyone; (2) sufficient evidence supported guilt even without Becky's testimony; and (3) this court previously considered the issue of another weapon and determined it would not have changed the outcome. *Id.* The federal district court later denied Kemp's request for a second stay in order to exhaust the prosecutor note claim in state court, holding that Kemp had not diligently pursued the claim and that it lacked factual merit. *See Kemp v. Hobbs*, No. 5:03-cv-55-DPM, 2012 WL 2505229 (E.D. Ark. June 28, 2012). The Eighth Circuit affirmed. *See Kemp v. Kelley*, 924 F.3d 489 (8th Cir. 2019).

It is with this background in mind that we turn to Kemp's second petition to reinvest jurisdiction in the circuit court to pursue coram nobis relief.

II.

A petition like Kemp's must surmount a high bar. A writ of error coram nobis is an extraordinarily rare remedy. Indeed, it is more known for its denial than its approval. *See Newman v. State*, 2009 Ark. 539, at 4–6, 354 S.W.3d 61, 65. Under established precedent, coram nobis proceedings are attended by a strong presumption that the conviction is valid.

Id. The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Id.* It functions to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition had it been known to the circuit court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Id.* Where the writ is sought after judgment has been on affirmed on appeal, the circuit court may entertain the petition only after this court grants permission. *Id.* We will do so only when it appears that the proposed attack on the judgment is meritorious. *Id.* In making such a determination, we look to the reasonableness of the allegations within the petition and to the existence of the probability of the truth thereof. *Id.*

The writ is available only to address errors falling within specific categories including, as relevant here, material evidence withheld by the prosecution. *See Ventress v. State*, 2015 Ark. 181, at 2, 461 S.W.3d 313, 315 (per curiam). This category is consistent with the violation of a defendant's right under *Brady v. Maryland*, 373 U.S. 83, to be shown exculpatory evidence that is in the prosecution's possession. *See Howard v. State*, 2012 Ark. 177, at 8, 403 S.W.3d 38, 44. There are three elements of a Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Id.*

Kemp claims the writ is warranted to address four issues. Each issue is based on alleged *Brady* violation. First, he points to the prosecutor's note discovered in 2013 regarding Mahoney's conversation with Wayne in the time between Kemp's departure and return.

Second, Kemp learned in 2013 that a rifle was purportedly discovered in the trailer after the crime scene was processed. Third, Kemp reasserts his 2010 claim that prosecutors failed to obtain and disclose records regarding Becky's emergency psychiatric care before and during trial. And last, Kemp reasserts the prosecutor's failure to disclose collateral details regarding Stuckey's criminal convictions occurring after trial but before resentencing.

The State opposes reinvestiture on two bases. It first contends that Kemp failed to diligently pursue his claims. Even if the petition were timely, the State argues that the claims within the petition are wholly without merit. Because we resolve this matter on the merits, and agree with the State, we need not consider whether Kemp diligently pursued his claims.

A.

We begin with Kemp's argument regarding statements that Becky made during an interview with the prosecutor. According to the prosecutor's notes, Wayne had shown Becky a pistol and told her that he planned to use it to scare Kemp should he return. The note specifically stated that "Wayne showed Becky a pistol that he had + said he would use it to scare Tim." According to Kemp, this statement corroborated his version of events leading up to the murders that night. Even assuming the prosecution wrongfully failed to disclose this evidence, there is no prejudice under *Brady* and no reasonable probability that the outcome of the trial would have been different had defense counsel been provided with the evidence.

The prosecutor's note, at most, suggests that Becky saw a gun and was aware of a plan to "scare" Kemp should he return during a time that Kemp was not at the trailer. There is no suggestion in the notes that Kemp was indeed threatened with or saw a gun prior to

murdering his victims. Even so, the jury was well aware that a pistol not belonging to Kemp was at the crime scene. The unfired .32 caliber pistol found between Sonny and Wayne's bodies was clear evidence that a gun, other than the murder weapon, was at the trailer that night. The jury was allowed to weigh that evidence against Kemp's claims of self-defense. It was also entitled to weigh the presence of that pistol against Becky's testimony that she had not seen a gun during the night. Based on the record, the alleged failure of the prosecution to disclose this note does not warrant granting Kemp's petition. There is no reasonable probability that Wayne's out of court statement to Becky during a period when Kemp was indisputably not at the trailer would have changed the outcome of his trial.

B.

For his second claim, the basis of which he discovered in 2013, Kemp asserts that a rifle found in Wayne's trailer by his girlfriend after investigators had processed the crime scene was suppressed evidence supporting his self-defense claims. This alleged information was discovered following a dispute between Wayne's ex-wife and his fiancée. After the murder, the fiancée claimed to have found a rifle in his trailer that she subsequently sold. In 2013, the fiancée provided Kemp with a declaration. However, there is no indication of how the declaration came to be created. Nor is there any explanation by the fiancée as to where in the trailer she found the rifle. Even assuming the veracity of the declaration, the mere existence of a rifle in the trailer does not implicate its use during the night of the crime.

Significantly, the record shows that officers searched the areas of the trailer where the murders occurred. Additionally, the investigator testified that he looked through the trailer for other weapons but did not find anything. If Kemp's recollection of events to

police were correct, a rifle would have been found in the area where the murders occurred. Four of the five individuals in the trailer were dead and could not have moved a rifle. There is no evidence that Becky hid or removed a rifle in the time between the murders and when police arrived. Indeed, she remained on the phone with the dispatcher until the police showed up. Thus, even if a rifle was somewhere in the trailer, there is no evidence to support the claim that it was present during the crime or used to threaten Kemp at any time.

C.

Kemp next claims he was deprived of access to Becky's medical and psychiatric records regarding PTSD treatment she received in the time leading up to his trial. He also claims he was wrongfully deprived of information regarding the involvement of the victim-witness unit of the prosecutor's office with helping her obtain that treatment. As noted above, this is not the first time Kemp has raised this claim to this court. It was first presented over a decade ago in his 2010 coram nobis petition. Once again, this claim fails to meet the standard for reinvestiture.

Kemp contends this information would have been favorable impeachment evidence. Though Becky testified that she had been in rehab since the murders, Kemp points out the prosecution did not disclose that Becky had been in rehab the day before her testimony. There is no evidence that the State had Becky's records. Had it obtained the records, there is nothing to suggest the records could have possibly benefitted Kemp. Indeed, Becky's care was sought specifically because of the resulting trauma from surviving the murders that night. If anything, this evidence could have been helpful to the State's victim-impact case. Moreover, even if the records could have been used to impeach Becky, there is no

reasonable chance that the records would have resulted in a different outcome given the overwhelming evidence of guilt.

D.

For his final point, Kemp contends that reinvesting jurisdiction is warranted because the prosecution downplayed Stuckey's legal troubles occurring between the 1994 trial and the 1997 resentencing. He suggests that Stuckey sugared his testimony at resentencing to please the prosecutor and secure lighter consequences for his criminal behavior. Had the prosecution disclosed the collateral details of Stuckey's criminal history, Kemp argues he could have attacked Stuckey's credibility before the jury. This argument is not new. Like the claim above, this argument was raised and rejected in Kemp's 2010 coram nobis petition. We are once again unpersuaded.

A comparison of Stuckey's testimony during trial and resentencing reveals no meaningful difference. Indeed, his testimony at both trials was virtually identical except for two statements. During both trials, Stuckey testified that Kemp showed up to his house in the middle of the night, awakened him, and borrowed gas money to get out of town. For the next hour or so, before police arrived, Kemp recounted the horrific details of the quadruple homicide he had committed earlier that night. During resentencing, Stuckey stated for the first time that Kemp characterized Wayne's falling to the ground "like a sack of taters" after Kemp shot him. He also stated that once police arrived, Kemp handed back the gas money he had borrowed and walked outside.

Kemp's effort to build an argument for the writ around these two statements is futile. They do not contradict any of his testimony and do not expand beyond what he testified to

during the first trial. The addition of these two statements does not support Kemp's claim that Stuckey expanded his testimony at resentencing as a means to please the prosecutor and receive favorable treatment for his recent legal issues. Simply put, disclosure of the collateral details surrounding Stuckey's criminal convictions do not create a reasonable probability that the jury would have reached a different conclusion during the resentencing trial. Reinvestiture is not warranted on this point.

III.

We decline to reinvest jurisdiction in the circuit court so that Kemp may pursue a writ of error coram nobis. Contrary to Kemp's view, there is no reasonable probability that disclosure of the evidence to the defense would have resulted in a different outcome. As a result, the proposed attack on the judgment is wholly without merit.

Petition denied.

KEMP, C.J., and HUDSON, J., concur.

COURTNEY RAE HUDSON, Justice, concurring. I agree with the majority that Timothy Wayne Kemp's application for coram nobis relief may be denied based on its lack of apparent merit, and I fully join that opinion. I write separately, however, to also emphasize Kemp's lack of diligence in pursuing the present application. Although there is no specific time limit in seeking a writ of error coram nobis, we have held that due diligence is required in making an application for relief, and in the absence of a valid excuse for the delay, the petition will be denied. *Scott v. State*, 2017 Ark. 199, 520 S.W.3d 262; *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). Due diligence requires that (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise

of due diligence, presented the fact at trial; and (3) upon discovering the fact, the defendant did not delay in bringing the petition. *Scott*, *supra*.

Kemp admits that he discovered the facts giving rise to his current claims in 2013 while pursuing discovery in his federal habeas proceedings. However, he then waited seven years to bring the claims before this court. The State asserts that Kemp's pursuit of his claims in federal court does not excuse his seven-year delay and that his application should be denied on this basis.

I agree that Kemp has failed to demonstrate diligence. Kemp's petition and attached exhibits support his position that he was not aware of the new facts until 2013. However, he then purposely delayed filing his second application for error coram nobis relief until 2020, after the conclusion of his federal habeas proceedings and associated appeals. Kemp's September 2014 reply in federal district court recognized that a second application in state court was an available and potentially meritorious remedy for his *Brady* claims. Nonetheless, even after the district court dismissed his habeas petition, he instead chose to appeal rather than return to state court.

Kemp cites our decision in *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61, to support his contention that the federal litigation excused his delay. In *Newman*, we rejected the State's argument that the petitioner lacked diligence when he had chosen to first seek relief in federal court. However, we based our decision on the unique facts in that case and did not announce a blanket exception to the diligence requirement for those petitioners involved in federal litigation. The petitioner in *Newman* had meritorious claims of incompetence and had not cooperated with appointed counsel in postconviction

proceedings in state court, issues that are not present in Kemp's case. *Newman*, 2009 Ark. 539, at 11–12, 354 S.W.3d at 67–68. As Kemp asserts, we also relied on the State's inconsistency in *Newman* by first maintaining that state-court remedies were not available to Newman and then later arguing that the state-court petition should have been filed earlier. *Id.* at 12, 354 S.W.3d at 68. While Kemp claims that the State made the same inconsistent arguments here, it is clear from his pleadings in federal court that he was aware he could seek further state-court relief but chose not to do so until years later. Accordingly, the situation in *Newman* is distinguishable, and this court could have chosen to deny Kemp's application based on his lack of diligence rather than on its lack of apparent merit. *See also Pinder v. State*, 2012 Ark. 45, at 4 (per curiam) (stating that the petitioner cited "no authority in support of the proposition that pursuing other types of postconviction relief, such as a petition under Rule 37.1 or a petition for writ of habeas corpus in federal court, will excuse a delay in pursuing coram nobis relief."). Our coram nobis jurisprudence requires that a petitioner not delay in bringing claims to this court's attention, and I caution Kemp, as well as future petitioners, that pending federal proceedings will not necessarily excuse such a delay.

KEMP, C.J., joins.

Julie Pitt Vandiver, Ass't Fed. Pub. Def., for appellant.

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

SUPREME COURT OF ARKANSAS

No. CR-98-463

	Opinion Delivered: October 7, 2021
TIMOTHY WAYNE KEMP PETITIONER V. STATE OF ARKANSAS RESPONDENT	PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS [PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION NO. 60CR-93-2903] HONORABLE MARION HUMPHREY, JUDGE PETITION DENIED.

COURTNEY RAE HUDSON, Associate Justice

Petitioner Timothy Wayne Kemp has filed his second application to reinvest jurisdiction in the Pulaski County Circuit Court to consider a petition for writ of error coram nobis. Kemp petitions for relief in both CR-95-549, his first direct appeal from his capital-murder convictions and death sentences, and CR-98-463, his second direct appeal following the resentencing hearing. *See Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996) (CR-95-549); *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998) (CR-98-463). Kemp's petitions in both cases are identical. For the reasons stated in our separate opinion issued today in *Kemp v. State*, 2021 Ark. ___, CR-95-549, we also deny his petition in the current case.

Petition denied.