

No. 21-6804

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 Supreme Court of Arkansas**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether 28 U.S.C. § 1257(a) provides this Court with jurisdiction to review the Arkansas Supreme Court's decisions denying petitioner Timothy Kemp permission to file a petition in state trial court challenging criminal judgments that were "final" more than two decades ago.

Whether the Arkansas Supreme Court's decisions denying Kemp permission to file a petition in state trial court claiming that the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), failed to comply with the requirements for analyzing a *Brady* claim in a capital case under *Cone v. Bell*, 556 U.S. 449 (2009).

LIST OF RELATED PROCEEDINGS

State of Arkansas v. Timothy Wayne Kemp, Pulaski County Circuit Court Case No. 60CR-93-2903 (judgment of conviction entered Dec. 5, 1994)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-95-549 (opinion affirming in part and reversing and remanding in part issued Apr. 22, 1996)

Timothy Wayne Kemp v. State of Arkansas, United States Supreme Court Case No. 96-5890 (petition for writ of certiorari denied Nov. 12, 1996)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-95-549 (opinion recalling and staying mandate issued Dec. 16, 1996)

State of Arkansas v. Timothy Wayne Kemp, Pulaski County Circuit Court Case No. 60CR-93-2903 (judgment of conviction entered Nov. 5, 1997)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-98-463 (opinion affirming issued Nov. 19, 1998)

Timothy Wayne Kemp v. State of Arkansas, United States Supreme Court Case No. 98-8128 (petition for writ of certiorari denied Apr. 19, 1999)

State of Arkansas v. Timothy Wayne Kemp, Pulaski County Circuit Court Case No. 60CR-93-2903 (order denying post-conviction relief entered Oct. 27, 1999)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-00-482 (opinion remanding for additional findings issued Nov. 29, 2001)

State of Arkansas v. Timothy Wayne Kemp, Pulaski County Circuit Court Case No. 60CR-93-2903 (amended order denying post-conviction relief entered Jan. 17, 2002)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-00-482 (opinion affirming denial of post-conviction relief issued May 16, 2002)

State of Arkansas v. Timothy Wayne Kemp, Pulaski County Circuit Court Case No. 60CR-93-2903 (order denying successive petition for post-conviction relief entered Sept. 30, 2008)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-09-77 (opinion dismissing appeal from denial of successive petition for post-conviction relief issued Dec. 17, 2009)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-00-482 (order denying motion to recall mandate entered Mar. 1, 2010)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-95-549 (order denying petition to pursue writ of error coram nobis entered Sept. 30, 2010)

Timothy Wayne Kemp v. Wendy Kelley, United States District Court for the Eastern District of Arkansas Case No. 5:30-CV-55 (judgment denying habeas petition entered Oct. 6, 2015)

Timothy Wayne Kemp v. Wendy Kelley, United States Court of Appeals for the Eighth Circuit No. 15-3849 (judgment and opinion affirming denial of habeas petition issued May 16, 2019)

Timothy Wayne Kemp v. Dexter Payne, United States Supreme Court Case No. 19-7476 (petition for writ of certiorari denied May 18, 2020)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-95-549 (order and opinion denying petition to pursue writ of error coram nobis issued Oct. 7, 2021)

Timothy Wayne Kemp v. State of Arkansas, Arkansas Supreme Court Case No. CR-98-463 (order and opinion denying petition to pursue writ of error coram nobis issued Oct. 7, 2021)

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INTRODUCTION

In a single night, nearly 30 years ago, petitioner Timothy Kemp gunned down four people: Wayne Helton, Robert “Sonny” Phegley, Cheryl Phegley, and Richard “Bubba” Falls. And Kemp would have murdered a fifth victim, his girlfriend, Becky Mahoney, but she managed to escape by hiding in a closet. Kemp was convicted of four counts of capital murder and sentenced to death on each count. The first judgment was final in 1996, and, after resentencing on three of the four counts, the second judgment was final in 1998. His petition seeks to review those long final judgments.

Kemp has never denied that he committed the murders. He claims, however, that the Arkansas Supreme Court erred by denying his 2020 identical petitions to reinvest jurisdiction in a trial court to consider a state-law petition for a writ of error *coram nobis*. Kemp’s petitions were based on a statement that Becky made to a prosecutor about a pistol that Wayne had shown her and said he would use to scare Kemp if Kemp—who previously had been asked to leave, and left, a gathering at the trailer where the murders occurred—returned. That statement wasn’t disclosed to Kemp before trial, and he argues that violated *Brady v. Maryland*, 373 U.S. 83 (1963). But that statement was hardly newly discovered at the time of Kemp’s filing his *coram nobis* petitions. Instead, Kemp had known about it for over seven years, and the Arkansas Supreme Court rejected his attempt to employ it to reopen his decades-old final judgments.

Kemp’s petition claiming that the Arkansas Supreme Court wrongly failed to conduct a “full review” of the merits of his penalty-phase *Brady* claim in a capital case

under *Cone v. Bell*, 556 U.S. 449 (2009), should be denied. The Court lacks jurisdiction to consider his petition because the Arkansas Supreme Court's decisions denying his petitions seeking reinvestment in the trial court are not final judgments. Even if they were final judgments, the question he wants this Court to answer is not presented here because, as he admits, the gatekeeping analysis that the Arkansas Supreme Court conducted was not a resolution of the merits of his *Brady* claim. And, even if it were, that analysis was not faulty under *Cone*. Review should be denied.

JURISDICTION

Although Kemp's petition purports to present a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, this Court does not have jurisdiction to consider the claim under 28 U.S.C. § 1257(a). The Arkansas Supreme Court's decisions denying Kemp's petitions to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis are not final judgments subject to this Court's certiorari review.

STATEMENT

1. Kemp's initial trial was held in the fall of 1994. At that trial, Becky, Kemp's live-in girlfriend of eight years, testified that, on October 4, 1993, she and Kemp had been riding around in Kemp's truck and drinking beer, until they stopped at Wayne's trailer. (TR 1380, 1392-94, 1420)¹ In addition to Wayne, also present at the trailer were Sonny, Cheryl, and Bubba, who Kemp and Becky did not know. (TR 1394-95, 1503) They all drank beer and danced as Sonny played the guitar. (TR 1395-96)

¹The trial record, TR, is on permanent file with the Clerk of the Arkansas Supreme Court as *Kemp v. State*, No. CR-95-549.

After Kemp and Becky had been at the trailer for a few hours, Kemp became angry at her, apparently because she was dancing with the others, and wanted to leave. (TR 1396-97, 1414) She refused to accompany him because she was afraid of him, and she told him to leave. (TR 1397, 1414) After Cheryl also made multiple requests for Kemp to leave, he finally did. (TR 1397) Shortly thereafter, someone knocked on the trailer door; Becky feared it might be Kemp. (TR 1398) As she stood in the hallway between the kitchen and the living room, she heard a gun going off and saw Bubba fall. (TR 1398-99) Cheryl then fell, yelling, “[O]h, my God. Oh, my God.” (TR 1399) Becky ran to a bedroom and hid in the closet where she heard more gunfire. (TR 1399) When the gunfire ended, Becky emerged from the closet and went into the living room where she saw the three men on the floor. (TR 1399-1400) She called 911, and, while on the telephone, she heard Kemp’s truck “start up.” (TR 1400-01) She had not heard the truck before the knock on the door. (TR 1400)

While Becky estimated that she and Kemp had consumed close to a case of beer each over the course of the day, with Kemp drinking more when they arrived at Wayne’s, she did not consider Kemp drunk when he left the trailer, as it was not unusual for him to drink a lot of beer in a day. (TR 1401-02, 1408, 1410-11, 1437-38) Becky testified that she did not see a gun or a pistol, including at the time when Kemp left, or see anyone pull a pistol on Kemp. (TR 1415) And, she stated that no one ever went outside the trailer with Kemp. (TR 1415, 1432)

As of the date of the trial, Bill Stuckey had been Kemp’s best friend for seven or eight years. (TR 1547) Bill testified that, on the night of the murders, Kemp arrived

at his home around 2:00 a.m., asking to borrow \$20 for gas to leave town. (TR 1548-49) Kemp stated he needed to leave town because “he had shot Wayne and some other people[]” at Wayne’s trailer, including Sonny, Sonny’s daughter, and “some other guy that he didn’t know[,]” who “was just in the wrong place at the wrong time.” (TR 1549) Kemp recounted that he had killed the victims because they had threatened him and “r[u]n him off[.]” kept Becky at the trailer, and would not let her leave with him. (TR 1549-50, 1559) Kemp explained that he then went home, got his gun, and went back to the trailer, parking down the road and walking approximately 50 yards through the woods to reach it. (TR 1550-51)

Upon reaching the trailer, Kemp knocked on the door, and when Wayne answered, Kemp shot him. (TR 1551) Kemp then entered the trailer and shot the other victims. (TR 1551) When Cheryl tried to escape into one of the bedrooms, Kemp followed her down the hall and shot her again. (TR 1551) Cheryl told Kemp that she was afraid that she was going to die, and Kemp “assured her that, yes, she was going to die.” (TR 1552) Kemp advised Bill that he was mad at Cheryl because she “started all the argument[,]” by telling Kemp that he needed to leave. (TR 1552) Kemp told Bill that, as he left the trailer, he could hear the victims “gasping for breath[.]” (TR 1552) Although Bill could tell that Kemp had been drinking, he did not believe Kemp was drunk that night. (TR 1552)

When officers arrived at Wayne’s trailer, they found Wayne and Sonny in the living room near the front door, Bubba on the opposite side of that same room, and Cheryl in a bedroom. (TR 1381, 1446-48, 1457) In addition to the victims, officers

found 12 spent Remington brand .22 caliber shell casings throughout the trailer and a .32 caliber pistol with seven live rounds in its clip—none in the cylinder—lying near the bodies of Wayne and Sonny. (TR 1450, 1453-54, 1457, 1461-64, 1467, 1472, 1578-79, 1582-83) The 12 casings matched exactly the number of times the victims were shot, with Cheryl shot five times (including twice in the back), Wayne shot four times (including once in the forehead and once in the mouth, point blank), Sonny shot twice, and Bubba shot once. (TR 1494, 1496, 1504, 1510-11, 1517-18) None of the casings found at the scene could have been fired from the .32 caliber pistol found in the living room; the pistol would have ejected casings had it been fired. (TR 1582, 1587)

Approximately two and a half hours after the shootings, law-enforcement officers located Kemp at Bill's home. (TR 1351, 1479) After being advised of his rights, Kemp told an officer that "these people beat his ass and threatened him and he was just defending himself." (TR 1386-88, 1480) Officers recovered an empty Remington .22 caliber shell box and a Ruger .22 caliber semi-automatic rifle—which Becky identified as Kemp's—in Kemp's mother's home, where he and Becky also lived. (TR 1403, 1405, 1482-84, 1486-88, 1577, 1579-80) They also recovered a box of .22 shells from the front seat of Kemp's truck. (TR 1567, 1570) Analysis of the 12 casings found at the scene and of damaged bullets recovered from the bodies of Cheryl, Sonny, and Bubba proved they were fired from Kemp's .22 caliber rifle. (TR 1497, 1502, 1579, 1585-86, 1589, 1590-91) Kemp did not testify at trial or, understandably, ever dispute that he shot the victims. He argued, however, that he mistakenly believed he was acting in self-defense, which reflected a lesser intent than capital murder. (TR 1295-

98, 1746-52) The jury found him guilty of four counts of premeditated and deliberated capital murder. (TR 1729, 1733, 1771-72)

In the sentencing phase, the State sought the death penalty for each count based on two aggravating circumstances. (TR 1932) Kemp's evidence in mitigation included testimony from his mother that he had grown up with an abusive father who served him alcohol at a young age, and from a psychologist who diagnosed him with substance abuse and a personality disorder, which caused him to have poor impulse control, to lack empathy, to feel threatened easily, and to be overly sensitive to slights and insults. (TR 1882-87, 1890-91, 1900-11) Relying on that testimony and the evidence of his drinking the day of the murders, his claim that the victims threatened him, and his allegedly "see[ing]" the pistol found near Sonny and Wayne, he argued that he acted under extreme emotional distress and believed he was acting in self-defense when he killed the victims. (TR 1950-52) The State disputed those claims, arguing that there was no evidence of an extreme emotional disturbance, particularly given the deliberateness of his actions, or that he acted in fear or self-defense, as he returned to the scene in order to kill the victims. (TR 1941-42, 1944, 1958-60)

The jury found both aggravating circumstances for each murder. (TR 1965, 1969, 1973, 1977) It unanimously found two mitigating circumstances for each murder—that Kemp grew up in an environment of abuse and alcoholism and that his father provided an example of extreme violent reactions to situations. (TR 1966, 1970, 1974, 1978) At least one juror, but not all, concluded with respect to each of the murders

that Kemp probably (1) committed the murders while under extreme mental or emotional disturbance, (2) believed he was acting in self-defense, and (3) had abilities that would allow him to be productive in prison. (TR 1966, 1970, 1974, 1978) The jury concluded that the aggravators outweighed the mitigators and sentenced him to death for each murder. (TR 1967, 1971, 1975, 1979) On direct appeal, the Arkansas Supreme Court affirmed all four guilty verdicts and the death sentence for the murder of Bubba Falls, but vacated the other three death sentences after concluding that there was insufficient evidence for one of the aggravators for the three other murders. *Kemp v. State*, 919 S.W.2d 943, 946, 953-55 (Ark. 1996). This Court denied Kemp's petition for a writ of certiorari. *Kemp v. Arkansas*, 519 U.S. 982 (1996).

2. At the resentencing held in October 1997, the State asserted only one aggravating circumstance for each murder. (SR 1156, 1163)² The evidence presented at the resentencing largely tracked that presented at the original trial with regard to the victims Wayne, Sonny, and Cheryl. That evidence included Becky's testimony that she never saw anyone that night with a gun and law-enforcement officers' testimony that a .32 caliber pistol was found near Wayne and Sonny and that Kemp claimed to have been beaten by the victims. (SR 914-15, 934, 951, 983-84) There were, however, differences. Those differences included Becky's testifying that, as Kemp was leaving Wayne's trailer alone, he "hollered" that she'd "be sorry for not leaving." (SR 885, 907, 910) Bill newly remembered that Kemp told him Wayne fell

²The resentencing record, SR, is on permanent file with the Clerk of the Arkansas Supreme Court as *Kemp v. State*, No. CR-98-463.

“[l]ike a sack of taters[]” when Kemp shot him as he opened the trailer door. (SR 1034, 1039) When asked on cross-examination whether Kemp had told him he'd been threatened with a gun, Bill responded, “I can't remember that.” (SR 1039) Bill as well as officers who talked to Kemp at 2:20 a.m. and shortly after 5:00 a.m. all testified that they did not see any injuries on Kemp. (SR 958, 972, 974, 984-85, 1040)

The most notable difference was Kemp's introduction of the statement he made to Pulaski County Sheriff Detective Terry Ward after his arrest providing his own jumbled narrative of the night's events. (SR 929-30, 957-58) He told Ward that, when he wanted to leave Wayne's trailer originally, “just about all of them” pushed him, ganged up on him, and threatened him, which scared him. (SR 962) After leaving, he claimed he drove around the block and hoped that, when he returned, Becky would be waiting outside for him. (SR 968) Instead of Becky's being outside, however, an unidentified group, which apparently included Sonny and Wayne, was there. (SR 962-63, 968) Kemp told Ward that they had been threatening to beat his ass and kill him and to take his truck. (SR 962-63) According to Kemp, after this, Sonny went inside the trailer and came back out with a “damn gun.” (SR 962-63) When pressed as to what kind of gun it was, Kemp first said he had “no idea.” (SR 963) When specifically asked whether it was a pistol, he replied that it “was a rifle.” (SR 963)

Kemp told Ward that Wayne directed Sonny “to take [the rifle] in the house . . . and that would be the end of it[.]” (SR 963) At that point, however, according to Kemp, “they just kept on instigating,” with it “getting worse and worse” and with them “cussing” and “threatening [him] and doing this and that[.]” (SR 963) Kemp

then described how “they go letting me go but, you know, they kept coming outside, you know, and I was gonna leave. . . . Well, they kept on threatening me, you know, like they gonna kill me, you know, and taking my truck. And they didn’t have to, you know, listen to any of this, you know. And so, hell, I—hell, I pulled my gun out.” (SR 963) According to Kemp, two or three of them were still outside when he pulled out his own “gun,” a .22 rifle with a 30-round magazine that had been in his truck. (SR 963-64, 970)

Kemp was unclear how the altercation moved inside the trailer, only that Wayne “backed up in the damn door,” and “Sonny still had the damn gun[]” and “was threatening [him] with it.” (SR 964) When Wayne tried to grab Kemp’s gun and push him around in the doorway, with the others by that time “back up in the trailer[,]” he started shooting, shooting Wayne first. (SR 964, 966) Kemp did not remember who he shot next, stating that he was “just firing[]” and that were times when he “blacked out.” (SR 964-66, 969) He specifically stated that Cheryl, whose name he did not know, was in the kitchen when the shooting started, but he did not remember shooting her or going down the hallway, claiming that he “blacked out.” (SR 965) Ward, who was in charge of processing the crime scene, did not find a rifle there. (SR 951-52, 972)

Kemp did not dispute the aggravator. (SR 850, 1179) Relying specifically on the testimony of his mother and the psychologist and the evidence of his drinking, however, he again argued that he acted under extreme emotional distress and believed he was acting in self-defense when he killed Wayne, Sonny, and Cheryl. (SR 1180-

83, 1186-87) The State again disputed these assertions, particularly focusing on Kemp's claim that he believed he was acting in self-defense. In doing so, the prosecutor noted that there was no evidence of self-defense "whatsoever[]" and that Kemp's statement to Detective Ward was "a pack of lies[.]" particularly the claim that Wayne or Sonny had pulled a rifle on him when a rifle had not even been found at the trailer. (SR 1167, 1190) The lies told within hours of the murders, the prosecutor added, reflected Kemp's lack of remorse. (SR 1167) Further demonstrating that lack of remorse, the prosecutor argued, was how Kemp had recounted the events to Bill, including stating that Wayne "fell like a sack of taters." (SR 1171)

Given the lack of dispute on the issue, the jury found the aggravating circumstance existed with respect to each murder. (SR 1197, 1201, 1205) The jury did not unanimously find any mitigators, while one or more jurors concluded that each murder probably was committed while Kemp was under an extreme emotional or mental disturbance, that he had abilities that would allow him to be a productive member of society even in prison, and that he grew up in an environment of alcoholism and abuse. (SR 1198, 1202, 1206) Jurors also unanimously concluded that there was some evidence to support the circumstance that each murder had been committed while Kemp's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law was impaired by mental disease or defect, intoxication, or drug abuse, but that this circumstance was not mitigating. (SR 1198, 1202, 1206) Ultimately, the jury concluded that the aggravator outweighed any mitigating circumstances and sentenced Kemp to death for each of the murders. (SR 1196, 1199, 1203,

1207) The Arkansas Supreme Court affirmed on direct appeal, *Kemp v. State*, 983 S.W.2d 383 (Ark. 1998), and this Court denied Kemp's petition for a writ of certiorari. *Kemp v. Arkansas*, 526 U.S. 1073 (1999).

3. Kemp subsequently filed a petition for post-conviction relief in the state trial court, which was denied after a hearing. Pertinent here, Kemp argued on appeal that the trial court erred by rejecting his claim that his counsel was ineffective for failing to investigate who owned the gun found at the crime scene that did not match the weapon that was used to commit the murders. *Kemp v. State*, 74 S.W.3d 224, 227-28 (Ark. 2002). He claimed that ownership of the gun was relevant to his claim of imperfect self-defense—that, because of his intoxication, he thought he was acting in self-defense—which he alleged was the heart of his mitigation case. *Id.* at 227. The court affirmed the trial court's rejection of the claim, concluding that “determining who owned the weapon would not have changed the outcome of the trial.” *Id.* at 228. Explaining this conclusion, the court noted the jury knew a gun was found at the scene that did not match the weapon that was used to commit the murders—facts from which it could have concluded that one of the victims had a gun, forcing Kemp to use his weapon in self-defense. *Id.*

4. Following the denial of his state post-conviction petition, Kemp filed a petition for a writ of habeas corpus in federal district court in early 2003. *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #1. Those proceedings were stayed for almost six years—without Kemp's initiating any proceedings for three years—to allow Kemp to pursue state remedies. In December 2010, however, Kemp returned to federal court, where

he filed a first amended habeas petition. *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #36. After discovery was conducted on some of his claims, he filed a second amended petition in October 2013. There, he alleged that he learned through discovery that Becky had told the prosecutor that—after Kemp left the trailer without her—Wayne had showed her a pistol and stated that he planned to use it to scare Kemp if he returned. *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #81 at 69-72, 149-50 (claims IV.5.A. and IX.7.A.). Kemp alleged that Becky’s statement was material exculpatory evidence with regard to both his guilt and his punishment. *Id.*

The federal district court concluded that Kemp was not entitled to a hearing on the claims concerning Wayne’s plan to scare him with a pistol because he did not develop the claims in state court and did not present new facts establishing by clear and convincing evidence that no reasonable juror would have found him guilty but for the constitutional error. *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #107 at 5-8, 13-14 (denying hearing on claims IV.B. and IX.B.). After conducting an eight-day evidentiary hearing on other claims, the district court denied him relief. In its order, it rejected the claims concerning Becky’s statement about Wayne’s possession of a pistol as procedurally defaulted, noting that the crime-scene materials and Bill’s testimony about Kemp’s admissions “were the case.” And, it denied his request for a stay to return to state court to seek a writ of error coram nobis to pursue them because, among other reasons, the claims were “plainly meritless.” *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #150 at 17-22, 24-25, 49-50 (claims IV.B. and IX.B.). Given these conclusions, the district court unsurprisingly denied Kemp’s motion to

expand the certificate of appealability to include these claims on appeal. *Kemp v. Kelley*, No. 5:03-cv-55 (E.D. Ark.), Doc. #154 at 2-3.

Undeterred, Kemp sought expansion of the certificate of appealability from the Eighth Circuit to include his claims that the prosecution's failure to disclose Becky's statement that Wayne showed her a pistol and would use it to scare Kemp violated his constitutional rights. *Kemp v. Kelley*, No. 15-3849, Entry ID No. 4355115, at 5, 12-13, 18-21 (8th Cir. Jan. 12, 2016). The Eighth Circuit denied the request. *Kemp v. Kelley*, No. 15-3849 (8th Cir. Apr. 22, 2016). After the Eighth Circuit affirmed the district court's denial of his habeas petition, Kemp sought a writ of certiorari from this Court. In his petition, he again alleged that a certificate of appealability should have been issued on his claims that the prosecution committed misconduct by not disclosing Becky's statement to the prosecutor. *Kemp v. Payne*, No. 19-7476, Petition for Writ of Certiorari, at 14-15, 32-37 (Jan. 27, 2020). The Court denied his petition on May 18, 2020. *Kemp v. Payne*, 140 S. Ct. 2770 (2020).

5. Thereafter, in July 2020—some seven years after he discovered that the prosecution withheld Becky's statement—Kemp first sought state-court relief on that ground. He did so by filing identical petitions in his long final direct-review cases, asking the Arkansas Supreme Court to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis. His petitions argued that, by withholding the statement and other evidence, the prosecution violated *Brady*, undermining confidence in both the determination of his guilt and punishment. *Kemp v. State*, Nos. CR-95-549 and CR-98-463, Pet. at 10-13, 21-27 (Ark. Jul. 23, 2020). With respect

to punishment, he argued that Becky's statement would have aided his claim of self-defense and prevented the prosecution from capitalizing on its nondisclosure by arguing that there was an ambush, rather than a confrontation, when he returned to the trailer and that he lacked remorse. *Id.* at 25-27.

In subsequent briefing, Kemp stressed that, when deciding whether to grant a discretionary petition to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis, the Arkansas Supreme Court was not itself ruling on the merits of his claims. Rather, he emphasized, the Court was making what amounted to a threshold assessment of his claims, with the "ultimate merits of the claims[]" to be determined by the circuit court upon reinvestment. *Kemp v. State*, Nos. CR-95-549 and CR-98-463, Br. of Petitioner at 15-16 (Ark. Jan. 15, 2021); *see also id.* at 16 (asserting that "the central question . . . is reserved for the circuit court or this Court on review of the circuit court's decision[;]" citing *Howard v. State*, 403 S.W.3d 38, 46 (Ark. 2012)). And, in reply, he asserted that his claims of prejudice "need be demonstrated only after a hearing[]" in the trial court after reinvestment. *Kemp v. State*, Nos. CR-95-549 and CR-98-463, Reply Br. of Petitioner at 6 (Ark. Jun. 24, 2021).

After oral argument, the Arkansas Supreme Court denied Kemp's petitions. In case number CR-95-549, in which the court had affirmed Kemp's four capital-murder convictions and death sentence for the murder of Bubba Falls, the court began its analysis with the proposition that a trial court can entertain a petition for a writ of

error coram nobis after a judgment has been affirmed on appeal only after the appellate court grants permission and only when it appears that the proposed attack on the judgment is meritorious. Pet. App. A. at 6. While noting that a claim that material evidence was withheld by the prosecution—which it noted is consistent with a *Brady* claim—is a ground for issuance of the writ, it nonetheless refused to allow Kemp to proceed in the trial court to pursue it, concluding that there is “no reasonable probability that the outcome of the trial would have been different had [Kemp] been provided with the evidence.” Pet. App. A. at 6-7.

Assuming the prosecution did not disclose Becky’s statement, the court noted it, “at most,” suggested that, when Kemp was gone, she saw a gun and was aware of a plan to scare him should he return. Pet. App. A. at 7. The court emphasized, however, that there was no suggestion “that Kemp was indeed threatened with or saw a gun prior to murdering his victims.” Pet. App. A. at 7-8. Furthermore, the court noted, the jury was well aware that a pistol not belonging to Kemp was found at the crime scene and could weigh that evidence in assessing his claim of self-defense and Becky’s testimony that she had not seen a gun that night. Pet. App. A. at 8. The court thus concluded that there was not a “reasonable probability” that Wayne’s statement to Becky “during a period when Kemp was indisputably not at the trailer would have changed the outcome of his trial.” *Id.* at 8. A concurring opinion, joined by the chief justice, “emphasize[d] Kemp’s lack of diligence” in not pursuing relief for seven years, which, alone, was a ground for denying his petition. Pet. App. A. at 11-13. The court refused Kemp’s request to pursue his claim in the direct appeal of his

resentencing for the murders of Wayne, Sonny, and Cheryl in case number CR-98-463 for the same reasons it denied his petition in case number CR-95-549. Pet. App.

B. His petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. The Court lacks jurisdiction because the decisions below present no final judgments for review.

The Court lacks jurisdiction to consider Kemp's claim that the Arkansas Supreme Court erred by denying his petitions to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis. Jurisdiction is lacking because that court's decisions denying Kemp's extraordinary state-law writ petitions are not final judgments subject to this Court's review. The final state-court judgments here were entered in 1996 and 1998, and this Court already has declined to review them. The Arkansas Supreme Court's refusals, in those long dormant direct-review cases, to authorize any reexamination into the basis of those judgments are not final judgments subject to this Court's review. Rather, the Arkansas Supreme Court's refusals to exercise its discretion to grant permission for a lower state court to reexamine those final judgments simply left the existing judgments in place.

Under 28 U.S.C. § 1257(a), "the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (per curiam). Kemp has the burden of affirmatively establishing this Court's jurisdiction pursuant to that provision, but has failed to do so. *See, e.g., Republic Nat. Gas Co. v. Oklahoma*,

334 U.S. 62, 70-71 (1948) (party invoking Court’s jurisdiction has burden of affirmatively establishing it). He contends simply that the Arkansas Supreme Court entered judgments when it “entered its opinions on October 7, 2021[,]” and, thus, “[t]his Court has jurisdiction under 28 U.S.C. § 1257(a).” Pet. 1. He is wrong. The denials of Kemp’s petitions to reinvest jurisdiction in the state trial court to consider petitions for writs of error coram nobis are not final judgments or decrees in these criminal proceedings.

As this Court repeatedly has observed, in a criminal proceeding, “finality generally is defined by a judgment of conviction and the imposition of a sentence.” *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (cleaned up). In this case, Kemp’s sentences, and hence the judgments, were issued by the state trial court in 1994 and 1997. Those judgments became final for purposes of this Court’s jurisdiction under 28 U.S.C. § 1257(a) when they were affirmed on direct review by the Arkansas Supreme Court in 1996 and 1998. Indeed, Kemp’s petitions to pursue a writ of error coram nobis in the trial court sought permission to file a pleading in the trial court “to secure relief from [the] judgment[s],” and, thus, the Arkansas Supreme Court’s 2021 decisions denying that discretionary relief were not themselves final judgments subject to review under 28 U.S.C. § 1257(a). *Chunestudy v. State*, 633 S.W.3d 324, 326 (Ark. 2021) (explaining function of writ of error coram nobis and that permission must be sought from Arkansas Supreme Court to proceed in trial court after a judgment has been affirmed on appeal); *see also Jenkins v. State*, 265 S.W.2d 512, 513 (Ark. 1954) (per curiam)

(noting that court determines whether leave to pursue error coram nobis in the trial court in “the exercise of its discretion”) (cleaned up).

The denial of Kemp’s petitions seeking to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis allowing him to challenge his judgments of conviction did not modify his final criminal judgments or otherwise reopen them for another round of direct review in the state court or in this Court on discretionary review. *Cf. Jimenez v. Quarterman*, 555 U.S. 113, 120 & n.4 (2009) (holding state court’s order granting motion for out-of-time appeal meant petitioner’s conviction was no longer final for purposes of habeas review, while emphasizing that “the possibility that the state court may reopen direct review does not render convictions and sentences that are no longer subject to direct review nonfinal[]”) (cleaned up); *Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (holding state-court judgment final for purposes of habeas review despite possibility state court might exercise discretion to decline to enforce procedural bar). Consequently, this Court lacks jurisdiction to entertain Kemp’s petition under 28 U.S.C. § 1257(a), and his petition should be denied for this reason alone.

II. The Arkansas Supreme Court’s decisions do not present the question Kemp wants answered.

Kemp asserts that certiorari is warranted to decide whether the Arkansas Supreme Court failed to comply with *Cone* when it allegedly failed to conduct a “full review” of any penalty-phase prejudice he may have suffered from the prosecution’s failure to disclose Becky’s statement. Pet. 8-9. This case does not present that issue.

As a matter of state law, the Arkansas Supreme Court was not adjudicating the merits of Kemp's *Brady* claim when it was deciding whether to grant his petitions to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis. Consequently, *Cone*'s holding concerning "full review" and "full consideration" of the merits of a penalty-phase *Brady* claim simply is not at issue here. 556 U.S. at 475, 476. Thus, Kemp's petition should be denied because his case does not present the question that he wants the Court to answer.

Cone was a capital habeas case under 28 U.S.C. § 2254. There, the Sixth Circuit held that *Cone*'s *Brady* claim was procedurally defaulted, and, in the alternative, that his claim was meritless because the withheld evidence at issue was not material with respect to either his guilt or his punishment. *Cone*, 556 U.S. at 463-64. After concluding that the Sixth Circuit erred in its procedural holding, the Court also addressed that court's merits holdings. *Id.* at 469. It began that analysis by noting that the federal courts' review of *Cone*'s claim was *de novo* because the Tennessee state courts had not analyzed the claim. *Id.* at 472. It then criticized the court of appeals' merits analysis on the grounds that the lower court "did not thoroughly review the suppressed evidence or consider what its cumulative effect on the jury would have been." *Id.* And, it added, "in concluding that the suppressed evidence was not material within the meaning of *Brady*, the court did not distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment—an omission we find significant." *Id.*

Despite finding the failure of the court of appeals to distinguish between the guilt and punishment phases was a significant omission, the Court did not reverse and remand the case to the lower courts to conduct an analysis of the materiality of evidence with respect to both phases of Cone's trial. Rather, it treated the two phases differently. It affirmed the Sixth Circuit's denial of habeas relief on Cone's *Brady* claim with respect to the guilt phase of the trial. *Cone*, 556 U.S. at 474. It reversed and remanded to the district court, however, for a "full review of the suppressed evidence and its effect" as to the sentencing phase because, in its view, neither the district court nor the court of appeals had "fully considered" whether the withheld evidence might have persuaded one or more jurors to sentence Cone to life imprisonment rather than death. *Id.* at 475; *see also id.* at 476 (remanding for "full consideration [of] the merits of Cone's *Brady* claim[]").

The assessment of Kemp's claim to reinvest jurisdiction in the trial court to consider a petition for a writ of error coram nobis was not a resolution of the merits of his *Brady* claim subject to *Cone*. When the Arkansas Supreme Court considers a petition to reinvest jurisdiction in a trial court to consider a petition for a writ of error coram nobis, including those premised on an alleged *Brady* violation, that court is not resolving the merits of the claim. Rather, as the Arkansas Supreme Court has long made clear, it is performing a gatekeeping function, granting reinvestment when it believes reinvestment is warranted based on a claim's "apparent merit[,] but leaving the assessment of the actual merits of the claim to the trial court. *Howard v. State*, 403 S.W.3d 38, 46 (Ark. 2012); *see also, e.g.*, *Jenkins*, 265 S.W.2d at 513 (noting that

discretionary decision to reinvest jurisdiction turns on court’s assessment of whether claim has apparent merit); Pet. App. A. at 6 (reciting same standard governing assessment of petition). Kemp concedes as much. Pet. 7 (acknowledging that the decisions below “barred consideration of the merits of [his] *Brady* claim[]”); *see also id.* at 10 (observing that “[t]he ultimate merits of the claim . . . [are] left to the circuit court on reinvestment[]”).

To be sure, the assessment of a *Brady* claim’s “apparent merit” does involve some assessment of the merits of the claim, as the chief opinion at issue here makes clear. *See, e.g.*, Pet. App. A at 11 (concluding that Kemp’s “proposed attack on the judgment is wholly without merit[]”); *see also, e.g.*, *Howard*, 403 S.W.3d at 44-46 (considering whether petitioner had shown, “on the face of his petition,” a possible *Brady* violation). Nonetheless, the Arkansas Supreme Court has made clear that its determination on the issue of “apparent merit” is not a resolution of the merits of a *Brady* claim. *See, e.g.*, *Larimore v. State*, 938 S.W.2d 818, 821, 822-23 (Ark. 1997). Indeed, that court stressed in this very case that its review of such claims and ultimate discretion to grant extraordinary relief under state law is only “consistent with”—not identical to—*Brady*. Pet. App. A. at 6. The difference between those standards further underscores that the decisions by the Arkansas Supreme Court here involved only threshold assessments in accordance with state law and that they do not present the issue of whether that court allegedly erred by not conducting a “full review” under *Cone*. *Cf., e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (reiterating in case arising

on state collateral review that Court has “no . . . supervisory authority over the work of state judges[]”). Kemp’s petition should be denied.

III. The Arkansas Supreme Court’s decisions do not run afoul of *Cone*.

Kemp’s petition for a writ of certiorari also should be denied for the simple reason that it lacks merit. The Arkansas Supreme Court’s opinion in CR-95-549 complied with *Cone*. As the State already has recounted, in *Cone*, the Court held that the Sixth Circuit erred when it failed to “thoroughly review the suppressed evidence” and “distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment[.]” *Cone*, 556 U.S. at 472. It reiterated that evidence is “material” under *Brady* “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Id.* at 469-70.³ Stated differently, the Court explained, evidence is material “when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 470 (cleaned up). The Arkansas Supreme Court applied the correct standards and thoroughly assessed the materiality of the evidence in accordance with *Cone*.

The court explained that Becky’s statement, “at most,” suggested that she saw a gun and learned of a plan to scare Kemp when he was not present at the trailer. Pet.

³*Cone* also reiterated that the materiality of withheld evidence must be assessed collectively. *Id.* at 474, 475. Before this Court, however, Kemp relies solely on the nondisclosure of Becky’s statement and not the additional three categories of evidence he alleged below entitled him to pursue a writ of error coram nobis. *See, e.g.*, Pet. App. A. at 6-7 (recounting that Kemp alleged that the prosecution withheld four kinds of evidence). Following Kemp’s lead, the State also focuses on that statement.

App. A. at 7. The statement did not, however, indicate that Kemp was ever threatened with or saw a gun prior to murdering his victims. Pet. App. A. at 7-8. Despite that, the court observed that the jury was “well aware” that an unfired pistol was found near Sonny and Wayne. Pet. App. A. at 8. The court noted that the jury was allowed to weigh the presence of the pistol against Kemp’s claims of self-defense and against Becky’s testimony that she had not seen a gun that night. *Id.* And, the court recited the proper materiality standard from *Cone* and concluded that there was not a reasonable probability that the outcome of the trial would have been different had Becky’s statement been disclosed. Pet. App. A. at 7-8.

The Arkansas Supreme Court’s thorough assessment of Becky’s statement was a “full consideration” of the evidence under *Cone*, 556 U.S. at 476. While the court did not explicitly state that it had analyzed the materiality of the evidence with respect to both the guilt and penalty phases, it explained that Kemp’s claims concerned both guilt and punishment and that the trial’s outcome—which covered both—would not have been different. Pet. App. A. at 2, 7. And, importantly, its analysis encompassed both. That analysis made clear that Becky’s statement that she was aware of a plan and saw a pistol—the presence of which the jury indisputably already knew—was not evidence that Kemp was threatened with a gun. That assessment had consequences in both the guilt and penalty phases. With respect to the latter, Becky’s knowledge of the presence of a pistol and a plan to “scare” Kemp with it, without more, would not have supported Kemp’s mitigation theory of provocation and threats and would not have tended to show that he was telling the truth when he told police that he was

threatened.

Even if the Court were to conclude that the Arkansas Supreme Court's analysis concerning the materiality of Becky's statement was deficient, the Court's intervention remains unwarranted under *Cone*. Despite criticizing the Sixth Circuit's failure to distinguish between the materiality of the evidence with respect to the guilt and penalty phases, the Court in *Cone* did not reverse and remand the case to the lower courts to conduct an analysis of the materiality of evidence with respect to both phases of Cone's trial. In fact, it affirmed the Sixth Circuit's denial of habeas relief on Cone's *Brady* claim with respect to the guilt phase upon concluding that the "suppressed evidence was immaterial to the jury's finding of guilt." *Cone*, 556 U.S. at 474. So, too, here, the Court readily can conclude that Becky's statement was immaterial to the juries' determination of Kemp's punishment.

As an initial matter, it bears emphasizing that, while Kemp claims the Arkansas Supreme Court wrongly failed to distinguish between the guilt and punishment phases when considering the materiality of Becky's statement regarding *Wayne* and the *pistol*, Kemp actually fails to distinguish between the two penalty proceedings at issue when analyzing the allegedly prejudicial impact of the nondisclosure of the statement. The prosecutor only argued that Kemp lacked remorse, for example, at the resentencing for three of his four convictions, not at the first sentencing proceeding. *Compare* (TR 1848-50, 1936-48, 1956-61) *with* (SR 1167, 1171). These arguments, moreover, chiefly were premised on evidence newly admitted at the resentencing—Kemp's statement to the police that *Sonny* threatened him with a *rifle* and his

callous description of Wayne’s collapsing after being shot as falling “like a sack of taters.” (SR 1167, 1171) Despite acknowledging that two sentencing proceedings are at issue here, Kemp’s argument nonetheless treats the two as one, with identical arguments and evidence. *See, e.g.*, Pet. 2 (recounting that, “[a]ccording to Kemp,” he was “threatened with a gun[]” upon his return to the trailer); *id.* at 17 (focusing on prosecutor’s penalty-phase argument at resentencing that Kemp lacked remorse). Bearing in mind that two sentencing proceedings are at issue, Kemp’s claim of a *Brady* violation must fail.

Kemp claims that the evidence that Becky saw a pistol and was aware of a plan to scare him with it was material to his mitigation case that the crimes were committed while he was under emotional distress or unusual pressures and that he believed he was acting in self-defense or was provoked. All of Kemp’s arguments on this score are premised on Becky’s statement corroborating his claims of being threatened, but it does no such thing. Becky’s statement does not establish that he was threatened, much less with a pistol, only that Wayne showed her a pistol before he returned to the trailer and that she was aware of Wayne’s plan, formulated when Kemp was not present, to scare him with it. And, importantly, Kemp never claimed to Bill or police that he was threatened with a pistol or presented any evidence of having been threatened with a pistol. Thus, in contrast to the evidence withheld in *Cone*, 556 U.S. at 470-71, the statement simply does not corroborate his version of the events.

Kemp’s argument also fails to take into account significant evidence that was

before each of the juries. Both juries heard Bill Stuckey recount Kemp's chilling account that he started gunning down the victims as soon as Wayne opened the trailer door *before* they had a chance to defend themselves. Both also heard Becky's testimony corroborating Kemp's account of systematically gunning down the victims after knocking on the trailer door. And, both juries heard that a pistol was found near Wayne's and Sonny's bodies, despite Becky's testimony that she did not see anyone with a gun that night. Kemp explicitly relied on the presence of the pistol in the first sentencing proceeding to bolster his claim of imperfect self-defense, with counsel arguing "There was a gun. A gun found[]" and "He sees a gun. He walks in. He sees a gun. He reacts." (TR 1950, 1952) He did not invoke the pistol in his argument at the resentencing, no doubt due to his introduction of his fantastical statements to police shortly after the murders, which included the assertions that he had been beaten and threatened outside the trailer—despite the absence of any visible injuries and the victims being found inside the trailer—and that Sonny allegedly had pulled a *rifle*, not a pistol, on him.

Equally misguided is Kemp's claim that the prosecutor capitalized on the suppression of Becky's statement to assert that his claim to police of being threatened was a "pack of lies," demonstrating his lack of remorse. This argument was made at the resentencing in response Kemp's statement to police—which he newly introduced into evidence at the resentencing—recounting that he had been physically threatened and that Sonny had threatened him with a rifle. (SR 1167, 1190) Had Becky's statement been disclosed, the prosecutor undoubtedly still would have argued that Kemp's

accounts of wildly shooting in self-defense after being beaten and threatened with a rifle outside the trailer was a “pack of lies,” particularly given Kemp’s confession to Bill, Becky’s testimony corroborating that confession, the locations of the bodies and their wounds, and the absence of any injuries on Kemp.

Indeed, if Becky’s statement regarding a pistol could be said to have any probative value at the resentencing, it would be to reinforce the prosecutor’s argument that Kemp’s contradictory claim to police of being threatened with a rifle was a lie, reflecting his lack of remorse. Kemp’s claims to police, of course, were not the only evidence demonstrating his lack of remorse—his statements to his best friend Bill, including recounting Wayne’s falling “like a sack of taters” and apprising Cheryl that “she was going to die,” more directly demonstrated it. (SR 1034-35) More importantly, however, the nondisclosure of Becky’s statement did not prevent Kemp from otherwise expressing remorse, but he never has, apparently believing that his claims of being threatened and beaten—after he left the scene unscathed—absolved him of feeling or expressing any remorse for killing four people. In short, Becky’s statement could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the juries’ verdicts of death. Consequently, the Arkansas Supreme Court’s decisions do not run afoul of *Cone*, and Kemp’s petition for a writ of certiorari should be denied.

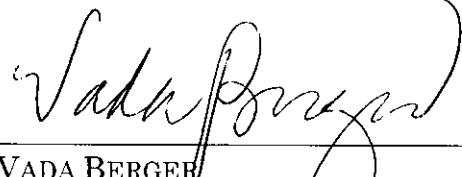
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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