

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2021 TERM

WILLIAM EDWARD GRAY
PETITIONER,

v.
THE STATE OF ARKANSAS
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The Arkansas law of justification, or self-defense, on the date of Petitioner William Gray's offense, recognized the right of an individual to use deadly force in response to an illegal act of violence or violent felony. The accused acting in self-defense had no duty to retreat from their residence or its surrounding curtilage. At Gray's trial on the charge of Murder in the First Degree, the trial court deleted the protection extending the curtilage provision from the mandatory instruction on the justification defense given jurors, on the State's motion.

While trial counsel objected to the deletion of the curtilage provision, he failed to preserve error for appellate review by tendering to the trial court a copy of mandatory jury instruction approved by the Arkansas Supreme Court. On direct appeal, the Arkansas Court of Appeals held that counsel procedurally defaulted the claimed error and dismissed Gray's appeal. The following issues relating to counsel's performance in light the Sixth Amendment right to effective assistance of counsel are raised for review:

- I. Whether trial counsel's failure to properly preserve error for appellate review constituted ineffective assistance where the appellate court ordered dismissal based on procedural default.
- II. Whether counsel's failure to object to the trial court's deletion of a statutory element of Arkansas self-defense law, resulting in an impermissible lessening of the prosecution's burden of proof in violation of due process, rendered his performance ineffective, warranting relief under the Sixth Amendment, in light of Arkansas law holding that preservation of a federal constitutional violation will not support a claim of ineffective assistance of counsel.
- III. Whether the appellate court's application of an unreasonable or inconsistent rule of procedural default to dismiss Gray's direct appeal violated his right to appeal ensured by the Equal Protection Clause of the Fourteenth Amendment contrary to *Lee v. Kemna*, 534 U.S. 362 (2002).

RELATED LITIGATION

1. *Gray v. State*, 2018 Ark. App. 544, 564 S.W.3d 289 (2018) Opinion of the Arkansas Court of Appeals dismissing Gray's direct appeal from his conviction for Murder in the First Degree and sentence of 55 years as a result of procedural default by trial counsel (November 7, 2018).
2. *Gray v. State*, No. CV-18-70, Arkansas Court of Appeals, Petition for Rehearing denied (January 9, 2018).
3. *Gray v. State*, No. CR-18-960, Arkansas Supreme Court, Petition for Review denied (February 21, 2019).
4. *Gray v. State*, FORMAL ORDER, No. 19-974 Arkansas Court of Appeals, remanding to settle record, *Gray v. State*, 2020 Ark. 553, 2020WL7239533, Not Published in S.W. Rptr. (December 9, 2020).
5. *Gray v. State*, 2021 Ark. App. 406, 636 S.W.3d 102 (2021), opinion of Arkansas Court of Appeals affirming denial of postconviction relief by Pope County [Ark.] Circuit Court (October 7, 2021).
6. *Gray v. State*, No. CR-19-974, Arkansas Court of Appeals, Petition for Rehearing denied (December 8, 2021).
7. *Gray v. State*, No. 19-974, Arkansas Supreme Court, Petition for Review denied (January 7, 2022).

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OPINIONS BELOW

Petitioner Gray appealed from the conviction and sentence imposed by the jury on the charge of Murder in the First Degree in the Pope County (Arkansas) Circuit Court. The Arkansas Court of Appeals held that trial counsel failed to preserve error when the trial court modified the mandatory self-defense instruction to eliminate Gray's right to use deadly force to defend himself on the curtilage of his residence because counsel did not tender a copy of the mandatory instruction in support of his objection to the modification, resulting in dismissal of his appeal. *Gray v. State*, 2018 Ark. App. 544, 564 S.W.3d 289, [Appendix--Exhibit B], issued on November 7, 2018.

After exhausting his direct appeal remedies, rehearing in the court of appeals and review by the Arkansas Supreme Court, Gray petitioned the trial court for postconviction relief based on trial counsel's ineffective assistance. The court of appeals upheld the denial of postconviction relief by the trial court. *Gray v. State*, 2021 Ark. App. 406, 636 S.W.3d 102, [Appendix—Exhibit A]. Petitioner again exhausted rehearing and review remedies available in the state postconviction process. The supreme court's order denying Petition for Review was entered on October 27, 2021. [Appendix--Exhibit C].

JURISDICTION

Petitioner Gray seeks relief in this Court from the denial of postconviction relief and his right to appeal on the merits by the Arkansas courts and invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). The Arkansas Court of Appeals upheld the denial of postconviction relief, *Gray, I*, 2021 Ark. App. 406, 636 S.W.3d 102, in its order issued on October 27, 2021. The Arkansas Supreme Court denied his petition for review of the appellate court's decision denying postconviction relief by its order entered on January 27, 2022. [Exhibit C].

This petition is timely if filed on or before April 27, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

Arkansas defined the defense of justification, or self-defense, on the date of the offense in ARK. CODE ANN. § 5-2-607, which provided,¹ in pertinent part:

¹ The Arkansas General Assembly subsequently amended Section 5-2-607 in 2021, substituting a *stand your ground* approach to self-defense, for the *no duty to retreat* approach at the time of the offense, expanding the right to use deadly force. See,

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

- (1) Committing or about to commit a felony involving force or violence;
- (2) Using or about to use unlawful deadly physical force

(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force:

(1) (A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) Unable to retreat with complete safety;

(ii) In the person's dwelling or on the curtilage surrounding the person's dwelling and was not the original aggressor. . . .

(c) As used in this section:

(1) "Curtilage" means the land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling. . . .

Rule 37.1 of the Arkansas Rules of Criminal Procedure describes the remedy for postconviction relief from unconstitutional convictions or sentences provides:

ARK. CODE ANN. § 5-2-607, *as amended*, Acts of 2021, Act 250, § 2, eff. July 28, 2021.

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(ii) that the court imposing the sentence was without jurisdiction to do so; or

(iii) that the sentence was in excess of the maximum sentence authorized by law; or

(iv) that the sentence is otherwise subject to collateral attack; may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.

ARK. R. CRIM. P. 37.1(a).

The mandatory jury instruction defining justification—or self defense when using deadly force provides, in pertinent part:

[A person is not justified in using deadly physical force if he knows that the use of deadly physical force can be avoided.

(a) (by retreating.) (However, he is not required to retreat if he is [unable to retreat with complete safety] [(in his dwelling) (on the curtilage surrounding his dwelling) and was not the original aggressor] [a law enforcement officer acting in the line of duty] [assisting at the direction of a law enforcement officer].)

ARK. MANDATORY JURY INST. 2d 705.

STATEMENT OF THE CASE

Petitioner Gray was convicted of Murder in the First Degree by a jury in Pope County [Arkansas] Circuit Court and sentenced to forty years imprisonment, enhanced by fifteen years for use of a firearm on the jury's punishment verdict. His defense at trial was justification under ARK. CODE ANN. § 5-2-607, which requires acquittal if the trier of fact is left with a reasonable doubt as to the accused's right to use deadly force in defense of himself from an attack by another involving unlawful deadly force or commission of a violent felony. *E.g., Kinsey v. State*, 2016 Ark. 393, at *11, 503 S.W.3d 772, 779.

A. *Summary of Material Facts*

The facts of the offense are summarized in the opinion on direct appeal issued by the Arkansas Court of Appeals. *Gray v. State*, 2018 Ark. App. 544, at *2-*3, 564 S.W.3d 289, 289-90 (2018). The court explained:

At trial, testimony revealed that Gray and Chisum had been romantically involved but had broken up. Evidence was presented that prior to May 25, 2016, Gray had called the police to his home on two occasions regarding Chisum's harassing behavior. The first occasion was on December 8, 2015, when Gray called the police reporting that Chisum had been knocking on the window of his home, she was parked behind his car blocking him in, and she would not leave. Officers were called to Gray's home a second time on May 24, 2016, the day before the shooting. On this occasion, Chisum had been driving by Gray's home threatening him, and she used an object to beat Gray's vehicle.

On May 25, 2016, Gray testified that he was asleep on the couch when he awoke to Chisum coming toward him with a knife and a screwdriver attempting to stab him in the neck. He said that he grabbed her wrists

and kicked her off him. According to Gray, Chisum ran out the front door and into Gray's vehicle to retrieve his gun. Gray testified that he grabbed Chisum by the waist, pulled her out of the car, grabbed the gun, and placed it in his waistband. Gray stated that Chisum ran to her car, "thr[ew] it in reverse and whip[ped] it and clip[ped] me" with the front end, knocking him to the ground and causing the gun to fall out of his waistband. He said that Chisum revved her car in neutral, and he thought she was going to run over him, so he "got up shooting." He said that she "whipped" her car around and then it rolled away, eventually stopping when it struck a wire fence across the street.

Corporal Joe Paterak of the Russellville Police Department testified that he found one bullet hole above the passenger-side door handle and two bullet holes in the driver's side window of Chisum's vehicle. Lieutenant Glenn Daniel of the Russellville Police Department stated that he discovered two bullet holes in the windshield of Chisum's vehicle. Russellville Police Department Detective Quinn Jones testified, and photographs confirmed, that four spent shell casings and one live round were found in the parking lot, sidewalk, and grass near Gray's neighbor's home at 211 James Circle. An associate medical examiner testified that Chisum died from a bullet that entered and exited her left arm, entered her chest cavity, and traveled through her lungs and heart.

In his defense, Gray testified about Chisum's violent threats against him, including the day before the shooting, when she tried to run him down in her car when he was returning from the community mailboxes to his residence, when she yelled at him: "I'm gonna fucking kill you. I'm gonna blow your head off. You think I didn't see you laying in the bed eating Crispy-O's? I could have blowed your fucking head off then." (TR/540). He also testified:

On the 25th I was at home on my couch, I was watching SportsCenter. I went outside to get my cigarettes out of the car, came back in and dozed off. I got that sensation of light hitting my face. TR. 535. I looked up and Mchelle was coming down on me with a knife and what looked

like a tire iron. She was trying to stab me in the neck. If it wouldn't have been for my arm being up, I'd be dead now. I grabbed her, got her off me, I kicked her up off of me and she was cussing at me. She said, "You're dead, you black mother fucker. I told you I was going to get you."

(TR/536). There was additional support for his testimony regarding the victim's extremely hostile and threatening behavior toward Gray given by neighbors of the community, Longoria, (TR/482-497), and Collins, (TR/510-517), including Chisum's efforts to force him to answer his door and damaging his car, as well her violent threats against him. Longoria testified that on one occasion "Ms. Chisum yelled at anothe lady that lived in the complex, saying 'I hope my pussy tasted good, bitch.'" (TR/497). And Collins testified that the day prior to the shooting:

[Chisum] saw me and then slowed down and sped up real quick. She was screaming and hollering at me. She yelled, "I know you're 'blanking' that big ass fucking bitch." She was cussing at me and then she goes over to Will's and starts cussing him, so I went inside. An hour or two later, I'm not exactly sure, she started beating on his car.

(TR/517).

Following the testimony, the court instructed the jury on the offenses of Murder in the First Degree, Murder in the Second Degree, and Manslaughter. The theory of manslaughter was that Gray was under the influence of extreme emotional distress at the time, similar to the traditional notion of heat of passion for which there was a sufficient cause. ARK. CODE ANN. § 5-10-104(a)(1)(A).

The court also instructed on the defensive theory of justification for use of deadly force in self-defense, but modified the mandatory instruction on the State's motion, to delete the statutory language expanding an accused's right to do so without having a duty to retreat if acting in the residence or on the *curtilage*, property surrounding the residence. This provision eliminates the duty of the accused to retreat under Section 5-2-607(b)(1)(B)(ii) if the attack occurs at the accused's residence or on the *curtilage*, defined the statute as follows:

[T]he land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling.

ARK. CODE ANN. § 5-2-607(c). This language was deleted from the instruction.

The trial court explained its reasoning for modifying the instruction:

The Court: Before we get the jury in here, I want to announce that I have read the *Moody* case and I do agree with the State. I'm going to submit the instruction on justification with the language that eliminates the *curtilage*. Now we still define *curtilage*, what it is in the definition parts of it, but so I'm clear, basically it will read, "A person is not justified in using deadly force if he knows that the use of deadly force can be avoided with complete safety by retreating."

I mean, you decide these based on the facts in each case. This incident, homicide took place in a parking lot of an apartment duplex-type facility. It was a common area and by analogy, fourth amendment jurisprudence, there's no expectation of privacy. It's common to everyone, so that will be the Court's ruling.

Mr. Shaw: If the Court would, for the record, note our respectful objection to the ruling. We believe that it should be admitted because

the initial contact took place not only on his curtilage, but inside the house. And even on the facts most generously state, this shooting took place less than twenty feet from his front door.

The Court: All right, your objection is noted. (TR/594-595). Counsel took no additional action in response to the court's announced decision to modify the mandatory jury instruction to delete reference to the application of the no duty to retreat protection to the curtilage of his dwelling.

The relevant part of the jury instructions relating to Gray's right to use deadly force in his own defense, as read to the jury, provided:

William Gray asserts as a defense to the charge of first-degree murder and second-degree murder that deadly force was necessary to defend himself. This is only a defense if:

First, William Gray reasonably believe that Rachel Michelle Chisum was committing or about to commit residential burglary, a felony, with force or violence; or William Gray reasonably believed that Rachel Michelle Chisum was using or was about to use unlawful deadly physical force;

Second, William Gray only used such force as he reasonably believed to be necessary. A person is not justified in using deadly force if he knows that the use of deadly force can be avoided with complete safety by retreating.

William Gray, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been showed to exist or if the evidence leaves you with a reasonable doubt as to his guilt of first-degree or second-degree murder, then you must find him not guilty.

Definitions: Curtilage means the land adjoining the dwelling that is convenient for residential purposes and is habitually used for residential purposes, but not necessarily enclosed and includes an outbuilding that

is directly and intimately connected with the dwelling and in close proximity to the dwelling.

(TR/600-601). The trial then continued with closing arguments. After deliberations, the jury convicted Gray on the first degree murder charge, (TR/686), and proceeded to impose a sentence of forty years on that charge, enhanced by fifteen years for use of a firearm in commission of the murder. (TR/719-720)

B. Disposition of the direct appeal

Gray was represented by appointed counsel on direct appeal to the Arkansas Court of Appeals, focusing on the single issue of the trial court's deletion of language from the mandatory jury instruction on justification eliminating the right to engage in self-defense while on the curtilage of his dwelling. *Gray*, 2018 Ark. App. 544, at *1, 564 S.W.3d at 289. The court of appeals did not reach the merits of this issue based on trial counsel's failure to tender an instruction reflecting his objection to the deletion of the curtilage language from that given jurors consistent with its finding that there is no expectation of privacy on the curtilage, and, thus, no right to use deadly force on the curtilage of his residence.

In deleting the *curtilage* language, the trial court had also embraced the State's argument on appeal that the use of deadly force did *not* occur on Gray's curtilage, but rather, on the parking lot—"a common area of an apartment/duplex facility." (Appellee's Brief on direct appeal, at 5-6). Consequently, it concluded that Gray did

not qualify for the protection afforded by the *no duty to retreat* protection included in the statute at Section 5-2-607(b)(1)(B).

Having reviewed the facts adduced at trial, the court of appeals noted the likelihood that there had apparently been a bench conference before the trial court announced its decision to delete the reference to the curtilage. The appellate court pointed out that this conference had not been recorded or referenced in the record on appeal. *Gray*, 2018 Ark. App. 544, at *4, 564 S.W.3d at 291. More importantly, however, the court held that counsel had failed to preserve the error for review in failing to tender an instruction reflecting its objection. It explained:

It is well settled that to preserve an objection to the circuit court's failure to give a jury instruction, the appellant must have made a proffer of the proposed instruction to the court. *Jackson v. State*, 2018 Ark. App. 222, at 3, 547 S.W.3d 753, 756 (citing *Stewart v. State*, 316 Ark. 153, 157, 870 S.W.2d 752, 755 (1994)). That proffered instruction must be included in both the record and the abstract to enable the appellate court to consider it. *Id.*, 547 S.W.3d at 756. An instruction that is not contained in the record is not preserved and will not be addressed. *Id.*, 547 S.W.3d at 756; *see also* citing *Robertson v. State*, 2009 Ark. 430, at 3, 347 S.W.3d 460, 462 (holding that to preserve an objection to an instruction for appeal, the appellant must proffer the proposed instruction to the circuit court, include it in the record on appeal, and abstract it to enable the appellate court to consider it; an instruction that is not contained in the record is not preserved and will not be addressed on appeal).

Id. *5, 564 S.W.3d at 291. The court of appeals dismissed Gray's appeal.

Gray petitioned for rehearing, arguing first that *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389, was based on significant dissimilarity of facts:

In Moody, the facts established that Moody did not enter the apartment, and instead approached the victims through a breezeway in a common area of an apartment complex. Moody was armed, and advanced on a group of girls even after she was told they did not want to fight. Thus, the appellate court in Moody approved of the refusal to include the "curtilage" clause in the instruction justification. *Id.* at 10. However, the facts here are plainly distinguished from Moody where Chisum had broken in to Gray's home, threatened him with a deadly weapon, verbally issued a death threat, attempted to retrieve a hrearm, and attempted to use her car 4 to kill or injury Gray. There was never any evidence that Chisum tried to diffuse the situation like the facts in Moody.

(Appellant's Petition for Rehearing, at 4-5).

Second, Gray argued that dismissal of his direct appeal was not required by Arkansas law requiring tender of an instruction in the record to support a claim of instruction error in a civil case, citing *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312, 313-14 (1984):

The appellee argues that the appellants did not make a proper objection to this instruction because no instruction was proffered in substitution. There is no such requirement. All that is required to preserve an objection for appeal regarding an erroneous instruction of law is to make a timely objection and state valid reasons for the objection. ARCP Rule 51. The appellants did both.

Id. at 402, 678 S.W.2d at 313-14; *see also, Grubbs v. Hindes*, 101 Ark. App. 405, 411-412, 279 S.W.3d 575, 579 (2004) (citing *Tandy Corp. v. Bone* in civil appeal).

The court of appeals denied rehearing in its order issued on January 9, 2018, 2021. Gray then sought review in the Arkansas Supreme Court, but his Petition for Review was denied by that court on February 21, 2019, with Hart, J., dissenting.

C. Disposition of Gray's petition for postconviction relief

After exhausting state remedies in the direct appeal process, Gray filed his petition for postconviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Appeal, alleging claims of ineffective assistance. He raised a separate claim directed at the application of the procedural default rule used to dismiss his direct appeal by the Arkansas appellate courts in his case, arguing that it violated the protection afforded by *Lee v. Kemna*, 534 U.S. 362 (2002). The trial court—sitting as the postconviction court under Arkansas 37.1 procedure did not order a hearing on the allegations in Gray's petition.

Instead, the court issued findings based on factual claims by the State in its response to the Rule 37.1. (Ex. D, Order at ¶4a). Based on its review of testimony and photographic evidence of the crime scene, it rejected Gray's ineffective assistance claim because it found that the evidence showed that he was not on the curtilage of his property and was not entitled to claim the benefit of the *no duty to retreat* protection under the statute. *Id.*

It rejected his second ineffectiveness claim, in which he argued that counsel failed to pursue the alternative theory of manslaughter based on Arkansas law of imperfect self-defense--*Harshaw v. State*, 344 Ark. 129, 133, 39 S.W.3d 753, 756 (2001)—which occurs when the accused acts in a belief in entitlement to use deadly force, but one based on a perception of threat arrived at recklessly or negligently.

The court held that Gray could not claim ineffectiveness based on trial counsel's failure to proffer an instruction on reckless manslaughter for the first time in a Rule 37 proceeding, essentially foreclosing argument that counsel's performance was deficient in failing to pursue a defensive theory supported by a reasonable view of the evidence which counsel had not sought during trial itself. (Ex. D, Order, at ¶4b).

Third, the trial court rejected Gray's argument that counsel's failure to object to the deletion of the curtilage protection violated his right to due process by lessening the prosecution's burden of proof on all elements of the statutory defense was not otherwise precluded from arguing his claim of self-defense based on its finding in ¶4a that he was not on his curtilage when he used deadly force. (Ex. D, Order, at ¶4c).

Fourth, the trial court rejected Gray's claim that counsel's procedural default constituted deficient performance with regard to the effect of deletion of the curtilage protection on the jury's verdict on the firearm enhancement, again based on the conclusion that the evidence showed that Gray did not use deadly force in shooting when shooting the victim while on his curtilage. (Ex. D, Order, at ¶4d).

Fifth, the trial court rejected Gray's claim that the Arkansas appellate courts applied the rule of procedural default in dismissing his claim that the rule was being applied irrationally and inconsistently in his case under *Lee v. Kemna*, 534 U.S. 362

(2002). It did not discuss the limitations imposed by *Lee* in any context. (Ex. D, Order, at ¶4e).

The trial court then engaged in a lengthy explanation as to why it considered the evidence of Gray's guilt to be overwhelming in the case. (Ex. D, Order, at ¶5).

In its opinion upholding the trial court's rejection of Gray's claims based on trial counsel's arguable ineffectiveness in failing to preserve error for review on appeal resulting in dismissal of the direct appeal, the court of appeals accredited the trial court's factual view of the evidence, finding that the postconviction court's findings will be upheld unless clearly erroneous:

We will not reverse the denial of postconviction relief unless the circuit court's findings were clearly erroneous. *Liggins v. State*, 2016 Ark. 432, 505 S.W.3d 191. Clear error exists where, after reviewing the totality of the evidence, we are left with the definite and firm conviction that a mistake has been made. *Id.*

Gray, 2021 Ark. App. 406, at *8, 636 S.W.3d 102, 108.

Upholding the postconviction court, the court of appeals reviewed its finding regarding the photographic evidence from trial as showing that Gray was not within the curtilage of his dwelling, but actually fired from his neighbor Cooper's property. It summarized the lower court's conclusion as to the location from which Gray fired and concluded that the lower court had *not clearly erred* in its conclusion:

We agree with the circuit court that the evidence indicates that the shooting took place in a common area in a parking lot in front of Cooper's side of the duplex. Accordingly, Gray was not entitled to a justification instruction that included the optional curtilage language. We cannot say that the circuit court clearly erred in concluding that Gray failed to establish that his trial counsel

was ineffective for failing to proffer the entire instruction.

Id. at *13, 636 S.W.3d at 110.

With respect to Gray's ineffectiveness claim based on counsel's failure to urge on the alternate manslaughter theory of *imperfect self-defense*, the court of appeals held that there was no evidence of recklessness to support an instruction relying on *Harshaw v. State, supra*, apparently because the evidence showed that Gray fired four times at Chisum's vehicle as she was backing away from him. *Id.* at *15-*16, 636 S.W.3d at 112. Again, the court did not find that the postconviction court's conclusion was clearly erroneous.

The court of appeals upheld the postconviction court's finding that because Gray had been able to argue self-defense, there was no ineffectiveness on counsel's part in failing to object to the deletion of the no duty to retreat and curtilage language on federal due process grounds. *Id.* at *17, 636 S.W.3d at 113. It specifically explained:

The evidence was that Gray shot Chisum in a common parking lot near his neighbor's yard, not on his curtilage; the State was not required to disprove this aspect of the defense because it had not first been raised by the undisputed evidence.

Id. at *17, 636 S.W.3d at 113.

The court similarly held with regard to Gray's argument that the deletion of the curtilage language from the self-defense instruction compromised his justification claim on the firearm enhancement that the postconviction court did not

err in characterizing his claim as “speculative.” *Id.* at *18-*19, 636 S.W.3d at 113.

Finally, the court of appeals upheld denial of relief on Gray’s due process argument based on the application of the procedural default rule to dismiss his direct appeal. It noted that the disparate application of the failure to preserve error requirement by tendering an instruction reflecting the defendant’s objection had already been rejected by the Arkansas courts with their respective denials of rehearing and review petitions in the exhaustion of the appellate process on direct appeal. Explaining that the issue was one of *trial error* the court of appeals held:

Second, Gray cannot raise this argument in a Rule 37 proceeding because it is an alleged trial error that should have been presented on direct appeal. The State first raised the preservation issue in its brief on direct appeal, to which Gray did not reply. Rule 37 does not provide an avenue to raise matters that could have been raised on direct appeal. *Beulah v. State*, 352 Ark. 472, 101 S.W.3d 802 (2003). This argument could have been raised by Gray on direct appeal, and we will not address it in this appeal from the denial of postconviction relief.

Affirmed.

Id. at *20, 636 S.W.3d at 114. The court explained in notes 1 and 2 to the opinion, respectively, that it had taken judicial notice, on Gray’s motion, of the rehearing and review petitions filed in the direct appeal and their denial; and that Gray had moved for modification in the postconviction court for its treatment of his argument based on his due process claim and that the court had not ruled in response to his motion.

D. Preservation of federal constitutional claims urged in Gray's petition

Gray raised his ineffective assistance claims in his Rule 37.1 petition, and arguing on appeal from the denial of relief by the trial court—sitting as the postconviction court—incorrectly rejected his claims based on its failure to comply with the probability of prejudice requirement of *Strickland, supra*. The two claims of ineffectiveness addressed in this petition are discussed in the previous section of this petition regarding disposition of his Rule 37.1 claims on appeal from their denial by the postconviction court.

With regard to both claims, the court of appeals upheld that court in substituting its view of the probative value of the evidence presented, effectively finding that Gray failed to meet the second prong by substituting its assessment of the probative value of the evidence, for the judgment of the jurors, who served including their decision as to the credibility of the testimony, including Gray's. While the trial court characterized Gray's testimony explaining his fear of the threat posed by Chisum warranting use of deadly force to protect himself from her threats as “self-serving,” it nevertheless, instructed jurors on justification—self-defense, as a defense requiring the State to disprove the defense beyond a reasonable doubt to obtain conviction.

Gray argues in this petition that the Arkansas postconviction court's findings, based on its view of the merits of his justification claim, were improperly upheld

under the Arkansas that bars reversal of the postconviction court's ruling denying relief unless the reviewing court judges its findings "clearly erroneous."

Gray also argued that counsel's failure to object to the modification of the *curtilage* on federal constitutional grounds resulted in his inability to argue that the federal constitutional guarantee of due process was violated when the trial court lessened the State's obligation to prove all elements of the offense when it deleted all reference to the *no duty to retreat* language from the jury instructions. Gray complained that counsel's failure to protect his right under *Jackson v. Virginia*, 443 U.S. 307 (1979) by objecting to the trial court's action on federal constitutional due process grounds would foreclose his ability to raise this claim in federal proceedings under *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

Finally, with respect to the rejection of his argument that the rule of procedural default used as the basis for dismissal of Gray's direct appeal, the court of appeals basically held that this claim was procedurally-defaulted because it should have been raised in the direct appeal process. *Gray*, 2021 Ark. App. 406, at *19-*20, 636 S.W. 3d at 114 ("This argument could have been raised by Gray on direct appeal, and we will not address it in this appeal from the denial of postconviction relief.").

Direct appeal counsel pointed this out in his petition for rehearing following the appellate court's dismissal of the appeal on the ground of procedural default the lack of consistency in application of this requirement for preservation of error in

criminal and civil appeals, citing the decision in *Tandy Corp. v. Bone*, 283 Ark. 399, 402, 678 S.W.2d 312, 313-14 (1984). The argument was re-asserted in his petition for review, later denied by the Arkansas Supreme Court.

Gray then raised this argument, relying on *Lee v. Kemna*, 534 U.S. 362, 366-67 (2002) in his Rule 37.1, petition. After rejection of the argument in the court of appeals' opinion on appeal from denial of postconviction relief, Gray argued that the issue could not have been finalized until after the state supreme court rejected his argument by denying relief on his petition for review in its order entered on February 19, 2021. Because the supreme court have agreed with Gray in the final stage of the direct appeal exhaustion process, this issue was improperly deemed defaulted by the court of appeals, as Gray argued in his petition for review from the court of appeals' opinion upholding the denial of relief by the postconviction court.²

² Under the Rules governing appellate process in Arkansas, Gray was limited to a ten-page petition for review of the decision issued by the Arkansas Court of Appeals. R. ARK. SUP. CT. & CT. APP. 2-3(e). The litigant may then petition for review in the Arkansas Supreme Court following an adverse ruling in the court of appeals on direct review, but the petition for review is limited to three pages in length, with the petitioner being afforded the option of appending the rehearing petition within the ten-page limit to the petition for review. R. ARK. SUP. CT. & CT. APP. 2-4(b) and (c). These page limits may compromise counsel's ability to fully argue points and offer supporting authority in some cases.

REASONS FOR GRANTING THE WRIT

I. Trial counsel's failure to properly preserve error for appellate review constituted ineffective assistance where the appellate court ordered dismissal based on procedural default, depriving Petitioner Gray of his right to direct appeal protected by the Fourteenth Amendment, warranting relief under the Sixth Amendment right to effective assistance of counsel.

The Arkansas Court of Appeals dismissed Gray's direct appeal from his conviction for first degree murder based on trial counsel's failure to tender a requested jury instruction arguably supporting his claim of trial court error. *Gray*, 2018 Ark. App. 544, at *4-*5, 564 S.W.3d at 291. This failure constituted deficient performance, *Evitts v. Lucey*, 469 U.S. 387, 397 (1985), meeting the test for the first prong of the test for demonstrating a Sixth Amendment claim of ineffective representation under *Strickland v. Washington*, 466 U.S. 688, 694 (1984). *See, e.g., Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004) (trial counsel's performance defective in failure to object to erroneous instruction on first degree murder charge, meeting first prong under *Strickland*, a showing of deficient performance by counsel).

The dismissal of Gray's direct appeal based on counsel's procedural default in failing to protect the record for review of error in not tendering instruction arguably correct in support of his objection to the instruction given the jury by the trial court, undeniably reflected that counsel's performance was deficient. Proof of ineffectiveness warranting relief as a violation of the Sixth Amendment not only requires a showing of deficient performance but also a reasonable probability that

the error resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.). Here, counsel’s failure to preserve the record for appeal unquestionably resulted in forfeiture of Gray’s right to direct appeal from his conviction protected by Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Douglas v. California*, 372 U.S. 353, 356-58 (1963). The right to assistance of counsel necessarily includes the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

The dismissal of Gray’s direct appeal due to counsel’s failure to comply with Arkansas law for preservation of error for review on the merits in the direct appeal denied him the option or right to challenge the trial court’s decision to delete the *no duty to retreat* protection afforded individuals using deadly force in their defense while responding to a threat of unlawful deadly force or violent felony directed against them while in their dwelling or its curtilage under Section 5-2-607(b) of Arkansas statute defining the justification defense as a result of the trial court’s decision that Gray was not on the curtilage of his property when he fired the shots killing Chisum.

Under Arkansas law, Gray sustained actual injury with the dismissal of his appeal because reversals based on instruction errors by trial courts are essentially treated as presumably prejudicial. If there is the slightest evidence to support an

instruction, refusal to give instruction constitutes reversible error. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980); *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005):

One of the overarching principles in criminal jurisprudence is that if evidence, albeit slight, and a rational basis warrant that an instruction of law be given to the jury, it must be given. *See, e.g., Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005); *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001). This principle is sacrosanct.

Brown, J., concurring in part and dissenting in part, 363 Ark. at 368, 214 S.W.3d at 258. In the instant case, the modification of the self-defense instruction to delete the protection afforded an accused by the expansion of *no duty to retreat* to encompass the curtilage of the residence, resulted in deletion of any reference at all to the right to defend oneself inside the dwelling.

The instruction the trial court ultimately given the jury read:

William Gray asserts as a defense to the charge of first-degree murder and second-degree murder that deadly force was necessary to defend himself.

This is only a defense if: First, William Gray reasonably believe that Rachel Michelle Chisum was committing or about to commit residential burglary, a felony, with force or violence; or William Gray reasonably believed that Rachel Michelle Chisum was using or was about to use unlawful deadly physical force;

Second, William Gray only used such force as he reasonably believed to be necessary. *A person is not justified in using deadly force if he knows that the use of deadly force can be avoided with complete safety by retreating.*

(TR/600-601, emphasis added). There was no language advising jurors of the right

to use deadly force in response to threatened violence or violent felony when the accused is inside his dwelling when attacked. Yet, the language of the statute in Section 5-2-607, in defining the parameters for use of deadly force expressly defines the *no duty to retreat* protection to include the residence:

(B) However, a person is not required to retreat if the person is:

- (i) Unable to retreat with complete safety;
- (ii) In the person's dwelling or on the curtilage surrounding the person's dwelling and was not the original aggressor. . . .

The mandatory jury instruction for use of deadly force in self-defense follows the statutory language, while the modified language given by the trial court to jurors, not only deleted the reference to the fact that the accused is not required to retreat if in his dwelling when otherwise justified in responding to a threat of deadly force or violent felony with deadly force. (TR/600-601). Inexplicably, moreover, the court included the statutory definition of "curtilage" in the instructions given jurors, (TR/601), without any explanation of its relevance in light of the deletion of any reference to curtilage when explaining on the duty to retreat.

Trial counsel, in objecting to the modification of the mandatory instruction deleting reference to the *no duty to retreat* statutory protection included in AMCI 2d 705 expressly referenced Gray's right to exercise deadly force:

[T]his shooting took place less than twenty feet from his front door.

Mr. Shaw: If the Court would, for the record, note our respectful objection to the ruling. We believe that it should be admitted because

the initial contact took place not only on his curtilage, but inside the house. And even on the facts most generously state, this shooting took place less than twenty feet from his front door.

The Court: All right, your objection is noted. (TR/594-595).

The facts supported instruction on use of deadly force and the trial court recognized testimony supporting Gray's claim of justification, even though it found his testimony "self-serving" and insufficient to support his explanation that:

[H]he was required to defend himself from inside his residence, continuing to his car, and continuing to the location in front of his neighbor's apartment where he shot and killed Chisum.

(Ex. D, Order, at ¶4b). This characterization was certainly subject to argument on the merits precisely because the jury's view of credibility could have differed from the postconviction court's. And, the characterization of Gray's testimony as self – serving," (Ex. D, Order, at ¶4f), is likely no different from an accused's in virtually every criminal trial, particularly a murder trial, and it would likely always be correct in non-perjorative sense because the claim of justification would serve the interest of the accused.

The postconviction court's usurpation of the jury's fact-finding function in its findings on his Rule 37.1 claims is apparent from its finding that the deletion of the curtilage language from its instruction on use of deadly force was warranted because the facts established that Gray was not on his curtilage when he fired. (Ex. D, Order,

at ¶4g). The court cast doubt on Gray's claim that he was attacked by Chisum with a screwdriver and knife stating:

There was no testimony or evidence presented as to how the knife and the screwdriver were discovered in the car by the police following the sequence of events as testified to by Gray.

(Ex. D, Order, at ¶4f). But, in fact, Russellville PD Detective Daniel testified extensively about the recovery of the knife and screwdriver from Chisum's car on both direct and cross-examination. (TR/421-425; 427-429, respectively). The court's speculative suggestion that Gray's explanation should be doubted because it might have suggested some kind of culpability, or failure to offer evidence to support his testimony on the initial assault that occurred inside his residence, then continued into his front yard and dedicated parking space.

Similarly, the postconviction court found, as a proven fact, that Gray was not on his curtilage at the time of the shooting, (Ex. D, Order, at ¶4a) ("The location where Defendant shot and killed Ms. Chisum occurred in front of Audrey Cooper's apartment and beyond a walkway leading exclusively to her apartment," referencing State's Exhibit 7). The court of appeals adopted the postconviction court's finding on this point, affirming: "*We agree with the circuit court that the evidence indicates that the shooting took place in a common area in a parking lot in front of Cooper's side of the duplex.*" *Gray*, 2021 Ark. App. 406, at *13, 636 S.W.3d at 110 (emphasis added). Yet there was no testimony from anyone, including his neighbor, Ms.

Cooper, as to exactly where he was standing or located at the time he fired at Chisum in her car. In fact, she testified on the State's direct that she only observed a black man whom she had seen before--later finding out that he was Gray--after she went to the window and looked out--seeing him—*after hearing four or five shots* while she was cutting peppers. (TR/472-474). On cross, she confirmed that she got up to look outside after she heard the gunshots and that they happened before she looked out the window and, also, that she did remember seeing the man she saw shooting at the car. (TR/475-476).

The postconviction court also bolstered its conclusion that Gray was not on the curtilage adjacent to his residence by relying on photographic evidence of the recovered shell casings at the scene to conclude that they showed that he in front of Cooper's apartment, not his curtilage, when he fired. (Ex. D, Order, at ¶4a). There was no testimony from any expert, or in fact, any investigating officer, regarding the length of travel of an expended shell casing from a Model 1911 Remington, which ejects expended shells to the right of the handgun, here consistent with Gray firing toward Chisum's car from near his own. Gray challenged the postconviction court's findings based on, at best, the court's conclusions drawn from the location of spent cartridges as portrayed on the State's photographic evidence in his brief on appeal from denial of relief, citing *People v. Henderson*, 77 N.E.3d 1046, 1060 (Ill. App. 2017):

Though the ejection port on a semiautomatic firearm is supposed to eject the spent cartridge in one direction, Horn [an Illinois State Police forensic scientist] testified that, due to numerous variables, there was no reliable way to determine if the cartridge ejects in the same direction every time. Shooter position, type of ammunition used, and the surface the cartridge hits all affect where the spent cartridge ultimately lands.

(Appellate's Brief, at ARG-7). He also referenced online information on point.³ In its opinion, the court of appeals acknowledged Gray's point on lack of foundation for the postconviction court's conclusion drawn from the circumstantial evidence, *Gray*, 2021 Ark. App. 406, at *12-*13, 636 S.W.3d at 110, but still accepted the lower court's conclusion.

Dismissal of Gray's direct appeal due to counsel's deficient performance in failing to preserve error for review on the merits clearly met *Strickland*'s first prong, *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017) suggests that the requirement that the litigant raising an ineffectiveness claim may not satisfy the second prong by relying on state law rule presuming prejudice from counsel's error. Instead, *Weaver*

³ Gray argued: "Moreover, the reliability of using location of ejected shell casings to establish the location of the shooter is highly questionable. See Charles Remsberg, *Findings are now firm: Ejected shell casings can't reliably tell much about a shooter's location*, PoliceOne.com (June 27, 2005), at <https://www.policeone.com/archive/articles/findings-are-now-firm-ejected-shell-casings-cant-reliably-tell-much-about-a-shooters-location-iIvDTegY0THF7otG/>. (Appellant's Brief, at ARG-7).

might be extended beyond the protection afforded by the “public trial” to require proof of probable prejudice in terms of a showing of a reasonable probability of a different outcome in order to warrant relief under *Strickland*. Thus, the burden on Gray would be to show not only that he was denied his right to direct appeal, but that there was a reasonable probability the outcome on appeal would have been different. In *Weaver*, the Court explained that not every violation of the public trial will result in prejudice to the accused, and relief for counsel’s error may not actually be warranted. *Id.* at 1911-1912.

Gray can meet the requirement for probable prejudice precisely because there was a reasonable probability that the trial court’s deletion of all reference to the statutory provision modifying the actor’s duty to retreat before using deadly force in response to a perceived threat of unlawful deadly force or violent felony likely did impair his ability to raise a reasonable doubt as to his use of deadly force in the circumstances.

The trial court’s reliance on *State v. Moody, supra*, which involved application of the historically-recognized curtilage protection in defining the scope of Fourth Amendment privacy protection from searches, *e.g.*, *Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018), suggests an issue of law with respect to the significance of curtilage in the definition of the *no duty to retreat* concept included by the Arkansas legislature in defining the parameters of use of deadly force in self-defense. Without

the opportunity to argue that the dedicated parking area afforded by his residence in the direct appeal process, Gray lost the reasonable opportunity that the trial court erred in modifying the mandatory jury instruction in deleting the *curtilage* language from the instructions given jurors. *Collins* had involved the question of the parking area to the curtilage of the home, suggesting that as a matter of law, the trial court erred.

Additionally, the trial court's reliance on the area in front of Gray's duplex, including the parking space as not qualifying for protection as *curtilage* raises unresolved issues of law:

This incident, homicide took place in a parking lot of an apartment duplex-type facility. It was a common area and by analogy, fourth amendment jurisprudence, there's no expectation of privacy. It's common to everyone, so that will be the Court's ruling.

(TR/594-595). First, the explanation suggests that residential housing not of a single-family type, but rental property, cannot have curtilage because the property immediately adjacent to the residence constitutes a "common area," a conclusion contrary to the historically-recognized understanding of *curtilage*. *Collins, supra*. Second, this view of common access to the property, including Gray's front yard and parking area, which *Collins* addressed directly, is not consistent with the statutory definition of "Curtilage" in ARK CODE ANN. § 5-2-607(c), demonstrating an abuse of discretion by the trial court in substituting its understanding of *curtilage* for that of the Arkansas General Assembly.

The ineffective assistance of trial counsel in failing to preserve error resulted in a breakdown in the appellate process that involves a structural issue providing support for the *certworthiness* of Gray's claim, evidenced by the test for a Sixth Amendment violation used by the Arkansas Court of Appeals in applying *Strickland* to jury instruction error claims. It explained, in affirming:

Ineffective assistance of counsel cannot be established by a mere showing of error by counsel or by revealing that counsel's failure to object prevented an issue from being addressed on appeal.  *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). To prevail on a claim of ineffective assistance of counsel based on counsel's failure to preserve an issue for appeal, a petitioner must show that, had the issue been preserved, the appellate court would have reached a different decision. *Strain v. State*, 2012 Ark. 42, 394 S.W.3d 294.

Gray, 2021 Ark. App. 406, at *12, 636 S.W.3d 102, 110. Gray argued in his brief challenging the postconviction court's disposition, at ARG-4:

There is no requirement under *Strickland*, as applied to issues on appeal, that Gray definitively show that he would have won on appeal. Here, the test for the defaulted claim equates with the test when appellate counsel fails to raise a meritorious issue on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Neill v. Gibson*, 278 F.3d 1044, 1057, n. 5 (10th Cir. 2001) (abandoning "dead-bang winner" test for relief and adopting "reasonable probability" of relief on appeal based on Court's decision in *Smith*).

The court, however, ignored *Smith v. Robbins* and *Strickland* as the test for a judging Sixth Amendment ineffectiveness issues arising on appeal, requiring Gray to meet the "dead-bang winner" test in order to prevail on appeal. Certiorari is warranted to re-enforce *Smith* and bury the "dead-bang" winner test.

II. Trial counsel's failure to object to the trial court's deletion of a statutory element of Arkansas self-defense law, resulting in an impermissible lessening of the prosecution's burden of proof in violation of due process, rendered his performance ineffective, warranting relief under the Sixth Amendment, even in light of Arkansas law holding that preservation of federal constitutional will not support a claim of ineffective assistance of counsel.

Gray argued that trial counsel's failure to object to the modification of the jury instruction on self-defense resulted in a due process violation by impermissibly lessening the prosecution's burden of proof. The instruction given not only deleted any reference to the protection afforded an individual acting in self-defense while on the curtilage of his property, but also excluded any instruction at all on Arkansas law imposing *no duty to retreat* upon the accused when the use of deadly force occurred in his residence or on the curtilage. The trial court instructed jurors on self-defense, including:

Second, William Gray only used such force as he reasonably believed to be necessary. A person is not justified in using deadly force if he knows that the use of deadly force can be avoided with complete safety by retreating.

(TR/600). This modified instruction contained no reference at all to the statutory protection afforded by Section 5-2-607(b)(1)(B), relieving the accused of the duty to retreat unless the use of deadly force occurs in the home or on the curtilage. Despite the issue of whether the actual discharge of Gray's firearm occurred on the curtilage and what the proper description of curtilage is under law, there was undisputed testimony that Chisum initiated a violent assault—a felony--when she

attacked Gray in his residence, eventually leading to the shooting outside and in the front of his residence. But the trial court's modification led to deletion of any reference to the law relieving him of a duty to retreat in this episode.

The court of appeals clarified the burden of proof under Arkansas law:

Justification is not an affirmative defense that must be pled but becomes a defense when any evidence tending to support its existence is offered to support it. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). By statute, justification, such as self-defense, is considered an element of the offense and, once raised, must be disproved by the prosecution beyond a reasonable doubt. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308.

Gray, 2021 Ark. App. 102, at *16, 636 S.W.3d at 112. The trial court instructed on use of deadly force, based on Gray's testimony of the circumstances as required by AMCI 2d 705, but with the deletion based on its conclusion that the parking area could not be included as curtilage because it was a common area. Only after Gray argued that counsel was ineffective did the court expand its reasoning for deleting the reference to curtilage based on its finding that he fired from the front of neighbor Cooper's residence.

The modification relieved the State of its burden to disprove the elements of Arkansas law of self-defense regarding the *no duty to retreat* protection when the use of deadly force originates in the home. Yet, counsel offered no objection to the trial court's functional directed verdict on the State's burden to disprove justification based on the *no duty to retreat* protection afforded by statute.

Gray was entitled to not have the court substitute its assessment of the evidence for that of the jury to find that the State prevailed on any aspect of the elements of its case by inferring that the accused failed to discharge a burden of disproving his guilt. *Humphrey v. State*, 332 Ark. 398, 409, 966 S.W.2d 213, 218 (1998) (“Because justification is not an affirmative defense, the State has the burden of negating the defense once it is put in issue”). The due process protection afforded by the Fourteenth Amendment requires the prosecution to prove each element of its case. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). In *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975), the Court held that the prosecution could not discharge its burden of proof by relying on an inference that the accused’s failure to contest an element of its case would be sufficient to establish the element. This is precisely what happened to Gray when the State was relieved of its burden to prove beyond a reasonable doubt that he was not within the protected curtilage or that the *no duty to retreat* protection for his home did not apply to the entire episode. Counsel had a duty to protect Gray’s constitutional right to due process.

However, with respect to application of the *Strickland* test in individual factual contexts, an important approach taken by the Arkansas Supreme Court is questionable. First, in *State v. Fudge*, 361 Ark. 412, 427, 206 S.W.3d 850, 861 (2005), the court explained:

[W]e held in *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), that failure to preserve an issue for federal habeas review is not the

prejudice contemplated by the Strickland test, which requires a reasonable probability that the outcome at trial would have been different.

Thus, counsel's failure to protect the record for review of federal constitutional claims, which must be asserted in the direct appeal process when ripe for objection at trial, is not recognized as defective performance under Arkansas law. As here, counsel's failure to object on federal constitutional grounds, such as the protection afforded by the Due Process Clause of the Fourteenth Amendment, as interpreted in this Court's decisions, is excused under Arkansas law. A federal constitutional claim defaulted in state court by application of a state preservation rule because it has not been presented to the state courts and exhausted in the state appellate process bars review in federal courts, whether by certiorari, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), or in the federal habeas corpus process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Gray argues that counsel's obligations to represent the client effectively cannot be excused by the Arkansas rule in *Fudge* and *Johnson*, relieving counsel of the duty of representing the client with respect to protections arising under both state and federal law, without jeopardizing the integrity of the criminal process.

In *Michigan v. Long*, the majority observed nearly forty years ago:

The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. *The state courts are required to apply federal constitutional standards*,

and they necessarily create a considerable body of “federal law” in the process. It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States.

463 U.S. 1032, 1042 n.8 (1983) (emphasis added). The Arkansas rule excusing counsel from protecting federal constitutional rights in the assessment of the effectiveness of representation guaranteed by the Sixth Amendment is woefully inconsistent with *Long*’s observation of the need for state court enforcement of federal constitutional rights in state criminal proceedings, comprising the standards for performance necessary to ensure fairness in the criminal justice system, warranting review of Gray’s claim by grant of the writ of certiorari in this case.

III. The appellate court’s application of an unreasonable or inconsistent rule of procedural default to dismiss Gray’s direct appeal violated his right to appeal ensured by the Equal Protection Clause of the Fourteenth Amendment contrary to *Lee v. Kemna*, 534 U.S. 362 (2002).

Following the decision dismissing his appeal as a result of procedural default based on trial counsel’s failure to preserve error in not tendering a correct instruction at trial Gray’s appointed appellate counsel filed the petition for rehearing. There, counsel pointed out the decision in *Tandy Corp. v. Bone, supra*, where the court addressed the preservation rule in a civil appeal:

The appellee argues that the appellants did not make a proper objection to this instruction because no instruction was proffered in substitution. There is no such requirement. All that is required to preserve an objection for appeal regarding an erroneous instruction of law is to

make a timely objection and state valid reasons for the objection. ARCP Rule 51. The appellants did both.

Id. at 402, 678 S.W.2d at 313-14, questioning the viability of the rule applied by the court of appeals in dismissing the direct appeal based on procedural default. The court of appeals denied rehearing and the Arkansas Supreme Court then denied review of the appellate court's dismissal.

Lee v. Kemna, 534 U.S. 362 (2002), references the standard for use of procedural default to bar federal review of allegations of federal constitutional violations not previously litigated fully in state court proceedings. Here, however, Gray complains of the use of procedural default to deprive him of his right to direct appeal protected by due process and equal protection guarantees of the Fourteenth Amendment, not simply to serve as a bar to a federal court's review of the application of the default rule to decline review on the merits in the state court. Gray points to two different grounds for holding that dismissal of his direct appeal itself violated Fourteenth Amendment protections affording him fair review of the consequences of counsel's claimed failure to protect his right to appellate review on the merits.

First, the application of the rule requiring counsel complaining of trial error in instructing the jury to tender a proposed correct instruction for the trial court's consideration in ruling on counsel's objection to the instruction being given does not have a reasonable basis here. The trial court, itself, made the determination that the

record warranted modification of the mandatory instruction adopted by the state supreme court, creating a duty for the trial court to give the mandatory instruction. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980). The court was, consequently, under the duty to be informed as to the contents of the mandatory instructions, including AMCI 2d 705, instruction on use of deadly force in self-defense that includes the expanded protection afforded by the *no duty to retreat* provisions drawn from the language of the controlling statute. On direct appeal, the court of appeals applied precedent recognizing counsel's duty to tender the proposed correct instruction for inclusion in the record on appeal. *Gray*, 2018 Ark. App. 544, at *5, 564 S.W.3d at 291.

But, with respect to AMCI 2d 705, the fact that this is a published, mandatory jury instruction that all Arkansas judges should be thoroughly familiar with, rendering counsel's duty to submit the mandatory instruction superfluous. Moreover, while *Lee v. Kemna* viewed regularity of application of a rule of procedural default by the state in order to bar federal review on the merits of a defaulted claim, the unequivocal language of *Tandy Corp. v. Bone*, shows that Arkansas precedent is not sufficiently regular to show that this rule is routinely applied. Arkansas has a unitary approach to appellate process, with criminal and civil appeals proceeding in the same general way; there is basis for distinguishing civil and criminal appeals in terms of preservation of error rules.

Gray's claim here is not focused on a federal court's refusal to consider the merits of his argument that the trial court abused its discretion or committed error in modifying the mandatory self-defense instruction because the claim had been procedurally-defaulted when his direct appeal was dismissed by the Arkansas Court of Appeals. Rather, he argues that the application of a rule of procedural default not reasonably warranted on the facts where the trial court and parties were aware of the contents of mandatory instruction that was modified by the trial court, apparently on motion of the State, violates due process. This violation by application of the state procedural default to bar review in a federal proceeding, but as a result of the denial of his right to direct appeal ensured by the Fourteenth Amendment.

Certiorari is warranted on this issue because of the posture of Gray's claim and the proper application in the principles underlying *Lee v. Kemna* in protecting the litigation processes, trial, direct appeal, and postconviction processes in state courts. The inconsistent application of state procedural default rules threaten the equitable approach to appellate decisionmaking, particularly when the consequences involve infringement on constitutionally-protected rights, such as the right afforded criminal defendants to direct appeal to challenge their convictions or sentences.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner Gray's claims can likely only be addressed by this Court through the certiorari process because they likely require new rules or extension of existing precedent for relief from the inappropriate rules followed by the Arkansas courts, or require correction that can only be ordered by this Court. Petitioner prays the Court grant the petition and issue the writ for briefing and argument; or alternatively, summarily reverse or vacate the judgment of the lower court and remand for reconsideration of controlling Supreme Court authority, in particular, the proper disposition of ineffective assistance claims under *Strickland v. Washington*.

Respectfully submitted this 25th day of April, 2022.

/s/ J. Thomas Sullivan
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