No.

IN THE
Supreme Court of the United States

RANDY WILLIAM GAY,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court of Arkansas**

PETITON FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether a capital defendant's Sixth and Fourteenth Amendments rights to a fair and impartial jury and to the effective assistance of counsel are violated by the preclusion of, and trial counsel's failure to ask, case-specific mitigation questions during *voir dire.*

2. Whether a capital defendant's Sixth and Fourteenth Amendment rights are violated by allowing two jurors to sit who stated they would not consider intoxication a mitigating circumstance and whether trial counsel was ineffective for failing to move to disqualify the impaired jurors.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Gay v. State*, No. 26CR-11-428 (Garland County, Arkansas, Circuit Court, conviction entered March 20, 2015)

2. *Gay v. State*, No. CR-15-948 (Arkansas Supreme Court, opinion affirming conviction and sentence entered December 8, 2016)

3. *Gay v. State*, No. 26CR-11-428 (Garland County, Arkansas, Circuit Court, order denying post-conviction relief entered March 5, 2019)

4. *Gay v. State*, No. CR-19-762 (Arkansas Supreme Court, opinion reversing and remanding entered January 21, 2021)

5. *Gay v. State*, No. 26CR-11-428 (Garland County, Arkansas, Circuit Court, supplemental order denying post-conviction relief entered April 23, 2021)

6. *Gay v. State*, No. CR-21-202 (Arkansas Supreme Court, opinion affirming denial of post-conviction relief entered February 10, 2022)

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming the conviction and sentence was published at 2016 Ark. 433 (App. A).

The opinion of the Arkansas Supreme Court remanding the Order Denying Rule 37 relief was published at 2021 Ark. 3. (App. E)

The opinion of the Arkansas Supreme Court affirming the denial of Rule 37 relief was published at 2022 Ark. 23. (App. G)

BASIS OF JURISDICTION

The Arkansas Supreme Court filed its opinion on February 10, 2022. (App. G). The Arkansas Supreme Court denied a petition for rehearing on March 31, 2022, (App. J), and a Motion to Stay Mandate on April 14, 2022. (App. K) This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution, amendment VI, provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defence.

U.S. Const. amend. VI.

The U.S. Constitution, amendment XIV, section 1, provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1.

STATEMENT OF THE CASE

On May 10, 2011, Gay shot and killed Connie Snow in the Ouachita National Forest in Garland County, Arkansas. He was charged with capital murder, and the State sought the death penalty. Gay was convicted of capital murder and sentenced to death on March 20, 2015. The Arkansas Supreme Court affirmed the conviction and sentence on December 8, 2016. *Gay v. State*, 2016 Ark. 433, 506 S.W.3d 851 (2016).

On February 27, 2017, counsel was appointed to represent Gay in state post-conviction relief ("PCR") proceedings. A Petition to Vacate Gay's conviction and sentence was filed May 26, 2017. As pertinent here, the Petition alleged that Gay was denied a fair and impartial jury under the Sixth and Fourteenth Amendments because none of the capital venire was asked if he or she could give meaningful consideration and effect to case-relevant mitigating evidence and because five of the venire, two of whom ultimately sat on the jury, stated they would not consider intoxication as a mitigating factor. *See Gay v. State*, No. 26CR-11-428, Petition to Vacate filed May 26, 2017. Gay further claimed that his trial counsel was ineffective for failing to ask the venire if they could give meaningful consideration and effect to any case-relevant mitigating factors and for failing to challenge for cause the two mitigation-impaired jurors. *Id.*

The PCR court denied Gay's claims on March 5, 2019. On appeal, the Arkansas Supreme Court reversed and remanded, directing the PCR court to enter more specific findings of fact and conclusions of law. *Gay v. State*, 2021 Ark. 3 (2021). The

PCR court entered a supplemental order on April 23, 2021, denying relief. On February 10, 2022, the Arkansas Supreme Court affirmed the denial of relief. As to Gay's claim that he was denied a fair and impartial jury due to the failure to ask the venire whether they could give meaningful consideration to relevant mitigating factors, the Court found the issue was raised and rejected in Gay's direct appeal. As to Gay's claim that trial counsel was ineffective for failing to ask any case-specific mitigating questions of the venire, the Court held:

> *Morgan [v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222 (1992)] stands for the proposition that a venireperson who will automatically vote for the death penalty, regardless of mitigators or aggravators, should be struck for cause. It does not stand for the proposition that Gay should have been allowed to question jurors about their views on "particular" mitigators.
>
> *Gay v. State*, 2016 Ark. at *13.

Gay petitioned the Arkansas Supreme Court to rehear the case, arguing that the Court failed to consider Gay's arguments that he was denied a fair and impartial jury when two of the jurors, in response to prosecution questions, unambiguously stated they would not consider intoxication as a mitigating factor and Gay's claim that trial counsel was ineffective for failing to challenge or strike the jurors. *See Gay v. State,* No. CR-21-202, Petition for Rehearing. Rehearing was summarily denied on March 31, 2022.[1]

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[1] Gay further moved to Stay the Mandate on March 21, 2022. It was summarily denied on April 14, 2022.

REASONS FOR GRANTING THE PETITION

The Arkansas Supreme Court erred in failing to find that a capital defendant is entitled to inquire of a capital venire whether it can give meaningful consideration and effect to mitigating circumstances relevant to the case, thus depriving Gay of a fair and impartial jury, and erred in failing to find trial counsel ineffective for failing to conduct such a *voir dire*, all in violation of the Sixth and Fourteenth Amendments. The Arkansas Supreme Court further erred in failing to find that Gay was deprived of a fair and impartial capital jury when two jurors were seated on the jury who refused to consider intoxication a mitigating circumstance and erred in failing to find trial counsel ineffective for failing to move to strike the unqualified jurors for cause, all in violation of the Sixth and Fourteenth Amendments. These decisions were either in direct conflict with this Court's decision in *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222 (1992), or present issues on an important question that *Morgan* did not decide but should now be settled by this Court.

*****

1.A. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978), established the concept of "individualized sentencing" in capital cases. The Court held that a capital sentencing jury cannot "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968), the Court held that "a sentence of death cannot be imposed or recommended if the jury that imposed or

recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. The standard for determining whether a potential juror may be excluded from the jury because of his or her views on capital punishment is "whether the juror's views could 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 841 (1985). *See also Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273 (1988). "[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246, 127 S.Ct. 1654, 1664 (2007). Thus, any potential juror who cannot give mitigating evidence meaningful consideration is disqualified to sit on a capital jury.

The present issue involves the extent of a *voir dire* that is constitutionally necessary in a capital case to determine whether a potential juror's views for or against the death penalty would prevent or substantially impair the performance of his or her duties. During *voir dire*, trial counsel did not ask the venire if they could give meaningful consideration and effect to any circumstances that would mitigate against imposition of the death penalty. If the trial court precluded such questions, it denied Gay a fair and impartial jury. If trial counsel failed to ask the questions, Gay was denied the effective assistance of counsel.

The only way to determine whether a member of a capital venire can meaningfully consider mitigating evidence is through questioning during *voir dire.* In *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992), the venire was asked if any member had moral or religious principles so strong that he or she could not impose the death penalty regardless of the facts. The trial court refused defense counsel's request that the venire be asked the reverse: whether any member would automatically vote to impose the death penalty following a capital conviction no matter the facts or circumstances. This Court held that the reverse question was constitutionally required.

A guarantee of the Fourteenth Amendment, the *Morgan* Court said, is a defendant's right to an impartial jury.

> The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Hence, 'the exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.'" (internal citations omitted).

Id. at 729-30. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality." *Id.* at 733 (emphasis in original).

The question of how far *Morgan* extends and whether capital defense counsel should be able to *voir dire* on specific mitigators has caused considerable confusion in the lower courts. Some courts have held that some specific questioning is required. *See People v. Cash*, 50 P.3d 332, 342–43 (Cal. 2002) (holding that the defense should have been permitted to inquire as to whether prospective jurors automatically would vote for the death penalty if the defendant had previously committed another murder). Other courts, after considerable analysis, have found that trial courts may (and should) permit such questions, even if they are not constitutionally required. *See United States v. Johnson*, 366 F. Supp. 2d 822, 849-50 (N.D. Iowa 2005) ("This court acknowledges that *Morgan* does not require 'case-specific' questions during *voir dire* of prospective jurors in capital cases, but neither does *Morgan* bar such questions, because the Supreme Court never addressed in *Morgan* the issue of whether such questions are permissible."). Others have found specific questions improper. *See Evans v. State*, 637 A.2d 117, 124–25 (Md. 1994) ("The specific circumstances of a particular crime are irrelevant to one's pre-existing bias or predisposition and thus cannot be factored into the court's evaluation of a juror's ability to judge impartially.").

This Court has not addressed the question specifically, although some of the Justices have opined that *Morgan*'s logic extends to case-specific questions. As Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, said in his *Morgan* dissent:

> [I]t is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that

> a *particular* factor—*e.g.*, "extreme mental or emotional disturbance"—is not mitigating. (Presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded.)

Morgan, 504 U.S. at 744 n.3 (citation omitted).

Gay proposed over 70 mitigating factors. But, the venire was not asked if they could give meaningful consideration and effect to any of them. Only by asking a venire if they can consider case-specific and relevant mitigating circumstances can a capital defendant be guaranteed a fair and impartial jury composed of members whose views would not prevent or substantially impair the performance of their duties, which include the duty to give meaningful consideration and effect to mitigating evidence. The *voir dire* in this case, therefore, was constitutionally inadequate to guarantee Gay a fair and impartial capital jury.

1.B. A petitioner making an ineffective-assistance-of-counsel claim must show that his or her counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 US. 668, 104 S.Ct. 2052 (1984). The petitioner must also show that counsel's deficient performance so prejudiced petitioner's defense that he or she was deprived of a fair trial. *Id.* The petitioner must show there is a reasonable probability that, but for counsel's errors, the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*

The record in this case does not make clear whether the trial court prohibited trial counsel from asking the venire whether they could give meaningful consideration and effect to case-specific mitigating factors or whether trial counsel simply failed to ask the questions. If the former, Gay's Sixth and Fourteenth Amendment rights to a fair and impartial capital jury were denied. If the later, Gay's Sixth and Fourteenth Amendment rights to effective representation were denied. The failure to ask such questions fell below an objective standard of reasonableness. And, Gay was prejudiced; he was sentenced to death by a jury comprised of jurors who could not assure that they would give meaningful consideration and effect to relevant mitigating circumstances.

2.A. The State asked five members of the venire this question or a variant: "Does anybody think that their punishment should be less because they chose to get drunk and do this than somebody who did something while they were sober?" (Trial Transcript, p. 3033-37). Venirepersons Frye and Stacey stated flatly, "No." Trial counsel failed to move to strike Frye and Stacey for cause (or to use a peremptory challenge). Both Frye and Stacey sat as jurors.

A capital jury must be allowed to give meaningful consideration and effect to a defendant's mitigating circumstances. *See Abdul-Kabir v. Quarterman*, supra. A juror who cannot discharge his or her duties is unqualified to sit. To determine whether a venire member will constitutionally consider mitigating evidence, he or she must be asked if they can give meaningful consideration and effect to mitigating evidence that is relevant and specific to the case. Even if one such juror is empaneled and the death

sentence is imposed, the State is disentitled to execute the sentence. *Morgan v. Illinois*, 504 at 729. Evidence of intoxication is a constitutionally recognized mitigating factor. *See, e.g., Ford v. Wainwright*, 861 F.Supp. 1447, 1455 (E.D. Ark. 1994). Jurors Frye and Stacey stated emphatically they would not consider intoxication as a mitigating factor. They were impaired in their ability to perform their duties in accordance with their instructions and oaths. The State, therefore, is disentitled to execute Gay.

2.B. The failure to challenge a juror who refuses to give meaningful consideration and effect to mitigating evidence falls below the standard of care and constitutes ineffective assistance. *See A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.10.2* ("Counsel should be familiar with techniques . . . for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence[.]"). The obvious technique is to challenge an unqualified juror for cause. Trial counsel failed to challenge Frye and Stacey for cause, or even to peremptorily remove them from the panel. The jury, which included these two unqualified jurors, imposed the death penalty. Gay's right to effective representation was, therefore, denied.

CONCLUSION

For the reasons set out above, the petition for writ of certiorari should be granted and the judgment of the Arkansas Supreme Court vacated and the case remanded.

Submitted June 27, 2022.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I, J. Blake Hendrix, hereby certify that on June 27, 2022, as required by Supreme Court Rule 29.3 and 29.4(a), I served the foregoing on each party in the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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/s/ J. Blake Hendrix
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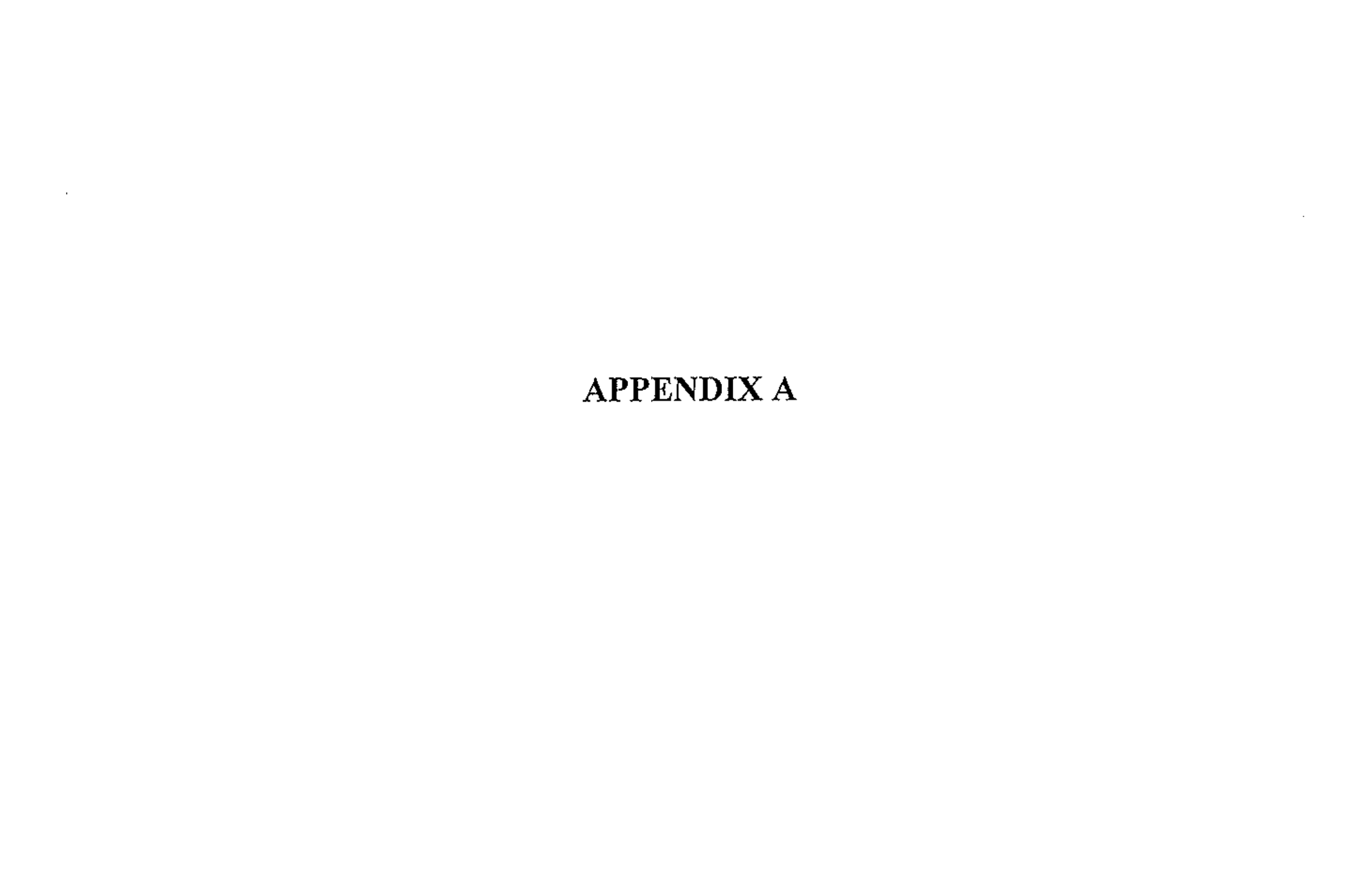

APPENDIX A

Neutral
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Gay v. State

Supreme Court of Arkansas

December 8, 2016, Opinion Delivered

No. CR-15-948

Reporter
2016 Ark. 433 *; 506 S.W.3d 851 **; 2016 Ark. LEXIS 364 ***

RANDY WILLIAM GAY, APPELLANT v. STATE OF ARKANSAS, APPELLEE

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

Prior History: [***1] APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT. NO. CR-11-428-1. HONORABLE JOHN HOMER WRIGHT, JUDGE.

Gay v. State, 2015 Ark. 469, 476 S.W.3d 791, 2015 Ark. LEXIS 657 (Ark., 2015)

Disposition: AFFIRMED.

Core Terms

circuit court, defense counsel, jurors, questions, mitigation, death penalty, asserts, lingering doubt, sentencing, mitigating circumstances, potential juror, proffered, calming, phase, pack, pen, instructions, truck, voir dire examination, closing argument, trial court, confession, capital murder, voir dire, demonstrates, contends, remember, murder, Falls, guilt

Case Summary

Overview

HOLDINGS: [1]-A challenge to the circuit court's allowance of defendant's "pen pack" was not considered on appeal where he failed to object to its introduction and had not asserted that any error in admitting the evidence fell within a Wicks exception; [2]-The voir dire arguments were rejected as defendant had not developed the arguments on appeal, nor had he contemporaneously objected to the voir dire of proffer questions he sought to ask potential jurors; [3]-As for the circuit court's approach to rehabilitative questions to veniremen, a challenge to the excusal of one juror for cause was not preserved for review; [4]-Defendant was not prejudiced by the granting of the State's motion for a mental examination where the examination was never used at trial; [5]-The challenges to the jury instructions were rejected.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

HN1[] **Plain Error, Definition of Plain Error**

It is well settled that arguments not raised at trial will not be addressed for the first time on appeal. Further, Arkansas does not recognize plain error, i.e., an error not brought to the attention of the trial court by objection, but nonetheless affecting substantial rights of the defendant.

Criminal Law & Procedure > ... > Reviewability > Preservation for

Review > Exceptions to Failure to Object

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

HN2[] Preservation for Review, Exceptions to Failure to Object

It is well settled that a contemporaneous objection is required to preserve an issue for appeal, but the Supreme Court of Arkansas has recognized four exceptions to the rule, known as the Wicks exceptions. These exceptions occur when (1) a trial court, in a death-penalty case, fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) a trial court errs at a time when defense counsel has no knowledge of the error and thus no opportunity to object; (3) a trial court should intervene on its own motion to correct a serious error; and (4) the admission or exclusion of evidence affects a defendant's substantial rights.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

HN3[] Preservation for Review, Failure to Object

A defendant cannot agree with a circuit court's ruling and then attack the ruling on appeal.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

HN4[] Voir Dire, Appellate Review

The extent and scope of voir dire examination is within the sound discretion of the circuit judge, and the latitude of that discretion is wide. The judge's restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. Abuse of discretion occurs when the circuit judge acts arbitrarily or groundlessly.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN5[] Preservation for Review, Requirements

The Supreme Court of Arkansas does not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN6[] Preservation for Review, Requirements

The Supreme Court of Arkansas has repeatedly stated that we will not consider arguments raised for the first time on appeal.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

HN7[] Voir Dire, Appellate Review

The extent and scope of voir dire examination is within the sound discretion of the circuit court judge, and the latitude of that discretion is wide. The circuit court's restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. Abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

HN8[] Bias & Impartiality, Actual & Implied Bias

The Supreme Court of Arkansas has said that the proper test to be used in releasing a prospective juror for cause is whether the person's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and oath.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

HN9[] Bias & Impartiality, Actual & Implied Bias

Because Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

HN10[] Pretrial Motions & Procedures, Competency to Stand Trial

Pursuant to *Ark. Code Ann. § 5-2-305(a)(1)(B) (2013)*, the circuit court may, on its own, suspend all proceedings and order a mental examination when there is reason to believe a mental disease or defect of the defendant has become an issue in the case.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN11[] Standards of Review, Abuse of Discretion

With regard to jury instructions, a trial court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN12[] Preservation for Review, Requirements

The Supreme Court of Arkansas does not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN13[] Capital Punishment, Mitigating Circumstances

Under *Ark. Code Ann. § 5-4-602(4)*, mitigation evidence must be relevant to the issue of punishment. *Ark. Code Ann. § 5-4-602* does not totally open the door to any and all matters simply because they might conceivably relate to mitigation. Relevant mitigating evidence is limited to evidence that concerns the character or history of the offender or the circumstances of the offense.

Counsel: For Appellant: Dale Eugene Adams.

For Appellee: Evelyn D. Gomez, Adam Donner Jackson, David Robert Raupp.

Judges: KAREN R. BAKER, Associate Justice.

Opinion by: KAREN R. BAKER

Opinion

[854] [*1] KAREN R. BAKER, Associate Justice**

On March 20, 2015, appellant, Randy William Gay, was convicted by a Garland County Circuit Court jury of one count of capital felony murder in the 2011 death of Connie Snow and sentenced to death. Gay appealed and presents seven issues on appeal: (1) the circuit court violated Gay's right to a fair and impartial trial by allowing Gay's entire "pen pack" to be submitted to the jury; (2) the circuit court erred by violating Gay's rights to due process by refusing to allow defense counsel to

question potential jurors in depth regarding their views on the death penalty and mitigation; (3) the circuit court's inconsistent approach to rehabilitative questions to veniremen resulted in the improper removal of jurors for cause that denied Gay the right to a fair and impartial jury; (4) the circuit court erred in granting the State's [***2] motion for a mental-health evaluation of Gay over Gay's objection; (5) the circuit court erred by refusing to allow jury instructions AMI Crim. 2d 202 and AMI Crim. 2d 206, which were proffered by the defense; (6) the circuit court erred in denying the defense [*2] mitigator of "lingering doubt" in the penalty phase; and (7) the circuit court erred for refusing to allow Gay to introduce as a mitigating circumstance that Gay had a calming influence on others while in custody.

I. *Facts*

Gay does not challenge the sufficiency of the evidence. Therefore, only a brief recitation of the facts is necessary. James Westlake testified he and his family operated a timber business in Garland County in 2011. James testified that he paid Gay "a few hundred dollars each week" to "keep an eye" on their equipment overnight. On May 10, 2011, James, Jim Westlake, and Rickey Stewart were attempting to repair machinery at their logging business in a wooded area of Garland County. Around 5 p.m. that day, Gay arrived in a pickup truck, and Snow was in the passenger seat. James testified that Gay exited the truck and ordered Snow out of the truck; Snow did not comply, and Gay went back to his truck and retrieved [***3] a shot gun and ordered Snow out of the truck. As Snow was attempting to exit the truck; Gay shot Snow in the right side of her face. The testimony demonstrates that James and Stewart both witnessed the [**855] shooting. James testified that Gay loaded Snow's body into the back of his truck and exited the property. Snow's body was recovered four days later in a shallow creek, and Gay was charged with capital murder. In 2013, Gay's first trial ended with a mistrial after the circuit court discovered that members of the jury had violated instructions by conducting independent research. Prior to the first trial, on a motion from the State and over an objection from Gay, the circuit court ordered a mental evaluation of Gay. The State retried Gay in March 2015 and on March 20, 2015, the jury convicted [*3] Gay, sentenced him to death, and this appeal followed.

II. *Points on Appeal*

A. Gay's "Pen Pack"

For his first point on appeal, Gay asserts the circuit court violated Gay's right to a fair and impartial trial by allowing Gay's entire "pen pack" to be submitted to the jury. During the sentencing phase, Gay introduced the "pen pack" that "spanned all periods of time that [Gay] had been incarcerated in the [***4] Arkansas Department of Correction. It consisted of approximately 300 pages and contained a large amount of information that was highly prejudicial to [Gay]." Gay contends that the "pen pack" should not have been introduced and considered by the jury and urges this court to reverse and remand this matter for a new trial.

At trial, during the sentencing phase, Gay called Shelly Hamilton, the classification administrator at the Department of Correction. Hamilton testified regarding Gay's two prior convictions for second-degree murder on two separate occasions, a felony conviction for felon in possession of a firearm, Gay's background, alleged parole violations, furloughs, and Minnesota Multiphasic Personality Inventory test results. However, Gay elicited the testimony and introduced the "pen pack." Further, Gay did not object to the introduction of the "pen pack."

Here, "before considering the merits of this point on appeal, we must first determine whether the issue was properly preserved for appellate review. . . . HN1[] It is well settled that arguments not raised at trial will not be addressed for the first time on appeal." Ray v. State, 2009 Ark. 521, at 3-4, 357 S.W.3d 872, 876 [*4] (internal citations omitted). Further, "Arkansas [***5] does not recognize plain error, i.e., an error not brought to the attention of the trial court by objection, but nonetheless affecting substantial rights of the defendant." Green v. State, 362 Ark. 459, 468, 209 S.W.3d 339, 344 (2005) (internal citations omitted). HN2[] "It is well settled that a contemporaneous objection is required to preserve an issue for appeal, but this court has recognized four exceptions to the rule, known as the *Wicks* exceptions." Springs v. State, 368 Ark. 256, 260, 244 S.W.3d 683, 686 (2006); Anderson v. State, 353 Ark. 384, 108 S.W.3d 592 (2003). These exceptions occur when (1) a trial court, in a death-penalty case, fails to bring to the jury's attention a matter

essential to its consideration of the death penalty itself; (2) a trial court errs at a time when defense counsel has no knowledge of the error and thus no opportunity to object; (3) a trial court should intervene on its own motion to correct a serious error; and (4) the admission or exclusion of evidence affects a defendant's substantial rights. *Springs, 368 Ark. at 261, 244 S.W.3d at 686*.

Here, Gay did not preserve the issue for review and has not asserted that the error falls within one of the exceptions in *Wicks*. Finally, we have repeatedly stated that HN3[] a defendant cannot agree with a circuit court's ruling and then attack the ruling on **[**856]** appeal. *See, e.g., Camargo v. State, 346 Ark. 118, 55 S.W.3d 255 (2001)*; *Roberts v. State, 352 Ark. 489, 504-05, 102 S.W.3d 482, 493 (2003)*. Based on the record before us, **[***6]** we do not find error with regard to the introduction of the pen pack and affirm the circuit court.

B. Questioning Potential Jurors Regarding the Death Penalty and Mitigation

For his second point on appeal, Gay contends that the circuit court violated Gay's due-process **[*5]** rights by refusing to allow Gay's counsel to question potential jurors in depth regarding their views on the death penalty and mitigation. Gay asserts that the circuit court restricted voir dire examination of potential jurors in two major areas: (1) the potential jurors' views on the death penalty and (2) mitigation. The State responds that the circuit court acted with sound discretion, and the circuit court repeatedly warned defense counsel that he was "fact qualifying" the potential jurors.

At issue is the voir dire examination of potential jurors. In *Isom v. State*, we explained our standard:

> HN4[] The extent and scope of voir dire examination is within the sound discretion of the circuit judge, and the latitude of that discretion is wide. *See Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992)*. The judge's restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. *Id.* Abuse of discretion occurs when the circuit judge acts arbitrarily **[***7]** or groundlessly. *See Walker v. State, 304 Ark. 393, 803 S.W.2d 502 (1991).*
>
> Arkansas Rules of Criminal Procedure provide the procedure for the conduct of proper voir dire in a criminal trial:
>
> > (a) Voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges. The judge shall initiate the voir dire examination by:
> > (i) identifying the parties; and
> > (ii) identifying the respective counsel; and
> > (iii) revealing the names of those witnesses whose names have been made known to the court by the parties; and
> > (iv) briefly outlining the nature of the case.
> > (b) The judge shall then put to the prospective jurors any question which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as the judge deems reasonable and proper.
> >
> > **[*6]** *Ark. R.Crim. P. 32.2(a)* and *(b)*.
>
> The fact that the Rules allow the circuit judge to permit such additional questioning as he or she deems proper underscores the discretion vested in the circuit judge.

Isom, 356 Ark. 156, 171-72, 148 S.W.3d 257, 267-68 (2004).

Here, Gay contends that the circuit court erred by not allowing **[***8]** voir dire for further questions into the veniremen's beliefs concerning the death penalty and mitigation and whether lack of premeditation was mitigation to an intentional murder. Gay further contends that the State was allowed to ask jurors questions regarding intoxication, which was mitigation evidence, and Gay was not able to ask questions regarding mitigation. Gay points to one specific instance in which he alleges that, when questioning Juror McLernon, **[**857]** he was unable to adequately explore the juror's views regarding the death penalty and was therefore not able to conduct a thorough voir dire. The State responds that the circuit court "even-handedly" applied the same discretion in limiting questions by the State and by Gay.

Gay briefly points to language in his questioning of

McLernon. The following colloquy is the questioning Gay complains about:

> DEFENSE COUNSEL: Besides the taking of a life, a homicide, do you feel that there are other circumstances where the death penalty should be applied?
>
> . . . .
>
> MCLERNON: I do not think so.
>
> . . . .
>
> DEFENSE COUNSEL: . . . Some people are of the belief, because of religion, the way that they were raised, what they've read, life experiences, I couldn't [***9] tell you what it would be, that if you take a life you should forfeit your life. Do you [*7] believe that?
>
> . . . .
>
> MCLERNON: It depends on how bad of the situation. Other than taking someone's life.
>
> DEFENSE COUNSEL: Okay. Now if I understand what you said, how bad a situation beyond the taking of a life. Is that what you said?
>
> MCLERNON: There's other circumstances that can make things a lot worse than just taking the life.
>
> DEFENSE COUNSEL: All right. Taking that last statement, would you be able to look at any circumstances there were presented to you to convince you that the death penalty's not appropriate?
>
> MCLERNON: I'm still on the side of the death penalty, so I can't really answer that question.
>
> DEFENSE COUNSEL: And let me just tell you. We're not allowed to give you examples and say - -
>
> MCLERNON: Oh, I know. I know.
>
> DEFENSE COUNSEL: - - if this is proven, would you do this.
>
> MCLERNON: I understand.
>
> DEFENSE COUNSEL: You know it's not like a - -
>
> MCLERNON: I understand.
>
> DEFENSE COUNSEL: - - slot machine, where you put it in, pull the handle and get an answer.
>
> MCLERNON: I know.
>
> DEFENSE COUNSEL: So that's why we're talking in a vacuum.
>
> MCLERNON: I understand.

[*8] Here, Gay asserts that he was unable to adequately [***10] explore Juror McLernon's view; but makes conclusory statements and does not develop this argument. However, based on the record discussed above, the record does not support Gay's argument. Further, HN5[] we "do not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken." *Decay v. State, 2009 Ark. 566, at 3-4, 352 S.W.3d 319, 324* (internal citations omitted). Further, based on our review of the record, Gay did not preserve this issue for review. Gay did not contemporaneously object to the voir dire or proffer questions he sought to ask the potential jurors.

Accordingly, based on our discussion above, we affirm the circuit court on Gay's second point.

C. Improper Removal of Jurors Based on the Circuit Court's Inconsistency

For his third point on appeal, Gay asserts that the circuit court erred when it [**858] employed an inconsistent approach to rehabilitative questions to veniremen, which resulted in the improper removal of jurors for cause that denied Gay the right to a fair and impartial jury. Further, Gay asserts that voir dire serves a critical function in assuring a fair trial and that the circuit court's uneven treatment [***11] regarding rehabilitation of jurors who favored the death penalty as opposed to those who had problems with the death penalty constitutes an abuse of discretion. Thus, Gay urges us to reverse and remand the matter for a new trial.

Here, Gay challenges rehabilitative questions by the circuit court to the following prospective jurors: Sandra Barker, Blanche Young, Elmer George, Samantha Brown, and [*9] Carolyn Wetthington. Barker, Young, and Wetthington were struck by the defense with

peremptory challenges. The prosecution struck George with a peremptory challenge. The record demonstrates that Gay did not object to the circuit court's questioning or treatment of these potential jurors that he now complains of in this appeal.

On the prosecution's motion, the circuit court excused Brown for cause. However, Gay did not object or preserve the issue for review. The record demonstrates that Gay did not object below after Brown had been struck. HN6[] This court has repeatedly stated that we will not consider arguments raised for the first time on appeal. *See Phavixay v. State, 2009 Ark. 452, 352 S.W.3d 311*; *see Decay, 2009 Ark. 566, at 7, 352 S.W.3d at 326*.

Further, the record does not support Gay's argument. HN7[] The extent and scope of voir dire examination is within the sound discretion of the circuit [***12] court judge, and the latitude of that discretion is wide. *Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992)*. The circuit court's restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. *Id.* Abuse of discretion occurs when the circuit court acts arbitrarily or groundlessly. *See Walker v. State, 304 Ark. 393, 803 S.W.2d 502 (1991)*. HN8[] "This court has said that the proper test to be used in releasing a prospective juror for cause is whether the person's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and oath. *Williamsnks v. State, 288 Ark. 444, 705 S.W.2d 888 (1986)*. HN9[] Because Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors. *Id.*" *Isom, 356 Ark. at 171-2, 148 S.W.3d at 267-68*.

[*10] Here, when asked whether she could consider guilt or innocence of capital murder in the first phase of the trial without considering the death penalty, prospective juror Brown stated that she was hesitant about being able to separate guilt from punishment. Brown also stated that she did not want to make a decision about the death penalty, and "I've never thought an eye for an eye . . . thing." Gay has failed to assert error by the circuit court and makes conclusory **[***13]** allegations. Further, based on our review of the record, we are unpersuaded that the circuit court erred on this point, and we affirm the circuit court.

D. Motion for Mental Examination

For his fourth point on appeal, Gay asserts that the circuit court erred in granting the State's motion for a mental examination of Gay pursuant to *Ark. Code Ann. § 5-2-305(a)(1)(B)* (Repl. 2013). HN10[] Pursuant to *Ark. Code Ann. § 5-2-305(a)(1)(B)*, which was in effect at the time of the motion, the circuit court may, on its own, suspend all proceedings and order a mental examination when there is **[**859]** "reason to believe" a mental disease or defect of the defendant has become an issue in the case. The State based its motion on the fact that Gay had previously been convicted of two murders, and in one of those cases, Gay put his fitness to proceed as an issue. Thus, the State contended that it anticipated Gay might put his mental condition at issue at some point, including sentencing, and the State was entitled to have Gay submit to a mental examination. Gay objected and asserted that if the motion was granted, the evaluation should be limited in scope; he also requested that counsel be present. On May 14, 2012, the circuit court entered an order allowing the examination, denied **[***14]** Gay's request for a limited exam and granted Gay's motion for counsel to be present on the **[*11]** premises.

Here, the record demonstrates that on August 14, 2012, psychologist Courtney A. Rocho met with Gay. However, Gay refused to participate. Further, the examination was not used against Gay. Although Gay asserts the circuit court erred, the examination was not introduced at trial. Because Gay's evaluation was never used at trial, he cannot demonstrate prejudice. *Hayes v. State, 274 Ark. 440, 447, 625 S.W.2d 498, 502 (1981)* ("We fail to perceive nor has appellant demonstrated how he was prejudiced by the non-use of these statements."); *see Simpson v. State, 339 Ark. 467, 6 S.W.3d 104 (1999)*. Accordingly, we affirm the circuit court on Gay's fourth point.

E. AMI Crim. 2d 202 and 206

For his fifth point on appeal, Gay asserts that the circuit court erred in refusing to give AMI Crim. 2d jury instructions 202 and 206. HN11[] With regard to jury instructions, "a trial court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of

discretion. *Hill v. State, 344 Ark. 216, 40 S.W.3d 751 (2001).*" Grillot v. State, 353 Ark. 294, 318, 107 S.W.3d 136, 150 (2003).

Gay challenges two separate instructions. First, AMI Crim. 2d 202, Inconsistent Statements, provides,

> Evidence that a witness previously made a statement which is inconsistent with his testimony at the trial may be considered by you for **[***15]** the purpose of judging the credibility of the witness but may not be considered by you as evidence of the truth of the matter set forth in the statement.

At trial, Gay asserted that the instruction was applicable because witness Rickey Stewart had been inconsistent with his testimony and statement given to the FBI. The State **[*12]** objected, and the circuit court refused to submit the instruction but allowed Gay to proffer the instruction. The following is the entire exchange regarding the instruction:

> DEFENSE COUNSEL: I also submitted an inconsistent statement instruction.
>
> THE COURT: 202?
>
> DEFENSE COUNSEL: 202, I believe. . . . The only potential witness that I - - witness that this came up with was Mr. Stewart.
>
> THE COURT: Okay.
>
> DEFENSE COUNSEL: And it's - - like I said, he's the only - - I don't recall Ms. Nevels or Ms. - - is it McElroy?
>
> THE COURT: And what were the inconsistent statements that Mr. Stewart made?
>
> DEFENSE COUNSEL: Well, during cross I asked him about things he said to the FBI agent. There weren't many questions, but when he was being interviewed. And that's the only thing, 'cause Mr. Westlake, that wasn't the case. And then no one **[**860]** else - - everybody else would've been crime lab **[***16]** or police.
>
> THE COURT: State object to that instruction being given?
>
> PROSECUTOR: Yes, Your Honor. I don't believe that there was anything where [defense counsel] pointed out you said this differently in your statement. He might've asked about the statement but I don't think there was any inconsistencies that were pointed out.
>
> DEFENSE COUNSEL: If you'll just show that proffered for the record on behalf of the Defendant, please.
>
> THE COURT: I'll do that.

Here, Gay does not develop his argument but simply makes conclusory allegations. HN12[] We "do not consider an argument when the appellant presents no citation to authority or **[*13]** convincing argument in its support, and it is not apparent without further research that the argument is well taken." *Decay, 2009 Ark. 566, at 3-4, 352 S.W.3d at 324 (2009)* (internal citations omitted). Further, based on the record, at trial, Gay did not identify the inconsistent statements supporting his request for the instruction or explain why the instruction should have been given. Accordingly, we do not find merit in Gay's argument and affirm the circuit court with regard to AMI Crim. 2d 202.

Second, Gay asserts that the circuit court erred in refusing to submit AMI Crim 2d. 206, Corroboration of Confession. Gay asserts that **[***17]** the circuit court mistakenly interpreted AMI Crim. 2d 206 to have a corroboration requirement. Gay contends that the circuit court should have given the instruction because Gay had provided a statement which the State introduced at trial, and the State referred to the statement in closing arguments.

AMI Crim. 2d 206 provides,

> A confession of a defendant, [unless made in open court], will not warrant a conviction unless accompanied with other proof that the offense was committed.

The circuit court refused to submit the instruction but allowed Gay to proffer it:

> DEFENSE COUNSEL: I did submit a 206 because there was a statement given to the authorities that the State introduced into evidence.
>
> . . . .

> THE COURT: But this is a corroboration. But, you know, I don't think the statement ever admitted the crime. Well it was - - I think the - - well, I can't suggest the purpose, but from what - - the way I understood it was they put it in to show that he was not telling the truth. . . . But I mean, this is a corroboration instruction of a confession and I just - -
>
> [*14] DEFENSE COUNSEL: Well, I did it - - I did it 'cause I think it's - -
>
> THE COURT: I'm gonna show this proffered too but I don't think I'm [***18] gonna give it . . . 'Cause I think it's gonna be confusing.

At trial, during closing arguments, the State referred to notes provided by Special Agent Scott Falls of the FBI during his investigation when Gay was questioned about the crime. The State referred to Falls's notes where Falls stated that Gay had claimed Gay was drunk and did not remember anything and also stating that he had spent the day in Mt. Pine. Gay asserts that the State's closing argument was the "confession" and that the circuit court should have submitted AMI Crim. 2d 206 to the jury. The portion of the closing argument he asserts merits the instruction being given is as follows:

> When you look at the statement that he gave, I submit to you, ladies and gentleman, that clearly shows that Randy [**861] Gay is not telling the truth about what he told the officers. Let's go through that.
>
> In the statement he gave to Scott Falls, he first claims he's an alcoholic who suffers from blackout spells and passes out frequently. Second, he has trouble recalling and cannot remember what he's done. He states that on Tuesday, May 10th, 2011, he had bought some beer and whiskey and stopped at a friend's house at nine in the morning and stayed [***19] there 'til 8:15 that night drinking. Ms. Nevels said that did not happen. He showed up at 6:30 after the murder.
>
> At approximately 8:15, he left with a girlfriend and went to her residence. He admits that he owns a white Chevy pickup with a silver toolbox. He admits that he has a shotgun. He admits that he works for James Westlike (sic). He stated that he had knew - he knew Connie Snow, but had not seen her for about two years. He denied having seen her for about two years. He denied having seen her within the past few days.
>
> When accused by Special Agent Falls of shooting and killing her in front of witnesses, he alternates between "Uh, I was drunk and I can't remember" to maintaining that he had spent the day in Mountain Pine with the Nevels, which Ms. Nevels says he did not do. And most heinously, when asked where he had hidden the [*15] body after he left her, took the pickup and dumped her, he said "He couldn't help." "I don't remember anything and I can't report what I don't remember."

Here, the record demonstrates that the State made arguments regarding Gay's truthfulness in statements provided to law enforcement, but there was not a confession. The State argued, "When you look at the [***20] statement he gave, I submit to you, ladies and gentlemen, that clearly shows that Randy Gay is not telling the truth about what he told the officers." Accordingly, the statement or information was not used as a confession but questions to Gay's truthfulness. Further, the statement was made by the State during closing arguments and was not evidence submitted to the jury. The jury had been instructed that closing arguments are not evidence in the trial. Based on our standard of review and the record before us, we do not find error on this point and affirm the circuit court.

F. "Lingering Doubt" Defense in Penalty Phase

For his sixth point on appeal, Gay asserts that the circuit court erred in denying his proffered jury instruction regarding "lingering doubt" as a mitigating-circumstance. Gay offered the following as a mitigating circumstance:

> There are lingering doubts as to Randy Gay's guilt as to the offense and as to eligibility for the death penalty. Even though these doubts may not rise to the level of 'reasonable doubt' under the instructions given during the penalty phase of trial.

During the penalty phase of the trial, Gay requested that the circuit court submit the instruction and [***21] the following colloquy occurred:

> PROSECUTOR: That instruction does not go to

anything about the Defendant. He is targeting the jurors in terms of saying even though you found the Defendant guilty of capital murder, this may not have been your verdict. I do not **[*16]** think that is a true mitigator.

DEFENSE COUNSEL: I would first point out that the jury can very easily check the box that "no member of the jury find that this is a mitigating circumstance that probably exists." Beyond **[**862]** that, if there is even a single juror that has any lingering doubt, it is absolutely a mitigator in the sense that it makes the death penalty inapplicable.

PROSECUTOR: The issue is that, during that stage of the trial, they should not even be concerned about what the punishment will be later on. They were instructed not to do that and he is saying they have a lingering doubt.

THE COURT: I am going to agree with the State on this. I am striking [it].

Gay asserts that the circuit court erred in denying this instruction. Gay urges us to revisit the holding in *Ruiz v. State, 299 Ark. 144, 164, 772 S.W.2d 297, 308 (1989)*, where this court held that it was not error to reject a "lingering doubt" instruction. Gay also asserts that recent studies have shown that "lingering doubt" is **[***22]** the most significant factor in deciding whether a defendant will receive a life sentence.

In *Ruiz*, we held,

> The trial court refused an instruction proffered by the appellants which told the jury it could consider in mitigation any lingering doubt it might have as to appellants' guilt. It was not error to refuse this proposed instruction. *See Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155, . . . (1988); Mitchell v. State, 527 So. 2d 179 (Fla. 1988).*

Id.; *see also Nooner v. State, 2014 Ark. 296, at 58, 438 S.W.3d 233, 263* ("Mitigating circumstances are not limited to those in existence at the time of the capital murder but may include events that have occurred after the defendant's arrest or even during imprisonment pending a successful appeal from a death sentence. *Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*, **[*17]** followed in *Pickens v. State, 292 Ark. 362, 730 S.W.2d 230 (1987)*. The trial court is not required to instruct that a lingering doubt regarding guilt may be considered a mitigating circumstance. *Ruiz v. State, 299 Ark. 144, 772 S.W.2d 297 (1989)*.)."

Here, based on the record before us, Gay does not provide a convincing argument that we should reconsider our holding in *Ruiz*, and we decline to revisit our holding in that case and affirm the circuit court.

G. Calming Influence as a Mitigator

For his final point on appeal, Gay asserts that the circuit court erred in refusing to allow Gay to introduce as a mitigating circumstance that Gay had a calming influence on others while in custody. **[***23]** During the sentencing phase, Gay sought to submit the following mitigating circumstance to the jury:

> DEFENSE COUNSEL: Randy Gay has had a calming influence with others while he has been in custody.
>
> PROSECUTOR: I have reviewed the . . . Defense exhibit on the records from the Department of Correction and I do not believe there is any document in that file that would indicate that and there's been no testimony from any of the Defense witnesses, from anyone he's been in custody with that he's had a calming effect upon anyone.
>
> . . . .
>
> DEFENSE COUNSEL: Judge, I think that the jury could reasonably infer that he's had a calming influence, just based on the absence of any disciplinary infraction in his correctional record.
>
> THE COURT: Okay, Again I agree with the State on that.

HN13[] *Arkansas Code Annotated § 5-4-602(4)*, "[m]itigation evidence must be relevant to the issue of punishment." *See also* **[**863]** *Simpson v. State, 339 Ark. 467, 6 S.W.3d 104 (1999)*. We **[*18]** have observed that *Ark. Code Ann. § 5-4-602* does not totally open the door to any and all matters simply because they might conceivably relate to mitigation. *McGehee v. State, 338 Ark. 152, 174, 992 S.W.2d 110, 123 (1999)*

(internal citations omitted). Relevant mitigating evidence is limited to evidence that "concerns the character or history of the offender or the circumstances of the offense." *Greene v. State, 343 Ark. 526, 532-33, 37 S.W.3d 579, 584 (2001)* (internal citations omitted).

Here, Gay **[***24]** did not introduce evidence that he had a calming influence on others but sought to submit the mitigating evidence based on an inference from Gay's lack of disciplinary record. However, Gay did not submit evidence to support this mitigating circumstance. Accordingly, we hold that the circuit court did not err in its refusal to submit the mitigation instruction regarding Gay's calming influence on others.

III. *Rule 10 Review*

Finally, we note that under *Rule 10 of the Arkansas Rules of Appellate Procedure—Criminal*, the entire record has been reviewed, including those issues that were not properly preserved for appeal, and we hold that no reversible error exists. The record has also been reviewed under *Arkansas Supreme Court Rule 4-3(i)* (2016). No reversible error has been found.

Affirmed.

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APPENDIX B

IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
FIRST DIVISON

FILED
2017 FEB 27 AM 11 37
JEANNIE PIKE
GARLAND CO. CIRCUIT CLERK
BY [signature]

STATE OF ARKANSAS	)	
	)	
v.	)	No. 26CR-11-428-I
	)	
RANDY WILLIAM GAY	)	

ORDER APPOINTING COUNSEL
PURSUANT TO ARK. R. CRIM. PRO. 37.5

On the 27th day of Feb, 2017, came on to be heard a Motion to Appoint Counsel Pursuant to Ark. R. Crim. Pro. 37.5. The Court finds:

1. A hearing was held in which the defendant was present;

2. The Court advised the defendant of the existence of possible relief under Rule 37.5 and determined that the defendant desires the appointment of counsel to represent him in proceedings under the rule;

3. The defendant is indigent and unable to afford the extraordinary cost of post-conviction proceedings in a capital case;

4. Within the past ten years Hendrix has represented more than one defendant under a sentence of death in state and federal post-conviction proceedings; that he has represented defendants within the past ten years in at least three state and federal post-conviction proceedings, at least one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including at least one murder; that he has been actively engage in the practice of law from more than three years; and, that he has completed at least six hours of training in capital cases within the past two years.

5. Hendrix is hereby appointed to represent the defendant. The appointment shall be effective from the date of this order through an appeal to the Arkansas Supreme Court;

6. The attorneys who represented the defendant at trial and on appeal shall make the compete files in connection with the defendant's conviction available to post-conviction counsel;

7. The defendant shall have 90 days from the date after entry of this Order to file a verified petition under Rule 37.5; and

8. The circuit clerk shall forward a copy of this Order to the Attorney General.

IT IS SO ORDERED.

CIRCUIT JUDGE

2/27/2017

DATE

APPENDIX C

FILED

2017 MAY 26 AM 9 48

JEANNIE PIKE
GARLAND CO. CIRCUIT CLERK
BY

IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
DIVISION I

STATE OF ARKANSAS	)	
	)	
vs.	)	**No. 26CR-11-428**
	)	
RANDY WILLIAM GAY	)	

PETITION TO VACATE

Randy William Gay is incarcerated under a death sentence for the capital murder of Connie Snow. The Arkansas Supreme Court affirmed the conviction and sentence on December 8, 2016, in *Gay v. State*, 2016 Ark. 433, and post-conviction counsel was appointed on February 27, 2017. Gay alleges the following grounds for relief:

1. **Gay was denied the right to a fair and impartial jury**

Gay was denied the right to a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments and Article 2, Sections 8 and 10 of the Arkansas Constitution. He alleges:

a) one or more jurors were disqualified because they would automatically vote for the death penalty for a homicide offense;

b) one or more qualified jurors were disqualified even though they were not substantially impaired in their ability to consider a death sentence;

c) none of the jurors were asked if he or she could consider and give effect to mitigating evidence, and, therefore, Gay was tried to a jury that was disqualified;

Appendix C

d) at least five jurors stated they would not consider intoxication as a mitigating factor (despite its recognition as both a statutory and non-statutory mitigating factor) and should have been disqualified;

e) trial counsel was precluded from asking the venire whether the members could consider mitigating factors particular to Gay;

f) one or more jurors who stated opposition to a life-without-parole sentence were wrongly qualified based on their affirmative responses to the State and Court that they would "follow the law"; and

g) a prospective juror who voiced concerns about the death penalty was wrongly struck for cause even though she unequivocally stated she could follow the law.

2. **Ineffective assistance of counsel**

Gay was denied the right to effective representation in violation of the Sixth Amendment and Article 2, Sections 8 and 10 of the Arkansas Constitution because of the following prejudicial acts or omissions:

a) trial counsel failed to conduct a reasonable *voir dire* to challenge for cause, or exercise a peremptory challenge to strike, one or more jurors who said they would automatically vote for the death penalty for a homicide offense;

b) trial counsel failed to adequately rehabilitate one or more potential jurors who expressed reservations about imposing the death penalty;

c) trial counsel failed to conduct a reasonable *voir dire* to ensure that all (or any) jurors could consider mitigating evidence;

d) trial counsel failed to conduct a reasonable *voir dire* to ensure that all (or any) jurors could consider mitigating evidence specific to Gay;

e) trial counsel failed to object or move to disqualify at least five jurors who stated, in response to the State's *voir dire*, that they would not consider intoxication as a mitigating factor;

f) trial counsel introduced Gay's entire "pen pack" as a mitigating circumstance, but it contained prejudicial and inadmissible evidence rendering it an unauthorized non-statutory aggravating factor;

g) trial counsel failed to object to improper victim-impact evidence;

h) trial counsel introduced evidence of the unsolved murder of Scott Garner without connecting it to any mitigating factor and, as a result, the evidence acted as a non-statutory aggravating factor;

i) trial counsel failed to make an effective penalty-phase closing argument failing to address any mitigating circumstances;

j) trial counsel failed to effectively prepare for trial and sentencing or conduct a reasonable investigation or make reasonable decisions that a particular investigation was

unnecessary within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), as follows:

i) the failure to investigate and present a meaningful theory of the defense;

ii) the failure to investigate and present a self-defense justification and proffer a self-defense instruction;

iii) the failure to investigate the history and record of Rickey Stewart, the only alleged eyewitness to the shooting of Snow, and to conduct an adequate cross-examination;

iv) the failure to investigate and determine that the injuries to the victim could not have occurred as Stewart testified;

v) the failure to investigate the background of the victim to determine a history of violence to support a guilt-phase defense or sentencing-phase mitigating factor;

vi) the failure to investigate and present evidence that, contrary to the State's theory, Gay and the victim did not have an intimate relationship and the phone number in Gay's wallet was not the victim's;

vii) the failure to object to the State's improper guilt-phase closing argument that the victim was left to rot, to be eaten by animals, and that she was treated like an animal;

viii) the failure to investigate and present a meaningful theory of mitigation;

ix) the failure to investigate and present as mitigating evidence Gay's medical health history, mental health history, and social history;

x) the failure to investigate Gay's prior diagnosis of post-traumatic stress disorder and to present evidence of the diagnosis in either the guilt or penalty phases;

xi) the failure to retain an expert in post-traumatic stress disorder and present expert testimony in the guilt and penalty phases;

xii) the failure to investigate Gay's chronic alcoholism and present it as evidence of Gay's reduced mental state in the guilt phase or reduced moral culpability in the penalty phase;

xiii) the failure to retain an expert in chronic alcoholism to testify to its long-term damage to the brain and consequent Neuro-Cognitive Disorders and to present this evidence as a reduced mental state in the guilt phase or reduced moral culpability in the penalty phase;

xiv) the failure to investigate Gay as the victim of sexual abuse as a child;

xv) the failure to retain an expert in child sexual abuse and present this evidence in mitigation;

xvi) the failure to investigate the two second-degree murder convictions and assert a challenge to, and not to concede, them as aggravating circumstances;

xvii) the failure to call Gay as a witness in either the guilt or penalty phases;

xviii) the failure to investigate the aggravating factors and argue that Gay did not "commit" the aggravating factors; and

xix) the failure of trial counsel to properly prepare mitigation witness and conduct proper witness examinations before the jury.

3. **The jury was not properly instructed**

In violation of the Fifth, Eighth, and Fourteenth Amendments and Article 2, Sections 8, 9, and 10 of the Arkansas Constitution, the jury was not instructed it had the discretion to impose a life-without-parole sentence even if it found aggravating circumstances existed and the aggravators outweighed the mitigating factors. The jury was instructed it had no choice but to impose the death penalty if it found against Gay in its weighing function.

4. **The sentence did not meet the statutory and constitutional requirements for imposing a death sentence**

Form 2 of the death penalty verdict forms was unsigned. Ark. Code Ann. §5-4-603 requires that the jury make written findings on Form 2 to ensure that it adequately

considered mitigating factors. The written findings require the signature of, at least, the foreman of the jury. The requirements of the statute are mandatory, but Form 2 was not signed.

5. **The jury's verdict forms were ambiguous**

The sentencing-phase instructions required the jury to place a checkmark by each of its findings. On Form 1 (aggravating circumstances), Form 2 (mitigating circumstances), and Form 3(A) and (B), the jury placed clear, obvious, and unambiguous checkmarks. However, on Form 3(C) (aggravators outweigh mitigators), there is no clear checkmark but, rather, an ambiguous and unclear symbol. The jury's verdict was ambiguous and deprived Gay of a fair sentencing proceeding in violation of the Fifth, Eighth, and Fourteenth Amendments and Article 2, Sections 8, 9, and 10 of the Arkansas Constitution.

6. **The death penalty was a disproportionate sentence**

In violation of the Eighth Amendment and Article 2, Section 9 of the Arkansas Constitution, a death sentence was disproportionate to Gay's offense when compared to similar cases. The death penalty is also disproportionate to a homicide offense that,

a) was committed without substantial premeditation and deliberation;

b) was committed in the heat of the moment;

c) was committed by a person suffering from the effects of chronic alcoholism; or

d) was committed by a person suffering a mental or intellectual impairment at the time of the offense.

7. **The aggravating factor in Ark. Code Ann. §5-4-604(3) is unconstitutionally vague**

The State alleged three aggravating factors under Ark. Code Ann. §5-4-604(3). The statute reads, "The person previously committed another felony offense, an element of which was the use or threat of violence to another person . . ." The statute and instruction fail to define "felony" and "violence." The statute and instruction are vague and failed to genuinely narrow the class of death-eligible individuals. The statute and instruction are likewise vague because, while a person may "commit" an offense, the conduct may be justified as, for example, in a case of self-defense or defense of another.

8. **The State failed to prove beyond a reasonable doubt that the aggravating factors were felonies**

The State was required to prove Gay 1) previously committed, 2) another felony, 3) an element of which was the use or threat of violence. The State produced no evidence that the prior offenses were felonies and the jury was not instructed on the definition of "another felony." See *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

9. The State unconstitutionally argued lack of remorse as an aggravating factor

Ark. Code Ann. §5-4-604 limits the State to proving one or more of ten specific aggravating factors. Lack of remorse is precluded. The State, however, emphasized a letter Gay's father wrote to the Arkansas Parole Board (and introduced by trial counsel) asking it to release Gay on parole, arguing to the jury that Gay was remorseless.

10. The State introduced improper victim-impact evidence

In violation of the Fifth and Fourteenth Amendments and Article 2, Section 8 of the Arkansas Constitution, the victim-impact evidence went beyond offering a "glimpse of the life" of the victim and encouraged the jury to make a comparative judgment between the life of the victim and the life of Gay, offering opinions to the jury on the defendant and the appropriate punishment.

11. Actual and constructive denial of counsel

Trial counsel's acts, omissions, and health, and the court's failure to ensure Gay was provided effective counsel, violated the Fifth, Sixth, and Fourteenth Amendments and Article 2, Sections 8 and 10 of the Arkansas Constitution.

For these reasons, the petitioner asks the Court to vacate the conviction and sentence.

Respectfully submitted by,

J. Blake Hendrix
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Fuqua Campbell P.A.
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(501) 376-0679
bhendrix@fc-lawyers.com

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017, I placed a copy of the foregoing in the U.S. Mail, postage pre-paid to the Office of the Prosecuting Attorney, 501 Ouachita Ave., Room 107, Hot Springs, AR 71901; The Honorable Homer J. Wright, 501 Ouachita Ave., Room 301, Hot Springs, AR 71901; Office of the Attorney General, 323 Center St., #200, Little Rock, AR 72201; Gregg Parrish, Arkansas Public Defender Commission, 101 E. Capitol, #201, Little Rock, AR 72201.

J. Blake Hendrix

AFFIDAVIT

The petitioner states under oath that he has read the foregoing petition for postconviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

RANDY GAY

Subscribed and sworn to before me the undersigned officer this 25th day of May, 2017.

NOTARY ARKANSAS PUBLIC
ELISE ALLEN
No. 12397552
PULASKI COUNTY
My Commission Expires 2-19-2024

APPENDIX D

ELECTRONICALLY FILED
Garland County Circuit Court
Jeannie Pike, Garland Co. Circuit Court Clerk
2019-Mar-05 16:00:22
26CR-11-428
C18ED01 : 4 Pages

IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
DIVISION I

STATE OF ARKANSAS	)		**PLAINTIFF**
	)		
vs.	)	**No. 26CR-11-428**	
	)		
RANDY WILLIAM GAY	)		**DEFENDANT**

ORDER DENYING RULE 37 PETITION

Before the Court is Defendant's Petition to Vacate under Rule 37 of the Arkansas Rules of Criminal Procedure. The Petition is denied based on the following grounds:

1. The Defendant's alleged denial to a fair and impartial jury as contained in Paragraph 1 of the Defendant's Petition could have been reviewed on direct appeal and the Defendant failed to prove prejudice or the likelihood that the outcome of the trial would have been different. Thus, Defendant's Petition to Vacate based on the above allegation is DENIED.

2. The Defendant's Petition to Vacated based on the allegations contained in Paragraph 2 of the Defendant's Petition are DENIED based on the following:

   a. The Defendant's allegations of error committed by the Court could have and should have been addressed on direct appeal.

   b. The allegations of error relative to counsel's inadequate voir dire were all matters of strategy within the limits imposed by the Court, and Defendant failed to demonstrate that the presence of any seated juror prevented him from receiving a fair trial.

c. The decision to introduce the "pen-pack" was a matter of trial strategy and not reviewable by a Rule 37 Petition.

d. The lack of objection to victim impact evidence is a matter of trial strategy. The Defendant failed to show that a different verdict would have been reached had his counsel made a sustainable objection.

e. The lack of objection to the State's closing argument is a matter of trial strategy. The Defendant failed to show that a different verdict would have been reached had counsel made a sustainable objection. The argument was not a mischaracterization of the evidence presented, which the Defendant does not argue.

f. The reference to the Scott Garner homicide was a matter of trial strategy. The Defendant failed to show that a different verdict would have been reached had counsel not made reference to this.

g. The decision on how to address a penalty phase closing in a death penalty case is a matter of trial strategy. There is nothing in the record to indicate that a different argument would have produced a different verdict.

h. The Defendant has failed to show that defense counsel failed to adequately investigate possible defenses, or that such an investigation would have revealed anything that might have been admissible at trial in light of the other evidence presented and the Defendant's refusal to testify or actively participate in the preparation of his defense.

i. The Defendant has failed to show the defense counsel failed to adequately investigate possible mitigating factors or that such an investigation would

have revealed anything that might have been admissible at trial in light of other evidence presented, and the Defendant's refusal to testify or actively participate in the preparation of his defense, including refusal to undergo mental evaluation.

j. Allegations of improper jury instruction or improper or misleading verdict forms and that the sentence was in some manner defective could have and should have been addressed on direct appeal.

k. All constitutional challenges to the proceedings could have and should have been addressed on direct appeal.

3. The allegations contained in Paragraphs 3-10 of Defendant's Petition to Vacate are all allegations of error which could have been reviewed on direct appeal and do not constitute grounds upon relief under Rule 37 can be granted. Thus, Defendant's Petition to Vacate based on the above allegations is DENIED.

4. The allegations contained in Paragraph 11 of Defendant's Petition to Vacate are cumulative in nature and serve only as a summary of the preceding paragraphs and do not provide basis for relief under Rule 37. Thus, Defendant's Petition to Vacate based on the above allegations is DENIED.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the Rule 37 Petition filed herein should be, and the same hereby is, DENIED.

It is so ORDERED this the 5th day of March, 2019.

EFFECTIVE UPON ELECTRONIC SIGNATURE
JOHN HOMER WRIGHT, CIRCUIT JUDGE

Arkansas Judiciary

Case Title: STATE V RANDY WILLIAM GAY

Case Number: 26CR-11-428

Type: ORDER OTHER

So Ordered

JUDGE JOHN HOMER WRIGHT

APPENDIX E

Neutral
As of: June 20, 2022 3:56 PM Z

Gay v. State

Supreme Court of Arkansas

January 21, 2021, Opinion Delivered

No. CR-19-762

Reporter
2021 Ark. 3 *; 2021 Ark. LEXIS 4 **

RANDY WILLIAM GAY, APPELLANT v. STATE OF ARKANSAS, APPELLEE

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

Prior History: [**1] APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT. NO. 26CR-11-428. HONORABLE JOHN HOMER WRIGHT, JUDGE.

Gay v. State, 2015 Ark. 469, 476 S.W.3d 791, 2015 Ark. LEXIS 657 (Ark., Dec. 10, 2015)

Disposition: REVERSED AND REMANDED.

Core Terms

circuit court, conclusions of law, postconviction, written finding of fact, ineffective assistance of counsel, aggravating factor, entry of the order, death sentence, death-penalty, ineffective, determines, sentence, murder, cases

Counsel: Fuqua Campbell, P.A., by: J. Blake Hendrix, for appellant.

Leslie Rutledge, Att'y Gen., by: Adam Jackson, Ass't Att'y Gen.; and Rachel Kemp, Sr. Ass't Att'y Gen., for appellee.

Judges: JOHN DAN KEMP, Chief Justice. Special Justice TIM SNIVELY joins. WOOD, J., not participating.

Opinion by: JOHN DAN KEMP

Opinion

[*1] JOHN DAN KEMP, Chief Justice

Appellant Randy William Gay was convicted by a Garland County Circuit Court jury of capital murder and sentenced to death. This court affirmed his conviction and sentence. *Gay v. State, 2016 Ark. 433, at 18, 506 S.W.3d 851, 863*. Gay then filed a petition for postconviction relief in the circuit court pursuant to *Rule 37.5 of the Arkansas Rules of Criminal Procedure.* After a hearing, the circuit court denied the petition, and Gay now appeals that denial. For reversal, he asserts that (1) he was denied the right to a fair and impartial jury, (2) he received ineffective assistance of counsel for eight reasons, (3) Form 3 of the death-penalty jury instructions prohibited the jury from exercising mercy, (4) the sentence did not meet the statutory and constitutional requirements for imposing a death sentence, (5) the verdict forms were ambiguous, and (6) the prosecution improperly **[**2]** argued lack of remorse as a nonstatutory aggravating factor. We reverse and remand to the circuit court for entry of an order that complies with *Rule 37.5(i)*.

[*2] *Rule 37.5* sets out the postconviction procedures for death-penalty cases. *See Fudge v. State, 354 Ark. 148, 151, 120 S.W.3d 600, 601 (2003)*. *Subsection (i)* provides in part that the circuit court shall "make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition." *Ark. R. Crim. P. 37.5(i)* (2020). This court has held that this provision imposes a "more exacting duty" on the circuit court than *Arkansas Rule of Criminal Procedure 37.3(c)*, which governs

postconviction procedures in non-death-penalty cases. *Echols v. State, 344 Ark. 513, 519, 42 S.W.3d 467, 470 (2001)*. Under *Rule 37.5(i)*, the petitioner determines the issues that must be addressed by the circuit court in a written order, while under *Rule 37.3(c)*, the circuit court determines the issues and then makes specific written findings of fact and conclusions of law with respect to those issues. *See Decay v. State, 2013 Ark. 185, at 2*.

Here, in the last of his eight allegations of ineffective assistance of counsel raised on appeal, Gay argues that his trial counsel was ineffective for failing to adequately investigate and challenge the aggravating factors of the second-degree murders of Glen Gay and Jim Kelly. From our review **[**3]** of the circuit court's order denying the postconviction petition, there are no findings of fact or conclusions of law addressing this claim. Therefore, we hold that the circuit court failed to make specific written findings of fact and conclusions of law—as required under *Rule 37.5(i)*—on Gay's last claim of ineffective assistance of counsel. Accordingly, we reverse and remand on this point for entry of an order containing findings of fact and conclusions of law in compliance with *Rule 37.5(i)*. *Id.*

[*3] Our remand is confined to the single ineffective-assistance claim discussed herein. No new claims may be raised on remand, and all other claims raised below but not argued on appeal are considered abandoned. *Id.* To avoid lengthy delay, we direct the circuit court to complete the order within sixty days from the date the mandate is issued.

Reversed and remanded.

Special Justice TIM SNIVELY joins.

WOOD, J., not participating.

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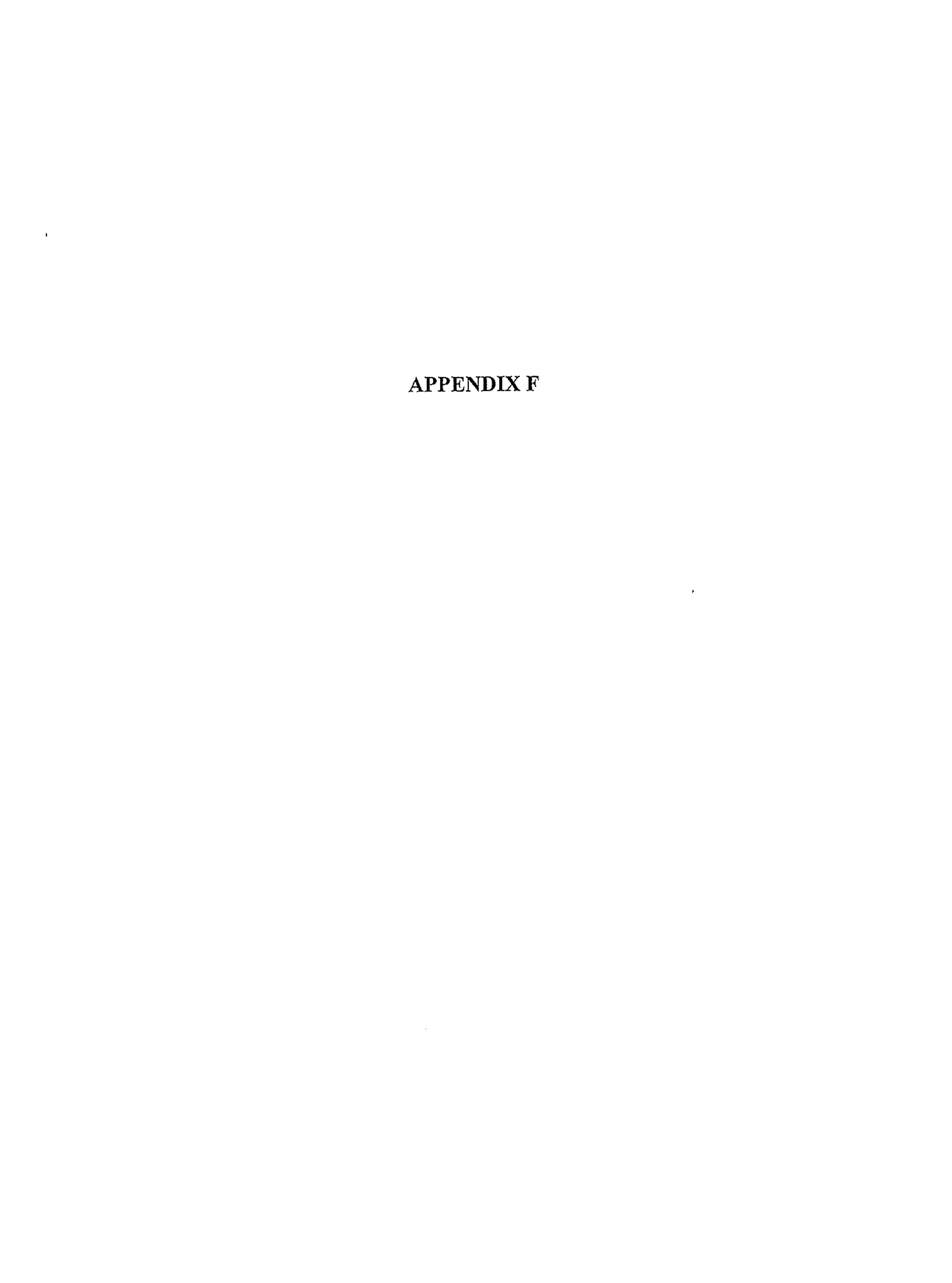

APPENDIX F

ELECTRONICALLY FILED
Garland County Circuit Court
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2021-Apr-23 09:08:51
26CR-11-428
C18ED01 : 8 Pages

IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
DIVISION I

STATE OF ARKANSAS)		**PLAINTIFF**
)		
VS.)	**NO. 26CR-11-428**	
)		
RANDY WILLIAM GAY)		**DEFENDANT**

SUPPLEMENTAL ORDER DENYING RULE 37 PETITION

Before this Court comes the directive of the Arkansas Supreme Court to Supplement the Review of the Rule 37 Petition that was previously filed in the above referred to matter.

1. On or about the 21st day of January, 2021, the Arkansas Supreme Court in case number CR-19-762, specifically directed this Court to do the following:

> Here, in the last of his eight (8) allegations of ineffective assistance of counsel raised on appeal, Gay argues that his trial counsel was ineffective for failing to inadequately investigate and challenge the aggravating factors of his second-degree murders of Glen Gay and Jim Kelly. From our review of the circuit court's order denying the postconviction petition, there are no findings of fact or conclusions of law addressing this claim. Therefore, we hold that the circuit court failed to make specific written findings of fact and conclusions of law-as required under Rule 37.5(i) - on Gay's last claim of ineffective assistance of counsel. Accordingly, we reverse and remand on this point for entry of an order containing findings of fact and conclusions of law and compliance with Rule 37.5(i). *id.*

Randy William Gay vs. State of Arkansas, Arkansas Supreme Court opinion, CR-19-762, page 2.

2. Pursuant to the directives of the Arkansas Supreme Court, in order to

adequately prepare for this responsibility, this Court has done the following:

A. Reviewed the trial transcript in the above referred to matter (over 6000 pages in length);

B. Reviewed the hearing transcript on the Petition for Rule 37 Relief (over 330 pages);

C. Reviewed all pleadings filed in conjunction with the Rule 37 Petition for Relief;

D. Reviewed the Order Denying Rule 37 Petition as filed by the Honorable John Homer Wright;

E. Reviewed the Briefs in conjunction with the appeal of this case on the Rule 37 issue before the Arkansas Supreme Court by both parties;

F. Reviewed the Opinion of the Honorable Associate Justice Karen R. Baker dated the 8th day of December, 2016, on the merits of the appeal from the criminal conviction;

G. Reviewed the Order from the Arkansas Supreme Court as previously noted in case number CR-19-762 that was delivered on or about the 21st day of January, 2021; and

H. Reviewed Rule 37.5 of the Arkansas Rules of Criminal Procedure.

3. After reviewing all of these documents, the Court is in a position to render an opinion on the eighth argument concerning the ineffective assistance of counsel claim, in particular, that the trial counsel was ineffective for failing to adequately investigate and challenge the aggravating factors of the second-degree murders of Glen Gay and Jim Kelly.

4. This Court adopts in total the Order of the Honorable John Homer Wright issued on the 5th day of March, 2019.

5. The first issue that needs to be addressed is whether trial counsel, in particular, the Honorable Mark Fraiser, failed to adequately investigate the second-degree murders of Glen Gay and Jim Kelly.

6. A review of the hearing on the Rule 37 Petition reflects that Mr. Fraiser adequately investigated these two murders.

7. Mr. Fraiser specifically testified that he secured copies of all files related to these murders and traveled to Mt. Ida to secure information in the investigation file concerning the murder of Glen Gay.

8. According to the testimony of Mr. Fraiser, he specifically stated the following:

> Q. Little paragraph 16 (xvi), the failure to investigate the two second-degree murder convictions and assert a challenge to, and not concede, them as aggravating circumstances. What is the aggravating circumstance that they qualify under?
>
> A. Previously committed a felony. It doesn't even have to be a conviction. A felony involving violence.
>
> Q. But there were two convictions. One was a guilty plea, and one was a jury verdict; is that correct?
>
> A. Right. And I -- I even went to Montgomery County and dug around in the courthouse and pulled -- you got to remember we're talking about Montgomery County -- and I had the ladies in the clerk's office actually pull the books that the handwritten docket sheets were in on the--Montgomery County case.

And then I found, either through discovery or on my own, I went to the prosecutor's office and they let me dig through their files. And, luckily, there was a young lady that worked there who knew that materials about Mr. Gay had been isolated because the FBI had been there prior to me. So I actually got my hands on them, and I'm positive it's still down at the public defender's office, what existed of the case file of the Glen Breshears (sic) murder.

Q. And you also received --

A. Oh and the one in Garland County; I had some discovery on it too.

Q. And you also received all the documents and evidence that the FBI had received from those places; is that --

A. Right. We had all the 302s, I think they're referred to, and in any other investigation they did.

Q. Are you aware of any way to come in and combat these particular aggravating circumstances, that they didn't occur, when there are convictions, one upon a guilty plea and one upon a jury verdict?

A. Not that I am aware of. And the State, much to my chagrin, didn't just rely on the convictions; they actually put on evidence to support the convictions.

Transcript of the Rule 37 hearing, page 368, line 11 through page 369, line 21.

9. The Court finds based upon this testimony that Mr. Fraiser fully and completely investigated the murder convictions of Glenn Gay and Jim Kelly by

securing all files associated with these murders in the possession of the prosecuting attorneys office and the circuit clerk's office. The Court finds that Mr. Fraiser adequately investigated these murders and all facts relating to these murders while preparing this case for trial.

10. The second issue raised by counsel in this argument is that trial counsel failed to adequately challenged the aggravating factors of the second-degree murders of Glenn Gay and Jim Kelly.

11. The Court finds that the decision to challenge or not challenge these aggravating factors, to wit, the two second-degree murder convictions, was trial strategy and not subject to review pursuant to a Rule 37 Petition.

12. Mr. Fraiser's trial strategy in dealing with these aggravating circumstances was to have Mr. Gay testify about these mitigating circumstances and aggravating circumstances and try to explain them to the jury.

13. Irrespective of the trial strategy advanced by Mr. Fraiser, Mr. Gay's trial strategy was to not testify or attempt to explain the mitigating circumstances or the aggravating circumstances either in the trial on the merits or the sentencing phase of this case.

14. In particular, the following exchange is relevant to this issue;

Q. And I think I skipped over one (1) paragraph. It talked about the failure to call Randy as a witness in the guilt or the punishment phase. But as far as the guilt phase, do you recall what your advice to Randy was as far as whether he should take the stand or not?

A. Well, obviously he was told that he did not have to. But I told him there were certain things he was going to have to explain and he

was gonna have to address, based on what the other witnesses said happened, and Randy chose not to testify. And the other thing is, is I had previously filed a motion in limine to keep the government or the State from using his prior convictions for impeachment purposes. And if I'm not mistaken, the Court granted it but that was subject to him taking the witness stand, so that was another thing that came in. So it was -- I think the risk outweighed the reward.

Q. So your advice to him was not to take the stand during the guilt phase? Or...

A. Yes. I wanted him to testify in the sentencing phase, no doubt. Cause we were being realistic. We have a man with two prior homicides, one of which is his own father; another which is his father-in-law. If he is convicted, there's a high likelihood he's gonna get the death sentence irrespective of any mitigation that's put forward. It certainly rose the stakes a lot.

Q. But during the guilt phase, your advice was not to take the stand, but it wasn't -- well, and we'll talk more about that in a minute. But it was Randy's decision, he was letting know it was his decision, he decided not to testify?

A. Right. And Randy, I don't think would've come across as a good witness, cause he didn't want to testify.

Q. Moving on to that same decision that was made during the punishment phase. I believe you testified that you were adamant that he needed to take the witness stand and explain certain

things.

A. I specifically remember me telling him to fight for his life; don't just sit back and let this happen.

Q. And over your adamant advice to take the stand, he chose not to take the stand.

A. Right. And I know Ashley talked to him, Brian, I'm sure -- I suspect did. I know Don Williams did. We all wanted him to testify in the sentencing phase.

Transcript of Rule 37 Petition hearing, page 372, line 2 through page 373, line 17.

15. The Court finds from a review of the above quoted testimony that Mr. Fraiser wanted Mr. Gay to testify to explain the aggravating circumstances and any mitigating circumstances that might be involved in this case. Mr. Gay decided, for whatever reason, he did not want to testify in this case. Again, this is trial strategy and not subject to review pursuant to a Rule 37 Petition.

16. This issue was again discussed during the Rule 37 Petition hearing in which the following quote is found:

A. Randy was not gonna testify despite, I think, all of us including -- I know myself -- at least in the sentencing phase to testify, and Randy chose not to testify, and that was against my advice and my -- I mean, I begged him -- short of actually begging him, I implored of him to do it, "Get on the witness stand and try to save your life."

Q. And you explained to him that was ultimately his decision and he chose not to take the stand?

A. That's correct....

Transcript of Rule 37 Petition Hearing, page 346, line 25 through page 347, line 8.

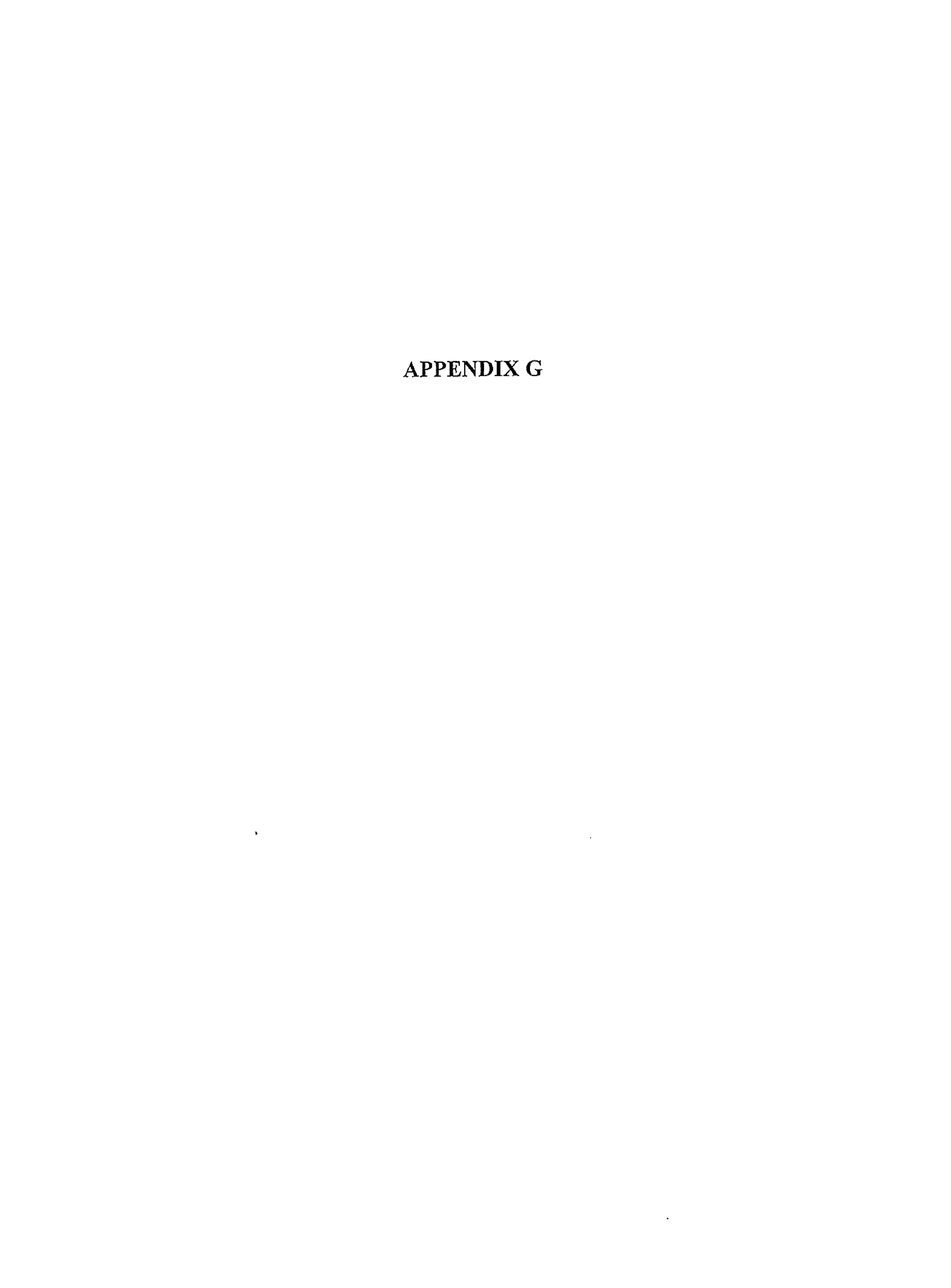
17. As this Court has previously concluded, this Court finds that trial counsel adequately investigated the aggravating factors of the second-degree murders of Glen Gay and Jim Kelly. The Court further finds that the decision to not rebut or offer testimony concerning the facts or circumstances surrounding these second-degree murders was a matter of trial strategy. Trial counsel wanted Mr. Gay to testify about these aggravating factors; however, Mr. Gay chose not to testify concerning the facts surrounding these issues. This is a matter of trial strategy and not subject to Rule 37 review. *See, Sartin v. State, 2012 Ark 155 at 4, 400 S.W.3rd 694, 697.*

18. The Court further finds that the actions of Mr. Fraiser do not meet the requirements of *Strickland v. Washington, 466 U.S. 668 (1984)*, which is the landmark Supreme Court decision that outlines the steps necessary for a criminal defendant to obtain relief because of ineffective assistance of counsel in a criminal case. There is nothing in this record to reflect that trial counsel was ineffective in this criminal case.

IT IS THEREFORE, CONSIDERED, ORDERED AND DECREED, that the Rule 37 Petition filed herein should be, and same hereby is denied. Furthermore, the last allegation of ineffective assistance of counsel raised on appeal, that trial counsel was ineffective for failing to adequately investigate and challenge the aggravating factors of the second-degree murders of Glen Gay and Jim Kelly, is denied for the reasons stated above.

IT IS SO ORDERED, This 23 day of April, 2021.

RALPH C. OHM, CIRCUIT JUDGE
Division I



APPENDIX G

Neutral
As of: June 20, 2022 4:20 PM Z

Gay v. State

Supreme Court of Arkansas

February 10, 2022, Opinion Delivered

No. CR-21-202

Reporter
2022 Ark. 23 *; 2022 Ark. LEXIS 29 **

RANDY WILLIAM GAY, APPELLANT v. STATE OF ARKANSAS, APPELLEE

Notice: THE PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

Subsequent History: Rehearing denied by *Gay v. State, 2022 Ark. LEXIS 75 (Ark., Mar. 31, 2022)*

Prior History: [1]** APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT. NO. 26CR-11-428. HONORABLE RALPH C. OHM, JUDGE.

Gay v. State, 2015 Ark. 469, 476 S.W.3d 791, 2015 Ark. LEXIS 657 (Ark., Dec. 10, 2015)

Disposition: AFFIRMED.

Core Terms

circuit court, murder, truck, jurors, mitigation, investigate, sentence, trial counsel, ineffective, contends, pack, sexual abuse, asserts, pen, trial strategy, argues, mitigating evidence, shot, closing argument, self-defense, mitigating circumstances, introduce, parole, alleged error, postconviction, aggravators, present evidence, ineffective-assistance, childhood, alcohol

Case Summary

Overview

HOLDINGS: [1]-The circuit court properly denied appellant's postconviction petition to vacate his conviction and sentence of death filed pursuant to Fed. R. Crim. P. 37.1-37.5 because it did not clearly err in finding that the decision to introduce appellant's Arkansas Department of Correction "pen pack" was a matter of trial strategy; [2]-Trial counsel was not ineffective for failing to pursue a self-defense or an imperfect self-defense theory because other than appellant's own self-serving statement, there was no evidence that appellant acted recklessly or in self-defense when he shot the victim; [3]-Trial counsel's decisions concerning mitigation evidence included matters of trial strategy and tactics because the postconviction strategy would have presented appellant as a loose cannon who would react with violence when placed in a stressful environment.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

HN1[] **Criminal Law & Procedure, Postconviction Proceedings**

Generally, a petition under Ark. R. Crim. P. 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. Rule 37 is a postconviction remedy and, as such, does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. However, the supreme court has made an exception for errors that are so

fundamental as to render the judgment of conviction void and subject to collateral attack. When the supreme court reviews a fundamental or structural error either on direct appeal or through the exception described above, the fundamental nature of the error precludes application of the harmless-error analysis.

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

HN2[] **Peremptory Challenges, Appellate Review**

The loss of peremptory challenges cannot be reviewed on appeal. The focus should not be on a venireperson who was peremptorily challenged, but on the persons who actually sat on the jury.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN3[] **Procedural Matters, Briefs**

The supreme court does not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Effective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4[] **Criminal Process, Assistance of Counsel**

The supreme court will not reverse the circuit court's decision granting or denying Ark. R. Crim. P. 37 postconviction relief unless it is clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been made. The benchmark for judging a claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Pursuant to Strickland, the court assesses the effectiveness of counsel under a two-prong standard. First, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the petitioner by the *Sixth Amendment to the United States Constitution*. A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN5[] **Criminal Process, Assistance of Counsel**

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Appellate Review

Criminal Law & Procedure > ... > Challenges to Jury Venire > Death Penalty > Tests for Excusal of Juror

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Capital Cases

Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

HN6[] Procedural Due Process, Scope of Protection

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him or her to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. Thus, a venireperson who will automatically vote for the death penalty, regardless of mitigators or aggravators, should be struck for cause.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN7[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for finding ineffective assistance of counsel. When a decision by trial counsel is a matter of trial tactics or strategy and that decision is supported by reasonable professional judgment, then such a decision is not a proper basis for relief under Ark. R. Crim. P. 37.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN8[] Effective Assistance of Counsel, Trials

A reversal of a judgment due to remarks made by counsel during closing arguments is rare and requires that counsel make an appeal to the jurors' passions and emotions. Experienced advocates might differ about when, or if, objections are called for since, as a matter of trial strategy, further objections from counsel may result in comments seeming more significant to the jury.

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN9[] Trials, Opening Statements

Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pretrial Proceedings

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN10[] **Effective Assistance of Counsel, Pretrial Proceedings**

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Counsel's decision not to investigate must be directly assessed for reasonableness, applying a heavy measure of deference to counsel's judgments.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN11[] **Criminal Process, Assistance of Counsel**

A trial counsel's failure to investigate and present substantial mitigating evidence during the sentencing phase of a capital murder trial can constitute ineffective assistance of counsel. Counsel is obligated to conduct an investigation for the purpose of ascertaining mitigating evidence, and the failure to do so is error. Such error, however, does not automatically require reversal unless it is shown that, but for counsel's errors, there is a reasonable probability that the sentence would have been different. When reviewing a claim of ineffectiveness based upon failure to present adequate mitigating evidence, the supreme court views the totality of the evidence, both that adduced at trial and that adduced in the postconviction proceeding.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN12[] **Postconviction Proceedings, Motions to Vacate Judgment**

Unless an error is so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Ark. R. Crim. P. 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN13[] **Capital Punishment, Aggravating Circumstances**

The Arkansas Model Jury Instructions permit the jury to show mercy, as it allows the jury to find that the aggravating circumstances do not justify a sentence of death. Non-model instructions are to be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN14[] **Postconviction Proceedings, Motions to Vacate Judgment**

Unless an error is so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Ark. R. Crim. P. 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal.

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

HN15[] **Reversible Error, Structural Errors**

There is a distinction between, on the one hand, structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards," and, on the other hand, trial errors which occur during the presentation of the case to the jury, and

which may therefore be quantitatively assessed in the context of other evidence presented.Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects a profound judgment about the way in which law should be enforced and justice administered. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

Counsel: FUQUA CAMPBELL, P.A., by: J. Blake Hendrix, for appellant.

Leslie Rutledge, Att'y Gen., by: Rachel Kemp, Sr. Ass't Att'y Gen.; and Adam Jackson, Ass't Att'y Gen., for appellee.

Judges: KAREN R. BAKER, Associate Justice. Special Justice TIM SNIVELY joins in this opinion. WOOD, J., not participating.

Opinion by: KAREN R. BAKER

Opinion

[*1] KAREN R. BAKER, Associate Justice

Appellant Randy William Gay appeals the Garland County Circuit Court's denial of his postconviction petition to vacate his conviction and sentence of death filed pursuant to *Rules 37.1-37.5 of the Arkansas Rules of Criminal Procedure*. A Garland County jury convicted Gay of capital murder for the shooting death of Connie Snow and sentenced Gay to death. We affirmed his conviction and sentence in *Gay v. State, 2016 Ark. 433, 506 S.W.3d 851* ("*Gay* I"). Gay subsequently filed a petition to vacate his conviction and sentence. The circuit court denied his petition and this appeal followed. On January 21, 2021, we reversed and remanded this matter for entry of an order containing findings of fact and conclusions of law in compliance with *Rule 37.5(i)*. *Gay v. State, 2021 Ark. 3, at 2 ("Gay II")*. We held that the circuit court's order denying the postconviction petition did not include findings of fact or conclusions **[**2]** of law addressing Gay's claim that his trial counsel was ineffective for failing to adequately investigate and challenge the aggravating factors of **[*2]** the second-degree murders of Glen Gay--Gay's father--and Jim Kelly. On April 23, 2021, the circuit court entered a supplemental order denying Rule 37 relief and Gay timely appealed.

On appeal, Gay presents the following six points: (1) he was denied the right to a fair and impartial jury; (2) he was denied effective assistance of trial counsel; (3) form 3 of the death-penalty jury instructions precluded the jury from exercising mercy in violation of the *Fifth*, *Eighth*, and *Fourteenth Amendments* and *article 2, sections 8*, *9*, and *10 of the Arkansas Constitution*; (4) his sentence of death did not meet the statutory and constitutional requirements for imposing a death sentence; (5) the verdict forms were ambiguous; and (6) the State improperly argued lack of remorse as a nonstatutory aggravating factor.

The pertinent facts are these. The record demonstrates that James Westlake testified that he and his family operated a timber business in Garland County in 2011. James testified that he paid Gay "a few hundred dollars each week" to "keep an eye" on their equipment overnight. On May 10, 2011, James, Jim Westlake, and Rickey Stewart were **[**3]** attempting to repair machinery at their logging business in a wooded area located in Garland County. Around 5:00 p.m. that day, Gay arrived in a pickup truck, and Snow was in the passenger seat. Gay got out of his truck and went to speak to James, leaving Snow in the vehicle. Gay told James that he was using Snow to obtain information about drug trafficking in the national forest and that she was probably going to jail. James noticed that Snow was attempting to say something to Gay from the vehicle, and when he told Gay, Gay then ordered Snow out of the truck. Snow did not comply and Gay went back to his truck, retrieved a shotgun, and again ordered Snow out of the truck. James testified that Snow was **[*3]** getting out of the truck, that he did not believe Gay was going to take any action, and that James turned away from the truck and back to the machinery when he heard a loud "BOOM." James testified that he turned around and saw Snow's body on the ground and that Gay was holding the gun toward the ground. James testified that he immediately told Gay, "I didn't see anything." James testified that Gay calmly walked over and asked him if

he had any plastic, and he responded that he did not. [**4] He then asked James to help him get his tailgate open. James said he was somewhat in shock and did not know whether Gay was going to kill the rest of them or what his next move was. James went over and helped with the tailgate and then checked on his elderly father. James testified that while he went to check on his dad, he kept his eyes on Gay because he did not know what was going to happen and watched Gay drag Snow over and load her into his truck bed. Gay then loaded Snow's body into his truck, left the site, and gave James a "thumbs up" on the way out. James testified that Gay then called him on his cell phone and asked if everything was "alright between them." James explained that they were loading logs and did not mention Snow because he was afraid, he did not know where Gay was, and that he and his employees were unarmed. James testified that he and his employees left together and that once they were back out of the woods safely to the highway, he, his brother, and Rickey called law enforcement and waited for them to arrive.

Rickey testified that when Gay summoned Snow from the truck, she failed to move. Gay then grabbed a bolt-action shotgun from the toolbox in the back of [**5] his truck, stuck it through the open driver's-side window, and again ordered her out of the vehicle. Snow still did not move. Gay walked to the back of his truck, propped his elbow on the vehicle, again [*4] pointed the gun at Snow, and yelled, "I told you to get the fuck outa my truck." Snow stepped out of the truck, keeping her back to the inside of the open door, and said, "What are you gonna do, shoot me?" Rickey heard Gay click off the gun's safety, and Gay then shot Snow in the right side of her face, killing her. Gay asked James if he had any plastic, and when James stated that he did not, Gay asked him to help him lower the tailgate of his truck. Gay dragged Snow by the belt loops of her jeans and her hair to the back of his truck and threw her body into the truck bed. He then drove away from the work site, giving James a "thumbs up" on the way out. James indicated that Gay phoned him several minutes later to see if everything was okay and to tell him that he "got everything taken care of." James and the others then notified law enforcement of the murder.

That evening, Gay attended a bonfire at the home of Larry and Vera Nevels and stayed the night with his girlfriend, Latonya McElroy. [**6] The next morning, he told McElroy that he had to "get rid of" something. He was arrested as he got into his car to leave the apartment. Gay claimed that he had a severe drinking problem and that he did not remember what happened the previous day. Snow's body was located four days later, on May 14, 2011, approximately 1.2 miles from the shooting in a shallow creek bed. On the other side of the creek, officers located Snow's hair and her scalp. It was evident that animals had predated on the body. Gay was charged with premeditated capital murder, and the State sought the death penalty.

On April 15, 2013, Gay's first trial ended in a mistrial after the circuit court found that several members of the jury had violated instructions by conducting independent online research about the murder. Gay was retried on March 11-15, 2015. Following the guilt [*5] phase of the trial, the jury convicted Gay of capital murder. During the penalty phase, the prosecution introduced evidence of three prior felony offenses, all of which were used as aggravating circumstances: (1) the second-degree murder of his then father-in-law, Jim Kelly, in 1978; (2) the second-degree murder of his father, Glen, in 1991; and [**7] (3) the terroristic threatening of John Ward in 2007. The defense submitted approximately seventy mitigating circumstances, most of which related to Gay's tumultuous and abusive relationship with his father, his heavy alcohol use, and his good behavior while incarcerated for his prior crimes. The jury found that the aggravators outweighed the mitigators and sentenced him to death.

On May 28, 2017, Gay filed a petition to vacate his conviction and sentence pursuant to *Arkansas Rule of Criminal Procedure 37.1*. On December 6, 2018, the circuit court conducted a two-day hearing on the petition. Gay presented several expert witnesses, including Dr. Matthew Mendel, Dr. John Roache, and law professor J. Thomas Sullivan. Dr. Mendel, an expert on the impact of childhood trauma, testified that he had interviewed Gay on October 24-25, 2018. He identified fourteen risk factors for a negative outcome that resulted from adverse events during Gay's childhood such as sexual abuse by Gay's father, by other juveniles in a "children's home" and in prison; abandonment by both his parents; alcohol abuse; physical and verbal abuse by

his father; and witnessing violent acts of his father on others, including a murder of his cousin and attempted [**8] sexual assaults of Gay's wives. Dr. Mendel diagnosed Gay with PTSD, alcohol dependency, and depression. He opined that Gay's childhood traumas and diagnoses caused him to react suddenly, violently, and aggressively when confronted with a threatening situation and that this would have [*6] been helpful information for the jury to know during sentencing. Dr. Roache testified as an expert in psychiatry and pharmacology. From a review of Gay's records, he diagnosed him with severe alcohol-use disorder, depression, anxiety, and PTSD. According to Dr. Roache, the combination of alcoholism and PTSD caused Gay to react impulsively and aggressively. Professor Sullivan testified to the capital-defense standards and also that Gay's attorneys performed deficiently, particularly with respect to jury selection and the investigation and presentation of mitigating evidence. Finally, Gay's trial counsel, Mark Fraiser, and his mitigation specialist, Ashley Hornibrook, both testified. They explained that many of the decisions challenged by Gay in his petition were a result of trial strategy, and they further explained that Gay would not testify during the sentencing phase or cooperate with their mitigation [**9] investigation.

Following the submission of posttrial briefs, on March 5, 2019, the circuit court entered an order denying all of Gay's claims for relief and finding that he had received effective assistance of counsel. Gay timely appealed, and we reversed and remanded for additional findings of fact and conclusions of law. *Gay II*, 2021 Ark. 3. Following our remand, the circuit court entered a supplemental order adopting the previous order and adding detailed findings and conclusions of law as directed by this court. The court again concluded that Gay's Rule 37 petition should be denied, and Gay timely appealed from this supplemental order.

I. *Fair and Impartial Jury*

For his first point on appeal, Gay argues that he was denied the right to a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments of the United States [*7] Constitution and article 2, sections 8, 9, and 10 of the Arkansas Constitution. Without identifying which jurors he is referring to; Gay argues that two jurors stated that they would automatically impose a death sentence if Gay was convicted of capital murder. Gay appears to be referring to Sandra Barker and Carolyn Wetthington. Gay goes on to explain that the defense challenges for cause were denied because the jurors said that they would follow the law. Gay contends that the jurors were substantially [**10] impaired in their ability to give meaningful consideration to mitigating evidence. Additionally, Gay argues that he was denied the right to a fair and impartial jury because "none of the jurors were asked if they could consider any mitigation evidence particular to Gay's case." In denying relief on his fair-and-impartial-jury claims, the circuit court found that these arguments could have been reviewed on direct appeal and that Gay failed to prove prejudice or the likelihood that the outcome of the trial would have been different. We agree. HN1[] In *Reams v. State*, we explained that

> [g]enerally, a petition under Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. Rule 37 is a postconviction remedy and, as such, does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. However, we have made an exception for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. When we review a "fundamental" or "structural" error either on direct appeal or through the exception described above, the fundamental nature of the error precludes application of [**11] the "harmless-error" analysis.

2018 Ark. 324, at 15-16, 560 S.W.3d 441, 452 (internal citations omitted). Gay asserts that his denial of a request to strike jurors for cause or to voir dire them on particular mitigating facts is an issue involving fundamental error; however, we are not persuaded by this argument.

[*8] A. Strike for Cause

With regard to the circuit court's refusal to strike jurors Barker and Wetthington for cause, Gay fails to mention that Barker and Wetthington were not seated on the jury because he struck both with peremptory challenges. To the extent that Gay is arguing that Barker and Wetthington should have been struck for cause, we have

explained that

> [w]e do not address this claim of error because it pertains to venirepersons that appellant excused through the use of his peremptory challenges. HN2[] It is well settled that the loss of peremptory challenges cannot be reviewed on appeal. The focus should not be on a venireperson who was peremptorily challenged, but on the persons who actually sat on the jury.

Willis v. State, 334 Ark. 412, 420, 977 S.W.2d 890, 894 (1998) (internal citations omitted). In Willis, we held that because the particular venirepersons were not seated on the jury we did not need to consider whether they should have been struck for cause. Further, to the extent **[**12]** that Gay is arguing that he was forced to utilize all of the peremptory challenges, he also fails to acknowledge that he had three strikes left. Accordingly, we do not find merit in Gay's argument.

B. Mitigating Factors

Next, with regard to Gay's claim that he was denied the opportunity to question prospective jurors about mitigating factors specific to his case, Gay raised this exact issue in *Gay I*, and we rejected his argument:

> [Gay] makes conclusory statements and does not develop this argument. However, based on the record discussed above, the record does not support Gay's argument. HN3[] Further, we do not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. Further, based on our review of the record, Gay did not preserve this issue for review. Gay did not contemporaneously object to the voir dire or proffer questions he sought to ask the potential jurors.

[*9] Gay I, 2016 Ark. 433, at 8, 506 S.W.3d at 857 (internal citations and quotation marks omitted). Because this is a death case, Gay's direct appeal was subject to review under Rule 10 of the Arkansas Rules of Appellate Procedure-Criminal. We noted that the entire record was reviewed, including **[**13]** those issues that were not properly preserved for appeal, and we held that there was no reversible error. Further, the record was reviewed pursuant to Arkansas Supreme Court Rule 4-3(i) (2016) and no reversible error was found. We find no error on this point and affirm.

II. *Ineffective Assistance of Counsel*

On appeal, Gay argues that (1) counsel was ineffective during jury selection; (2) counsel was ineffective for introducing the Arkansas Department of Correction Institutional File, also known as a "Pen Pack"; (3) counsel failed to object to victim-impact evidence; (4) counsel failed to object to the State's closing argument; (5) counsel failed to pursue self-defense or imperfect self-defense theories; (6) counsel failed to properly present the Scotty Garner murder; (7) counsel failed to investigate and present evidence of posttraumatic stress disorder, alcohol-abuse disorder and childhood sexual abuse as mitigators; and (8) counsel failed to investigate and challenge the aggravators.

HN4[] Turning to our standard of review with regard to a circuit court's ruling on a petitioner's request for Rule 37 relief, this court will not reverse the circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. **[**14]** Kemp v. State, 347 Ark. 52, 55, 60 S.W.3d 404, 406 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been made. *Id.*; Prater v. State, 2012 [*10] Ark. 164, at 8, 402 S.W.3d 68, 74. "The benchmark for judging a claim of ineffective assistance of counsel must be 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' Strickland [v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]." Henington v. State, 2012 Ark. 181, at 3-4, 403 S.W.3d 55, 58. Pursuant to Strickland, we assess the effectiveness of counsel under a two-prong standard. First, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. Williams v. State, 369 Ark. 104, 251 S.W.3d 290 (2007). A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. Springs v. State, 2012 Ark. 87, 387 S.W.3d 143. A court must

indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

HN5[] Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* The petitioner **[**15]** must show there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Howard v. State, 367 Ark. 18, 238 S.W.3d 24 (2006)*. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* Additionally, **[*11]** conclusory statements that counsel was ineffective cannot be the basis for postconviction relief. *Anderson v. State, 2011 Ark. 488, 385 S.W.3d 783*.

A. Jury Selection

In his first ineffective-assistance argument, Gay contends that his trial counsel was ineffective during jury selection. The circuit court found that the allegations of error relative to trial counsel's inadequate voir dire were all matters of strategy within the limits imposed by the circuit court, and Gay failed to demonstrate that the presence of any seated juror prevented him from receiving a fair trial.

Specifically, Gay asserts that no juror was asked whether he or she could give meaningful consideration and effect to any of the approximately seventy mitigating **[**16]** factors presented. Trial counsel asked only if the venire could consider mitigating evidence generally. No juror was asked, for example, if he or she could give intoxication, a history of child abuse and sexual victimization, or a mental-health disorder meaningful consideration and effect as a mitigating circumstance. Gay further asserts that the venire was asked if it could consider mitigating evidence, but only as a general category of evidence, and all venirepersons indicated that they could. To support his position, Gay relies on *Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*. In *Morgan*, the Court held that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. HN6[] Therefore, based on the requirement of impartiality embodied in the *Due Process [*12] Clause of the Fourteenth Amendment*, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State **[**17]** is disentitled to execute the sentence." *504 U.S. at 729*. Thus, *Morgan* stands for the proposition that a venireperson who will automatically vote for the death penalty, regardless of mitigators or aggravators, should be struck for cause. It does not stand for the proposition that Gay should have been allowed to question jurors about their views on "particular" mitigators.

Further, Gay has not demonstrated that trial counsel's performance was deficient under *Strickland*. During the Rule 37 hearing, Fraiser testified the defense team scoured the jury questionnaires and divided them into three stacks: good, questionable, concerning. In the "concerned" stack were jurors that indicated they were pro-death penalty. Fraiser testified that his strategy was to seat as many jurors "as possible who would be bordering on being excluded because they could not consider the death penalty." Fraiser testified that his goal for these prospective jurors was to get them to say they could consider the death penalty in order to prevent the prosecution from striking them for cause. At trial, Fraiser asked the jury mitigation specific questions, including, "Do you consider [the possibility of life without parole] a severe punishment for a crime?" **[**18]** and "Some people are of the belief, because of religion, the way that they were raised, what they have read, life experience, that if you take a life you should forfeit your life. Do you believe that?"

HN7[] Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for finding ineffective assistance of counsel. *Hartman v. State, 2017 Ark. 7, 508 S.W.3d 28*. When a decision by trial counsel is **[*13]** a matter of trial tactics or strategy and that

decision is supported by reasonable professional judgment, then such a decision is not a proper basis for relief under Rule 37. *Van Winkle v. State, 2016 Ark. 98, 486 S.W.3d 778*. We agree with the circuit court's determination that Fraiser's voir dire was a matter of trial strategy. Finally, because Gay cannot demonstrate deficient performance, we need not consider the prejudice prong in *Strickland*.

B. Pen Pack

In his second ineffective-assistance argument, Gay contends that his trial counsel was ineffective for introducing his Arkansas Department of Correction (ADC) "pen pack" during his sentencing phase. The pen pack consisted of approximately 300 pages and spanned all periods of time that he had been incarcerated in the ADC. Gay contends that while his defense counsel purportedly **[**19]** introduced the pen pack as mitigating evidence, it was extremely prejudicial to his defense.

Gay asserts that the pen pack contained highly damaging information, including a record of Gay's parole violations and revocations. Notes from Gay's parole officer included evidence that Gay (1) had threatened to blow up someone's house; (2) had been arrested for battery while on parole; (3) had been seen carrying around a shotgun; (4) had beaten up a woman with whom he was having an affair; and (5) had been arrested for felon in possession of a firearm. The pack also contained a letter from Gay's father, Glen, to the parole board. The prosecution later used it against Gay in its closing argument. Specifically, Gay asserts that the prosecution, referring to the letter, argued that Glen had tried to help Gay get paroled and that Gay repaid Glen by killing him. The results of Gay's "Minnesota Multiphasic Personality Inventory" (MMPI) test were also contained in the pack. Gay **[*14]** argues that the prosecution read the MMPI findings to the jury, suggesting that Gay had the personality of a cold-blooded killer.

During the Rule 37 hearing, Fraiser testified that the decision to introduce the pen pack as evidence **[**20]** in mitigation was made "in the context of this case and what we had to work with." Fraiser explained that the majority of Gay's adult life was spent in custody or in isolation, which limited the evidence that the defense could explore in mitigation. Fraiser explained that the pen pack was introduced to demonstrate Gay's ability to conform his behavior to the requirements of being institutionalized. Further, by the time the decision to introduce the pen pack was made, the jury had already been introduced to proof that Gay had been involved in two previous homicides. Fraiser opined that the jury had already found Gay guilty and had seen the graphic pictures of Snow's body. Thus, Fraiser testified, by the time the pen pack was introduced, the defense was trying to convince the jury to "not forfeit [Gay's] life. Lock him up, put him in a confined environment, remove him from society. He'll no longer be a danger to society as a whole, and at least he has shown ability to not flourish but survive accordingly in that environment." When asked, "[O]ther than the pen pack, what type of evidence could you have presented to adequately convey that portion of your mitigation defense?" Fraiser testified **[**21]** that he could not find any ADC officer, guard, or administrator who was willing to come forward to render an opinion. On this issue, the circuit court found the decision to introduce the pen pack was a matter of trial strategy and not reviewable in a Rule 37 petition.

Here, counsel made a deliberate decision to allow introduction of the pen pack, and he provided his specific reasoning for doing so. Further, Gay's own witness, Professor **[*15]** Sullivan, acknowledged that the pen pack was the only evidence admitted to demonstrate that Gay was a "good prisoner in the mitigating evidence." As the State points out, the jury unanimously found the following mitigating factors: (1) Gay respects the chain of command at the ADC; (2) Gay functions best when he is in a highly structured situation in which he has a supervisor; (3) Gay has been respectful to correctional officers and administrators during his incarceration; (4) Gay is a model inmate; (5) Gay has never been in any fights or involved in any assaults during his years of confinement; (6) Gay has demonstrated his desire to be productive and work at an assigned position while incarcerated; and (7) Gay has been rule abiding and complies with staff directives **[**22]** and work assignments while in custody, and as such, he is considered to be a good prospect for peaceful and productive adjustment while in custody. Accordingly, the circuit court did not clearly err in finding that the decision to introduce the pen pack

was a matter of trial strategy.

C. Victim-Impact Evidence

In his third ineffective-assistance argument, Gay contends that his trial counsel was ineffective for failing to object to Mary Beth Lansdell's penalty-phase victim-impact testimony. Specifically, Gay takes issue with Ms. Lansdell's statement about the loss of her mother "[d]ue to the actions of one man, who had no remorse, which resulted in taking our mother's life so ruthlessly." To support his argument, Gay relies on *Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*, recognizing that *Payne* overruled *Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)*, which prohibited victim impact statements. However, Gay notes that the *Payne* court left intact the prohibition against statements about "the crime, the defendant, and the appropriate sentence" because such statements violated the *Eighth Amendment* and were **[*16]** inadmissible. *Id. at 830 n.2*. Gay then goes on to cite an Eighth Circuit case, *Williams v. Norris, 612 F.3d 941, 951 (8th Cir. 2010)*, which recognizes that the *Booth* prohibition against statements about the crime, the defendant, and the appropriate sentences remained intact. **[**23]** Gay argues that Lansdell's statement violated this prohibition because she commented directly on Gay—calling him remorseless. She also commented on the crime—calling it ruthless. Gay contends that without these statements, a reasonable probability exists to believe the sentencing outcome would have been different. We disagree. The *Payne* court stated that if evidence was introduced that was "so unduly prejudicial" that it rendered "the trial fundamentally unfair," then the *Due Process Clause of the Fourteenth Amendment* could provide relief. *Id. at 825*. Given the record before us, Landsell's statement did not rise to the level of rendering Gay's trial fundamentally unfair. Therefore, we agree with the circuit court's finding that Gay failed to demonstrate that a different verdict would have been reached had his counsel made a sustainable objection.

As a secondary basis for denying relief, the circuit court found that the lack of objection to victim-impact evidence is a matter of trial strategy. We agree. During the Rule 37 hearing, Fraiser testified that he believed "that is going to be pretty egregious to step on a family victim member during their victim impact statement." In his own experience, he has "seen it blow up in someone's face to their detriment." **[**24]** Specifically, Fraiser recalled being a trial attorney in the capital-murder trial of Terrick Nooner. During Nooner's trial, the defense attorney posed a question to a family victim after victim impact testimony. Fraiser testified that the defense "asked a question that they should not have asked, and it was to the point with [family victim member]'s response, the jurors were crying and the **[*17]** court reporter was visibly crying. Given this, you have to be careful." Based on Fraiser's testimony regarding his experience with questioning a victim's family member, it was a matter of trial strategy to not appear insensitive to Lansdell's loss. We cannot say that the circuit court's findings in this regard were clearly erroneous.

D. State's Closing Argument

In his fourth ineffective-assistance argument, Gay contends that his trial counsel was ineffective for failing to object to the State's improper closing argument. *HN8*[] A reversal of a judgment due to remarks made by counsel during closing arguments is rare and requires that counsel make an appeal to the jurors' passions and emotions. *Houghton v. State, 2015 Ark. 252, 464 S.W.3d 922*. Experienced advocates might differ about when, or if, objections are called for since, as a matter of trial strategy, **[**25]** further objections from counsel may result in comments seeming more significant to the jury. *Id.* *HN9*[] Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct. *Howard, 367 Ark. 18, 238 S.W.3d 24*. Here, the circuit court found that the lack of objection to the State's closing argument was a matter of trial strategy; Gay failed to show that a different verdict would have been reached had counsel made a sustainable objection; and the argument was not a mischaracterization of the evidence presented.

Specifically, Gay argues that the prosecutor's comments—(1) that Gay "picked [the victim] up like a dead deer and chunked her, after he drug her, and he chunked her into the back of his truck"; (2) that "she's left there for four days so animals could eat her"; and **[*18]** (3) that he "pushes her up on his knee like she's a

dead animal"—were overly inflammatory and that there is a reasonable probability that the jury would not have sentenced him to death had counsel objected.

We agree with the circuit court's determination that trial counsel's **[**26]** decision not to object during the State's closing argument was a matter of trial strategy. At trial, two witnesses testified that after Gay shot Snow, he dragged her to the back of his truck by her hair and belt loops, rolled her up on his knee, and put her in the back of his truck. Additionally, medical examiner Dr. Charles Kokes testified that when Snow's body was recovered, bones and tissue were missing from her face, which could have been caused by animal activity. We cannot say that the circuit court's findings in this regard were clearly erroneous. Accordingly, we agree with the circuit court and affirm the circuit court on this point.

E. Self-Defense Theory

In his fifth ineffective-assistance argument, Gay contends that his trial counsel was ineffective for failing to pursue a self-defense or an imperfect self-defense theory. As a basis for this theory, Gay contends that a knife was found in the passenger compartment of the pickup truck that Snow occupied, and a photograph of the knife in the truck was introduced. In addition, Gay's "Prisoner Medical Treatment Report" contained Gay's statements that "a woman tried to stab him." On this issue, the circuit court found that Gay did **[**27]** not show that defense counsel failed to adequately investigate possible defenses or that such an investigation would have revealed anything that might have been admissible at trial **[*19]** in light of the other evidence presented and Gay's refusal to testify or actively participate in the preparation of his defense.

HN10[] Counsel has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kemp v. State, 348 Ark. 750, 758, 74 S.W.3d 224, 227 (2002)*. Counsel's decision not to investigate must be directly assessed for reasonableness, applying a heavy measure of deference to counsel's judgments. *Id.* Given what counsel had to work with, it was reasonable to opt for a strategy that he believed had the most chance of success. The fact that he did not investigate what he believed to be a losing defense theory was a tactical decision and not a basis for Rule 37 relief. *See Flores v. State, 350 Ark. 198, 206, 85 S.W.3d 896, 901 (2002)*.

Here, other than Gay's own self-serving statement, there is no evidence that Gay acted recklessly or in self-defense when he shot Snow. At trial, there was no evidence presented that Snow had a weapon or acted aggressively toward Gay. The two witnesses testified that Gay exited the truck and ordered Snow out of the truck; Snow did **[**28]** not comply, and Gay went back to his truck and retrieved a shotgun and again ordered Snow out of the truck. As Snow was attempting to exit the truck, Gay shot Snow in the right side of her face. Further, during the Rule 37 hearing, Fraiser testified that there was no indication from any witness during the trial that a knife was presented in a threatening manner to Gay when he shot Snow.

As the justification of self-defense was not available to Gay, his counsel necessarily did not render ineffective assistance of counsel by failing to raise the defense. *Edwards v. [*20] State, 2017 Ark. 207, at 6, 521 S.W.3d 107, 112*. Accordingly, we cannot say that the circuit court erred in denying Gay's petition on this issue.

F. Scotty Garner Murder

In his sixth ineffective-assistance argument, Gay contends that his trial counsel was ineffective for failing to properly investigate and present evidence of the killing of Gay's cousin, Garner, as a mitigating factor. Specifically, Gay argues that the jury could have concluded that Gay may have killed Garner. On this issue, the circuit court found that the reference to the Garner homicide was a matter of trial strategy. Further, the circuit court found that Gay failed to show that a different verdict would have been reached **[**29]** had counsel not made reference to this.

During the penalty phase, the defense elicited testimony regarding the death of Garner. Gloria Lindsay, Gay's sister, testified that both Gay and Glen were present when Garner was killed. According to Lindsay, Glen admitted to the authorities that he was the one who shot Garner, and then he recanted. However, Lindsay testified that as far as she knew, no one was ever charged with Garner's death. During closing argument, Fraiser emphasized to the jury that Glen claimed that he

had shot Garner. "It was investigated and for whatever reason the authorities at that time . . . felt that Glen Gay should not be charged with an offense. That murder - or that homicide was ruled to be justifiable, but it's something that Randy saw."

At the Rule 37 hearing, Fraiser testified that he introduced evidence about Garner's death to demonstrate that Gay had been exposed to violence in his life. Fraiser testified that when Gay would not help the defense develop mitigation or facts relevant to the actual **[*21]** merits of the charge itself, he "did not have a lot to work with, and [was] trying to use family members to convey exposure to violence for mitigation purposes."

Based on **[**30]** the foregoing, the circuit court did not err in determining that the reference to the Garner homicide was a matter of trial strategy. Further, in light of Lindsay's testimony and Fraiser's closing argument indicating that Glen had shot Garner, Gay's bare allegation that the jury "could" have concluded that he shot Garner is not persuasive. Accordingly, we affirm the circuit court's decision on this point.

G. Failure to Investigate Mitigators

In his seventh ineffective-assistance argument, Gay contends that his trial counsel was ineffective for failing to investigate and present as mitigating factors evidence of his PTSD, alcohol abuse, and childhood sexual abuse.

In response, the State argues that Gay ignores the fact that counsel presented evidence in virtually all of these categories during the penalty phase—multiple witnesses testified about Gay's chronic alcohol abuse; Lindsay offered testimony regarding Gay's abuse at the hands of his father, Glen; and Lindsay offered testimony that Gay had been sexually abused by older boys at the children's home.

The circuit court found (1) that Gay failed to show that defense counsel did not adequately investigate possible mitigating factors; (2) **[**31]** that such an investigation would have revealed anything that might have been admissible at trial in light of other evidence presented; and (3) that Gay refused to testify or actively participate in the preparation of his defense, including refusal to undergo a mental evaluation.

[*22] _HN11_[] A trial counsel's failure to investigate and present substantial mitigating evidence during the sentencing phase of a capital murder trial can constitute ineffective assistance of counsel. *See* _Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)_; _Sanford v. State, 342 Ark. 22, 25 S.W.3d 414 (2000)_. Counsel is obligated to conduct an investigation for the purpose of ascertaining mitigating evidence, and the failure to do so is error. _Coulter v. State, 343 Ark. 22, 31 S.W.3d 826 (2000)_. Such error, however, does not automatically require reversal unless it is shown that, but for counsel's errors, there is a reasonable probability that the sentence would have been different. _Howard, 367 Ark. 18, 238 S.W.3d 24_. When reviewing a claim of ineffectiveness based upon failure to present adequate mitigating evidence, we view the totality of the evidence—both that adduced at trial and that adduced in the postconviction proceeding. *Id.*

Gay asserts that prior to trial, his trial counsel received his "Prisoner Medical Treatment Report," which Gay contends provided the following mitigation evidence: Gay's prior **[**32]** psychiatric treatment; that two days after the Snow homicide, he was diagnosed with "alcohol abuse, continuous drinking behavior"; evidence of prior diagnoses with alcohol-dependence disorder; a "Mental Health Social History" noting that Gay's father was an alcoholic and was abusive; on the day of the homicide, Gay drank a pint of whiskey and between twelve and twenty beers; he drank twelve beers a day for twenty-five years; Gay was a witness to his father's violence; Gay was victimized during a prior incarceration; Gay was symptomatic of PTSD; and Gay's father was abusive and had sexually abused Gay. Gay notes that trial counsel's file also contained numerous witness statements from an FBI investigation that contained mitigating evidence—that Gay was a heavy drinker; that he was **[*23]** in an orphanage when he was very young; that Gay had witnessed the murder of Garner; and that several individuals stated that Glen had been sexually inappropriate with Sherry (Gay's first wife) and Candy (Gay's half-sister). Gay asserts that trial counsel's failure to adequately investigate and present this evidence was unreasonable and fell below the standard of care for defense counsel in capital cases. **[**33]** He also claims that a reasonable investigation would have resulted in competent counsel consulting with, and offering the testimony of, experts in the fields of child sexual abuse, PTSD, and chronic

alcoholism. Further, Gay asserts that had this evidence been investigated and presented, one or more jurors would have rejected the death penalty.

During the Rule 37 hearing, Dr. Mendel, testified that he had conducted a psychological examination of Gay. His report focused on Gay's childhood-abuse experiences, including sexual abuse. Dr. Mendel opined that Gay had been subjected to a range of adverse childhood experiences that damaged him—childhood sexual abuse, verbal and emotional abuse, the loss of his mother who stopped being involved early in his life, and further abandonment when he spent time in an orphanage. Additionally, Gay witnessed his father threaten violence toward others and was subjected to his father's threats of violence toward him. Dr. Mendel opined that Gay's adverse childhood experiences would have provided an enormous amount of mitigating evidence. He also testified that he diagnosed Gay with PTSD, alcohol dependency, and major depressive disorder.

Dr. Roache testified that **[**34]** Gay suffered physical, sexual, and emotional abuse as a child; Gay and his father were alcoholics; and Gay's chronic alcohol abuse likely caused changes to his brain that made logical reasoning and impulse control more difficult for him. **[*24]** Dr. Roache found that Gay was predisposed to alcohol-use disorder (AUD), which was likely genetically inherited from Glen. AUD causes structural changes in the brain that can result in neurocognitive deficits. As a result, Gay's actions are more impulsive or instinctual rather than deliberative or decisional. Dr. Roache agreed with Dr. Mendel's diagnosis of PTSD, which causes irritable behavior and angry outbursts, reckless or self-destructive behavior, hypervigilance, and an exaggerated startle response.

Despite Gay's assertion to the contrary, this is not a case in which trial counsel failed to investigate the mitigating evidence. As the State asserts, Gay's alcohol abuse was a consistent theme in his trial. Janice Cochran, Gay's second wife, testified that Gay and Glen both drank in excess and that Gay was always angry when he drank whiskey. John Ward, Gay's former employer, testified that Gay's drinking was the reason he stopped giving Gay jobs **[**35]** to do around his store. Lindsay testified that Gay drank heavily and was an alcoholic. She stated that she tried unsuccessfully to get Gay to seek help for his drinking problem. With regard to sexual abuse, Lindsay testified that Gay had been sexually abused by older boys at the children's home.

As to sexual abuse by Gay's father, the mitigation investigator's notes reflect that Gay reported that he had been sexually abused by his father. However, at the Rule 37 hearing, Fraiser testified that he decided not to introduce that evidence because he believed Gay would have objected to any attempt to put on testimony about the sexual abuse. Fraiser stated that he did not recall telling Gay that he expected Lindsay to testify about the sexual abuse at the children's home for fear that he would have insisted that he not introduce such evidence.

[*25] Here, trial counsel discovered and presented mitigating evidence. Approximately seventy mitigating circumstances were submitted to the jury. Also, Fraiser testified that Gay refused to testify and develop mitigation facts. Further, as the State points out, the mitigation strategy proposed in the Rule 37 proceedings was the exact opposite of the one employed by trial **[**36]** counsel. At the Rule 37 hearing, Fraiser testified that the defense strategy during the sentencing phase was to demonstrate that Gay "could conform his behavior to the requirements of being institutionalized or in the Department of Correction[]." The postconviction strategy would have presented Gay "as a loose cannon who will react with violence when placed in a stressful environment." Here, trial counsel's decisions concerning mitigation evidence included matters of trial strategy and tactics.

Here, the jury heard an abundance of evidence about Gay's childhood, such as abuse by his father, sexual abuse by other children in the children's home, and his chronic alcohol abuse; however, it found that most of this evidence did not rise to the level of a mitigating circumstance. Despite this, the jury found that "the aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist." Thus, Gay has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to present testimony from the doctors, the jury would have reached a different result, namely a sentence of life imprisonment without parole. Therefore, we affirm **[**37]** the denial of relief on this point.

H. Failure to Adequately Investigate and Challenge the Aggravating Factors of the Second-Degree Murders of

Glen Gay and Jim Kelly

Gay's final ineffective-assistance argument is that trial counsel was ineffective for failing to further investigate or challenge the two second-degree murders that were used as [*26] aggravating factors. He contends that counsel should have presented additional circumstances surrounding the murders of his father-in-law, Kelly, and his father, Glen, to lessen the weight the jury gave to these aggravators. Gay asserts that the police file on Kelly's murder contained evidence that Gay had been drinking before the murder and that the week before Kelly's death, Gay had been talking about killing himself. Gay further contends that the file contained evidence that Kelly had told Gay that he would "beat his brains out" if he laid another hand on his daughter, Sherry. Gay further asserts that the file contained evidence of a letter from Sherry stating that a ten-year sentence with five years suspended, with parole eligibility after serving one-sixth of the five years was a fair and just sentence. In addition, Gay argues that there was [**38] evidence in the file on his father's murder that Glen had pulled a gun on Gay, that Glen had attacked Gay's wife, and that Gay shot Glen in self-defense. Gay asserts that none of this evidence was presented to the jury to lessen the weight of the aggravators related to Kelly and Glen.

In its supplemental order, the circuit court found that trial counsel fully and completely investigated the two murder convictions by securing all files associated with the murders in the possession of the prosecuting attorneys' offices and the circuit court clerk's office. The court also found that the decision whether to challenge these aggravating factors was a matter of trial strategy. The court noted that counsel's strategy was to have Gay testify during sentencing about the aggravating and mitigating circumstances and try to explain them to the jury. However, Gay refused to testify even though counsel implored him to do so.

[*27] Here, Gay fails to recognize that trial counsel successfully obtained a motion in limine to prevent evidence about the circumstances leading up to Kelly's murder--that Gay had beaten his wife the night before and on previous occasions. Further, any attempt to introduce testimony [**39] to mitigate the effect of that prior murder would have opened the door to this harmful evidence. The file on Glen's murder contained multiple, varying descriptions of the circumstances behind that shooting, and Gay had admitted during a polygraph examination that Glen did not have a gun at the time of the murder. Gay's wife at the time, Janice Cochran, was the only other witness to Glen's murder. Cochran also testified during the sentencing phase, and her version of the events would have contradicted any evidence presented by Gay that he shot his father in self-defense. Cochran testified that she overheard an argument between Gay and Glen, heard a loud noise, and went outside the camper to see what had happened. Cochran testified that Gay came to the camper and retrieved shotgun shells, and when Cochran asked what was happening, Gay shoved her back into the camper and padlocked the door. Cochran testified that she could see Gay outside the camper loading the shotgun, that she heard a loud noise, and that Gay came back and let her out of the camper. Cochran testified that when she returned to where they were camping, she found Glen, who had been shot in the head. She testified that [**40] Gay made her help load Glen's body into a boat and row it down the river. Cochran testified that she convinced Gay that they should turn themselves in to the police because she was afraid of Gay. Accordingly, because the prosecutor's file and the testimony of the only other witness do not support a self-defense inference, counsel did not perform deficiently by not investigating further. Finally, even if counsel had been able to introduce additional evidence [*28] about these prior murders, Gay has not demonstrated how this would have changed the jury's determination that these were aggravating circumstances, particularly when he pled guilty to one murder and was found guilty of the other. Thus, postconviction relief was not warranted on this claim.

III. *Form 3*

For his third point on appeal, Gay argues that the third death-penalty verdict form ("Form 3") prohibits the jury from exercising mercy in violation of the *Fifth*, *Eighth*, and *Fourteenth Amendments* and *article 2, sections 8*, *9*, and *10 of the Arkansas Constitution*. Form 3 provided that if the jury determined that (A) the State proved beyond a reasonable doubt one or more aggravating circumstances; (B) the aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstances; and (C) the aggravating [**41] circumstances justify beyond a reasonable doubt a sentence of death, "then sentence Randy William Gay to

Death on Form 4." Gay contends that Form 3 prohibited the jury from exercising mercy. On this issue, the circuit court found that this allegation of error could have been reviewed on direct appeal and does not constitute grounds for relief under Rule 37. We agree. HN12[] As set forth in *Reams, supra*, unless an error is so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. Here, Gay does not argue that this alleged error is structural or fundamental in nature. Accordingly, we agree with the circuit court's finding that this issue does not constitute grounds for relief under Rule 37.

[*29] Finally, we note Gay's acknowledgment that *Kemp v. State, 324 Ark. 178, 919 S.W.2d 943 (1996)* rejects his very argument.[1] In *Kemp*, the appellant contended that the circuit court erred in refusing to give the jury his proffered penalty-phase instruction, which read as follows: "Whatever the jury finds regarding aggravating and mitigating circumstances, the jury may still return a verdict of life imprisonment without parole." HN13[] In rejecting Kemp's argument, **[**42]** we explained that we have held "that AMCI 2d Form Three, Section (C) permits the jury to show mercy, as it allows the jury to find that the aggravating circumstances do not justify a sentence of death." *Id. at 206, 919 S.W.3d at 957*. Non-model instructions are to be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject. *Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994)*. Accordingly, we affirm on this issue.

IV. *Sentencing Procedures*

For his fourth point on appeal, Gay argues that the sentencing procedures did not meet the statutory and constitutional requirements necessary for imposing the death penalty. Specifically, Gay contends that because the jury foreman failed to sign Form 2 and because there is an ambiguous mark on Form 3, his death sentence should be reversed. On this issue, the circuit court found that Gay could have raised alleged errors or inconsistencies in the verdict form at trial or on direct appeal, and therefore, these arguments are not cognizable in his postconviction proceeding. We agree. HN14[] As set forth in *Reams, supra*, unless an error is **[*30]** so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Rule 37 does not provide **[**43]** a remedy when an issue could have been raised at trial or argued on appeal. Here, Gay does not argue that this alleged error is structural or fundamental in nature. Accordingly, we agree with the circuit court's finding that this issue does not constitute grounds for relief under Rule 37. Accordingly, we affirm on this point.

V. *Verdict Forms*

For his fifth point on appeal, Gay argues that the verdict forms failed to establish that the jury considered all mitigating evidence. The State alleged three aggravating factors pursuant to *Ark. Code Ann. § 5-4-604(3)*, which provides: "The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person[.]" Gay contends that the statute and the jury instruction are vague and failed to genuinely narrow the class of death-eligible individuals. Further, Gay contends that the statute and instruction are also vague because while a person may "commit" an offense, the conduct may be justified, for example, in a case of self-defense of another. The circuit court found that this allegation of error could have been reviewed on direct appeal and does **[**44]** not constitute grounds for relief under Rule 37. As set forth in *Reams, supra*, unless an error is so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. Here, citing *Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)*, and *Teater v. State, 89 Ark. App. 215, 201 S.W.3d 442 (2005)*, without analysis or explanation, Gay asserts that a deficient jury instruction amounts to a structural error. The structural **[*31]** errors involved in *Sullivan* and *Teater* are clearly distinguishable from the alleged error in the present case. In *Sullivan*, the Court found that a constitutionally deficient jury instruction concerning the burden of proof was a "structural" error that was not amenable to

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[1] While Gay recognizes that *Kemp v. State* does not support his argument, he states that the issue is raised to preserve it for federal habeas review.

harmless-error analysis and thus required automatic reversal of the defendant's conviction. The Court stated as follows:

> In [*Arizona v. Fulminante, 499 U.S. 279, 307-309, 111 S. Ct. 1246, 113 L. Ed. 2d 302*], we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," . . . and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented[.]" . . . Denial of the right to a **[**45]** jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." . . . *HN15*[] The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 508 U.S. at 281-82. In *Teater*, the court of appeals held that the error in omitting the instruction on mental disease or defect is a "structural" error that is not subject to harmless-error review. Citing *Sullivan*, the court of appeals explained that the *Sixth Amendment to the United States Constitution* affords a criminal defendant the right to have an impartial jury reach the requisite finding of guilt. *Teater v. State, 89 Ark. App. at 222, 201 S.W.3d at 447*. Gay's bare assertion that the instruction and statute are vague does not rise to the level of a structural error. We agree with the circuit court's finding that this issue does not constitute grounds for relief under Rule 37. Accordingly, we affirm the circuit court on this point.

[*32] VI. *Lack of Remorse*

For his final point on **[**46]** appeal, Gay argues that the State improperly argued lack of remorse as a nonstatutory aggravating factor. Gay asserts that *Ark. Code Ann. § 5-4-604* limits the State to proving one or more of ten specific factors but that lack of remorse is precluded. Gay contends that the State used a letter written by Gay's father, Glen, to the Arkansas Parole Board asking for Gay's release. Gay asserts that the State argued that the letter implied that Gay was remorseless. The circuit court found that this allegation of error could have been reviewed on direct appeal and does not constitute grounds for relief under Rule 37.

As set forth in *Reams, supra*, unless an error is so fundamental as to render the judgment of conviction void and subject to collateral attack, a petition under Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. Here, Gay does not argue that this alleged error is structural or fundamental in nature. Therefore, we agree with the circuit court's finding that this issue does not constitute grounds for relief under Rule 37. Therefore, we affirm the circuit court on this point.

Affirmed.

Special Justice TIM SNIVELY joins in this opinion.

WOOD, J., not participating.

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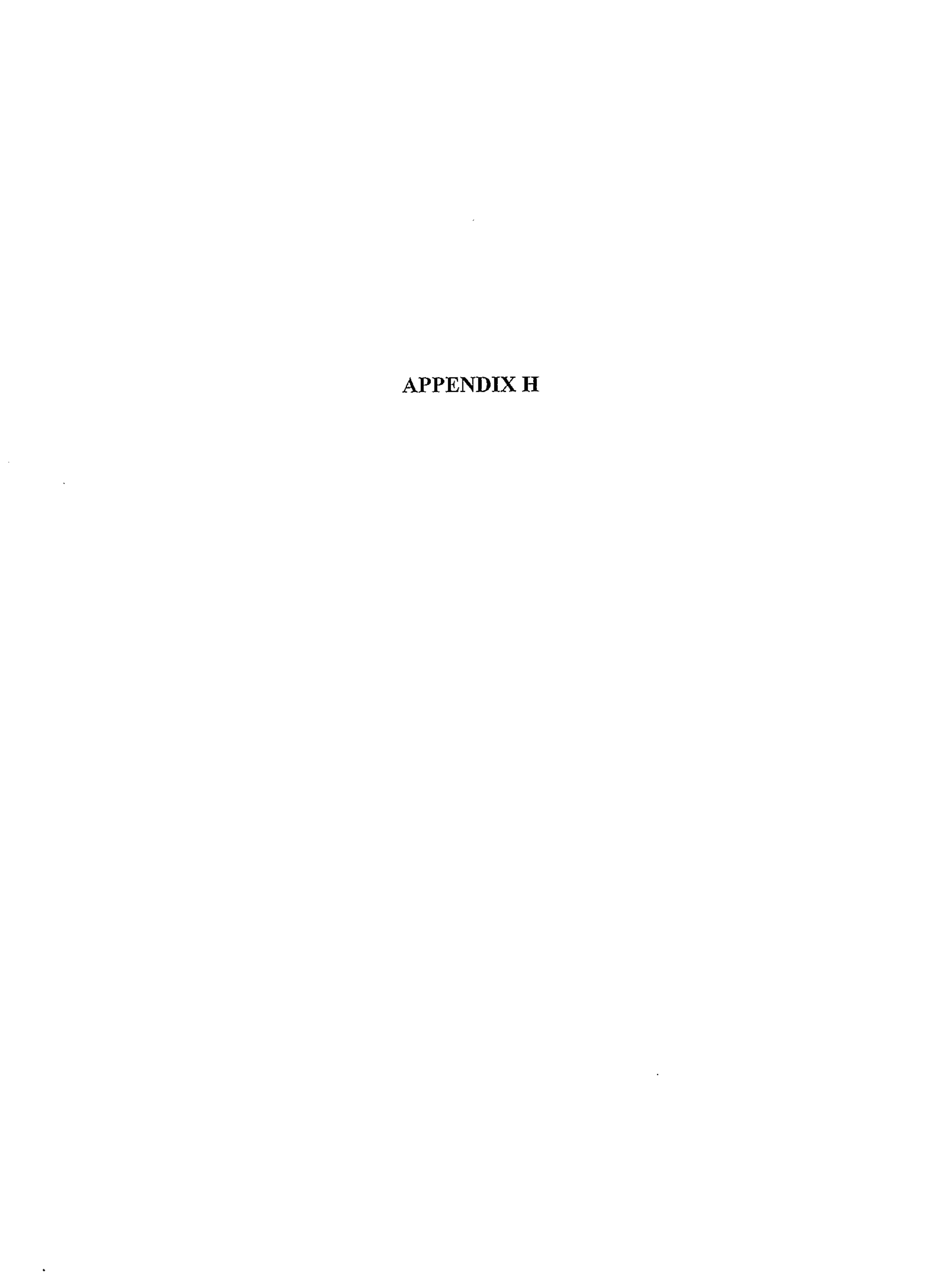

APPENDIX H

IN THE SUPREME COURT OF ARKANSAS

RANDY WILLIAM GAY **APPELLANT**

v. **No. CR-21-202**

STATE OF ARKANSAS **APPELLEE**

PETITION FOR REHEARING

Pursuant to Rule 2-3 of the Rules of the Supreme Court and Court of Appeals of Arkansas, Gay requests rehearing to "call attention to specific errors of law or fact." Gay first contends the Court overlooked and failed to consider Gay's arguments that he was deprived of a fair and impartial jury when the trial court permitted the seating of two jurors who explicitly refused to consider Gay's intoxication as a mitigating factor and Gay's related claim that trial counsel was ineffective for failing to challenge the two jurors for cause. Second, Gay contends the Court misconstrued United State Supreme Court precedent on victim-impact evidence. Finally, Gay contends the Court did not fully consider Gay's argument on the issue the Court remanded for consideration in *Gay v. State*, 2021 Ark. 3: whether trial counsel failed to adequately contest the aggravating factors.

The petition is timely, meritorious, and not filed for the purpose of delay. Gay asks that the Court grant rehearing to correct the identified errors and omissions.

I. THE COURT OVERLOOKED GAY'S ARGUMENT CONCERNING TWO JURORS' INABILITY TO TREAT INTOXICATION AS MITIGATING

Gay contends that the Court overlooked and failed to address two of his claims relating to the jury selection process: 1) whether Gay was denied a fair and impartial jury when two jurors, in response to the prosecutor's questioning, unambiguously stated they would not consider intoxication as a mitigating factor and 2) whether trial counsel's failure to challenge the jurors for cause constituted ineffective assistance of counsel. *See Appellant's Brief, Statement of the Case*, p. 2; *Argument*, pp. 7-8, 10-11.

Jurors Frye and Stacey denied that a defendant's "punishment should be less because they chose to get drunk and do this than somebody who did something while they were sober." Ab. 395. But, state statute explicitly provides that a capital crime is mitigated when "the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of . . . intoxication." *Ark. Code Ann. § 5-4-605(3)*. Evidence of intoxication, moreover, is a constitutionally recognized mitigating factor, *see Ford v. Wainwright*, 861 F.Supp. 1447, 1455 (E.D. Ark. 1994), and the failure to challenge a juror who refuses to give consideration to mitigating evidence falls below the standard of care and constitutes ineffective assistance. *See A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.10.2* ("Counsel should be familiar with techniques . . . for uncovering those prospective jurors who are unable to give meaningful consideration to

mitigating evidence[.]" The obvious technique is to challenge for cause an unqualified juror.

II. THE COURT SHOULD RECONSIDER ITS HANDLING OF THE VICTIM-IMPACT CLAIM

Gay argued that counsel was ineffective for failing to object to an inadmissible victim-impact statement -- testimony from Mary Beth Lansdell, the victim's daughter -- that Gay "had no remorse" and "ruthlessly" killed the victim. Br. at 14. As the brief explained, the Supreme Court has held that the Eighth Amendment permits the use of victim-impact statements "relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). The Eighth Amendment continues to categorically forbid "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* Lansdell's statement fell on the wrong side of the line, and trial counsel should have objected to it.

In adjudicating Gay's claim, rather than recognizing the categorical prohibition on victim-impact statements of this type, the Court found no error because the statement was not "'so unduly prejudicial' that it rendered 'the trial fundamentally unfair' [under] the Due Process Clause of the Fourteenth Amendment." *Gay*, 2022 Ark. 23, at 17 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

Under *Payne*, however, the due-process analysis applies only to the type of victim-impact evidence that the Eighth Amendment typically permits. Though a State may generally introduce statements relating to the victim's characteristics and the impact of her death, that sort of evidence might become so excessive that it violates due process. Only then is it forbidden under *Payne*. *See Payne*, 501 U.S. at 825.

By contrast, characterizations about the crime or defendant are always forbidden under the Eighth Amendment. The Due Process Clause does not factor into it. Moreover, this Court has held that the introduction of impermissible victim-impact testimony at the penalty phase of a capital trial is not harmless. *See Miller v. State*, 2010 Ark. 1, at 35–37, 362 S.W.3d 264, 285–86; *but cf. Nance v. State*, 339 Ark. 192, 198–99, 4 S.W.3d 501, 505 (1999) (finding no prejudice from counsel's failure to object to prohibited testimony). Had counsel objected, he would have preserved the issue, and on direct appeal Gay would have been entitled to relief under a straightforward application of *Miller*.

The Court also held that counsel was not ineffective because "the lack of objection to victim-impact evidence is a matter of trial strategy." *Gay*, 2022 Ark. 23, at 17. Specifically, the Court cited to the portion of the record in which trial counsel testified "regarding his experience with questioning a family member." *Id.*

According to trial counsel, such questions could "blow up in someone's face to their detriment." *Id.*

Gay's claim, however, is *not* that trial counsel ineffectively failed to cross-examine Lansdell. It is that he should have objected to any commentary on the crime, the defendant, or the appropriate sentence. Lansdell had prepared her statement to read to the jury before she took the stand. *See* Ab. 687. Reasonable defense counsel would have requested and reviewed that statement ahead of time to ensure that it included no inappropriate material, and he would have otherwise taken steps to alert the court that the victim-impact statement should not contain opinions about the crime, the defendant, or the appropriate sentence. This approach would have avoided any potential backfire occasioned by confronting the witness before the jury. Instead, trial counsel let this forbidden material in, a mistake that was not harmless.

III. The Court Failed to Consider that Evidence of Abuse by Gay's Father Would Have Undercut an Aggravating Factor

In its earlier opinion in this case, the Court remanded to the circuit court to make findings of fact and conclusions of law on whether "trial counsel was ineffective for failing to adequately investigate and challenge the aggravating factors of the second-degree murders of Glen Gay and Jim Kelly." *Gay v. State*, 2021 Ark. 3, at 2. In this appeal, the Court focused exclusively on the facts surrounding the murders themselves and the immediate lead-up to them. In the process, the Court omitted any consideration of whether trial counsel unreasonably failed to challenge

the aggravating factors in an even more important way—by explaining how these offenses were mitigated by Gay's broader past with the victims.

This sort of mitigation was particularly important as it relates to Gay's father. As argued in the brief, "[if] the jury had known that Glen Gay had raped Randy, it would likely have given less weight to the aggravator. It would have explained the effects of Randy's childhood sexual trauma and provided a greater context to understand the death of Glen." Br. at 35. The opinion, however, did not grapple with this argument. Instead, it focused on the idea that "because the prosecutor's file and the testimony of the only other witness do not support a self-defense inference, counsel did not perform deficiently by not investigating further." *Gay*, 2022 Ark 23, at 29.

Gay asks that the Court address the totality of his claim. Had the jury heard of Glen's sexual abuse of Randy, the aggravating factor would not have weighed nearly as heavily as it did. And without the weight of that aggravator, it is reasonably likely that at least one juror would not have voted for death.

CONCLUSION

For these reasons, Gay respectfully requests that the Court grant this Petition for Rehearing and enter a corrected opinion reversing the circuit court and granting Rule 37 relief based on the issues raised herein.

Respectfully submitted by,

/s/ J. Blake Hendrix
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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2022, this document was filed with the Court's electronic filing system, which shall send electronic notification of this filing to all counsel of record as follows:

Adam Jackson, Assistant Attorney General
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323 Center Street, Suite 200
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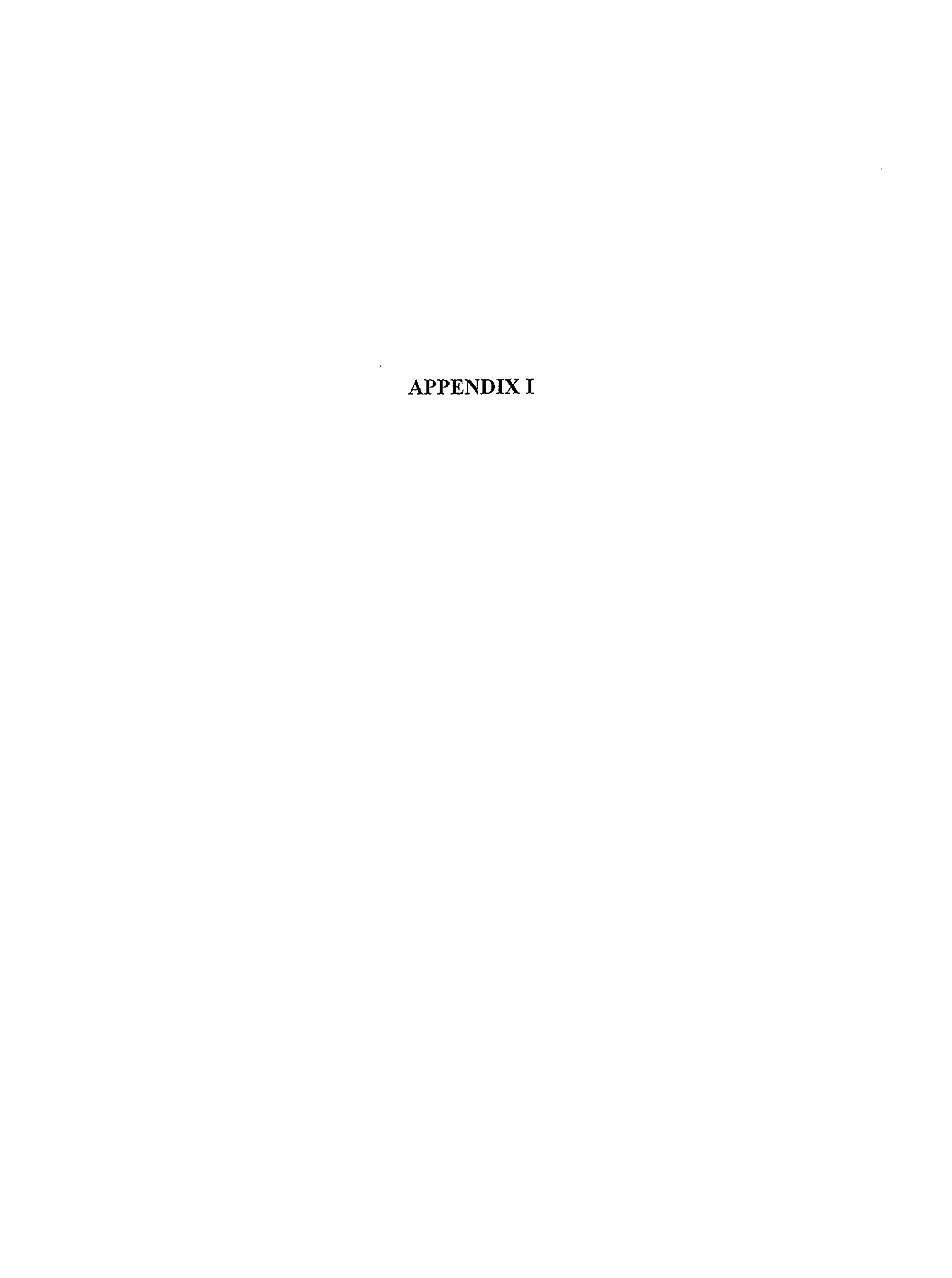
/s/ J. Blake Hendrix
J. Blake Hendrix



APPENDIX I

ELECTRONICALLY FILED
Arkansas Supreme Court
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2022-Mar-21 17:27:17
CR-21-202
4 Pages

IN THE SUPREME COURT OF ARKANSAS

RANDY WILLIAM GAY **APPELLANT**

v. **No. CR-21-202**

STATE OF ARKANSAS **APPELLEE**

MOTION TO STAY MANDATE

Appellant Randy Gay was sentenced to death in the Garland County Circuit Court, and his conviction and sentence were upheld on appeal. *Gay v. State*, 2016 Ark. 433. Gay filed a timely petition for state post-conviction relief that was denied. He appealed to this Court, which affirmed the denial of relief on February 10, 2022. *Gay v. State*, 2022 Ark. 23. Gay then filed a timely Petition for Rehearing that is pending before the Court.

Gay files this motion under Ark. S. Ct. R. 5-3(c). If the Court denies the petition for rehearing, Gay asks that the Court stay its mandate while he files a petition for writ of certiorari in the U.S. Supreme Court.

Under Rule 5-3(c), a stay is warranted if the petition for writ of certiorari would present a substantial question and if there is good cause. Both requirements are met here.

In its opinion affirming the denial of Rule 37 relief, the Court rejected Gay's argument that his counsel unreasonably failed to ask jurors in voir dire whether they could consider important mitigating factors, such as intoxication at the time of the

offense. *Cf.* Ark. Code Ann. § 5-4-605(3). Specifically, the Court disagreed with Gay's argument that such questions are required under *Morgan v. Illinois*, 504 U.S. 719 (1992): "*Morgan* stands for the proposition that a venireperson who will automatically vote for the death penalty, regardless of mitigators or aggravators, should be struck for cause. It does not stand for the proposition that Gay should have been allowed to question jurors about their views on particular mitigators." *Gay v. State*, 2022 Ark 23, at 12. The petition for writ of certiorari will present the substantial question left unaddressed in *Morgan*: are a capital defendant's constitutional rights violated by a prohibition on asking, or trial counsel's failure to ask, case specific mitigation questions?

The question of how far *Morgan* extends and whether capital defense counsel should be able to *voir dire* on specific mitigators and aggravators has caused considerable confusion in the lower courts. Some courts have held that some specific questioning is required. *See People v. Cash*, 50 P.3d 332, 342–43 (Cal. 2002) (holding that the defense should have been permitted to inquire as to whether prospective jurors automatically would vote for the death penalty if the defendant had previously committed another murder). Other courts, after considerable analysis, have found that trial courts may (and should) permit such questions, even if they are not constitutionally required. *See United States v. Johnson*, 366 F. Supp. 2d 822, 849-50 (N.D. Iowa 2005) ("This court acknowledges that *Morgan* does not require

'case-specific' questions during *voir dire* of prospective jurors in capital cases, but neither does *Morgan* bar such questions, because the Supreme Court never addressed in *Morgan* the issue of whether such questions are permissible."). Others have found specific questions improper. *See Evans v. State*, 637 A.2d 117, 124–25 (Md. 1994) ("The specific circumstances of a particular crime are irrelevant to one's pre-existing bias or predisposition and thus cannot be factored into the court's evaluation of a juror's ability to judge impartially.").

The Supreme Court has not addressed the question, although some of the Justices have opined that *Morgan*'s logic extends to case-specific questions on topics such as the defendant's intoxication during the offense. As Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, said in his *Morgan* dissent:

> [I]t is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that a *particular* factor—*e.g.*, "extreme mental or emotional disturbance"—is not mitigating. (Presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded.)

Morgan, 504 U.S. at 744 n.3 (citation omitted).

There is good cause to stay the mandate because there is a reasonable chance that the Supreme Court will grant certiorari in light of the foregoing and because a stay will not prejudice the State. After these proceedings, Gay will move to federal habeas corpus, which will entail a significant amount of litigation before he is eligible for execution. Thus, stay of the mandate to permit a petition for writ of

certiorari will not delay an execution date or otherwise harm the State's interest in carrying out its judgment.

Gay has previously been declared indigent and remains indigent. He therefore asks to be excused from the $50.00 deposit usually required by Ark. S. Ct. R. 5-3(c)(1)(C).

WHEREFORE, Gay respectfully requests that, should his petition for rehearing be denied, the Court stay its mandate during the pendency of his petition for writ of certiorari to the U.S. Supreme Court.

Respectfully submitted by,

/s/ J. Blake Hendrix
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, this document was filed with the Court's electronic filing system, which shall send electronic notification of this filing to all counsel of record as follows:

Adam Jackson, Assistant Attorney General
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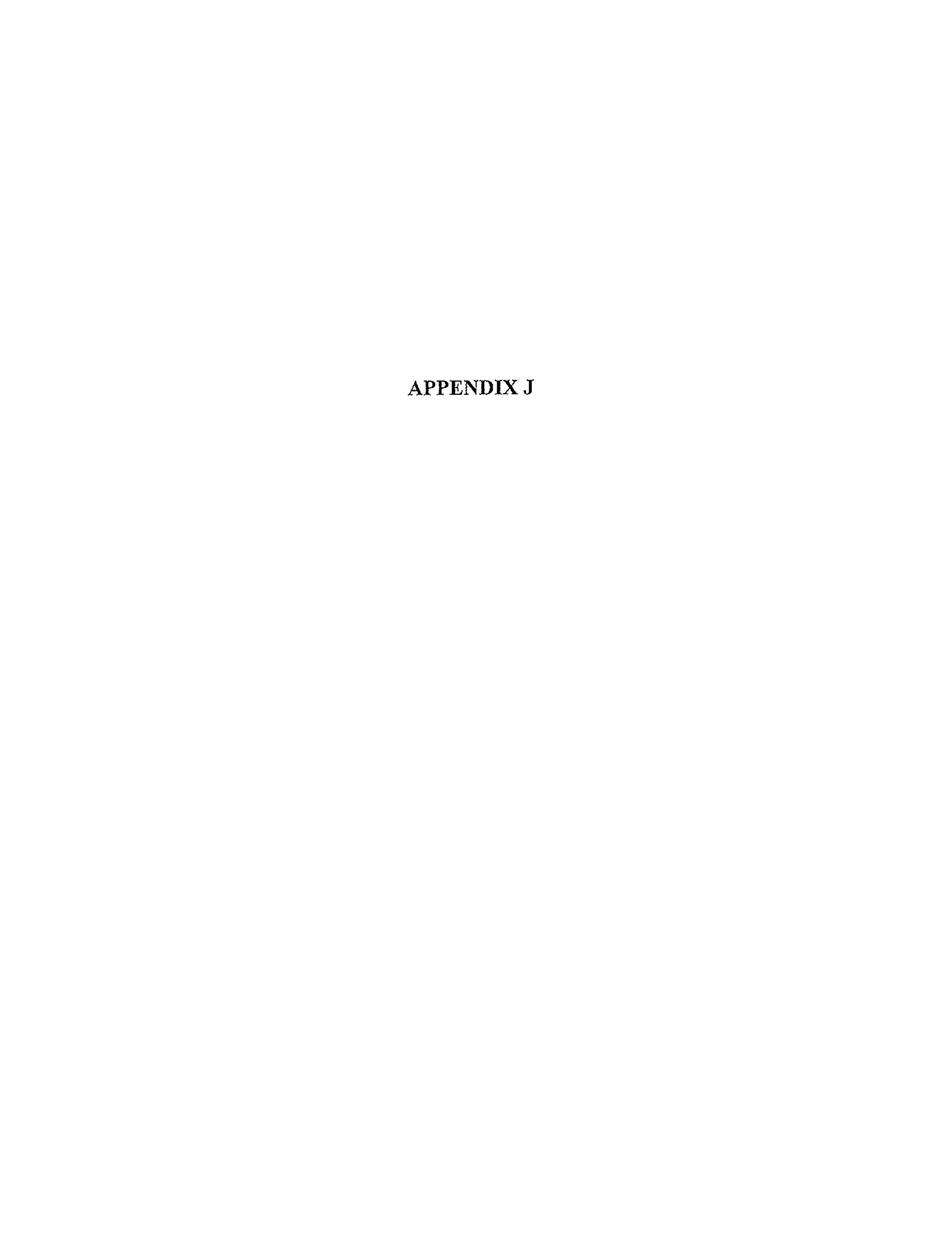
Little Rock, AR 72201

/s/ J. Blake Hendrix
J. Blake Hendrix



APPENDIX J

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

MARCH 31, 2022

RE: SUPREME COURT CASE NO. CR-21-202
RANDY WILLIAM GAY V. STATE OF ARKANSAS

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

"APPELLANT'S PETITION FOR REHEARING IS DENIED. SPECIAL JUSTICE TIM SNIVELY AGREES. WOOD, J., NOT PARTICIPATING."

SINCERELY,

STACEY PECTOL, CLERK

CC: J. BLAKE HENDRIX
ADAM JACKSON, ASSISTANT ATTORNEY GENERAL
HON. RALPH C. OHM, CIRCUIT JUDGE
GARLAND COUNTY CIRCUIT COURT
(CASE NO. 26CR-11-428)

APPENDIX K

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 14, 2022, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

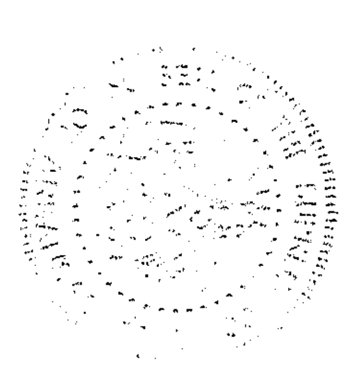
SUPREME COURT CASE NO. CR-21-202

RANDY WILLIAM GAY APPELLANT

V. APPEAL FROM GARLAND COUNTY CIRCUIT COURT – 26CR-11-428

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION TO STAY MANDATE IS DENIED. SPECIAL JUSTICE TIM SNIVELY AGREES. HUDSON, WYNNE, AND WEBB, JJ., WOULD GRANT. WOOD, J., NOT PARTICIPATING.



IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 14TH DAY OF APRIL, 2022.

______________________ CLERK

BY: ______________________

DEPUTY CLERK

ORIGINAL TO CLERK

CC: J. BLAKE HENDRIX
ADAM JACKSON, ASSISTANT ATTORNEY GENERAL
RACHEL KEMP, SENIOR ASSISTANT ATTORNEY GENERAL
HON. RALPH C. OHM, CIRCUIT JUDGE