CAPITAL CASE No. _____

IN THE

Supreme Court of the United States

ZACHARIAH MARCYNIUK,

Petitioner

v.

DEXTER PAYNE, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 19-1943

Zachariah Marcyniuk

Plaintiff - Appellant

v.

Dexter Payne, Director, Arkansas Department of Correction[1]

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: December 15, 2021
Filed: July 8, 2022

Before LOKEN, SHEPHERD, and STRAS, Circuit Judges.

SHEPHERD, Circuit Judge.

[1]We note that Payne's official title is Director of the Arkansas Division of Correction. The Director of the Arkansas Division of Correction works under the direction of the Arkansas Board of Corrections and the Arkansas Department of Corrections Secretary. For the sake of continuity, however, we adopt the phrasing of the district court: Director, Arkansas Department of Correction.

After an Arkansas jury convicted him of capital murder and sentenced him to death, Zachariah Marcyniuk petitioned the district court[2] for a writ of habeas corpus in part on the basis that an off-the-record jury selection procedure violated his constitutional rights. Without holding an evidentiary hearing, the district court dismissed Marcyniuk's petition with prejudice. We granted a certificate of appealability as to whether the district court prematurely dismissed Marcyniuk's claims that the pretrial jury selection procedure violated his right to be present, right to a public trial, and right to an appeal and that his trial counsel was ineffective for participating in the procedure. Having jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm.

I.

Marcyniuk began a romantic relationship with Katherine Wood in 2006, when they were both students at the University of Arkansas. After Wood ended the relationship in February 2008, Marcyniuk exhibited obsessive and harassing behavior towards Wood. In the early morning hours of March 9, 2008, Marcyniuk went to Wood's apartment in Fayetteville, Arkansas. After noticing that Wood was not home, Marcyniuk entered her apartment through a bedroom window. Though Marcyniuk testified that his intent was to return a cell phone that he had stolen from Wood, he did not have the cell phone with him when he entered Wood's apartment. Marcyniuk went through Wood's belongings and accessed her laptop four times looking for evidence that she had a new boyfriend before eventually falling asleep in a chair. When Wood returned home hours later, Marcyniuk met her at the front door, dragged her into her apartment, and stabbed her to death with a knife. At trial, Marcyniuk testified that "[w]e were just kind of wrestling and there was a knife" and that he remembered "getting up and there was blood everywhere." See Marcyniuk v. State (Marcyniuk II), 436 S.W.3d 122, 125 (Ark. 2014). After leaving Wood's apartment, Marcyniuk returned to his home, where he placed his bloody clothes and

[2]The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

the knife in a bag and picked up his dog before driving to his mother's house. Marcyniuk's parents thereafter contacted law enforcement "because they were concerned for [Wood] after [Marcyniuk] showed up . . . in a disheveled, frantic state asking [his mother] to take care of his dog and stating that he thought he had hurt [Wood]." Marcyniuk v. State (Marcyniuk I), 373 S.W.3d 243, 247 (Ark. 2010). Marcyniuk then drove west into Oklahoma, disposing of the knife somewhere along the way before being stopped and arrested by Oklahoma Highway Patrol.

Marcyniuk was charged in the Washington County Circuit Court with capital murder and residential burglary in connection with Wood's murder. Prior to Marcyniuk's trial, his trial counsel requested that the trial court use juror questionnaires. See Ark. R. Crim. P. 32.1. Thereafter, 100 potential jurors were sent a 29-page questionnaire consisting of 88 questions, including questions about the potential juror's education, experience with the judicial process and crime, exposure to pretrial publicity, beliefs about the death penalty, and views of the criminal justice system. A cover letter mailed out with each questionnaire informed potential jurors that the completed questionnaires would be destroyed after final resolution of the case. At least 90 potential jurors completed and returned the questionnaires. Forty-seven potential jurors reported in person for jury duty, and after voir dire was conducted in open court, a jury of 11 women and 1 man was seated. After a four-day trial, the jury convicted Marcyniuk of both charges and sentenced him to death on the capital murder charge. On direct appeal, after considering each of Marcyniuk's arguments and reviewing "the entire record . . . pursuant to Rule 4-3(i) of the Rules of the Arkansas Supreme Court, Ark.[ ]Code Ann. § 16-91-113(a), and Rule 10 of the Rules of Appellate Procedure—Criminal," the Arkansas Supreme Court found no reversible error and affirmed Marcyniuk's capital murder conviction[3] and death sentence. Marcyniuk I, 373 S.W.3d at 256. Marcyniuk then sought state post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37, which allows a person in custody to file a

[3]Marcyniuk did not challenge his residential burglary conviction before the Arkansas Supreme Court.

petition in the circuit court that imposed his or her sentence requesting that the sentence be vacated or corrected. See Ark. R. Crim. P. 37.1(a). Following a two-day hearing (the Rule 37 hearing), the Washington County Circuit Court denied Marcyniuk's petition, and the Arkansas Supreme Court affirmed. Marcyniuk II, 436 S.W.3d at 125.

While preparing to file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on Marcyniuk's behalf, Marcyniuk's federal habeas counsel discovered through an investigator that, prior to trial—and without Marcyniuk's knowledge—Marcyniuk's trial counsel agreed to and participated in a pretrial jury selection procedure whereby both sides reviewed the potential juror questionnaires and each submitted a list of 15 potential jurors to strike from the venire. These 30 potential jurors were not called to appear in person for jury duty, and the strikes eliminating these potential jurors did not count as peremptory strikes for either side. The lists were kept in a 16-page juror information file (the juror information file) that was maintained separate from the trial record. Based upon this discovery, Marcyniuk's federal habeas petition alleged, *inter alia*, that the pretrial jury selection procedure resulted in violations of his right to be present, right to a public trial, and right to appellate review and that his trial counsel rendered ineffective assistance when he agreed to and failed to object to the pretrial jury selection procedure (collectively, the jury selection claims).

The district court denied Marcyniuk's request in his first motion for discovery to depose the prosecuting attorney, trial judge, and circuit clerk that handled Marcyniuk's trial, finding that granting Marcyniuk's request "would not resolve any factual disputes or assist the Court in deciding Marcyniuk's claims, or any issues related to procedural default." R. Doc. 24, at 3. However, the district court granted the portion of Marcyniuk's motion requesting that the district court expand the record to include the juror information file and declarations from Jamie Reynolds and Pam Penn, who were both employed by the Washington County Circuit Court Clerk's Office at the time of Marcyniuk's trial. Penn's declaration provided that the trial judge handled death penalty cases differently from his other cases and allowed

the prosecution and defense to strike a number of potential jurors prior to voir dire in those cases. In that same declaration, Penn further stated that "[t]he potential juror information maintained by the deputy clerk assigned to each judge is entirely different from the information filed in the circuit court's case file" and that the deputy clerks "each maintain [their] own records regarding the potential juror panel information used for a trial." R. Doc. 42-28, at 1.

The district court subsequently dismissed Marcyniuk's petition in its entirety and denied his "embedded request for a hearing," finding that he had procedurally defaulted his jury selection claims by failing to raise them on direct appeal to the Arkansas Supreme Court or during his state Rule 37 proceedings and had failed to demonstrate cause and prejudice as required to excuse his procedural default of these claims. Marcyniuk sought a certificate of appealability from the district court on the issues of, *inter alia*, whether the district court was required to hold an evidentiary hearing on his jury selection ineffective assistance of counsel claim and whether his constitutional rights were violated by the pretrial jury selection procedure. The district court denied Marcyniuk's motion, and he filed a motion for a certificate of appealability with this Court. We granted Marcyniuk a certificate of appealability "as to claims [1].A., [1].B., 1.C., and [1].D[.], as stated on pages 7-8 of Zachariah Marcyniuk's Application filed August 8, 2019." Marcyniuk's application states:

A certificate of appealability should issue as to:

1. Whether the following off-the-record jury selection claims were prematurely dismissed:

   A. Off-the-record jury selection violated Marcyniuk's right to be present.

   B. Off-the-record jury selection violated Marcyniuk's right to a public trial.

   C. Off-the-record jury selection violated Marcyniuk's right to an appeal.

D. Counsel was ineffective for participating in off-the-record jury selection.

Appl. for Certificate of Appealability, at 10-11 (Aug. 12, 2019). The body of Marcyniuk's application clarifies that these are Claims 3.3.1., 3.3.2., 3.3.5., and 3.10.7., respectively, as asserted in his Petition for Writ of Habeas Corpus.[4]

II.

Marcyniuk argues that the district court lacked an adequate basis for its conclusion that he failed to show cause and prejudice to excuse the procedural default of his jury selection claims, and he asks this Court to vacate this conclusion and reverse the district court's denial of his requests for discovery and an evidentiary hearing. "When reviewing the denial of a § 2254 habeas petition, 'we review the district court's findings of fact for clear error and its conclusions of law de novo.' We review a district court's finding of procedural default de novo." Harris v. Wallace, 984 F.3d 641, 647 (8th Cir. 2021) (citation omitted). We review the district court's decision to deny Marcyniuk's requests for discovery and an evidentiary hearing for an abuse of discretion. See Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996); Osborne v. Purkett, 411 F.3d 911, 915 (8th Cir. 2005).

A federal court may entertain a petitioning state prisoner's application for a writ of habeas corpus if it concludes "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "If a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted." Anderson v. Kelley, 938 F.3d 949, 954 (8th Cir. 2019). "Out of respect for finality, comity, and the orderly administration of justice, a federal

[4]We note that Marcyniuk couches his jury selection ineffective assistance of counsel claim (Claim 3.10.7.) in terms of his trial counsel's "participation" in the pretrial jury selection process, but before the district court, he couched this claim in terms of his trial counsel's "agreement to and failure to object to" the pretrial jury selection process.

court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." Cagle v. Norris, 474 F.3d 1090, 1099 (8th Cir. 2007) (quoting Dretke v. Haley, 541 U.S. 386, 388 (2004)); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991) (holding in relevant part that federal habeas review of a procedurally defaulted claim is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law"). "If a prisoner fails to demonstrate cause, the court need not address prejudice." Cagle, 474 F.3d at 1099.

"'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him . . . ." Coleman, 501 U.S. at 753. As noted by the Supreme Court,

> "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard."

Id. (alterations in original) (citations omitted). In Coleman, the Supreme Court clearly stated that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. (citation omitted). In Martinez v. Ryan, however, the Supreme Court created a narrow exception to this rule, providing that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. 1, 17 (2012). Subsequently, in Trevino v. Thaler, the Supreme Court expanded this exception, holding that Martinez applies "where . . . state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a

meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." 569 U.S. 413, 429 (2013).

The parties do not dispute that because Marcyniuk failed to raise his jury selection claims on direct appeal or during his Rule 37 hearing, these claims are procedurally defaulted. See Anderson, 938 F.3d at 954; see also Ruiz v. Norris, 71 F.3d 1404, 1409 (8th Cir. 1995) (finding claim that defendant failed to raise on direct appeal to the Arkansas Supreme Court or during state post-conviction proceedings was procedurally defaulted). The parties diverge as to whether the district court correctly determined that Marcyniuk failed to demonstrate cause to excuse the procedural default of these claims. Marcyniuk argues that he demonstrated cause to excuse the procedural default of each of his jury selection claims by showing that state officials interfered with his ability to comply with the procedural rule and the factual basis of his claims was not reasonably available to his state post-conviction counsel and, additionally, that he demonstrated cause to excuse the procedural default of his ineffective assistance of trial counsel claim under Martinez. Marcyniuk further contends that, without a hearing, the district court lacked an adequate basis for its ruling that cause had not been shown. He asserts that the district court should have ordered discovery and a hearing on cause because the extent of state officials' interference and state post-conviction counsel's efforts to investigate the pretrial jury selection procedure is not known. We disagree. For the reasons that follow, we hold that the district court correctly determined that Marcyniuk did not demonstrate cause to excuse the procedural default of his claims, and it did not abuse its discretion in denying his request for discovery and an evidentiary hearing on cause and prejudice.

A.

We first address Marcyniuk's argument that he demonstrated cause to excuse the procedural default of his jury selection ineffective assistance of counsel claim under Martinez. A petitioner claiming, as Marcyniuk does here, ineffective

assistance of state post-conviction counsel as cause must demonstrate the following in order to excuse procedural default:

> (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; and (3) the state collateral review proceeding was the "initial" review proceeding with respect to the "ineffective-assistance-of-trial-counsel claim."

Harris, 984 F.3d at 648 (citation omitted).

Beginning with the first requirement, this Court recently explained that "[a] 'substantial claim' is one with 'some merit,'" and "Martinez's some-merit requirement 'means that whether [the claimant's] trial counsel was ineffective . . . must at least be debatable among jurists of reason.'" Dorsey v. Vandergriff, 30 F.4th 752, 756 (8th Cir. 2022) (second and third alterations in original) (citations omitted). Thus, to demonstrate that his ineffective assistance of trial counsel claim is "substantial," Marcyniuk must show that it is at least debatable among jurists of reason whether his trial counsel's performance was deficient and whether this deficient performance prejudiced him. See id. at 757; Strickland v. Washington, 466 U.S. 668, 687 (1984). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. Because Marcyniuk fails to show that his trial counsel's alleged deficient performance prejudiced him, we need not address whether his trial counsel's performance was, in fact, deficient. See id.

Marcyniuk argues that to demonstrate prejudice, he need only show that his trial counsel's participation in the pretrial jury selection procedure rendered his trial "fundamentally unfair." Marcyniuk bases his argument on Weaver v. Massachusetts, where the Supreme Court considered the necessary showing to demonstrate prejudice when a defendant alleges a violation of the right to a public

trial in the context of an ineffective-assistance-of-counsel claim. 137 S. Ct. 1899, 1910 (2017). There, the Supreme Court assumed without deciding that, "even if there is no showing of a reasonable probability of a different outcome," as is typically required to demonstrate Strickland prejudice, "relief must still be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." Id. at 1911. We make the same assumption but nonetheless determine that Marcyniuk has not shown that "fundamental unfairness" resulted from his trial counsel's participation in the pretrial jury selection procedure.

Marcyniuk alleges that his trial was fundamentally unfair because he was unaware of the pretrial jury selection procedure and any discriminatory strikes made during this procedure. However, Marcyniuk's trial counsel agreed to and participated in the procedure, which effectively gave both parties an additional 15 peremptory strikes; a record was, in fact, made of these strikes, and maintained by and available for review at the Washington County Circuit Court Clerk's Office; the written submission of strikes that occurred as part of the pretrial jury selection procedure was only a portion of voir dire[5]; and the remainder of voir dire, along with the evidentiary and sentencing phases of the trial, remained open to the public. Further, Marcyniuk has not shown that any potential harm flowing from the closure came to pass; his suggestion that the prosecution and defense engaged in gender-based, discriminatory strikes is speculative, and he makes no argument that he was prejudiced by his own trial counsel's alleged gender-based strikes. Cf. United States v. Lee, 715 F.3d 215, 222 (8th Cir. 2013) (explaining that ineffective assistance of counsel claim based on trial counsel's racially motivated jury selection strategy could not succeed absent showing of prejudice).

Under these circumstances, we conclude that the alleged public-trial, right to be present, and right to appellate review violations resulting from Marcyniuk's trial counsel's participation in the pretrial jury selection procedure did not render his trial

[5]The Arkansas Supreme Court "has observed that the concept of an expanded questionnaire is merely a written form of voir dire examination." Miller v. State, 362 S.W.3d 264, 274 (Ark. 2010).

fundamentally unfair. See, e.g., Weaver, 127 S. Ct. at 1913 (finding exclusion of petitioner's mother and her minister from courtroom during jury selection did not "pervade the whole trial or lead to basic unfairness" where petitioner's trial was not conducted in secret, closure was limited to voir dire, courtroom remained open during evidentiary phase of trial, and record of the proceedings "[did] not indicate any basis for concern, other than the closure itself"); Williams v. Burt, 949 F.3d 966, 978 (6th Cir. 2020) (determining petitioner could not demonstrate fundamental unfairness where "[t]he vast majority of his trial took place in an open setting, transcripts were made available from the limited sessions that took place behind closed doors, and the closure had no discernable effect on the judge, counsel, or jury"); United States v. Aguiar, 894 F.3d 351, 356-57 (D.C. Cir. 2018) (concluding exclusion of petitioner's family members from voir dire was not fundamentally unfair where "[t]he closed proceedings were held on the record, in the presence of all parties and their counsel"; "[t]he evidentiary and sentencing phases of the trial were held in open court, as were peremptory strikes and the district court's final rulings on pretrial motions"; and district court used breaks during voir dire "to reference issues for final resolution later in open court").

Having determined that Marcyniuk's trial counsel's participation in the pretrial jury selection procedure did not render his trial fundamentally unfair, we turn to Marcyniuk's alternative argument that he nonetheless meets Strickland's prejudice requirement because he was prejudiced by his trial counsel's participation in and failure to preserve a record of the pretrial jury selection procedure. Marcyniuk asserts that, absent his trial counsel's alleged errors, his case would have been reversed on appeal or he would have been granted post-conviction relief because the Arkansas Supreme Court has long recognized the right to open, public trials, including voir dire, and treats violations of the right to a public trial as fundamental errors that require no showing of prejudice. Marcyniuk did not raise this argument to the district court as part of the ineffective assistance claim on which this Court

granted him a certificate of appealability.[6] Rather, before the district court, Marcyniuk focused on the outcome of his trial, arguing that his trial counsel's agreement to and failure to object to, i.e., participation in, the pretrial jury selection procedure prejudiced him "because his jury, because of its composition and the method of selection[,] was predisposed to find him guilty and sentence him to death," see R. Doc. 1, at 70, an argument he does not reassert before this Court. Therefore, we decline to consider this new argument for the first time on appeal or disturb the district court's conclusion that Marcyniuk was not prejudiced by his trial counsel's alleged errors. See Mellott v. Purkett, 63 F.3d 781, 784 (8th Cir. 1995); Etheridge v. United States, 241 F.3d 619, 622 (8th Cir. 2001).

Ultimately, we agree with the district court that Marcyniuk has failed to show that his trial counsel's agreement to and failure to object to the pretrial jury selection procedure prejudiced him or rendered his trial fundamentally unfair, and we conclude that the matter is not "debatable among jurists of reason." See Dorsey, 30 F.4th at 756 (citation omitted). Therefore, because Marcyniuk has not demonstrated that his ineffective assistance of trial counsel claim is substantial, we affirm the district court's finding that his procedural default of this claim is not excused under Martinez.

We further affirm the district court's denial of Marcyniuk's requests for discovery and "embedded request for a hearing" to prove that cause and prejudice exist to excuse the procedural default of his ineffective assistance of trial counsel claim. In a case decided during the pendency of this matter before this Court, the Supreme Court held "that, under [28 U.S.C.] § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."

[6]Marcyniuk did make this argument to the district court in relation to Claim 3.10.6., see R. Doc. 1, at 69, but Marcyniuk applied for, and this Court granted, a certificate of appealability as to Claim 3.10.7., specifically, not Claim 3.10.6., see Appl. for Certificate of Appealability, at 10-11, 14, 28-32.

Shinn v. Ramirez, No. 20-1009, slip op. at 13, 2022 WL 1611786 (U.S. May 23, 2022). Instead, "a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements."[7] Id., slip op. at 15. Shinn explicitly rejects the idea that "because § 2254(e)(2) bars only 'an evidentiary hearing on the claim,' a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice," finding that because "holding a Martinez hearing when the prisoner cannot 'satisfy [the Antiterrorism and Effective Death Penalty Act's] demanding standards' in § 2254(e)(2) would 'prolong federal habeas proceedings with no purpose[,] . . . a Martinez hearing is improper if the newly developed evidence never would 'entitle [the prisoner] to federal habeas relief.'" Id., slip op. at 19-21 (third alteration in original) (citations omitted).

Marcyniuk makes no argument that he can satisfy the narrow requirements of § 2254(e)(2), instead arguing that the provision does not apply to him because state officials concealed the factual basis of his claims from his state appellate and post-conviction attorneys and the trial record contained no indication that the pretrial jury selection procedure took place. Marcyniuk relies on Williams v. Taylor, which provides that the question posed by the opening clause of § 2254(e)(2) "is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." 529 U.S. 420, 435 (2000). Diligence in this context "depends

[7]Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—(A) the claim relies on—(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue the claims in state court; it does not depend . . . upon whether those efforts could have been successful." Id. In Williams, the Supreme Court held that the prisoner and his state habeas counsel had not exercised the required diligence to preserve his Brady[8] claim where the undisclosed psychiatric report in question was discovered in the prisoner's state court file and there were repeated references to such report in the transcript of the prisoner's sentencing proceeding, which put his "state habeas counsel on notice of the report's existence and possible materiality." Id. at 437-40. However, the Supreme Court also found that the prisoner and his state habeas counsel *were* diligent in their efforts to develop facts supporting his juror bias and prosecutorial misconduct claims where the trial record contained no evidence that one of the jurors deliberately omitted the fact of her previous marriage to one of the prosecution's witnesses during voir dire and "[s]tate habeas counsel did attempt to investigate petitioner's jury." Id. at 440-43.

We find that this case is more akin to the former factual scenario and, therefore, Marcyniuk and his state post-conviction counsel did not exercise the diligence required to preserve his ineffective assistance of trial counsel claim. First, for the reasons discussed infra Section II.B., we disagree with Marcyniuk that state officials concealed the factual basis of his claims from his state appellate and post-conviction attorneys. Second, to the extent Marcyniuk argues that no amount of diligence would have led to the discovery of the juror information file, we disagree. Not only was the juror information file stored at the Washington County Circuit Court Clerk's Office in accordance with typical practice and available for review by attorneys, see R. Doc. 42-28, the practice of excusing potential jurors prior to trial based upon their answers to an expanded juror questionnaire was considered by the Arkansas Supreme Court in a death penalty case decided in January 2010, the same year that Marcyniuk filed his petition for state post-conviction relief, see

[8]Brady v. Maryland, 373 U.S. 83 (1963).

Miller, 362 S.W.3d at 273-74 (concluding that no requirement "that all jurors be brought in for voir dire and not be excluded based on . . . their beliefs about the death penalty . . . . exists under either state or federal law"). Thus, even if, as Marcyniuk alleges, there was no mention of the pretrial jury selection procedure in the record, we conclude that the multiple references in the record to the expanded questionnaire used in this case, combined with the Arkansas Supreme Court's discussion of a similar procedure in Miller, were sufficient to lead Marcyniuk's post-conviction counsel to conduct at least a cursory review of the juror information file, especially considering that Marcyniuk brought claims related to the questionnaires and voir dire in his Rule 37 petition. Therefore, because Marcyniuk fails to demonstrate either that the requirements of § 2254(e)(2) do not apply to him or that he can satisfy those requirements, we conclude that he is not entitled to discovery and an evidentiary hearing on his ineffective assistance of trial counsel claim and affirm the district court's denial of the same. See Adam and Eve Jonesboro, LLC v. Perrin, 933 F.3d 951, 958 (8th Cir. 2019) ("[W]e may affirm a judgment on any ground supported by the record."); Cross-Bey v. Gammon, 322 F.3d 1012, 1014 (8th Cir. 2003) ("[W]hen the [Supreme] Court interprets a federal statute and applies that rule of federal law to the parties before it, that interpretation 'must be given full retroactive effect[.]'" (quoting Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993)).

B.

Marcyniuk further argues that he demonstrated cause to excuse the procedural default of his right to be present, right to a public trial, right to appellate review, and ineffective assistance of trial counsel claims because state officials interfered with his ability to comply with the procedural rule and the factual basis of his claims was not reasonably available to his state post-conviction counsel.

Beginning with Marcyniuk's state interference argument, he contends that the court reporter and circuit clerk hindered his compliance with the procedural rule by omitting the juror information file from the record transmitted to the Arkansas

Supreme Court, which the court reporter certified as "true and correct" and the deputy circuit clerk certified as "true and complete."[9] Rule 10(a) of the Arkansas Rules of Appellate Procedure–Criminal provided at the time:

> Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty (30) days after entry of judgment. . . . The court reporter shall transcribe all portions of the criminal proceedings consistent with Article III of the Rules of the Supreme Court and shall file the transcript with the circuit clerk within ninety (90) days after entry of the judgment. Within thirty (30) days after receipt of the transcript, the circuit clerk shall compile the record consistent with Article III and shall file the record with the clerk of the Arkansas Supreme Court for mandatory review consistent with this rule and for review of any additional issues the appellant may enumerate.

Ark. R. App. P.–Crim. 10(a) (2009). We conclude that the court reporter's certification, which merely provided that "the foregoing pages numbered 236 through 1462 constitute a true and correct transcript of the proceedings," was not a warranty as to the completeness of the entire record. We have reviewed the state court record, and these pages contain only the transcripts and exhibits from the pretrial motion hearings and the trial transcript and exhibits. Thus, we conclude that the court reporter's certification was not a false statement and the court reporter did not hinder his compliance with the procedural rule.

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[9]Marcyniuk also alleges in a mere two sentences that the state court judge, who "initiated" the pretrial jury selection procedure, and another deputy circuit clerk, who "sequestered" the juror information file from the record, interfered with his compliance with the procedural rule. However, Marcyniuk does not provide any further explanation or citation to relevant authority that would demonstrate how these officials interfered with his compliance with the procedural rule, and therefore, we need not address this argument. See Cox v. Mortg. Elec. Registration Sys., 685 F.3d 663, 674 (8th Cir. 2012) (finding that appellants "waived [an] issue by failing to provide a meaningful explanation of the argument and citation to relevant authority in their opening brief").

Further, we conclude that the deputy circuit clerk did not make a false statement when she certified the record as "true and complete." At that time, Arkansas Supreme Court Rule 3-4(b) provided that "[t]he record shall not include the impaneling or swearing of the jury, the names of the jurors, or any motion, affidavit, order, or ruling in reference thereto unless expressly called for by a party's designation of the record." Ark. Sup. Ct. R. 3-4(b) (2009); see also Jefferson v. State, 276 S.W.3d 214, 231 (Ark. 2008) (same). Marcyniuk's notice of appeal, which was prepared by the circuit clerk in accordance with Rule 10(a), designated "the entire record" but did not expressly call for the jury-selection records to be included, nor did Marcyniuk make any other request for these records to be included in the record. See McKee v. State, 608 S.W.3d 584, 596 (Ark. 2020) (finding designation of "the entire record" in notice of appeal did not extend to transcription of jury-selection proceedings). Because it was not required that the juror information file be included in the record transmitted to the Arkansas Supreme Court, the deputy circuit clerk did not interfere by stating that the record was "true and complete." Therefore, we agree with the district court that there was no interference by state officials that prevented Marcyniuk's state appellate and post-conviction lawyers from raising his claims.

Marcyniuk alternatively argues that the factual basis for his jury selection claims was not reasonably available to his state post-conviction counsel. We disagree. The juror information file was available at the Washington County Circuit Court Clerk's Office and Marcyniuk's federal habeas counsel learned of the pretrial jury selection procedure after an investigator with the Federal Public Defender's Office spoke with Penn, who described the procedure and gave the investigator a copy of the juror information file. We agree with the district court that the factual basis of Marcyniuk's claims was "reasonably available" to his state court lawyers. The juror information file in this case is not akin to the information discovered in Amadeo v. Zant, 486 U.S. 214, 224 (1988), where "a sweeping investigation of 20 to 30 years' worth of jury lists" turned up a handwritten memorandum revealing a scheme to underrepresent black people and women on grand and traverse juries, or in Ambrose v. Booker, 684 F.3d 638, 645 (6th Cir. 2012), where a "broad statistical

analysis" uncovered a computer glitch that was "buried in a mountain of computer code" and caused the systematic underrepresentation of black people in a county's jury pools. Here, the juror information file was maintained by the Washington County Circuit Court Clerk's Office and available for attorneys to review. The declaration of Penn, who at the time had been employed by the Washington County Circuit Court Clerk's Office for nearly ten years, reveals that deputy circuit clerks maintain juror information files separate from case files—a practice that seems consonant with Rule 3-4, which does not require that juror information be included in the record transmitted to the appellate court unless expressly called for in the notice of appeal. See Ark. Sup. Ct. R. 3-4(b) (2009). Thus, it appears that the manner in which the juror information file was stored—that is, separate from the case file—was not unusual, and therefore, the factual basis for Marcyniuk's claims was "reasonably available" to his state court lawyers. Cf. Zeitvogel v. Delo, 84 F.3d 276, 280 (8th Cir. 1996) ("When a petitioner can obtain the information contained in unproduced documents through a reasonable and diligent investigation, the State's failure to produce documents is not cause.").

Because Marcyniuk fails to show either that interference by state officials made compliance with the procedural rule impracticable or that the factual or legal basis for his claims was not reasonably available to his state appellate and post-conviction counsel, we conclude that the district court did not err in finding that he had not demonstrated cause to excuse the procedural default of his claims. We further affirm the district court's denial of discovery and an evidentiary hearing on cause and prejudice. Marcyniuk argues that an evidentiary hearing is necessary because the extent of state court officials' interference and his state post-conviction counsel's efforts to investigate the pretrial jury selection procedure and collect records is not known. Marcyniuk's latter argument is irrelevant to the determination of whether the factual basis of his claims was reasonably available to his post-conviction counsel. As to his former argument, we have already determined that Marcyniuk has failed to show that state officials interfered with his ability to comply with the procedural rule, and we decline to remand this matter to the district court on the basis of the vague and unsupported assertion that there may have been

some further, undiscovered interference by state officials that would excuse the procedural default of his claims. Cf. Schriro v. Landrigan, 550 U.S. 465, 475 (2007) ("If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts.").[10]

III.

Based upon the foregoing, we affirm.

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[10]We need not comment on the extent to which Shinn reaches requests for evidentiary hearings on cause and prejudice where the basis of the petitioner's cause argument is not ineffective assistance of post-conviction counsel. Still, we note that, though our precedent is clear that "the strict rules regarding the availability of federal evidentiary hearings on the merits of habeas cases do not preclude our court from ordering evidentiary hearings on the limited issues of cause or prejudice," Wooten v. Norris, 578 F.3d 767, 780 (8th Cir. 2009), the Supreme Court, in Shinn, expressed doubt about, but declined to address, the petitioners' argument to the same effect. See Shinn, slip op. at 19-20.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CAPITAL CASE

ZACHARIAH MARCYNIUK **PETITIONER**

v. **5:15-cv-00226-JM**

WENDY KELLEY, Director, **RESPONDENT**
Arkansas Department of Correction

ORDER

Zachariah Marcyniuk is an inmate in the Arkansas Department of Correction under a death sentence for the murder of Katie Wood. Having exhausted his state remedies, Marcyniuk petitions this Court for federal *habeas* relief.

1. Fact Summary. Marcyniuk and Wood began dating in the summer of 2006; they were both students at the University of Arkansas. Wood ended the relationship in February 2008. Approximately three weeks passed between the break-up and March 9, 2008—the date that Marcyniuk killed Wood. Testifying at trial, Marcyniuk said that he was obsessed with restarting the relationship and worried that Wood was dating someone else. He started showing up at Wood's apartment unannounced at all hours of the night. During one of Marcyniuk's late-night visits, he took Wood's cell phone to read her messages. On one occasion, he made a pest of himself when he found Wood out playing pool with friends.

In the early morning hours of March 9, Marcyniuk left work early. He drove by Wood's apartment and saw that she was not there. About 3:00 a.m., Marcyniuk returned to Wood's apartment; she still was not home. He entered her apartment through a bedroom window. He testified that his intent was to return the stolen cell phone, but he did not have the phone with him.

He had no explanation for why he did not return home to get it. Once inside the apartment, Marcyniuk went through Wood's things and accessed her laptop four times. He admitted at trial that he was consumed with finding evidence that Wood had a new boyfriend. Marcyniuk said he eventually fell asleep in a chair.

Wood returned home shortly after 7:00 a.m. Marcyniuk's car was parked where she would not have seen it. He met her at the front door. Wood's neighbors heard her frantic screams—"help me, help me, somebody help me"—and her pleas to Marcyniuk—"please don't kill me, please don't kill me." Trial Record 558, 564. They heard sounds as if Wood was being dragged into her apartment. One neighbor called 911.

Marcyniuk claimed not to remember killing Wood, but he did not deny that he was the one who stabbed her to death. He remembered Wood's screams. He recalled taking a "big carving knife" from a counter or drawer, and "wrestling" Wood in the kitchen. Trial Record 958–59, 971–72. He remembered dragging her body to the bathroom and putting it in the bathtub; he recalled being "covered in blood." Trial Record 958.

The crime-scene and forensic evidence fills in the missing pieces. When officers arrived at Wood's apartment, they found a purse and a woman's shoe outside the apartment. The chain-link fence just outside the apartment door was bowed inward toward the pool area. They would later find Wood's broken key ring and severely bent front-door key. Inside, officers found a large amount of blood in the kitchen. Behind a locked bathroom door, they discovered Wood's fully clothed body in the bathtub. Marcyniuk had stabbed Wood six times; there was blunt force trauma to the back of her head. She had twenty defensive wounds on her hands and forearms.

After killing Wood, Marcyniuk left through the bedroom window and went to his apartment to clean up. He put the bloody clothes and knife in a bag and then drove to his parents' house. His mother testified that he was very upset, saying he thought he had "hurt Katie real bad." Trial Record 800. She tried to get Marcyniuk to stay; the two struggled a bit. Marcyniuk then left and headed toward Oklahoma. Along the way, he threw out the bloody clothes and knife. Neither were recovered. His mother called her husband, who contacted the police. A warrant for first-degree murder was issued. That afternoon, an Oklahoma state trooper stopped Marcyniuk for speeding. The trooper arrested him after learning of the warrant.

2**. Procedural History.** In 2008, Marcyniuk stood trial in Washington County Circuit Court for killing Wood and for a related residential-burglary charge. His lawyers raised the affirmative defense of mental disease or defect. The trial court instructed the jury on capital murder and the lesser offenses of first-degree and second-degree murder. Rejecting the mental-disease-or-defect argument, the jury found Marcyniuk guilty of both capital murder and residential burglary.

Imposing the death penalty,[1] the jury unanimously found two aggravating circumstances: (1) Marcyniuk previously committed another felony, an element of which was the use or threat of violence to another person, or creating a substantial risk of death or serious physical injury to another person; and (2) the capital murder was committed in an especially cruel or depraved manner. The prior violent-felony aggravator was based on an aggravated-assault conviction. The victim was another former girlfriend, Sarah Huffman. While Huffman was a passenger in his vehicle, Marcyniuk sped down an interstate highway with a gun to his head.

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[1]Marcyniuk was also sentenced to 240 months' imprisonment for the residential-burglary conviction. He did not challenge that conviction on direct appeal.

The Arkansas Supreme Court affirmed the capital-murder conviction and the death sentence. *Marcyniuk v. State (Marcyniuk I)*, 2010 Ark. 257, 373 S.W.3d 243. Marcyniuk then sought post-conviction relief under Rule 37.5 of the Arkansas Rules of Criminal Procedure. The Washington County Circuit Court denied the Rule 37 petition; the Arkansas Supreme Court affirmed. *Marcyniuk v. State* (*Marcyniuk II*), 2014 Ark. 268, 436 S.W.3d 122. Marcyniuk's timely petition for a writ of *habeas corpus* brought the case here.[2]

3. Standard Of Review. As a state prisoner, Marcyniuk "may seek a writ of *habeas corpus* in federal court if his confinement violates the federal Constitution or federal law." *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001) (citing 28 U.S.C. § 2254(a)). Before seeking federal *habeas* review, Marcyniuk must exhaust available state remedies by fairly presenting his claim in state court. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

This Court will not review questions of federal law decided in state court, if the state-court decision was based on "a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729–30. A "firmly established and regularly followed" state procedural rule, even if discretionary, can be an adequate ground to bar *habeas* review. *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quotations omitted). Procedural default also

[2]Marcyniuk's petition is a web of overlapping and criss-crossing claims of ineffective assistance, trial error, and prosecutorial misconduct. The Court believes organizational choices in *Anderson v. Kelley*, No. 5:12-cv-279-DPM, *No. 112* and *Kemp v. Kelley*, No. 5:03-cv-00055-DPM, *No. 150* are useful and adopts a number of them. Most significant are (1) the use of Appendix A listing claims for relief, (2) an initial evaluation of cause and prejudice with alternative merits review when appropriate, (3) the division of claims into categories, and (4) the listing of common evidence and evaluation of prejudice in the procedurally defaulted claims section.

occurs when a petitioner fails to present a claim in state court and a state-court remedy is no longer available. *O'Sullivan*, 526 U.S. at 848. A procedural default can occur at any point during state-court review: at trial, on direct appeal, or during post-conviction proceedings. *Kilmartin v. Kemna*, 253 F.3d 1087, 1088 (8th Cir. 2001).

Marcyniuk says claims not raised on direct appeal or in his Rule 37 proceedings are not defaulted. He argues Arkansas courts—by arbitrarily recalling the mandates in capital cases—waived state procedural rules barring successive direct appeals and Rule 37 petitions. The Court rejects this argument. Recalling a mandate and reopening a case to consider additional relief is an "extraordinary rather than routine" act. *Wooten v. Norris*, 578 F.3d 767, 782–86 (8th Cir. 2009). Procedural default of post-conviction claims occurred when Marcyniuk did not raise them in his Rule 37 petition. *Wallace v. Lockhart*, 12 F.3d 823, 825 (8th Cir. 1994). Other claims that could have been raised on direct appeal were defaulted when Marcyniuk did not fairly present them to the state appellate court. *Williams v. Norris*, 576 F.3d 850, 865 (8th Cir. 2009). Marcyniuk says Claim 6.4—a *Brady* claim—is not defaulted because there is no available ordinary state remedy. It is true the Arkansas Supreme Court characterizes a writ of *error coram nobis* as an "extraordinary" remedy that is "known more for its denial than its approval." *Strawhacker v. State*, 2016 Ark. 348, at 4, 500 S.W.3d 716, 718 (2016). It is also true, however, that the Supreme Court recognizes the writ as the prescribed mechanism for raising post-conviction *Brady* claims. *See Isom v. State*, 2015 Ark. 225, at 2, 462 S.W.3d 662, 663.

If a claim is defaulted, this Court can consider it only if Marcyniuk establishes either cause for the default and actual prejudice, or that the default will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. To establish cause, Marcyniuk must "show that some objective

factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Examples of cause include constitutionally ineffective assistance of counsel, an unavailable factual or legal basis for a claim, or interference by state officials that made complying with the exhaustion requirements impracticable. *Id.* at 488–89. The procedural-default prejudice element requires Marcyniuk to show "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (emphasis original) (quotations omitted).

The *Martinez-Trevino* equitable exception opens the door for merits review of procedurally defaulted ineffectiveness-of-trial-counsel claims not raised in the initial-review collateral proceeding when that claim is substantial and post-conviction counsel was ineffective for not raising it. *Trevino v. Thaler*, 569 U.S. 413, 428–29 (2013); *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). A substantial claim is one that has "some merit." *Martinez*, 566 U.S. at 14. "[U]nless post-conviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite *Trevino*." *Sasser v. Hobbs*, 743 F.3d 1151, 1151 (8th Cir. 2014). A *Martinez-Trevino* analysis therefore requires this Court to address the underlying merits of the defaulted ineffectiveness claim. Marcyniuk must show his lawyers' deficient performance and resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The *Martinez-Trevino* exception does not apply to ineffectiveness claims litigated in initial-review collateral proceedings, but not preserved on appeal. *Franklin v. Hawley*, 879 F.3d 307, 313 (8th Cir. 2018); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012).

The fundamental miscarriage of justice exception to procedural default requires that Marcyniuk (1) present "new reliable evidence" not introduced at trial, and (2) demonstrate that, in light of the new evidence, "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324, 326–27 (1995). To be actually innocent of the death penalty, Marcyniuk must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992); *see Wooten*, 578 F.3d at 781.

With Marcyniuk's claims that were adjudicated on the merits in state court, this Court may grant *habeas* relief only if the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A decision is contrary to federal law if the state court "applies a rule that contradicts the governing law" set out by the United States Supreme Court, or if it faces facts that are "materially indistinguishable" from a Supreme Court case and decides differently. *Brown v. Payton*, 544 U.S. 133, 141 (2005). *Habeas* relief is warranted only if the state court's application of clearly established federal law was "objectively unreasonable," not if the application was "merely erroneous or incorrect." *Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001) (quotations omitted). The state court's findings of fact are presumed correct unless Marcyniuk can rebut the presumption by clear and convincing evidence. *Rousan v. Roper*, 436 F.3d 951, 956 (8th Cir. 2006) (citing 28 U.S.C. § 2254(e)(1)).

Defaulted claims may be denied on the merits. 28 U.S.C. § 2254(b)(2). Under some circumstances, a merits review is the better approach. When the procedural default issues are tangled and the merits can be disposed of with less ink, "it might well be easier and more efficient to reach the merits than to go through the studied process required by the procedural default doctrine." *McKinnon v. Lockhart*, 921 F.2d 830, 833 n.7 (8th Cir. 1990) (*per curiam*). Discussing the merits of defaulted claims, moreover, is not inappropriate in a death-penalty case. *Joubert v. Hopkins*, 75 F.3d 1232, 1244 (8th Cir. 1996).

4. Excuses For Procedural Default. Appendix A lists Marcyniuk's sixteen claims for relief. Claims 2, 6, 9, 10, 11, 12, 13, 14, 15, and 16 are procedurally defaulted. The same is true for most of Claims 1, 3, 4, 5, 7, and 8.

Prejudice. Marcyniuk has not developed any argument that procedural-bar prejudice excuses these defaults, and this Court's review of the record has not uncovered any errors that "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494 (emphasis original). The essence of Marcyniuk's argument in many defaulted claims is that the jury was exposed to prejudicial evidence and argument. He also says a broader investigation, more evidence, and additional argument would have made a difference. He says that he was prejudiced by jury selection, and that his lawyers should have done more with his case on appeal. The record, however, contains overwhelming evidence against Marcyniuk on the elements of capital murder and on the aggravating factors supporting the death sentence. Marcyniuk did not contest that he killed Wood. He testified he wrestled with her in the kitchen and dragged her body to the bathtub. He has not shown how he was actually and substantially prejudiced by jury selection; he has not demonstrated that a seated juror was biased.

Even if cause exists to excuse the default of Claim 6.4, Marcyniuk has not shown prejudice to excuse the default of this *Brady* claim: the prosecutor withheld the medical examiner's email that a photograph of Wood's intestines spilling out of her body was "not . . . that helpful" to his cause-of-death testimony. *No. 18 at 28*. Marcyniuk says the email would have supported suppression of the intestines photograph. The undisclosed email, however, does not meet the *Brady* materiality standard. *Banks v. Dretke*, 540 U.S. 668, 698–99 (2004); *Strickler v. Greene*, 527 U.S. 263, 282 (1999). The prosecutor introduced the intestines photograph as crime-scene evidence, not to support the medical examiner's cause-of-death testimony. As addressed herein, Marcyniuk has not shown, if the email had been disclosed, "the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). Non-disclosure of the email does not "undermine[] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quotations omitted).

The Court is not persuaded by Marcyniuk's argument that, as a general rule, if prejudice for the underlying claim has been shown, prejudice to excuse procedural default has also been established. The Court also rejects Marcyniuk's argument that a defaulted structural-error claim does not require a showing of procedural-bar prejudice to overcome default. Marcyniuk's reliance on *Amadeo v. Zant* is misplaced; the *Amadeo* Court declined to reach the issue of prejudice because it was conceded by the State. 486 U.S. 214, 228 n.6 (1988). Under Circuit precedent, "a finding of structural error does not obviate a petitioner's obligation to show prejudice when attempting to overcome a state procedural default." *Hunt v. Houston*, 563 F.3d 695, 704 n.2 (8th Cir. 2009).

Cause. For most claims, Marcyniuk says cause to excuse procedural default exists based on his trial and appellate lawyers' ineffectiveness. None of his ineffectiveness arguments excuse the default of these claims. As addressed herein, these ineffectiveness claims properly raised in the Rule

37 appeal do not rise to the level of constitutional violations. Because the default of the remaining ineffectiveness claims is not excused, Marcyniuk cannot rely on them to demonstrate cause either. *Edwards v. Carpenter*, 529 U.S. 446, 451–53 (2000). Marcyniuk also argues cause exists because his trial lawyers abandoned him after trial. He says they neither investigated grounds for a new trial motion nor filed one. He also says his post-conviction lawyers abandoned him when they did not amend his Rule 37 petition. Marcyniuk's lawyers, however, never stopped acting as his representatives. *Maples v. Thomas*, 565 U.S. 266, 281–82 (2012). They did not "literally abandon[]" him. *Sasser v. Hobbs*, 735 F.3d 833, 850 n.11 (8th Cir. 2013). Finally, Marcyniuk says his post-conviction lawyer's ineffectiveness excuses the default of many claims. The *Martinez-Trevino* exception, however, does not extend to defaulted claims of trial error or prosecutorial misconduct. *Martinez*, 566 U.S. at 14; *Dansby v. Hobbs*, 766 F.3d 809, 833–34 (8th Cir. 2014). The Supreme Court, moreover, recently determined the exception does not extend to defaulted ineffectiveness-of-appellate-counsel claims. *Davila v. Davis*, 137 S. Ct. 2058, 2062–63 (2017).

Marcyniuk says the default of Claim 3.3—challenging the use and destruction of juror questionnaires and the agreed excusal of thirty potential jurors before trial—was caused by state action. He says his lawyers did not challenge the pretrial jury selection procedure on direct appeal or in Rule 37 proceedings because the procedure was not part of the trial record. His trial lawyers, however, participated in the process. The juror information file, including evidence of the pretrial procedure, was at the Washington County Circuit Clerk's Office and available for lawyers to review. Marcyniuk's *habeas* lawyers learned of the procedure after a Federal Public Defender investigator talked to a deputy circuit clerk. The clerk described the procedure and gave a copy of the juror file to the investigator. *No. 42-28.* There was no "interference by officials" that prevented Marcyniuk's

state-court lawyers from raising the claim; the factual basis was "reasonably available" to them. *Murray,* 477 U.S. at 488.

Next, Marcyniuk says cause exists to excuse the default of Claims 9 and 15 about the death penalty because his legal arguments are novel. The arguments, however, are not so novel that the "tools . . . to construct" them were not available when Marcyniuk was in state court. *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996).

To the extent Claims 1, 3, 4, and 7 are defaulted, Marcyniuk has not demonstrated cause and prejudice to excuse the default. He also has not demonstrated cause and prejudice to excuse the default of Claims 6, 9, 12, 13, 14, 15, and 16. Even if cause exists to excuse Claim 6.4, Marcyniuk has not demonstrated procedural-bar prejudice. *Martinez-Trevino* does not apply to ineffectiveness-of-trial-counsel claims abandoned on state-court appeal; Marcyniuk has not shown cause and prejudice to excuse the default of those claims either. *Franklin*, 879 F.3d at 313; *Arnold*, 675 F.3d at 1087. Precedent has not settled if Marcyniuk's incompetency claim—Claim 2—is subject to the procedural-default rule. *See Springs v. Hobbs*, 2014 WL 2815804, *36 n.17 (E.D. Ark. 2014); *compare Vogt v. United States*, 88 F.3d 587, 590 (8th Cir. 1996), *with Bainter v. Trickey*, 932 F.2d 713, 716 (8th Cir. 1991). Whether cause exists to excuse the default of Claim 10 is a procedural tangle. The Court therefore will review the merits of Claims 2 and 10, and of other defaulted claims when appropriate. The Court will apply a *Martinez-Trevino* analysis to most defaulted claims of ineffective assistance of trial counsel—Claims 3.10, 5, 8 and 11. The Court will then address Marcyniuk's allegations of actual innocence as a gateway to consider defaulted claims. *Dretke v. Haley*, 541 U.S. 386, 393–94 (2004).

5. Resolution Of Claims. In the interest of clarity, the Court divides Marcyniuk's interwoven claims and sub-claims into seven categories: (1) settled law or record, (2) incompetency, (3) mental state, (4) mental capacity, (5) fair jury, (6) improper evidence, (7) sentencing, and (8) remaining procedurally defaulted claims. The Court determined that *Nos. 19-1 (sealed), 42-27,* and *42-28* may be helpful in resolving Marcyniuk's defaulted ineffectiveness points related to pretrial jury selection and therefore expanded the record to include that evidence. *No. 58.*

The Court denied Marcyniuk's remaining requests to expand the record. *No. 58*. Marcyniuk's embedded request for a hearing is now denied for similar reasons. On most claims, either 28 U.S.C. § 2254(e)(2) bars consideration of additional evidence, or the existing record contains an adequate factual basis on which to rule fairly. With defaulted ineffectiveness-of-trial-counsel claims not raised in the initial state collateral review proceeding, *Martinez-Trevino* can open the door for merits review. Under these circumstances, § 2254(e) allows for consideration of new evidence. *Sasser*, 735 F.3d at 853–54. Neither a hearing nor additional material, however, would be helpful in deciding these defaulted ineffectiveness claims—with the noted exception of ineffectiveness claims related to pretrial jury selection. The existing record is sufficient for their adjudication. *No. 58*. Marcyniuk did not make a preliminary showing that any of these claims are "potentially meritorious" under *Strickland* standards. *Sasser*, 735 F.3d at 851.

Based on Marcyniuk's embedded request for merits briefing, the Court ordered him to identify claims that he believes require additional briefing. *No. 27.* Marcyniuk names six points in his claims paper. *No. 61*. Based on this Court's review of the *habeas* papers and state-court record, additional briefing would not assist the Court in deciding the related claims. The *habeas* papers and state-court record are sufficient for a fair evaluation.

1. Claims Determined By Settled Law Or The Record

Precedent settles Claims 9, 10, 13, 14, 15, and 16, and the record does not support *habeas* relief on Claim 11. The Court has found most of these claims are procedurally defaulted. A merits analysis is appropriate. 28 U.S.C. § 2254(b)(2); *Joubert*, 75 F.3d at 1244.

First, Marcyniuk argues the United States Supreme Court's ban on death sentences for the intellectually disabled should be extended, making him ineligible for the death sentence because of mental illness. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Marcyniuk is not intellectually disabled under *Atkins*, and there is no direct authority for extending the ban. Claim 9 therefore fails on the merits.

Second, Marcyniuk says Arkansas's lethal-injection protocol change after his sentencing is an unconstitutional increase in punishment in violation of the *ex post facto* clause of the federal constitution.[3] Method-of-execution challenges, however, must be brought as civil rights claims under 42 U.S.C. § 1983. *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015) (citing *Hill v. McDonough*, 547 U.S. 573, 576, 579–80 (2006)). Marcyniuk says this claim is not a method-of-execution challenge because he is alleging a punishment increase. Marcyniuk, however, is challenging a particular lethal-injection protocol, or the conditions in which his sentence will be carried out; he is not challenging the constitutionality of his death sentence. To the extent Marcyniuk is raising a method-of-execution challenge, that claim cannot be considered on *habeas* review.

Even if cognizable on *habeas* review, the claim fails. To sustain an *ex post facto* claim, Marcyniuk must demonstrate that the amended method-of-execution statute creates a "significant

[3]Marcyniuk's challenge of the state *ex post facto* law is not cognizable on federal *habeas* review. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

risk of increased punishment." *Williams v. Hobbs*, 658 F.3d 842, 848 (8th Cir. 2011) (internal quotations omitted). "Such a showing must be more than a speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes, and the *ex post facto* clause does not forbid any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* (internal quotations omitted). The *ex post facto* clause is not implicated "[w]here only the mode of producing death has changed, with no allegation of superadded punishment or superior alternatives." *In re Lombardi*, 741 F.3d 888, 897 (8th Cir. 2014) (internal quotations omitted); *see Zink v. Lombardi*, 783 F.3d 1089, 1107–08 (8th Cir. 2015).

Arkansas's current method-of-execution statute allows the Arkansas Department of Correction (ADC) to select the lethal-injection protocol from two options: (1) a barbiturate, or (2) midazolam, followed by vecuronium bromide, followed by potassium chloride. Ark. Code Ann. § 5-4-617(c). The version of the statute in effect at Marcyniuk's sentencing required a death sentence to be administered by lethal injection of an ultra-short acting barbiturate and a chemical paralytic. Acts of 1983, Act 774, §§ 1, 5, 6 (former Ark. Code Ann. § 5-4-617(a)(1)).

At sentencing, the trial judge—after finding appropriate the jury's recommendation of death by lethal injection—announced the then-existing lethal-injection protocol from the bench. Marcyniuk contends he was sentenced to be executed by that specific drug-protocol and that the amended statute changed his punishment. This argument fails because Marcyniuk's sentence was death. Marcyniuk alleges the ADC's use of the midazolam protocol will result in increased pain and greater "psychological terror," but the punishment—death by lethal injection—has not changed. Marcyniuk, moreover, has not cited any authority that the change in lethal-injection drugs is

"superadded punishment" in violation of the *ex post facto* clause. Even if cognizable on *habeas* review, Claim 10 is denied on the merits.

Third, Marcyniuk argues he was not represented by counsel during the post-trial period. He says that his trial lawyer took a "speedy exit" before the time to file a new-trial motion elapsed, and that substituted counsel did not become involved until the record was filed on appeal. This is Claim 11. The record does not support Marcyniuk's argument. He was represented by his trial lawyer for almost all of the 30-day post-trial period. *See* Ark. R. Crim. P. 33.3(b).

Marcyniuk also says that he received ineffective assistance during the post-trial period, and he lists claims that, he says, effective counsel would have raised after trial. He has not shown that his lawyers' performance was deficient for not raising these claims in a new-trial motion. Arkansas's post-trial deadline, moreover, prevents the adequate development of at least some of these claims. In any event, these claims fail for the same reasons set out in the Court's denial of relief on the related ineffectiveness-of-trial-counsel claims.

Fourth, Marcyniuk says in Claim 13 that he is entitled to *habeas* relief because he was denied the effective assistance of counsel during post-conviction proceedings. "There is no constitutional right to an attorney in state post-conviction proceedings." *Coleman*, 501 U.S. at 752. Marcyniuk therefore cannot claim constitutional ineffectiveness during these proceedings as a stand-alone claim.

Fifth, Marcyniuk says an investigation would show the Arkansas death penalty is applied infrequently and arbitrarily, but he has not provided sufficient evidence to support the claim. "The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime." *McCleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987). "Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be

irrelevant to his actual guilt." *Id.* "Apparent disparities in sentencing are an inevitable part of our criminal justice system." *Id*. at 312. "[T]here can be no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Id.* at 313 (quotations omitted). On this record, and in light of the teachings of *McCleskey*, there is no basis for finding relief on Claim 14.

Sixth, Marcyniuk argues the death penalty is unconstitutional based on evolving standards of decency, but there is no direct authority to support Marcyniuk's argument. The United States Supreme Court has recently reaffirmed that the death penalty is constitutional. *Glossip*, 135 S. Ct. at 2728. Claim 15 therefore fails on the merits.

Seventh, Marcyniuk asks the Court to consider the combined prejudicial effect of all alleged constitutional errors, but "cumulative error does not call for *habeas* relief, as each *habeas* claim must stand or fall on its own." *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990). Claim 16 fails.

2. Claims Related To Marcyniuk's Competency To Stand Trial

Marcyniuk says he was incompetent to stand trial due to a combination of major psychiatric illness and Asperger's Syndrome, now classified as part of Autism Spectrum Disorder. He argues the trial court committed constitutional error by not holding a competency hearing. He says his mental disorders affected his competency in specific ways: he could not make a rational decision about a plea offer; the stressful courtroom situation caused him to "shut down"; and his in-court demeanor—rocking in his seat, rubbing his hands, sobbing, and speaking out inappropriately—gave the jury an inaccurate and prejudicial impression, and made him an ineffective witness. This is Claim 2. Marcyniuk proffers the declarations of two mental-health experts: psychologist Dr. Richard Back, who testified on his behalf during the penalty phase; and psychiatrist Dr. Pablo

Stewart. Both say Marcyniuk was not competent to stand trial. Dr. Back attests that Marcyniuk has a "thought disorder" that "prevented him from understanding his legal predicament and cooperating with his lawyers." He says Marcyniuk's "ability to appreciate his legal situation and assist his counsel . . . was markedly impaired." *No. 42-3*. Dr. Back points to Marcyniuk's refusal to consider the possibility of a guilty plea in exchange for a life sentence, his focus on explaining the minor details of his case, and his obsession with testifying about the love between him and Wood. Dr. Stewart diagnosed Marcyniuk with major depressive disorder with psychotic features, and Autism Spectrum Disorder. He concludes Marcyniuk's "perceptions of his legal situation were colored by his exceedingly depressed state." He says Marcyniuk's "mental disease and defects prevented him from comprehending his legal situation, accepting the advice of his counsel, and making rational decisions." *No. 42-2*.

Claim 2 was not raised in state court. The trial court ordered a mental evaluation at the State Hospital. Both the State Hospital psychologist, Dr. Michael Simon, and the defense psychiatrist, Dr. Brad Diner, concluded that Marcyniuk was competent to stand trial. Marcyniuk's trial lawyers did not request a competency hearing, and none was held. They did not challenge his competency on direct appeal or in state post-conviction proceedings. Circuit panels have reached different conclusions when considering whether an incompetency claim is subject to the procedural-default rule. *See Springs*, 2014 WL 2815804, *36 n.17; *compare Vogt*, 88 F.3d at 590, *with Bainter*, 932 F.2d at 716. This Court need not reach the default issue. Claim 2 fails under a merits analysis. 28 U.S.C. § 2254(b)(2).

Due process prohibits the trial of an incompetent defendant. *Medina v. California*, 505 U.S. 437, 453 (1992). Under Arkansas law, "[n]o person who lacks the capacity to understand a

proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." Ark. Code Ann. § 5-2-302(a). A trial court must hold a hearing when "evidence raises a sufficient doubt about the mental competency of an accused to stand trial." *Griffin v. Lockhart*, 935 F.2d 926, 929 (8th Cir. 1991). A trial court should be alert to the defendant's irrational behavior and demeanor at trial, available medical evaluations, and trial counsel's questioning of competence. *Vogt*, 88 F.3d at 591. Still, "not every manifestation of mental illness demonstrates incompetence to stand trial." *Id.* (quotations omitted). "Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Id.* (quotations omitted).

Marcyniuk says Dr. Simon's evaluation was cursory and based on an inadequate social history. Dr. Simon relied on Marcyniuk's responses to the Competency to Stand Trial Assessment, his above-average intelligence based on educational records, and his previous experience with the legal system. He interviewed Marcyniuk and reviewed Marcyniuk's previous mental-health records and the prosecutor's file; he administered the MMPI-2 personality test; and he did a psychosocial history/assessment that included an interview with Marcyniuk's mother. Dr. Simon's evaluation was not deficient, and Marcyniuk has not demonstrated that any additional information would have made a difference.

Dr. Diner also found Marcyniuk competent to stand trial. He relied on interviews with Marcyniuk and his parents, and Marcyniuk's mental status and psychological examination results. He also considered records from the prosecutor's file, various writings by Marcyniuk, and Dr. Simon's forensic report.

Marcyniuk's lead lawyer, W.H. Taylor, testified at the Rule 37 hearing. He believed Marcyniuk did not allow him to explore a plea offer due to mental illness and lack of judgment. He also said, however, that Marcyniuk is "able to understand abstract concepts and on a personal level communicates very well when he's not under a great deal of stress." Rule 37 Record 561. He said that Marcyniuk wanted to believe that, if he testified, the jury would understand that "he wasn't a bad guy." Rule 37 Record 562. He described Marcyniuk as a "bright guy but . . . quite foolish sometimes from a judgment standpoint." Rule 37 Record 542. He said Marcyniuk "latched onto the idea that it was second degree murder." Rule 37 Record 662. Taylor believed Marcyniuk would have accepted a term-of-years offer; but the prosecutor was only willing to discuss a life sentence. Taylor also testified that Marcyniuk assisted his legal team with trial preparations: he provided a list of potential witnesses, sent requested narratives, and was a good historian on his life history.

The record is clear that Marcyniuk understood the proceeding and the charges against him, and that he was able to assist effectively in his own defense. The Court declined to expand the record with the two expert declarations as well as other proffered documents related to Marcyniuk's and his family's mental-health history. *No. 58.* Even if the proffered evidence is considered, the Court's findings are the same. Marcyniuk's decision not to pursue a plea may show poor judgment, and his courtroom behavior and misguided focus on details may be due to mental illness. These actions, however, do not establish a sufficient doubt about his lack of competence to stand trial. Claim 2 is denied on the merits.

In his traverse, Marcyniuk says this claim is not exhausted. He seeks a *Rhines* stay so he can return to state court to file a *coram-nobis* petition based on insanity at the time of trial. His request is denied. Based on a review of the state-court record and the proffered declarations, Marcyniuk has

not demonstrated his incompetency claim is potentially meritorious. *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

In related ineffectiveness claims, Marcyniuk argues his lawyers' work was constitutionally deficient because they did not request a competency hearing, or adequately investigate and argue at trial or on appeal that he was incompetent to stand trial. He says his lawyers should have investigated an Asperger's Syndrome diagnosis, gathered and provided Dr. Simon with more information about his developmental period and family history of mental illness, and hired a mitigation specialist. These claims are procedurally defaulted.

Martinez-Trevino applies to the defaulted ineffectiveness-of-trial-counsel claims. The Court declined to expand the record because the proposed material would not be helpful in deciding the claims. *No. 58*. Marcyniuk did not make the preliminary evidentiary showing required for consideration of new evidence. *Sasser*, 735 F.3d at 851; *No.* 58. Even if the proffered material is considered, the equitable exception does not excuse the default of these claims. Under the familiar *Strickland* standard, they are not substantial. *Martinez*, 566 U.S. at 14. All these claims, moreover, fail under a merits analysis. 28 U.S.C. § 2254(b)(2). Marcyniuk's trial and appellate lawyers' work was not constitutionally deficient for not pressing his incompetency. His trial lawyers asked for a mental-health evaluation at the State Hospital, and they retained Dr. Diner to conduct a psychiatric forensic evaluation. There was nothing in these reports to raise doubts about the experts' competency findings or alert the defense team that more evaluations were needed. Marcyniuk's lawyers' contacts with him demonstrated that he was competent to proceed; Taylor testified at length about Marcyniuk's assistance with trial preparations. Marcyniuk has not demonstrated *Strickland* prejudice either. Even if his lawyers had taken the steps now urged by Marcyniuk, there is no

reasonable probability that the trial court would have found him incompetent to stand trial. *Strickland*, 466 U.S. at 694. Both the State Hospital psychologist and the defense psychiatrist found him competent. Marcyniuk has not demonstrated that Dr. Simon's conclusions would have been any different with additional time or more information about his family history or developmental period. Marcyniuk, moreover, has presented no persuasive evidence or argument of his incompetency. His depression, poor judgment, and behavior in stressful situations does not equate to incompetency to stand trial. Claims 5.1 (in part), 5.2, 5.16.1, 5.16.2 (in part), 5.16.3, 8.1 (in part) and 12.3 fail.

3. Claims Alleging Absence Of Required Mental-State

Marcyniuk argues his constitutional rights were violated because the trial evidence did not prove the premeditation and deliberation required for capital murder. This is part of Claim 1.

On direct appeal, Marcyniuk made a related sufficiency-of-the-evidence argument. He also referred to due-process evidentiary requirements and argued the trial evidence did not meet that standard. *No. 12-3 at 20.* The Arkansas Supreme Court considered the evidence consistent with the jury verdict and denied relief:

> The State presented evidence that [Marcyniuk] was obsessed with [Wood] following their breakup; that he had been following her consistently and pestering her; that he had stolen her cell phone in an effort to discover if she was dating someone else; that he broke into [Wood's] apartment in the early morning hours of March 9, staying several hours until her return; and that he stabbed her as she unlocked the front door. Physical and forensic evidence supported a finding that [Marcyniuk's] attack on [Wood] was immediate and intense. There was a violent struggle in which she begged for her life. The jury could have concluded that [Marcyniuk] attempted to cover up the crime by hiding her body in a locked bathroom and fleeing the scene through the bedroom window. . . . After the murder, [Marcyniuk] then returned home to collect his belongings, dropped off his dog at his mother's home, disposed of the murder weapon, and fled out of the state. When he was stopped during a routine traffic stop, he calmly lied to the officer about his destination and how he received

> the scratch on his face. As a whole, the evidence presented was sufficient to sustain a conviction for capital murder.

Marcyniuk I, 2010 Ark. 257, at 9–10, 373 S.W.3d at 250–51.

The Due Process Clause forbids a conviction when "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). This Circuit has held the Arkansas Supreme Court adjudicated a constitutional due-process claim when it resolved the sufficiency-of-the-evidence state claim and did not specifically refuse to consider the constitutional claim. *Dansby*, 766 F.3d at 817–19. The Circuit relied on the Arkansas Supreme Court's determination that the state substantial-evidence standard is consistent with *Jackson*. *Id.* (citing *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002)). Marcyniuk has not rebutted the presumption that the Supreme Court adjudicated his due-process argument. *Johnson v. Williams*, 568 U.S. 289, 300–01 (2013). The Court therefore reviews this exhausted claim under § 2254(d) deference.

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, *Jackson*. 28 U.S.C. § 2254(d). In Arkansas, a person commits capital murder if, "[w]ith the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person." Ark. Code Ann. § 5-10-101(a)(4). Arkansas courts have recognized that "[p]remeditation and deliberation may be formed in an instant." *Marcyniuk*, 2010 Ark. 257, at 9, 373 S.W.3d at 250. "Intent can rarely be proven by direct evidence; however, a jury can infer premeditation and deliberation from circumstantial evidence, such as the type and character of the weapon used; the nature, extent, and location of wounds inflicted; and the conduct of the accused." *Id.* Applying this standard, the Supreme Court concluded that "a jury could easily have inferred that

[Marcyniuk] lay in wait for [Wood] and killed her when she arrived home." *Id.* at 9, 373 S.W.3d at 251. The Supreme Court's analysis "was not an unreasonable way for a state court to ensure that a rational trier of fact could have found the requisite [premeditation and deliberation] beyond a reasonable doubt." *Dansby*, 766 F.3d at 818. The evidence of premeditation and deliberation more than satisfies the due-process standard.

Marcyniuk also says the trial evidence does not demonstrate that he entered or remained in Wood's apartment with the purpose of committing a crime punishable by imprisonment, an element of residential burglary. Ark. Code Ann. § 5-39-201(a)(1). Because Marcyniuk did not challenge on direct appeal the trial court's finding of sufficient evidence, this piece of Claim 1 is procedurally defaulted. It also fails under a merits analysis. 28 U.S.C. § 2254(b)(2). A rational trier of fact could have found beyond a reasonable doubt that Marcyniuk unlawfully entered, or remained in, Wood's apartment through an unlocked bedroom window with the purpose of killing her. *Jackson*, 443 U.S. at 324. Marcyniuk's related ineffectiveness claim—Claim 12.1—also fails. His appellate lawyer's work was not deficient for not raising a meritless sufficiency argument on appeal.

4. Mental-Capacity and Related Ineffectiveness Claims

Marcyniuk alternatively argues the trial evidence of mental disease or defect shows he is not guilty of capital murder or residential burglary. He says the evidence demonstrates that, as a result of mental disease or defect, he was unable to conform his conduct to the requirements of the law or appreciate the criminality of his conduct; or, he says, the evidence establishes he was unable to engage in the required mental state for these crimes. He also makes a freestanding claim of actual innocence, contending he is innocent of capital murder and the death penalty based on new evidence

of mental disease or defect. This is the remainder of Claim 1. Marcyniuk also makes related claims of ineffective assistance of trial counsel.

Sufficiency Of Mental-Disease-Or-Defect Evidence. The Arkansas Supreme Court found Marcyniuk's sufficiency argument—based on the mental-disease-or-defect affirmative defense—was not preserved for its review. *Marcyniuk I*, 2010 Ark. 257, at 11–12, 373 S.W.3d at 252. This part of Claim 1, as well as Marcyniuk's related claim about his inability to engage in the required mental state, is procedurally defaulted. Marcyniuk has not demonstrated any excuse for the default. His arguments raised here are relevant to analysis of related ineffectiveness claims. In the interest of efficiency, the Court therefore reviews this part of Claim 1 under an alternative merits analysis. 28 U.S.C. § 2254(b)(2).

During the guilt phase, Drs. Simon and Diner testified about their diagnoses of Marcyniuk. Their diagnoses were similar, but they disagreed over whether Marcyniuk could control his behavior or form the intent to kill Wood.

Dr. Diner testified that Marcyniuk suffered from major depression and a personality disorder with borderline and schizotypal traits. He described Marcyniuk's history of depression with psychosis and manic features. He said Marcyniuk was bright but socially inept. Dr. Diner told the jury about Marcyniuk's isolation, and he said that, while in high school, Marcyniuk became psychotically depressed and heard critical voices. He said that, in the weeks before he killed Wood, Marcyniuk was very depressed—not sleeping well, constantly preoccupied, very unhappy and anxious, and very withdrawn and isolated. Dr. Diner defined borderline personality disorder as reflecting "a pervasive pattern of instability in . . . personal relationships, self image, affect or mood and marked impulsivity in a variety of contexts. Frantic efforts to avoid real or imagined

abandonment." Trial Record 887. He stated that one diagnostic criteria of borderline personality disorder is dissociation: a defense mechanism in which one breaks from reality when faced with an overwhelming and painful situation. He said Marcyniuk was suffering from dissociative amnesia when he killed Wood. According to Dr. Diner, Marcyniuk therefore was unable to conform his behavior to the law or form the intent to kill Wood. He testified that, when Marcyniuk was confronted with Wood entering her apartment and screaming, he was faced with "ultimate rejection" and "literally dissociated and flew into a rage much of which he could not recall." Trial Record 892. Dr. Diner, however, acknowledged that Marcyniuk said he was "fully aware of events both before and after the stabbing." Trial Record 911. Dr. Diner also said that Marcyniuk's thought processes were logical and goal-oriented during the mental evaluation.

Instead of finding major depression, Dr. Simon determined Marcyniuk had an adjustment disorder, which he described as a reaction to a stressor—such as being charged with capital murder or ending a relationship—that leads to depression and anxiety. He also found Marcyniuk had a borderline personality disorder. He said that, when a personality trait becomes inflexible or maladaptive, it is labeled a personality disorder. He acknowledged a personality disorder can affect the way a person behaves in certain situations, such as poor anger control. He said Marcyniuk's attack on Wood was the result of being angry and losing control, but he did not believe that these diagnoses qualified as a mental disease or defect. He maintained that Marcyniuk still had a choice. He testified Marcyniuk's actions— running away, fleeing the state, and getting rid of his bloody clothes and the knife—demonstrated that he appreciated the criminality of his conduct. He acknowledged, however, that it was possible for Marcyniuk, as a person with a personality disorder, to slip into a dissociative state.

Expert and lay witnesses summarized Marcyniuk's mental-health history; Marcyniuk and his mother described his mental condition on the morning of the murder. Marcyniuk's parents testified that Marcyniuk was a happy child who became severely depressed beginning in his adolescence. Staff members from Marcyniuk's high school described him as depressed and withdrawn. The study hall monitor remembered repeated instances of Marcyniuk coming to her classroom and curling up behind her desk. Marcyniuk's father recounted Marcyniuk holding a gun and threatening suicide at age 17 or 18; he told of a bizarre incident in which Marcyniuk shot the family dog. Marcyniuk testified that, beginning in his teen-age years, he spent too much time thinking and preferred to be alone. He said that, if he was quiet, he could hear people talking about him. He sought seclusion to avoid having people look at him and talk about him. Dr. Diner told the jury that family psychiatric history was relevant; he testified that Marcyniuk had two cousins who suffered from agoraphobia and anxiety, a paternal uncle diagnosed with depression, and a family history of alcoholism. He said Marcyniuk had a history of volatile relationships, with "anger episodes and outbursts even as a child." Trial Record 878. Dr. Diner testified that Marcyniuk's physical medical history was fairly unremarkable, with the exception of anxiety-related conditions. He said Marcyniuk had twice seen a therapist—after the suicide threat and, by court order, after the 2005 aggravated-assault conviction. Dr. Simon added that Marcyniuk also sought counseling at the University of Arkansas Health Center and talked to someone there; he said that, because there was no formal treatment, he did not try to obtain those records. There was testimony of prior incidents involving a former girlfriend, including Marcyniuk's actions resulting in the aggravated-assault conviction. Marcyniuk's testimony recounted his unwelcome pursuit of Wood after the two stopped dating. He admitted that he was "obsessed" with getting back together with her. Trial Record 947. With respect to the murder,

Marcyniuk said he only remembered the minutes before and after he stabbed Wood; he said that he got lost afterwards on his way to his parents' house. Marcyniuk's mother testified that, after Marcyniuk arrived at her house, he began rocking with his arms around his knees and speaking in fragmented sentences.

Evidence of Marcyniuk's calculated actions is too much to overcome. In light of the conflicting expert testimony and the circumstances of the crime, a rational juror could have found Marcyniuk's behavior was not consistent with someone who has a mental disease or defect. A rational trier of fact could have found beyond a reasonable doubt that Marcyniuk was capable of acting purposefully to commit residential burglary, and with premeditation and deliberation to commit capital murder. A rational trier of fact also could have found that Marcyniuk was able to conform his conduct to the requirements of law and appreciate the criminality of his conduct. *Jackson*, 443 U.S. at 324. This part of Claim 1 fails on the merits.

Freestanding Claim Of Actual Innocence. Marcyniuk also says new mental-disease-or-defect evidence shows he is actually innocent of capital murder and the death penalty. The United States Supreme Court has not decided if a freestanding claim of actual innocence—based on discovery of new reliable evidence—warrants federal *habeas* relief absent other constitutional error. *House v. Bell*, 547 U.S. 518, 554–55 (2006). The threshold for proving a freestanding claim, if it exists, is higher than the gateway standard for allowing consideration of defaulted claims upon a showing of actual innocence. *Id.* A gateway showing that "it is more likely than not that no reasonable juror would have convicted him" is therefore insufficient to prove a freestanding actual-innocence claim. *See Schlup,* 513 U.S. at 327.

Even if a freestanding claim is recognized, Marcyniuk has not proffered any new, reliable evidence that reaches this "extraordinarily high" threshold. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). He refers to evidence—dissociative episodes, signs of a mood disorder and depression at a young age, anxiety and psychosis, suicide attempts, and a family history of mental illness—that he says could have been presented at trial. In support, Marcyniuk proffers lay witness declarations and various documents, along with Dr. Stewart's declaration stating he suffers from a mental disease or defect and was under an extreme emotional or mental disturbance at the time of the murder. *Nos. 42-2* through *42-26,* and *43*. The proffered material mostly substantiates, or is cumulative of, trial evidence. Marcyniuk, moreover, has not demonstrated that the new evidence was not available at trial, or could not have been discovered with due diligence. *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001). In any event, none of this evidence, even if considered along with trial evidence, meets the extraordinarily high threshold for proof—that Marcyniuk could not form the premeditation or deliberation required to commit capital murder. *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir. 1995). This evidence also does not compel a conclusion that Marcyniuk could not form the intent to commit a cruel or depraved murder, or that he was otherwise ineligible for the death penalty. *Sawyer*, 505 U.S. at 347; *Wooten*, 578 F.3d at 781. There is overwhelming evidence to support the jury verdict as to both guilt and sentencing. Marcyniuk's standalone actual-innocence claim is denied.

Related Ineffectiveness Claims. Marcyniuk says there was more his lawyers should have done to develop his mental-disease-or-defect argument at the guilt and penalty phases. He says additional work on this point also would have helped with plea agreement negotiations and explained

his bizarre courtroom behavior to the jury. These are Claims 5.1 (in part), 5.15, 5.16.2 (in part), 5.16.5 (in part), 5.16.6, 5.16.7, 5.16.8, 5.16.9, 5.16.10, 5.16.11, 5.16.12, 8.1 (in part), 8.2, and 8.3.

Marcyniuk was represented by four lawyers. His lead lawyer Taylor was assisted by Stevan Vowell, Bo Morton, and Victoria Hargis. Taylor hired Dan Short, a retired Arkansas State Police criminal investigator, to help with guilt-phase issues. Taylor, assisted by Hargis, handled the mitigation case. The defense team hired two experts: Drs. Diner and Back.

Marcyniuk says his trial lawyers should have moved for a directed verdict based on mental disease or defect. Because he raised this ineffectiveness claim in the initial-review collateral proceeding before abandoning it in his Rule 37 appeal, *Martinez-Trevino* does not apply to the defaulted claim. *Franklin*, 879 F.3d at 313; *Arnold*, 675 F.3d at 1087. In any event, Marcyniuk's trial lawyers' work was not deficient for not raising a meritless argument. *Thai v. Mapes*, 412 F.3d 970, 979 (8th Cir. 2005). Based on conflicting testimony, the jury was entitled to resolve the capacity issue. *Navarro v. State*, 371 Ark. 179, 192, 264 S.W.3d 530, 539 (2007). There was substantial evidence to support the verdict. *Flowers v. State*, 373 Ark. 127, 129, 282 S.W.3d 767, 769–70 (2008).

Marcyniuk also challenges his lawyers' work at both the guilt and penalty phases. He says they should have requested funds for or hired a mitigation specialist and more experts. He lists lay witnesses that he says a mitigation specialist would have interviewed; he lists personal and family records that he says a specialist would have gathered. He says his lawyers should have worked harder and called more witnesses to present his and his family's social and mental-illness history, and his mental condition at the time of the crime; he says a mitigation specialist would have helped. He says his lawyers should have discovered and introduced evidence that he meets the criteria for

Asperger's Syndrome; he alleges a mitigation specialist would have identified a related expert. He says a mitigation specialist would have developed evidence demonstrating his positive qualities. He says his lawyers should have investigated a medical basis—possibly a childhood diagnosis of pernicious anemia—for his mental disorders. Marcyniuk lists specific evidence that, he says, his lawyers should have introduced at trial: (1) his suicide note written a few years before he killed Wood, (2) clinical records of his 2005 visit to the University of Arkansas Health Center to seek counseling, and (3) recordings of 911 calls from Marcyniuk's father and a friend, Chris Harris, after Marcyniuk killed Wood. Marcyniuk's trial lawyers called Dr. Back to testify during the penalty phase; Marcyniuk says they should have had him testify during the guilt phase.

Exhaustion Of Ineffectiveness Claims. Marcyniuk raised some of these ineffectiveness claims in state-court proceedings. More analysis is required to determine if they were exhausted. Marcyniuk alleged in his Rule 37 petition that his trial lawyers' work was constitutionally ineffective for not investigating and calling to testify additional mitigation witnesses. He argued in a sub-claim that they should have hired a mitigation specialist, and he said his lawyers were untrained and unqualified to conduct a capital-defense mitigation investigation. Marcyniuk broadly alleged they "merely skimmed the surface of the available mitigation and failed to investigate and present mitigating evidence." Rule 37 Record 51. He then said he was specifically prejudiced because a mitigation specialist would have discovered and investigated named mitigation witnesses. In a separate claim, he alleged his trial lawyers were remiss in not calling more guilt-phase witnesses to explain various points, including his emotional instability and depression.

At the Rule 37 hearing, Taylor described his experience with defending capital defendants and mitigation-evidence training, his approach to developing Marcyniuk's mitigation case, and the

defense team's mitigation work and trial strategy. He referred to records that the defense team examined and witnesses that the lawyers interviewed. A capital-defense expert, however, testified that a mitigation specialist is required when representing capital defendants. The expert described the work of a mitigation specialist and said Taylor should have hired a specialist to do a more thorough life-history investigation. Some of the proposed witnesses testified, and an affidavit of one was introduced into evidence. Denying the Rule 37 petition, the circuit court found Marcyniuk's lawyers "completely and thoroughly investigated [Marcyniuk's] background and potential fact witnesses" and were "thorough in investigating and presenting mitigation issues to the jury." Rule 37 Record 509. The circuit court also determined Marcyniuk was not prejudiced by not having a mitigation specialist or by his lawyers not calling the proposed witnesses.

In the Rule 37 appeal, Marcyniuk dropped his sub-claim that his trial lawyers should have hired a mitigation specialist, and he pared down the list of proposed witnesses. Marcyniuk argued his lawyers' penalty-phase work was constitutionally deficient for not investigating and calling seven mitigation witnesses: Joshua Beall, Hollie Knox, Chuck Ray, Jason Stephens, Jeremiah Estes, Laura Cotton, and Jessica Romine. Knox was Marcyniuk's therapist during court-ordered therapy after his aggravated-assault conviction. The remaining witnesses were former classmates and co-workers. Marcyniuk described the testimony that the proposed witnesses would have provided about his positive qualities, depression, and mental illness. He said Knox would have testified that, with the benefit of additional training, she now believes he suffers from major depression.

Habeas ineffectiveness claims are exhausted if Marcyniuk fairly presented their substance to the Arkansas Supreme Court. *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009). To be exhausted, "[t]he federal claim cannot contain significant additional facts . . ., but closely related

claims containing an arguable factual commonality may be reviewed." *Id.* (quotations omitted). The *habeas* claim does not have to be an "exact duplicate" of the state-court claim, but it must have "the same legal and factual bases." *Id.* Here, there is an "arguable factual commonality" between the state-court arguments and *habeas* ineffectiveness sub-claims: Marcyniuk's lawyers, with the help of a mitigation specialist, should have interviewed and called mitigation witnesses named in the Rule 37 appeal to testify about his mental-health history and positive qualities. The Arkansas Supreme Court had a "fair opportunity to consider [those ineffectiveness claims] and to correct that asserted constitutional defect." *Picard v. Connor*, 404 U.S. 270, 276 (1971). This Court therefore will review those pieces of Marcyniuk's *habeas* ineffectiveness claims under § 2254(d). Review is limited to the record before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

During the penalty phase, Marcyniuk's lawyers called witnesses who supported their mitigation strategy of showing mental illness. Dr. Back testified Marcyniuk suffers from significant mental disorders, including generalized anxiety disorder, borderline personality disorder, and schizotypal personality disorder. He based his conclusion on test results, mental-health history, and observations of Marcyniuk. He told the jury that a person with these disorders is often "ruminating and obsessing" and has a "distorted way of perceiving the world." Trial Record 1102–04. He said that, as a result of these disorders, Marcyniuk was under an extreme emotional disturbance when he killed Wood. Dr. Back said that, because of Marcyniuk's poor coping and problem-solving skills, he could not deal with Wood ending their relationship. He said this stress triggered a psychotic episode in which Marcyniuk lost touch with reality when he killed Wood. Lawyers used lay-witness testimony to support the expert's conclusions. Marcyniuk's aunt and grandmother described him as a happy, loving, respectful child who changed during adolescence, becoming sad and withdrawn.

Marcyniuk's aunt said there were "numerous occasions" when Marcyniuk would just "phase out." Trial Record 1124. She described an incident in which she found Marcyniuk, then a teenager, curled up under the bed. Both Marcyniuk's aunt and grandmother referred to a family history of mental illness. Marcyniuk's aunt said her daughter had been diagnosed with borderline personality disorder and agoraphobia. Marcyniuk's mother testified again in the penalty phase. She described the onset of Marcyniuk's depression, and she said that she and her husband felt very guilty that they had not recognized earlier that he needed help. The mitigation case also included the testimony of Chris Harris, who told the jury that Marcyniuk was a good friend and had a strong work ethic. He remembered Marcyniuk making a suicidal gesture early in their friendship. He said that he contacted police after Marcyniuk called him on the morning he killed Wood, telling him good-bye and saying he had "f*** up." Trial Record 1141.

The Arkansas Supreme Court held the lawyers' decision not to call witnesses to testify about Marcyniuk's positive qualities was a matter of professional judgment. *Marcyniuk II*, 2014 Ark. 268, at 18–20, 436 S.W.3d at 135–36. The Supreme Court referred to Taylor's Rule 37 hearing testimony that he did not want to portray Marcyniuk as mentally ill and depressed with trouble functioning in society, while simultaneously presenting a number of "friends" to testify about his mental stability. The Supreme Court determined Taylor's testimony was consistent with his pretrial letter to Marcyniuk in which he rejected the same tactic. *Id.* The Supreme Court also determined that other proposed witnesses—who would have testified about Marcyniuk's mental disease or defect—would have been cumulative. The Court held that, because Taylor presented mental-disease-or-defect evidence at trial, the defense was not deprived of this evidence. *Id.* The Court held Marcyniuk did not satisfy the performance or prejudice elements in the familiar *Strickland* standard *Id.*

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). To demonstrate constitutional ineffectiveness, Marcyniuk first must show that his lawyers' work was so deficient that they were "not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Review is "highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight." *Id.* at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. To satisfy the *Strickland* prejudice element, Marcyniuk must show that his lawyers' "errors were so serious as to deprive [him] of a fair trial." *Id.* at 687. He must demonstrate a reasonable probability that the outcome would have been different absent the error. *Id.* at 694. The Supreme Court was not unreasonable in finding Marcyniuk failed to satisfy either *Strickland* element. Marcyniuk's lawyers' decision not to call the named mitigation witnesses "fell within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Marcyniuk, moreover, has not demonstrated a reasonable probability that his sentence would have been different if his lawyers had investigated or presented testimony from those witnesses about his mental illness and positive qualities.

Procedurally Defaulted Ineffectiveness Claims. The remaining ineffectiveness claims—about additional mental-disease-or-defect evidence and arguments that Marcyniuk says his lawyers should have presented at the guilt or penalty phases, his general claim that they should have hired a mitigation specialist, and his remaining sub-claims about how he was specifically prejudiced by not having a mitigation specialist—are procedurally defaulted. *Martinez-Trevino* does not apply

to the ineffectiveness-of-trial-counsel claims raised in the initial collateral review proceeding but abandoned on appeal. *Franklin*, 879 F.3d at 313*; Arnold*, 675 F.3d at 1087. For the sake of efficiency, the Court applies a merits analysis to all these claims. 28 U.S.C. § 2254(b)(2).

Marcyniuk's lawyers had a duty to conduct a thorough investigation into his background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). In determining whether an investigation was reasonable, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). "[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 19 (2009) (*per curiam*).

Taylor recognized the need "to explore [Marcyniuk's] history from the time [he] came out of the womb until the day [of] trial." Rule 37 Record 528. More importantly, he acted on it. Taylor testified that the defense team talked to family members, friends, counselors, high school staff members, and co-workers. He said they looked at Marcyniuk's work history, school records, and medical records; and they hired Drs. Diner and Back. Taylor asked about Marcyniuk's life history, and if he suffered from depression or showed signs of mental illness. He said the theme that developed during the investigation was that Marcyniuk was a depressed, mentally ill young man, who had trouble fitting into society.

The evidence left no room for Marcyniuk's lawyers to argue that he did not kill Wood. They therefore focused their trial strategy on emphasizing early onset mental illness. In the guilt phase, Marcyniuk's lawyers presented a solid case based on Marcyniuk's mental illness. Dr. Diner told the jury that Marcyniuk was in a dissociative state—a symptom of his borderline personality disorder—at the time he stabbed Wood to death and therefore was unable to conform his conduct to the requirements of law or form the intent to kill her. Dr. Diner referred to Marcyniuk's family history of mental illness; his testimony provided a thorough mental-health history. Marcyniuk's parents and two high school staff members corroborated the expert's conclusions, testifying about Marcyniuk's history of depression and troubled behavior. The lawyers' decisions about penalty-phase witnesses were part of trial strategy. Their decision to reserve calling Dr. Back for the penalty phase was professionally reasonable. Taylor testified that they anticipated the jury finding Marcyniuk guilty and wanted to have something new for mitigation. He believed that using one strong witness can be more effective than calling multiple witnesses on the same issue. Lawyers again called lay witnesses to substantiate the expert testimony. The sentencing verdict forms reflect the strategy was somewhat effective. Jurors found Marcyniuk suffered from mental illness; but they rejected the mitigating circumstances connecting his mental illness to the crime.

The Court denied Marcyniuk's motion to expand the record with proffered material, *Nos. 42-2* through *42-26* and *43*, that, he says, would support the defaulted ineffectiveness claims. *No. 58.* To the extent *Martinez-Trevino* applies, Marcyniuk did not make a sufficient preliminary evidentiary showing to warrant expansion of the record. These defaulted ineffectiveness claims are not "potentially meritorious." *Sasser*, 735 F.3d at 851. More evidence would not assist the Court in evaluating them. *No. 58*.

Even if the proposed material is considered, Marcyniuk has not demonstrated that his lawyers' performance was constitutionally deficient at either the guilt or the penalty phase. Their decisions related to the investigation and use of guilt-phase and mitigation evidence, and whether to hire a mitigation specialist, did not fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The lawyers' investigation work was thorough; their decisions as to which evidence to pursue and present was part of a reasonable strategy. Marcyniuk also has not demonstrated *Strickland* prejudice. There was no attorney error "so serious as to deprive [Marcyniuk] of a fair trial." *Id*. at 687. Marcyniuk has not pointed to any compelling evidence that more investigation would have uncovered for presentation at either the guilt or the penalty phase. The proffered material is cumulative and of little mitigating value. There is no reasonable probability that more evidence would have changed the jury's verdict on guilt or at sentencing.

Marcyniuk has not demonstrated that his lawyers were remiss in not hiring a mitigation specialist. Taylor explained why he believed he could do the same work. His decision was not unreasonable; the defense team's mitigation work was not constitutionally deficient. Marcyniuk says more lay witness testimony describing his mental illness and history of zoning out would have corroborated expert testimony and established that he was not guilty of capital murder, or that a death sentence was not appropriate. His trial lawyers' pursuit and presentation of his mental-illness history, however, was reasonable under *Strickland* standards. *Rompilla*, 545 U.S. at 383; *Bobby*, 558 U.S. at 19. More evidence on this point would have been cumulative. Marcyniuk says his lawyers should have pursued a medical diagnosis, but he has not shown how they should have been alerted to any. He makes no convincing argument that other diagnoses would have changed the outcome. Marcyniuk's lawyers' decision to retain and call Drs. Diner and Back was reasonable trial strategy;

they were not required to "scour the globe" for additional experts. Marcyniuk, moreover, has failed to show that retaining or calling another expert would have made a difference. Even if Dr. Stewart's declaration is considered, the Court's conclusion is the same. Like Drs. Diner and Back, Dr. Stewart found Marcyniuk stabbed Wood to death while experiencing a break from reality, albeit due to a different diagnosis. Marcyniuk says recordings of 911 calls from his father—that he was "totally distraught, shaking and crying"—and from friend Chris Harris—that he was suicidal and said he had done something but "it wasn't him"—would have been more evidence of his dissociation. Marcyniuk's father, however, was only relaying what his wife reported to him. Both Marcyniuk's mother and Harris testified at trial about their contact with Marcyniuk after he killed Wood. The 911 calls are cumulative and no more helpful than the testimony elicited by Marcyniuk's lawyers. Marcyniuk says his suicide note written a few years before he killed Wood would have corroborated Dr. Diner's major-depression diagnosis, but there was trial testimony of Marcyniuk's history of depression and suicidal gestures. Similarly, more evidence of Marcyniuk's family history of mental illness would not have been helpful. Marcyniuk says an Asperger's Syndrome diagnosis would have explained his inability to read Wood's social cues and his courtroom behavior. The diagnosis, however, would not have helped during the guilt phase, and it is not particularly mitigating under the circumstances. Marcyniuk says he sought counseling at the university health center prior to his actions leading to the aggravated-assault conviction but was denied an appointment due to lack of university resources. He proffers his health center records that, he says, would demonstrate that he tried to address his mental disorders and has a treatment history. The jury, however, heard from witnesses that Marcyniuk saw a therapist; Dr. Simon told the jury that Marcyniuk sought counseling at the university health center. The health center records would have added little to Marcyniuk's

defense or mitigation case. All of these defaulted ineffectiveness claims fail under a merits analysis; neither *Strickland* element is satisfied.

Other Ineffectiveness Claims. Marcyniuk makes three additional claims that his lawyers made mistakes with mental-disease-or-defect evidence. These are Claims 5.16.13, 5.16.14, and 8.9. All three are procedurally defaulted.

First, Marcyniuk argues lead lawyer Taylor's work was deficient for incorrectly stating that he would be released if the jury returned a verdict of not guilty by reason of mental disease or defect. This is Claim 5.16.13.

Marcyniuk points to three guilt-phase statements:

* "[Marcyniuk] does not expect to walk out of here without you punishing him. " Trial Record 550 (Opening statement)

* "I am not so naive and I do not expect you to be so naive as to let him walk out of this courtroom. I would be doing him a grave disservice if I did that because the facts are the facts." Trial Record 1055 (Closing argument)

* "[J]uries don't much like mental disease or defect because they are like the rest of us. They can't really accept the idea that we just turn people out after they've done things that are wrong." Trial Record 1060 (Closing argument)

When Marcyniuk raised this claim for the first time in his Rule 37 appeal, the Arkansas Supreme Court found the argument was not preserved for its review. The Court recognized that it may address the issue only if "prejudice is conclusively shown by the record." *Marcyniuk II*, 2014 Ark. 26, at 12–14, 436 S.W.3d at 132. There must be "an error of such magnitude that it deprived [Marcyniuk] of the fundamental right to a fair trial." *Id.* at 7, 436 S.W.3d at 127. The Supreme Court found Marcyniuk did not meet this high bar because the trial court instructed the jury on the resulting procedure that would be followed if it returned a verdict of not guilty by reason of mental

disease or defect. *Id.* The Arkansas Supreme Court did not reach and resolve the merits of the claim; the Court's prejudice review did not "cure" the procedural default. *Clark v. Bertsch*, 780 F.3d 873 (8th Cir. 2015). The defaulted claim therefore is analyzed under *Martinez-Trevino.*

As noted by the Arkansas Supreme Court, the trial court complied with state law and instructed the jury on the process that would occur if Marcyniuk was acquitted on the defense of mental disease or defect:

> If you find Zachariah Marcyniuk not guilty by reason of mental disease or defect, the court will conduct a hearing. If the court determines that Zachariah Marcyniuk is no longer affected by mental disease or defect, the court will immediately discharge Zachariah Marcyniuk. If the court determines that Zachariah Marcyniuk remains affected by mental disease or defect, the court will order the Defendant committed to the custody of the Director of the Department of Human Services for an examination by a psychiatrist or licensed psychologist. The Defendant will not be released from custody unless it is determined that Zachariah Marcyniuk's release would not create a substantial risk of bodily injury to another person or serious damage to property of another person.

Marcyniuk II, 2014 Ark. 268, at 13, 436 S.W.3d at 132; Trial Record 1035–36.

Marcyniuk has not demonstrated a reasonable probability that the jury would have decided his guilt or sentence differently, if his lawyer had not made these statements. *Strickland*, 466 U.S. at 694. The trial court's instruction was sufficient to inform the jury of the procedure that occurs when a defendant is found not guilty by reason of mental disease or defect; and there was substantial evidence supporting the jury's decision to reject the affirmative defense. As discussed further in addressing Claim 5.16.14, the lawyer's comments, moreover, were part of a reasonable trial strategy to maintain credibility with the jury. Under these circumstances, the ineffectiveness claim is not substantial. *Martinez*, 566 U.S. at 14. The default of Claim 5.16.13 is not excused under the *Martinez-Trevino* equitable exception.

Second, Marcyniuk, referring to these same statements by Taylor, says his lawyers were constitutionally ineffective for abandoning the affirmative defense of not guilty by reason of mental disease or defect. Marcyniuk says his lawyers' decision undercut the credibility of Dr. Diner and lay witnesses, who testified in support of the affirmative defense. He says the jury would have otherwise found him not guilty by reason of mental disease or defect, or that his mental illness prevented him from forming the mental state necessary for capital murder. He also says the jury would have found the existence of more mental health-related mitigating circumstances and would not have sentenced him to death. This is Claim 5.16.14.

Marcyniuk presented evidence on this point at his Rule 37 hearing. He did not, however, include this claim in his pleadings; the trial court did not rule on the issue. Referring to state-court procedural requirements, the Arkansas Supreme Court determined the claim was raised for the first time on appeal and therefore was procedurally barred. The record, the Supreme Court held, did not conclusively show the prejudice required to allow the Court's review. The Supreme Court determined that Marcyniuk's lawyers' actions were part of their trial strategy to use mental-disease-or-defect evidence to obtain a lesser-included second-degree murder conviction. *Marcyniuk II*, 2014 Ark. 268, at 4–11, 436 S.W.3d at 126–31. The Supreme Court's prejudice review did not "cure" the procedural default. *Clark*, 780 F.3d 873. This Court considers whether *Martinez-Trevino* allows for merits consideration.

At the Rule 37 hearing, Taylor testified that he believed pressing a mental-disease-or-defect defense would have caused him to lose credibility with the jury, in light of Marcyniuk's "goal-oriented behavior" on the night he killed Wood, and other trial evidence. Rule 37 Record 663. He thought that, even with Dr. Diner's testimony, "there was a lot better shot at the jury finding

[Marcyniuk] guilty of something less than capital than there was of them outright acquitting him on mental disease or defect." Rule 37 Record 662. He said the defense strategy was to emphasize that Marcyniuk's lack of capacity lessened his culpability, making him guilty of the lesser-included offense of second-degree murder. Marcyniuk's lawyers nonetheless did not completely abandon the mental-disease-or-defect defense. They called Drs. Diner and Back to testify about their findings. They called lay witnesses to show that Marcyniuk "had been mentally ill for a very long time." Rule 37 Record 537, 545. In both opening statement and closing argument during the guilt phase, Taylor referred to defense expert testimony and asserted that Marcyniuk killed Wood while he was in a dissociative state. He acknowledged, however, that finding in favor of the affirmative defense can be difficult. Taylor summarized the defense strategy in closing argument, telling the jury that, even if it did not find mental disease or defect as an affirmative defense, it could consider the same evidence—Marcyniuk's dissociative state and mental illness—to determine that Marcyniuk did not have the required mental state to commit capital murder. This strategy continued during the penalty phase. Marcyniuk's lawyers presented evidence and argument that his mental illness supported mitigating circumstances.

Marcyniuk's lawyers' work was not constitutionally deficient. Marcyniuk has not overcome the presumption that their tactics were within the range of professionally reasonable judgment; he has not demonstrated a reasonable probability that the outcome would have been different if his lawyers had placed more emphasis on the mental-disease-or-defect defense. Because the claim is not substantial, the default is not excused under a *Martinez-Trevino* analysis.

Third, Marcyniuk says his lawyers should have challenged the jury's refusal to consider his mental illness at sentencing. He says there was sufficient mental-illness evidence to compel the jury to find related mitigating circumstances. This is Claim 8.9.

The jury was instructed on 21 mitigating circumstances. Jurors unanimously found Marcyniuk suffered from a borderline personality disorder and generalized anxiety disorder; at least one juror found he suffered from major recurrent depression, and had a history of extreme personality or emotional disorder or disturbance with suicidal tendencies. All jurors rejected the mitigating circumstances related to the effect of any mental illness on the commission of the crime.

Marcyniuk raises this ineffectiveness claim for the first time in his *habeas* petition. He made a related argument in state court on direct appeal, contending the jury refused to consider mental disease or defect as a mitigating factor. The Arkansas Supreme Court found the point was not preserved for its review. *Marcyniuk I*, 2010 Ark. 257, at 19–20, 373 S.W.3d at 256. The Supreme Court nonetheless considered the argument based on the state-court rule requiring review of certain unpreserved claims in death-penalty cases. *Id.* (citing Ark. R. App. Proc.—Crim. 10). The Court determined the trial court did not fail to bring mental-disease-or-defect mitigating factors before the jury: "The jury acknowledged that appellant suffered from borderline-personality disorder and generalized anxiety disorder; however, it found that those disorders did not prevent appellant from being able to conform his behavior to the law and that he was not under extreme mental or emotional disturbance at the time of the murder." *Id.*

Because Marcyniuk did not fairly present his ineffectiveness claim in state court, it is procedurally defaulted and *Martinez-Trevino* applies. To demonstrate a substantial ineffectiveness claim, Marcyniuk must show "that the jury's actions were in error, that counsel's failure to object

was deficient, and that it resulted in an unfair trial." *Williams v. Norris*, 612 F.3d 941, 956 (8th Cir. 2010). There is no evidence that the jury failed to consider the mitigating evidence; the jury was free to reject the evidence and make its own conclusions. An objection by Marcyniuk's lawyers would not have been successful. The *Martinez-Trevino* equitable exception does not excuse the default.

5. Alleged Violations Of The Right To A Fair And Impartial Jury

Marcyniuk raises a number of challenges related to jury selection. He also makes related claims about things his trial and appellate lawyers should have done differently. These are Claims 3, 12.2 (in part), 12.4, 12.5, and 12.6.

Exhausted And Related Claims. Marcyniuk fairly presented in state court two claims about his lawyers' work during *voir dire*: (1) they should have challenged four jurors' dismissal for cause, or tried harder with rehabilitation; and (2) their questioning omitted significant issues.

First, Marcyniuk says his trial lawyers' work was constitutionally deficient because they did not object to four jurors' dismissal for cause based on their death-penalty views, or try to rehabilitate them (with the exception of Ginger Roberts). This is Claim 3.10.4

During *voir dire*, potential juror Matthew Krauft said he "[did not] believe [he] could sentence anyone to the death penalty." Trial Record 424. Another potential juror, Yesenia Swenson, said she would not be able to vote for the death penalty, even if she believed it was appropriate based on the evidence and testimony. The prosecutor referred to Donald Burnette's and Ginger Roberts's juror questionnaire responses that they could not impose the death penalty. Burnette and Roberts responded that they could not impose the death penalty because of their personal beliefs. Burnette said she did not believe "it's [her] place" to impose death. Trial Record 485. Roberts said she believed "scripturally" that there must be two or more "eye-witnesses" to the crime for her to impose

the death penalty. Trial Record 485. Taylor tried to rehabilitate Roberts by explaining witnesses were unnecessary because Marcyniuk's guilt was not contested; his efforts were unsuccessful. On the prosecutor's motion, the trial court excused all four jurors for cause based on their death penalty views. Marcyniuk's lawyers did not object.

Denying relief on this ineffectiveness claim, the Arkansas Supreme Court held Marcyniuk's lawyers' work did not fall below an objective standard of reasonableness, and their performance did not so prejudice Marcyniuk that he was denied a fair trial. The Supreme Court supported its conclusion with findings: the prospective jurors' remarks indicated that none could impose the death penalty; Marcyniuk did not show that any of the jurors could have been rehabilitated, or that a seated juror was biased; and Marcyniuk did not show actual prejudice. *Marcyniuk II*, 2014 Ark. 268, at 16–17, 436 S.W.3d at 133–34.

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). The Supreme Court's *Strickland* analysis was proper. Its decisions that Marcyniuk's lawyers' work satisfied the *Strickland* standard and that there was no *Strickland* prejudice were not unreasonable determinations. The test for excluding a juror for cause based on his capital-punishment views is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt*, 469 U.S. 412, 424 (1985) (quotations omitted). "[D]eference must be paid to the trial judge who sees and hears the juror." *Id.* at 426. Marcyniuk says the potential jurors' responses do not show their performance would be substantially impaired. He argues his lawyers should have objected to their excusal and asked more questions, but his arguments and citations are not convincing. Each juror unequivocally responded that he or she could not vote in

favor of imposing the death penalty. Their responses were more than "general objections" or an expression of "conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). Taylor testified at the Rule 37 hearing that he was generally opposed to pressing an objection to excusal or attempting rehabilitation. He wanted to avoid highlighting situations in which the death penalty may be appropriate and emphasizing to the jury panel that it could impose the death penalty. In light of *Witherspoon-Witt*, Marcyniuk's lawyers' decision not to object to the jurors' excusal or inquire further was not constitutionally deficient performance. They made a reasonable strategic decision that "there was no point in attempting to rehabilitate [these] jurors." *Foster v. Delo*, 39 F.3d 873, 878 (8th Cir. 1994). Claim 3.10.4 is denied under deference review. For the same reasons, Marcyniuk's related trial-error and ineffectiveness-of-appellate-counsel claims raised for the first time also fail under an alternative merits analysis. 28 U.S.C. § 2254(b). Marcyniuk has not shown a *Witherspoon-Witt* violation.

Second, Marcyniuk argues in Claim 3.10.5 that his trial lawyers' questioning of potential jurors was constitutionally ineffective. He says they did not ask about significant issues: pretrial publicity exposure, previous experiences with romantic partners, willingness to consider mental-illness evidence, or willingness to consider a punishment other than death. He says adequate questioning would have revealed biased jurors. The Arkansas Supreme Court, in *Marcyniuk II*, rejected two parts of this claim: whether Marcyniuk's trial lawyers conducted adequate *voir dire* on the mental-disease-or-defect defense and on the death penalty.

The Supreme Court held Marcyniuk did not demonstrate his lawyers' questioning on mental disease or defect fell below the *Strickland* performance standard or was so prejudicial that he was denied a fair trial. *Marcyniuk II*, 2014 Ark. 268, at 11–12, 436 S.W.3d at 131. The Court

determined Marcyniuk did not identify any particular biased juror, and that "[i]t was appropriate for [Marcyniuk's lawyer] to consider responses to questions asked by the State as well as responses to his own questions." *Id.*

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, *Strickland*. 28 U.S.C. § 2254(d). Marcyniuk has not shown that his lawyers' inquiry was constitutionally deficient or that a seated juror was biased. *Sanders v. Norris*, 529 F.3d 787, 790–94 (8th Cir. 2008). At the Rule 37 hearing, Taylor acknowledged that he did not specifically ask potential jurors if they would follow the law on the affirmative defense of mental disease or defect. He testified, however, that he asked in the jury questionnaire and during *voir dire* about potential jurors' perception of mental illness and exposure to mentally ill individuals. He said his strategy was to consider these responses in evaluating whether potential jurors understood mental illness and its effects. Marcyniuk, moreover, has not identified any particular juror who refused to consider the mental-disease-or-defect evidence; and the Court instructed the jury on the affirmative defense. The jury is presumed to have followed the Court's instruction. *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992). Under § 2254(d) review, this part of Claim 3.10.5 fails.

The Supreme Court also held the lawyers' *voir dire* on the death penalty did not fall below *Strickland* performance standards, or so prejudice Marcyniuk's defense as to deprive him of a fair trial. *Marcyniuk II*, 2014 Ark. 268, at 14–16, 436 S.W.3d at 132–33. Marcyniuk argued his lawyers did not ask potential jurors if, with a capital-murder conviction, they would automatically vote for the death penalty. The Supreme Court, however, found that the jury questionnaire assessed potential jurors' death-penalty views and that both Taylor and the prosecutor asked during *voir dire* if potential jurors understood the death penalty is not automatically imposed. *Id.*

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). The jury questionnaire addressed potential jurors' death-penalty views with several multiple choice questions. As noted by the Supreme Court, Question Number 35 directly addressed the issue: "35. Which of the following statements best represents your feelings about the death penalty?" The five choices ranged from "the death penalty should be imposed in all capital murder cases" to "I could never, under any circumstances, return a verdict for the death penalty." *Marcyniuk II*, 2014 Ark. 268, at 15, 436 S.W.3d at 133; Trial Record 341–44. During *voir dire*, the prosecutor told potential jurors that they could not serve on the jury if they would automatically impose a death sentence; he asked if any believed a defendant should automatically receive the death penalty if convicted of capital murder. Trial Record 436. Taylor also asked potential jurors if they understood that they could always not vote for the death penalty; jurors indicated that they did. Trial Record 456. *Voir dire* on this point was not constitutionally deficient, and Marcyniuk provides no support or context for his bare allegation that a seated juror was only willing to consider the death penalty. This part of Claim 3.10.5 fails under deference review.

The remaining ineffectiveness sub-claims—about other questions that Marcyniuk's lawyers should have asked during *voir dire*—are procedurally defaulted. Applying *Martinez/Trevino*, the default is not excused. Marcyniuk has not shown these claims are substantial under a *Strickland* analysis. He has not demonstrated the lawyers' questioning was inadequate or that a seated juror was biased. *Sanders*, 529 F.3d at 790–94.

Procedurally Defaulted Claims. Marcyniuk's remaining claims about being denied a fair and impartial jury are procedurally defaulted. The Court has found no excuse for the default. They also fail under an alternative merits analysis, or because Marcyniuk has not developed a sufficient

argument for this Court's review. 28 U.S.C. § 2254(b)(2). Marcyniuk's related ineffectiveness claims are also defaulted; and relief is not warranted under *Martinez-Trevino* or an alternative merits review. One ineffectiveness claim—that Marcyniuk's trial lawyers should have challenged the pretrial jury selection procedure—requires some analysis.

Marcyniuk complains his constitutional rights were violated because pretrial publicity prevented him from receiving a fair trial. He points to news reports, blog posts, and online articles. This is not one of those cases where pretrial publicity was so extreme that prejudice can be presumed. *Skilling v. United States*, 561 U.S. 358, 377–81 (2010). Marcyniuk has not demonstrated pretrial publicity infected the jury with actual prejudice. *Id.* at 385–95. The jury selection process was sufficient to secure unbiased jurors. Only two potential jurors—one dismissed and one seated—said they had read newspaper articles about the case; both stated they had not formed an opinion. Marcyniuk also says his constitutional rights were violated because minority groups, the poor, and perhaps men were underrepresented in his jury panel, but he has not supported his allegations with the required evidence of systematic exclusion. *United States v. Horton*, 756 F.3d 569, 578 (8th Cir. 2014); *Singleton v. Lockhart*, 871 F.2d 1395, 1399 (8th Cir. 1989). Marcyniuk next says the trial court's denial of individual, sequestered *voir dire* resulted in a biased jury. There is no indication in the record, however, that questioning of jurors—general *voir dire* and a 29-page juror questionnaire—was insufficient, or that individual, sequestered *voir dire* would have changed the jury composition. *Kilgore v. Bowersox*, 124 F.3d 985, 994 (8th Cir. 1997). Taylor testified at the Rule 37 hearing that he did not know if he would have asked questions differently in individual *voir dire*. He also said that he had adequate time during general *voir dire*. Marcyniuk says his constitutional rights were violated because Juror Brenda Bruce did not disclose that she had been in

a relationship with an abusive partner. He says the prosecutor had a duty to disclose this fact, if he was aware. Marcyniuk, however, has not shown that Bruce was biased. *Fuller v. Bowersox*, 202 F.3d 1053, 1056 (8th Cir. 2000). He has not demonstrated the prosecutor knew about Bruce's relationship. Marcyniuk says the prosecutor violated the Equal Protection Clause by intentionally using peremptory strikes and cause challenges to exclude men from the jury. He says the trial court should have taken steps to correct the venire's gender imbalance. Eleven women and one man served on the jury. The prosecutor used three of six peremptory strikes on men; he successfully challenged for cause two men and two women based on their opposition to the death penalty. Marcyniuk has not applied the familiar three-part *Batson* analysis applicable to gender-based strikes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144-45 (1994). He has not demonstrated the prosecutor intentionally struck male potential jurors based on their gender. Marcyniuk also says the prosecutor failed to disclose relationships with jurors, but he has not alleged any facts to support his claim.

Marcyniuk says his trial and appellate lawyers should have worked harder to raise these points and to preserve juror questionnaires. To the extent *Martinez-Trevino* applies, the ineffectiveness-of-trial-counsel claims are not substantial and the default therefore is not excused. All of these ineffectiveness claims fail under an alternative merits review. 28 U.S.C. § 2254(b)(2). This Circuit has cautioned that "courts must resist the temptation to second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed . . . and his best judgment as to the attitudes and sympathies of judge and jury." *Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987). The Supreme Court also has recognized that the process of "winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*,

477 U.S. 527, 536 (1986). Either Marcyniuk's lawyers' strategic decisions were not unreasonable, or the underlying claim is meritless or undeveloped.

Marcyniuk says his lawyers' work was constitutionally deficient for not seeking a venue change based on pretrial publicity. He made the same ineffectiveness claim in his Rule 37 petition; his appellate lawyer did not challenge the trial court's denial of relief. Taylor testified at the Rule 37 hearing that he made the decision not to pursue a change in venue because his only option was removal to Madison County. He said he thought the jury pool in Washington County would be more favorable to the defense because the population is generally more educated than in Madison County and the case involved "intricate psychological issues." Rule 37 Record, 558-59. Taylor also testified that Marcyniuk was "adamant" that he did not want his trial moved to Madison County. Rule 37 Record 558. Marcyniuk's lawyers' decision not to file the change-of-venue motion was clearly strategic. The reasonableness of their strategy is supported by jurors' *voir dire* responses indicating the absence of pretrial publicity exposure. Marcyniuk has not shown a biased juror was seated. Marcyniuk says his trial and appellate lawyers should have challenged the prosecutor's alleged gender-based strikes and requested that more men be added to the panel, but he has not demonstrated there was gender discrimination. He has not shown that, if the excluded male potential jurors had been present, the results of the proceeding would have been different. *Young v. Bowersox*, 161 F.3d 1159, 1160–61 (8th Cir. 1998). Marcyniuk says that, after the trial, juror questionnaires were destroyed by the trial court, and no copies were kept by his lawyers or the prosecutor. The questionnaires therefore are not part of the trial record or available for *habeas* review. Marcyniuk says his lawyers should have worked to preserve the questionnaires as significant evidence of possible claims, but he has not developed any argument as to what claims could have been raised.

Taylor testified at the Rule 37 hearing that he was aware the questionnaires would be destroyed at the end of the case. He said he believed potential jurors were more likely to be candid if they knew the questionnaires would be destroyed. Marcyniuk has not overcome the strong presumption that his lawyers' decision not to seek preservation of the questionnaires fell "within the wide range of reasonable processional assistance." *Strickland*, 466 U.S. at 689. Marcyniuk's claim that his appellate lawyer should have tried to supplement the record with the questionnaires is speculative. He has not specified what additional claims based on the questionnaires could have been raised on appeal, or why he believes the questionnaires were even available to supplement the record.

Marcyniuk also says his lawyers should have moved to strike Juror Bruce based on her disclosure of her father-in-law's murder, or inquired further. A *Martinez-Trevino* analysis applies to the defaulted claim, but it is not substantial. Taylor asked Bruce if she could set that circumstance aside and decide the case based on the facts; she said that she could. Taylor's performance was not constitutionally ineffective; Marcyniuk has not demonstrated that Bruce was biased. *Sanders*, 529 F.3d at 790–94.

Questionnaires And Pretrial Jury Selection Procedure. Marcyniuk says for the first time in his *habeas* petition that the use and destruction of the questionnaires and the agreed excusal of thirty potential jurors before trial violated his constitutional rights: to be present, to a public trial, to select a jury from a fair cross-section of the community, to meaningful *voir dire*, and to a complete record for appellate review. He says the procedure allowed the prosecutor to strike potential jurors with qualms about the death penalty without further inquiry, and to strike potential jurors for

impermissible reasons. He says the procedure violated state law limiting the number of peremptory strikes. These are procedurally defaulted Claims 3.3 and 3.6.[4]

Marcyniuk's lawyer asked the trial court to use juror questionnaires; a 29-page questionnaire thereafter was sent to 100 potential jurors. The comprehensive questionnaire asked 88 questions about jurors' education; experience with the judicial process and crime; exposure to pretrial publicity; relationships with attorneys and others involved in the case; impediments to serving on the jury—physical disabilities, mental impairments, and religious beliefs; employment history; jury experience; death-penalty views; criminal justice system views; and religious, political, and military experience. Trial Record 328–56. At the Rule 37 hearing, Taylor testified that a cover letter informed potential jurors that the questionnaires would be destroyed. He said the reason was that potential jurors were disclosing sensitive, private information, and to encourage candid responses. At least ninety potential jurors completed and returned the questionnaires. There is no dispute that, before trial, the trial court allowed the prosecutor and Marcyniuk's counsel to each remove fifteen potential jurors from the jury panel. The pretrial jury selection procedure is not part of the trial record. Neither party alleges the trial court reviewed the pretrial strikes; the basis for the removal of these potential jurors is not clear. Marcyniuk says he was not present or consulted about which potential jurors to remove.

Voir dire was held in open court with Marcyniuk present. The trial court questioned the remaining jury panel and dismissed six potential jurors for hardship. The trial court then called twelve potential jurors and allowed lawyers to conduct additional *voir dire*. As potential jurors were

[4]The Court found expansion of the record is barred by 28 U.S.C. § 2254(e)(2), or proffered jury-selection papers—jury-file documents and clerks' declarations—would not be helpful in evaluating these sub-claims. *Doc. 58 at 8*.

excused for cause, or a peremptory strike was used, the trial court replaced the dismissed jurors with others from the pool. Lawyers addressed a variety of topics: contact with law enforcement, death-penalty views, aggravating and mitigating circumstances, burden of proof, and circumstantial evidence. Lawyers relied on potential jurors' questionnaire responses in asking questions and making selection decisions. According to Taylor, the responses gave the lawyers "a real good idea of who and what [they] wanted for a jury." Rule 37 Record 596. The trial court excused five potential jurors for cause. The prosecutor used six peremptory strikes; Marcyniuk's lawyers used seven strikes during the seating of the jury and one during the selection of the alternate. Twelve jurors and one alternate were seated without objection.

With most of his alleged constitutional violations, Marcyniuk is not entitled to *habeas* relief unless he can establish that the error resulted in "actual prejudice." *Brecht v. Abramson*, 507 U.S. 619, 637–38 (1993). *Habeas* relief is not available on this record. Marcyniuk has not demonstrated that any alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* He has not shown the alleged constitutional violations altered the verdict, or even the jury composition. Any claim that a biased or unqualified juror was seated, or that impermissible strikes were used, is speculative. Marcyniuk has not shown the use of questionnaires is equivalent to a closed proceeding or deprived him of his right to be present. Counsel used the questionnaires during *voir dire* in open court with Marcyniuk present; they presumably were not destroyed until after the trial.

Marcyniuk says that he was denied appellate review of jury selection, but he has not shown how he was prejudiced. *Mitchell v. Wyrick*, 698 F.2d 940, 941–43 (8th Cir. 1983). He has not alleged specific incidents of bias or prejudice. *Id.* at 943. Marcyniuk has not shown the systematic

exclusion required by a fair-cross section claim. *Horton*, 756 F.3d at 578; *Singleton*, 871 F.2d at 1399. His state-law claim, moreover, is not cognizable on federal *habeas* review. 28 U.S.C. § 2254(a); *Estelle*, 502 U.S. at 67–68.

Violation of the Sixth Amendment right to a public trial is generally structural error requiring automatic reversal without a prejudice inquiry. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017); *Presley v. Georgia* 558 U.S. 209, 214 (2010). The public-trial right, however, is not absolute. *Addai v. Schmalenberger*, 776 F.3d 528, 533 (8th Cir. 2015). Under AEDPA deference, this Circuit held a petitioner's right to a public trial was not violated when his lawyer called a witness, creating the need for closure of the courtroom; and then consented to the closure. *Addai*, 776 F.3d at 533–34. "When a party agrees to the closure of the courtroom, he waives any such right, and cannot complain on appeal that the alleged error he helped cause requires reversal, or in this case, *habeas* relief." *Id.* at 534. Unlike Marcyniuk, the *Addai* petitioner was present and "indicated no concern or objection" to the closure. *Id.* at 533. The Circuit's focus, however, seemed to be on the lawyer's consent and participation in the closure for trial-strategy reasons. *Id.* at 534. Assuming the public-trial right applied to jury selection at the time of Marcyniuk's 2008 trial, Marcyniuk, through his lawyer, cannot agree to and benefit from the extra strikes, and now argue the procedure violated his Sixth Amendment right. Claims 3.3 and 3.6 are denied as procedurally defaulted and alternatively under a merits analysis.

In a related ineffectiveness claim, Marcyniuk says his lawyers' work was constitutionally deficient for not objecting to the pretrial jury selection. The Court will consider the defaulted claim under *Martinez-Trevino*. Three arguments require analysis: underlying violations of the right to a fair and impartial jury, to be present, and to a public trial. This is Claim 3.10.7. The Court expanded

the record to consider jury-selection documents. *No. 58*. These papers reflect that Marcyniuk's counsel and the prosecutor each submitted their list of fifteen potential jurors to strike. The listed individuals were not summoned to appear in court. The strikes did not count toward the statutory limit on peremptory strikes. *Nos. 19-1 (sealed), 42-27,* and *42-28.*

Marcyniuk argues his ineffectiveness claim—with underlying violations of the right to a fair and impartial jury, to a public trial, and to be present—does not require a demonstration of *Strickland* prejudice; he says these violations are structural error requiring automatic reversal. His claim that his lawyers' work led to a biased jury, however, requires a preliminary showing that jurors were not impartial. *Sanders*, 529 F.3d at 791. A violation of the right to be present is subject to the harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 117, n. 2 (1983) (citations omitted); *United States v. Smith*, 771 F.3d 1060, 1063 (2014). The United States Supreme Court, moreover, recently held *Strickland* prejudice was not presumed when the underlying claim was a public-trial violation: the lawyer failed to object to courtroom closure during jury selection. *Id.* at 1908–11.

Marcyniuk has not shown the required *Strickland* prejudice. He has not demonstrated a reasonable probability that the trial outcome, or even the jury composition, would have been different absent the pretrial jury selection. He has failed to show that his lawyers' agreement to the procedure rendered the trial fundamentally unfair. "[T]he violation here did not pervade the whole trial or lead to basic unfairness." *Weaver*, 137 S. Ct. at 1913. Marcyniuk has not demonstrated "that the potential harms flowing from [the pretrial jury selection procedure] came to pass in this case." *Id.* The courtroom was open for the entire trial, including general *voir dire.* Any claim that a biased or unqualified juror was seated is mere speculation. There is no way to know who would have been on or off the jury, or the impact of a different jury composition. Marcyniuk argues that he was

prejudiced because the seated jury was predisposed to find him guilty and sentence him to death, but there is no evidence to support this allegation. Claim 3.10.7 is not a substantial ineffectiveness claim; the default is not excused under *Martinez-Trevino*.

6. Exhausted Claims of Improper Evidence

Marcyniuk says the trial court violated his right to a fair trial by admitting crime-scene photographs and by allowing projection of the enlarged photographs onto a screen. He makes related claims of prosecutorial misconduct and attorney ineffectiveness. Marcyniuk also argues his constitutional rights were violated when the trial court denied his motion to suppress his pre-*Miranda* statements. These are Claims 4.1, 4.2, 4.6, 5.4, 5.17 (in part), 6.4, 8.6 (in part), 12.8, and 12.9 (in part).

Photograph Exhibits. Marcyniuk specifically refers to three photographs: Wood's body lying in the bathtub, as discovered by police; a close-up of Wood's head while her body was still in the bathtub; and Wood's body lying on a white sheet after police moved the body from the bathtub. In the third photograph, Wood's clothing is pulled away to show her intestines spilling out of her abdomen. Marcyniuk also argues he was unduly prejudiced when the trial court allowed the projection of photographs onto a five-by-four-feet screen.

The Arkansas Supreme Court held the trial court did not abuse its discretion in allowing the prosecutor to introduce and enlarge seventeen photographs of Wood's body taken at the crime scene and during the autopsy. *Marcyniuk I*, 2010 Ark. 257, at 12–15, 373 S.W.3d at 252–54. The Supreme Court found the trial court "applied the appropriate balancing test" and used "considerable . . . restraint in deciding what photographs to admit into evidence." *Id.* The Supreme Court noted that the trial court "individually pointed out its basis for allowing in each photograph, whether

because it accurately depicted the crime scene, the extent of [Wood's] injuries, the condition of [Wood's] body following the attack, or was essential for a full understanding of the State's forensic and investigatory witnesses." *Id.* As to the photograph of Wood's intestines, the Supreme Court found the photograph was the only picture showing Wood's intestines spilled out of her body through a stab wound. *Id.* The Supreme Court noted there was testimony that the police moved Wood's body before taking the photograph. The Court concluded the jury could decide "if it believed the injury was caused from the movement of the body or during the attack." *Id.* at 14, n.5; 373 S.W.3d at 253, n.5. Finally, the Supreme Court held the projection of the photographs "did not misrepresent the wounds in any way or accentuate them prejudicially." *Id.* at 15, 373 S.W.3d at 254.

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). "A state court's evidentiary rulings can form the basis for *habeas* relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." *Parker v. Bowersox*, 94 F.3d 458, 460 (8th Cir. 1996). Marcyniuk points to new evidence: the medical examiner's email to the prosecutor that the intestines photograph was "not . . . that helpful [to his cause-of-death testimony], since the fatal injuries are on the inside. Intestines coming out are interesting but not neccisarily [sic] fatal." *No. 18 at 28.* He says the email would have supported his suppression argument that the photograph was unduly prejudicial and not probative. This Court's review is limited to the facts before the state court. *Pinholster*, 563 U.S. at 181–82. Even if the email is considered, the claim fails. The photographs were significantly probative to show "the identity and condition of [Wood's body], the location of the wound[s], and the intent of [Marcyniuk]." *Kuntezelman v. Black*, 774 F.2d 291, 292–93 (8th Cir. 1985) (*per curiam*). The

admission of the photographs and their projection did not fatally infect the proceedings. The presentation of the photographs was not so inflammatory as to result in error of constitutional magnitude. A substantial basis existed for the jury to find Marcyniuk guilty—even absent consideration of the projected photographs.

Marcyniuk says his lawyers should have raised better arguments at trial and on appeal to support exclusion of these photographs and their projection. He only develops one ineffectiveness argument with sufficient specificity: his trial lawyers should have discovered and introduced the medical examiner's email. All these ineffectiveness arguments fail under an alternative merits analysis. 28 U.S.C. § 2254(b)(2).

Whether the intestines photograph was important to the medical examiner's testimony would not have been a factor in the trial court's determination of the photograph's admissibility. The Court's review of the record shows the photograph was not introduced to support the medical examiner's testimony about Wood's cause of death. The prosecutor stated at the suppression hearing that the photograph would serve two purposes: (1) show Wood's body as it was found by police, and (2) explain that there was not more blood at the scene because Wood's coat had soaked it up. The prosecutor introduced the photograph during the presentation of crime-scene evidence. Crime-scene technician John Brooks testified the photograph showed how Wood's coat soaked up her blood and how her intestines fell out of her stab wounds. Although the medical examiner briefly described the photograph during his testimony, the photograph was admitted because of its importance to Brooks's testimony about the crime scene. Discovering and introducing the medical examiner's email would not have bolstered the suppression argument. Marcyniuk's lawyers' work was not deficient for not raising a meritless argument. *Thai*, 412 F.3d at 979.

Marcyniuk's defaulted claim of prosecutorial misconduct also fails under an alternative merits analysis. 28 U.S.C. § 2254(b)(2). Non-disclosure of the medical examiner's email did not amount to a *Brady* violation. The email would not have bolstered the argument to suppress the photograph; it was not material evidence within the meaning of *Brady*. *Cone*, 556 U.S. at 469–70. Marcyniuk's lawyers' work at trial and on appeal was not deficient for not raising this meritless prosecutorial-misconduct argument. *Thai*, 412 F.3d at 979.

Suppression of Statement. Marcyniuk says the trial court should not have admitted his pre-*Miranda* statements. He says *Miranda* warnings were required because the statements were made during a custodial interrogation.

On the afternoon of Wood's murder, Lieutenant Donald Kerr of the Oklahoma Highway Patrol stopped Marcyniuk for speeding on an Oklahoma interstate highway. Lieutenant Kerr directed Marcyniuk to sit in the front seat of his patrol car; he then asked a few routine questions. Marcyniuk told Lieutenant Kerr that he was driving to Amarillo to see a friend; he said a dog scratched his face. Lieutenant Kerr advised Marcyniuk that he would give him a warning for speeding. He ran Marcyniuk's license as part of the traffic stop. Dispatch then alerted Lieutenant Kerr that a first-degree-murder warrant had been issued for Marcyniuk's arrest. At that time, Lieutenant Kerr arrested Marcyniuk and read him his *Miranda* rights.

The Arkansas Supreme Court held the questioning inside Lieutenant Kerr's patrol car during a routine traffic stop did not rise to the level of a custodial interrogation requiring *Miranda* warnings. The Court held the trial court's denial of the motion to suppress therefore was not against the preponderance of the evidence. *Marcyniuk I*, 2010 Ark. 257, at 16–18, 373 S.W.3d at 254–55. The Court noted that Marcyniuk "was not restrained in any way while sitting in the officer's car, and

Lieutenant Kerr's actions and questioning up until he *Mirandized* [Marcyniuk] did not rise to those of a formal arrest." *Id.* The Court further recognized that "[a]s the officer prepared the [warning] citation, he engaged in a conversation with [Marcyniuk] and asked him very routine questions." *Id.* The Court found that "[t]he facts do not suggest that [Marcyniuk] was a suspect in a particular crime or subject to the sort of police 'dominance' that would indicate a custodial interrogation." *Id.*

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law; or an unreasonable determination of the facts in light of evidence presented in state court. 28 U.S.C. § 2254(d). The Arkansas appellate court properly considered the circumstances of the traffic stop under *Berkemer v. McCarty*, where the United States Supreme Court held "roadside questioning of a motorist detained pursuant to a routine traffic stop is not a custodial interrogation" requiring *Miranda* warnings. 468 U.S. 420, 435–41 (1984). The Supreme Court determined *Miranda* safeguards only become applicable if a petitioner demonstrates "he was subjected to restraints comparable to those associated with a formal arrest." *Id.* at 441. Applying this standard, the United States Supreme Court considered the amount of time between the stop and the arrest, if the petitioner considered the detention to be temporary, if a single police officer was present, and the number of questions asked by the officer. *Id.* at 441– 42.

The Arkansas Supreme Court was not unreasonable in holding Marcyniuk's pre-*Miranda* statements were admissible. Marcyniuk's freedom was not "curtailed to a 'degree associated with a formal arrest'" as to require *Miranda* warnings. *Berkemer*, 468 U.S. at 440. Lieutenant Kerr asked Marcyniuk a few questions and advised him that he would be issuing a warning citation. Marcyniuk was not restrained; he was sitting in the front seat of the police car on the side of the interstate highway. There were no other officers present. Lieutenant Kerr's testimony that he would have

stopped Marcyniuk if he had tried to exit the patrol car does not compel a different conclusion. It is undisputed that Marcyniuk was a detained motorist seized under the Fourth Amendment. *Berkemer,* 468 U.S. at 436–37. Whether Marcyniuk believed he was free to terminate the encounter, moreover, does not resolve whether *Miranda* warnings were required. *United States v. Morse*, 569 F.3d 882, 884 (8th Cir. 2009). This claim fails under § 2254(d) deference review.

7. Sentencing Claims: Closing Argument And Jury Instructions

Marcyniuk says his constitutional rights were violated because the trial court submitted an unsupported aggravating circumstance to the jury. He also says the prosecutor's argument in favor of the aggravator was inconsistent with his guilt-phase argument. In another sentencing claim, he argues his lawyers failed to inform the jury that they could show mercy. Marcyniuk also makes related ineffectiveness claims. These are Claims 5.17 (in part), 6.7 (in part), 7.1, 8.6 (in part), 8.8, 12.9 (in part), and 12.11. All but Claim 7.1 are procedurally defaulted.

Cruel-Or-Depraved Aggravator. The jury unanimously found that the "cruel or depraved" aggravating circumstance existed. Marcyniuk argues there was not sufficient evidence to submit the aggravator to the jury. This is Claim 7.1.

The trial court instructed the jury, consistent with Ark. Code Ann. § 5-4-604(8):

> [A] capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted. Mental anguish is defined as the victim's uncertainty as to his or her ultimate fate. Serious physical abuse is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Torture is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death. A capital murder is committed in an especially depraved manner when the Defendant relishes the murder, evidencing debasement

> or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.

Trial Record 1166–67.

Marcyniuk objected to the aggravator at trial but did not challenge the instruction on direct appeal until his reply brief. *Marcyniuk I*, 2010 Ark. 257, at 18–19, 373 S.W.3d at 255–56. The Arkansas Supreme Court nonetheless reached the merits based on the state-court rule requiring appellate review. *Id.* (citing Ark. R. App. Proc.—Crim. 10). Because of the state court's *sua sponte* review of a constitutional question, the claim is exhausted. *Walton v. Caspari*, 916 F.2d 1352, 1356–57 (8th Cir. 1990). Marcyniuk is entitled to *habeas* review of his claim. *Id*.

The Arkansas Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). The Supreme Court properly considered whether evidence supported the jury's findings on the challenged aggravator. The Circuit has applied this standard to determine whether there was sufficient evidence for the trial court to submit an aggravating circumstance to the jury. *United States v. Ortiz*, 315 F.3d 873, 902 (8th Cir. 2002). The test is whether a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Jackson*, 443 U.S. at 324; *Williams*, 576 F.3d at 871. The Supreme Court was not unreasonable in holding sufficient evidence supported the jury's finding: "[T]he evidence that [Marcyniuk] broke into [Wood's] apartment, waited hours for her to return, and then viciously attacked her as she walked in the door, stabbing her several times, was sufficient to prove the murder was especially cruel or depraved." *Marcyniuk I*, 2010 Ark. 257, at 19, 373 S.W.3d at 56.

Marcyniuk says there was insufficient evidence to support the aggravator because of evidence that Wood lost consciousness within minutes after the attack began. He refers to testimony of Wood's neighbors and the State Crime Lab forensic pathologist, Dr. Adam Craig. Wood's neighbors testified that sounds from Wood's apartment lasted about a minute. Dr. Craig testified that, once Wood began bleeding from the stab wound to the aorta, she probably lost consciousness within five minutes and then died shortly thereafter.

This testimony tells only a small part of the gruesome and horrific end to Wood's life. A rational juror could conclude that Wood suffered both mentally and physically before succumbing to her injuries, beginning with Marcyniuk lying in wait and attacking her as she opened her apartment door. The encounter in the doorway was so fierce that Wood's apartment key bent in the key-hole, her purse and one shoe fell, and the chain-link fence outside her door bowed. Neighbors heard Wood's frantic screams for help. After Marcyniuk dragged Wood inside her apartment, the violent struggle continued in the kitchen, as Marcyniuk attacked Wood with a knife. The evidence shows Wood tried to grab the knife or put up her arms to defend herself; she suffered 20 defensive wounds on her hands and forearms. There were more abrasions, cuts, and bruises on her face and neck; she had lacerations on the back of her head caused by blunt force injury. Marcyniuk stabbed Wood six times. He stabbed her in the ear, and he stabbed her twice in the back. The other three stab wounds—one in the chest and two in the abdomen—were the most vicious. With the chest wound, Marcyniuk forced his knife between Wood's ribs and through her diaphragm; he cut her stomach and left kidney. The two abdomen stab wounds were even deeper at 6.5 and 7 inches. With one, Marcyniuk struck Wood's aorta, cutting it into two pieces; the knife went through her right

kidney and diaphragm, and between her ribs. With the other abdomen wound, Marcyniuk stabbed through Wood's small intestines and diaphragm; the knife went through to her ribs next to her spine.

Given this evidence, a rational juror could conclude Marcyniuk killed Wood as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture on her before her death, and that he did inflict mental anguish, serious physical abuse, or torture. The trial court's submission of the cruel-or-depraved aggravator was not constitutional error. This claim is denied under deference review.

In a related ineffectiveness claim, Marcyniuk says his appellate attorney's work was constitutionally ineffective for not raising this argument on direct appeal until the reply brief. This claim is procedurally defaulted, and it fails under an alternative merits analysis. 28 U.S.C. § 2254(b)(2). A lawyer's work cannot be deficient for not raising a meritless argument. *Thai*, 412 F.3d at 979.

In a related prosecutorial misconduct claim, Marcyniuk says the prosecutor took inconsistent positions—about whether Wood believed he was going to kill her—at the guilt and penalty phases. Marcyniuk points to the prosecutor's guilt-phase closing argument that he acted with premeditation and deliberation: when Wood saw Marcyniuk at the front door, "she knows she's in serious trouble because that Defendant . . . is going to kill her and she knows it right there at the doorway." Trial Record 1041. Marcyniuk compares that position to the prosecutor's closing argument, in support of the cruel-and-depraved aggravating circumstance, that he intended to inflict mental anguish: Wood "was uncertain as to what her ultimate fate was from the minute she got that door open." Trial Record 1150. This claim is procedurally defaulted; and it fails under an alternative merits analysis. 28 U.S.C. § 2254(b). This is not a case where a prosecutor presented factually inconsistent theories

to different juries to obtain convictions for the same murder. *Smith v. Groose*, 205 F.3d 1045, 1049–53 (8th Cir. 2000). The prosecutor's theory throughout the trial was that Wood knew when she saw Marcyniuk that he planned to kill her and that she was fighting for her life. His arguments did not render Marcyniuk's conviction or sentence unreliable in violation of due process. Marcyniuk's lawyers' work was not constitutionally deficient for not raising a meritless prosecutorial misconduct claim. *Thai*, 412 F.3d at 979.

Seeking Mercy. Marcyniuk says his lawyers' work was constitutionally ineffective at sentencing because they did not tell jurors that they could show mercy and sentence him to life imprisonment. He says his lawyers should have argued in closing that jurors must make their own decision about the appropriateness of the death penalty—even if they found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances justified the death penalty beyond a reasonable doubt.

Marcyniuk raised this argument for the first time in his Rule 37 appeal. The Arkansas Supreme Court held that it would not review the defaulted ineffectiveness claim because the record did not conclusively show prejudice. *Marcyniuk II*, 2014 Ark. 268, at 17–18, 436 S.W.2d at 134–35. Applying state-court precedent, the Supreme Court held the trial court's instruction on aggravating circumstances and mitigators allowed the jury to show mercy. *Id.* (citing *Camargo v. State*, 337 Ark. 105, 108–09, 987 S.W.2d 680, 682–83 (1999)). "Mercy may be shown to the defendant by finding that the aggravating circumstances, even though they exist and outweigh the mitigating circumstances, do not justify imposition of the death sentence." *Id.* The Supreme Court found that Marcyniuk's lawyer did make an argument for mercy, by asserting that life imprisonment was a

sufficient punishment. *Id.* The Court's prejudice review did not "cure" the procedural default. *Clark*, 780 F.3d 873. A *Martinez-Trevino* analysis therefore applies.

Taylor did not use the word "mercy" in his closing argument, or specifically inform the jury that it was not required to vote for the death penalty. As found by the Arkansas Supreme Court, Taylor did argue, however, that life imprisonment was a sufficient punishment for Marcyniuk. He urged the jury to find that there was "some good" in Marcyniuk, and he argued that "we do not kill people" like Marcyniuk, who are "weaker than we are." Trial Record 1161. Further emphasis on mercy is unlikely to have been effective, particularly in light of the prosecutor's response that Marcyniuk showed no mercy to Wood.

Marcyniuk's lawyers' work was not constitutionally ineffective under the *Strickland* performance standard. There is not a reasonable probability that a greater emphasis on mercy would have made a difference at sentencing. The ineffectiveness claim is not substantial; the default is not excused under *Martinez-Trevino.*

8. Remaining Procedurally Defaulted Claims

Marcyniuk's remaining claims are procedurally defaulted. They are interwoven claims of trial error, prosecutorial misconduct, and ineffective assistance of trial and appellate lawyers: Claims 4.3, 4.4, 4.5, 4.7, 4.8, 4.9, 5.1 (in part), 5.3, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.16.4, 5.16.5 (in part), 5.17 (in part), 6.1, 6.2, 6.3, 6.5, 6.6, 6.7, 7.2, 7.3, 8.4, 8.5, 8.6 (in part), 8.7, 12.1 (in part), 12.2 (in part), 12.7, 12.9 (in part), 12.10, and 12.12. The Court will consider if *Martinez-Trevino* allows merits review of most defaulted ineffectiveness-of-trial-counsel claims. *(Martinez-Trevino* does not cover ineffectiveness claims abandoned on appeal: Marcyniuk's lawyers' decisions not to introduce Wood's cell phone or investigate the crime scene.) The Court also will apply an

alternative merits analysis to the remaining procedurally defaulted claims. 28 U.S.C. § 2254(b)(2).

With most of these arguments, Marcyniuk contends the jury heard improper evidence and argument. The list of challenged evidence and argument:

* Marcyniuk's 2001 letter—with foul and abusive language—to a female acquaintance, Shannon Wilks;

* Prosecutor's cross-examination of Dr. Diner about an incident involving Marcyniuk forcing his way into Wilks's apartment, which had not been introduced into evidence;

* Prosecutor's cross-examination of Dr. Diner about whether his diagnosis was consistent with Marcyniuk breaking into ex-girlfriend Sarah Huffman's apartment and hiding in her closet—without introducing evidence Marcyniuk was found in the closet;

* Testimony about a binocular receipt found in Marcyniuk's vehicle, despite a sustained objection to the receipt's introduction;

* Crime-scene technician John Brooks's testimony about where in the apartment Marcyniuk killed Wood based on blood patterns—without testimony that Brooks was an expert in the field;

* Forensic examiner Jennifer Beatty's testimony about DNA results, when the tests were performed by a different forensic examiner;

* Prosecutor's guilt-phase closing argument that Marcyniuk's entering Wood's apartment was enough to convict him of residential burglary—when the offense requires the purpose to commit an offense punishable by imprisonment;

* Prosecutor's guilt-phase closing argument that two witnesses heard Wood's screaming "please don't kill me" when only one witness heard this scream—and the other heard Wood shout "help me";

* Victim-impact evidence: messages written on a memorial for Wood, photographs of Wood, and a description of the murder as "savage";

* List of Marcyniuk's prior charges, introduced as part of his jail file by his trial lawyers during the penalty phase; and

* Prosecutor's penalty-phase closing argument that Marcyniuk wants to "choose his own fate" and "doesn't deserve to get to pick his punishment."

Marcyniuk says the trial court should not have required him to wear a shock belt during trial. He contends submission of the mitigating circumstance—he "would not pose a future danger if he is kept in a structured environment such as the Arkansas Department of Correction"—confused the jury that he could be housed in an environment less secure than a prison, if not sentenced to death. Marcyniuk also makes related ineffective-assistance-of-counsel claims.

Marcyniuk says his lawyers should have taken additional steps: (1) hired or sought funds for a forensic expert to investigate the crime scene, moved to preserve the crime scene, or requested funds to allow for additional crime-scene investigation; (2) obtained mental-health treatment for him; (3) sought to have off-the-record bench discussions recorded and alternatively moved on appeal to remand for completion of the record; and (4) advised him that he did not have to testify and should not testify, and alternatively better prepared him. Marcyniuk argues his trial lawyers should have introduced into evidence Wood's cell phone to corroborate his testimony that he had possession of the phone and entered Wood's apartment to return it, not to kill her. He says they should have introduced his suicide note, written a few years before he killed Wood, to corroborate his testimony that he was driving to the ocean to kill himself, not fleeing, when he was stopped by the Oklahoma trooper.

Trial Error, Prosecutorial Misconduct, Appellate Counsel's Ineffectiveness, And Abandoned Ineffectiveness-Of-Trial-Counsel Claims. With each of these defaulted claims, the threshold issue is prejudice. The challenged evidence and prosecutor's statements were not "so egregious that they fatally infected the proceedings and rendered [Marcyniuk's] entire trial fundamentally unfair." *Garcia v. Mathes*, 474 F.3d 1014, 1017 (8th Cir. 2007) (quotations omitted); *see also Stringer v. Hedgepeth*, 280 F.3d 826, 829 (8th Cir. 2002). Testimony—about DNA

results—alleged to violate the Confrontation Clause was harmless in light of the overwhelming evidence of guilt. *Middleton v. Roper*, 455 F.3d 838, 857 (8th Cir. 2006). There is not a reasonable probability of a different outcome if Marcyniuk's lawyers had introduced the cell phone or done more to investigate the crime scene. *Strickland*, 466 U.S. at 694. Marcyniuk has not shown a reasonable probability that his sentence would have been different absent the complained of victim-impact testimony; the evidence was not so unduly prejudicial as to render his trial fundamentally unfair. *Williams*, 612 F.3d at 952. Marcyniuk alleges misconduct related to the prosecutor's introduction of his letter to Wilks, but the prosecutor did not take any steps rendering the trial fundamentally unfair. To the extent Marcyniuk alleges the prosecutor suppressed evidence, the Wilks letter was not material to guilt or punishment. *Cone*, 556 U.S. at 469–70. There was no false testimony affecting the outcome of the trial. *Napue*, 360 U.S. at 269. Marcyniuk's argument that he was prejudiced by wearing an uncomfortable shock belt is not convincing; he has not asserted the belt was visible to the jury or otherwise demonstrated prejudice. Marcyniuk has not shown that he was prejudiced by submission of the structured-setting circumstance. The trial court responded to a jury question about the circumstance, clarifying that Marcyniuk, with a life sentence, "would be committed to the Department of Correction which operates our prison system." Trial Record 1175. Finally, no error raised here "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

With each of these claims, Marcyniuk also makes related arguments about his trial lawyers' work. He says they should have raised objections and made arguments challenging the evidence and alleged prosecutorial misconduct; he says they should have clarified a submitted mitigating circumstance. The default is not excused under the *Martinez-Trevino* equitable exception. The

ineffectiveness claims are not substantial; Marcyniuk has not demonstrated a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694.

Marcyniuk also says his appellate lawyers' work was deficient for not raising prosecutorial misconduct, or challenging prejudicial evidence and victim-impact testimony. He says they should have sought a remand to complete the record. The Court rejects these arguments as either stand-alone or related ineffectiveness-of-trial-counsel claims. They are denied here as well.

Remaining Claims of Trial Counsel's Ineffectiveness. *Martinez-Trevino* applies to the remaining stand-alone ineffectiveness-of-trial-counsel claims. Marcyniuk, however, has not shown a substantial claim; he has not demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Even if his lawyers had raised objections or not introduced the now-challenged evidence and argument, the jury's finding of guilt and on sentencing would have been the same. Marcyniuk has not demonstrated that additional steps—doing more investigation, advising him not to testify or better preparing him, seeking mental-health treatment, or putting bench discussions on the record—would have changed the outcome either. Marcyniuk's lawyers introduced his jail file during the penalty phase to show he had not been a disciplinary problem. Lead lawyer Taylor argued that Marcyniuk had been a good citizen, except for the aggravated-assault conviction. The jail file, however, included a list of prior charges: fleeing, failure to appear, speeding, theft of property, false imprisonment, aggravated assault, violation of a protection order, and criminal trespassing. Marcyniuk argues that, if his lawyers had not introduced his charge history, the jury would have sentenced him to life. His arguments are not convincing. He cannot overcome the high hurdle of *Strickland*. Given the circumstances of the murder and the undisputed prior violent-felony

conviction, there is not a reasonable probability that the jury verdict would have been different absent the introduction of the charge history. *Martinez-Trevino* does not allow for merits review of any of these defaulted ineffectiveness claims.

9. Overcoming Default: Actual Innocence

Finally, Marcyniuk argues his actual innocence provides a gateway to overcome procedural default of his claims. The Court has concluded the evidence does not meet the high bar required to support a freestanding claim of actual innocence. The proof required to prove a gateway actual-innocence claim is slightly lower. *House*, 547 U.S. at 554–55; *Dansby*, 766 F.3d at 840. Marcyniuk, however, still must satisfy the demanding standards set out in *Schlup* and *Sawyer*. For essentially the same reasons that Marcyniuk cannot demonstrate a freestanding claim of actual innocence, he has not established actual innocence to excuse procedural default. He has not demonstrated that, in light of new, reliable evidence, it is more likely than not that no reasonable juror would have found him guilty of capital murder. *Schlup*, 513 U.S. at 324. He has not shown by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. *Sawyer*, 505 U.S. at 336.

* * *

For the reasons stated, Marcyniuk's petition for writ of *habeas corpus*, *No. 1*, will be dismissed with prejudice. Judgment will be entered accordingly.

SO ORDERED this 11th day of July, 2018.

JAMES M. MOODY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX A

Claim 1—Marcyniuk's constitutional rights were violated because there was insufficient evidence to convict him; he is innocent of capital murder and residential burglary.

Claim 2—Marcyniuk's constitutional rights were violated because he was incompetent to stand trial.

Claim 3—Marcyniuk's right to a fair, impartial, and representative jury was violated.

Claim 3.1— Jury bias due to pretrial publicity.

Claim 3.2—Violation of "fair cross-section" requirement.

Claim 3.3—Use of pretrial off-the-record peremptory strikes and jury questionnaires.

Claim 3.4—Denial of individual, sequestered *voir dire*.

Claim 3.5—Exclusion of jurors not substantially impaired under *Witherspoon*.

Claim 3.6—Omission of pretrial jury selection and jury questionnaires from the record.

Claim 3.7—Failure of the prosecutor to disclose his relationship with jurors.

Claim 3.8—Prosecutor's intentional exclusion of men from the jury.

Claim 3.9—Juror's failure to disclose a disqualifying experience.

Claim 3.10—Marcyniuk's right to effective assistance of counsel was violated during jury selection.

Claim 3.10.1—Failure to move for venue change.

Claim 3.10.2—Failure to object to the prosecutor's gender-based strikes.

Claim 3.10.3—Failure to move to strike Juror Brenda Bruce, or question her further.

Claim 3.10.4—Failure to object to jurors' dismissal based on their death-penalty views, or move to rehabilitate them.

Claim 3.10.5—Inadequate *voir dire*.

Claim 3.10.6—Failure to move to preserve jury questionnaires.

Claim 3.10.7—Failure to object to pretrial jury selection.

Claim 4—The trial court's errors violated Marcyniuk's right to a fair trial.

Claim 4.1—Admission of prejudicial crime scene photographs.

Claim 4.2—Allowing the prosecutor to project photographs onto a five-by-four-feet screen.

Claim 4.3—Admission of Marcyniuk's letter to Shannon Wilks.

Claim 4.4—Failure to instruct the jury to disregard the prosecutor's question about an alleged incident involving Marcyniuk forcing his way into Wilks's apartment ("Wilks incident").

Claim 4.5—Failure to instruct the jury to disregard testimony about a binoculars receipt found in Marcyniuk's vehicle.

Claim 4.6—Failure to suppress Marcyniuk's pre-*Miranda* statement to Trooper Donald Kerr.

Claim 4.7—Allowing blood-pattern analysis testimony.

Claim 4.8—Allowing a forensic examiner to testify about DNA results when a different examiner did the analysis.

Claim 4.9—Requiring Marcyniuk to wear a shock belt during trial.

Claim 5—Marcyniuk was denied effective assistance of counsel at the guilt phase.

Claim 5.1—Failure to request funds for investigation and expert assistance.

Claim 5.2—Failure to move for a competency hearing.

Claim 5.3—Failure to obtain mental-health therapy for Marcyniuk.

Claim 5.4—Failure to raise all arguments to exclude crime-scene photographs and their projection.

Claim 5.5—Failure to object to the trial court's requiring Marcyniuk to wear the shock belt during trial.

Claim 5.6—Failure to hire a forensic expert or move to preserve the crime scene.

Claim 5.7—Failure to object when crime-scene technician John Brooks testified about blood-pattern analysis without the prosecutor laying a proper foundation.

Claim 5.8—Failure to move to exclude testimony about the binoculars receipt, or asking the trial court to instruct the jury to disregard it.

Claim 5.9—Failure to object to forensic examiner Jennifer Beatty's testimony about DNA results when the tests were performed by a different forensic examiner.

Claim 5.10—Failure to renew an objection to the Wilks letter and raise all supporting arguments.

Claim 5.11—Failure to object to questioning about the Wilks incident.

Claim 5.12—Failure to object to a question about Marcyniuk breaking into Sarah Huffman's apartment and hiding in her closet—without evidence Marcyniuk was in the closet.

Claim 5.13—Failure to seek to have off-the-record bench discussions made a part of the record.

Claim 5.14—Failure to introduce Wood's cell phone to rebut the presumption that Marcyniuk entered her home with the intent to kill her.

Claim 5.15—Failure to introduce 911 calls made by Marcyniuk's father and a friend.

Claim 5.16—Failure to fully investigate, present, and argue issues of Marcyniuk's mental health.

Claim 5.16.1—Not providing Dr. Simon with a social history and mental-health history.

Claim 5.16.2—Not hiring a mitigation specialist.

Claim 5.16.3—Not arguing Marcyniuk was incompetent to stand trial.

Claim 5.16.4—Not advising Marcyniuk that he did not have to testify and should not testify.

Claim 5.16.5—Not introducing Marcyniuk's suicide note written a few years before he killed Wood.

Claim 5.16.6—Not introducing evidence of Marcyniuk's 2005 attempt to obtain mental-health treatment.

Claim 5.16.7—Not investigating a medical basis for Marcyniuk's psychiatric symptoms.

Claim 5.16.8 —Not investigating and presenting evidence that Marcyniuk met the diagnostic criteria for Autism Spectrum Disorder.

Claim 5.16.9 —Not calling Dr. Back to testify during the guilt phase.

Claim 5.16.10—Not supporting mental-health testimony with additional lay testimony and records.

Claim 5.16.11—Not presenting Marcyniuk's family history of mental illness.

Claim 5.16.12—Not raising the affirmative defense of mental disease or defect as a ground for the directed-verdict motion.

Claim 5.16.13—Arguing a verdict of not guilty by reason of mental disease or defect would result in Marcyniuk being released.

Claim 5.16.14—Conceding the affirmative defense of not guilty by reason of mental disease or defect.

Claim 5.17—Failure to object or move for a mistrial based on prosecutorial misconduct, improper questioning, or improper argument.

Claim 6—Marcyniuk was a denied a fair trial by prosecutorial misconduct.

Claim 6.1—Relying on information in Wilks's out-of-court statement to argue for the admissibility of Marcyniuk's letter to her.

Claim 6.2—Assuming facts not in evidence during Dr. Diner's cross-examination by asking about the Wilks incident.

Claim 6.3—Asking Dr. Diner about Marcyniuk breaking into Sarah Huffman's apartment and hiding in her closet—without presenting evidence Marcyniuk was in the closet.

Claim 6.4—Failure to disclose the medical examiner's email about Exhibit 57.

Claim 6.5—Arguing Marcyniuk admitted to residential burglary—based on his testimony about how he entered Wood's apartment—when the offense also requires the purpose to commit an offense punishable by imprisonment.

Claim 6.6—Introducing victim-impact testimony: messages written on a memorial for Wood, photographs, and a description of the murder as "savage."

Claim 6.7—Making inflammatory and improper closing arguments at both the guilt and penalty phases.

Claim 7—The trial court deprived Marcyniuk of a fair trial at sentencing.

Claim 7.1—Submitting the "cruel and depraved" aggravating circumstance to the jury.

Claim 7.2—Admitting improper victim-impact testimony.

Claim 7.3—Submitting a mitigating circumstance that Marcyniuk "would not pose a future danger if he is kept in a structured environment such as the Arkansas Department of Correction."

Claim 8—Marcyniuk received ineffective assistance of counsel at sentencing.

Claim 8.1—Failure to hire a mitigation specialist, who would have assisted in the investigation and gathering of mitigation evidence.

Claim 8.2—Failure to present a family history of mental illness.

Claim 8.3—Failure to develop and present Marcyniuk's mental-health history.

Claim 8.4—Introduction of prior criminal-history evidence.

Claim 8.5—Failure to object to improper victim-impact testimony.

Claim 8.6—Failure to raise prosecutorial misconduct claims.

Claim 8.7—Improper wording of a mitigating circumstance to suggest that Marcyniuk would not necessarily be housed in the Arkansas Department of Correction, if sentenced to life imprisonment.

Claim 8.8—Failure to inform the jury that it could show mercy.

Claim 8.9—Failure to argue that the jury refused to consider mental illness as a mitigating circumstance.

Claim 9—Marcyniuk's execution is constitutionally prohibited due to his mental illness.

Claim 10—Marcyniuk's execution would violate the *ex post facto* clause of the state and federal constitutions.

Claim 11—Marcyniuk was deprived of counsel, or his lawyers were ineffective, during the post-trial period.

Claim 12—Marcyniuk received ineffective assistance of counsel on appeal.

Claim 12.1—Failure to challenge Marcyniuk's residential burglary conviction.

Claim 12.2—Failure to move to remand for completion of the record.

Claim 12.3—Failure to argue Marcyniuk was incompetent to stand trial.

Claim 12.4—Failure to argue Marcyniuk was entitled to individual, sequestered *voir dire*.

Claim 12.5—Failure to raise a claim based on intentional gender-based strikes.

Claim 12.6—Failure to argue jurors were improperly excused for cause based on their death-penalty views.

Claim 12.7—Failure to challenge admission of prejudicial evidence.

Claim 12.8—Failure to raise all arguments to support exclusion of crime-scene photographs and their projection.

Claim 12.9—Failure to challenge prosecutorial misconduct.

Claim 12.10—Failure to challenge admission of victim-impact evidence.

Claim 12.11—Failure to challenge the trial court's instruction on the "cruel and depraved" aggravating circumstance.

Claim 12.12—Failure to challenge submission of the "structured setting" mitigating circumstance.

Claim 13—Marcyniuk was denied effective assistance of counsel in state post-conviction proceedings.

Claim 14—Arkansas's death-penalty scheme is applied infrequently and arbitrarily.

Claim 15—The death penalty is unconstitutional based on evolving standards of decency.

Claim 16—The Court should conduct a cumulative assessment of whether constitutional errors occurred and whether those errors were prejudicial.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-1943

Zachariah Marcyniuk

Appellant

v.

Dexter Payne, Director, Arkansas Department of Correction

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:15-cv-00226-JM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 04, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

App. 99 **Appendix D**

DECLARATION OF JAMIE REYNOLDS

I, JAMIE REYNOLDS, do declare as follows:

1. I am currently employed by the Washington County-County Clerk's Office located in Fayetteville, Arkansas. I was formerly employed as a deputy clerk for the Washington County Circuit Court Clerk's Office. While employed as a deputy clerk, I began working as Judge Storey's courtroom clerk in 2006 and remained in that position until 2012. I was responsible for notifying veniremen to report for jury duty when trial dates were scheduled. I handled the Zachariah Marcyniuk capital murder jury trial that was tried in Judge Storey's court. All of the potential jurors were mailed an initial questionnaire to qualify for our juror panel for each term. We had four three-month terms. A second questionnaire, that was quite lengthy, was mailed out in capital murder cases.

2. Judge Storey's office would notify me when a jury trial date was set. They would also tell me how many veniremen to pull. We had a computerized system that randomly selected individuals for the number needed by the court. The defense and the prosecution were allowed to strike 15 veniremen each, for a total of 30, prior to voir dire beginning. We would call the remaining potential jurors on the call list to notify them about when to show for court until we had enough to meet the number requested by the judge. We did not contact any of the individuals struck by the defense or prosecutor.

I declare under penalty of perjury of the laws of the State of Arkansas and the United States of America that the foregoing is true and correct to the best of my knowledge.

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Appendix D

Jamie Reynolds

JAMIE REYNOLDS

6.1.16

DATE

App. 101 **Appendix E**

DECLARATION OF PAM PENN

I, PAM PENN, do declare as follows:

1. I am currently employed as a deputy clerk in the Washington County Circuit Court Clerk's Office for the Washington County Circuit Court located in Fayetteville, Arkansas. August of 2016 will make my 10th year being employed as a deputy clerk with our office. I am currently the criminal court clerk assigned to Judge Mark Lindsay's court in Division VI. Judge Lindsey handles 75% of the criminal cases. I was assigned to Judge William Storey for a short period of time before being assigned to Judge Lindsey's court. My job duties also consist of providing training to the other deputy clerks on the process of the juror system used in our office. Each judge has a deputy clerk assigned to their court from our office.

2. The potential juror information maintained by the deputy clerk assigned to each judge is entirely different from the information filed in the circuit court's case file. The juror information maintained by the deputy clerk is not included in the case file. We each maintain our own records regarding the potential juror panel information used for a trial. I currently maintain the juror information file for the Zachariah Marcyniuk case. Mr. Marcyniuk was convicted and sentenced to death by jury trial on capital murder charges out of Washington County.

3. In Washington County, we have four three-month terms for jury duty a year. At the beginning of a new term, roughly 500 questionnaires are mailed out to prospective jurors. We usually receive about 40% of the 500 questionnaires mailed. Once we receive the

completed questionnaires to qualify a person to be a juror, that information is entered into our juror database system.

4. Judge Storey handled death penalty cases differently from his other cases. Judge Storey allowed the prosecution and the defense to strike a number of veniremen before they were summoned to appear in court. The veniremen struck prior to voir dire by the defense attorney or prosecutor did not count toward peremptory strikes. The judge may have also excused a venireman because of a schedule conflict due to vacation, medical reasons or some other reason. Those struck or excused were not notified by letter or phone call to appear. They simply were not contacted to appear after being struck or excused. The veniremen left on the call list were notified to show up for jury duty. That was how Judge Story did it in his death penalty cases. I was not the deputy clerk that handled the Zachariah Marcyniuk jury trial. Judge Storey was the judge for both the Zachariah Marcyniuk and Gregory Decay jury trials. Jamie Reynolds was the deputy clerk assigned to Judge Storey's court at that time. Jamie Reynolds is currently employed by the Washington County-County Clerk's Office.

5. On May 25, 2016, I met with Joseph Cummings, III, an investigator with the Federal Public Defender Office and relayed the foregoing to him. I provided Mr. Cummings with a copy of the juror information maintained by my office on the Marcyniuk case. The file includes a copy of the Juror Attendance Summary, a redacted copy, excluding the addresses and contact information. A copy of the Juror Call List, and a copy of the 15 veniremen struck by the defense attorney and a copy of the 15 veniremen struck by the prosecutor prior to voir dire in the Marcyniuk case. Before speaking with Mr. Cummings, I had not talked to anyone representing

Mr. Marcyniuk regarding the jury summoning and selection process in his case. I would have provided the information and the documents described had I been asked.

I declare under penalty of perjury of the laws of the State of Arkansas and the United States of America that the foregoing is true and correct to the best of my knowledge.

Pam Penn

PAM PENN

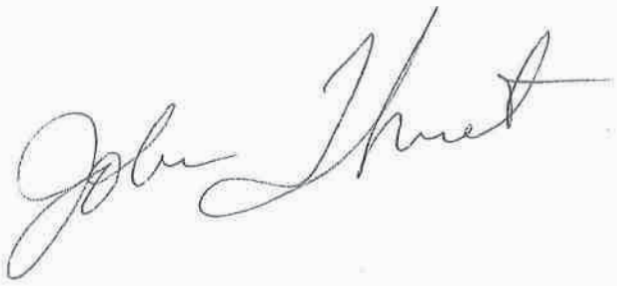
6/1/16

DATE

Blomgren, lyle
Coon, Jean
Franklin, Connie
Hillbrand, John
Houghland, Lee Ann
Husted, William
Kline, Leslie
Means, Shannon
Moses, Sara
Murphy, Gail
Page, Candace
Pettey, Uli
Rogers, Sharon
Skaggs, Meredith
Toll, Beverly

This is my list of 15 that I would choose to strike before calling them as potential jurors.

Thanks



DEFENSE LIST TO STRIKE
FROM JURY PANEL
State of Arkansas v. Zachariah Scott Maryniuk
Washington Circuit, CR-08-475-1

1. Lester A. Coger
2. Larry Bowerman
3. Kent Ellis Barron
4. Rex C. Dodge
5. Daniel W. Hudgins
6. Clyde Allen Shults
7. Glenda Ruth Richert
8. James Clifford Walker
9. James Michael Cate
10. Rebecca Ruth Sisco
11. Cynthia Jean Seidman
12. Michael Allen Gough
13. Whitnie R. Lushbaugh
14. Titus D. Eldredge
15. Mardy Lee Ann Brooks

Don't Call Harold Vowell

C E R T I F I C A T E

I, Amy Jeffers-Pense, Official Court Reporter within and for the Fourth Judicial District, First Division, of Washington County, Arkansas, hereby certify that I recorded the proceedings by stenomask recording in the matter of **STATE OF ARKANSAS VS. ZACHARIAH MARCYNIUK, CASE NO. CR-2008-475-1**, held on the 13th day of November, 5th day of December and the 8th through 12th days of December, 2008, in Washington County, before the Honorable WILLIAM A. STOREY; that said recording has been reduced to a transcription by me, and the foregoing pages numbered 236 through 1462 constitute a true and correct transcript of the proceedings held to the best of my ability, along with all items of evidence admitted into evidence. I further certify that I am a disinterested party to this action and that I am neither of kin nor counsel to any of the parties hereto. The cost incurred by the Defendant for said appeal record is $4655.20.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal on this 3rd day of June, 2009.

Amy Jeffers-Pense
Supreme Court Certified No. 660

1464

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

CERTIFICATE OF CIRCUIT CLERK

I, Bette Stamps, Circuit Clerk in and for the County of Washington, State of Arkansas, do hereby certify that the above and foregoing is a true and complete transcript of the supplemental record had and done in **CR 2008-475-1**, State v. Zachariah Marcyniuk and that the following is a true and accurate statement of the costs incurred by the respective parties thereto as reflected by the records of my office.

	PLAINTIFF	DEFENDANT
Clerk's Costs:	_____	_____
Sheriff's Costs:	_____	_____
Cost of Witnesses:	_____	_____
Cost of Appeal Transcript	_____	$4655.20
TOTAL COSTS:	_____	_____

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my office on this 9 day of JUN, 2009.

Bette Stamps, Circuit Clerk

by _____
Deputy Clerk

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Appendix H

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR08-475-1

ZACHARIAH MARCYNIUK DEFENDANT

ORDER

Now on this 18 day of December, 2008, pursuant to the provisions of Rule 10 of the Rules of Appellate Procedure--Criminal, the Court finds:

1. That on the 11th day of December, 2008, a jury found Zachariah Marcyniuk guilty of capital murder:

2. That on the 12th day of December, 2008, Zachariah Marcyniuk was sentenced to death.

3. That by reason of the foregoing, Bette Stamps, Circuit Clerk, should be and is hereby ordered and directed to file a notice of appeal on behalf of Zachariah Marcyniuk within 30 days after the entry of said judgment.

IT IS SO ORDERED.

WILLIAM A. STOREY
Circuit Judge

2008 51585

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
DIVISION 1 DISTRICT 4
STATE OF ARKANSAS

STATE OF ARKANSAS — PLAINTIFF

VS — CASE NO. CR 2008-475-1

ZACHARIAH MARCYNIUK — DEFENDANT

NOTICE OF APPEAL FROM JUDGEMENT IMPOSING DEATH SENTENCE

CONVICTION(S) APPEALED: CAPITAL MURDER

DATE OF ENTRY OF JUDGEMENT: 12-12-2008

SENTENCES: Offense 1: DEATH
Offense 2: DEATH

INDIGENT: ( ) YES (X) NO

NAME AND COMPLETE ADDRESS OF:
1. COURT REPORTER(S)

Amy Pense _____ 479-444- 1562_____
280 North College, Suite 401_____ Fayetteville ___AR____72701____

2. DEFENDANT'S TRIAL COUNSEL

W H Taylor_____ 479-443-5222
P. O. Box 8310 – 303 E. Millsap _____ Fayetteville____AR____ 72702

THE COURT REPORTER SHALL IMMEDIATELY PREPARE THE ENTIRE RECORD AND TRANSMIT IT IN ACCORDANCE WITH RULE 10 (a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE –CRIMINAL.

THIS NOTICE OF APPEAL MUST BE GIVEN WITHIN THE TIME SPECIFIED IN RULE 2(a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE – CRIMINAL.

I certify that I have served a copy of this notice of appeal on all parties or their representatives involved in the cause and on the court reporter by mailing a copy of the notice of appeal to the parties or their representatives, to the court reporter, and to the Attorney General on this 22 day of December, 2008.

Bette Stamps, CIRCUIT COURT CLERK

ARKANSAS CODE

App. 111 Appendix I

OF 1987 ANNOTATED

COURT RULES

VOLUME 2

2008 Edition

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Under the Direction and Supervision of the
ARKANSAS CODE REVISION COMMISSION

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Senator Shawn Womack
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Honorable William G. Wright
Honorable Don M. Schnipper
Honorable Cynthia Nance, *Dean, University of Arkansas at Fayetteville, School of Law*
Honorable Chuck Goldner, *Dean, University of Arkansas at Little Rock, William H. Bowen School of Law*
Honorable Warren T. Readnour, *Senior Assistant Attorney General*
Honorable David Ferguson, *Director of the Bureau of Legislative Research*

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the jury's verdict of guilty because such an appeal by the state, if successful, results in reinstatement of the verdict of guilty and does not subject the defendant to a second trial.

Rule 10. Automatic appeal and mandatory review in death-sentence cases; procedure on affirmance.

(a) *Automatic appeal.* Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty (30) days after entry of judgment. The notice of appeal shall be in the form annexed to this rule. The court reporter shall transcribe all portions of the criminal proceedings consistent with Article III of the Rules of the Supreme Court and shall file the transcript with the circuit clerk within ninety (90) days after entry of the judgment. Within thirty (30) days after receipt of the transcript, the circuit clerk shall compile the record consistent with Article III and shall file the record with the clerk of the Arkansas Supreme Court for mandatory review consistent with this rule and for review of any additional issues the appellant may enumerate.

(b) *Mandatory review.* Whenever a sentence of death is imposed, the Supreme Court shall review the following issues in addition to other issues, if any, that a defendant may enumerate on appeal. Counsel shall be responsible for abstracting the record and briefing the issues required to be reviewed by this rule and shall consolidate the abstract and brief for such issues and any other issues enumerated on appeal. The Court shall consider and determine:

(i) pursuant to Rule 4-3(h) of the Rules of the Supreme Court and Ark. Code Ann. § 16-91-113(a), whether prejudicial error occurred;

(ii) whether the trial court failed in its obligation to bring to the jury's attention a matter essential to its consideration of the death penalty;

(iii) whether the trial judge committed prejudicial error about which the defense had no knowledge and therefore no opportunity to object;

(iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;

(v) whether the trial court erred in failing to take notice of an evidentiary error that affected a substantial right of the defendant;

(vi) whether the evidence supports the jury's finding of a statutory aggravating circumstance or circumstances; and

(vii) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

(c) *Procedure on affirmance.* When a judgment of death has been affirmed, the denial of post-conviction relief has been affirmed, or a mandate has been returned from the United States Supreme Court, and the day of execution has passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance or return of mandate and judgment, to the end that a warrant for the execution of the judgment may be issued by the Governor. Such certificate shall operate to dissolve any stay of execution previously entered by the Supreme Court or any stay of execution previously entered by a circuit court pending disposition of a petition for post-conviction relief.

FORM: CLERK'S NOTICE OF APPEAL TO THE ARKANSAS SUPREME COURT IN DEATH-SENTENCE CASE PURSUANT TO RULE 10 OF THE RULES OF APPELLATE PROCEDURE — CRIMINAL

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

DIVISION _____ DISTRICT _____

STATE OF ARKANSAS

_____ PLAINTIFF

vs. Case No. _____

_____ DEFENDANT

NOTICE OF APPEAL FROM JUDGMENT IMPOSING DEATH SENTENCE

CONVICTION(S) APPEALED (list all offenses appealed): _____

_____

_____

DATE OF ENTRY OF JUDGMENT: _____

SENTENCE(S) (List all sentences in addition to sentence(s) of death):

_____

_____

INDIGENT: ( ) YES ( ) NO

NAME AND COMPLETE ADDRESS OF:

1. COURT REPORTER(S) (List all court reporters; use additional pages if needed):

_____

(name) (telephone)

_____

(address) (city) (state) (zip code)

_____

(name) (telephone)

_____

(address) (city) (state) (zip code)

2. DEFENDANT'S TRIAL COUNSEL (List all attorneys; use additional pages if needed):

_____

(name) (telephone)

_____

(address) (city) (state) (zip code)

_____

(name) (telephone)

_____

(address) (city) (state) (zip code)

THE COURT REPORTER SHALL IMMEDIATELY PREPARE THE ENTIRE RECORD AND TRANSMIT IT IN ACCORDANCE WITH RULE 10(a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL.

THIS NOTICE OF APPEAL MUST BE GIVEN WITHIN THE TIME SPECIFIED IN RULE 2(a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL.

I certify that I have served a copy of this notice of appeal on all parties or their representatives involved in the cause and on the court reporter by mailing a copy of the notice of appeal to the parties or their representatives, to the court reporter, and to the Attorney General on this _____ day of _____, 20____.

_____
CIRCUIT COURT CLERK

(Amended July 6, 1981; adopted and amended July 10, 1995, effective January 1, 1996; amended January 13, 2000; amended July 9, 2001, effective for all cases in which the death penalty is imposed on or after August 1, 2001.)

Reporter's Notes to Rule 10 (1995): This rule is former ARCrP 36.12, with grammatical changes and amended only by the addition of the last sentence to make it clear that stays are dissolved automatically when either the Arkansas Supreme Court or the United States Supreme Court affirms a judgment of death.

Addition to Reporter's Notes, 2000 Amendment: The rule was clarified with regard to the dissolution of a stay of execution after the denial of post-conviction relief has been affirmed on appeal. (See Ark. R. Crim. P. 37.5 (g)(ii) for dissolution of stays of execution when there is no appeal.)

ATTORNEY GENERAL
LESLIE RUTLEDGE
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Asher Steinberg
Assistant Solicitor General

Direct Dial: (501) 682-1051
asher.steinberg@arkansasag.gov

November 23, 2021

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Marcyniuk v. Payne*, No. 19-1943

Dear Mr. Gans:

In his reply brief, Marcyniuk argues at length that the Arkansas Supreme Court would have entertained his public-trial and right-to-be-present claims absent contemporaneous objection. Reply Br. at 13-18. This premise is essential to Marcyniuk's case. Without it, not only can't he show prejudice in his denial-of-an-appeal claim, he cannot show cause for the procedural default of his underlying claims, as his only theory of cause assumes those claims were defaulted on appeal. That premise, however, is false; Marcyniuk defaulted the claims at trial when his counsel failed to object.

As to Marcyniuk's public-trial claim, the Arkansas Supreme Court "requires a contemporaneous objection to preserve" public-trial claims. *Friday v. State*, 561 S.W.3d 318, 324 (Ark. 2018). It has even refused to consider public-trial claims when a defendant objected below to the public's exclusion, but "did not object on [public-trial] grounds." *Callaway v. State*, 246 S.W.3d 889, 890 (Ark. 2007). It has only entertained unpreserved public-trial claims when the exclusion was "not known by [defendant] *and his counsel*." *Schnarr v. State*, 2017 Ark. 10, at 11 (emphasis added); *see also Douglas v. State*, 511 S.W.3d 852, 854 (Ark. 2017) (same).

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As to Marcyniuk's right-to-be-present claim, the Arkansas Supreme Court has held for over a century that counsel may waive a defendant's right to be present and is presumed to have authority to do so—even when the defendant subsequently professes ignorance of proceedings in his absence or the waiver. *Davidson v. State*, 158 S.W. 1103, 1107-08 (Ark. 1913); *see also Bledsoe v. State*, 39 S.W.3d 760, 765-66 (Ark. 2001); *Martin v. State*, 497 S.W.2d 268, 272 (Ark. 1973). And it has also held that "fail[ing] to object" to the defendant's absence is a waiver. *Clayton v. State*, 906 S.W.2d 290, 295 (Ark. 1995); *see also Durham v. State*, 16 S.W.2d 991, 992 (Ark. 1929) ("[T]he attorney for the defendant was present and did not make any objection [to defendant's absence] . . . Consequently, he will be deemed to have waived any error of the court in this respect.").

Therefore, Marcyniuk's public-trial and right-to-be-present claims were defaulted at trial.

Respectfully submitted,

/s/ *Asher L. Steinberg*
Asher L. Steinberg
Assistant Solicitor General

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on November 23, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Asher L. Steinberg*
Asher L. Steinberg

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ZACHARIAH MARCYNIUK,
Appellant,
v.
DEXTER PAYNE,
Director, Arkansas Department of Correction,
Appellee

No. 19-1943

CAPITAL CASE

MOTION TO STRIKE APPELLEE'S RULE 28(j) LETTER

Appellant Zachariah Marcyniuk respectfully requests that the Court strike a letter allegedly authorized by the Fed. R. App. P. 28(j) filed by the government. Doc. 5101249 (Nov. 23, 2021). The letter is an impermissible sur-reply filed without leave of Court, which consists entirely of argument that could have been included in the government's brief. It thus falls outside the scope of that limited rule and is barred by this Court's precedent.

The purpose of Rule 28(j) is to allow parties to apprise the Court of "supplemental authorities." As this Court has held, "Rule 28(j) is not a vehicle for parties to say what they could and should have argued in their briefs" and it may not be used by any party to raise new arguments. *Sasser v. Hobbs*, 735 F.3d 833, 841 n.3 (8th Cir. 2013) (granting motion to strike); *United States v. Mathison*, 518 F.3d 935, 942 (8th Cir. 2008) (declining to consider argument raised for the first time in Rule 28(j) letter).

In Marcyniuk's Opening Brief filed on March 8, 2021—without conceding that such showing is necessary—Marcyniuk argued that he can show actual prejudice from denial of his right to appellate review and denial of his right to be present because, in part, the outcome of his direct appeal and post-conviction proceedings would have been different. Opening Br. at 38–45. Marcyniuk also argued that in addition to rendering his trial fundamentally unfair, his trial counsel's ineffective performance was prejudicial because it affected subsequent appeals. Opening Brief at 57–59, 64–66. In arguing this point, Marcyniuk cited Arkansas Supreme Court jurisprudence, including *Schnarr v. State*, 2017 WL 374727 (Ark. Jan. 26, 2017), and other Arkansas state cases on point.

The government responded six months later, on September 9, 2021, arguing that Marcyniuk had to make a contemporaneous objection at trial to preserve a constitutional error. Response at 55–56. Marcyniuk responded to this argument in his Reply brief at 13–18, filed with this Court on November 18, 2021.

Without obtaining leave of Court, the government then filed an impermissible sur-reply masquerading as a Rule 28(j) letter. In this sur-reply, the government re-raises its contemporaneous objection argument, including citing *Schnarr* and other cases at least several years old. It effectively circumvents this Court's order denying the government's motion to file an overlength Response. Doc. 5072928 (Sept. 3, 2021). It also raises a new argument based on waiver under state law. The most recent case cited by the government in support of that

argument is 20 years old. Finally, the government asserts— incorrectly and without any basis or citations—that Marcyniuk's claims were defaulted at trial.

The government had every opportunity to raise these arguments in its Response. Now, on the eve of oral argument, the government has filed an alleged Rule 28(j) letter, not "setting forth the citations" of "pertinent and significant authorities [which] come to a party's attention after the party's brief has been filed," Fed. R. App. P. 28(j), but instead presenting this Court with new and additional responsive arguments.

Rule 28(c) prohibits filing sur-reply briefs without leave of court and certainly, no party is permitted to raise arguments for the first time in either sur-reply or a Rule 28(j) letter. *United States v. Thompson*, 560 F.3d 745, 751 (8th Cir. 2009); *Mathison*, 518 F.3d at 942; *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 917 n.3 (8th Cir. 2007); *United States v. Kicklighter*, 413 F.3d 915, 918 (8th Cir. 2005); *Harstad v. First American Bank*, 39 F.3d 898, 905 (8th Cir. 1994). And when parties cite stale cases in support of arguments that could have been included in the response brief, this Court as well as other circuit courts have granted motions to strike such letters. *Sasser*, 735 F.3d at 841 n.3; *see also Underwood v. City of Bessemer*, 11 F.4th 1317, 1321 n.1 (11th Cir. 2021) (striking the letter as exceeding the scope of Rule 28(j) because it "reasserts arguments from the briefs and cites to cases that were available to the Defendants before oral argument"); *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 n.1 (9th Cir. 2002) (striking the 28(j) letter "because it

makes new contentions not raised in the briefs or in the district court"); *cf. Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 329 (6th Cir. 2011) (admonishing counsel because they "have flouted the rules of this Court by filing numerous unauthorized letters, responses, and replies under the guise of Rule 28(j)").

Allowing the government to present arguments for the first time in a Rule 28(j) letter prejudices Marcyniuk in a number ways. First, Marcyniuk has no meaningful opportunity to respond to these new arguments, especially since they involve complex issues of state law and timing of procedural default. The limitations found in a Rule 28(j) letter prevent Marcyniuk from being able to respond adequately. The Federal Rules of Appellate Procedure contemplate that responses to these issues should be made in a Reply brief. Second, having to respond to these arguments on the eve of oral argument diverts counsel attention from preparation for the argument. The government had six months to research and respond to Marcyniuk's arguments. Nothing in the government's letter is a new legal authority. The arguments made here could have easily been made in its Response brief filed with this Court back in September and responded to by Marcyniuk in due course in the Reply Brief.

Therefore, Marcyniuk requests the Court to strike the government's letter since it presents argument that could easily have been made in its Response. In the alternative, Marcyniuk requests that the oral argument be postponed and the Court order additional briefing on the issues raised for the first time by the government in its letter.

DATE: December 2, 2021

Respectfully submitted,
LISA G. PETERS
FEDERAL DEFENDER

By:

Nadia Wood, MN Bar No. 091334
Assistant Federal Public Defender
Federal Public Defender Office
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114
Nadia_Wood@fd.org

Counsel for Zachariah Marcyniuk

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing Motion complies with requirements of Fed. R. App. 27(d) because, excluding the parts of the document exempted by FRAP 32(f), that document contains 963 words.

Nadia Wood, AFPD

CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ZACHARIAH S. MARCYNIUK **APPELLANT**

V. **CASE NO. 19-1943**

DEXTER PAYNE, Director,
Arkansas Division of Correction **APPELLEE**

AN APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

THE HONORABLE JAMES M. MOODY, JR.
DISTRICT JUDGE

RESPONSE TO MOTION TO STRIKE APPELLEE'S RULE 28(j) LETTER

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: Asher Steinberg
Arkansas Bar No. 2019058
Assistant Solicitor General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-1051 [phone]
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asher.steinberg@arkansasag.gov

ATTORNEY FOR APPELLEE

On November 23, 2021, 22 days before oral argument in this case, the State filed a 350-word letter under Federal Rule of Appellate Procedure 28(j) to advise the court of "pertinent and significant authorities [that] c[a]me to [the State's] attention after [its] brief ha[d] been filed," in the State's review of an argument made for the first time in Marcyniuk's reply brief. That argument claimed, at considerable length, that the Arkansas Supreme Court would have excepted Marcyniuk's unpreserved claims, had they been raised on appeal, from its ordinary contemporaneous-objection rule. Reply Br. at 13-18. This argument was absent from Marcyniuk's opening brief, which merely asserted that, had the Arkansas Supreme Court reached the merits of Marcyniuk's claims, it would have reversed. Opening Br. at 44-45. In researching Marcyniuk's new argument in preparation for oral argument, a number of "pertinent" authorities "c[a]me to [the State's] attention" that directly refuted Marcyniuk's argument, and the State "promptly advise[d]" the Court—and Marcyniuk—of those authorities. Fed. R. App. P. 28(j).

Now, rather than offer any substantive response to those authorities, as Rule 28(j) permits, *see id.* (allowing response if "promptly filed" and "similarly limited" in length), Marcyniuk has filed a 963-word motion to strike the State's 350-word letter, claiming it exceeds the bounds of Rule 28(j) for three reasons: that it relies on cases predating the filing of the State's brief, that it makes new arguments, and that it prejudices Marcyniuk. Each of these arguments is meritless.

First, Rule 28(j) does not limit citations of supplemental authorities to new cases. It permits parties to cite "pertinent and significant authorities [that] come to a party's attention after the party's brief has been filed," not just authorities that are issued after a party's brief has been filed. As Wright and Miller explain, and several courts of appeals have held, that plain language means "a Rule 28(j) letter can also be used to bring to the court's attention an authority that existed, but was not found by counsel, prior to briefing." 16AA Federal Practice & Procedure § 3974.6 (5th ed. 2021) (citing *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 431 (2d Cir. 2008); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 434 n.1 (10th Cir. 1990)). Indeed, they go on to say that an appropriate occasion for filing a 28(j) letter is "shortly before argument, when renewed research uncovers something," or "after a reply brief is filed, when new research provides an answer to a question not theretofore asked," as occurred in this case. *Id.* (quoting Magnuson & Herr, Federal Appeals Jurisdiction & Practice § 12.21 (2020)).

Second, Marcyniuk vaguely suggests the letter contains new arguments. In reality, though it *responds* to a new argument, it merely provides new (to counsel) authorities for an argument in the State's brief: that the Arkansas Supreme Court would have enforced its contemporaneous-objection rule had Marcyniuk raised his unpreserved claims on direct appeal. *See* Appellee's Br. at 55-56. In any event, Rule 28(j) was specifically amended in 2002 to remove the prohibition on

"argument," old or new, in a supplemental letter, "permit[ting] parties to decide for themselves what they wish to say about supplemental authorities." Fed. R. App. P. 28 advisory committee note (2002). "The *only* restriction upon parties is that the body of a Rule 28(j) letter . . . cannot exceed 350 words." *Id.* (emphasis added).

Third and last, Marcyniuk claims he is prejudiced by the State's letter, asserting he lacks the time to respond to it adequately, and that Rule 28(j)'s word limitations deny him the necessary space. The first contention is hardly credible given that Marcyniuk's counsel has been able to prepare, in just a week, a heavily researched, 963-word motion to strike the State's letter—nearly three times as long as a responsive letter would be. As to space, Rule 28(j) merely requires parity; a 350-word letter should only need a 350-word response. But if Marcyniuk believes Rule 28(j)'s limitations are inadequate, the proper means to raise that concern is not a motion to strike the State's letter, but a motion to file an overlength response.

In truth, the only prejudice here would be that created by striking the State's letter. Rather than respond to the century of law on Arkansas's procedural rules therein, Marcyniuk proposes the Court decide this case and reverse a judgment in the State's favor by ignoring what its procedural rules really are. The Court should reject that request and consider the State's authorities and any response thereto.

CONCLUSION

The Court should deny Marcyniuk's motion to strike the State's Rule 28(j) letter.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: /s/ Asher Steinberg
Asher Steinberg
Arkansas Bar No. 2019058
Assistant Solicitor General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-1051 [phone]
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asher.steinberg@arkansasag.gov

ATTORNEYS FOR APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that that this response contains 766 words of text, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and is therefore in compliance with the type-volume limitation specified in Fed. R. App. P. 27(d)(2)(A).

In compliance with 8th Circuit R. 28(h), I further certify that the electronic version of this brief was virus-free when it was submitted to the Court.

/s/Asher Steinberg
ASHER STEINBERG

ATTORNEY GENERAL
LESLIE RUTLEDGE
ARKANSASAG.GOV

Asher Steinberg
Assistant Solicitor General

Direct Dial: (501) 682-1051
asher.steinberg@arkansasag.gov

December 8, 2021

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Marcyniuk v. Payne*, No. 19-1943

Dear Mr. Gans:

Under Federal Rule of Appellate Procedure 28(j), I write to inform the Court that the appellee may refer at oral argument to the holdings of *Young v. Bowersox*, 161 F.3d 1159, 1161 (8th Cir. 1998), and *United States v. Kehoe*, 712 F.3d 1251, 1253-55 (8th Cir. 2013), on whether and when the discriminatory use of peremptory strikes causes prejudice under *Strickland*; and to Ark. Sup. Ct. R. 3-4(b)'s exclusion of "jury matters" from the record on appeal in criminal cases.

Respectfully submitted,

/s/ *Asher L. Steinberg*
Asher L. Steinberg
Assistant Solicitor General

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on December 8, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Asher L. Steinberg*
Asher L. Steinberg

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ZACHARIAH MARCYNIUK,
Appellant,
v.
DEXTER PAYNE,
Director, Arkansas Department of Correction,
Appellee

No. 19-1943

CAPITAL CASE

MOTION TO STRIKE APPELLEE'S SECOND RULE 28(j) LETTER

Appellant Zachariah Marcyniuk respectfully requests that the Court strike the second letter allegedly authorized by the Fed. R. App. P. 28(j) filed by the government. Doc. 5106074 (Dec. 8, 2021).

It is well established that this Court does not consider arguments "raised for the first time either at oral argument or in a 28(j) letter." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (citing *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aero. Workers*, 501 F.3d 912, 917 n.3 (8th Cir. 2007)); *Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 476 F.3d 598, 602, n.1 (8th Cir. 2007) (finding that an issue raised for the first time at oral argument and not briefed is waived) (citing *United States v. Mitchell*, 31 F.3d 628, 633 n.1 (8th Cir. 1994) (finding that an argument raised for the first time at oral argument is waived under the general rule that issues not addressed in an opening brief are waived)); *United States v. Larison*, 432 F.3d 921, 923 n.3 (8th Cir. 2006) ("We do not consider arguments raised for the first time at oral argument.").

One circuit, which considered this issue at length, refused to allow "tactical sandbagging" of the kind that the government is engaged in here:

> The proper function of Rule 28(j) letters, after all, is to advise the court of "new authorities" a party has learned of after oral argument, not to interject a long available but previously unmentioned issue for decision. *See* Fed. R. App. P. 28(j). Allowing a party to convert the rule to an entirely new and different purpose—allowing Rule 28(j) letters to be used to introduce any sort of new issue after briefing is complete—risks leaving opponents with no opportunity (at least if they abide the rules of appellate procedure) for a proper response; it risks an improvident opinion from this court by tasking us with the job of issuing an opinion without the full benefits of the adversarial process; and it invites an unsavory degree of tactical sandbagging by litigants in future cases: why bother pursuing a potentially winning issue at the outset when you can wait to introduce it at the last second and leave your opponent without the chance to respond?

Niemi v. Lasshofer, 728 F.3d 1252, 1262 (10th Cir. 2013).

The government's second letter indicates that it intends to raise several new arguments for the first time at oral argument. The authorities it cites have long been available but previously unmentioned. Moreover, these new authorities are irrelevant. Marcyniuk has not argued that gender-based discriminatory strikes constitute prejudice under *Strickland*, so cases on this point are a red herring. *See* Opening Brief at 64–66 (arguing that Marcyniuk can demonstrate *Strickland* prejudice because his trial counsel's deficient performance deprived him of a fair appellate review, the outcome of which likely would have been different had counsel preserved the record). Marcyniuk did argue that he can demonstrate that trial counsel's engagement in off-the-record jury selection rendered his trial

fundamentally unfair under the factors articulated in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913 (2017): the duration of the closure, whether it was initiated by the judge, whether other members of the venire who did not become jurors could observe the proceedings, whether there was a record made of the proceedings and if it indicates "any basis for concern, other than the closure itself." *See* Opening Brief at 61–64. Under *Weaver*, gender-based strikes—and failure of the defense attorney to challenge the state's strikes—show a "basis for concern," which is that the closure of the courtroom resulted in misbehavior by the participants. But it is just one of many factors that weigh in Marcyniuk's favor. *See* Opening Brief at 61–63 (applying *Weaver* factors). Both cases that the government cites in its second 28(j) letter pre-date *Weaver* and serve only to muddy previously-briefed issues.

Likewise, Arkansas Supreme Court Rule 3-4(b)[1] the government cites for the first time in its second 28(j) letter is irrelevant in death penalty cases where the court has a statutory obligation to review the entire record for errors. Ark. Code Ann. § 16–91–113(a) ("[W]here either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant."). Lack of a complete record is grounds for reversal. *See, e.g.*, *Romes v. State*, 139 S.W.3d 519 (Ark. 2003) (reversing because the record in a

[1] Arkansas Supreme Court Rule 3-4(b) (2009) states as follows: "The record shall not include the impaneling or swearing of the jury, the names of the jurors, or any motion, affidavit, order, or ruling in reference thereto unless expressly called for by a party's designation of the record." The Rule has since been amended and the cited section appears as Rule 3-4(c).

capital case lacked transcript of voir dire); *Jacobs v. State*, 939 S.W.2d 824, 827 (Ark. 1997) ("Our rules require us to examine the record for all errors prejudicial to the defendant in such cases. . . . Without an adequate appellate record, such a review is impossible. We are left with no choice but to reverse the conviction and remand the case for a new trial."); *cf. Huff v. State*, 2012 Ark. 182, 2 (2012) (order to supplement the record with the missing voir dire transcript even though "[n]either side asserts that the circuit court made any rulings prejudicial to appellant during . . . jury selection, or voir dire," because "we cannot say that we have reviewed the record for adverse rulings unless we are provided with a complete record. "). In Marcyniuk's case, the Notice of Appeal filed by the Circuit Court Clerk does designate "the entire record" (Add. 112), which the same Circuit Court Clerk later certified as "true and complete" (Add. 115). That record does contain jury matters normally excluded by Ark. Sup. Ct. R. 3-4—but expected in a capital case that requires the entire record—such as impaneling and swearing of the jury, voir dire, names of the jurors, written and verbal motions to strike the jury panel, and corresponding rulings. Because jury selection must be reviewed in a capital case and some, but not all, "jury matters" were included in the official record in Marcyniuk's case, Rule 3-4(b) is irrelevant.

It is obvious that new counsel for the government who entered his appearance after the briefing was completed is unhappy with the arguments made by his predecessor. That alone, however, is not grounds to allow a party to multiply the issues that were not raised in the briefs; undertake end-runs around

other procedural rules, such as word limits on principal briefs;[2] and burden the Court with citations to irrelevant authorities. *See In re Target Corp. Customer Data Sec. Breach Litig.*, 855 F.3d 913, 918–19 (8th Cir. 2017) (Shepherd, J., dissenting). These new arguments are waived and should not be considered by this Court.

Given that in his Motion to Strike the government's first 28(j) letter Marcyniuk has already pointed out that no party is permitted to raise arguments for the first time in a Rule 28(j) letter or at oral argument, this second filing appears to be made in bad faith and for the purposes of prejudicing Marcyniuk. In light of the government's persistence in vexatious filings, Marcyniuk asks that in addition to striking both letters, the Court direct the government to limit its oral argument and any future 28(j) letters to the issues actually briefed by the parties. Preparing for appellate oral argument requires many skills, clairvoyance should not be one of them. *Cf. Ecimos, LLC v. Nortek Glob. HVAC, LLC*, 736 F. App'x 577, 584 (6th Cir. 2018).

DATE: December 9, 2021

Respectfully submitted,
LISA G. PETERS
FEDERAL DEFENDER

By:

Nadia Wood, MN Bar No. 0391334
Assistant Federal Public Defender

[2] The State's Response is certified as containing 12,919 words, only 81 words short of the limit set by Rule 32(a)(7)(B)(i), which this Court declined to expand in its Order dated September 3, 2021.

Federal Public Defender Office
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114
Nadia_Wood@fd.org

Counsel for Zachariah Marcyniuk

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing Motion complies with requirements of Fed. R. App. 27(d) because, excluding the parts of the document exempted by FRAP 32(f), that document contains 1,319 words.

Nadia Wood, AFPD

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-1943

Zachariah Marcyniuk

Appellant

v.

Dexter Payne, Director, Arkansas Department of Correction

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:15-cv-00226-JM)

ORDER

Appellant's motion of December 9, 2021, to strike the appellee's Rule 28(j) citation filed December 8, 2021 has been considered by the court and is denied.

December 10, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

FEDERAL PUBLIC DEFENDER ORGANIZATION
EASTERN DISTRICT OF ARKANSAS

CAPITAL HABEAS UNIT

Lisa G. Peters
FEDERAL DEFENDER

CAPITAL HABEAS CHIEF
Scott W. Braden

ASSISTANT DEFENDERS
Julie Vandiver
John Williams
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Anisha Phillips

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SENIOR INVESTIGATOR
Joseph Cummings

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Mike Stagg

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Little Rock, Arkansas
72201

PHONE NUMBER
501-324-6114

December 13, 2021

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Marcyniuk v. Payne*, No. 19-1943,
Government's 28(j) letter dated November 23, 2021

Dear Mr. Gans:

The government argues that a defendant may waive the right to be present, citing *Davidson v. State*, 158 S.W. 1103, 1107–08 (Ark. 1913). In more recent cases, the Arkansas Supreme Court has distinguished between waiver of this right in capital and non-capital cases. *Johnson v. State*, 604 S.W.2d 927, 929 (Ark. 1980) ("There is no doubt that in every case, *except a capital case*, a criminal defendant can waive the right to be present during a trial.") (citing *Taylor v. United States*, 414 U.S. 17 (1973)) (emphasis added); *cf. Ridling v. State*, 72 S.W.3d 466, 475 (Ark. 2002) (quoting *Taylor* with approval); *see also Venn v. State*, No. CR 06-584, 2007 WL 1028789, at *2 (Ark. Apr. 5, 2007) (noting a distinction between capital and noncapital cases). The lower courts follow this precedent. *See, e.g.*, *Honeycutt v. State*, No. CACR 95-1339, 1997 WL 40087, at *3 (Ark. Ct. App. Jan. 29, 1997) (citing *Taylor* and *Johnson*); *Scott v. State*, No. CACR93-1207, 1994 WL 721883, at *3 (Ark. Ct. App. Dec. 21, 1994) (same). Arkansas also codified this distinction in 1997. Ark. Code Ann. § 16-89-103(2)(A)(ii).

None of the cases cited by the government on this point are capital cases. Moreover, most of these involve a communication between a judge and a juror in the absence of the defendant and not, as in Marcyniuk's case, deprivation of the right to be present during impaneling of the jury. This line of cases was discussed and distinguished by Marcyniuk in his Opening Brief, 38–40.

Further, *Martin v. State*, 497 S.W.2d 268, 272 (Ark. 1973), also cited by the government, establishes that even in non-capital cases, an attorney's authority to waive his client's right to be present can be rebutted.

Finally, *Reams v. State*, 560 S.W.3d 441, 452–55 (Ark. 2018), holds that "fundamental" or "structural" error is reviewable in Rule 37 even when it was not raised on direct appeal. It specifically identifies the right to public trial as a structural error. *Id.* at 452; *see also* Reply Brief at 22–23. Therefore, Marcyniuk's claims were not defaulted at trial.

Respectfully submitted,

/s/ *Nadia Wood*

Nadia Wood
Assistant Federal Public Defender
Counsel for Appellant Zachariah Marcyniuk

CERTIFICATE OF SERVICE

I certify that on December 13, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Nadia Wood*

Nadia Wood, AFPD

FEDERAL PUBLIC DEFENDER ORGANIZATION
EASTERN DISTRICT OF ARKANSAS

CAPITAL HABEAS UNIT

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501-324-6114

January 10, 2022

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Marcyniuk v. Payne*, No. 19-1943

Dear Mr. Gans:

During oral argument, the Court asked for Arkansas cases on adequacy of the record on appeal. In addition to the U.S. Supreme Court cases cited in the Appellant's Brief at 41, Mr. Marcyniuk cited several Arkansas cases in his Motion to Strike filed with the Court on December 9, 2021. Per the Court's request, Mr. Marcyniuk now submits these cases in a 28(j) letter:

> Lack of a complete record is grounds for reversal. *See, e.g.*, *Romes v. State*, 139 S.W.3d 519 (Ark. 2003) (reversing because the record in a capital case lacked transcript of voir dire); *Jacobs v. State*, 939 S.W.2d 824, 827 (Ark. 1997) ("Our rules require us to examine the record for all errors prejudicial to the defendant in such cases. . . . Without an adequate appellate record, such a review is impossible. We are left with no choice but to reverse the conviction and remand the case for a new trial."); *cf. Huff v. State*, 2012 Ark. 182, 2 (2012) (order to supplement the record with the missing voir dire transcript even though "[n]either side asserts that the circuit court made any rulings prejudicial to appellant during . . . jury selection, or voir dire," because "we cannot say that we have reviewed the record for adverse rulings unless we are provided with a complete record.").

Respectfully submitted,
/s/ *Nadia Wood*
Nadia Wood, Assistant Federal Public Defender
Counsel for Appellant Zachariah Marcyniuk

CERTIFICATE OF SERVICE

I certify that on January 10, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Nadia Wood*

Nadia Wood, AFPD

ATTORNEY GENERAL
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Asher Steinberg
Assistant Solicitor General

Direct Dial: (501) 682-1051
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January 21, 2022

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Marcyniuk v. Payne*, No. 19-1943

Dear Mr. Gans:

I write in response to Marcyniuk's supplemental letters of January 10 and December 13.

January 10 Letter. In Arkansas, even in mandatory-review cases controlled by Ark. Sup. Ct. R. 4-3, if the defendant doesn't designate jury-selection records, trial-court clerks don't transmit them and the Arkansas Supreme Court doesn't review them. *See Jefferson v. State*, 276 S.W.3d 214, 230-31 (Ark. 2008); *Ellis v. State*, 233 S.W.3d 606, 609 (Ark. 2006); *O'Neal v. State*, 158 S.W.3d 175, 183 (Ark. 2004). In the cases Marcyniuk cites (with the exception of *Huff*), the defendant *did* request the full record.

December 13 Letter. Marcyniuk claims that in Arkansas the right to be present is unwaivable in capital cases. The Arkansas Supreme Court once said so in dicta in a non-capital case, *Johnson v. State*, but has since repeatedly held the opposite in capital cases. *See Terry v. State*, 600 S.W.3d 575, 585 (Ark. 2020) (defendant preserved claim as to absence in connection with first jury note, but not as to the second); *Jackson v. State*, 290 S.W.3d 574, 581-82 (Ark. 2009) (merely belated objection waived absence during jury empaneling); *Bell v. State*, 757 S.W.2d 937, 939-41 (Ark. 1988) (absence during critical pre-trial hearing).

Marcyniuk finally claims that under *Reams v. State*, 560 S.W.3d 441 (Ark. 2018), forfeited public-trial claims are reviewable in Arkansas postconviction proceedings, but concededly, not on direct appeal. That paradoxical claim is incorrect. The claims Arkansas courts entertain for the first time in postconviction (and, even more clearly, entertained at the time of Marcyniuk's 2014 postconviction proceedings) are solely those that "render the judgment of conviction void," *Rowbottom v. State*, 13 S.W.3d 904, 906 (Ark. 2000)—either because of a lack of jurisdiction over the subject matter (double jeopardy, *see id.*), or a fundamental defect in the jury, *see Collins v. State*, 920 S.W.3d 846, 849 (Ark. 1996) (less-than-12-member jury); *Reams*, 560 S.W.3d at 452-54 (fair-cross-section violation). If forfeited public-trial claims revived in postconviction, the legion of Arkansas cases holding them forfeited on direct appeal (*see* Appellee's Letter of Nov. 23, 2021) would have postconviction sequels. But no such sequels exist.

Respectfully submitted,

/s/ *Asher L. Steinberg*
Asher L. Steinberg
Assistant Solicitor General

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on December 8, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Asher L. Steinberg*
Asher L. Steinberg

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

V. NO. CR-2008-475-1

ZACHARIAH MARCYNIUK DEFENDANT

VOLUME I OF VII

APPEAL RECORD

Proceedings before the Honorable William A. Storey, Judge of the Circuit Court, Division I, 4th Judicial District, the Judgment and Commitment Order being entered on the 12th day of December, 2008.

ORIGINAL

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IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. CASE NO. CR-08-475-1

ZACHARIAH SCOTT MARCYNIUK DEFENDANT

MOTION TO ALLOW INDIVIDUAL SEQUESTERED VOIR DIRE

Comes now the defendant, by and through his attorney, and in support of his motion, states:

1. The defendant is charged with capital felony murder and is, therefore, exposed to the penalty of death.

2. Without waiving any objections properly raised, the defendant requests that he be allowed to question the prospective jurors individually during a sequestered voir dire, and that the Court allow the defendant wide latitude during voir dire on all issues relevant to the trial of this case.

3. The substance of this motion is a matter totally within the discretion of the Court, and since the defendant faces the possibility of a death sentence, the Court should exercise its discretion and allow the defense a sequestered voir dire.

4. In Hovey v. California, 28 Cal. 3d 1 (1980), the court recognized the importance of individual and sequestered voir dire in death penalty cases, noting that because of the necessity to determine potential jurors' attitudes toward the death penalty in the event there is a sentencing phase after a finding of guilt, the jury selection process necessarily focuses prospective jurors' attention on punishment, thereby creating a predisposition to convict the accused. In order to minimize the untoward effects of death qualification, the court determined the most practical and effective procedure would be individual and sequestered voir dire.

Further, individual and sequestered voir dire avoids the possibility of contamination of an entire jury panel if an individual makes a remark or remarks prejudicial to the rights of the defendant.

WHEREFORE, the defendant requests that the Court grant the defense individual sequestered voir dire and jury selection at the trial of this case.

Respectfully submitted,

ZACHARIAH SCOTT MARCYNIUK, Defendant

By: _____

W. H. Taylor, #81154
Taylor Law Partners
303 East Millsap Road
P. O. Box 8310
Fayetteville, AR 72703
(479) 443-5222
(479) 443-7842 (Fax)

CERTIFICATE OF SERVICE

I, W. H. Taylor, attorney for the defendant herein, hereby state that I have served the foregoing document by forwarding a copy of same by U. S. Mail, postage prepaid, on this 20 day _____, 2008, addressed to:

John Threet
Prosecuting Attorney
Washington County Courthouse
280 North College, Suite 301
Fayetteville, AR 72701

_____
W. H. Taylor

Motion.37

69

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. CASE NO. CR-08-475-1

ZACHARIAH SCOTT MARCYNIUK DEFENDANT

BRIEF IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Pursuant to Rule 32.2 of the Arkansas Rules of Criminal Procedure the "vior dire examination shall be conducted for the purpose of discovering basis for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges". In order to elicit adequate disclosure by prospective jurors an individual sequestered vior dire is necessary.

Due to the gravity of the offense and the extensive pretrial publicity, an individual sequestered voir dire is mandatory to assure fairness. Often a collective voir dire "fails to elicit answers which may cause even the most conscientious juror to reveal an existing prejudice". Missouri Pac. Trans. Co. v. Johnson, 197 Ark 1129, 126 S.W.2d 931; Griffin v. State, 239 Ark 431, 389 S.W.2d 900 (1965).

The Court's failure to grant a motion for an individual vior dire has resulted in prejudicial error and cause for reversal. When there is not a sufficient opportunity to evaluate jurors, the defense cannot determine whether or not to use its peremptory challenges. Fauna v. State, 265 Ark. 934, 582 S.W.2d 18 (1979); Cochran v. State, 256 Ark. 99, 505 S.W.2d 520 (1974); Griffin v. State, 239 Ark. 431, 389 S.W.2d 900 (1965).

A collective voir dire would make selection of a fair and impartial jury panel impossible. In order to ensure honesty and candor from the prospective jurors, an individual sequestered voir dire is essential.

Respectfully submitted,

ZACHARIAH SCOTT MARCYNIUK, Defendant

By: _____

W. H. Taylor, #81154
Taylor Law Partners
303 East Millsap Road
P. O. Box 8310
Fayetteville, AR 72703
(479) 443-5222
(479) 443-7842 (Fax)

CERTIFICATE OF SERVICE

I, W. H. Taylor, attorney for the defendant herein, hereby state that I have served the foregoing document by forwarding a copy of same by U. S. Mail, postage prepaid, on this 20 day May, 2008, addressed to:

John Threet
Prosecuting Attorney
Washington County Courthouse
280 North College, Suite 301
Fayetteville, AR 72701

_____
W. H. Taylor

Motion.47B

PROCEEDINGS

THE COURT: This is State of Arkansas versus Zachariah Scott Marcyniuk, CR 2008-475-1. There are a number of pending motions that at this point need to be addressed and I think most, if not all of these motions, have been filed by the Defendant. And, does the State have any motions pending that perhaps I'm not aware of or --

MR. THREET: No, Your Honor.

THE COURT: Okay. Well, will we need to take any testimony in support of any of these motions?

MR. TAYLOR: No, Your Honor.

THE COURT: Well, since they're your motions, Mr. Taylor, let's -- you can address whichever ones you prefer to address first.

MR. TAYLOR: The first thing I'd like to make a record on, Judge, and bring to the Court's attention is on the Motion To Strike Jury Panel and the Motion For A Continuance. I have previously filed that motion based on Mr. Marcyniuk appearing here in restraints and in his jail clothing. For the record, I note that he's here again today. I had asked the court yesterday to allow him to appear without restraint and to appear in civilian clothes and as I informed the Court we had the necessary clothing for

him. The Court will recall that I initially raised this issue with the Court back on May the 20th of 2008. I believe that it is gravely prejudicial for the Defendant to be appearing here today in restraint, in jail clothing. I say that against the background, Judge, that since this case has already started and that we have submitted written voir dire questionnaires to the jury panel which have been returned and as I apprised the Court in my motion that was delivered to the Court the other day, the last time Mr. Marcyniuk appeared here in restraints and in jail clothing there was that night, the Nielson audience for the local newscast was 82,413 people. Surely, some of those were jury panel members. I anticipate that tonight we'll have probably even more people since it's a Friday night. I would move once again to strike the jury panel and I would move once again for a continuance of this matter so that a new panel could be brought in, questionnaires submitted, so that the Defendant may receive a fair trial.

THE COURT: Does the State wish to respond?

MR. THREET: No, Your Honor.

THE COURT: Well, as I indicated at the conclusion of the last hearing I felt it was not appropriate in these preliminary hearings to have the

Defendant appear in civilian clothing without restraint. First, and let me try to explain this perhaps in a little more detail. First, as the issue is raised today I see there are no television cameras although apparently there were television cameras at the last hearing. Secondly, of course, security in criminal cases, felony criminal cases especially and certainly serious cases as this is, is always an issue and it's important that we keep that in mind. Third, as I indicated before, the Washington County Detention Center's website is available to the general public. The photographs of everyone incarcerated, including the Defendant, are on that website and available to the general public and there's, so that at least to a certain extent makes his residence and status available to the general public. Third, in the last -- this week alone, 21 people have been arraigned in jail clothing in this court by Judge Reynolds. Nine people this morning were in court for their 8.1 hearings all in jail clothing. The point being is it would become an administrative nightmare if every felon or every person charged with a felony incarcerated in the Washington County Jail had to be dressed in civilian clothing. It's simply just not practical. Now, with respect to Mr. Marcyniuk, of

course when the trial begins on Monday he will be in civilian clothing and your motion will be granted, Mr. Taylor. He will be perhaps restrained but no restraints visible to the potential jurors or anybody else for that matter. So I am granting your motion to that extent. Now, most importantly in my judgment is that again, as it relates to your motion to quash the jury panel and continue the case, I almost consider that as a motion to change venue and at least gave some thought to moving this case to Madison County. But nonetheless, I think the Defendant here has failed to demonstrate any prejudice here whatsoever. And as I indicated at the conclusion of the hearing we last had, you'll have an opportunity to fully examine the prospective jurors as to any preconceived notion they may have about this particular issue. So for all those reasons I'm going to once again deny your motion.

Now, we'll move to the next motion.

MR. TAYLOR: Judge, I wrote you a letter back on December the 1st, 2008, and I think that's the easiest way to get at the rest of these paper -- what I'll call paper motions that are pending before the Court. As I told the Court I have no objection to the Court ruling on motions numbered four through eight, I mean

This is the case of State of Arkansas versus Zachariah Scott Marcyniuk, CR 2008-475-1. Is the State ready to proceed?

MR. THREET: It is, Your Honor.

THE COURT: Is the Defendant ready to proceed?

MR. TAYLOR: Yes, Your Honor.

THE COURT: Will all members of the jury panel please stand and raise your right hands.

CLERK: Do you and each of you solemnly swear or affirm that you will well and truly answer all questions asked by or under the directions of the Court touching your qualification to serve as a petit juror in the case of the State of Arkansas against Zachariah Marcyniuk now pending in this court, so help you God?

(Whereupon, the panel answered affirmatively.)

THE COURT: Please be seated. Ladies and gentlemen, members of the jury panel, this is a criminal case. The State of Arkansas alleges that the Defendant, Zachariah Scott Marcyniuk on or about March 9th, of this year, committed the offenses of Capital Murder and Residential

Burglary. The Defendant denies these allegations. That basically is what the case is about. You'll hear more of the facts and details as we proceed with the trial. The State of Arkansas is represented by Prosecuting Attorney, John Threet, and assisted by Deputy Prosecuting Attorney, Bill Jones. Mr. Threet, can you tell us who you intend to call as witnesses?

MR. THREET: Your Honor, the State intends to call, I may not call all, but as for a witness list: Tara Bryant, Sean Hamley, Weng Feng Li, Sharon Wood, Officer Richard Duncan, Officer Dan Baker, Detective Jason French, Lieutenant Donnie Kerr who is with the Oklahoma Highway Patrol, Deputy Brad George who is a county deputy in Oklahoma, John Brooks, Officer Mike Parks, Russell Cable, Breanna Elliot, Michele Mustion, Alec Center, Bobby Humphries, Gisele Hardy, Jennifer Beaty, Dr. Adam Craig, and may or may not call in rebuttal and sentencing, Dr. Michael Simon, Jak Kimball, Sarah Huffman, Officer Chris Denton, Officer Elliot Luebker, Matt Wood, and Dale Wood, Your Honor.

THE COURT: Thank you. Now, as I've indicated the Defendant in this case is Zachariah

Scott Marcyniuk. Mr. Marcyniuk, would you please stand and face the jury panel.

(Whereupon, the Defendant stood and faced the panel.)

THE COURT: Thank you, sir, you may be seated. He is represented by Mr. W.H. Taylor.

MR. TAYLOR: Good morning.

THE COURT: And Steve Vowell who practice here in Fayetteville, Arkansas. Mr. Taylor, if you elect to call witnesses who might you possibly call?

MR. TAYLOR: Your Honor, Kathy Marcyniuk, Michael Marcyniuk, Janie Harriman, Sue Hammons, Dr. Brad Diner from Little Rock, Dr. Richard Back from Fayetteville, Mary Collier, Dolores Marcyniuk, Chris Harris, and perhaps the Defendant.

THE COURT: Thank you. Now, ladies and gentlemen, members of the jury panel, I know many of you have not been here before, some of you have. I'm going to ask you some questions and if you should need to respond to any of my questions would you first please stand and give us your name and then your response all in a very loud voice. It's important that we hear what you have

to say and it's a little bit difficult up here because of the acoustics in this room to hear. So I guess the point is please speak up.

Are any members of the jury panel related by blood or marriage to any of the parties, attorneys, or witnesses?

JUROR BISHOP: My name is Linda Bishop. I'm a second cousin to Sue Hammons. Also, Zach is a former student of mine.

THE COURT: You're a second cousin to one of the witnesses?

JUROR BISHOP: Yes, one of the defense witnesses.

THE COURT: Okay, well, thank you ma'am, I'm going to excuse you. Thank you very much.

JUROR BISHOP: Thank you, sir.

THE COURT: Anybody else? Do any of these attorneys presently represent you or have they represented you in the past?

JUROR SELLERS: My name is Gina Sellers and W.H. Taylor has represented my family.

THE COURT: Your name, please, ma'am? It's just so hard to hear up here.

JUROR SELLERS: Gina Sellers.

THE COURT: Well, let me ask you this. Will

that association or representation in the past, apparently your family, not you personally, will that cause you to give more weight or less weight to one side of the case?

JUROR SELLERS: No, sir.

THE COURT: You can put that aside if chosen to serve and simply decide this case on the facts as you hear them and the law as I instruct you?

JUROR SELLERS: Yes, sir.

THE COURT: Thank you. Anybody else? Do any members of the jury panel have a business or social relationship with any of the attorneys, parties, or witnesses?

JUROR CHANEY: My name is Stephanie Chaney and you have been a client of our agency for over 20 years. Does that matter?

THE COURT: Well, I think we should for the record clear this up. You're with an insurance agency and I maintain insurance through that agency.

JUROR CHANEY: Yeah.

THE COURT: I'm not a party or an attorney but let me just ask you this, Ms. Chaney, and I appreciate you calling this to our attention. Will that fact cause you any problem if chosen to

serve on this jury?

JUROR CHANEY: No.

THE COURT: In other words you can put our association aside, our business relationship, and just decide this case on the facts as you hear them and the law as I instruct you?

JUROR CHANEY: Yes.

THE COURT: Thank you very much. Anybody else? Do any of you know any of the purported facts of this case? It's gotten some media attention, both on television and newspapers. Have any of you read an article about this case? Yes, sir?

JUROR VENABLE: Are you asking if we are familiar with the case at all?

THE COURT: Yes.

JUROR VENABLE: Just newspaper-related. My son's in law enforcement so I follow it through that, that's the only reason I know.

THE COURT: And your name, please, sir?

JUROR VENABLE: Matt Venable.

THE COURT: Sir, have you formed an opinion based on what you've read in the newspapers and seen on television as to the guilt or innocence of the Defendant in this case?

JUROR VENABLE: No, sir.

THE COURT: Now, let me ask you this also, can you put aside whatever facts that you may have gotten from these news reports and decide this case only on the facts that are developed during this trial and the law as I instruct you?

JUROR VENABLE: I can do my best.

THE COURT: All right, sir, thank you. Anybody else?

JUROR CUNNINGHAM: Penny Cunningham, and I have read an article in the newspaper.

THE COURT: Same question to you. Have you formed an opinion based on that article that you read in the newspaper?

JUROR CUNNINGHAM: No, sir.

THE COURT: Can you put aside those facts that you saw or read in the article and decide this case only on the facts developed during this trial?

JUROR CUNNINGHAM: Yes, sir.

THE COURT: Thank you. Anybody else? Has anybody tried to discuss this case with you prior to coming here today? Yes, sir?

JUROR KRAUFT: Matthew Krauft. I have discussed it with my boss and a couple of

friends.

THE COURT: Well, let me ask you essentially the same question, have you formed an opinion based on those discussions about the guilt or innocence of the Defendant in this case?

JUROR KRAUFT: Somewhat.

THE COURT: Well, can you --

JUROR KRAUFT: I can probably, you know, let those go.

THE COURT: Well, we need an absolute certainty. Can you put aside whatever discussion you may have had with others about this case and simply -- and put aside that opinion, and simply decide this case on the facts as you hear them in court and the law as I instruct you?

JUROR KRAUFT: Yes, sir.

THE COURT: All right, thank you. Anybody else? Is there anybody on this jury panel who feels that they could not be fair and impartial if chosen to serve in this case?

(Whereupon, there was no response.)

THE COURT: I anticipate this case will be tried in three and a half to four days although there's certainly a possibility it'll take all week, five days. I would add that if you're

chosen to serve on this case you'll have fulfilled your obligation as jurors during this term. In other words you won't be called back. Is there anybody on the panel who could not give us a week of your time if chosen to serve on this jury? We'll start with you, yes, ma'am?

JUROR POTTER: Andrea Potter. I would have childcare issues with serving for a full week.

THE COURT: What about for four days?

JUROR POTTER: I only -- I have childcare for two days a week.

THE COURT: That's all you have?

JUROR POTTER: Yes.

THE COURT: And I assume that would be a hardship for you if you had to stay here all week?

JUROR POTTER: Yeah, I wouldn't have anyone to watch my daughter, Your Honor.

THE COURT: All right, well, I'm going to excuse you, thank you very much.

JUROR POTTER: Thank you. My name is P-O-T-T-E-R.

THE COURT: Yes, ma'am? You're next.

JUROR DIXON: Marie Dixon. I have a disabled child at home that I do not feel

comfortable leaving for that many days.

THE COURT: Well, thank you very much. I'm going to excuse you then. Is it Dixon, is that correct?

JUROR DIXON: Yes, sir.

THE COURT: Okay, thank you very much.

JUROR DIXON: Thank you, sir.

THE COURT: Yes, sir, back here.

JUROR SIMPSON: My name is Eric Simpson. I work two jobs to pay my bills and stuff. I don't know if I could go all week without working.

THE COURT: Well, you do get paid for being here but not well. Could you give us a week of your time or do you think this will just be an economic hardship for you?

JUROR SIMPSON: I think it would be a hardship, sir.

THE COURT: All right, sir, I'm gonna -- and your name, please?

JUROR SIMPSON: Eric Simpson.

THE COURT: Well, I'm going to excuse you.

JUROR SIMPSON: Thank you, sir.

THE COURT: Yes, ma'am.

JUROR OSBURN: My name is Bertha Osburn and I have a A-fib heart condition so I don't know if

I can handle that many days.

THE COURT: Well, do you think this will be a problem health wise for you?

JUROR OSBURN: It might be, yes.

THE COURT: Well, only you can tell me.

JUROR OSBURN: It goes up and down like a rocket ship.

THE COURT: Well, I'll excuse you then. Thank you very much. Yes, sir?

JUROR EMERSON: Ryan Emerson. My only question is if this trial starts today. I'm self-employed and I generally go out of town, is this trial gonna go today for the rest of this week?

THE COURT: That's correct and then your obligation for jury service would be over if you're chosen to serve. We will conclude this trial this week. I can assure you of that.

JUROR EMERSON: Okay.

THE COURT: What we're going to do now --

MR. TAYLOR: One other.

THE COURT: Yes, sir?

JUROR LANGHAM: Judge Storey, I'm Warren Langham and --

THE COURT: It's nice to see you, Mr.

Langham.

JUROR LANGHAM: Long time. My wife is 84 and she's house bound and it's difficult for us to operate unless I can be there most of the time.

THE COURT: Mr. Langham, I understand the problem and I'm going to excuse you. Thank you very much. What we're going to do now is initially draw 12 names and as your names are called if you would, please, have a seat in the jury box. Let's fill the top row first from my left to right and then the bottom row and if you are selected for this jury please keep the seat that you initially have. Ms. Clerk, draw 12 names.

CLERK: Juror Number 39, Carole Stone. Juror Number 23, Matthew Krauft. Juror Number 6, Arbor Buchanan. Juror Number 4, Linda Bolin. Juror Number 16, Debra Euculano. Juror Number 27, Barbara Markowski. Juror Number 12, Penny Cunningham. Juror Number 38, Donald Steinkrauss. Juror Number 20, Shannon Joyce. Juror Number 24, Mary Leverington. Juror Number 9, Juliann Conrow. Juror Number 19, Christina Henretty.

THE COURT: The State may voir dire the

panel.

MR. THREET: Thank you, Your Honor.

VOIR DIRE BY THE STATE

MR. THREET: What we're doing now, well, first of all I'd like to thank you for being here. Jury duty, that doesn't sound good. It is a duty, it's something you're required to be here for. It's not like you have any choice in it because that's the way our society is but that's the way our society is set up. But I don't take your time for granted, I appreciate you being here. What we're doing or going to do, the defense attorney, Mr. Taylor and I, will be asking you questions to try and determine how you feel about certain issues, to try and determine if you feel that you can be fair and objective to the State of Arkansas as well as this Defendant. My questions aren't meant to embarrass you or harass you. Please don't take them personally and if I excuse one of you from service, please don't take that personally. It may be that you would be better suited for a different trial. If you don't understand a question or I haven't asked the specific question in a way that you understand it or there is something that you want

to say more than what I said or asked about, just raise your hand and let me know.

Now, your duty as a jury if selected as jurors, your duty is to apply the law. The Judge will give you the law at the end of the trial, the Judge will give you the law and instruct you on the law. You apply that law to the facts and you determine what those facts are. Does everybody feel they can do that? Anybody have a problem with that? Have any of you, friends, family, or associates had any contact whatsoever with local, state, or federal law enforcement? Yes, ma'am, and you are Ms. Henretty?

JUROR HENRETTY: Yes. I was a jailer about seven years ago but I don't recognize any of the names, only one, Baker. But I never associated with him.

MR. THREET: And is it Henretty?

JUROR HENRETTY: Henretty, yes.

MR. THREET: Ms. Henretty, would that association cause you to feel more or less sympathy for the state of Arkansas or this Defendant?

JUROR HENRETTY: No, it would not.

MR. THREET: Okay, so you can set that aside

and decide the facts of the case on what you hear in front of you?

JUROR HENRETTY: Yes.

MR. THREET: Anyone else? Yes, ma'am, and you are Ms. Leverington?

JUROR LEVERINGTON: Leverington. Did you want just the state of Arkansas?

MR. THREET: Well, do you have --

JUROR LEVERINGTON: I have a son who is a policeman in Tulsa.

MR. THREET: Okay, will you be able to set that connection aside?

JUROR LEVERINGTON: Yes.

MR. THREET: Anyone else had any contact in any way, shape, or form with the police, with law enforcement? How about with the prosecutor's office? I know you guys got forms. There was a list of names out on those forms and I believe somebody, it may have been Ms. Henretty, knew Charles Duell?

JUROR HENRETTY: He did a personal --

MR. THREET: Case for you?

JUROR HENRETTY: Before he became a prosecuting attorney back in 2003, I think.

MR. THREET: Okay, several years back?

JUROR HENRETTY: Several years back.

MR. THREET: And did that --

JUROR HENRETTY: I haven't had any dealings with him since then.

MR. THREET: Okay, will that contact cause you to feel one way or another about this case or the facts?

JUROR HENRETTY: No, it was a child custody, child support case so it has nothing, no bearing on this at all.

MR. THREET: Okay, anyone else? Anyone just because of personal, religious, whatever reasons, doesn't feel that they can sit in judgment of somebody else? Yes, sir, and you are Mr. Krauft?

JUROR KRAUFT: Yes, sir. I -- this is really tough to be up here and look at him right now. He just looks so --

MR. THREET: Now, without going into any facts or details do you feel that you will not be able to serve as a juror and make a decision? I'll start off now saying this is a Capital Murder case. In this particular case the State is seeking the death penalty. Do you believe that you cannot sit there in judgment of him and make a decision on the guilt or innocence of this

acceptable to the State?

MR. THREET: She is, Your Honor.

MR. TAYLOR: Yes, Your Honor.

THE COURT: The following persons will constitute the jury panel to try this case: Darlene Smith, Tamara Mallard, Susan Ramey, Linda Bolin, Debra Euculano, Elaine King, Penny Cunningham, Brenda Thompson, Shannon Joyce, Mary Leverington, Brenda Bruce, Archie Dash, Mary Drain. Is the panel acceptable to the State?

MR. THREET: It is, Your Honor.

THE COURT: Acceptable to the Defendant?

MR. TAYLOR: Yes, Your Honor.

THE COURT: Ladies and gentlemen, members of the jury panel, would you once again please stand and raise your right hands.

CLERK: Do you and each of you solemnly swear or affirm that you will well and truly try the cause of the State of Arkansas against Zachariah Marcyniuk and you will render a true verdict according to the law and the evidence, so help you, God?

(Whereupon, the panel answered affirmatively.)

THE COURT: Please be seated. Ladies and

gentlemen, members of the panel who were not selected, again, I want to thank you for making an effort to be here today. This process is completely random so you shouldn't feel bad because your name was not called. As a matter of fact I've been called for the next jury panel to serve in my court so it is a random process is the point that I'm trying to make. I know this is an imposition upon your time but as I said earlier without your willingness to serve, this important civic process will not work properly. Again, if you need a statement for work purposes or other purposes if you'll see Shelly out here in the outer office, she'll take care of those statements. Thank you very much and you may now be excused.

Ladies and gentlemen, members of the jury, we're going to break here in just a few minutes.

MR. TAYLOR: I need to approach, Judge, with Mr. Threet, if I could.

(Whereupon, the following conference occurred at the bench.)

MR. TAYLOR: I don't mean to upset you, Judge, but I need to make a motion to renew my motion previously made for a continuance as it

talking about the doctor --
A Anybody would be helpful in proving any history that they have facts that would prove the history. And Dr. Back certainly could have been helpful in proving up a history of his mental illness.
Q And again, the thing that's gonna cause a juror to change their mind, whether it be guilt, innocence, mental disease or defect, whatever; I mean sometimes it can be just the slightest push, kind of like the straw that broke the camel's back.
A I don't know about that.
Q I mean, sometimes there is no rhyme or reason why jurors do things, do you agree with that? I mean, we think we know what --
A That would be speculation on my part.
Q Well, you've been practicing for 28 years.
A It would be speculation though for me to try to get into the minds of an illusive juror that I don't even know who you're talking about.
Q Okay, well how about the 12 on the jury?
A It would be speculation on my part to try to get into the mind of you or 12 people who were on this jury, Mr. James. I don't mean to be smart but no one can answer that question.
Q Well, do you have a theory that you go by when you try cases about what jurors may think about those things, what may

push them into a decision that's consistent with what you're arguing for?

A Sure.

Q Okay, and would you agree that sometimes, again, just a little more evidence can make that difference, do you agree with that?

A I suppose. But that's -- that would be speculation.

Q Well, let's look at it -- we're doing mental disease or defect defense, correct? And that's your defense, right?

A Correct.

Q Okay, and so you've got Dr. Diner to testify, you've got Dr. Simon testifying to things that are consistent with your -- he doesn't go all the way for you, but he's not hurting you like they do a lot of times in these kind of cases. So there is certainly some kind of a problem there. Do you agree?

A Right.

Q And then we have information, we have a counselor from Ozark Guidance Center that has treated him previously, two, the counselor and then you have Dr. Back, both folks that treated him prior to this who would add to the validity of this defense, correct?

A Correct.

Q One was not called and then Dr. Back was waited for the sentencing. And if you're gonna make hay, I mean, where is the best place to make hay with this defense? It's in the

guilt phase, isn't it? You get it off premeditation, I mean, you get your -- there's your life right there?

A Lawsuits are not about marching 42 witnesses up on the stand as you well know, Bill. There is no great, it's about believability and it's about whether or not the jury finds your witness credible. One witness is oftentimes vastly superior to having three or four witnesses because if the defense calls three or four witnesses on the same issue in the case, it leaves the defense open to the prosecution saying, well what did they have to bring all these people up here for if that's the truth. If he's really mentally ill why couldn't they just bring Dr. Diner in here. He's the guy that's got all the credentials. He's the guy who is board certified in forensics. So --

Q Have you heard Mr. Threet actually argue that you brought too many experts to a case?

A I have never heard him argue that because I've never brought to many experts to a case.

Q Have you ever heard any prosecutor argue that?

A I have heard David Clinger argue that.

Q All right, now let's talk about mental disease or defect, how you dealt with that in voir dire.

A Okay.

Q So that's your defense. I mean, that's the whole shebang, correct?

A Well, I don't know if it's "the whole shebang." I think it comes -- it always becomes an issue in all these cases of what a jury is gonna do is directly related to the Defendant.
Q Okay, so how did you deal with mental disease or defect in voir dire?
A Well, I'm sure you've read through the transcript. The first way we dealt with it is we did an extensive jury questionnaire in this case. I think it runs some 31 pages that gives a pretty good insight into the people who are gonna be on the jury. And then we went through those issues during voir dire, panel wise, here in court.
Q So you went over mental disease or defect with the panels, during the actual voir dire?
A I don't have a specific recollection off the top of my head about that, yay or nay, Bill. If you can point me to something.
Q I'm just, I don't know if it's in there so that's what --
A Sure.
Q I don't know where it's at so I have not found it.
A Well, it's in --
Q There's some mention of it but it's never really explained or talked about people's feelings about mental disease or defect or that defense.
A Well, I think that was raised at several different times during the voir dire as it related to how they felt about

people with emotional problems, extreme emotional disturbance, mental problems. And wouldn't you like to know what this person's mental state has been for a long period of time and if the State, if everyone is in agreement with the diagnosis being made that that adds some validity to it. Some of those issues were raised in voir dire.

Q They are discussed but the defense of mental disease or defect and what that means, and their feelings about that defense; would you agree that that's not discussed extensively with any of the jurors?

A May very well not have been.

Q And was there a technical reason for, I mean, if that's your defense why you wouldn't meet that head on in voir dire?

A Well, I think because of the questionnaires and because we had a pretty good understanding of who was gonna be on this jury. I mean, this is an unusual case. I'm not gonna deny that the voir dire section of this case was not a bit unusual. I mean, I did individual voir dire and did panel voir dire that lasted four, five, six days in capital cases. This was certainly shortened up because of this extensive questionnaire. But we were provided a whole lot of information and had a whole lot of time to look and see who was gonna be on this jury.

Q And discuss their feelings about the mental disease or defect defense?

A Not so much about the mental disease or defect but it goes through a litany of things that these jurors were -- where they were at in life and how they thought the disease -- the defense of mental disease or defect would work.
Q So it asked them how it worked?
A I'm sure you've looked at that, have you not?
Q I've seen it.
A Have you looked through the questions?
Q Yes, sir.
A Okay. It pretty well goes through and asks lots of questions about who these people are, which is what you want to know if you're gonna present a mental disease or defect case.
Q So what specifically do you need to know about somebody in order to determine whether they're a good juror for a mental disease or defect defense?
A There is no way anyone can answer that question.
Q I just thought that you just said that this gave you the information you needed to know before you made that decision.
A I think what you want in a mental disease or defect case is someone who is intelligent, someone with an education as a general rule, someone who has some worldly experiences. And generally, a well rounded compassionate person, if possible.
Q Okay. Now, can those people with all those -- let's say you have multiple people with those specific attributes, is it

possible that their position on whether mental disease or defect is a valid defense and whether they can accept that and even consider the possibility of finding someone not guilty if those elements are met. Can they differ on their opinion regarding mental disease or defect?

A I think human beings can always differ on everything.

Q So you would agree that even if they met all the parameters that you've laid out for a good person for this case, for a case like this, that they still might have differing opinions on whether it's a valid defense or whether they would even accept it?

A I suppose.

Q And so was there a tactical reason for relying on the information in the questionnaire for that information and not asking them specifically?

A I can not think of any particular tactical reason other than the fact that I felt like that by using this questionnaire I had a pretty good handle on who was gonna be on the jury. I mean, we spent a lot of time or I spent a lot of time going through those questionnaires and looking at these people's answers. I mean, there is no science to picking a jury that you can quantify. As you well know, it kind of depends on the luck of the draw sometimes, of who shows up on a panel or who the clerk draws. I mean, and but we drew a pretty typical jury panel for Washington County,

Arkansas, my recollection is -- and I don't have those questionnaires in front of me, is pretty educated group of people who had various life's experiences.

Q And is that, you have that little notebook out, is that a copy of your questionnaire?

A It is.

MR. JAMES: 7?

COURT REPORTER: 8.

Q Let me show you what's been marked for identification purposes as Petitioner's Number 8. Is that the same questionnaire that you have?

A Well, where's page one? It does. Yeah, I think the first page is missing but that's just the little fax statement.

MR. JAMES: Your Honor, at this time I'd move to introduce Defense Number 8.

THE COURT: Any objection?

MR. THREET: No objection, Your Honor.

BY MR. JAMES:

Q Do you have a copy of that with you in that little notebook?

THE COURT: Defendant's 8 will be received without objection.

(Whereupon, Defendant's Exhibit Number 8, jury questionnaire, was admitted into evidence and

appears at the end hereof.)

A I do.

MR. JAMES: Oh, thank you, Your Honor. I'm sorry.

BY MR. JAMES:

Q Let's go to page 21 on the questionnaire. Are you there?

A I see it.

Q Question Number 61, "Have you or a family member or close personal friend ever studied psychology, sociology, criminology or law?" I believe this is the beginning of the section dealing with psychological issues in this, would you agree with that?

A Appears to be.

Q Okay, so that again asks has anyone studied it, in the area of psychology? There's a number of others but it does mention psychology specifically, correct?

A Correct.

Q The next question is, "Have you ever suffered from mental disease, mental illness, or mental impairment?" And answer that yes or no. 63, "Have you or a family member or close friend ever undergone counseling or treatment for emotional, psychiatric, behavioral, or substance abuse?" And then 64, "What are your feelings, positive or negative about psychiatrists, psychologists or other mental health professionals?" It appears that that is the -- exhausts all

the questions in this questionnaire regarding psychology or psychiatric or mental disease issues of any sort. Would you agree with that?

A No.

Q What else do you point to in that regard?

A Well, go to question 68. "Name and location of your church, synagogue or place of worship. How often do you attend." That's a very important question whenever you start presenting a defense of mental disease or defect.

Q Okay, and I'd agree that it's an important question but how does that tell you whether they're gonna be a good juror for the defense of mental disease or defect?

A Go to the next part of that question. "Does your church, synagogue or place of worship have a position on the death penalty. If yes, give details. Were you raised in some faith or denomination?" All of those things are very important. I handled a death penalty case one time where I got the widow or the mother of a child that was killed who was a Catholic to say that she did not want the guy killed. And the State at that point waived the death penalty because Catholics are pretty good about not wanting people killed. You always want to know things like that.

Q Well, and Mr. Taylor, I agree with you 100 percent. These are important questions and certainly good information to have. But specifically with regard to the issue of mental

disease or defect and psychiatric issues and the jury's willingness to accept and abide by the law in that regard we don't have any information about that in this questionnaire, would you agree with that?

A I agree with that.

Q And you also agree that you really didn't delve into that in voir dire?

A I'll agree with that.

Q And that was your defense?

A That was the defense.

Q So it's certainly arguable that there certainly could be people on the jury, and it's speculation, but that held a position that they would never accept that as a defense to a crime, that got on that jury?

A I suppose you could make that argument.

Q Okay. Now, in the sentencing --

A But let me say this.

Q Yes, sir.

A When I say I suppose you could make that argument, I can't really answer that question without those questionnaires here in front of me today.

Q Okay, well where are the questionnaires?

A The questionnaires were turned back in as the Court directed.

Q Okay, so where are they?

A I have no idea. I understood they were to be destroyed. I think the order provided for that.
Q Were they turned in before or after the trial?
A They were turned in after the trial.
Q Okay, so you knew the result of the trial at that point when you turned them in?
A Yes.
Q Did you make a motion to preserve those as part of the record?
A My recollection is that that questionnaire provided -- when it was provided to the panel, told them that that would be destroyed.
Q Okay, did you object to the fact that they were gonna destroy evidence in this case?
A No, I did not.
Q Okay, don't you think that's something that would be important?
A I don't think it's evidence though.
Q Well, it's certainly a record of what occurred, is that correct?
A Yeah, it's part of the record.
Q And evidence is probably the wrong term.
A Right.
Q But you never objected to that or tried to see that they were sealed or in some way preserved for future litigation?

A No.
Q Now, in the closing of the case, again, you mentioned mental disease or defect but you seemed to basically say, look I know you're never gonna cut him loose. I mean, you kinda talk about it and then you say, "And in reality I know you're probably never gonna cut him loose and let him go," and kind of move on to other subjects.
A He had not made a good witness for his self, Bill.
Q Well, but your entire defense is mental disease or defect, correct?
A I'm trying a case and trying to keep some credibility, okay.
Q Yes, sir.
A You always -- you know how this goes.
Q Well --
A You know how this goes. Let me finish. Closing argument. Guilt or innocence. I'm trying to keep some credibility with this jury. I got a guy over there that I can't -- I think the jury may think is acting out, faking. He's got on the stand, he's not made his self a good witness. I got to keep some credibility for this jury and try to keep this jury from killing this boy. You know, he hasn't done a very good job to help me and I'm pretty much fighting and using everything I know, hoping and praying that they will not come back and give him the death penalty. And I just

couldn't, you know, if I get up there at that point and I start acting out, I'm gonna lose all my credibility and there's no question he's gonna get the death penalty.
Q Well, let me ask you this. What was Dr. Diner's final decision, final testimony in this case?
A Dr. Diner's opinion?
Q The bottom line, yeah.
A He suffered from dissociative amnesia which led to him to being unable to conform his conduct based upon his reactive rage that morning.
Q Okay, so if they believed Dr. Diner, you had it? And as you said earlier, one witness that's credible, a board certified psychologist, I mean that's, I mean it maybe all you need. Now --
A He's board certified in psychiatry.
Q Psychiatry, excuse me. So you had -- I mean you certainly had testimony by which a juror, assuming that they were receptive to the idea of mental disease or defect as a defense, and they agreed to follow the law and believed by a preponderance of the evidence that Dr. Diner was correct --
A And we had Dr. Simon though, who said it wasn't so.
Q Sir?
A We had Dr. Simon that said it wasn't so.
Q Well, but you know, I understand that. But you said you didn't put on the other witnesses, Dr. Back, and the woman

from Ozark Guidance Center, part of the reason being because you wanted to go with one strong and not open yourself up to attacks why do you have to over-egg the pudding so to speak, right? So my question is you had the testimony from a very qualified psychiatrist that would get you every -- if the jury believed it, got you everything you needed from mental disease or defect, correct?

A Correct.

Q They could have went all the way with that and you never, and you would agree that you never explained to them how that worked and how they could make that finding?

A I don't know if that's true or not, Bill. I mean, I haven't looked back through the closing statement in this case closely. I don't know if that's true or not. I'm certain I talked about the fact that he was mentally ill. I mean the idea of mental illness was pervasive in the courtroom all the way through this trial.

Q And again, I am not questioning the fact that it came out. I'm questioning the fact that when you got to the, beyond what happened before, when you got to the closing argument you didn't really even argue for mental disease or defect?

A I don't think that's true.

Q You basically told them it wasn't gonna happen.

A Do what now?

Q You basically told them you didn't think that they were ever gonna do it. And when you had an expert that said everything you needed him to say?
A I think you're mis-characterizing it.
MR. JAMES: If I may have just a second, Your Honor. Let me -- we'll just move on, Your Honor.
THE COURT: I think that would be helpful.
MR. JAMES: Your Honor, at this time I want to mark this --
MR. TAYLOR: I think you're at 9.
MR. JAMES: Thank you. Someone needs to keep track.
BY MR. JAMES:
Q Mr. Taylor, I will hand you for identification purposes what has been marked for identification purposes as Defense Number 9. Can you identify that for the Court, please?
A I understand this to be Katie Wood's phone. I don't have a clear recollection of how it came into my possession. It may have been that Mr. Short and I found it in his apartment, in Mr. Marcyniuk's apartment or his mother and father may have found it in the apartment. I just don't recollect at the present time.
Q All right, but that's the phone that was provided to you, that was represented as Katie's phone?
A It was.

Q And we talked about why you decided not to put it in?
A Right.
MR. JAMES: Your Honor, at this time we would move to introduce Number 9.
THE COURT: Any objection?
MR. THREET: No objection, Your Honor.
THE COURT: Defendant's 9 will be received without objection.
(Whereupon, Defendant's Exhibit Number 9, a cell phone, was admitted into evidence and retained by the court reporter.)
A What volume do you have, Bill?
Q I think I'm around, it's Volume 5. And I'm around page 1055.
A Okay.
Q About mid-way through on 1055, about line number 13, maybe a little further back.
A I see that.
Q And do you agree that you told them, I mean, you told them he had mental illness but you said, "I do not expect you to be so naive as to let him walk out of the courtroom."
A Sure.
Q But you had, again, psychiatrists that said everything that they needed if they believed it, correct?
A I did, and of course he wouldn't walk out of the

courtroom if they found mental disease or defect.
Q Of course, they don't know that because no one ever told them.
A Well, I don't want to tell them that. I don't want them to think he's gonna go to a little hospital stay and then get out.
Q What did you want them to believe?
A I wanted them to believe that this fellow had committed a second degree murder and that was the best we were gonna do.
Q Okay, so let's back up and deal with the issue here. I mean, you would agree that you didn't really ever explain to them the process of coming to a not guilty by reason of mental disease or defect in your closing argument?
A Apparently not, though I talked extensively about him being mentally ill, that he's different than us.
Q And that's true, I mean, you did talk -- all right, so let's talk about voir dire.
A Okay.
Q Of course, your defense is mental disease or defect. We talked about what was discussed and what was not with regard to voir dire and that topic. But let's talk just generally speaking, what was your plan going into voir dire in this case, picking this jury.
A Well, as I said, it was a bit unusual. I mean, normally when you try these cases, I mean, I've tried them all

different ways. I've tried them individually. I've tried them with panels. I've tried them with questionnaires and I've tried them without questionnaires. And this case was a bit unusual in that we had an extensive questionnaire and I had a real good idea of who and what I wanted for a jury before I ever came down here to the courthouse which you would not have in your ordinary case of where you have your one sheet questionnaire and a panel of names. And because once we did the questionnaire I, of course passed that around to my office to see who all knew different people, as you always do, and as I said, I spent a lot of time sitting around thinking about who I wanted on this jury before I got here. And I wanted educated people. And I knew I had some witnesses who were educators so one of my goals was to try to get some educators on the jury. I had some terrible, horrendous pictures so I wanted some medical people on the jury, if possible, to sort of soften that blow if I could because it was awful. And I wanted women because I had a young man and I have an abiding belief that women are a lot more forgiving than men are, especially whenever you've got a dead girl.

Q And so was your plan to exclude men to try to get as many women as possible?

A No, it wasn't my plan to exclude men. I didn't know how it would go. But I certainly had a preference for women.

Q And there is 11, I think, that ended up on this jury?

A I think that's right.
Q So was there any -- I mean, you talked about you wanted medical, people with medical histories I guess to deal with the pictures, that kind of thing. I assume --
A I've used women -- I've done the same thing in another case that turned out very well for a young man here in Washington County where I seated 12 women on the jury. And I mean, we all have prejudices when it comes to picking jurors and one of my prejudices is, you know, if you've got a man defendant, young man defendant, pick women. If you've got a woman defendant, pick men. I've done that before.
Q And why is that?
A Because I have that prejudice. Because I made that decision. That's just what I believe about life. I think women are a lot more forgiving of young men than men are.
Q So you, I mean, this kinda goes back to what we talked about earlier. You do have some idea, at least -- you have theories at least about what juries think? Again, you'd have to speculate but --
A We all do.
Q Sometimes it's a voodoo science and I recognize that but you certainly in your time doing this have some idea of what jurors think and what you think works?
A Sure.
Q You know, whether it always does, never always plays out

the same way twice it seems like?
A Right.
Q All right, now so let's talk about the questionnaires that you talked about.
A Okay.
Q Extensive questionnaire. Now, how did the idea of doing the questionnaires come up?
A I've been doing this for years and years.
Q How did it come up in this case? Did Mr. Threet say that? Did the judge say we're gonna have one? Do you remember?
A I don't have a recollection. I'm sure that that's something that John and I probably talked about but I don't have a specific recollection of that. I mean, this is something that's blowed sort of hot and cold in the law for a long time. I mean, there's been times whenever it seems like judges will go along with that and accept questionnaires and then I've had other cases where it wasn't used so much.
Q So you filed a motion requesting the questionnaire, didn't you?
A I very well may have. I also filed a request for an individual voir dire.
Q Okay, we'll talk about that in a -- we'll do that in a second. And the death penalty, the death qualification, to the extent that they're in there, you don't remember who wrote

those questions about the death penalty in the questionnaire?
A No. I mean, my recollection is we had a couple of back and forth's on what I wanted and what he wanted. It was a negotiated out deal.
Q Okay.
A But it wasn't anything other than sort of a workmanship like job on both our parts to put that together. I mean, there is certainly no, wasn't any great dispute about what both of us wanted to find out.
Q Okay, now you said you've done voir dire different ways in different courts?
A Sure.
Q And we all know what court we're in now?
A Sure.
Q And we all know the Court's propensity for wanting quick voir dire's in this court, would you agree with that?
A Judge Storey worries about time. I've known him for 30 years. He's always worried about time. And I'm not saying that in a bad way. He's very efficient and he's always been very efficient. He was efficient when he was a lawyer, he's been efficient as a judge. But that is his psychological make-up.
Q And tends to push voir dire?
A He does. He does. He tends to push every part of a case, from the time the case is filed in his court.

Q We're talking about voir dire specifically.
A Okay.
Q And how important then do you think voir dire is in this whole process and the fact that we --
A That's, of course, one of the great debates in American jurisprudence. There's federal judges that will tell you it's not very important at all and they can do it and the lawyers need to sit down and shut up. There's people west of the Mississippi River, which is where you primarily find the open voir dire that we have, who think it's God's gift to trial lawyers. I probably fall somewhere in between those two ideas. I think it's very important as it relates to -- voir dire and the information you get in voir dire should be connected up with your opening statement and it should be connected up with your closing statement. And it's, that's the great benefit of it. And that's not an original thought on my part. Bill Puttman who taught trial practice at the University of Arkansas always taught that as a central theme of our trial practice is you try to pull those areas together.
Q Well, let's -- I mean, your -- I mean, you've other than prosecuting a couple of -- you've never prosecuted in your career other than as a special prosecutor?
A That's right.
Q So as a defense attorney how important do you feel that voir dire, I mean, you said you're in the middle of the road

and maybe it's the same answer.
A Well, I can't quantify that. I mean, sure it's important. I mean, you're trying to figure out who you want on the jury. You're trying to find out information about those people. It's important.
Q All right, so what was your understanding of the parameters of the voir dire going into this, like what kind of time frame were you gonna be given?
A There was no limiting or time frame. If you're asking me why I wanted this questionnaire, I --
Q No, I'm not asking you that.
A Okay.
Q I'm asking you how did you -- was there any time limit created and I don't see it in the record but --
A No.
Q -- time limits by the Court saying you're gonna get ten minutes, five minutes, 15 minutes?
A No. No, I've tried cases in front of Judge Storey before and I knew that he would not impose a time limit on us but he would want us to move it along.
Q So any time limit was self-imposed on your part or any, let me ask you this, did you feel like you had all the time you needed to question these jurors?
A I felt like I did based upon the fact that I had the questionnaire.

Q Okay, and did you and had you -- you were doing 12 at a time, correct?
A That's my recollection.
Q Okay, and would you have asked any questions differently if you had individual or smaller group voir dire? Would you have asked anything else?
A I don't know. That would be speculation on my part.
Q Well, I mean, do you believe you would?
A I don't know. I don't know, Bill. I don't know that.
Q Well, let me ask you this.
A I don't know what the person would have responded to me as an individual. I don't know how they would have reacted differently than in a panel.
Q Do people act differently when they're individual?
A Sometimes.
Q Sure. Would you agree with the concept that oftentimes you don't really know what's, I mean, people will agree with, oftentimes just agree with whatever is said.
A If it was a perfect world, here is what I would want. I would want an individual voir dire of each and every person who got called and I would have wanted to sit there with that jury questionnaire and go through that in great detail, in a perfect world. These cases are not tried in a perfect world and it rests within the discretion of the judge, of course, voir dire and keeping it moving. And everybody is different

and you learn to deal with that.
Q But other than the known history you've indicated that Judge Storey did not put any limitations on you?
A That's correct and as I've told you I felt like I had adequate time to ask these people questions based upon the fact that I had a 31-page voir dire that had multiple, multiple questions about both their thoughts about the death penalty and their private life.
Q So you were -- I mean, so fair to say you were happy with the questionnaire that you had?
A It was -- I'm never happy with anything in a case. I'd always want more but I had what I had and it was at least adequate.
Q If there was more that you wanted, did you offer that and then try to make a record on that?
A All I can tell you is that no, I did not do that but I felt that the questionnaire we did was adequate.
Q Okay, understood. Now, you indicated you had the questionnaires in advance. How far in advance did you have those?
A I don't have a recollection of that.
Q A sufficient period of time to go through them?
A Yeah, I want to say about a month maybe. Maybe less than that but for some reason -- you know, two or three weeks at least. I'm pretty sure. I mean, I remember sitting in my

conference room at different times going through them.

MR. JAMES: May I approach, Your Honor?

THE COURT: You may.

BY MR. JAMES:

Q Let's look at the questionnaire.

A Okay.

Q How well did you feel like the questionnaire covered the issue of the death penalty?

A Fairly well.

Q Was there anything in there that you would like to have seen added that you can remember at this time?

A Not at this time, I can't remember any specific thing.

Q And did you feel like -- I mean, tell me what your understanding of life qualification of a jury in this case is?

A Do what now?

Q What life qualification means of a juror.

A Life qualification?

Q The idea that a juror must be determined to be willing to accept life as a punishment. The idea that they find --

A Yeah, that they'll follow the law and they'll look at the full range of punishments and that they would consider life imprisonment as a possibility just as they would consider death as a possibility based upon the facts and the law as read by the Court.

Q Okay. Let's look at the death penalty, starts at 34,

Number 34.
A Okay.
Q Correct? And I'm going to assume, well let me just ask you. Do you recall any of the specific answers that any jurors gave to any of these questions?
A I do not recall the specific answers that any juror gave but I will tell you that the pool that we ended up with down here were predominately on 35, would have either circled 35(b) and 35(c).
Q Okay, well I'm just talking generally. Do you recall any specific answers for any of them?
A No.
Q Okay, and again, those were given to the Court and as far as we know they were destroyed?
A That's correct.
Q And your understanding early on was that that was gonna happen?
A Do what now?
Q Your understanding from the beginning was that they were gonna be destroyed?
A Yes.
Q Okay. All right, let's --
A Because I think the Court, I mean, there was some pretty sensitive questions asked in here and I don't, and I can't tell you if John and I reached an agreement on that or if the

Court ordered that but there was some very sensitive information in here, and I'm fairly sure that the Court was pretty concerned about that. I mean, I was concerned about that. There's some pretty private information that these people are disclosing here.

Q Okay, all right. So the first question is, "Do you believe the death penalty is necessary?" Correct?

A Right.

Q And the second one is, "What statement represents your feeling about the death penalty?" Do you agree with that?

A Yes.

Q "Moral, religious, or personal beliefs would present you from returning a verdict which would result," -- well, let's do this. I mean 34, as far as being either prosecutor or defense, that would be good for them if the answer was affirmative. I mean, "Do you believe the death penalty is necessary," you're gonna get both answers there, right? That's not particularly gonna help the defense or help the prosecutor, it's just gonna tell their opinion on whether it's necessary, right?

A Um-hmm.

Q It's not gonna tell whether they're gonna do it or what their feelings are about the automatic death penalty or automatic life, those kind of things?

A Oh, I don't know. "Do you believe the death penalty is

necessary in our society?" If they checked yes, well that would lead me to the conclusion they'd be more likely to give somebody the death penalty then if they checked no.

Q All right, so then the next question. Of course, this gives four different options and so that could go either way, correct, depending on the answer?

A Sure.

Q All right. And it lays out some, what are common answers to these issues, correct?

A Correct.

Q Now, you've done these cases, you've seen them, you've been around for a while; would you agree that oftentimes people will circle an answer or indicate an answer on a questionnaire but then when asked at length about them, turns out their opinion is sometimes different from what they circled?

A I suppose.

Q It's certainly possible, isn't it?

A Anything is possible.

Q Okay, and "Are there any moral, religious, or personal beliefs that would present you from returning a verdict which would result in the execution of another human being?" Certainly you would want someone -- the defense would want someone that was, that said, yes. But of course that person is generally gonna get struck if they hold to that, correct?

A Right.
Q And again oftentimes these feelings or their beliefs are, in some cases are more rooted than others? I mean, some people, you know, it's pretty much straight out do you have any and then they answer the question but then with the explanation it could mean something else?
A You're gonna get, you know, you're gonna get people fall off on both sides of that deal and what you're looking for is middle of the road people as a general rule.
Q So if you don't talk to them about it, how do you find out who the middle of the road people are?
A Well, you're gonna find it out by reading through this questionnaire for one thing.
Q Okay, so when we get to the point where the questionnaire is gonna show the middle of the road people on 36 that would indicate that, let me know?
A Look at 42.
Q Well, we're gonna go through it. Just let me know when we get there.
A All those questions go to that, Bill. All these questions, I mean, all these questions go to that. Look at 43, 44, 45. You know, what one person considers an aggravating circumstance certainly gives you some indication of how they feel about the death penalty. What they think about mitigating, that gives you some idea of what they think

about. Whether they think serving life in prison is more severe than death. I mean, some people think it is. All of those questions go to that issue. And the pool of people that I had presented to me down here when I came to try this case were middle of the road people by and large.

Q Okay, so then we'll just jump to that point. Do you believe that based on the information in this questionnaire you can make an intelligent decision about where they stood on the death penalty?

A Yes.

Q All right, and was this questionnaire explained? I mean, is there a presumption of one punishment over the other in a death penalty case?

A Do what now?

Q Is there a presumption of one punishment over the other in a death penalty case?

A I don't know if there is any presumption.

Q Well --

A It depends on whether the aggravating or the mitigating are there. I mean, there's, you know, --

Q Well, let me ask you --

A I think as human beings we all have a presumption that death is the last resort. I mean --

Q I mean, you presume that all jurors think that?

A I don't presume that all jurors think that but I think

that our society in general believes that. I mean, that's a common sense idea. Look how many people are on death row in Arkansas and how many murders are committed every year.

Q Well, the point being, I mean -- let's just jump it this way.

A Okay.

Q Finding of capital murder comes down. At that point the only possible punishment is what, until some other evidence is put on what's the possible punishment?

A Life.

Q You can't get death until that calculation has been done, correct?

A Correct.

Q So you would argue or agree with me that life is basically presumed under the law until something else is proved?

A Correct.

Q Okay, did the jury understand that?

A I'm sure they did.

Q Were they ever told that?

A I'm sure they were.

Q Who told them that?

A Well, we argued about aggravating and mitigating.

Q Okay, but who told them that we start out presuming life and only until --

A I don't know that I used the words.
Q Okay, and so you, I mean did you feel hampered or hamstrung or limited in any way being -- making decisions on people with regard to their death qualification and life qualification based on the information you got in the questionnaire? You felt like you could make those decisions?
A I felt like I had to make those decisions.
Q And why did you feel like you had to?
A That was the information I had.
Q Okay, but you were never limited on the amount of questions you could ask?
A No, except that we were limited that we weren't allowed to do individual voir dire and I, once again, I felt like the day I showed up down here I knew pretty much who I wanted on the jury.
Q Did you compile a list of these are the people I want, these are the people I don't want?
A I don't think I did. I think I marked up those sheets. I used like a plus and minus system is my recollection and I went through and plussed and minused people out and then I sorted them into stacks and I had a stack of who I wanted and a stack of who I probably didn't want. I don't know that I made a list.
Q Did anyone during the questioning of voir dire, the questions that were asked change your opinion on that? Do you

recall making any change in your decisions?
A I don't recall at this point.
Q Okay. What was the racial make-up of your jury panel?
A White people.
Q Did you have any blacks on the panel?
A I don't recall any black people being on the panel.
Q Okay, so do you recall if there were any that were minorities cut?
A I'm 99 percent sure there wasn't any minorities.
Q Okay. Now, do you agree, I mean, you know when I said life qualifying, make sure that a juror accepts the idea that life is an appropriate punishment for a premeditated and purposeful act, no mental disease or defect, just -- you understand what I'm talking about there, right?
A Sure.
Q Did you life qualify any juror in this case? Did you have those discussions or ask those questions of any juror in this case?
A No.
Q Okay, and was there a tactical reason for doing that or not doing that?
A No.
Q Did you explain to the jury that they could always give mercy?
A Yes, I think I did.

Q Okay, and do you recall how you explained it to them?
A Well, I explained it to them, it's always their personal, moral decision.
Q All right, but that's, I mean, that's different.
A Mercy is your moral decision.
Q Well, but -- I mean, I understand that's how you think of it but was that ever said to the jury?
A I never said it in that context to the jury.
Q What is the problem with the law from a defense standpoint? I'm sure that people are gonna say it's not a problem but from the defense standpoint, what is the problem with the jury instructions, the three jury instructions they had to fill out; the verdict forms with mitigation, the mitigators versus the aggravators, then ultimately the sentence, the three findings. What is the problem with that in the law with regard to their ability to apply mercy at any time?
A I don't understand your question.
Q Okay. Is it, under the law, are you able to make all three findings and still vote for life?
A What all three findings?
Q Well, aggravators exist, and that the aggravators outweigh the mitigators beyond a reasonable doubt, and that --
A The jury can do what it wants to.
Q Okay, well I understand that. But the jury instruction

doesn't say that, does it?
A The jury can render the verdict that it thinks is proper.
Q Well, I understand that. But what I'm saying is, you would agree that you can tell the jury you can give mercy at any time, would you agree with that?
A Um-hmm.
Q And there is case law that says that. I'm sure you're familiar with that. And so, but you would also agree that the verdict forms do not indicate that?
A They have nothing about mercy on the verdict forms.
Q And there is no clear indication that, I mean, if someone didn't know and was just relying simply on the jury instructions for their information would not understand unless someone told them, I would think. That may be speculation. That they could give mercy even though the aggravating circumstances justify it beyond a reasonable doubt.
A I made the argument in closing argument that he is weaker than each and every one of you.
Q Okay, no, I'm talking specifically, Mr. Taylor, about the idea that they can apply mercy at any time and they can make -
A That is not on the verdict form, Bill, and the verdict forms are the verdict forms. That's what the jury is to look at and make their decision off of.
Q Okay, do you recognize that the law allows you to argue mercy and to explain to them that even if they make the three

findings, they never have to vote for death?
A I believe you could probably do that.
Q Okay, and did you do that?
A I don't believe I did do that.
Q Okay, so if you didn't do it and I assume Mr. Threet didn't do that, how would a juror know that?
A They may not.
Q Did you ever discuss with any of the jurors in voir dire that you recall, or in closing, the idea that once they decided the decision was life that they were done and it did not have to be unanimous?
A I don't recall.
Q Well, do you think that would be something important for a juror to understand? That a decision for life does not have to be unanimous?
A I would think so.
Q Do you believe there is anything in the jury instructions that tell them that?
A Probably not.
Q And now would you agree also that there were a number of jurors that were seated in this case that you never actually spoke to other than as a group?
A Correct.
Q Other than what we've talked about, was there a strategic reason for that?

A No.
Q In fact, the alternate which arguably was never -- well, not even arguably, never got to the jury, you didn't even ask that person a question, is that correct?
A I think that's right.
Q Okay, and was there a tactical reason for that?
A I'd have to go back to those questionnaires. I mean, I don't have those here in front of me today, but I had a clear view or a clear idea of who I wanted on the jury.
Q All right, and can you, and let me ask the question again. Do you recall any specific juror that you had pre-determined whether you wanted them or didn't want them, that your opinion was changed in voir dire, during the actual voir dire process?
A I don't have that recollection now.
Q Okay, just a moment.
A Okay.
Q All right, I'm gonna hand you what's been marked for identification purposes as a packet of eight different smaller stapled together papers that is basically, it's pretty much verbatim everything that was said in voir dire. It's just not in a transcript form, but a little easier to follow as far as who specifically answered questions and who did not, and I think -- I wanted to talk to you about some of those folks.
Q Well, let me understand what this is.

A Okay, and I'm sorry. I thought you got a copy of this.
MR. JAMES: May I approach, Your Honor?
THE COURT: You may.
A I take it this is just a first person rendition -- what I'm getting is a response without the question?
Q Well, there's the questions and there's the responses.
A Okay.
Q So these are the people that are on the first panel and then if they responded other than --
A Okay. Okay, I got you.
Q And then it goes to you.
A Okay, panel two. Okay, I got you.
Q Most of the death penalty stuff, almost all of it is bolded.
A Okay.
(Whereupon, Mr. James and Mr. Taylor talking to each other quietly.)
THE COURT: I assume this discussion is off the record?
MR. JAMES: That's fine, Your Honor. Yes.
BY MR. JAMES:
Q And I apologize, I thought you'd already seen that.
A Well, I've seen it but I don't think I understood it.
Q Okay, well sometimes that makes it a little harder when no one is explaining it and I apologize for that. All right,

panel one, and I think we've covered a lot of things in this but, I want to talk about the middle of page three where Mr. Krauft --

A Okay.

Q -- was struck for cause.

THE COURT: Do we want to put this in evidence?

MR. JAMES: Oh, yes. I'm sorry. I move the packet, Number 10, into evidence.

THE COURT: This is 10? Any objection?

MR. THREET: No objection, Your Honor.

MR. JAMES: I apologize, Your Honor.

THE COURT: Defendant's 10 will be received without objection.

(Whereupon, Defendant's Exhibit Number 10, voir dire packet, was admitted into evidence and appears at the end hereof.)

BY MR. JAMES:

Q Middle of the page that's in bold.

A Page two?

Q Yes, sir. Page 3.

A I show 2.

Q It is the second page. Mine is messed up. Mr. Krauft says, "I don't believe I could sentence anyone to death." State moves for a strike for cause. Court strikes. You don't object. Why would you not object at that point or try and

rehabilitate this juror?
A Because I've never been a big believer in that. I've never been a big believer in that you get up and you try to rehabilitate a juror who says that he can't give the death penalty and you start going through the litany of things that might lead one to give the death penalty. Plus, I knew Mr. Krauft's family, and I didn't think there was a way in the world I was ever gonna get him rehabilitated. And all I was gonna do was reinforce upon the jury that they could give the death penalty. I've never been a big believer in that and have always tried to stay away from that if I could.
Q So what is --
A And in this case, understand this is different in this case because I know at this point what this pool of people out here, what their thoughts are about the death penalty --
Q Based on --
A -- based upon the questionnaire.
Q Yes.
A So I knew there were people who were still available to be on the pool who were "middle of the road-ers," on the death penalty.
Q Is there an advantage though to the defense, let's say that you can rehabilitate him, what happens to him, probably?
A Well, yeah, there is, but there's a great downside to it and all I can tell you is in my experience there's more of a

downside to trying to do that a lot of times than there is an upside.

Q And the downside again, is?

A Well, the downside is that you reinforce upon them that hey, there are cases out here where you would give the death penalty and we were faced here with a case that was especially cruel and just a terrible case. I mean, we had these terrible pictures. It was a knife killing which are always worse than -- about as bad as it gets has been my experience. And I didn't want to keep reinforcing on the jury that, hey, you can give the death penalty in these cases. I mean, I've got a bad case factually, I mean the pictures and stuff. And I'm trying a mental disease or defect case.

Q So while you did not want to accentuate the fact that you could give the death penalty, did you -- but you didn't offset that with you could give life. I'm talking generally in voir dire. Do you agree with that?

A No.

Q Okay, so you didn't object and that was your tactical reason you've just given for that, correct?

A Sure.

Q All right --

A Same on these other people over here.

Q The other two? There is three, I think total.

A I think there was one I did get up and talk to a little

bit and my recollection is she didn't seem to understand much of anything so I stopped.

Q Well, let's look and going through this in order to move along here, you struck, and we'll go back to the first page. Carole Stone got struck by the defense. Do you remember why you struck her?

A No, Bill, I don't.

Q Of course, and Krauft we just dealt with him, he was struck for cause. Arbor Buchanan the prosecutor struck. Linda Bolin, you did take Linda Bolin. Let me ask about her. You did speak, you did ask to speak to Ms. Bolin? Where's Ms. Bolin, I know she's in here.

MR. JAMES: I apologize, Your Honor. I've lost her.

Q Okay, you talked to Ms. Bolin. You did talk to her, and on page, which would be page four, I think of yours.

A Okay.

Q You talked to her about mental disease and defect and asked her if she could make a decision, possibly give sympathy for that?

A I believe that's the State.

Q Oh, okay. I'm sorry, that is the State. I apologize and so she did speak and then that's certainly in line with what you're looking for, I assume. Since she has somebody that has had illness, she could be more receptive to it?

A Yeah, but see, I don't know what else she said on the questionnaire. Did she tell me she was a, you know, she believed in an eye for an eye. I don't recall if she said --
Q Well, you didn't cut her, so.
A Do what?
Q You didn't cut her. She's on the jury.
A Okay.
Q I mean, any of these people. You also cut Juliann Conrow, Christina Henretty, and Barbara Markowski. Do you have any idea why you cut them?
A I cannot at this point tell you why I did that.
Q Okay. Debra Euculano, that person was seated. Do you know what that person's education level was?
A No.
Q Their propensity for accepting mental disease or defect as a defense?
A No.
Q Do you have any tactical reason that you're aware of why you allowed her on the jury, other than she's a woman?
A Sure. I had a lot of reasons I wanted her on the jury but I cannot cite you to that now because I do not have those questionnaires in front of me.
Q Okay, and we'll probably get a lot of those answers, I understand.
A That's gonna be my answer to everyone that you pose with

the exception, I understand with the exception of perhaps the lady who ended up being the foreman. She's the only one I specifically remember why I took her and I took her because she was an educator, I think out in Lincoln or in Prairie Grove, and I had this Harriman lady and this Hammond lady coming to testify. They were about her age and that whole school deal. I thought that that would probably work pretty well.

Q Okay. Shannon Joyce, she's a woman so she's consistent in that regard. Any other reason that you would allow her to be on the jury and not strike her that you can think of?

A I cannot tell you a reason now. I will tell you this, Bill. I remember specifically, there was a blond-headed lady sitting over there in seat number seven who I think was a nurse, I remember taking her because she was an emergency room nurse if I remember correctly.

Q Mary Leverington, same question here. Do you know why you decided she would be a good juror for this case?

A I cannot tell you that.

Q And then we talked about Juliann Conrow and Christina Henretty. Those folks were struck and you don't know why you struck them at this time?

A No.

Q Okay, and Tamara Mallard. Any idea why you decided she would be a good juror for this case?

A No.
Q Or appropriate?
A No.
Q All right, let's go to panel two. And I think this is the second, if you go to page 16.
A Okay.
Q I believe it's the second page in that packet, is that correct? Mr. Swenson. I assume that's a man, I'm not really sure. Juror Swenson we'll say.
A I think that was a lady.
Q And she said or Ms. Swenson said it's appropriate but I can't do it, correct?
A Right.
Q That's what she said. The State moves to strike. The Court strikes and you don't object. And is there a reason you don't object and try to bring her back? I mean, she at least agrees with it.
Q Well, the reason I -- I can't tell you that now. I mean, I don't know. I don't have those questionnaires here in front of me. Was she someone that I was gonna strike anyway? I don't know. I can't tell you that.
Q So it's certainly possible -- okay. Now, let me ask you about Ms. Bruce. Brenda Bruce. Page 18. She got put on this jury and she did speak. I think she spoke to the prosecutor and you also, on page 18 is where she's at. This lady had, I

believe it was her father-in-law who was killed by a burglar.
A That's not the first time I've done that. I've done that before.
Q And so, I guess you know what the question is coming, why, what tactical reason would there be for putting her on that when she had a very close family member that had experienced almost virtually, I mean, the only thing we didn't have information that the grandfather or the father-in-law dated the person that --
A That's not -- you can't make that quantum leap with the little bit of facts we know about Ms. Bruce. She did testify that she had a prior situation where her father-in-law was killed. That to me does not necessarily strike one from a jury and as I said, I have done that before. I once seated a guy on a jury whose son was killed and he ended up being the foreman of the jury who gave my client the minimum sentence of 10 years in a first degree murder case. And you know, I can't tell you specifically why I took Ms. Bruce on the day I took her though I will tell you at this juncture, I probably know why I took her, though I can't point you to the specific sheet and that's because since this trial happened, I have represented Ms. Bruce in a matter. And I've come to find out and I suppose this is on her jury questionnaire, though I don't have it in front of me, that she is for lack of a better word, pretty much a wide eyed liberal and that her son clerked

for Judge Wilson down in Little Rock and they're pretty wide-eyed liberals and I'm sure that's what was on her jury questionnaire and that's what I wanted with mental disease or defect to some extent.

Q But as to the specific reason you can't articulate your thought process at that time, as far as --

A Not without the sheet in front of -- her jury questionnaire in front of me, I cannot.

Q Now, the bottom of page 19. This is jury panel two. You're talking to them about your job classifying what crime has actually been committed.

A Right.

Q And so what is it that differentiates the crime, the possible crimes that he could be convicted of, what's the difference in those?

A Well, of course it all goes to mental state.

Q And did you at any time tell this jury panel that?

A I don't believe I did.

Q So you never explained to them or got their feelings with regard to how two people can commit the same act but be thinking different things and be guilty of different things or nothing?

A Right.

Q And was there a tactical reason for not including that information or those kind of questions?

A I can't think of one right now.
Q And that's certainly not covered in the questionnaire, is it? There's nothing about culpability and differential decisions it would make or --
A Of course, it's covered in the jury instructions.
Q Sir?
A It's covered in the jury instructions.
Q But again, would you agree that oftentimes, if a juror is already on there -- if a bad juror is on there a bad juror is on there. It's too late to fix it when they get on the -- if you have someone that can't accept the idea that two people killing somebody could be guilty of different things then even though it's on the jury instruction later on, that's not gonna help.
A I can agree with that.
Q And you don't have anyone's -- none of the jurors that received it, gave that information or were asked that question, do you agree with that?
A Not other than in the somewhat generic form that is stated there, though and then in opening statement, of course, I talked about that.
Q All right. Let's just go through this real quick.
A Okay.
Q Melissa Linde was cut by the defense in jury panel two. Do you know why?

A No.
Q Okay, and you can't think of any articulable reason or --
A Not without her sheet. Not without her jury questionnaire in front of me.
Q Okay, Ms. Ramey was put on the jury. Any tactical decision for putting her on the jury that you're aware of?
A I can not tell you that without her jury questionnaire in front of me.
Q Brenda Thompson was put on the jury, it doesn't appear that anyone ever spoke to her other than in a group setting. As a group, asking questions of the group, any tactical reason for allowing her to stay on the jury?
A I would have to see her jury questionnaire to be able to answer that question.
Q Brenda Bruce, we spoke about her. Yesenia Swenson, struck for cause, we talked about that. And then the prosecutor cut Patrick McCullough. So that would conclude number two, panel number two. Let's go to panel number three. Let's talk about the two strikes for cause. I think the prosecutor asked both Ms. Roberts and Mr. Burnette at the same time about their questionnaire and there was some answers they had given. No specifics are given but they both indicated apparently that they thought it was appropriate but they couldn't do it, correct?
A I think that's right.

Q So the Judge cuts Mr. Burnette because he says I don't think it's my place. You would agree you do not object?
A Right.
Q And again, would that be for the same reason you discussed before, first off you don't think that that's a good idea to try to rehabilitate people that say that and then also that it may be that you had a predetermined decision you were gonna cut them anyway and so you don't know if you're --
A That's a yes to both questions.
Q Okay, and Ms. Roberts said she scripturally, she thought scripture said it had to be two or more witnesses, eye-witnesses. You do actually ask her some questions about that. She doesn't really ever seem to ever -- she seems to have a little trouble understanding what's going on around her, to be honest with you. I mean, in all fairness, she's not, I mean, she's not -- she doesn't seem to get it, you know, and I mean --
A There was a little bit of that.
Q And so then the Judge ultimately grants the strike before she ever actually answers the actual question?
A Point me to where you're looking at.
Q It's on page 24, is where it finally ends up. The last paragraph of your name, your name is in the middle. You start, "Well, let me do it this way," and her answer is, "I'm not sure I could classify it as first degree murder for death

penalty," which really means nothing for the purpose of what we're doing.

A My recollection is the entire transcript would go something like this, I think I say, "I should stop at this point." And I think the Judge responded, "Yes, you should, probably." I mean, it was apparent to -- and I certainly don't mean to speak ill of this juror but it was pretty apparent to me, and I think to the prosecutor, and the Court that she wasn't getting it. And that's what happened is the Court ended up granting the strike.

Q But it's your position that not getting it is, I mean, she certainly didn't say that she wouldn't give the death penalty?

A No.

Q I mean, she indicated it. I mean, there was certainly a reasonable inference from what she answered, but she never got all the way and said, I would not do it, correct? I would not consider it?

A I think that's right. I think that's right.

Q Okay, and was there a tactical reason for stopping your questioning and not objecting at that point?

A I didn't think she was getting it.

Q Sir?

A I didn't think she was getting it. I didn't think she would get it if we tried this case.

Q Well, but if she ended up on the jury and she's indicated she's not gonna give the death penalty or she's unlikely to, what would you expect Mr. Three to do with her?
A I know Mr. Threet's gonna do with her.
Q Well, I would assume you would think that he might cut her, wouldn't you? He wouldn't probably want somebody whose trying to get death -- he's not gonna put somebody on there that says they're not gonna give it?
A Probably not.
Q So that would cut, get rid of one of his strikes, wouldn't it? Put you in an advantageous position?
A Maybe.
Q Possibly?
A Possibly.
Q Now, on page 27, you mentioned personal moral decision right in the middle of the page. And you go on to say, and this is to Smith. "Does that make you feel better about sitting on this case knowing that it's your personal, moral decision? That's gonna be something you'll have to make at some point if you're on this jury?" What point would that be that they would have to make that?
A Oh, whenever they got into the punishment stage.
Q And how would Juror Smith know that based on that question?
A Well, look up above. I said, "Okay, that's good enough.

Let's talk about punishment. Ms. Smith, you heard what I said about personal, moral decision. Do you believe in that? Let's talk about punishment."

Q Okay, all right. Darlene Smith, we're looking at just the full panel on the first page, we're up to page 23 now.

A Okay.

Q Darlene Smith is put on the jury. I think that's the one we were just referring to. You put her on the jury. Any tactical reason that you can point to why you would want her on the jury?

A I think she was the blonde-headed nurse, sitting up at Number 7. I wouldn't bet -- I mean, I wouldn't stake my life on it but for some reason I think that's who it is.

Q Okay. Ms. Roberts and Mr. Burnette we've talked about them, they were cut for cause. Matt Venable and Stephanie Chaney, both of those people were cut by the defense. You have -- Mr. Venable, do you know why you cut him? Other than he's a male?

A I do not. That may not have been the reason I cut him. I cannot answer your question without the jury questionnaire.

Q And Ms. Chaney, same question. Why did you choose her for the jury?

A Same answer.

Q Okay, so you cannot articulate any tactical reason for cutting either one of them?

A No, not without the jury questionnaire.
Q Let's go to jury panel number four.
A Okay.
Q There is on page 33, Ms. Cotrell gets cut and the Judge grants the motion from Mr. Threet based on her concerns about being emotional. He doesn't specifically deal with whether she likes the death penalty or not. The Judge does grant it and there is no objection on your part. Why would you not object or try to rehabilitate her with regard to the emotion issue?
A I don't know without the jury sheet in front of me. I don't know.
Q Would you agree though, that in your case, well I guess emotion could go both ways? You would agree with that?
A Sure. You know, I had this guy -- but I can't answer your question without the jury questionnaire.
Q And so you can't articulate any tactical reason for not objecting or trying to rehabilitate Ms. Phillips?
A I cannot articulate a reason now without the jury sheet, though I may have not wanted her on the jury to begin with.
Q Asa Cotrell, second juror, she was cut by the prosecution which would complete that panel. The fifth panel, two people were on it. Paula Dutton is cut by the prosecution.
A I think Mr. Dash was seated, wasn't he?
Q Yeah, Mr. Dash was seated. I'm sorry, Ms. Dutton was

not.
A Right.
Q And then Mr. Dash was. Is there any particular reason that you wanted to keep Mr. Dash?
A I'd have to see his jury questionnaire in order to be able to answer your question.
Q Jury panel number six. Elaine King, Ms. King was put on, she's a lone juror on this panel. She was put on. Basically you asked her two questions. "Any reason why you couldn't serve on this jury and do a good job, listen to the evidence, and make a reasoned, good decision?" She agreed. She says, "No, sir," but I think that's an affirmative opinion, response to your question. And you put her on. Any reason other than these answers --
A Right. For the reason I stated earlier. She is an educator out -- my recollection is she's either the principal or the superintendent of Lincoln, I think Lincoln school system. She's about the same age as Harriman and Hammond. She had the right, apparently had the right sort of answers on her jury questionnaire, and I thought she was what I wanted.
Q Okay.
A And I had her picked out long before. For whatever reason, I can just remember, I had her picked out long before. She may have had a counseling degree but I'm not sure.
Q Okay, panel number seven, Misty Fletcher. You cut Ms.

Fletcher. Do you know why you cut her?
A I cannot tell you the answer to that without her jury questionnaire.
Q She answered the questions and she was a sole juror so you did talk to her. She answered all yours in the affirmative. No tactical reason that you can articulate at this time for cutting her?
A Not without having her jury questionnaire in front of me.
Q Okay, and then, Mary Drain, jury panel number eight. I think we've talked about Ms. Drain. She was actually the alternate on the case and no questions were asked of her. You did not object or did not strike her. Any reason that you can articulate for that, any tactical reason for not asking her questions, for putting her on?
A Not without having the jury questionnaire in front of me.
MR. JAMES: May I have just a second, Your Honor?
THE COURT: You may.
BY MR. JAMES:
Q All right, finally, Mr. Taylor, one of the charges against Mr. Marcyniuk was burglary, is that correct?
A Right.
Q Did you defend against the burglary or argue that it was not a burglary?
A As a recall we moved for a directed verdict on the issue

of the burglary.
Q But as far as the jury was concerned, did you make any arguments to the jury regarding the fact that what happened was not a burglary, I guess -- I don't find it in the record. Let me just go ahead and jump to that.
A Right.
Q And was there a tactical reason by you for not arguing that he did not enter that apartment with the intent to commit a crime?
A I can't remember any at the present time, Bill. But you know as I sit here it's kind of, I think it's kind of wrapped up in this whole phone deal in that here he says I'm gonna take this phone back, but he doesn't take the phone back. And that, you know, I can't articulate right now that that was a conscious decision that I made but I think that's kind of where my mind was about that. I didn't want to get focused on -- I didn't want to get off the idea that hey, he had just went over there to take the phone back and that he, you know, we had Parks testify that he went in and checked the computer and all of those sort of things.
Q Well, what did you assume, I mean, what did you take from the prosecution's theory as the underlying crime of the burglary, what crime was intended to be committed?
A I took from it that the State could proved up assault, a battery --

Q That he went over there to kill her, right? I mean, part of the premeditation, I mean was that --

A Well, if he went over there to kill her then you would argue under *State vs. Parker* that he couldn't be charged with burglary.

Q But you didn't make that argument?

A Well, I didn't want to make the argument he went over there to kill her. I preferred to make the argument he went over there to, you know, look at her computer to see if she was with some boy or to take her phone back to her.

Q But at this time you cannot articulate a tactical reason for not doing that, for not arguing against the burglary to the jury?

A No.

MR. JAMES: Your Honor, if I could have just a second, I think I'm done. Pass the witness.

THE COURT: It's almost 12:00 noon. I think this would be an appropriate time to break for lunch. We'll reconvene at 1:10 p.m. Court will stand in recess.

(Whereupon, after a lunch recess the following proceedings resumed.)

THE COURT: Cross-examination?

MR. THREET: Thank you, Your Honor.

CROSS-EXAMINATION

Sarah Huffman.

Q Okay. But you even had Dr. Back, he even testified that he showed remorse. You got in testimony that he showed remorse to Dr. Back or in Dr. Back's opinion he showed remorse for what happened?

A Right.

Q You also got in jail records, probation records, and I think his father testified in the guilt phase, but mainly everything he testified to was mitigation?

A Yes.

Q About how he was as a child, how he was growing up, how he was later in life, his mental issues growing up, how he was depressed, how he liked to be alone, how he liked to threaten suicide. All of those things you got out to the jury on the mental issue from the father in the guilt phase?

A Correct.

Q Now, there's -- one of the allegations in the petition and I'll run through the petition here in a minute, was that you didn't use the juror questionnaire, I believe, or some effect of that. Did you use the jury questionnaire?

A Sure.

Q How did you use it?

A Well, I studied it intensively. I mean, I spent a lot of time trying to figure out who I wanted on the jury and like I said, I had a real good idea of who I wanted before I ever got

here.
Q Did anyone else go over that jury questionnaire with you? Did Steve Vowell?
A I'm sure Mr. Vowell went over it. I'm sure Victoria looked through it, probably some of the lawyers at my office looked through it. I'm pretty sure Terry Harper did.
Q Now, a lot of those questions off the questionnaire are personal, a lot of them. Even going down to what bumper stickers you have, what is your church's stance, all those; are those things that you would normally ask in front of everyone else and ask -- "Who is your most admired two men that you most admire, two women you most admire?"
A I don't think most judges are going to allow you to do that.
Q And part of it is that those personal questions you may not ask because you don't want to embarrass them in front of everybody else?
A Well, that's true. I mean, sure. You're always sensitive to that because people sometimes hold that against you if you embarrass them.
Q And if you ask them publicly some of those personal questions, they're probably not going to respond? At least you're going to assume that they're not going to respond as openly and honestly as they would if they were just writing in the comfort of their own home and making those answers.

A I think you can certainly make that argument.
Q Now, part of, as you know, on a Rule 37, part of the finding is but for, even assuming, assuming that there were errors on your part, but for those errors he would not have been found guilty; is that not correct?
A Yes.
Q All right, in this particular case what or let me ask you this. He had scratches on his face?
A He did.
Q And he claimed or -- and he admitted later he lied to the trooper and said his dog did that?
A Right.
Q The DNA under Katie's fingernails matched to this Defendant, is that not correct?
A It did.
Q The Defendant fled?
A He did.
Q He told his parents he had hurt Katie?
A He did.
Q He called Chris Harris the morning of the murder and said, "I fucked up."
A He did.
Q The Defendant had no cuts or stab wounds on him?
A No, he had those marks on his right hand as I recall.
Q All right, that he claimed were bite marks?

A Um-hmm.
Q Both the shoes that he got caught with in Oklahoma had Katie's DNA on them?
A They did.
Q His jacket had Katie's DNA?
A It did.
Q He admitted he did it?
A Yes.
Q Who all did he admit to doing it to?
A Well, he admitted it to me. He admitted it to Victoria, to Bo Morton, Steve Vowell, Dan Short, to his mother and daddy. I think that covers it. And, you know, I haven't -- I'd have to go back and listen to some of those jail conversations. I mean, there may be additional people there, but I don't know that off the top of my head.
Q Okay, but he did not deny it at trial. He just says he doesn't remember the specific stabbing? He remembers everything except specifically plunging the knife in her?
A That's a pretty fair characterization of it. Zach had some memory of that morning and of course, Dr. Diner says he did suffer from dissociative amnesia. And he initially told me he thought that he'd only stabbed her maybe a couple of times. And then whenever I got the autopsy report and some of these photos and you know, he looked at some of that stuff and he was horrified that he had done what he had done. He was

very remorseful about this situation but -- and I don't believe that he did have a clear recollection of what happened over there in that kitchen that morning. But he couldn't believe it.

Q He also disposed of the murder weapon and some of the clothing?

A Yes.

Q There was some evidence of cover up at the scene. He had put her body in the tub, put the curtains over it, locked the bathroom door, locked the front door? Fled out the back window?

A Correct.

Q Anything else that you can recall?

A Well, this video here. This video was a real bad piece of evidence for Mr. Marcyniuk in that --

Q And you're holding the State, or the Defendant's --

A Traffic stop in Oklahoma.

Q When he got pulled over in Sayer?

A Right. He was pretty cool and calm during that situation and made up a story that he was going to Amarillo.

Q Made up the story about the scratches?

A Right. But his demeanor was what was so destructive on the video tape. I mean, because, you know, I mean you had this terrible, terrible killing and then you have him being pretty cool five, six hours later.

Q Let me ask you this. What evidence did you find from any source, anywhere, that this Defendant, Zach Marcyniuk, did not commit the murder?
A There is no evidence that he didn't do it. It was always the issue of why.
Q Now, direct brought up Hollie Knox. Now, she was a counselor over at OGC, is that correct?
A That's what I understand.
Q Okay, and you had two different doctors testify; Dr. Back testified in sentencing, Dr. Diner testified during the guilt phase, correct?
A Correct.
Q And Dr. Diner is the forensic psychologist, he had been with the Department of -- Tennessee Department of Corrections in Tennessee. I want to say he may have done work with the State Hospital but I may be confusing one of those experts. Dr. Simon was with the Arkansas State Hospital.
A Correct.
Q He'd been there 25 years, he was a forensic psychologist, done thousands of forensic evaluations?
A Correct.
Q All right, and Dr. Back was a clinical psychologist for about 30 years?
A Correct.
Q All right. Now, Hollie Knox, if you recall I think from

the transcripts, her opinion as a counselor actually was in agreement with the State's expert?

A Right, she said he had a generalized anxiety disorder, which is what Dr. Simon said.

Q All right. Now, neither of your experts agree with that, leaving it at that diagnosis?

A Well, I think they both said he had anxiety but they were more focused on the fact that he was suffering from recurrent depression.

Q Right, but both of yours went much further?

A Yeah.

Q Then the counselor who agreed with the State's expert?

A Right, and all of that is on what we call Axis I. And then there was a complete agreement on Axis II that he suffered from borderline personality disorder which Ms. Knox would not have been qualified to make that diagnosis.

Q Okay, and with Dr. Diner, not only did he find and did he testify that he was profoundly depressed, he also diagnosed him with major depression, been psychotic in the past, dissociative amnesia?

A Right.

Q And he also said that he could not conform his behavior, did not have the ability to actually form the intent to kill her?

A Correct.

Q It was not his conscious object to cause her death, unable to conform his conduct to the requirements of the law.
A Correct.
Q All right, now given that, it was brought out on direct that you still didn't get up in front of the jury and say you've got to find him not guilty by reason of mental disease or defect, correct?
A Right.
Q Why not?
A Well, in all these cases you have got to keep your credibility in front of a jury. And what you have to do is be realistic about what is possible and what could happen in the case. And I thought there was a lot better shot at the jury finding him guilty of something less than capital than there was of them outright acquitting him on mental disease or defect. But we talked about that extensively, Zach and I did. You know, Zach latched on to the idea that it was a second degree murder, that that's what he was guilty of and I tried my best to tell him that the jury wasn't going to see it that way.
Q And in fact, in your closing argument you argued, the transcript showed that you argued quite a bit, brought up quite a bit about mental illness, mental disease. That you argued that in closing argument. You argued it in context with what I believe was your strategy, I'm gonna try in the

guilt phase to get it as low as possible but I'm not gonna walk up there and tell them he's not guilty, he didn't do this?

A Yeah, that was a -- I thought I would have lost all credibility in doing that based upon the photos and I couldn't explain why this girl started screaming as soon as this door was opened.

Q Nor did you believe, even though the experts testified, nor did you believe that the jury was gonna believe that he remembered everything clearly running up to the actual stabbing, remembered everything clearly after the actual stabbing. It's just that actual stabbing that he's got a little bit of, he's cloudy on for the most part?

A Well, that's, you know, and this isn't the first time that I've tried a case involving dissociative amnesia. I mean, that's not unusual for people to say that. And what I was faced with was I had a lot of goal oriented behavior before the death of this girl and I had a whole lot of goal oriented behavior after the death of this girl. I mean, when people start taking the murder weapon away from the scene and disposing of the murder weapon, that causes you to stop and be concerned about how much -- why would he take the weapon away? I could never get a good answer to that. I could never get a good answer from him as to why he took the weapon away.

Q All right, so based on the facts that you knew, it was a

part of your strategy to not get up in front of that jury and say hey, find him not guilty by mental disease or defect, let him go, or sentence him to the State Hospital for whatever they're going to do?

A Right.

Q All right, and in fact you argued in closing it mitigates him down or it lessens his culpability and should be a murder 2nd?

A Correct.

Q All right, and that was part of your strategy?

A It was certainly part of my strategy.

Q Now, I think, and I could be wrong, correct me if I'm wrong; on direct there was a discussion about you not bringing up mental disease or defect during voir dire, is that correct?

A That's correct.

Q Now, when that was being discussed up there, I started just going through and flipping and seeing all these places in the voir dire where mental disease, mental illness was talked about with the jury?

A Well, as I said to Mr. James, I think the issue of mental disease or defect was pervasive in the courtroom from the very time we started this case until the end of this case and I certainly don't disagree with what you have marked there. And of course, that's all part of the record of the case.

Q All right, so do you recall talking to them, to the jury

about how they feel about mental issues, and mental illness, and how that can make you do things one way or the other?
A I remember some of that but I think the record --
Q And I don't want to read all of those --
A I know that but the record is gonna be part of this case and I think that's a better indication of what was done. I know that I raised those issues.
Q All right, now your strategy in voir dire of talking to them, and some of these that I've marked is probably myself explaining to them the law on mental disease or defect, so they would have had that knowledge?
A Sure.
Q They would have been told that. What was your strategy in talking to them in general terms about how they feel about mental disease, mental illness, what was your strategy?
A What I wanted to convey to the jury, both in voir dire, in opening and in closing, was that Zach Marcyniuk did not become mentally ill on March the 7th, or March the 8th, or March the 9th, of 2008. I wanted to convey that he had been mentally ill for a very long time. And that is the way we tried this case. That is how I told him I was gonna try the case in a letter dated December the 1st. We talked about it over and over. I thought that was his best shot for trying to soften the blow because I never had any doubt that he was going to be convicted.

Q But now as far as your strategy in voir dire though, as far as asking general questions to the potential jurors about how they felt about mental disease or defect, I may have been mistaken again on direct, but you said you would have just gone off of the jury questionnaires, but you asked several questions, asking them about how they feel about it. Was that part of your strategy to see whether they, that they understood the issue of mental illness and how it can affect someone?

A Yes.

Q Now, also some was brought out about the death penalty during voir dire. In fact, let me -- you struck seven jurors from the panel, do you recall that?

A I don't recall that number specifically but --

Q You don't have any dispute with the transcript if it reflects that --

A That's right. I don't have dispute.

Q Reflects the seven strikes?

A That's right.

Q You struck one for cause. You struck one of the alternates. I think voir dire, one of them, and this is no measurement of time, but about 108 pages of the transcript was devoted to voir dire. There was a 30-page or so questionnaire?

A Correct.

Q That went into voir dire that you studied extensively.
A Correct.
Q There was also talk about and I'm not gonna go through all of them, but there was talk about whether you asked the specific question of do you know that you don't have to be unanimous to vote for life or it doesn't have to be unanimous to vote for life, some question like that was asked of you on direct.
A I recall something about that.
Q Do you recall that not only with the 30-plus page jury questionnaire, all of the talk about the death penalty, how do you feel about the death penalty, what do you think about the death penalty, those kind of questions. There were multiple questions asked during voir dire about the death penalty, how they felt, and whether they believed the death penalty was automatic?
A I believe so.
Q And it was explained to them also that it had to be unanimous --
A I'm sure.
Q -- to vote for the death penalty.
A Yes.
Q So even though you may not have said, and I can't remember the way it was phrased, the jury was aware that they had to vote unanimously if they're gonna give him the death

penalty?
A Sure.
Q Okay, you may not have asked the reverse question of that or someone may not have asked or something but that was asked?
A Correct.
Q Okay, and then not only you, but the State also talked about the jurors about being unanimously beyond a reasonable doubt, explained to them the death penalty, how you get to that point and that it's not automatic?
A Yes.
Q Okay, I'm gonna show you what's marked as State's Exhibit Number 1 for identification, ask you if you recognize State's Number 1?
A Yes, I recognize it.
Q What is State's Number 1?
A Oh, it's the, what I call the, it's the juror summons and it has information that's gathered on the back of it from individual jurors and they're asked to sign their name. Basically, it goes through and asks a few preliminary questions about who people are, what their date of birth is. I've always thought it was kind of funny they ask if they own any interest in an insurance company. I've always thought of it as a car wreck questionnaire.
Q Well, be that as it may, you recognize it, and that's the standard form that's sent out on all, to all jurors to fill

out and send back in?
A This is commonly what you would see if you were gonna try a criminal case, that's what we call the jury sheets. That's the jury sheet that you would commonly see.
MR. THREET: All right, Your Honor, at this time the State would move to introduce 1 into evidence.
MR. JAMES: No objection.
THE COURT: State's 1 will be received without objection.
(Whereupon, State's Exhibit Number 1, standard jury summons, was admitted into evidence and appears at the end hereof.)
BY MR. THREET:
Q And in this particular case you didn't just rely on that?
A No.
Q We had the jury questionnaire that's part of the record?
A Yes.
Q The 30-page or whatever it was that was introduced?
A Yes.
Q Now, on the petition I am not 100 percent sure that everything was touched on on the petition, but some of it was. I want to go the petition that was done. One was the part about the voir dire on their belief about the death penalty, that you failed to voir dire them on their beliefs about the

death penalty. We've already, I think, talked about that enough and the transcript covered as well as the jury questionnaire beliefs on the death penalty and how they felt?

A Correct.

Q You've already gone through those panels, then failed to seek to rehabilitate three jurors stricken for cause and you can clear this up. You've already talked about the first two, that it was a strategy of yours not to get up in front of the jury and convince them that it's okay to execute the client, basically.

A Well, I wouldn't quite phrase it that way but I don't -- I've never liked the idea of getting back up and reintroducing to the jury that, hey, you can give this fellow the -- there are some cases where the death penalty would be appropriate because you seem to just pound away at the idea that death, death, death is in the courtroom and that's what you're trying to stay away from.

Q Okay, so again, strategy?

A Yes.

Q Now, and help me out if you can, on the Swenson and Krauft jurors, I understand those, those are clear to me. The Burnette and Roberts, it appears from the transcript that I asked to strike both of them. You asked to speak to one of them and the Judge went ahead and excused that one, is that correct? Do you recall that from the transcript?

A I don't recall that, John.
Q Okay, and then the other one that I was asking to strike for cause, you did try to rehabilitate?
A I recall trying to use her to rehabilitate her but I was obviously trying to do was introduce to the jury this idea that hey, this is a case that you're gonna have to decide at what level of murder this is. That's what I was trying to do with that.
Q Okay, and so that was part of your strategy?
A Sure.
Q Then ineffective to investigate and call to testify other mitigation witnesses.
A Which page are you at?
Q I'm sorry. Are you looking at the petition?
A I am.
Q I'm up to page nine.
A Okay.
Q Sarah Huffman, why didn't you call her and we're, this point, it says mitigation, so just on the penalty phase. Sarah Huffman.
A Well, as I previously testified on direct I understood she was out on the west coast somewhere whenever we became involved in this case.
Q That's right, I apologize, and you have talked about that. So I can move on to the next one.

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS RESPONDENT
vs. CR-2008-475-1

ZACHARIAH SCOTT MARCYNIUK PETITIONER

ORDER

NOW, on this 31st day of July, 2012, comes on for hearing Petitioner's Rule 37 Petition, and from all matters before the Court, the Court finds:

A. That the Court makes the following findings of fact, to-wit:

1. That on March 12, 2008, Petitioner was charged by Information with one count of committing Capital Murder in accordance with A.C.A. § 5-10-101(a)(4) and one count of Residential Burglary in accordance with A.C.A. § 5-39-201.

2. That Attorney W.H. Taylor was retained by Petitioner, appeared at Petitioner's arraignment on April 1, 2008, and was trial counsel throughout the proceeding.

3. That Attorney W.H. Taylor, as lead counsel, as well as attorneys Bo Morton, Victoria Hargis, and Steven Vowell, represented Petitioner until the conclusion of Petitioner's trial.

4. That Petitioner's trial counsel filed twenty-four (24) pre-trial motions on which a hearing was held on November 13, 2008, including a motion to suppress a video recording of Petitioner's arrest on March 9, 2008, by an Oklahoma law enforcement officer.

5. That Petitioner's trial began on December 8, 2008, and concluded on December 11, 2008, with Petitioner being found guilty by the jury of Capital Murder and Residential Burglary and sentenced to death and twenty (20) years in the Department of Correction.

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6. That Petitioner's convictions were affirmed by the Arkansas Supreme Court on May 27, 2010.

7. That Petitioner's trial counsel called five (5) witnesses during the sentencing phase, including Petitioner's mother, grandmother, aunt, a friend, and a clinical psychologist with twenty-eight (28) years' experience.

8. That said five (5) witnesses testified as mitigation witnesses.

9. That of the twenty-one (21) mitigating factors submitted to the jury by the Petitioner, the jury found unanimously that five (5) mitigating factors existed and at least one juror found that another five (5) mitigating factors probably existed.

10. That Petitioner's trial counsel, in addition to the psychiatrist and psychologist employed by the defense, used testimony and evidence from the State's forensic psychologist for mitigation.

11. That at the direction of the trial court and in order to encourage perspective jurors to be candid, open, and honest in their responses, each person summoned was advised the information contained in the juror questionnaire was confidential and the questionnaire would be destroyed at the conclusion of the trial.

12. That Voir Dire was conducted in panels of twelve (12) veniremen in full view and hearing of the entire jury pool, giving all jurors the ability to hear all comments to, and questions asked of, all potential jurors throughout the Voir Dire proceedings.

13. That Petitioner's trial counsel actively participated in Voir Dire through use of the questionnaire and by questioning the potential jurors resulting in striking seven (7) potential jurors, striking one (1) potential juror for cause, and striking one (1) alternate juror.

14. That Petitioner's trial counsel attempted to rehabilitate one (1) juror struck for cause.

15. That Petitioner's trial counsel intentionally did not object to the State's strikes for cause or attempt to rehabilitate the struck jurors as a result of information obtained from the juror questionnaires and the standard jury questionnaire.

16. That Petitioner's trial counsel called six (6) witnesses during Petitioner's case in chief, including a forensic psychiatrist, the Petitioner, the Petitioner's father, the Petitioner's mother, Petitioner's former teacher, and Petitioner's former school counselor.

17. That Petitioner's expert witness Chris Adams called in support of his Rule 37.5 allegations based his opinions solely on the trial transcript.

18. That Petitioner's trial counsel's decision not to call Sarah Huffman as a witness was based on not wanting evidence of several incidents of Petitioner's violent past to be heard by the jury. The record is silent as to any evidence of what Sarah Huffman would have provided at trial.

19. That Petitioner's trial counsel did not call Joshua Beall to testify at trial because he believed Beall to be out of the country. The record is silent as to any evidence of what Joshua Beall would have provided at trial.

20. That Petitioner's trial counsel did not call Katie Campbell to testify at trial because he believed her testimony would undermine his defense of mental illness. The record is silent as to any evidence of what Katie Campbell would have provided at trial.

21. That Petitioner's trial counsel did not call Jeremiah Estes to testify at trial because he believed his testimony would undermine his defense of mental illness

22. That Laura Cotton would have testified at trial that she had a brief, casual relationship with the Petitioner three (3) years prior to the murder, that they had been in contact with one another through Facebook, and that they were scheduled to have dinner together on the evening of the murder.

23. That Petitioner's trial counsel did not call Laura Cotton to testify at trial because he believed her testimony would undermine his defense of mental illness.

24. That Petitioner's trial counsel did not call Stephanie Lucas to testify at trial because that name was not provided to him nor to anyone else involved in Petitioner's trial. The record is silent as to any evidence of what Stephanie Lucas would have provided at trial.

25. That Petitioner's trial counsel did not call Chuck Ray to testify at trial. The record is silent as to any evidence of what Chuck Ray would have provided at trial.

26. That the State called a witness from the Petitioner's place of employment to testify and who claimed Petitioner had no problems at work from November 2006 until the murder. This witness also testified that the Petitioner left work early on the morning of the murder.

27. That Petitioner's trial counsel did not call Jessica Romine, a fellow employee of the Petition, to testify at trial because he believed her testimony would undermine his defense of mental illness.

28. That Petitioner's trial counsel did not call Dustin Alexander, a fellow employee, to testify at trial because he believed his testimony would undermine his defense of mental illness. The record is silent as to any evidence of what Dustin Alexander would have provided at trial.

29. That Petitioner's trial counsel did not call Kathleen Smith to testify at trial because her name was not provided by Petitioner or anyone else in Petitioner's trial. Kathleen Smith knew Petitioner from 4th or 5th grade through high school, but only had contact through one phone call with Petitioner since 1997.

30. That Petitioner's trial counsel did not call Jason Stephens to testify at trial because that name was not provided to him nor to anyone else involved in Petitioner's trial.

31. That Petitioner's trial counsel did not call Hollie Knox to testify at trial. Hollie Knox was a counselor who had seen Petitioner as a condition of his probation from his prior conviction for Aggravated Assault in 2005. The record is silent as to any evidence of what Hollie Knox would have provided at trial or how her testimony would vary from the testimony of Dr. Back, Dr. Diner, and Dr. Simon.

32. That Petitioner's trial counsel employed a retired Arkansas State Police trooper as his investigator. The State Police officer was the head of investigations for his troop and had over thirty (30) years' experience as a trooper and twenty (20) years as an investigator.

33. That Petitioner's trial counsel did not call Chris Dooley to testify at trial because he believed her testimony would undermine his defense of mental illness. The record is silent as to any evidence of what Chris Dooley would have provided at trial.

34. That Petitioner's trial counsel did not move for a change of venue because he believed his client would be better served with a jury from Washington County. Trial Counsel discussed the issue with Petitioner, and Petitioner agreed Washington County was the proper venue.

35. That Petitioner's trial counsel did not move for a directed verdict on the affirmative defense of mental disease or defect. That the State offered evidence at trial relating to Petitioner's premeditation and deliberation.

36. That Petitioner's trial counsel argued during the trial that Petitioner was not in the murder victim's home for the purpose of committing a crime.

37. That Petitioner's trial counsel did not attempt to locate the knife used to commit the murder because he did not want it used by the State to illustrate the manner of death. That he was given conflicting stories by the Petitioner as to where the knife was disposed of; and he was given conflicting stories by Petitioner as to what kind of knife was used. Evidence at the scene, as well as autopsy evidence and statements by the Petitioner, established that the Petitioner may have used a knife from his home that had brass knuckles as part of the handle. Petitioner's trial counsel moved to have all photos and any mention of the Petitioner's collection of knives suppressed which motion was granted.

38. That Petitioner's trial counsel did not introduce the victim's cell phone into evidence because he believed it would be detrimental to the defense. Evidence at trial established that the Petitioner had possession of the phone.

B. That the Court makes the following conclusions of law:

1. That Petitioner's trial counsel team, as well as their investigator, completely and thoroughly investigated Petitioner's background and potential fact witnesses while seeking evidence of a defense to the allegations raised by the State.

2. That Petitioner's trial counsel was thorough in investigating and presenting mitigation issues to the jury.

3. That Petitioner suffered no prejudice by not having a separate mitigation specialist.

4. That Petitioner's trial counsel thoroughly covered all issues relating to mental disease or defect through Voir Dire and by use of the jury questionnaire.

5. That the jury was death qualified and life qualified through questioning by trial counsel and through the use of an extensive jury questionnaire.

6. That Petitioner's trial counsel fully developed each potential jurors' beliefs in regard to the death penalty through the use of an extensive jury questionnaire as well as through the Voir Dire examination of the jurors.

7. That the issue of whether the death penalty was automatic upon a guilty verdict for Capital Murder was covered thoroughly with potential jurors through the use of an extensive jury questionnaire as well as the Voir Dire examination of the potential jurors.

8. That Petitioner's trial counsel's decisions not to object to the State's strikes for cause, and not to attempt to rehabilitate the struck jurors were part of his trial strategy.

9. That Petitioner's trial counsel's decision not to call Sarah Huffman, Joshua Beall, Kadie Campbell, Jeremiah Estes, Laura Cotton, Jessica Romine, Dustin Alexander, Hollie Knox, and Chris Dooley to testify was part of his trial strategy. Petitioner has failed to show he was prejudiced by not calling these witnesses at trial.

10. That Petitioner has failed to show he was prejudiced by Petitioner's trial counsel's failure to call Stephanie Lucas, Chuck Ray, Kathleen Smith, or Jason Stephens as witnesses.

11. That Petitioner's trial counsel fully prepared Petitioner's experts for trial.

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12. That witness Chris Harris was prepared for trial by Petitioner's trial counsel.

13. That Petitioner has failed to show he was prejudiced as a result of trial counsel's failure to move for a directed verdict on the affirmative defense of mental disease or defect.

14. That Petitioner has failed to show he was prejudiced as a result of trial counsel's defense of the Residential Burglary count.

15. That Petitioner's trial counsel's failure to actively search for the knife used to commit the murder was a part of the trial strategy.

16. That Petitioner's trial counsel's decision not to introduce the victim's cell phone was a part of his trial strategy.

17. That Petitioner's trial counsel properly conducted Voir Dire examinations, which examinations were not in violation of Petitioner's rights set forth in the Sixth and Fourteenth Amendment to the United States Constitution and Article 2 Section 10 of the Arkansas Constitution.

18. That Petitioner's trial counsel's decision not to file a change of venue motion was a part of his trial strategy; Petitioner's Sixth and Fourteenth Amendment rights were not violated by not seeking a change of venue to Madison County, Arkansas.

19. That Petitioner's trial counsel raised and properly objected to all relevant evidentiary issues; any issues he did not object to were a part of his trial strategy.

20. That Petitioner was afforded his fundamental rights of due process and a fair trial at all stages of the proceeding.

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21. That the jury's verdict finding Petitioner guilty of Residential Burglary and Capital Murder and subsequent sentences of twenty (20) years and death were supported by the evidence presented at trial.

22. That Petitioner has failed to demonstrate that he has suffered prejudice as a result of trial counsel's representation.

23. That Petitioner has failed to demonstrate that trial counsel's performance was deficient and fell below an objective standard of reasonableness.

24. That Petitioner failed to demonstrate that there is a reasonable probability that absent any errors allegedly made by Petitioner's attorney, different verdicts would have resulted.

That by reason of the foregoing, Petitioner's Rule 37.5 Petition should be and is hereby denied and dismissed.

IT IS SO ORDERED.

WILLIAM A. STOREY
Circuit Judge

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