****CAPITAL CASE****

No._____

IN THE
Supreme Court of the United States

KARL DOUGLAS ROBERTS,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

Eighth Circuit Opinion Below
(August 19, 2024)

United States Court of Appeals
For the Eighth Circuit

No. 22-1935

Karl Roberts

Plaintiff - Appellant

v.

Dexter Payne

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas

Submitted: December 12, 2023
Filed: August 19, 2024

Before GRUENDER, GRASZ, and KOBES, Circuit Judges.

GRASZ, Circuit Judge.

In 2000, Karl Roberts was tried, convicted, and sentenced to death in Arkansas state court for the rape and murder of his twelve-year-old niece. Roberts waived his right to challenge his conviction on direct appeal, in state postconviction proceedings, and in federal habeas corpus proceedings. The Arkansas state trial court found the waiver to be knowing and voluntary. The Arkansas Supreme Court

also found Roberts's waiver to be valid, and it upheld his conviction and death sentence. *See Roberts v. State*, 102 S.W.3d 482, 485 (Ark. 2003) (*Roberts I*).

On the day of his scheduled execution in 2004, Roberts moved for a stay of execution in a federal district court, which was granted. A few months later, Roberts filed his petition for writ of habeas corpus in federal district court. This began two decades of litigation alternating between state and federal courts.

By 2022, a federal district court denied Roberts's nineteen habeas corpus claims, but it granted a certificate of appealability (CoA) on three claims: whether Roberts was (1) intellectually disabled, (2) competent to be tried, and (3) competent to waive his direct appeal.[1] This court then expanded Roberts's CoA to include two ineffective assistance of counsel claims: whether counsel was ineffective for (1) failing to properly investigate and challenge Roberts's competency to be tried and (2) failing to investigate and present evidence of Roberts's mental health as mitigating evidence at sentencing. For the reasons below, we affirm the district court and deny Roberts's petition for writ of habeas corpus.

I. Background

A. The Murder Trial

In 1999, after police questioning, Roberts confessed he took his twelve-year-old niece, Andria Brewer, from her home, drove her to a secluded location, raped her, and strangled her to death. After this horrific rape and murder, Roberts threw Andria's clothes in a creek and covered her body with dead tree limbs. Roberts

[1]The CoA as to the first two claims was granted by the then presiding judge, the Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation. The CoA as to the third claim was granted by the Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

admitted he killed Andria to keep her from identifying him to police. Following his confession, Roberts led investigators to the location of Andria's body.

During Roberts's trial in Arkansas state trial court, Roberts attempted to persuade the jury he did not have the requisite mental state for murder. He presented evidence that he was run over by a dump truck when he was twelve, causing damage to the frontal and temporal lobes of his brain. The defense presented testimony from Dr. Lee Archer, a neurologist, and Dr. Mary Wetherby, a neuropsychologist. Both defense experts testified Roberts had impulse and behavioral control problems due to his brain injury. Dr. Archer opined that "if it were not for the injury that Karl Roberts sustained in 1980, he would not have committed this alleged crime."

In contrast, the State presented testimony from Dr. Reginald Rutherford, a clinical neurologist, and Dr. Charles Mallory, a psychologist. They opined that while Roberts's intelligence quotient (IQ) score of 76 put him on the borderline range of intellectual functioning, his abilities had no "substantial impairment in any occupational or social arena of life." Indeed, Roberts completed high school, worked at the same construction job for six years, was married for ten years, and has two children. Dr. Mallory opined Roberts has "the capacity to appreciate the criminality of his conduct" because "he took steps to avoid apprehension" both before and after the crime—he selected a time in which Andria would be home alone, drove her to a remote location to rape her with no witnesses, and then killed her because he did not want her to report the rape. Dr. Rutherford agreed Roberts "was involved in a fairly complex series of actions and it's clear that he appreciated the circumstances that he was engaged in . . . . [H]e tried to cover up what he did."

After the trial, the jury convicted Roberts of capital murder. During sentencing, the jury found one aggravating circumstance—that the murder was committed in an especially cruel or depraved manner—outweighed the mitigating circumstances, and sentenced Roberts to death.

B. Arkansas State Court Waivers

Direct Appeal Waiver: In July 2000, two months after his conviction, Roberts—who was represented by counsel—waived his rights to challenge his conviction on direct appeal to the Arkansas Supreme Court. During this proceeding, the trial judge asked Roberts a series of questions about whether he understood what it meant to waive his rights to appeal. Roberts reaffirmed he understood all his appeal rights and had fully discussed the waiver with his attorneys. The trial judge asked Roberts to tell him in his own words what he was asking for, and Roberts stated: "I want to die." The trial judge then clarified with Roberts whether he was asking for the death sentence to be carried out without any further action by his attorney on direct appeal. Roberts answered, "Yes." The trial court subsequently found "Roberts has knowingly and intelligently waived his right to [direct] appeal." In April 2003, during an automatic and mandatory review of the entire record, the Arkansas Supreme Court affirmed that the trial court did not clearly err in determining "Roberts knowingly and intelligently waived his rights of [direct] appeal." *See Roberts I*, 102 S.W.3d at 488.

Postconviction Waiver: The following month, in May 2003, Roberts attended a hearing in Polk County Circuit Court pursuant to Arkansas Rule of Criminal Procedure 37.5, the Special Rule for Persons Under Sentence of Death. *See State v. Roberts*, 123 S.W.3d 881, 882 (2003) (*Roberts II*). During this hearing, Roberts appeared pro se and indicated he did not want to have an attorney appointed to represent him during postconviction relief matters. *Id.* Roberts stated, "I don't think a guilty person should be allowed to live or he should at least be able to accept responsibility, his punishment whatever it may be." *Id.* When the court asked whether Roberts understood he was choosing death over life, Roberts answered, "Yes, sir." *Id.* After a series of follow up questions, the court found Roberts had sufficiently waived his right to appointment of counsel and his right to seek postconviction relief. *See id.* at 882–83. In October 2003, the Arkansas Supreme Court affirmed the circuit court's findings. *See id* at 883.

C. Federal Habeas Corpus Proceedings

On January 6, 2004, the day of Roberts's scheduled execution, Roberts moved for and was granted a stay of execution by a federal district court. *See Roberts v. Norris*, 415 F.3d 816, 818 (8th Cir. 2005). On July 16, 2004, Roberts petitioned for a writ of habeas corpus with the federal district court. *See id.*

In 2007, the district court issued a "stay and abey" order, directing Roberts to seek relief in state court under Arkansas Rule 37.5 regarding all unexhausted claims. *Roberts v. Norris*, 526 F. Supp. 2d 926, 949 (E.D. Ark. 2007). "In short, Roberts will be given an opportunity to convince the state courts that he did not competently waive his right to appeal and to seek state post-conviction relief." *Id.*; *see also id.* at 928 n.2 (staying the federal action "to avoid a statute of limitations problem" under 28 U.S.C. § 2244(d)(1)–(2)).

D. Arkansas Rule 37.5 Petition

Thereafter, this case oscillated between Arkansas state courts for over ten years. In 2016, the Arkansas Supreme Court ultimately held "the [Arkansas] circuit court erred when it found that Roberts has the capacity to choose between life and death and could make a knowing and intelligent waiver" because it was "undeniable that Roberts suffers from schizophrenia." *Roberts v. State*, 488 S.W.3d 524, 526, 529 (Ark. 2016) (*Roberts III*). Thus, the Arkansas Supreme Court reopened Roberts's Rule 37.5 proceedings and allowed him to file a new petition for postconviction relief. *See id.* at 529. In his renewed petition, Roberts asserted eighteen claims for postconviction relief. *See Roberts v. State*, 592 S.W.3d 675, 679 (Ark. 2020) (*Roberts IV*).

The Arkansas circuit court held a three-day evidentiary hearing. One of Roberts's expert witnesses, Dr. Daryl Fujii, attested to Roberts's schizophrenia and its impact on his ability to assist his counsel in his own defense and to conform his conduct to the law. Dr. Fujii also identified what he believed to be errors prior

defense experts, Dr. Mallory and Dr. Wetherby, made in their competency assessments. The circuit court heard from people who knew Roberts prior to his dump truck accident. These individuals testified that Roberts became more distant and quicker to anger after his accident. Ultimately, the circuit court denied relief on every claim, and the Arkansas Supreme Court affirmed the decision in January 2020. *See Roberts IV*, 592 S.W.3d at 685.

E. Return to Federal Court

In October 2020, Roberts filed an amended federal habeas corpus petition, raising nineteen claims of constitutional error. About one year later, the district court entered an order denying Roberts's petition in its entirety, but granting Roberts's CoA on two claims. In 2022, the district court granted a CoA for one more claim. This court then expanded Roberts's CoA to include two ineffective assistance of counsel claims.

Five issues are now before this court: whether (1) Roberts is intellectually disabled, (2) Roberts was competent to stand trial, (3) Roberts was competent to waive his direct appeal, (4) trial counsel was ineffective in investigating Roberts's competency to be tried, and (5) trial counsel was ineffective in investigating Roberts's mental health as mitigation evidence. We address each in turn.

II. Discussion

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). "In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release." *Trevino v. Thaler*, 569 U.S. 413, 421 (2013).

When reviewing habeas corpus appeals, this court reviews the district court's legal conclusions de novo, the factual findings for clear error, and defers "to a state court's findings of fact if they are fairly supported by the record." *Wilkins v. Bowersox*, 145 F.3d 1006, 1011 (8th Cir. 1998). Because of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified in 28 U.S.C. § 2254, we give great deference to the factual findings made by the state court.

Specifically, AEDPA restricts a federal court's power to grant habeas relief in two ways. First, AEDPA "provides that if a claim was adjudicated on the merits in state court, a federal court cannot grant relief unless the state court (1) contradicted or unreasonably applied [Supreme Court] precedents, or (2) handed down a decision 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Shoop v. Twyford*, 596 U.S. 811, 818–19 (2022) (quoting § 2254(d)). This means "[t]he question under AEDPA is . . . not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable . . . ." *Id.* at 819. This is "'a substantially higher threshold' for a prisoner to meet." *Id.* (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

Second, AEDPA prevents a federal court from developing or considering new evidence outside of state court proceedings. *Id.* This ensures that the "state trial on the merits is the main event . . . rather than a tryout . . . for what will later be the determinative federal habeas hearing." *Id.* (internal quotation marks omitted); *see also* § 2254(e)(2). There are two limited exceptions to this rule if a prisoner "failed to develop the factual basis of a claim in State court proceedings": first, if the claim relies on a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by the Supreme Court; or second, if the claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* (quoting § 2254(e)(2)).

A. Intellectual Disability Claim

The district court below applied the deferential standard of review under AEDPA and rejected Roberts's claim that he was intellectually disabled, concluding "Roberts has not rebutted the presumption of actual correctness in *Roberts I* regarding intellectual disability by clear and convincing evidence." We agree.

Roberts's claim is grounded in the Eighth Amendment's prohibition of "cruel and unusual punishments" because the execution of an individual with an intellectual disability is a cruel and unusual punishment prohibited by the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

The review on whether a defendant is intellectually disabled—and thus, spared from execution—belongs in the first instance to the states. *See Hall v. Florida*, 572 U.S. 701, 719 (2014). Accordingly, states have "the task of developing appropriate ways to enforce" the constitutional restriction on executing the intellectually disabled. *Id.* (internal quotation marks omitted). While states' statutory definitions of intellectual disability are not identical, they must "generally conform to the clinical definitions," *id.* (quoting *Atkins*, 536 U.S. at 317 n.22), and be "informed by the medical community's diagnostic framework." *Id.* at 721.

Under Arkansas law, intellectual disability is defined as follows:

> (A) Significantly below-average general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than eighteen (18) years of age; and
>
> (B) A deficit in adaptive behavior.

Ark. Code Ann. § 5-4-618(a)(1). "[T]he Arkansas Supreme Court has consistently construed its state's statutory right to be concurrent with the federal constitutional right established in *Atkins*." *Sasser v. Hobbs*, 735 F.3d 833, 842 (8th Cir. 2013).

"Arkansas places the burden of proving [intellectual disability] 'by a preponderance of the evidence' on the defendant.'" *Id.* at 843 (quoting Ark. Code Ann. § 5-4-618(c)). To meet this burden, the defendant must prove: (1) the defendant has significant below-average general intellectual functioning; (2) the defendant has significant deficit or impairment in adaptive functioning; (3) both of the above manifested before age eighteen; and (4) the defendant has a deficit in adaptive behavior. *Id.*; Ark. Code Ann § 5-4-618(a)(1).

Though AEDPA generally restricts a federal habeas court from developing or considering new evidence outside of state court proceedings, *see Shoop*, 596 U.S. at 819; § 2254(e)(2), we must consider whether an exception applies. If the habeas claim relies on a "new" and "previously unavailable" rule of constitutional law made retroactively applicable by the Supreme Court, then the federal court may consider new evidence outside of state proceedings. *Id.* Here, Roberts's trial occurred before the 2002 *Atkins* decision created a new constitutional right forbidding the execution of the intellectually disabled. *See Atkins*, 536 U.S. at 321. Therefore, we must first address the question of whether Roberts's habeas claim relies on a "new" and "previously unavailable" rule of constitutional law. If so, then we can consider new evidence outside of state court proceedings.

Roberts argues our decision in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007) is controlling here, but we disagree with this characterization. In *Simpson*, we held that the prisoner did not procedurally default his *Atkins* claim, even when the prisoner "did not present a mental retardation defense to the death penalty (a defense available to him under [Arkansas] law)." *See id.* at 1034. Notably, we reasoned that "the availability of a similar claim under Arkansas law is irrelevant to our consideration here: [the prisoner] is raising a previously unavailable federal claim, and that claim is separate and distinct." *Id.* at 1035. The facts here differ. The prisoner in *Simpson* never litigated the issue of his intellectual disability until he reached federal courts. Here, Roberts litigated his intellectual disability claim in state court and received a decision on the matter, without a procedural default issue.

Under these facts, *Atkins* did not provide a "previously unavailable federal claim," as Roberts's prior hearings were substantively akin to a federal *Atkins* hearing.

The facts in this case are much closer to *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006), where our sister circuit decided a similar issue. In *Conaway*, the Fourth Circuit held that a state court decided "the dispositive issue in the *Atkins* claim" when, before *Atkins* was decided, the state court determined that a defendant was not intellectually disabled under North Carolina law. *See id.* at 592. The Fourth Circuit noted a state court ruling that does not cite the relevant Supreme Court precedent could still reach the "merits" of that precedent for purposes of AEDPA. *Id.* (citing *Early v. Packer*, 537 U.S. 3, 7–8 (2002)). Therefore, the state court's statutory decision constituted an adjudication of the *Atkins* claim "on the merits" for purposes of AEDPA review. *Id.*

We agree with our sister circuit's approach in *Conaway*. AEDPA requires a federal court to give "deference to the state court's determination," so "a habeas petitioner challenging a state conviction must first attempt to present his claim in state court," *Harrington*, 562 U.S. at 103–04, because "a federal habeas court may *never* needlessly prolong a habeas case, particularly given the essential need to promote the finality of state convictions," *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022) (cleaned up), nor should a federal court "disturb the 'State's significant interest in repose for concluded litigation.'" *Shoop*, 596 U.S. at 820 (quoting *Harrington*, 562 U.S. at 103).

Hence, we stay true to AEDPA's intent and prioritize Arkansas's significant interest in adjudicating this habeas litigation. Because Arkansas courts have already heard extensive evidence regarding Roberts's alleged intellectual disability, we hold they have already decided the merits of Roberts's intellectual disability claim when they determined he was not intellectually disabled under Arkansas law, even if that determination occurred prior to the *Atkins* decision. *See Packer*, 537 U.S. at 7–8 (upholding state court's decision when prisoner's habeas claim was "the same claim rejected *on the merits* in his direct appeal" (emphasis added)). Therefore, the

Arkansas courts' decisions constituted an adjudication of the *Atkins* claim "on the merits" for purposes of AEDPA, and we accordingly apply AEDPA deference to their findings. *See id.* Applying that deference, we affirm the district court's dismissal of Roberts's *Atkins* claim.

Ample proof supports the reasonableness of the Arkansas Supreme Court's rejection of Roberts's intellectual disability claim. Most notably, Roberts's 76 IQ score is six points above the recognized intellectually-disabled threshold of 70 IQ points. Even accounting for the standard error of measurement of plus-or-minus 5 IQ points, Roberts's IQ score is, at worst, 71, which is still above the range for intellectual disability. *See Jackson v. Payne*, 9 F.4th 646, 654 (8th Cir. 2021) (noting a generally applicable standard error of measurement is plus-or-minus 5 IQ points). Additionally, Dr. Rutherford testified that Roberts's "major life activities" were not affected by his intelligence level and highlighted that Roberts "completed high school, he was successful in employment, [and] he was married for 10 years[.]"

And because nothing in the Arkansas courts' adjudication "(1) resulted in a decision that was contrary to, or 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," § 2254 (d)(1)-(2), we cannot disturb their decisions.

B. Roberts's Competency to be Tried

The district court, applying AEDPA deference, rejected Roberts's claim that he was incompetent to be tried. Roberts argues this was error. We agree with the district court.

The Due Process Clause of the Fourteenth Amendment prohibits states from prosecuting defendants who are not competent to stand trial. *Medina v. California*, 505 U.S. 437, 439 (1992). To be competent to stand trial, a defendant must have

"the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . . ." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Competence to stand trial is a factual issue, so we presume the state court's finding of competence is correct. *Lyons v. Luebbers*, 403 F.3d 585, 593 (8th Cir. 2005); *Reynolds v. Norris*, 86 F.3d 796, 800 (8th Cir. 1996) ("On habeas review of a substantive competency claim, this court generally presumes that a state court's factual finding of competency is correct.").

The Arkansas courts' competency findings are reasonably supported by the record. Before Roberts's trial, Dr. Mallory evaluated Roberts at the Arkansas State Hospital and determined he was competent to stand trial. The examination process was extensive—it included four days of observation by nursing staff in an inpatient ward, eight hours of in-person interviews and examinations with medical professionals, and reviews of his entire medical history since 1980. Roberts was "alert and cooperative" during his interviews, and denied symptoms of psychosis during open-ended questioning, and specifically denied having altered states of thought, uncontrollable behavior, or seizures.

Of course, the doctors did not just take Roberts at his word. Rather, they conducted an extensive examination process which included the administration of the following three psychological tests.

(i) Wechsler Adult Intelligence Scale-III: This is "a measure of general cognitive skills and efficiency." This test showed Roberts to have below average general intellectual skills, but the report noted "his intellectual handicap has not affected any of his major life activities."

(ii) Minnesota Multiphasic Personality Inventory-2 (MMPI-2): This is "a self-report, true-false inventory of items that assess attitudes, problems, and personality styles of individuals[.]" Roberts's answers "would suggest bizarre thinking and experiences, depressed mood, anxiety and social avoidance." But the examiner considered Roberts's results invalid because

"he appeared to over-report psychological problems and over-endorse personal virtues."

(iii) Georgia Court Competency Test: This is "a structured interview that assesses a defendant's understanding of the trial process and issues related to his own defense." Roberts's response indicated "he understood the roles of various court personnel," and "he had the capacity to relate to his attorney in a rational manner." He also "understood the nature of his charges and could appreciate their seriousness," and "had the capacity to understand the range of possible verdicts and the consequences of conviction." A score greater than 70 on this test is passing. Roberts scored 90 out of 100.

The state court considered the evidence and extensive testing in each instance and concluded (1) Roberts was competent to stand trial and to assist his attorneys, and (2) Roberts has not demonstrated his later mental condition equates with his condition at the time of trial. *Roberts IV*, 592 S.W.3d at 681. Based on the assortment of intellectual functioning tests and expert testimony at the time of trial, we see no reason to disturb the Arkansas courts' repeated findings that Roberts was competent for trial.[2]

C. Roberts's Competency to Waive Direct Appeal

On Roberts's claim he was not competent to waive his appeal rights, the district court concluded "AEDPA deference requires the denial of this claim." We agree.

[2]Roberts relies on Dr. Fujii's later opinion to argue that Dr. Mallory erroneously discarded the results of his MMPI-2 test, which Dr. Fujii believed supported a diagnosis of schizophrenia. But this is insufficient to overcome AEDPA's deferential standard of review—Roberts's competency to stand trial was adjudicated at least three times in state court: in a pretrial motion, on direct appeal, and during Rule 37.5 proceedings. The findings made in those adjudications were not unreasonable, and therefore we defer to the state court's rulings. *See* § 2254(e)(1).

As with competency to stand trial, a state court's conclusion regarding a defendant's competency to waive appeal rights is generally entitled to the "presumption of correctness." *O'Rourke v. Endell*, 153 F.3d 560, 567 (8th Cir. 1998). Here, after extensive questioning, the Arkansas trial court found Roberts competent to make a knowing and voluntary waiver of his right to appeal. On direct appeal,[3] the Arkansas Supreme Court discussed and analyzed Roberts's competency to waive his appeal and concluded "the trial court did not clearly err in determining Roberts knowingly and intelligently waived his rights of appeal." *Roberts I*, 102 S.W.3d at 487.

Roberts argues his case is comparable to *O'Rourke v. Endell*, when we concluded the state court record failed to "demonstrate that [the petitioner] appreciated the consequences of his decision to waive his Rule 37 appeal." 153 F.3d at 568 (internal quotation marks omitted). But *O'Rourke* is distinguishable from Roberts's case in several ways.

In *O'Rourke*, we found a postconviction waiver inadequate for two predominant reasons. First, the state court failed to appoint a representative for O'Rourke, depriving him of due process. *See id.* at 569. This was not the case

[3]A decade after *Roberts I*, in 2013, the Arkansas Supreme Court found Roberts unable to knowingly and intelligently waive postconviction proceedings. But this does not render its 2003 decision unreasonable. In 2013, the Arkansas Supreme Court concluded that, at time of trial, Roberts was suffering from schizophrenia that rendered him "incapable of choosing between life and death or knowingly and voluntarily waiving his postconviction rights." *Roberts III*, 488 S.W.3d at 528. This is a non-contemporaneous schizophrenia finding, which does not demonstrate Roberts was unable to waive his appeal rights following his trial, more than a decade ago. *See Roberts I*, 102 S.W.3d at 487 (deferring to the trial judge because "the trial judge had the benefit of having heard much psychological evidence during the pretrial competency hearing and throughout the course of the trial"); *see also Weisberg v. Minnesota*, 29 F.3d 1271, 1278 (8th Cir. 1994) (stating "[r]etrospective determinations" of competency are "strongly disfavored" and have "inherent difficulties even under the "most favorable circumstances" (internal quotation marks omitted)).

here—unlike the unrepresented petitioner in *O'Rourke*, Roberts was represented by counsel. Specifically, Roberts confirmed he waived his appeal rights after his counsel advised him that he "would be able to proceed under Arkansas Rules of Criminal Procedure 37.5 and allege any errors or ineffective assistance."

O'Rourke was different for a second reason. The record reflected the petitioner in O'Rourke did not understand "the significance and consequences" of his decision to waive his appeal. *Id.* at 568. Notably, O'Rourke said he wanted "to be executed," and that statement "falls far short of demonstrating that he fully understood the consequences" because "[t]he court never explained to O'Rourke the significance of his decision to waive" and "[n]o one questioned him as to his understanding of the possible results of a successful appeal, which might have included not only a lesser sentence but a new trial with a potentially different outcome." *Id.*

As in *O'Rourke*, Roberts also stated his desire to die. *See id.* But unlike the court in *O'Rourke*, the Arkansas trial court thoroughly explained the significance of Roberts's decision to waive his appeal, asking multiple times whether Roberts understood his decision:

> BY THE COURT:
> Q: Do you know what the word "waiver" means?
> A: Yes.
> Q: Would you mind telling me?
> A: That means to let something pass.
> Q: You have the right to appeal your conviction and sentence to the Arkansas Supreme Court. A waiver of that appeal would mean that you would be giving up that right. Do you understand that?
> A: Yes.
> Q: Now, do you understand the difference between life and death?
> A: Yes.
> Q: Do you understand that if you do not have an appeal, that the judgment entered by the Court could be carried out?
> A: Yes.
> Q: What is that judgment?

A: Death.
Q: Do you understand that?
A: Yes.
Q: Are you sure?
A: Yes, I am.
Q: Now, I'm not trying to talk you into anything or change your mind or tell you what I think you should do. The purpose of these questions is to make sure that you understand what you're doing. Do you understand me?
A: Yes, sir.
. . . .
Q: I guess maybe I ought to go over this. Your waiver says that you have fully discussed with your attorneys. Did you discuss with [defense counsel] what we're talking about today?
A: Yes, we did.
Q: Did he tell you that you don't have to do this if you don't want to?
A: Yes.
Q: You can assert your right to any and all appeals provided by law.
A: Yes.
Q: Do you want to assert any of those appeals?
A: No.
Q: Are you positive?
A: Yes.
Q: Now, you said when you signed this waiver that you were not under the influence of any medication or receiving any medical treatment. Is that correct?
A: Yes, it is.
. . . .
Q: Do you understand my questions, what I'm asking you?
A: Yes, I do.
Q: Now, just tell me in your own words what your waiver is asking for and what you are asking for today.
A: I want to die.
Q: Are you telling me that you are asking that the death sentence be carried out?
A: Yes.
Q: It says here, without any further action by your attorney by way of direct appeal.
A: Yes.

The record here demonstrates Roberts was able to understand his position, and supports the finding that Roberts had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation . . . ." *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

D. Ineffective Assistance of Counsel

Roberts claims ineffective assistance of trial counsel because the trial counsel failed to (1) properly investigate and challenge Roberts's competency to be tried during the guilt phrase of trial and (2) properly investigate and present Roberts's mental health as mitigating evidence during the sentencing phase of trial. The district court dismissed these claims, stating "[t]o be frank, it is not close." We agree with the district court.

An ineffective assistance of trial counsel claim is addressed under the two-part test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To grant relief based on a claim of ineffective assistance of counsel, we must find (1) counsel's performance was constitutionally ineffective (performance test) and (2) the ineffective performance resulted in prejudice (prejudice test)." *Kenley v. Armontrout*, 937 F.2d 1298, 1303 (8th Cir. 1991). To satisfy the performance test, the defendant must show "that counsel's performance fell below an objective standard of reasonableness." *Worthington v. Roper*, 631 F.3d 487, 498 (8th Cir. 2011). Courts presume "that counsel provided effective assistance," and "do not use hindsight to question counsel's performance." *Kenley*, 937 F.2d at 1303. To satisfy the prejudice test, the defendant must show there is "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.

A federal habeas court's review of a state court's application of *Strickland* is "doubly deferential" because it requires a "highly deferential look at counsel's performance through the deferential lens of [AEDPA]." *Bahtuoh v. Smith*, 855 F.3d 868, 872 (8th Cir. 2017) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011));

accord Abernathy v. Hobbs, 748 F.3d 813, 817 (8th Cir. 2014) ("Taking AEDPA and *Strickland* together establishes a 'doubly deferential' standard of review in § 2254 cases."). In other words, the doubly deferential standard "gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

Here, the Arkansas Supreme Court reasonably applied *Strickland* under both the performance and prejudice prongs. *See Roberts IV*, 592 S.W.3d at 680. Regarding the performance prong, Roberts argues only that it was unreasonable for counsel to investigate his brain injury caused by the dump-truck accident, without investigating whether he had schizophrenia or other mental-health issues. But we cannot "use hindsight to question counsel's performance," and Roberts was not diagnosed with schizophrenia at the time of his trial. *See Kenley*, 937 F.2d at 1303. Therefore, the Arkansas Supreme Court reasonably concluded "counsel cannot be considered ineffective for failing to investigate Roberts's schizophrenia when the four mental health professionals who testified at trial did not diagnose him as such." *Roberts IV*, 592 S.W.3d at 680–81. The Arkansas Supreme Court also reasonably affirmed the Arkansas circuit court's conclusion that counsel did not perform deficiently in its handling of mitigation evidence. *Roberts IV*, 592 S.W.3d at 683. Indeed, the jury found nine mitigating circumstances and still concluded the one aggravating circumstance—the cruel and depraved nature of the murder—outweighed any mitigating circumstance.

Furthermore, even if the counsel's performance was ineffective, Roberts was not prejudiced. During the sentencing phase of trial, the jury heard testimony that Roberts showed malice and calculation. According to Roberts's own admissions, he drove Andria to a secluded spot, murdered her to prevent being identified, tried to hide her body, and pretended to look for her to prevent arousing suspicion. Roberts failed to show how other evidence—such as his birth records, personal injuries, history of trauma, or turmoil over the death of his nephew—would have affected the jury's ultimate determination that Roberts's brutal murder deserved death. It follows "there is no prejudice when the new mitigating evidence 'would

barely have altered the sentencing profile presented' to the decisionmaker[.]" *Sears v. Upton*, 561 U.S. 945, 954 (2010) (quoting *Strickland*, 466 U.S. at 700).

III. Conclusion

For the foregoing reasons, we reject Roberts's claims and affirm the denial of Roberts's habeas petition.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1935

Karl Roberts

Plaintiff - Appellant

v.

Dexter Payne

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:04-cv-00004-JM)

JUDGMENT

Before GRUENDER, GRASZ, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 19, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

Appendix B

Eastern District of Arkansas
Memorandum and Order
(September 21, 2021)

THIS IS A CAPITAL CASE
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

KARL DOUGLAS ROBERTS,

Petitioner,

vs.

DEXTER PAYNE, Director,
Arkansas Division of Correction
(originally named as Larry Norris),

Respondent.

NO. 5:04CV0004-RGK

MEMORANDUM AND ORDER

This is a habeas corpus case involving the death penalty. It is based on an amended petition (filing 266; filing 272) submitted in the latter part of 2020 and briefs submitted in 2020 and 2021. (Filing 267; Filing 277; Filing 286). With over a thousand pages of record and hundreds of pages of briefs the task of fairly adjudicating this matter, but with all due deliberate speed, is daunting.

This federal case was started in 2004, but the case did not become ripe in this court until mid-September of 2021 when Roberts submitted his last brief. I granted Roberts and Respondent several extensions of time to brief this matter due to the voluminous nature of the record. For purposes of exhaustion, the matter took 13 or so years in the state courts as Robert's superb counsel sought to exhaust his claims and equally superb counsel vigorously resisted.

The murder occurred on May 15, 1999. His jury trial commenced and ended in 2000.

After serious deliberation, I have taken a minimalist approach to this opinion both in substance and in form. Among other things, and as to form, I have decided

in some circumstances not to insert CM/ECF or Bates stamped citations to the record. That said, the Master Index, containing various hyperlinks,[1] supplies references to the massive record. My reference to the record throughout this opinion may be consulted for accuracy via the Master Index (filing 247) together with the related submissions (filing 243; filing 244; and filing 245.[2])

I now find and conclude that the amended petition should be denied with prejudice. My reasons follow.

CLAIMS

The following 19 claims are asserted:

Claim 1: Roberts is intellectually disabled.

Claim 2: Roberts was not competent to be tried.

Claim 3: Counsel was ineffective in the handling of mental-health issues at the guilt phase.

Issue 3-1: Counsel was ineffective for failing to challenge Roberts' competency to be tried.

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[1] The Arkansas ECF system does not permit users to link to a specific page within ECF filings. It is possible only to link to the first page of each filing. For each "exhibit" that contains more than one document, Roberts has prepared an internal index. When the user clicks on the link provided, it will take him to that internal index, where he will find additional references to the specific documents listed here.

[2] By three separate filings Roberts also broke down the complete record of the state-court proceedings in Bates-stamped form. Filing 243 contained the pre-*Rhines* state-court record. Filing 244 next submitted the post-*Rhines* state postconviction proceedings from 2007 to 2016. Lastly, Filing 245 submitted the record of post-*Rhines* state postconviction proceedings from 2016 to 2020.

Issue 3-2: Counsel ineffectively pursued the lack-of-capacity defense.

Issue 3-3: Counsel unreasonably failed to challenge Roberts' confession on mental-health grounds.

Claim 4: Counsel was ineffective for failing to adequately investigate, develop, and present mitigating evidence.

Claim 5: Counsel were ineffective for failing to pursue a change of venue.

Claim 6: Roberts' conviction and death sentence must be vacated because individuals on the jury did not meet the constitutional standards of impartiality.

Claim 7: The trial court violated Roberts' rights by erroneously failing to exclude jurors, thus depriving Roberts of his full complement of peremptory challenges and forcing upon him a juror whom he did not accept.

Claim 8: Roberts' conviction and sentence should be vacated because of the prejudicial atmosphere in the courtroom.

Claim 9: The prosecutor's improper closing arguments violated Roberts' Due Process and Eighth Amendment rights.

Claim 10: The jury's failure to consider mitigation evidence violated Roberts' Eighth Amendment rights.

Claim 11: Trial counsel should have challenged the jury's failure to consider mitigation evidence.

Claim 12: The State suppressed material evidence and countenanced false testimony in violation of Roberts' due process rights.

Claim 13: Counsel failed to reasonably respond to prejudicial false testimony about Roberts' work history and driving record.

Claim 14: Admission of excessive victim-impact evidence violated Roberts' Eighth Amendment Rights.

Claim 15: Roberts' confession was involuntary.

Claim 16: The overlap between capital murder and first-degree murder under Arkansas law is unconstitutional.

Claim 17: Appellate counsel was ineffective.

Claim 18: Roberts' waiver of his direct-appeal rights was unconstitutional.

Claim 19: Roberts is entitled to relief because of the cumulative prejudicial effect of the errors described herein. (As noted later, this claim has essentially been abandoned.)

Filing 266 at CM/ECF pp. 2-3.

EARLY BACKGROUND

The early background is found in two published opinions of the Arkansas Supreme Court. *See* *Roberts v. State*, 102 S.W.3d 482 (2003) ("*Roberts I*") and *State v. Roberts*, 123 S.W.3d 881 (2003) ("*Roberts II*"). Other information must be dredged from the record.

I start with the murder. It is horrifying.

That said, Roberts is intellectually dull. And, to be frank, that is the essence of this horribly sad case.

A. THE MURDER

Because he confessed[3], and that confession was corroborated, there is little doubt: (1) that Roberts abducted his 12-year-old niece, Andria Brewer, from her parents' residence when they were away; (2) that Roberts drove the child to a secluded spot despite her terrified pleas to be taken home; (3) that he told her that he was going to "fuck her"; (4) that he held her down as she struggled; (5) that he raped her (causing significant bruising to her vagina); (6) that Roberts decided to kill the child because he knew that she could identify him; (7) that he strangled her; (8) that Roberts covered up her body; and (9) that he threw her clothes away. *Roberts I*, 102 S.W.3d at 485-86, 494-495.

As a result of Roberts' confession, the investigators were able to locate the child's body in a secluded spot; Roberts' ability to tell law enforcement where to find the missing girl confirmed the truth of his confession. Physical evidence also linked Roberts to the murder. For example, Roberts' green tank top had blood on it. According to DNA analysis, the blood on Roberts' tank top matched the victim's blood with a very high degree of confidence.

B. ROBERTS' MENTAL CAPACITY AS DESCRIBED BY THE ARKANSAS SUPREME COURT

Regarding Roberts' mental capacity, the following information is presented in the opinion of the Arkansas Supreme Court in *Roberts I*:

* At the time of the murder, Roberts was thirty-one years old. *Roberts I*, 102

[3] He took three polygraphs. The examiner's opinion was that Petitioner had not been entirely truthful. After being told that, Roberts confessed both orally and in writing. An FBI agent was present for and witnessed the confession.

S.W.3d at 490.

* Testing done by a psychologist for the prosecution (Dr. Mallory) revealed that Roberts had a full-scale I.Q. of seventy-six. (*Id.* at 487.) That score placed Roberts within the borderline range of intellectual functioning. *Id.*

* According to defense witnesses, Dr. Lee Archer, a neurologist from the University of Arkansas Medical Center, and Dr. Mary Wetherby, a neuropsychologist from Texarkana, Arkansas, Roberts had experienced damage to the frontal lobes of his brain when he was hit by a dump truck at age 12. *Id.* Both doctors stated that as a result of the brain injury, Roberts suffered from hallucinations. *Id.* Regarding the specifics of the brain injury, magnetic resonance imaging (MRI) revealed that the accident destroyed one-fifth of Roberts' right frontal lobe and damaged other parts of his brain. *Id.* at 499 (dissent). A significant part of his right frontal lobe, as well as the medial aspect of his left frontal lobe, and part of his temporal lobe, were missing. *Id.* (dissent). While these defense doctors conceded that Roberts knew right from wrong, they believed that Roberts was unable to control his emotions and that lack of emotional control was directly responsible for Roberts raping and murdering the victim. *Id.* at 487.

* Despite the foregoing, Roberts had graduated high school, could read and write on a high school level, held the same job for the six years preceding the murder, and had a wife of ten years and a family. *Id.*

* Dr. Charles Mallory, a psychologist from the Arkansas State Hospital, interviewed Roberts, tested him, and reviewed his medical and psychological records. Among other things, Roberts did very well on the Georgia Court Competency Test administered by Dr. Mallory, which measures if a person understands the legal system and the procedures of the trial. *Id.* Dr. Mallory believed that Roberts knew the difference between right and wrong and that he had the ability to conform his conduct to the law. In particular, Mallory came to these conclusions because Roberts was aware of his actions and because he took steps both before and

after the killing to avoid apprehension (by driving the girl to a remote location, by raping and killing her, and then covering her body and throwing away her clothes). *Id.* In addition, Mallory also pointed to Roberts' statement that he decided to kill the child because he knew that she could identify him. *Id.*

* Dr. Reginald Rutherford, a clinical neurologist called by the prosecution, gave an opinion that Roberts' brain injury did not cause him to do what he did. *Id.* The doctor explained that Roberts had no dramatic behavioral problems, that Roberts was involved in a complex series of actions that culminated in the crime, and that Roberts' actions demonstrated that he appreciated the criminality of his conduct. *Id.*

In *Roberts II*, the Arkansas Supreme Court reviewed Roberts' waiver as it pertained to post-conviction relief. *Roberts II*, 123 S.W.3d at 881–883. No additional neurologic, psychiatric or psychological information regarding Roberts' mental capacity is presented in that opinion. *Id.*

C. EARLY STATE COURT TIMELINE[4]

A time-line, concentrating particularly on the doctors and when certain state court legal proceedings took place, is helpful. Therefore, the following chronology is provided.

May 15, 1999: Roberts abducted, raped and killed Andria. *Roberts I*, 102 S.W.3d at 485.

[4] Much of the early state court time line is taken directly from my earlier stay and abeyance opinion. *Roberts v. Norris*, 526 F.Supp 2d 926, 930-942 (E.D. Ark. 2007). That opinion contained citations to the record as it existed at that time. I have omitted citations to the old record which, frankly, was accurate but a mess. While a mess, recitation of the record as redeveloped in the recent gig is a time waster. In this opinion, I have quoted the jury verdict form. For that document, I cited to the recent record because it is both very important and new.

May 17, 1999: Roberts went to the Polk County Police Station to take a polygraph examination. *Id.* at 498 (dissent). After receiving his *Miranda* warnings, and about four hours after arriving at the police station, Roberts confessed. *Id*. Before he confessed, but after he had been told that a polygraph indicated that he had been deceptive, Roberts began to cry and told the police "he had done something terrible." *Id*. at 488. A police officer responded, "Get if off your chest, we'll help." *Id*. Roberts' confession followed.

May 18, 1999: Roberts was charged with "capital murder."

August 9, 1999 through August 12, 1999: Roberts was examined at the Arkansas State Hospital. The examination was primarily conducted by Dr. Mallory, a staff psychologist holding a Ph.D. While a neurologist saw Roberts, no imaging studies were conducted.

In addition to clinical interviews and other efforts, Mallory administered a variety of psychological tests, including an MMPI. Although the MMPI results suggested bizarre thinking and experiences, depressed mood, anxiety and social avoidance, Mallory did not rely upon the results of that test. He did not rely upon the MMPI because validity scales showed that Roberts appeared to be over-reporting psychological problems, appeared to over endorse personal virtues, and because one scale showed "dissimulation."

Dr. Mallory found that: (1) at the time of the examination, Roberts was competent to participate in court proceedings and to assist his counsel; (2) at the time of the offense, Roberts had the capacity for purposeful conduct, an element of the offense charged; (3) Roberts had the capacity to appreciate the criminality of his behavior; and (4) Roberts had the capacity to conform his conduct to the requirements of the law.

Dr. Mallory declined to provide an Axis I or II diagnosis and listed "History of Closed Head Injury at age 12" for the Axis III diagnosis. *Id.* In that regard, Dr.

Mallory noted and reviewed Roberts' medical history. Dr. Mallory reported the following information pertinent to Roberts' medical history:

> Records obtained from the Sparks Regional Medical Center in Ft. Smith indicated that the defendant was knocked unconscious and suffered a severe head injury at the age of 13 when his bicycle was struck by a dump truck. The records indicate that he showed bizarre behavior and affect due to the closed head injury and improved over several days of inpatient treatment. He was treated from July 17 to August 8, 1980 in the hospital. At one point the treatment note by Dr. Michael Dulligan observed: "His major injury is a skull fracture by skull X-rays. He was knocked unconscious for a period of time. He is alert but extremely belligerent. He has had a complete change of personality based on a blow, probably with bruising to both frontal lobes and to the temporal lobe which we can see obviously." He was noted to initially have headaches and double vision as a result of his head injury. He ambulated on crutches when he was discharged from the hospital. His discharge diagnosis was "Left Frontal Skull Fracture without Depression." He was seen in follow-up visits for the next year and observations and notes about his behavior indicated that he was not having any problems with headaches, seizures, or behavior that would indicate personality changes.
>
> Dr. Earnest Serrano, a neurologist at the Holt–Krock Clinic, indicated that the defendant's parents brought him to that clinic in January 1990 due to their observations that he had uncontrollable temper episodes in which he would "shout, scream, and make obscene gestures at family or people walking down the street." At the time of the examination the defendant admitted that he could not keep his urges of anger under control, but that he did not lose consciousness during the episodes. Dr. Serrano's examination concluded that there were no neurological irregularities and that he thought the symptoms were due to "behavior disorder, situational stress reaction." The defendant was referred to counseling.

August 13, 1999 and August 24, 1999: Dr. Mallory's report was prepared and submitted on August 13, 1999. According to the filing stamp on the report, it was received by the Polk County Circuit Court Clerk on August 24, 1999.

September 10, 1999: As discussed more thoroughly later, Dr. Wetherby, a defense expert, examined Roberts on this date.

November 18, 1999: A pretrial hearing on motions, including a hearing to determine whether Roberts was competent to stand trial, was conducted. Dr. Mallory was the only witness who testified at the hearing and he testified in a manner generally consistent with his report. The judge ruled from the bench that Roberts was competent.

February 10, 2000: As discussed more thoroughly in a moment, Dr. Archer, a defense expert, examined Roberts on this date.

May 16, 2000-May, 19, 2000: After six days of jury selection, a short trial took place, the defendant was found guilty, penalty phase evidence was presented, the jury returned a verdict of death, and Roberts was sentenced to death. The verdict form, which is reproduced in its entirety, reads as follows:

FORM 1
AGGRAVATING CIRCUMSTANCES

> We, the Jury, after careful deliberation, have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstance:
>
> (X) The capital murder was committed in an especially cruel or depraved manner.
>
> A capital murder is committed in an especially cruel manner when, as a 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 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.

[Signed by the Foreman]

FORM 2
MITIGATING CIRCUMSTANCES

A. (X) We unanimously find that the following mitigating circumstance(s) probably existed:

(If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.)

(Check applicable circumstances and specify any additional ones.)

( ) The capital murder was committed while Karl Douglas Roberts was under extreme mental or emotional disturbance.

( ) The capital murder was committed while the capacity of Karl Douglas Roberts to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect and/or alcohol intoxication.

(X) Karl Douglas Roberts has no significant history of prior criminal activity.

( ) Karl Douglas Roberts, although legally responsible, suffers from an intellectual deficit.

(X) Karl Douglas Roberts' IQ places him in the borderline range of intellectual functioning.

(X) Karl Douglas Roberts, as a result of a closed-head injury at age 12, has sustained significant brain damage to the frontal and temporal lobe areas of his brain.

( ) As a result of Karl Douglas Robert's brain damage, his ability to control his emotions and/or impulses have been impaired.

( ) As a result of Karl Douglas Robert's brain damage, his ability to accurately interpret social cues and communications from other persons has been impaired.

(X) Karl Douglas Roberts has been married approximately 10 years to Trina Brewer Roberts and is the father of two (2) children, Charli (age 5) and Bradley (age 1).

(X) Prior to his arrest, Karl Douglas Roberts adequately provided for the financial and material needs of his family.

(X) Karl Douglas Roberts cooperated with law enforcement officers by making a statement confessing to the homicide of Andria Brewer.

( ) Karl Douglas Roberts exhibited remorse when interviewed by law enforcement officers about the disappearance of Andria Brewer.

( ) Karl Douglas Roberts cooperated with the investigation by leading law enforcement officers to the crime scene and to the body of Andria Brewer.

(X) Since his arrest, Karl Douglas Roberts has maintained a relationship with his parents, Bob and Peggy Roberts.

(X) Since his arrest, Karl Douglas Roberts has maintained a relationship with his wife, Trina.

(X) Since his arrest, Karl Douglas Roberts has maintained a relationship with his daughter, Charli (age 5), and his son, Bradley (age 1).

( ) Other: Specify in writing. _____

B. One or more members of the jury believed that the following mitigating circumstance(s) probably existed, but the jury did not unanimously agree that such mitigating circumstance(s) probably existed:

(If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.)

(Check applicable circumstances and specify any additional ones.)

( ) The capital murder was committed while Karl Douglas Roberts was under extreme mental or emotional disturbance.

( ) The capital murder was committed while the capacity of Karl Douglas Roberts to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect and/or alcohol intoxication.

( ) Karl Douglas Roberts has no significant history of prior criminal activity.

( ) Karl Douglas Roberts, although legally responsible, suffers from an intellectual deficit.

( ) Karl Douglas Roberts' IQ places him in the borderline range of intellectual functioning.

( ) Karl Douglas Roberts, as a result of a closed-head injury at age 12, has sustained significant brain damage to the frontal and temporal lobe areas of his brain.

( ) As a result of Karl Douglas Robert's brain damage, his ability to control his emotions and/or impulses have been impaired.

( ) As a result of Karl Douglas Robert's brain damage, his ability to accurately interpret social cues and communications from other persons has been impaired.

( ) Karl Douglas Roberts has been married approximately 10 years to Trina Brewer Roberts and is the father of two (2) children, Charli (age 5) and Bradley (1 year old).

( ) Prior to his arrest, Karl Douglas Roberts adequately provided for the financial and material needs of his family.

( ) Karl Douglas Roberts cooperated with law enforcement officers by making a statement confessing to the homicide of Andria Brewer.

( ) Karl Douglas Roberts exhibited remorse when interviewed by law enforcement officers about the disappearance of Andria Brewer.

( ) Karl Douglas Roberts cooperated with the investigation by leading law enforcement officers to the crime scene and to the body of Andria Brewer.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his parents, Bob and Peggy Roberts.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his wife, Trina.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his daughter, Charli (age 5), and his son, Bradley (age 1).

( ) Other: Specify in writing._____

C. There was some evidence presented to support the following circumstance(s). However, having considered this evidence, the jury unanimously agreed it was insufficient to establish that the mitigating circumstance(s) probably existed[5]:

(If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.)

[5] The words "some evidence" was circled by hand. The words "insufficient to establish" and "probably existed" were underlined in hand.

(Check applicable circumstances and specify any additional ones.)

( ) The capital murder was committed while Karl Douglas Roberts was under extreme mental or emotional disturbance.

( ) The capital murder was committed while the capacity of Karl Douglas Roberts to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect and/or alcohol intoxication.

( ) Karl Douglas Roberts has no significant history of prior criminal activity.

( ) Karl Douglas Roberts, although legally responsible, suffers from an intellectual deficit.

( ) Karl Douglas Roberts' IQ places him in the borderline range of intellectual functioning.

( ) Karl Douglas Roberts, as a result of a closed-head injury at age 12, has sustained significant brain damage to the frontal and temporal lobe areas of his brain.

( ) As a result of Karl Douglas Robert's brain damage, his ability to control his emotions and /or impulses have been impaired.

( ) As a result of Karl Douglas Robert's brain damage, his ability to accurately interpret social cues and communications from other persons has been impaired.

( ) Karl Douglas Roberts has been married approximately 10 years to Trina Brewer Roberts and is the father of two (2) children, Charli (age 5) and Bradley (1 year old).

( ) Prior to his arrest, Karl Douglas Roberts adequately provided for the financial and material needs of his family.

( ) Karl Douglas Roberts cooperated with law enforcement officers by making a statement confessing to the homicide of Andria Brewer.

( ) Karl Douglas Roberts exhibited remorse when interviewed by law enforcement officers about the disappearance of Andria Brewer.

( ) Karl Douglas Roberts cooperated with the investigation by leading law enforcement officers to the crime scene and to the body of Andria Brewer.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his parents, Bob and Peggy Roberts.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his wife, Trina.

( ) Since his arrest, Karl Douglas Roberts has maintained a relationship with his daughter, Charli (age 5), and his son, Bradley (age 1).

D. ( ) No evidence of a mitigating circumstance was presented by either party during any portion of the trial. (Check only if no evidence of a mitigating circumstance was presented.)

(Signed by the Foreman)

FORM 3
CONCLUSIONS

The Jury, having reached its final conclusions, will so indicate by having its Foreman place a check mark in the appropriate space ( ) in accordance with the Jury's findings. In order to check any space, your conclusions must be unanimous. The Foreman of the Jury will then sign at the end of this form.

WE THE JURY CONCLUDE:

(a) (X) The State proved beyond a reasonable doubt the aggravating circumstance.

(If you do not unanimously agree to check paragraph (a), then skip (b) and (c) and sentence Karl Douglas Roberts to life imprisonment without parole on Form 4.)

(b) (X) The aggravating circumstance outweighs beyond a reasonable doubt any mitigating circumstances found by any juror to exist.

(If you do not unanimously agree to check paragraph (b), then skip (c) and sentence Karl Douglas Roberts to life imprisonment without parole on Form 4.)

(c) (X) The aggravating circumstance when weighed against any mitigating circumstances justifies beyond a reasonable doubt a sentence of death.

(If you do not unanimously agree to check paragraph (c), then sentence Karl Douglas Roberts to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b), and (c), then you may, but are not required to sentence Karl Douglas Roberts to death on Form 4.

Otherwise, sentence Karl Douglas Roberts to life imprisonment without parole on Form 4.

(Signed by the Foreman)

FORM 4
VERDICT

We, the Jury, after careful deliberation, have determined that Karl Douglas Roberts shall be sentenced to:

A. ( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B. (X) DEATH.

(If you return a verdict of death, each juror must sign this verdict.)

All jurors physically signed the "Verdict Form."

Filing 243-1 at CM/ECF pp. 601-614.

Roberts had four experienced lawyers. Roberts' defense was that he was unable to control himself due to his brain injury and related mental problems. The four doctors previously described gave detailed testimony.

Dr. Leroy Archer, who is a physician and a medical school professor, testified as a witness for the defense. Archer is a Fellow of the American Academy of Neurology and was voted the best neurologist in Arkansas. Archer reviewed all the pertinent records and examined Roberts on February 10, 2000.

Among other things, Archer noted that a CAT scan conducted in 1980 showed damage to the right frontal and temporal lobes of Roberts' brain, that intelligence testing later revealed that 95% of the population was smarter than Roberts, and that subsequent MMPI testing showed that "even minor stress" could cause "significant behavioral configurations" in Roberts. Critically, Archer also examined MRI scans. According to Archer, these studies clearly revealed that Roberts had lost "a fifth of his right frontal lobe" and a portion of the temporal lobe. As a result of these injuries, the doctor stated that Roberts would "[v]ery easily" misunderstand or misinterpret things and that Roberts would "jump to conclusions prematurely, not properly think through a situation[.]"

Dr. Mary Wetherby, a psychologist, who was awarded a Ph.D. with a specialty in neuroscience, testified for the defense. Dr. Wetherby did her internship at a Federal Bureau of Prisons medical center. About 80 percent of her practice was devoted to treating people who "have some kind of brain dysfunction, some kind of cognitive brain problem[ ]."

Dr. Wetherby performed a neuropsychological evaluation of Roberts on September 10, 1999. While her evaluation was conducted before the MRI studies

were completed, her evaluation was "real consistent with having problems in the frontal lobes. . . . "

Among other things, Wetherby administered the MMPI to Roberts. This time, unlike the MMPI administered by Dr. Mallory, the test was valid. For subjects like Roberts, Dr. Wetherby testified that authorities in her field believed that it was appropriate and desirable to re-administer the MMPI, particularly if there are problems on the first test with the validity scales. In any event, the test results revealed that Roberts had a "psychological maladjustment" that was "ongoing." "[E]ven mild stress" could cause "personality deterioration" in Roberts.

In particular, Roberts' results revealed a "chronic pattern" of depression and a tendency to fixate on particular thoughts. In addition, "his schizophrenia scale [was] elevated as well as the social introversion scale. As a result of her examination, and particularly due to the damage to Roberts' frontal lobe, Dr. Wetherby believed that Roberts was likely to be impulsive and likely to misinterpret information coming from others.

Dr. Reginald Rutherford, a physician and practicing neurologist, was called to testify by the prosecution as a rebuttal witness. Rutherford was engaged in a general neurology practice.

The doctor reviewed the records, but did not examine Roberts. According to Dr. Rutherford, "Roberts' MRI scan clearly depicts that he has a large los[s] [of] tissue in the right frontal lobe" and he "has lesser loss of tissue in the left medial frontal lobe and side and he has injury or loss of tissue to the right anterior temporal lobe." The "anatomy was clear cut." According to the doctor, "it's a significant injury, and it may have significant clinical implications." When asked by the prosecutor whether Roberts acted impulsively on May 15, 1999, Dr. Rutherford answered: "I don't know. I really don't know why this happened. I can't make any sense of it. . . . "

Dr. Charles Mallory, a clinical psychologist at the state hospital, was called as a rebuttal witness by the prosecution. Dr. Mallory received his Ph.D. from Baylor University in 1973 and since September of 1998 had served on the forensic unit of the state hospital doing evaluations.

When Mallory conducted the examination of Roberts in the summer of 1999, no MRI studies had been completed. Furthermore, he acknowledged that the medical records he reviewed when he conducted his evaluation "didn't show the extent of damage that were revealed in MRIs and subsequent diagnoses." Nonetheless, Mallory's opinions remained unchanged. However, Mallory agreed with defense counsel that Roberts had "anger control and impulse control problems."

June 1, 2000: Roberts signed the following waiver prepared by his lawyer:

WAIVER OF APPEAL

> I, Karl Douglas Roberts, having been found guilty and convicted of the offense of CAPITAL MURDER, and having been sentenced to death by lethal injection following a Jury Trial before a Polk County jury, and having been advised by the Court of my right to appeal, do hereby waive my right to appeal the conviction of Capital Murder and the sentence of death imposed against me, and in this regards further state:
>
> 1. On May 19, 2000, following the announcement by the Court of the jury's verdict, the Circuit Court of Polk County, Arkansas, Honorable Gayle K. Ford, presiding, advised me of my right to appeal and the time limitations in which to perfect an appeal.
>
> 2. I have fully discussed with my Attorney the effect of waiving my right to appeal and respectfully request that the sentence of death be carried out without any further action being taken by my attorney by way of direct appeal.
>
> 3. I further acknowledge that the proceedings which have been conducted against me not only include the review of possible error on direct appeal to the Arkansas Supreme Court, but also, any post-

conviction review following a direct appeal which would review any other matter, including but not limited to, claims of ineffective assistance of counsel.

4. It is my request that no appeal be brought in my behalf and that the Court conduct a prompt hearing to determine my competency to make this waiver.

5. I am not under the influence of any medication or receiving medical treatment that would prevent me from fully understanding the effect of this waiver of appeal.

DATED this 1st day of June, 2000.
s/ Karl Douglas Roberts
STATE OF ARKANSAS
COUNTY OF POLK
Subscribed and sworn before me this 1st day of June, 2000.
s/ Notary Public
(Seal)
Prepared by:
s/ Phillip M. Hendry ABN# [bar number redacted]
Arkansas Public Defender Commission
[address and phone number redacted]

July 19, 2000: Spanning seven pages in the transcript, the record reveals that a brief hearing was conducted on Roberts' "waiver." The only evidence that was presented was Roberts' own testimony. Using leading questions, and eliciting short answers (mostly "yes" or "no"), defense counsel called Roberts as a witness and asked him questions regarding the waiver.

Defense counsel's interrogation revealed that (1) after the death sentence, Roberts told his lawyer that he wished to waive his right to appeal; (2) Roberts was informed he had a right to a direct appeal to the Arkansas Supreme Court; (3) Roberts was informed that he would "be able to proceed under Arkansas Rules of Criminal Procedure 37.5 and allege any errors or ineffective assistance"; (4) Roberts was advised that "after that proceeding" he could pursue "avenues in federal court of habeas corpus relief"; (5) Roberts answered "yes" to the question: "Is it your desire

to-knowing all that, to waive those matters and waive those issues?"; (6) Roberts answered "yes" to the question: "So, it is your desire not to file a direct appeal or not to pursue Rule 37 or habeas corpus relief, is that correct?"; (7) Roberts answered "no" to the question: "Are you under the influence of any medication or receiving medical treatment which would prevent you from fully understanding the affect of your waiver of appeal?"; (8) Roberts answered "no" to the question: "Are you under the influence of any alcohol or any other substance that may affect your judgment or ability to understand?"; and (9) he signed the written waiver before a notary public on June 1, 2000.

The trial judge then briefly interrogated Roberts. While the judge's questions were somewhat more open-ended, Roberts gave very brief answers. The judge's questioning revealed that: (1) Roberts knew that, in his words, waiver "means to let something pass"; (2) Roberts said "yes" to the question: "Do you understand that if you do not have an appeal, that the judgment entered by the Court will be carried out?" (3) Roberts answered "death" when asked: "What is that judgment?"; (4) Roberts answered: "Yes, I am" when asked: "Are you sure?"; (5) Roberts declined to make a statement; (6) Roberts answered "Yes, we did" when asked whether he "fully discussed with your attorneys . . . what we're talking about today?"; (7) Roberts answered "yes" to the question, "Did he tell you that you don't have to do this if you don't want to?"; (9) Roberts was "positive" that he did not want to assert any appeals; (10) Roberts confirmed that he was not under "the influence of any medication or receiving any medical treatment" when he signed the waiver and also on the day of the hearing; and (10) when asked to "tell [the judge] in your own words what your waiver is asking for and what you are asking for today," Roberts replied: "I want to die."

The prosecutor presented no evidence and asked no questions. Acknowledging that he was "in somewhat uncharted territory," the judge then made a "finding that Karl Douglas Roberts has knowingly and intelligently waived his right to appeal.

February 7, 2002: Despite the fact that Roberts had waived his right to appeal, and pursuant to *State v. Robbins*, 5 S.W.3d 51 (1999), the Arkansas Supreme Court appointed new counsel to "abstract" the record and directed counsel to brief errors. *See Roberts II*, 123 S.W.3d at 881 ("On February 7, 2002, this court issued a per curiam opinion in which we appointed Tim Buckley to abstract the brief and set out any points of error.") Tim Buckley was not appointed as Roberts' counsel but rather he was appointed to assist the Arkansas Supreme Court in its mandatory review.

October 30, 2002: Buckley filed an "Abstract, Brief and Addendum of Special Assistant to the Court." He summarized the case in great detail and included quotations from most of the waiver hearing. He also asserted four arguments and they were: (1) the trial court erred when it refused to suppress the defendant's statement as a product of an involuntary waiver of his rights due to a false promise by police officers; (2) the trial court erred by denying defendant's motion to suppress physical evidence as fruit of the poisonous tree; (3) the trial court erred by not excusing for cause juror Glenda Gentry after the defense exhausted all peremptory challenges; and (4) the trial court erred by denying the defendant's motion for a directed verdict at the sentencing phase.

Buckley did not argue that Roberts' waiver of appeal was involuntary or otherwise improper. Nor did Buckley provide any critical analysis of the waiver hearing or Roberts' state of mind at the time of the waiver hearing. Still further, I cannot determine from the record whether Buckley consulted Roberts before making his written submission.

April 10, 2003: *Roberts I*, 102 S.W.3d at 482, was decided. The Arkansas Supreme Court first took up the question of whether Roberts had given a knowing and intelligent waiver of appeal rights. *Roberts I*, 102 S.W.3d at 486-488. The court concluded that "the trial court did not clearly err in determining that Roberts knowingly and intelligently waived his rights to appeal." *Id.* at 488.

The court then took up the four specific issues raised by Mr. Buckley. It resolved those issues against Roberts. *Id.* at 488–495.

The court then examined the record for other errors and also to determine whether Roberts' trial had included "fundamental safeguards." The court found no errors and found nothing in the record that would call into question "the essential fairness of the process afforded Roberts." *Id.* at 495. In particular, the court considered the following when it engaged in this omnibus review:

* As required by Ark. Sup.Ct. R. 4–3(h) (implementing a statutory directive regarding review of errors in death cases) and Ark.Code Ann. § 16–91–113(a) (West 2007) (requiring review of "all errors prejudicial to the rights of the appellant" in death penalty cases), the court reviewed the transcript for "adverse rulings objected to by Roberts and his counsel" and, without specifying what those rulings were, concluded that "no such reversible errors were found." *Roberts I*, 102 S.W.3d at 495.

* As required by *State v. Robbins*, 27 S.W.3d 419, 423 (2000) for death penalty cases in which the defendant waived appeal, the court applied the exceptions to its general rule of not recognizing plain error and examined the record to determine (a) whether the trial court failed to bring to the jury's attention a matter essential to its consideration of death penalty itself; (b) whether there was error by the trial judge of which the defense had no knowledge and therefore no opportunity to object; (c) whether the trial court failed to intervene without objection and correct a serious error by admonition or declaring a mistrial; and (d) whether there was a failure of the trial court to take notice of errors affecting substantial rights in a ruling admitting or excluding evidence, even though there was no objection. *Roberts I*, 102 S.W.3d at 495. The court found no such errors. *Id.*

* The court then looked to "determine whether other fundamental safeguards were followed" and it found that there was no irregularity. *Id.* In addition, the court responded to and rejected a portion of the lone dissenting judge's opinion which asserted that the verdict forms had not been properly completed because the jury had

failed to complete the forms as they regarded seven important mitigating factors. Compare 102 S.W.3d at 495–497 (majority) with 102 S.W.3d at 501 (dissent). The court believed that there was conflicting evidence on each of the seven proposed mitigating factors for which the verdict forms were left blank, and thus no error occurred when the jury failed to complete the forms. *Id.* at 495–497.

Finally, and because the court had earlier decided that Roberts' statement to the police had been properly obtained, the majority did not directly respond to the dissent's disagreement on that point. *Compare* 102 S.W.3d at 488–492 (majority) with 102 S.W.3d at 497–500 (dissent).

May 1, 2003: The mandate of the Arkansas Supreme Court was filed with the local court.

May 20, 2003: A hearing, where Roberts appeared in person, was held in the Polk County Circuit Court pursuant to Ark. R.Crim. P. 37.5 (hereafter Rule 37.5). Among other things, this rule requires that "not later than twenty-one (21) days after the mandate is issued" the "person under sentence of death shall be present at [a] hearing" and the court shall "inform the person of the existence of possible relief under this rule" and "determine whether the person desires the appointment of an attorney . . . ." Rule 37.5(b)(2).

As contrasted with the judge who tried Roberts' case and who presided over Roberts' initial waiver hearing, a different judge conducted the Rule 37.5 hearing. Indeed, the judge stated, "I was not the judge [at the time of the trial and the waiver hearing], so, I had to do this by looking at the transcript."

In the presence of the prosecutor, the judge began the hearing with the following statement and questioning of Roberts:

> BY THE COURT: Court will be in session. We're here on the matter of CR–99–70, State of Arkansas versus Karl Douglas Roberts. Let the record reflect that Mr. Roberts is in the courtroom. Mr. Roberts,

the hearing today is for a number of reasons, most importantly is to consider some rights that you may have under Rule 37.5 of the Arkansas Rules of Criminal Procedure. To get to that, let me review for you what has occurred up to now. I was not the judge that presided over your trial and so part of this is for my benefit as well as for yours.

On May 19, 2000, you were sentenced to death by lethal injection for capital murder of Andrea (sic) Brewer in this courtroom and that was by a jury which unanimously found that you had committed the crime and should receive the sentence of death.

On June 13, 2000 you filed with the court a written waiver of appeal requesting that the death sentence be carried out without an attorney taking further action to challenge the sentence.

On July 19, 2000 a hearing was held before the Court regarding that waiver. You testified at that time and made it clear that it was your wish, after being fully advised of all your options, to forego any challenge to your sentence.

BY MR. ROBERTS: Yes.

BY THE COURT: The Court at that time found that your waiver was knowing and intelligence—intelligently given. Under the Rules of Arkansas Criminal Procedure, your sentence was automatically reviewed by the Arkansas Supreme Court both with regard to the waiver of appeal rights, but also with regard to the trial itself to determine whether or not any reversible error had occurred during that trial.

On April 29th of this year the Arkansas Supreme Court issued a mandate affirming the capital murder conviction and upheld the death sentence pursuant to their mandatory review. That mandate from the Supreme Court was filed with the Polk County Circuit Clerk on May 1, 2003. The rules require that within twenty-one days of that filing that this hearing be held and we're here today to conduct this what is referred to often as a Rule 37.5 hearing.

The primary purpose, Mr. Roberts for the hearing today is to determine whether or not you wish to have an attorney appointed to

assist you at this time to pursue any possible post conviction rights and relief that you might have under the Arkansas Rules of Criminal Procedure. That could include also a look at whether or not there's any federal relief available to you under federal law, the federal habeas procedures. What that really amounts to is that you have the right, now that your conviction has been upheld by the court, you have the right within ninety days after whatever order I issue today, to file a petition with this Court asking for review of certain matters with regard to your sentence. I must inform you that those are not matters that were taken up on appeal, that's all been handled and you are at this point of course facing not only a confirmed conviction, but a sentence of death by lethal injection. But, you have the right to have this Court review any matters with regard to things that are outside what was reviewed on the appeal. For example, you have the right to raise questions about the assistance of counsel that you received during your trial, whether or not that was effective and as I've already suggested, there may be federal rights that also go with that. And, so, our point here today is to determine whether or not you wish to have an attorney appointed to represent you in these post conviction matters. Before I can make that decision, I'll have to hear from you and ask you a number of questions with regard to that. I also will have to make the determination of whether first of all your indigency status and you can answer this for me right there, you had appointed counsel during the trial. I am assuming, without knowing, that your financial situation is no different than it was at the time of the trial that you would qualify for an appointment of counsel, is that correct, sir?

BY MR. ROBERTS: Yes, sir.

BY THE COURT: All right, and I'm basing that on the fact that these procedures require that if you desire, an attorney can be appointed for you at no cost to you, if you are in fact indigent and my assumption I'm sure is correct, that you still are going to qualify. Now, let me ask you, Mr. Roberts, just as a general question without getting into specifics at this point, do you wish to have an attorney appointed to represent you at this stage?

BY MR. ROBERTS: No.

> BY THE COURT: All right, that's a preliminary answer and I need to make further inquiry. To do that, Mr. Roberts, I think the best way for me to do this is to ask you to take the stand and take the oath so that I can ask you some questions under oath.
>
> BY MR. ROBERTS: All right.

After Roberts took an oath, the judge proceeded to conduct a further inquiry. The judge first determined that nothing had changed regarding Roberts' eligibility for the appointment of counsel; that is Roberts was eligible for the appointment of counsel because he was a poor person. When asked whether Roberts wanted "to have an attorney appointed to represent you with regard to the post-conviction relief matters," Roberts said, "No."

Roberts answered "Yes" to the question: "Do you understand that the legal consequences of this decision of not having an attorney appointed is that you are effectively waiving any rights to seek further relief?" The judge then questioned Roberts regarding his understanding of his right to appeal and to seek post-conviction relief, and Roberts affirmed that he did not wish to have anyone seek postconviction relief on his behalf. Roberts stated that he understood that an execution date would be set if counsel were not appointed and the Arkansas Supreme Court reviewed the case and found nothing amiss.

The judge summarized the prior psychiatric and psychological testimony, and then asked: "Do you feel that your decision-making ability, your ability to understand, your ability to make a waiver in this case is any different today than it was at the time of your trial and post-trial hearing?" Roberts answered, "No, nothing's changed." Roberts also answered in the negative when asked whether he "had [taken] any medication or substance, is there anything at all that would affect your thinking today?" Roberts then stated that he understood that "waiver . . . means that I'm not going to file for further actions and that means that I'm going to go on ahead and carry out my sentence."

The judge then asked the following questions and Roberts gave the following answers:

> BY THE COURT: All right, sir, and tell me in your own words, as you told Judge Ford [the trial judge]. What is it that you want to happen, to occur at this point?
>
> BY MR. ROBERTS: Well, I don't think a guilty person should be allowed to live or he should at least be able to accept responsibility, his punishment whatever it may be.
>
> BY THE COURT: And, do you understand that if you accept that punishment in your case, that means that you are not choosing to live.
>
> BY MR. ROBERTS: Right.
>
> BY THE COURT: Is that what you're asking?
>
> BY MR. ROBERTS: Yes.
>
> BY THE COURT: Do you understand that once the Governor sets that date, then you are—you are choosing death over life under these circumstances.
>
> BY MR. ROBERTS: Yes, sir.
>
> BY THE COURT: I don't want to just go over this over and over, Mr. Roberts, but we're trying to be very careful here and make sure that you fully understand everything that's happening and the legal consequences of your decision. I'll review it for you one more time. Do you understand you would have the right for me to appoint an attorney to represent you at this stage?
>
> BY MR. ROBERTS: Yes, sir.
>
> BY THE COURT: And, I'm understanding that you're saying you do not [want] that attorney.
>
> BY MR. ROBERTS: Yes.

BY THE COURT: Do you understand that that attorney could seek relief in this Court within the next ninety days, that means file a petition on your behalf asking the Court to review any matters that you wanted to bring up, really, other than those that have already been handled in your appeal. Do you understand you're giving up that opportunity?

BY MR. ROBERTS: Yes.

BY THE COURT: Do you understand that also includes some federal rights? You might have the opportunity to go into federal court and ask the federal courts to review some of the conduct of your trial and other matters since your trial. Do you understand you're giving up that right?

BY MR. ROBERTS: Yes.

BY THE COURT: You also have indicated to me that—and I believe you understand what a waiver is and that you are knowingly giving up and waiving these rights that you have.

BY MR. ROBERTS: Yes, sir.

BY THE COURT: And, you know the consequences.

BY MR. ROBERTS. Yes, death.

After the foregoing discussion, the judge inquired of the prosecutor whether the court should ask any additional questions. The prosecutor responded, "I don't believe so, your honor." The judge then found that Roberts had waived his right to appointment of counsel and to seek post-conviction relief.

Following the judge's oral finding of waiver, the petitioner tried to make a statement to the families, people in the crowd objected, and the judge silenced Roberts telling him to talk to the prosecutor. In particular, the transcript reveals the following:

BY THE COURT: Is there anything else you want to say?

BY MR. ROBERTS: I'd like to say a couple of words to these families, if I would be able to.

A VOICE FROM THE AUDIENCE: No.

BY THE COURT: They don't want to hear it, Mr. Roberts and since they object—

(VOICES FROM THE AUDIENCE)

BY THE COURT: Talk with Mr. Williamson about that. Anything else, Mr. Williamson?

BY MR. WILLIAMSON: Your Honor, I think formally, even though there's not an execution date set, since his—

BY THE COURT: Hold up just a second (Noise from the audience).

BY MR. WILLIAMSON: Since his— since his direct appeal issues were waived, the conviction has been affirmed under a mandatory review and the death sentence has been upheld, I think technically the Court should also enter an order staying any execution. We just need to be sure that's on the record.

BY THE COURT: Thank you for reminding me. Mr. Roberts I have to just make that formal—that is for the Supreme Court to have an opportunity to review today's hearing. So, I will make as part of that order, the execution will be stayed until such time as the Supreme Court directs us to proceed.

BY MR. ROBERTS: Okay.

BY THE COURT: All right, that's it, folks, thank you.

May 22, 2003: The judge who presided over the Rule 37.5 hearing entered a written order. In pertinent part, that order is reproduced below:

> 1. That the Court finds on May 19, 2000, the Defendant was convicted by a jury of one count of Capital Murder and sentenced to death by lethal injection.
>
> 2. That the Court finds on June 13, 2000, a Waiver of Appeal of said death sentence was filed by the Defendant requesting that his death sentence be carried out without his attorneys taking any further action to challenge his conviction or sentence.
>
> 3. That the Court finds on July 19, 2000, a hearing was held regarding said Waiver of Appeal in which the Defendant testified and made it clear that it was his own wish, after being fully advised of his options, to forego any challenge to his death sentence, and that said waiver was knowingly and intelligently made by the Defendant.
>
> 4. That the Court finds on April 29, 2003, after completing a mandatory review for any prejudicial errors at trial regarding the conviction and sentence of the Defendant, the Arkansas Supreme Court issued its mandate affirming the Capital Murder conviction and death sentence of the Defendant and affirmed the finding of competency of the Defendant to waive his appeal from his sentence of death, with said mandate being filed with the Polk County Circuit Clerk on May 1, 2003.
>
> 5. That the Court finds on May 20, 2003, the Defendant was present at a hearing regarding the appointment of an attorney as required by Rule 37.5 of the Arkansas Rules of Criminal Procedure with said hearing being conducted within twenty-one (21) days after said mandate was issued by the Arkansas Supreme Court.

6. That the Court finds at said hearing the Defendant was advised that all previous hearings, jury trial, and Waiver of Appeal hearing which were held in this matter were presided over by Circuit Judge Gayle Ford, who is now retired.

7. That the Court finds at said hearing the Defendant was advised that careful consideration and review was recently conducted by the Court prior to this hearing of the court docket; transcript of trial testimony of Charles Mallory, Ph.D., a staff psychologist with the Arkansas State Hospital; the trial testimony of Reginald John Rutherford, M.D., a neurologist; transcript of the trial testimony of Lee Archer, M.D., a staff member of the University of Arkansas Medical Sciences in Little Rock; transcript of the trial testimony of Mary M.C. Wetherby, Ph.D., a psychologist; transcript of the trial testimony of Danny Davis, former employer of the Defendant; transcript of other trial testimony pertinent to the competency of the Defendant; the contents of the Waiver of Appeal and transcript of the hearing held regarding said waiver; and the Arkansas Supreme Court opinion affirming the capital murder conviction and death sentence and affirming the finding of competency of the Defendant to waive his appeal from his sentence of death.

8. That the Court finds at said hearing the Defendant was personally informed of the following facts, to wit:

a. the Defendant was advised of the post-conviction relief available to him pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure and that a petition seeking such relief must be filed with the Circuit Court within ninety (90) days from the date of entry of this order; and,

b. the Defendant was advised of his right to have an attorney appointed at no charge to represent him

in proceedings pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure; and,

c. the Defendant was advised that if he has sustained no change in his financial status, he would continue to be declared indigent and entitled to the appointment of an attorney at no charge to him; and,

d. the Defendant was advised of his right to appeal the denial of any postconviction relief and has the right to pursue certain remedies which may be applicable to him pursuant to habeas corpus relief in federal court; and,

e. the Defendant was advised of his right to reject and waive the appointment of an attorney to represent him in proceedings pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure; and,

f. the Defendant was advised of his right to waive the filing of any proceeding for post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure; and,

g. the Defendant was advised that exercising his right to waive the filing of any proceeding for post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure could impair his ability to seek habeas corpus relief in federal court; and,

h. the Defendant was advised that his waiver and willful failure to pursue post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure would result in the death sentence being carried out against him.

9. That after having advised the Defendant of his rights and facts set forth above, the Court took sworn testimony from the Defendant, and based upon the verbal

responses and comments made by the Defendant, the Court hereby makes the following findings, to wit:

a. the Defendant has the capacity and is clearly competent to understand the choice between life and death; and,

b. the Defendant has the capacity and is clearly competent to knowingly and intelligently waive any and all rights to pursue post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure or habeas corpus relief in federal court; and,

c. the Defendant has the capacity and is clearly competent to knowingly and intelligently reject his right to have counsel appointed at no charge to him to pursue on his behalf post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure; and,

d. the Defendant has unequivocally expressed his desire to freely, voluntarily, knowingly, and intelligently reject his right for the appointment of an attorney at no cost to him and waive his right to pursue post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure; and,

e. the Defendant has completely demonstrated he fully understands the legal consequences of (i) his waiver of his right to have an attorney appointed to him, (ii) the waiver of his right to pursue post-conviction relief pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure, and the waiver to pursue habeas corpus relief in federal court; and,

f. the Defendant has unequivocally expressed his desire for his death sentence to be carried out by the State of Arkansas and to die by lethal injection.

> 10. That these written findings and order is filed in compliance with the provisions of Rule 37.5(b) of the Arkansas Rules of Criminal Procedure and as required by Rule 37.5(g), a stay of execution of the sentence of death against the Defendant shall be and hereby is ordered and shall remain in effect until dissolved by a court with competent jurisdiction or by operation of law.
>
> 11. That the Court Reporter is hereby ordered to prepare the complete transcript of this hearing forthwith.
>
> 12. That the Circuit Clerk shall be and hereby is ordered to forward a copy of this Order pursuant to A.R.Cr.P. Rule 37.5 to Attorney General Mike Beebe forthwith.

October 9, 2003: In a per curiam opinion, the Arkansas Supreme Court reviewed the Rule 37.5 hearing record and affirmed the lower court's findings. *Roberts II*, 123 S.W.3d at 883. Thus, the court ruled that Roberts had waived his right to an attorney and to seek state post-conviction relief.

D. EARLY HISTORY OF FEDERAL HABEAS CORPUS CASE

On January 6, 2004, Roberts, through the Arkansas Federal Public Defender, filed a motion to stay his execution and that motion was granted on that same day by Judge Howard. The stay of execution was subsequently extended and then indefinitely extended on July 23, 2004.

On March 29, 2004, Roberts filed a personal declaration stating that "I want the Federal Public Defender Office to pursue my federal habeas case" and "I authorize the Federal Public Defender Office to prepare and file with the Court all appropriate pleadings in my name." On June 24, 2004, Judge Howard granted Roberts' motion for a psychological evaluation.

On July 16, 2004, Roberts' counsel filed a petition for writ of habeas corpus. (Filing 19.) Roberts asserted twenty-two claims. They are not identical to the claims he asserts now.

On November 4, 2004, and as directed by Judge Howard, the Respondent filed a response, certain state court "transcripts" and various "other" records. The parties also filed briefs. The respondent's "surreply" was the last brief submitted and it was filed on May 16, 2005.

At about the same time as the parties' initial briefing was coming to an end in the spring of 2005, the Supreme Court of the United States decided *Rhines v. Weber*, 544 U.S. 269 (2005). In that case, the Court reversed a decision of our Court of Appeals. The Court held that a district court had discretion to stay a mixed habeas petition to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then return to federal court for review of his perfected petition.

Until the summer of 2005, the parties and Judge Howard apparently awaited a decision from the Court of Appeals on the Respondent's appeal of the original stay of execution. Once the original habeas petition was filed, the Court of Appeals dismissed that appeal as moot. It did so on July 18, 2005. After that, and perhaps because of Judge Howard's ill-health, the case remained dormant until the spring of 2007.

Following the death of Judge Howard on April 21, 2007, this case was assigned to me pursuant to order of Chief Judge Loken, of the United States Court of Appeals for the Eighth Circuit, dated May 11, 2007. I expedited consideration of this case. Subsequently, I consulted counsel and entered various orders further progressing this case. Then, relatively soon after my appointment, I entered a *Rhines* stay and abeyance order. *Roberts v. Norris*, 526 F.Supp.2d 926 (E.D. Ark. 2007). I required monthly status reports from Petitioner's counsel and they scrupulously complied.

"RECENT" BACKGROUND

This case bounced back and forth between the state Circuit Court and the Arkansas Supreme Court for about 13 years. For example, the Circuit Judge dismissed the Federal Public Defender and assigned the case to the state defender. On appeal, the Arkansas Supreme Court reversed. But it is unnecessary to discuss all the complex series of events that took place. Only a few of these opinions are critical and necessary to discuss in any detail.[6] And, I do so next.

A. ARKANSAS SUPREME COURT FINDS ROBERT'S INCOMPENT TO WAIVE POSTCONVICTION RELIEF

During the process Roberts made clear to me and others that he wanted to die. The Circuit Court found he was competent to make that decision. Accordingly, the Circuit Court dismissed Roberts's petition for postconviction relief. That decision was appealed to the Arkansas Supreme Court.

On March 17, 2016, the Arkansas Supreme Court reversed. *Roberts v. State*, 488 S.W.3d 524 (2016) (*Roberts III*). The Supreme Court decided that the postconviction court's conclusion that Roberts was competent to waive his

[6] There were other proceedings. On February 1, 2008, Roberts filed a state postconviction (Rule 37.5) petition in the Polk County Circuit Court. On June 30, 2010, the court issued an order dismissing the petition without an evidentiary hearing. Roberts appealed. On December 1, 2011, the Arkansas Supreme Court dismissed the appeal, holding that the circuit court lacked jurisdiction over the Rule 37.5 petition and that the circuit court could not consider the petition unless the Arkansas Supreme Court first granted a motion to reopen Rule 37.5 proceedings. On January 3, 2012, Roberts filed a motion in the Arkansas Supreme Court seeking to reopen his Rule 37.5 proceedings. On February 14, 2013, the court granted the motion and allowed Roberts to return to Polk County Circuit Court to litigate his postconviction claims. Simultaneous with his successful effort to reinstate the Rule 37.5 proceedings, Roberts filed two additional motions in the Arkansas Supreme Court in an unsuccessful attempt to reopen his direct appeal.

postconviction rights was clearly erroneous. It said that this conclusion was inescapable because both the State's expert witness and Robert's expert witness testified that his psychosis, including a diagnosis of schizophrenia, affected his ability to make a rational decision about waiving his postconviction rights, and the remaining evidence, including defendant's letters to the trial court and me asserting his desire to waive his rights, did not compel an alternative conclusion. The State's expert testified that defendant's auditory hallucinations could affect the content of his letters.

B. 2018 CIRCUIT COURT DECISION THAT THE ARKANSAS SUPREME COURT REVIEWED

The case proceeded to the Circuit Court once again. After a three-day hearing in May of 2017, the judge issued a 95-page opinion on May 17, 2018. Because that opinion is important and not published, I shall call that document *Roberts IV*. After methodically going through each of the claims raised in the postconviction proceedings, the postconviction judge denied relief. (Filing 245-2 at CM/ECF pp. 355-460.) He made findings of fact and conclusions of law on the following claims:

> Claim 1-1-1: Counsel was ineffective for failing to secure a change of venue of the trial. (Filing 245-2 at CM/ECF p. 356.)
>
> Claim 1-1-2: Counsel was ineffective for inadequate voir dire on pretrial publicity. (Filing 245-2 at CM/ECF p. 358.)
>
> Claim 1-1-3: Counsel was ineffective for failure to move to excuse for cause/biased potential jurors. (Filing 245-2 at CM/ECF p. 359.)
>
> Claim 1-1-4: Counsel was ineffective for failure to object to arbitrary deprivation of full complement of peremptory challenges. (Filing 245-2 at CM/ECF p. 361.)
>
> Claim 1-1-5: Trial counsel was ineffective for failure to accept an extra peremptory and strike juror, Glenda Gentry. (Filing 245-2 at CM/ECF p. 363.)

Claim 1-2: Counsel provided ineffective assistance by failing to protect Petitioner from a prejudicial courtroom atmosphere. (Filing 245-2 at CM/ECF p. 364.)

Claim 1-3-1: Counsel was ineffective for failure to challenge testimony regarding the salary figure of Petitioner with contradictory evidence. (Filing 245-2 at CM/ECF p. 366.)

Claim 1-3-2: Counsel was ineffective for failing to challenge the supposed lack of traffic tickets. (Filing 245-2 at CM/ECF p. 367.)

Claim 1-4: Counsel was ineffective for failing to raise a violation of *Turner v. Louisiana*, 379 U.S. 466 (1965.) (Filing 245-2 at CM/ECF p. 369.) [This claim was withdrawn.]

Claim 1-5: Counsel was ineffective for failing to object to hearsay and failing to protect Petitioner's confrontation clause rights. (*Id.*)

Claim 1-6: Counsel was ineffective for failing to protect Petitioner's right to be present. (Filing 245-2 at CM/ECF p. 370.)

Claim 1-7: Counsel was ineffective for failing to support Petitioner's motion to suppress with readily available and legal authority. (Filing 245-2 at CM/ECF p. 372.)

Claim 1-8: Counsel was ineffective for failing to raise prosecutorial misconduct. (Filing 245-2 at CM/ECF p. 374.)

Claim 1-8-1: Failure to object to improper arguments. (*Id.*)

Claim 1-8-2: Failure to make a record of the prosecutor orchestrating extraneous and impermissible influence. (Filing 245-2 at CM/ECF p. 379.)

Claim 1-8-3: Failure to object to false testimony. (Filing 245-2 at CM/ECF p. 380.)

Claim 1-8-4: Failure to object to the prosecutor's failure to disclose material exculpatory information, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963.) (Filing 245-2 at CM/ECF p. 382.)

Claim 1-8-5: Failure to object to the prosecution's intentional dissemination of inadmissible and prejudicial information. (Filing 245-2 at CM/ECF p. 384.)

Claim 1-8-6: Failure to object to improper ex-parte contact. (*Id.*)

Claim 1-9: Counsel was ineffective in litigating competency to stand trial. (Filing 245-2 at CM/ECF p. 385.)

Claim 1-10: Trial counsel was ineffective in failing to properly support Petitioner's "lack of capacity" defense. (Filing 245-2 at CM/ECF p. 389.)

Claim 1-11: Trial counsel was ineffective for failing to present evidence of juror misconduct. (Filing 245-2 at CM/ECF p. 391.)

Claim 1-11-1: Juror Wornick's undisclosed bias. (*Id.*)

Claim 1-11-2: Juror Denton's undisclosed bias. (Filing 245-2 at CM/ECF p. 392.)

Claim 1-11-3: Juror Mos's undisclosed bias. (*Id.*)

Claim 1-11-4: Juror Powell's undisclosed bias. (*Id.*)

Claim 1-11-5: A juror conducted personal investigation. (Filing 245-2 at CM/ECF p. 393.)

Claim 1-11-6: Failure to object to juror's refusal to consider mitigation. (*Id.*)

Claim 1-11-7: Failure to discover the jury's preconceived sentencing decision. (Filing 245-2 at CM/ECF p. 396.)

Claim 1-11-8: Failure to object to the jury's failure to complete verdict. (*Id.*)

Claim 1-11-9: Failure to discover that juror failed to take responsibility for verdict. (Filing 245-2 at CM/ECF p. 397.)

Claim 1-11-10: Consideration of improper and irrelevant factors. (*Id.*)

Claim 1-11-11: Contamination from illegitimate and extraneous influences. (Filing 245-2 at CM/ECF p. 398.)

Claim 1-12: Counsel's cumulative performance was unreasonable and prejudicial. (Filing 245-2 at CM/ECF p. 399.)

Claim 2: Petitioner suffered ineffective assistance at the penalty phase. (*Id.*)

Claim 2-1: Defense counsel unreasonably failed to "life qualify" the jury. (*Id.*)

Claim 2-2: Presenting harmful evidence and argument. (Filing 245-2 at CM/ECF p. 401.)

Claim 2-3: Failure to present evidence effectively in mitigation. (Filing 245-2 at CM/ECF p. 404.)

Claim 2-4: Trial counsel ineffectively failed to object to improper victim impact. (Filing 245-2 at CM/ECF p. 408.)

Claim 2-5: Failure to claim a categorical exemption from the death penalty due to severe mental illness and brain damage. (Filing 245-2 at CM/ECF pp. 409-410.)

Claim 2-6: Trial counsel was ineffective for failing to challenge the verdict forms. (Filing 245-2 at CM/ECF p. 411.)

Claim 2-7: Failure to challenge capital murder and death penalty statutes and the aggravating circumstance. (*Id.*)

Claim 2-7-1: Failure to challenge the aggravating circumstance. (Filing 245-2 at CM/ECF p. 412.)

Claim 2-7-2: Failure to challenge Arkansas's Capital Sentencing Procedure. (Filing 245-2 at CM/ECF p. 414.)

Claim 2-7-3: Failure to challenge the arbitrary discretion granted by Arkansas's murder statutes. (Filing 245-2 at CM/ECF p. 415.)

Claim 2-8: Counsel's errors at sentencing were cumulatively unreasonable and prejudicial. (Filing 245-2 at CM/ECF p. 417.)

Claim 3: Counsel was ineffective during the post-trial stage. (*Id.*)

Claim 3-1: Counsel was ineffective for failing to file a motion for new trial raising claims of juror misconduct. (*Id.*)

Claim 3-2: Counsel was ineffective for failing to file a motion for new trial, claiming the denial of Petitioner's right to be present. (Filing 245-2 at CM/ECF p. 419.)

Claim 3-3: Counsel was ineffective for failing to file a motion for new trial raising claims of prosecutorial misconduct. (Filing 245-2 at CM/ECF p. 420.)

Claim 3-4: Trial counsel was ineffective for failing to protect Petitioner's right to appeal during the post-trial period. (*Id.*)

Claim 3-5: Trial counsel was ineffective for failing to raise ineffective assistance of trial and sentencing counsel during the post-trial period. (Filing 245-2 at CM/ECF p. 422.)

Claim 4: Petitioner suffered ineffective assistance of counsel on appeal. (Filing 245-2 at CM/ECF p. 423.)

Claim 4-1: Mandatory review counsel was ineffective for failing to claim that trial counsel was ineffective. (*Id.*)

Claim 4-2: Mandatory review counsel was ineffective for failing to raise pre-trial publicity claim. (Filing 245-2 at CM/ECF p. 424.)

Claim 4-3: Mandatory review counsel was ineffective for failing to claim that jurors should have been removed for cause. (*Id.*)

Claim 4-4: Mandatory review counsel was ineffective for failing to argue that the prejudicial courtroom atmosphere was unconstitutional. (Filing 245-2 at CM/ECF p. 425.)

Claim 4-5: Mandatory review counsel was ineffective for failing to raise the violations of *Turner v. Louisiana*, 379 U.S. 466 (1965.) (*Id.*)

Claim 4-6: Mandatory review counsel was ineffective for failing to raise hearsay/ confrontation clause issues. (*Id.*)

Claim 4-7: Mandatory review counsel was ineffective for failing to argue Petitioner's right to be present. (Filing 245-2 at CM/ECF p. 426.)

Claim 4-8: Mandatory review counsel was ineffective for failing to argue the motion to suppress with readily available evidence and authorities. (*Id.*)

Claim 4-9: Mandatory review counsel was ineffective for failing to argue prosecutorial misconduct. (*Id.*)

Claim 4-10: Ineffectiveness for failing to argue incompetency to stand trial. (Filing 245-2 at CM/ECF p. 427.)

Claim 4-11: Ineffectiveness for failure to argue juror misconduct. (Filing 245-2 at CM/ECF p. 428.)

Claim 4-12: Ineffectiveness for failure to argue ineffectiveness of sentencing counsel. (*Id.*)

Claim 4-13: Ineffectiveness for failure to argue "life qualification." (Filing 245-2 at CM/ECF p. 429.)

Claim 4-14: Ineffectiveness for failure to argue impermissible victim impact. (*Id.*)

Claim 4-15: Failure to argue categorical exclusion from the death penalty. (Filing 245-2 at CM/ECF pp. 429-430.)

Claim 4-16: Failure to argue the Petitioner's right to consideration of mitigation. (Filing 245-2 at CM/ECF at p. 430.)

Claim 4-17: Failure to challenge statutes and aggravating circumstances. (*Id.*)

Claim 4-18: Failure to argue ineffectiveness of counsel during post-trial stage. (Filing 245-2 at CM/ECF p. 431.)

Claim 4-19: Failure to challenge validity of direct appeal waiver. (Filing 245-2 at CM/ECF p. 432.)

Claim 4-20: Ineffectiveness for failing to argue cumulative error. (*Id.*)

Claim 5: The atmosphere of the community and the pretrial publicity was so prejudicial and inflammatory that Petitioner was deprived of a fair trial. (Filing 245-2 at CM/ECF pp. 432-433.)

Claim 6: The prejudicial atmosphere during trial violated Petitioner's constitutional rights. (*Id.*)

Claim 7: Petitioner was incompetent to stand trial. (Filing 245-2 at CM/ECF p. 434.)

Claim 8: Petitioner's rights were violated by juror misconduct. (Filing 245-2 at CM/ECF p. 437.)

Claim 9: The bailiff in charge of the jury was the Sheriff's key witness for the prosecution at both the guilty and penalty phases, in violation of due process. (Filing 245-2 at CM/ECF p. 438.)

Claim 10: Arkansas's death penalty scheme in general, and the aggravating circumstance used in this case, are unconstitutional. (*Id.*)

Claim 11: Petitioner's waiver of direct appeal was invalid and taken in violation of this constitutional rights. (Filing 245-2 at CM/ECF p. 439.)

Claim 12: Petitioner's right to be present was violated. (Filing 245-2 at CM/ECF p. 440.)

Claim 13: Petitioner's statement and its fruits should have been suppressed. (*Id.*)

> Claim 14: Petitioner's death sentence should be vacated because the trial court failed to life-qualify the jury. (Filing 245-2 at CM/ECF p. 441.)
>
> Claim 15: Petitioner is categorically excluded from the death penalty as a result of psychiatric illnesses and brain damage. (Filing 245-2 at CM/ECF p. 442.)
>
> Claim 16: The jury failed to consider and give meaningful effect to mitigating evidence. (Filing 245-2 at CM/ECF p. 446.)
>
> Claim 17: Petitioner's constitutional rights were violated by cumulative error. (*Id.*)
>
> Claim 18: Petitioner suffered from intellectual disability at the time of the offense and is therefore ineligible for a death sentence. (Filing 245-2 at CM/ECF p. 447.)

C. REVIEWING *ROBERTS IV*, THE ARKANSAS SUPREME COURT DECIDES IN *ROBERTS V* THAT ROBERTS IS NOT ENTITLED TO ANY RELIEF

This matter was finally resolved by *Roberts v. State*, 593 S.W.3d 675 (2020). (*Roberts V*) in the Arkansas Supreme Court. In summary, the court made the following rulings:

> 1 The defendant was not denied effective assistance as result of counsel's failure to investigate and present evidence of his schizophrenia during guilt phase;
>
> 2 The trial court did not commit clear error in determining that defendant was competent to stand trial;
>
> 3 The defendant was not denied effective assistance as result of counsel's failure to pursue change of venue;

> 4 The defendant's claim of denial his right to impartial jury was not cognizable in post-conviction proceeding;
>
> 5 The defendant was not denied effective assistance as result of trial counsel's failure to search his Social Security records;
>
> 6 The defendant was not denied effective assistance as result of counsel's failure to introduce evidence that he had eleven speeding violations; and
>
> 7 The defendant's claim that he was incompetent to be executed was not ripe.[7]

There was an impassioned dissent. In part, it read:

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[7] The Arkansas Supreme Court suggested that if a death warrant is later issued, a claim that Roberts cannot be executed because he was then severely mentally ill would be ripe and may entitle him to consideration at that time. *See Roberts V*, 592 S.W.3d at 685. *See also Panetti v.Quarterman*, 551 U.S. 930 (2007). Even then, and without prejudging the matter, Roberts would seem to have an uphill battle. *See Dunn v. Commissioner*, 138 S.Ct. 9 (2017) (Alabama state court's determination that petitioner sentenced to death for capital murder was competent to be executed, even if recent strokes suffered by petitioner left him unable to remember committing the murder, was not unreasonable application of Supreme Court precedent, and thus federal habeas relief was not warranted under Antiterrorism and Effective Death Penalty Act (AEDPA); testimony of court-appointed psychologist and psychologist retained by petitioner established that notwithstanding memory loss, petitioner recognized that he would be put to death as punishment for murder he was found to have committed.) However, for habeas purposes, his distinct intellectual disability claim is ripe now. *See*, *e.g.*, *Davis v. Kelly*, 834 F.3d 867, 971-972 (8th Cir. 2017) (Death row inmate's claim that Eighth Amendment forbids execution of intellectually disabled person became ripe at time his sentence was imposed, rather than when his warrant was issued).

I dissent. The defendant, Karl Roberts (Roberts), was not competent to stand trial at the time of his prosecution in 1999. The constitution prohibits the criminal prosecution of a defendant who is not competent to stand trial, and competence requires the ability to assist effectively in his or her own defense. *See*, *e.g.*, *Newman v. State*, 2014 Ark. 7, 2014 WL 197789. The fact that Roberts was incompetent to stand trial, standing alone, compels that his conviction be vacated under Rule 37, without regard to the reasonableness of his trial counsel's representation. *See* Ark. R. Crim. P. 37.1(a)(i) (providing for relief where "the sentence was imposed in violation of the Constitution and laws of the United States or this state"); *Cothren v. State*, 344 Ark. 697, 704, 42 S.W.3d 543, 547–48 (2001) ("A petitioner may also qualify for Rule 37 relief, regardless of trial counsel's performance, if he demonstrates error so fundamental as to render the judgment of conviction void and subject to collateral attack.").

. . .

All the evidence presented below supports the conclusion that Roberts was incompetent both at the time of the crime and for purposes of standing trial. Much of the litigation in this matter has revolved around the past opinions of two experts, Dr. Mallory and Dr. Wetherby, who examined Roberts before trial in 1999 and concluded he was competent to stand trial, though both acknowledged reservations in their opinions. Importantly, those opinions have since been dispelled. The clinical assessments that formed the basis for those two opinions were incorrectly scored and incompletely administered.

Both doctors administered the Georgia Competency Test (GCT), and both doctors mishandled the questions designed to assess whether the subject can assist his attorneys in his defense. As an example, Dr. Mallory noted at the pretrial competency hearing that "if someone were to lie about him in court, ... he would tell his lawyer," but on the GCT, Roberts actually said he would "call them a liar out loud" and "I couldn't control myself." Moreover,

Dr. Mallory entirely failed to administer the portion of the test meant to identify psychosis. Similarly, Dr. Wetherby gave Roberts a passing score (at least "20") on the competency test she administered, but the evidence presented below indicates that Roberts actually scored only a 17 or an 18—a failing score that would have indicated Roberts was incompetent to stand trial. These incorrect and incomplete evaluations were what Dr. Mallory and Dr. Wetherby based their opinions on in determining that Roberts was competent to stand trial. At the hearing below, the State presented no evidence of its own to contradict the assertion that these errors did, in fact, occur.

Roberts's postconviction attorneys demonstrated below both that these errors occurred and that they were material. Had the assessments been properly performed before the first trial, the results would have shown that Roberts was incompetent. There is no other evidence to suggest Roberts was competent; instead, all the evidence—including detailed testimony by forensic experts, illustrative accounts from Roberts's family and acquaintances about his life, and the difficulties explained by Roberts's trial attorneys themselves—supports that Roberts suffered a psychotic break and was unable to assist his trial attorneys in his defense. All this information is now in the record, and none of it is refuted by the State, nor is that lack of contrary evidence addressed by the majority.

In short, Roberts's postconviction attorneys established that his cognitive state was so reduced by disease and trauma that he could not assist his trial attorneys in preparing and presenting his defense—manifesting all the way up to and specifically including the trial itself. The evidence presented at the postconviction hearing to show Roberts's incompetence was overwhelming and uncontroverted in all material respects—including the

> salient errors by the experts who examined Roberts before trial.
>
> *Id.* at 686-688.

THE GENERALLY APPLICABLE FEDERAL LAW

Various strands of federal habeas law intertwine in this case. They are (1) exhaustion and procedural default; (2) the deference that is owed to the state courts when a federal court reviews the legal conclusions and factual findings set forth in an opinion of a state court; and (3) the standard for evaluating a claim of ineffective assistance of counsel. I set forth these strands now and apply them later. (When necessary, additional state and federal law will be referred to later.)

A. EXHAUSTION AND PROCEDURAL DEFAULT

As set forth in 28 U.S.C. § 2254:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The United States Supreme Court has explained the habeas exhaustion requirement as follows:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

"In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts." *Carney v. Fabian*, 487 F.3d 1094, 1096 (8th Cir. 2007) (internal citation and quotation omitted). Although the language need not be identical, "[p]resenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirement." *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999). In contrast, "[a] claim has been fairly presented when a petitioner has properly raised the 'same factual grounds and legal theories' in the state courts which he is attempting to raise in his federal habeas petition." *Wemark v. Iowa*, 322 F.3d 1018, 1021 (8th Cir. 2003) (citation omitted).

Where "no state court remedy is available for the unexhausted claim—that is, if resort to the state courts would be futile—then the exhaustion requirement in § 2254(b) is satisfied, but the failure to exhaust 'provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.'" *Armstrong v. Iowa*, 418 F.3d 924, 926 (8th Cir. 2005) (quoting *Gray v. Netherland*, 518 U.S. 152, 162 (1996)).

To be precise, a federal habeas court may not review a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule "unless the prisoner can demonstrate cause for the

default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Also, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar to relief. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). To invoke the actual innocence exception, a petitioner "must show that in light of all the evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Jennings v. United States*, 696 F.3d 759, 764-65 (8th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, (1995)). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)).[8]

B. DEFERENTIAL STANDARD UNDER 28 U.S.C. § 2254(D)

When a state court has adjudicated a habeas petitioner's claim on the merits, there is a very limited and extremely deferential standard of review both as to the law and the facts. *See* 28 U.S.C. § 2254(d). Section 2254(d)(1) states that a federal court may grant a writ of habeas corpus if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As

[8] In Respondent's excellent brief, Respondent's lawyers made the following statement: "The unique procedural posture of this case, having been stayed and held in abeyance for over a decade, while Roberts, in relatively piecemeal fashion raised his unexhausted claims in state court, means that the majority of Roberts's claims now have been reviewed and rejected on the merits by the state courts." (Filing 277 at CM/ECF p. 23.) It appears that Respondent concedes that most of Robert's claims have been exhausted and not procedurally defaulted. However, and while not a procedural default, Roberts is not entitled to two bites of the apple in the Arkansas courts. That is, Roberts cannot relitigate a claim in an Arkansas postconviction action that had previously been denied in a direct appeal. *Kemp v. State*, 74 S.W.3d 224, 232 (2002) ("Rule 37 does not allow appellant to reargue points decided on direct appeal.").

explained by the Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000), a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts the Supreme Court's prior holdings or if it reaches a different result from one of that Court's cases despite confronting indistinguishable facts. *Id.* at 405-06. Further, "it is not enough for [the court] to conclude that, in [its] independent judgment, [it] would have applied federal law differently from the state court; the state court's application must have been objectively unreasonable." *Rousan v. Roper*, 436 F.3d 951, 956 (8th Cir. 2006).

With regard to the deference owed to factual findings of a state court's decision, section 2254(d)(2) states that a federal court may grant a writ of habeas corpus if a state court proceeding "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)(2). Additionally, a federal court must presume that a factual determination made by the state court is correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

As the Supreme Court noted, "[i]f this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The deference due state court decisions "preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Id.*

However, this high degree of deference only applies where a claim has been adjudicated on the merits by the state court. *See Brown v. Luebbers*, 371 F.3d 458, 460 (8th Cir. 2004) ("[A]s the language of the statute makes clear, there is a condition precedent that must be satisfied before we can apply the deferential AEDPA [Antiterrorism and Effective Death Penalty Act] standard to [the petitioner's] claim. The claim must have been 'adjudicated on the merits' in state court.").

The Eighth Circuit clarified what it means for a claim to be adjudicated on the merits, finding that:

> AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. Accordingly, the postconviction trial court's discussion of counsel's performance—combined with its express determination that the ineffective-assistance claim as a whole lacked merit—plainly suffices as an adjudication on the merits under AEDPA.

Worthington v. Roper, 631 F.3d 487, 496-97 (8th Cir. 2011) (internal quotation marks and citations omitted).

The court also determined that a federal court reviewing a habeas claim under AEDPA must "look through" the state court opinions and "apply AEDPA review to the 'last reasoned decision' of the state courts." *Id.* at 497. A district court should do "so regardless of whether the affirmance was reasoned as to some issues or was a summary denial of all claims." *Id.*

C. THE ESPECIALLY DEFERENTIAL *STRICKLAND* STANDARD

When a petitioner asserts an ineffective assistance of counsel claim, the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984), must be applied. The standard is very hard for offenders to satisfy.

Strickland requires that the petitioner demonstrate both that his counsel's performance was deficient, and that such deficient performance prejudiced the petitioner's defense. *Id.* at 687. The first prong of the *Strickland* test requires that the petitioner demonstrate that his attorney failed to provide reasonably effective assistance. *Id.* at 687-88. In conducting such a review, the courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

The second prong requires the petitioner to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Further, as set forth in *Strickland*, counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" in a later habeas corpus action. *Id.* at 690.

Additionally, the Supreme Court has emphasized that the deference due the state courts applies with special vigor to decisions involving ineffective assistance of counsel claims. *Knowles v. Mirzayance*, 556 U.S. 111 (2009). In *Knowles*, the Justices stressed that under the *Strickland* standard, the state courts have a great deal of "latitude" and "leeway," which presents a "substantially higher threshold" for a federal habeas petitioner to overcome. As stated in *Knowles*:

> The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

Id. at 123 (internal quotation marks and citations omitted).

Strickland applies equally to appellate counsel, and appellate counsel is entitled to the "benefit of the doubt." *Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016) (a "fairminded jurist" could have concluded that repetition of anonymous tip in state-court cocaine-possession trial did not establish that the uncontested facts it conveyed were submitted for their truth, in violation of the Confrontation Clause, or that petitioner was prejudiced by its admission into evidence, precluding federal habeas relief under AEDPA; petitioner could not establish that petitioner's appellate counsel was ineffective, as appellate counsel was entitled to the "benefit of the doubt").

The imposition of the death penalty does not dilute the doubly deferential standard that must be applied to ineffective assistance of counsel claims. "[I]n more concrete terms, a federal court may grant relief only if *every* 'fairminded juris[t]' would agree that *every* reasonable lawyer would have made a different decision." *Dunn v. Reeves*, 141 S. Ct. 2405, ---- (2021) (the Supreme Court held that state postconviction counsel reasonably determined that counsel did not perform deficiently, as element of ineffective assistance of counsel, in failing to hire an expert to develop penalty-phase mitigation evidence of intellectual disability, after receiving funding to retain an expert) (emphasis in original).

ANALYSIS

Again, I have taken a minimalist approach given AEDPA and the extraordinary age of this case. But I have done so with an emphasis on caution and concern for accuracy. After all, I deal with the life of a human being.

It is also worth noting for the reader the way in which Roberts phrased his claims in the amended federal petition filed in 2020 and related brief in this court compared to the way he phrased them in the Arkansas courts. This sometimes makes it difficult and confusing to match them up, particularly as to whether his federal claims were denied on the merits. Without intending to be hard on Roberts' excellent counsel, it would have been easier for me (and the reader) if the claims were stated in the same order using the same wording in this court, *Roberts IV* and *Roberts V*.

Claim 1: Roberts is intellectually disabled.

Based on the Eighth Amendment, Roberts asserts that he cannot be executed because of his intellectual disability. *Atkin v. Virginia*, 536 U.S. 304 (2002) (Execution of mentally retarded criminal is unconstitutionally "cruel and unusual punishment."). *Cf.* *Moore v. Texas*, 139 S.Ct 666 (2017) (To make a finding of intellectual disability, for purposes of Eighth Amendment protection against

execution of an intellectually disabled person, a court must see: (1) deficits in intellectual functioning, which is primarily a test-related criterion; (2) adaptive deficits, assessed using both clinical evaluation and individualized measures; and (3) the onset of these deficits while the defendant was still a minor).

Although phrased in the present tense ("is"), one assumes that Petitioner means that he was intellectually disabled in 1999 when the murder took place or 2000 when the trial took place. That was how the postconviction judge perceived and addressed the claim. (Filing 245-2 at CM/ECF p. 447.) *See also Davis*, 854 F.3d at 971-972 (Whether Davis is now, in 2017, intellectually disabled has no bearing on whether he had the requisite moral culpability for the murder he committed in 1990. *See In re Bowling*, 422 F.3d 434, 436 (6th Cir.2005) ('Thus, the key substantive question before this court is whether Bowling was mentally retarded *at the time he committed the murders* of James and Tina Early.' (emphasis added)").

Albeit in the context of his confession, the Arkansas Supreme Court in *Roberts I* decided that Roberts was not so intellectually challenged as to warrant relief. That is:

> The evidence showed that Roberts was thirty-one years old at the time and that he had graduated high school and had held a job for the last six years. The evidence also showed that Roberts had been married for ten years and that he had two children. Dr. Mallory testified that Roberts's overall I.Q. was seventy-six, which placed him in the range of borderline intellectual functioning. Mallory indicated, however, that Roberts could read and write at a high school level, and that he reads like a person who has a higher I.Q.
>
> *Roberts I*, 102 S.W.3d at 490.

The postconviction judge considered this claim in detail. He wrote:

Claim 18: Petitioner Suffered from Intellectual Disability at the Time of the Offense and is Therefore Ineligible for a Death Sentence.

Findings of Fact: At the Rule 37 post conviction evidentiary hearing, Dr. Garrett Andrews, a neuro-psychologist, testified on behalf of the Petitioner. (TR. 1108-1134.) Dr. Andrews did not interview Petitioner (TR. 1128) or members of his family. (TR. 1112; TR. 1129.) He reviewed the records of Petitioner for approximately five (5) or six (6) hours. (TR. 1129.) He testified that he received the records that he reviewed from the Federal Attorney's Office. (TR. 1132.) He did not review letters Petitioner had written to the Court. (TR. 1131.)

Dr. Andrews testified after reviewing the raw data and reports that Petitioner had an intellectual disability in 1999. (TR. 1112.) He testified that Petitioner had been given "the full battery" of intellectual testing in August or September, 1999 by Drs. Mallory and Wetherby. (TR. 1113-1114.) He testified that Petitioner had an IQ score of 76 which would not standing alone rule out a diagnosis of intellectual disability. (TR. 1115.) He stated that based on his review, Dr. Mallory did not look at any adaptive functioning deficits with respect to Petitioner. (TR. 1116.) He characterized Petitioner's intellectual disability as mild. (TR. 1125.) He testified that a person with mild intellectual disability is not excluded from holding a job and can live in an apartment, drive a car, and play the drums. (TR. 1122.) Petitioner was tested until the eleventh grade and could not exceed an eighth-grade level in any subjects. (TR. Ex. 35, 43.)

Conclusions of Law: In *Roberts v. State*, 102 S.W.3d 482 (2003), the Supreme Court found no error in the findings by the trial court that in 1999 Petitioner had a full-scale I.Q. of seventy-six (76) which placed him within the borderline intellectual functioning range and that Petitioner had graduated from high school, could read and write on a high school level, held the same job for the previous six (6) years and had a wife of ten (10) years and a family. According to the testimony of Dr. Mallory, Petitioner understood the criminal justice system and the procedure of trial. The doctor stated Petitioner demonstrated to him that Petitioner understood his legal rights and the trial process. He testified that Petitioner knew the difference between right and wrong and that he had the ability to conform his conduct to the requirements of the law. Dr. Mallory also stated that Petitioner was cognitive of his

> actions and that he took steps to avoid apprehension both before and after the crime. Petitioner also had "decided to kill Andria because he knew that she could identify him as having raped her." (*Id.* at 497.) The Supreme Court found no error in these conclusions of the trial court.
>
> As the court has previously found, the rule governing petitions for post conviction relief does not provide an opportunity to reargue points that were settled on direct appeal. (*Davis v. State*, 44 S.W.3d 726, 345 Ark. 161 (2001).) It should also be noted that the *Davis* court held that Rule 37 never was intended to provide a means to add evidence to the record or to refute evidence adduced at trial. (*Id.* at 172.) (Emphasis added.)
>
> In this case, Petitioner supports his claim with testimony of Dr. Andrews presented at the Rule 37 evidentiary hearing which refutes the evidence of Dr. Mallory introduced at trial. The question of the competency of the Petitioner at the time of the offense was settled on direct appeal and cannot be reargued or refuted in this post conviction proceeding.

(Filing 245-2 at CM/ECF pp. 447-449.)[9]

Thus, to the extent that Petitioner claims he was intellectually disabled in 1999 or 2000 I reject the claim. The Arkansas Supreme Court in *Roberts I* clearly found otherwise. Applying the deferential standard of review that I am obligated to apply under §§ 2254(d)(1) and 2254(d)(2), I find no basis to overturn *Roberts I* (or *Roberts IV).* More specifically, under § 2254(e)(1) Roberts has not rebutted the presumption of factual correctness in *Roberts I* regarding intellectual disability by clear and convincing evidence. In this regard, it is noteworthy that Dr. Andrews did a records review, and did not

[9] *See also* filing 245-2 at CM/ECF p. 390 discussing the testimony of Dr. Matthew Mendell who concluded that Roberts had diminished intellectual functioning. This came in the context of an ineffective assistance of counsel claim. The doctor did not interview Roberts. He relied on the records and what he had heard.

interview Roberts.[10] His review took place almost two decades after the relevant time frame.

Claim 2: Roberts was not competent to be tried.

In *Roberts IV*, the postconviction judge resolved this issue against Petitioner. In his opinion, the postconviction judge wrote the following:

> Claim 7: Petitioner was Incompetent to Stand Trial
>
> Findings of Fact: This court adopts the "Findings of Fact" set forth in "claim 1-9, claim 1-10, issues 2-2, 2-3 and issue 4-10" which are incorporated by reference as if fully set forth herein.
>
> Conclusions of Law: Petitioner alleges in his post-hearing brief that "the record of the Rule 37 hearing is replete with evidence that Karl suffered from schizophrenia, that he was psychotic at the time of trial, and that he was unable to assist his counsel."
>
> As already pointed out, A.C.A.§ 5-2-301 et seq. sets forth the procedures for determination of the competency of a defendant as well as his fitness to proceed and assist in his or her own defense.
>
> Petitioner was convicted and sentenced to death by order of the trial court entered on May 23, 2000. On June 13, 2000, Petitioner filed a waiver of appeal. In 2003, the Supreme Court in *Roberts I* was required to address the issue of whether the Petitioner had the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence. The Supreme Court found that "the trial judge had the benefit of having heard much

[10] In fairness, Roberts refused to meet with defense experts. Filing 245-3 at CM/ECF p. 3.

psychological evidence during the pretrial competency hearing and throughout the course of the trial." *Id.* at 496. The trial court heard from defense experts, Dr. Archer and Dr. Wetherby, who both testified that as a result of brain injury, Petitioner suffered from hallucinations and his ability to conform his conduct to the requirements of the law was impaired. The state presented testimony from Dr. Rutherford and Dr. Mallory which conflicted with the testimony of the defense experts. Dr. Mallory testified as a rebuttal witness for the state and as noted earlier, testified that he could not find the existence of any form of schizophrenia and that Petitioner had the capacity to understand the proceedings against him and that he had the capacity to assist effectively in his own defense. (R. 2595.) The trial court relied on this evidence and the Supreme Court found that "the foregoing evidence demonstrates that the trial court did not clearly err in determining Roberts knowingly and intelligently waived his rights of appeal." *Id.* at 497. Although the Supreme Court determined that Petitioner at the time was competent to waive his right of appeal, it stands to reason that at that time, Petitioner was also competent to stand trial. After all, the testimony of Dr. Mallory presented by the state was for the purpose of determining that Petitioner was competent at the time. The Supreme Court found that based "on his tests and interviews" with Petitioner as well as his medical and psychological records, and the results of the Georgia Court Competency Test, Dr. Mallory "ultimately concluded" that Petitioner understood the criminal justice system, the procedures of the trial and that Petitioner knew the difference between right and wrong and that he had the ability to conform his conduct to the requirements of the law. The court noted that "Mallory relied on the foregoing facts as well as on Roberts' actions in the crime." *Id.* at. 496-497.

During the Rule 37 post conviction evidentiary hearing, Petitioner relied on the testimony of Dr. Fuguii, who testified that Dr. Mallory's determination that Petitioner was competent to stand trial was based on incomplete

> administration and incorrect scoring of the Georgia Competency Test. In other words, according to Petitioner the trial court and the Supreme Court got it wrong in 1999 and 2003.
>
> The Supreme Court has held that a Petitioner who asserts incompetence to stand trial for the first time in a petition for post conviction relief has "the heavy burden" of demonstrating the facts that he or she was not competent at the time of trial; the mere fact that the Petitioner can document a history of mental illness or show that counsel could have argued incompetence but chose not to do so, does not in itself entitle the Petitioner to a new trial under Rule 35. (*Burnett v. State*, 293 Ark. 300, 741 S.W.2d 624 (1987). Here, Petitioner attempted to show that he was not competent to assume responsibility for his conduct due to severe traumatic brain injury in the past which caused him to suffer from hallucinations and other forms of psychotic behavior and was therefore, not competent to stand trial. This history of mental problems suffered by Petitioner was documented. However, the diagnosis of Petitioner by Dr. Fuguii in 2018 with the diagnosis of Petitioner by Dr. Mallory in 1999-2000 does not in itself rise to the level of granting Petitioner a new trial under Rule 37. Petitioner has failed to overcome the finding that Petitioner was not [sic] competent at the time of his trial. In sum, Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial in 1999.
>
> Filing 245-2 at CM/ECF pp. 434-437

The Arkansas Supreme Court evaluated this claim in *Roberts V*. The court wrote regarding "*Competency to Stand Trial*" as follows:

> First, Roberts argues that over-whelming evidence establishes that he has long suffered from schizophrenia; that his schizophrenia rendered him incompetent to stand trial; and that trial counsel failed to investigate and present

evidence of his schizophrenia during the guilt phase. Regarding the alleged deficiencies in trial counsels' performance, we conclude that counsel cannot be considered ineffective for failing to investigate Roberts's schizophrenia when the four mental health professionals who testified at trial did not diagnose him as such. One of the defense experts, Dr. Mary Wetherby, noted that a diagnosis of schizophrenia was ''suggested,'' but she went on to find that while Roberts ''possessed a decreased ability to conform his behavior to the requirements of the law,'' he did not lack the ability to appreciate the criminality of his behavior at the time of the offense *and he was competent to stand trial*. Counsel's performance must be viewed from counsel's perspective at the time of trial, and Roberts was not diagnosed with schizophrenia until years later. We recognize counsel's argument that a reasonable attorney would have recognized the signs of Roberts's mental disease; would have investigated their client's paranoia and visual and auditory hallucinations; would have followed up on Dr. Wetherby's suspicions of schizophrenia; and would have consulted another expert. With the benefit of hindsight, further investigation into mental disease may seem appropriate, but we view trial counsel's performance from their perspective at the time of trial. Based on expert reports, trial counsel focused on the mental defect caused by Roberts's child- hood accident involving a dump truck. The jury heard testimony about Roberts's traumatic brain injury that resulted in a loss of 15 percent of the brain tissue in his frontal lobes, behavioral changes afterward, and expert opinions that his ability to conform his conduct to the requirements of the law was impaired and, but for the brain injury, he would not have committed the crime. Having carefully reviewed the record, we see no deficient performance by trial counsel under the standards set forth by *Strickland*.

In addition, Roberts argues that he was schizophrenic at the time of the trial and that his schizophrenia rendered him incompetent to stand trial. A petitioner may also qualify for Rule 37 relief, regardless of trial counsel's

> performance, if he demonstrates error so fundamental as to render the judgment of conviction void and subject to collateral attack. *Cothren v. State*, 344 Ark. 697, 704, 42 S.W.3d 543, 547–48 (2001). It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Newman v. State*, 2014 Ark. 7, 2014 WL 197789 (citing *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992)). Competency to stand trial has two parts: (1) the capacity to understand the proceedings against him or her and (2) the ability to assist effectively in his or her own defense. *See Newman, supra.* This court has defined the test of competency to stand trial as ‘‘whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational under- standing and whether he has a rational, as well as factual, understanding of the proceedings against him.’’ *Id.* (citations omitted).
>
> Here, the issue of Roberts's competency to stand trial was litigated before the trial court prior to trial, and he was found to be competent. At the postconviction hearing, Roberts's counsel presented evidence that the competency testing was flawed. In the order denying Rule 37 relief, the court found that Roberts had not overcome the previous finding of competency and that ‘‘Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial in 1999 [sic].’’ We cannot say that the trial court's denial of relief on this point is clearly erroneous, and we thus affirm.
>
> *Roberts V*, 592 S.W. at 680-681 (emphasis added).

Applying the deferential standard of review that I am obligated to apply under §§ 2254(d)(1) and 2254(d)(2), together with rebuttable presumption found in § 2254(e)(1), I reject this claim.

But there is a twist. In *Robert III*, the Arkansas Supreme Court decided that the postconviction court's conclusion that Roberts was competent to waive his postconviction rights was clearly erroneous. It said that this conclusion was inescapable because both the State's expert witness and Robert's expert witness testified that his psychosis, including a diagnosis of schizophrenia, affected his ability to make a rational decision about waiving his postconviction rights, and the remaining evidence, including defendant's letters to the postconviction court and me asserting his desire to waive his rights, did not compel an alternative conclusion.

If he was incompetent in 2016, is it a stretch to conclude that he was also incompetent in 2000 when he was tried? In *Roberts V*, the court quoted the *Roberts IV* postconviction judge who wrote "Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial . . . ." The Arkansas Supreme in *Roberts V* found that such a determination was not "clearly erroneous." Applying the deference due under AEDPA, Roberts is not entitled to relief.

Claim 3: Counsel was ineffective in the handling of mental-health issues at the guilt phase.

Issue 3-1: Counsel was ineffective for failing to challenge Roberts' competency to be tried.

Issue 3-2: Counsel ineffectively pursued the lack-of-capacity defense.

Issue 3-3: Counsel unreasonably failed to challenge Roberts' confession on mental-health grounds.

Claim 4: Counsel was ineffective for failing to adequately investigate, develop, and present mitigating evidence.

Claim 5: Counsel were ineffective for failing to pursue a change of venue.

Claim 11: Trial counsel should have challenged the jury's failure to consider mitigation evidence.

Claim 13: Counsel failed to reasonably respond to prejudicial false testimony about Roberts' work history and driving record.

Claim 17: Appellate counsel was ineffective.

I could write book on these ineffective assistance of counsel claims. I won't.[11]

To some extent in *Roberts I*, and to a much greater extent in *Roberts IV*[12] and *Roberts V*, the Arkansas courts dissected the performance of counsel under the proper standard; that is, *Strickland*. Given the "doubly deferential" nature of review that I am required to give to these issues, Roberts is not entitled to relief. To be frank, it is not close.

I stress only one further point. In *Roberts V* the Arkansas Supreme Court found that defense counsel could not be faulted when their very well-credentialed expert (Dr. Mary Wetherby, who was partially trained at a Federal Medical Center for Federal Prisoners) opined that "Roberts was competent to stand trial." *Roberts V*, 592 S.W. at 680.

[11] For what it is worth, if I were to review the ineffective assistance of counsel claims de novo I would come to the same conclusion, albeit, sometimes, for different reasons. The four lawyers (with assistance of investigators from the Arkansas Defender's office) did a superlative job with a losing hand. But even if they stumbled, there was no *Strickland* prejudice to Roberts.

[12] I have previously set forth where each of the findings of fact and conclusions of law appear relative to each claim addressed in the 95-page *Roberts IV* opinion. By that reference one can find where each of the ineffective assistance of counsel claims were discussed by the postconviction judge as well as all the other claims.

Claim 6: Roberts' conviction and death sentence must be vacated because individuals on the jury did not meet the constitutional standards of impartiality.

First, this claim has been procedurally defaulted because Arkansas law requires such matters be first submitted to the trial court via a motion for new trial and that is so even in death penalty cases. *See, e.g. Roberts IV*, at CM/ECF pp. 437-438. No such motion was filed. Furthermore, the Arkansas Supreme Court in *Roberts V* agreed:

> . . . Roberts argues that he was denied his constitutional right to an impartial jury when jurors failed to disclose their actual bias during voir dire. He challenges the impartiality of jurors Dennie Wornick and Vickie Denton, both of whom averred during voir dire that they would be impartial. Appellant points to testimony from the postconviction hearing, some seventeen years after the trial, that Wornick believed ''the law says'' premeditated murder should result in imposition of the death penalty and that Denton was biased against Roberts because of pretrial publicity and her belief that Roberts should get the death penalty if found guilty. The circuit court found this claim procedurally barred, citing *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006), and *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995). Indeed, this court has held that Rule 37 does not provide a means to challenge the constitutionality of a judgment where the issue could have been raised in the trial court, and a defendant's remedy for alleged juror misconduct is to directly attack a verdict by requesting a new trial pursuant to Ark. Code Ann. § 16-89-130(c)(7). *See Howard*, *supra*. Although Roberts attempts to distinguish his case and argues that his claim of juror misconduct was not known until years later, we are not persuaded. Because claims of juror misconduct are not cognizable in this postconviction proceeding, we affirm on this point.

Roberts V, 592 S.W.3d at 682.[13]

I discern no convincing reason such as "cause and prejudice" or "actual innocence" to excuse this default. Rather this claim has been defaulted and there is no alternative in state law to resurrect the claim.

Second, even if the default were to be ignored, I am convinced by Respondent's argument that this claim was reasonably adjudicated on the merits in *Roberts 1V* through discussions of ineffective assistance of counsel claims. (Respondent's brief at filing 277, CMECF pp. 117-122.) Applying the deference that I am required to give this claim must be denied even if it was not procedurally defaulted.

Claim 7: The trial court violated Roberts' rights by erroneously failing to exclude jurors, thus depriving Roberts of his full complement of peremptory challenges and forcing upon him a juror whom he did not accept.

The loss of a peremptory challenges is not by itself of Constitutional concern *providing* that (1) the accused was allowed the peremptory challenges provided for under state law and (2) the jury ultimately seated was impartial. *See*, *e.g.*, *Ross v. Oklahoma*, 487 U.S. 81, 89-91 (1988) ("Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury."); *Pickens v.Lockhard*, 4 F3d 1446, 1450-1451 (8th Cir. 1993) (Petitioner was not denied due process by having to use peremptory strikes to remove prospective jurors (including one who should have been removed for cause under *Witherspoon v. Illinois*) whom the state trial court refused to excuse for cause; Petitioner received all that Arkansas law allowed, though he retained fewer peremptory challenges to use as he wished).

[13] *See also Roberts I* for juror Gentry. 102 S.W.3d at 492-493.

From a numerical perspective, it is undisputed that Roberts was afforded the preemptory strikes the state law allowed. Indeed, the trial judge offered an extra peremptory strike that was rejected for fear that it would constitute a waiver as to the issue of whether objections for cause had been improperly denied. As to whether the jury that was ultimately seated was impartial, this was disputed. But in *Roberts I* (by discussions of Juror Gentry, review for plain error and review of "Other Fundamental Safeguards")) and *Roberts IV* (through discussion of ineffective assistance of counsel claims regarding jurors and jury bias) this claim, albeit indirectly, was resolved on the merits against Roberts.[14]

Applying the deferential standard of review that I am obligated to apply under §§ 2254(d)(1) and 2254(d)(2), together with rebuttable presumption found in § 2254(e)(1), I reject this claim.

Claim 8: Roberts' conviction and sentence should be vacated because of the prejudicial atmosphere in the courtroom.

There is no doubt that the courtroom "vibe" was tense. A metal screening machine was set up. One of the defense lawyers carried a gun. Various spectators wore small buttons with the face of the victim, although the trial judge observed that the jury was not paying attention to them. There was extra security in the courtroom. In *Roberts IV*, the postconviction judge took up this claim (through the lens of an ineffective assistance of counsel assertion) and resolved it against Roberts. (*See*, *e.g.*, filing 245-2 at CM/ECF pp. 364-366.) AEDPA deference dooms this claim.

Claim 9: The prosecutor's improper closing arguments violated Roberts' Due Process and Eighth Amendment rights.

In *Roberts IV* the postconviction judge considered this claim through analysis of ineffective assistance of counsel claims. (Filing 245-2 at CM/ECF pp. 374-379.)

[14] Since claim 6 was defaulted, it may be that claim 7 is also procedurally defaulted because the question of whether the jury was impartial is intertwined with both claims. However, Respondent does not seem to make such an argument.

Among other things the judge found no prejudice and chalked up defense counsel's failure to object as "nothing more than a tactical decision . . .." In *Roberts I*, upon global review, the Arkansas Supreme Court found that there were no prejudicial errors. "Suffice it to say, nothing in the instant record reveals any irregularity in procedure that would call into question the essential fairness of the process afforded Roberts." 102 S.W.3d at 495. Giving the deference that is due, I deny this claim.

Claim 10: The jury's failure to consider mitigation evidence violated Roberts' Eighth Amendment rights.

I have previously quoted the entire verdict form. The jury agreed as to some mitigators but not others. Roberts asserts that "check the box" errors existed, and this must mean that the jury did not consider all the evidence in mitigation. The argument is exceptionally weak. In *Roberts I*, with one judge dissenting, the Arkansas Supreme Court addressed this issue in great and careful detail. 102 S.W.3d at pp.495-497. It found no error. The court observed that there was conflicting evidence on the seven mitigators for which the jury left blanks indicating to the majority of the Arkansas Supreme Court that the jury was not persuaded that that those mitigators existed. The deferential review required under AEDPA causes me to deny this claim.

Claim 12: The State suppressed material evidence and countenanced false testimony in violation of Roberts' due process rights.

This claim is based upon alleged *Brady* violations and the failure of the prosecutor to cut square corners during examination and cross examination of witnesses regarding those *Brady* violations. Roberts wanted to address at least part of this claim through a writ of error coram nobis. Roberts requested permission from the Arkansas Supreme Court to do so since under state law he was required to seek permission from the Arkansas high court. The court denied the request because

Roberts had not been diligent in bringing this claim. *Roberts v. State*, 425 S.W.3d 771, 776-779 (2013) (*Coram Nobis case*).[15]

In the *Coram Nobis case*, the Arkansas Supreme Court employed a regularly applied independent and adequate state procedural rule requiring diligence. That being the case, the alleged *Brady* violations are procedurally defaulted without excuse.

Regarding the claim of prosecutorial impropriety brought in the context of the *Brady* violation issue, I agree with Respondent (filing 277 at CM/ECF pp.161-164) that the AEDPA statute of limitations of one year had long expired before this *new* claim was put forth. This claim was not asserted in the original habeas pleading (filing 19) when I issued my stay order.

Therefore, this new claim does not relate back. *Cf. Mayle v. Felix*, 545 U.S. 644, 645 (2005) (An amended habeas petition does not relate back (and thereby avoid AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading.)

Finally, this claim was discussed in the context of an ineffective assistance of counsel claim in *Roberts IV*. *See, e.g.*, Filing 245-2 at CM/ECF pp. 382-384. The judge found that there was no evidence that the sought-after material was undisclosed and further that there was no prejudice. Under the AEDPA deferential standard of review, there is no basis for concluding that Roberts is entitled to relief. I therefore deny the claim.

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[15] "The three alleged *Brady* violations raised by Roberts were that (1) the State withheld evidence of eleven traffic tickets Roberts had received, (2) the State withheld evidence that Roberts could only earn $28,000 per year, and (3) the State withheld evidence that Roberts's polygraph results had been inconclusive." *Id.*

Claim 14: Admission of excessive victim-impact evidence violated Roberts' Eighth Amendment Rights.

Among other decisions, the Arkansas Supreme Court resolved this issue against Roberts in the *Coram Nobis case*. 428 S.W.3d at 774-776 (Defendant, who alleged error in admission of victim-impact testimony, failed to demonstrate extraordinary circumstances resulting in defect in appellate process that warranted recall of the Supreme Court's mandate issued after its mandatory review of conviction for capital murder and death sentence; although defendant's federal-court proceedings had been stayed indefinitely, and case involved sentence of death, family members gave victim-impact testimony about effects that murder had on family, they did not request death penalty, and it could not be said that their testimony inflamed the passions of jurors, such that the statements called into question imposition of death sentence.) Following the AEDPA deference standard, Roberts is not entitled to relief on this claim.

Moreover, and as discussed regarding claim 12, the ADEPA one-year statute of limitations ran out. This was a new claim which did not relate back to the original petition. (Filing 19.)

Claim 15: Roberts' confession was involuntary.

In *Roberts I*, 102 S.W.3d at 488-492, the Arkansas Supreme Court thoroughly considered this claim and found it wanting. In my view, this issue is easy. AEDPA deference requires denial.

Claim 16: The overlap between capital murder and first-degree murder under Arkansas law is unconstitutional.

I reject this claim.

First, I agree with Respondent that this claim has been repeatedly rejected by both the federal and state courts. (Filing 277 at CM/ECF pp. 185-187 (collecting cases)). There is no contrary holding from the United States Supreme Court.

Second, I agree with Respondent that the AEDPA standard of review applies to the merits determination on this issue:

> Roberts raised this claim in a pretrial motion, and the issued was argued and considered at a pretrial hearing, after which the trial court denied Roberts's motion. . .[16] The trial court's rejection of the claim was abstracted on appeal and reviewed by the [Arkansas Supreme Court during its mandatory direct review. The [Arkansas Supreme Court] reasonably concluded that no prejudicial error occurred, and its decision is due deference.
>
> *Id.* at CM/ECF p. 185.

Claim 18: Roberts' waiver of his direct-appeal rights was unconstitutional.

In *Roberts II* the Arkansas Supreme Court found that Petitioner was competent to waive his direct-appeal rights. 123 S.W.3d at 882-883. While the Arkansas Supreme Court later found that Roberts was not competent to waive his postconviction rights *at that time*, long after the Arkansas Supreme Court issued *Roberts II*, the passage of time makes all the difference.

In short, AEDPA deference requires the denial of this claim.

[16] The trial motion and brief challenging the death penalty statute was asserted because it "fails to truly narrow the class of persons" eligible for, and deserving of, the death penalty. Filing 243-1 at CM/ECF pp. 236-239. The trial judge heard argument on this issue and denied the motion. Filing 243-2 at CM/ECF pp. 45-47. It therefore became subject to review in *Roberts I*.

Claim 19: Roberts is entitled to relief because of the cumulative prejudicial effect of the errors described herein.

I reject this claim. This claim concentrates on the numerous claims of ineffective assistance of counsel. Our Court of Appeals has rejected this approach. That is, for example:

> Middleton's argument contradicts Eighth Circuit precedent. We repeatedly have recognized "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir.2002) (citation omitted); *see, e.g., United States v. Robinson*, 301 F.3d 923, 925 n. 3 (8th Cir.2002) (recognizing "the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief," and noting the Eighth Circuit's rejection of cumulative error doctrine); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir.1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation." (citation omitted)); *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir.1990) (holding "cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own" (citation omitted)). Therefore, we have no hesitancy in rejecting Middleton's argument and concluding the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief.
>
> *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006).

But even if the habeas law would encompass the cumulative error theory as a legitimate, I would reject it. I have previously determined that none of the ineffective assistance of counsel claims warrant relief under the deferential standard of ADEPA. Thus, the cumulative error theory has no substance given the determination on the merits noted.

Finally, it his reply brief Roberts admits that: "The State argues that Claim 19, in which Roberts alleges cumulative error, is defaulted without excuse. Roberts concedes the default and does not address the claim further." (Filing 286 at CM/ECF p. 6 n. 2.) He is obviously not entitled to relief on this claim.

CERTIFICATE OF APPEALABILITY

The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Applying the foregoing standard, I grant a certificate of appealability on only the first two claims. They are:

Claim 1: Roberts is intellectually disabled.[17]

Claim 2: Roberts was not competent to be tried.

[17] For example, on the date it was decided, I became aware of and thereafter carefully considered *Jackson v. Payne*, No. 20-1830, 2021 WL 3573012 (August 13, 2021) (over a dissent, the Court found Mr. Jackson ineligible for the Arkansas death penalty because he was intellectually disabled under the Eighth Amendment and *Atkins*.)

Applying that same law, I deny a certificate of appealability as to all other claims.

IT IS ORDERED that:

1. The amended habeas corpus petition (and all earlier such petitions) are denied with prejudice.

2. A separate judgment will be issued.

3. A certificate of appealability is granted for the first two claims and they are:

   Claim 1: Roberts is intellectually disabled.

   Claim 2: Roberts was not competent to be tried.

4. A certificate of appealability is denied for all other claims.

Dated this 20th day of September 2021.

BY THE COURT:

Richard G. Kopf

Richard G. Kopf
Senior United States District Judge

Appendix C

Eighth Circuit Order Denying Rehearing (October 15, 2024)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1935

Karl Roberts

Appellant

v.

Dexter Payne

Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:04-cv-00004-JM)

ORDER

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

October 15, 2024

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

/s/ Maureen W. Gornik

Appendix D

Arkansas Supreme Court Opinion
(January 30, 2020)

Cite as 2020 Ark. 45

SUPREME COURT OF ARKANSAS

No. CR-18-845

KARL D. ROBERTS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** January 30, 2020 APPEAL FROM THE POLK COUNTY CIRCUIT COURT [NO. 57CR-99-70] HONORABLE JERRY RYAN, JUDGE AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Karl D. Roberts appeals from the Polk County Circuit Court's order denying his amended petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.5. Roberts raises nine points on appeal, none of which require reversal. We therefore affirm.

Roberts was convicted of the capital murder of twelve-year-old Andria Brewer, who was his niece, and sentenced to death in May 2000. He filed a waiver of his rights to appeal and to pursue postconviction remedies, but this court conducted an automatic review pursuant to *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), and affirmed his conviction and sentence in *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003) (*Roberts*

I).[1] The record shows that Roberts went to Andria's house when he knew her parents were not home, ordered her to get into his truck, drove to a remote area, raped her, and then strangled her to death. Roberts later confessed to police. At trial,

> the evidence showed that Andria was taken from her home by Roberts on May 15, 1999. According to his confession, Roberts knocked on the door, and Andria answered. Roberts knew that her parents were not home at the time. He told Andria to get into his truck. Andria then asked him what was wrong, and Roberts responded by telling her to just get in the truck. Andria complied. Roberts then proceeded on a journey of approximately ten miles that, according to Arkansas State Police Detective Lynn Benedict, would have taken twelve to thirteen minutes. Benedict also stated that the road that Roberts took continued to become darker and more remote, covered with low hanging trees and brush.
>
> According to Roberts's statement, Andria asked him to take her home several times along the way. Roberts kept on driving. He eventually stopped his truck on an old logging road and told Andria to get out. When she asked him what he was going to do, he told her he was going to "fuck" her. He told her to take off her shirt and lay down. He then took off the girl's pants and raped her. While he was violating her, Andria tried to get away from him, but he was able to hold her down. He told police that when he finished raping her, he knew that he could not let her live, because he had ejaculated inside her. He then decided to kill her by mashing his thumbs into her throat. Once the child turned blue and passed out, he dragged her body off into the woods and covered her up with limbs and brush. He then took her clothes and threw them off a nearby bridge, into a creek.

Roberts I, 352 Ark. at 507, 102 S.W.3d at 494–95. The jury rejected Roberts's defense that he was unable to conform his conduct to the requirements of the law due to a brain injury, found him guilty of capital murder, and ultimately sentenced him to death.

[1] In *Roberts I*, this court also affirmed the circuit court's finding that Roberts knowingly and intelligently waived his rights of appeal. Roberts was represented on appeal by appointed counsel.

Numerous proceedings followed. *State v. Roberts*, 354 Ark. 399, 123 S.W.3d 881 (2003) (*Roberts II*) (per curiam affirming the trial court's finding, following hearing at which Roberts appeared pro se, that Roberts was competent to waive Rule 37.5 rights); *Roberts v. Norris*, 526 F. Supp. 2d 926 (E.D. Ark. 2007) (staying federal habeas corpus action while Roberts exhausted his claims in state court that he did not competently waive his right to appeal and to seek state postconviction relief); *Roberts v. State*, 2011 Ark. 502, 385 S.W.3d 792 (*Roberts III*) (dismissing appeal upon finding that the circuit court was without jurisdiction to entertain Roberts's Rule 37.5 petition, and this court was likewise without jurisdiction to hear an appeal); *Roberts v. State*, 2013 Ark. 56, 425 S.W.3d 771 (*Roberts IV*) (denying petition to recall mandate issued after this court's mandatory review of Roberts's conviction and sentence in *Roberts I* and denying petition to reinvest jurisdiction to consider writ of error coram nobis); *Roberts v. State*, 2013 Ark. 57, 426 S.W.3d 372 (*Roberts V* (handed down simultaneously with *Roberts IV*)) (holding that failure to ensure that Roberts was competent to waive his rights to postconviction relief constituted breakdown in appellate process that warranted reopening his postconviction proceedings).

In December 2014, a competence hearing was held in Polk County Circuit Court. The State presented the testimony of Dr. Mark Peacock, a forensic psychologist with the Arkansas State Hospital, and the defense presented the testimony of neuropsychologist Dr. Daryl Fujii, who specializes in psychotic disorders stemming from traumatic brain injury. Both doctors concluded that Roberts was schizophrenic and that his mental illness affected his ability to make a rational decision about his case. Although the circuit court found that

Roberts was competent to waive his postconviction rights, this court reversed and remanded, holding that the circuit court was clearly erroneous when it concluded that Roberts was competent to waive postconviction review. *Roberts v. State*, 2016 Ark. 118, 488 S.W.3d 524 (*Roberts VI*). Upon remand, Roberts filed a 171-page petition for postconviction relief. His final amended petition, filed on February 27, 2017, asserted eighteen claims for relief in ten pages. Roberts's pre-hearing brief included the facts and legal support for the claims in his petition.

The circuit court held a hearing on Roberts's petition on May 15–17, 2017. Defense counsel presented the testimony of eighteen witnesses, including four expert witnesses, and introduced over forty exhibits. Three mental-health experts testified for the defense. Dr. Matthew Mendel, a clinical psychologist, testified regarding the effects of extreme trauma and how that trauma shaped Roberts. Dr. Daryl Fujii, who had also testified at the 2014 hearing on Roberts's competence to waive postconviction remedies, attested to Roberts's schizophrenia and its impact on his ability to assist his counsel in his own defense and conform his conduct to the requirements of the law. Finally, Dr. Garrett Andrews, a neuropsychologist, concluded that, based on objective data, Roberts was intellectually disabled as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM). The circuit court excluded the testimony of the final defense expert, Michael Wiseman, an attorney who proffered testimony regarding the standard of care for capital attorneys at the time of Roberts's trial. Following the hearing and the completion of the transcript, the circuit court allowed the parties to file simultaneous briefs. On May 17,

2018, the circuit court entered a 95-page order denying Roberts relief on every claim. This appeal followed.

Our standard of review in Rule 37 petitions is that, "on appeal from a circuit court's ruling on a petitioner's request for Rule 37 relief, this court will not reverse the circuit court's decision granting or denying post-conviction relief unless it is clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Wood v. State*, 2015 Ark. 477, at 2–3, 478 S.W.3d 194, 197 (citations omitted). For claims of ineffective assistance of counsel, we assess the effectiveness of counsel under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). *Watson v. State*, 2014 Ark. 203, at 3, 444 S.W.3d 835, 838–39. In asserting ineffective assistance of counsel under *Strickland*, the petitioner first must demonstrate that counsel's performance was deficient. *Id.* This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Id.* The reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.*

Second, the petitioner must show that the deficient performance prejudiced the defense, which requires a demonstration that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* This requires the petitioner to show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Springs v. State*, 2012 Ark. 87, at 3, 387 S.W.3d 143, 147. Unless a petitioner makes both *Strickland* showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Sales v. State*, 2014 Ark. 384, at 6, 441 S.W.3d 883, 887. We also recognize that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *See id.* (quoting *Strickland*).

I. *Competency to Stand Trial*

First, Roberts argues that overwhelming evidence establishes that he has long suffered from schizophrenia; that his schizophrenia rendered him incompetent to stand trial; and that trial counsel failed to investigate and present evidence of his schizophrenia during the guilt phase. Regarding the alleged deficiencies in trial counsels' performance, we conclude that counsel cannot be considered ineffective for failing to investigate Roberts's schizophrenia when the four mental health professionals who testified at trial did

not diagnose him as such. One of the defense experts, Dr. Mary Wetherby, noted that a diagnosis of schizophrenia was "suggested," but she went on to find that while Roberts "possessed a decreased ability to conform his behavior to the requirements of the law," he did not lack the ability to appreciate the criminality of his behavior at the time of the offense and he was competent to stand trial. Counsel's performance must be viewed from counsel's perspective at the time of trial, and Roberts was not diagnosed with schizophrenia until years later. We recognize counsel's argument that a reasonable attorney would have recognized the signs of Roberts's

mental disease; would have investigated their client's paranoia and visual and auditory hallucinations; would have followed up on Dr. Wetherby's suspicions of schizophrenia; and would have consulted another expert. With the benefit of hindsight, further investigation into mental disease may seem appropriate, but we view trial counsel's performance from their perspective at the time of trial. Based on expert reports, trial counsel focused on the mental defect caused by Roberts's childhood accident involving a dump truck. The jury heard testimony about Roberts's traumatic brain injury that resulted in a loss of 15 percent of the brain tissue in his frontal lobes, behavioral changes afterward, and expert opinions that his ability to conform his conduct to the requirements of the law was impaired and, but for the brain injury, he would not have committed the crime. Having carefully reviewed the record, we see no deficient performance by trial counsel under the standards set forth by *Strickland*.

In addition, Roberts argues that he was schizophrenic at the time of the trial and that his schizophrenia rendered him incompetent to stand trial. A petitioner may also qualify for Rule 37 relief, regardless of trial counsel's performance, if he demonstrates error so fundamental as to render the judgment of conviction void and subject to collateral attack. *Cothren v. State*, 344 Ark. 697, 704, 42 S.W.3d 543, 547–48 (2001). It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Newman v. State*, 2014 Ark. 7 (citing *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992)). Competency to stand trial has two parts: (1) the capacity to understand the proceedings against him or her and (2) the ability to assist effectively in his or her own defense. *See Newman*, *supra*. This court has defined the test of competency to stand trial as "whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him." *Id.* (citations omitted).

Here, the issue of Roberts's competency to stand trial was litigated before the trial court prior to trial, and he was found to be competent. At the postconviction hearing, Roberts's counsel presented evidence that the competency testing was flawed. In the order denying Rule 37 relief, the court found that Roberts had not overcome the previous finding of competency and that "Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial in 1999." We cannot say that the trial court's denial of relief on this point is clearly erroneous, and we thus affirm.

II. *Change of Venue*

Roberts argues that trial counsel was ineffective for not pursuing a change of venue in light of the media attention in the rural judicial district where the trial was held. Lead counsel Buddy Hendry filed a motion asking for the trial to be moved to Garland County, in the neighboring judicial district, but withdrew the motion a few days later. Roberts argues that the decision to withdraw the motion was not based on trial strategy, but rather, the decision was borne out of counsel's dereliction of duty. There was testimony at the postconviction hearing that defense attorney Darrel Blount was supposed to get affidavits from citizens of Montgomery County that Roberts could not receive a fair trial there, but he failed to do so because he was busy with other things. Without those affidavits, Hendry feared the venue might be changed to the other county within the judicial district (Montgomery County), which would be worse than Polk County, where at least Roberts had family. The circuit court found that the decision to seek a change of venue is a matter of trial strategy and denied relief. *See Stalnaker v. State*, 2015 Ark. 250, at 8, 464 S.W.3d 466, 472 (per curiam) (the decision whether to seek a change of venue is largely a matter of trial strategy and therefore not an issue for debate under our postconviction rule). While we acknowledge Roberts's argument that the evidence in this case falls outside the typical venue decision that is a matter of trial strategy, we nonetheless find no clear error in the circuit court's denial of relief on this point. To establish that the failure to seek a change in venue amounted to ineffective assistance of counsel, a petitioner must offer some basis on which to conclude that an impartial jury was not empaneled. *Van Winkle v. State*, 2016

Ark. 98, at 13, 486 S.W.3d 778, 788. Roberts has not done so, and therefore he has failed to demonstrate prejudice as required by the second prong of *Strickland*. *See id.*

III. *Juror Bias*

For his third point on appeal, Roberts argues that he was denied his constitutional right to an impartial jury when jurors failed to disclose their actual bias during voir dire. He challenges the impartiality of jurors Dennie Wornick and Vickie Denton, both of whom averred during voir dire that they would be impartial. Appellant points to testimony from the postconviction hearing, some seventeen years after the trial, that Wornick believed "the law says" premeditated murder should result in imposition of the death penalty and that Denton was biased against Roberts because of pretrial publicity and her belief that Roberts should get the death penalty if found guilty. The circuit court found this claim procedurally barred, citing *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006), and *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995). Indeed, this court has held that Rule 37 does not provide a means to challenge the constitutionality of a judgment where the issue could have been raised in the trial court, and a defendant's remedy for alleged juror misconduct is to directly attack a verdict by requesting a new trial pursuant to Ark. Code Ann. § 16-89-130(c)(7). *See Howard*, *supra*. Although Roberts attempts to distinguish his case and argues that his claim of juror misconduct was not known until years later, we are not persuaded. Because claims of juror misconduct are not cognizable in this postconviction proceeding, we affirm on this point.

IV. *Courtroom Atmosphere*

Under this point, Roberts argues that he was denied his constitutional right to a fair trial because the prejudicial courtroom atmosphere violated his right to due process. In addition, he argues that appellate counsel was ineffective in failing to protect his right to due process by not raising arguments on appeal regarding the prejudicial courtroom atmosphere and improper statements made by the prosecutor in closing argument.

The courtroom atmosphere was apparently tense[2] and included the victim's family members and others wearing buttons with her picture. However, the circuit court found that Roberts's "bare allegations" on this point could not sustain a finding that he was deprived of his fundamental right to a fair trial. In addition, the circuit court found that Roberts failed to meet his burden of demonstrating that counsel's performance was ineffective under *Strickland*. We see no clear error and affirm on this point.

V. *Responding to Prejudicial False Testimony*

Next, Roberts contends that trial counsel was ineffective for failing to reasonably respond to false testimony presented by the State regarding his earnings and driving record. Attorneys have a well-established duty to conduct reasonable records searches, including employment records and public criminal history. *Rompilla v. Beard*, 545 U.S. 374, 385–86 (2005). Here, Roberts alleges that his trial counsel's failure to investigate his criminal and financial history was objectively unreasonable.

[2] There were threats made, a defense attorney carried a gun, and security was heightened at the defense's request.

Regarding Roberts's earnings, his employer testified that Roberts was a carpenter's helper and did concrete finishing and operated equipment such as a small truck or backhoe. Roberts earned $11.50 an hour and time-and-a-half for any overtime, plus a bonus; he was making $50,000 a year. During closing argument, the prosecutor argued that "he's not the sharpest knife in the drawer, but he's sharp enough isn't he, to make $50,000 a year as a construction worker." At the postconviction hearing, Social Security records were introduced that showed that the salary figure was exaggerated. Nonetheless, the evidence showed that Roberts had steady gainful employment for several years preceding the murder. Even if Roberts could show deficient performance by his trial counsel, he could not show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's error on such a relatively minor point.

Regarding Roberts's driving record, the prosecution challenged the notion that Roberts could not conform his conduct to the requirements of the law by pointing out his satisfactory driving history. At trial, evidence was introduced of two speeding tickets, in 1996 and 1998, but in fact Roberts had eleven speeding violations and had nearly had his license taken away. However, in the nine years immediately preceding the murder, he received only four traffic citations—an average of less than one ticket every two years. As the State points out, the introduction of the evidence of the additional tickets may well have harmed Roberts's claim that he was incapable of conforming his conduct to the law because the jury could have concluded from the five-year gap between his two most recent

tickets and the next most recent ticket that Roberts had learned from the consequences of his previous actions and had, in fact, subsequently conformed his conduct.

Roberts cannot show prejudice from these alleged errors by trial counsel, and we affirm on this point.

VI. *Failure to Present Mitigation Evidence*

For his sixth point on appeal, Roberts argues that his trial counsel was ineffective in failing to present mitigation evidence at the penalty phase. Specifically, he points to evidence presented at the postconviction hearing of abuse by Roberts's father, the severity of his near-death accident at age twelve, his schizophrenia and family history of mental illness, and the death of his nephew in the days leading up to the offense. The circuit court thoroughly analyzed the evidence presented at trial and the evidence postconviction counsel argued should have been presented, and under the *Strickland* standards, was not convinced that counsel's performance had been ineffective. Having carefully reviewed the record, we see no clear error in the trial court's finding and affirm on this point.

VII. *Jury's Alleged Failure to Consider Mitigation Evidence*

On this point, Roberts argues that trial counsel and appellate counsel were ineffective for failing to challenge the jury's failure to consider mitigation evidence as shown by the jury forms. Roberts offered sixteen mitigating circumstances in Forms 2A, 2B, and 2C. The jury checked nine circumstances in Form 2A, signifying that all members of the jury agreed those probably existed, but it did not place a check by any of the remaining seven circumstances on Forms 2B or 2C. Form 2B was to be checked if one or

more members of the jury (but less than all) believed that the mitigating circumstance probably existed; Form 2C was to be checked if there was some evidence presented to support the circumstance but the jury unanimously agreed that it was insufficient to establish that the mitigating circumstance probably existed. Roberts argues that the jury failed to properly consider the mitigating circumstances it did not check on any form,[3] which is critical because the jury was obligated to weigh the aggravating circumstance found unanimously to exist beyond a reasonable doubt against "any mitigating circumstances found by any juror to exist." The circuit court denied relief on the basis that the issue had been reviewed on direct appeal. Indeed, in *Roberts I*, this court specifically addressed the completion of the jury forms on mitigating circumstances and held that there was "no error." *Roberts I*, 352 Ark. at 511, 102 S.W.3d at 497. We affirm on this point because the trial court did not clearly err in determining that this issue could not be relitigated. *See Kemp v. State*, 348 Ark. 750, 765, 74 S.W.3d 224, 232 (2002) ("Rule 37 does not allow appellant to reargue points decided on direct appeal.").

VIII. *Ineligibility for Death Penalty Due to Intellectual Disability*

[3] These circumstances are as follows: the capital murder was committed while Roberts was under extreme mental or emotional disturbance; the capital murder was committed while the capacity of Roberts to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect and/or alcohol intoxication; Roberts, although legally responsible, suffers from an intellectual deficit; as a result of Roberts's brain damage, his ability to control his emotions and/or impulses have been impaired; as a result of Roberts's brain damage, his ability to accurately interpret social cues and communications from other persons has been impaired; Roberts exhibited remorse when interviewed by law enforcement officers about the disappearance of Andria Brewer; and Roberts cooperated with the investigation by leading law enforcement officers to the crime scene and to the body of Andria Brewer.

Roberts argues that he is categorically ineligible for the death penalty under the Eighth Amendment and Arkansas law because he is intellectually disabled, citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) (forbidding imposition of the death penalty on persons who are "mentally retarded"), and Arkansas Code Annotated section 5-4-618 (Supp. 2019). Section 5-4-618(b) provides that "[n]o defendant with intellectual disabilities at the time of committing capital murder shall be sentenced to death."[4] Roberts contends that his death sentence should be vacated because he proved that he met the criteria for intellectual disability at the time of the offense. Before trial, Roberts filed a motion for a hearing to determine whether the State could seek the death penalty, citing Ark. Code Ann. section 5-4-618(b) and raising the issue of intellectual disability. The circuit court held a hearing that included expert testimony from Dr. Charles Mallory of the Arkansas State Hospital and found that Roberts was "subject to the death penalty." In this court's mandatory review of the record on direct appeal, we found no reversible error. In the order denying postconviction relief, the circuit court recognized that Roberts offered the testimony of neuropsychologist Dr. Andrews that Roberts was mildly intellectually disabled in 1999. However, the court found that the issue of Roberts's competency at the time of the offense had been settled on direct appeal and could not be reargued in postconviction proceedings. We affirm on this point.

IX. *Ineligibility for Death Penalty Due to Severe Mental Illness*

[4] At the time of Roberts's trial, before Act 1035 of 2019, the statute used the term "mental retardation" rather than "intellectual disabilities." *See* Act of Apr. 16, 2019, No. 1035, 2019 Ark. Acts ____.

Finally, Roberts argues that the Eighth Amendment of the United States Constitution, and the corresponding provision in article 2, section 9 of the Arkansas Constitution, prohibit his execution because he is severely mentally ill. He contends that this court should vacate his death sentence because of his undisputed traumatic brain injury and schizophrenia. However, there is currently no categorical prohibition on sentencing a person with schizophrenia to the death penalty. Roberts urges this court to extend *Roper v. Simmons*, 543 U.S. 551 (2005) (forbidding imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed), and *Atkins v. Virginia*, *supra*, to categorically prohibit the execution of the mentally ill. He argues that the same rationale that motivated the Supreme Court to outlaw the execution of juvenile offenders and the intellectually disabled should prohibit the execution of persons with serious mental illnesses. We decline Roberts's invitation to hold at this time that he may not be executed under the federal and state constitutions due to his schizophrenia and traumatic brain injury. We note that the law prohibits the execution of the "insane," *see Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986), and *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842 (2007), but this court has held that a petitioner's claim of incompetency to be executed is not ripe when no date had been set for his execution. *Isom v. State*, 2015 Ark. 219, 462 S.W.3d 638 (citing *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233). Accordingly, we affirm on this point.

X. *Conclusion*

We find no clear error in the circuit court's order denying Rule 37 relief, and we affirm.

Affirmed.

Hart, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. The defendant, Karl Roberts (Roberts), was not competent to stand trial at the time of his prosecution in 1999. The constitution prohibits the criminal prosecution of a defendant who is not competent to stand trial, and competence requires the ability to assist effectively in his or her own defense. *See*, *e.g.*, *Newman v. State*, 2014 Ark. 7. The fact that Roberts was incompetent to stand trial, standing alone, compels that his conviction be vacated under Rule 37, without regard to the reasonableness of his trial counsel's representation. *See* Ark. R. Crim. P. 37(a)(i) (providing for relief where "the sentence was imposed in violation of the Constitution and laws of the United States or this state"); *Cothren v. State*, 344 Ark. 697, 704, 42 S.W.3d 543, 547–48 (2001) ("A petitioner may also qualify for Rule 37 relief, regardless of trial counsel's performance, if he demonstrates error so fundamental as to render the judgment of conviction void and subject to collateral attack.").

The facts of this case are tragic and undisputed. Roberts raped and killed Andria Brewer, known by those close to her as Andi, when she was just twelve years old. Without doubt, Andi's death was and is a painful loss for her family and her community. However, it is also undisputed that Roberts is sick. He suffers from schizophrenia. His diagnosis is contributed to and exacerbated by structural damage to the integrity of Roberts's brain. As

a child, 15 percent of Roberts's brain was destroyed when a dump truck ran over him and left him in a coma. As this court acknowledged in *Roberts VI*, the evidence of Roberts's schizophrenia and reduced cognitive state is "undeniable." 2016 Ark. 118, at 8, 488 S.W.3d 524, 529.

All the evidence presented below supports the conclusion that Roberts was incompetent both at the time of the crime and for purposes of standing trial. Much of the litigation in this matter has revolved around the past opinions of two experts, Dr. Mallory and Dr. Wetherby, who examined Roberts before trial in 1999 and concluded he was competent to stand trial, though both acknowledged reservations in their opinions. Importantly, those opinions have since been dispelled. The clinical assessments that formed the basis for those two opinions were incorrectly scored and incompletely administered.

Both doctors administered the Georgia Competency Test (GCT), and both doctors mishandled the questions designed to assess whether the subject can assist his attorneys in his defense. As an example, Dr. Mallory noted at the pretrial competency hearing that "if someone were to lie about him in court, . . . he would tell his lawyer," but on the GCT, Roberts actually said he would "call them a liar out loud" and "I couldn't control myself." Moreover, Dr. Mallory entirely failed to administer the portion of the test meant to identify psychosis. Similarly, Dr. Wetherby gave Roberts a passing score (at least "20") on the competency test she administered, but the evidence presented below indicates that Roberts actually scored only a 17 or an 18—a failing score that would have indicated

Roberts was incompetent to stand trial. These incorrect and incomplete evaluations were what Dr. Mallory and Dr. Wetherby based their opinions on in determining that Roberts was competent to stand trial. At the hearing below, the State presented no evidence of its own to contradict the assertion that these errors did, in fact, occur.

Roberts's postconviction attorneys demonstrated below both that these errors occurred and that they were material. Had the assessments been properly performed before the first trial, the results would have shown that Roberts was incompetent. There is no other evidence to suggest Roberts was competent; instead, all the evidence—including detailed testimony by forensic experts, illustrative accounts from Roberts's family and acquaintances about his life, and the difficulties explained by Roberts's trial attorneys themselves—supports that Roberts suffered a psychotic break and was unable to assist his trial attorneys in his defense. All this information is now in the record, and none of it is refuted by the State, nor is that lack of contrary evidence addressed by the majority.

In short, Roberts's postconviction attorneys established that his cognitive state was so reduced by disease and trauma that he could not assist his trial attorneys in preparing and presenting his defense—manifesting all the way up to and specifically including the trial itself. The evidence presented at the postconviction hearing to show Roberts's incompetence was overwhelming and uncontroverted in all material respects—including the salient errors by the experts who examined Roberts before trial.

In its order denying Roberts's petition, the lower court acknowledged the problems with the original competence evaluations, but never assessed the significance of those

problems. Instead, the lower court simply opined that Roberts's postconviction attorneys failed to meet their burden of proof:

> [Petitioner argues that the earlier] determination that Petitioner was competent to stand trial was "based on incomplete administration and incorrect scoring of the Georgia Competency Test.["] In other words, according to Petitioner the trial court and the Supreme Court got it wrong in 1999 and 2003.
>
> ...
>
> Petitioner has failed to overcome the finding that Petitioner was not competent [sic] at the time of his trial. In sum, Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial in 1999.

R. 847-50 (underlines added). The lower court declined to actually address how the incorrectness of the assessments that supplied the basis for that original "finding" would impact the analysis. To affirm that holding, the majority essentially does the same:

> Here, the issue of Roberts's competency to stand trial was litigated before the trial court prior to trial, and he was found to be competent. At the postconviction hearing Roberts's counsel presented evidence that the competency testing was flawed. In the order denying Rule 37 relief, the court found that Roberts had not overcome the previous finding of competency and that "Petitioner has not demonstrated that his current mental condition equates with his condition at the time of trial in 1999." We cannot say that the trial court's denial of relief on this point is clearly erroneous, and we thus affirm.

(Maj. Op. at 8). With all due respect to the majority, I disagree.

As did the lower court's order, the majority opinion fails to acknowledge the significance of what appears to be uncontroverted fact: (1) the assessments that formed the basis for the original opinions regarding Roberts's competence were not properly performed; (2) had those assessments been administered completely and scored correctly,

the results would have shown that Roberts could not assist his attorneys and was incompetent to stand trial; and (3) the deference that has since been afforded to those opinions was therefore misplaced. Despite the offhand remarks contained in the lower court's order, this was *exactly* the point Roberts's postconviction attorneys were making, i.e., the courts that have previously addressed this issue *did* get it wrong because they were relying on incorrect information. Moreover, Roberts's postconviction attorneys have established this point in spades, and the State has presented nothing to rebut it. Accordingly, the lower court's decision on this point is clearly erroneous, and it should be reversed. In *Roberts VI*, this court explained, "Despite our belief that the trial court is in the best position to assess credibility and weigh the evidence, in this case we are left with a firm conviction that a mistake has been made." 2016 Ark. 118, at 8. This court should do so again here, as there is simply nothing to "compel an alternative conclusion." *Id.*

By our law and our constitution, individuals situated as Roberts was at the time of his prosecution are incompetent to stand trial, and when it is determined that such an individual was tried and convicted despite his incompetence, that conviction violates due process and must be vacated. *See* Ark. Code Ann. § 5-2-302(a) ("No 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[.]"); *Pate v. Robinson*, 383 U.S. 375, 387 (1966) ("If the State elects to retry Robinson, it will of course be open to him to raise the question of his competence to stand trial at that time and to request a

special hearing thereon. In the event a sufficient doubt exists as to his present competence such a hearing must be held. If found competent to stand trial, Robinson would have the usual defenses available to an accused."). Accordingly, while I would also hold that Roberts's trial attorneys were deficient for failing to develop a defense for mental disease (and other related errors), those questions need not be addressed in this case. Roberts's incompetence at the time of trial, standing alone, is dispositive.

I dissent.

Lisa G. Peters, Federal Defender, by: *Scott W. Braden*, for appellant.
Leslie Rutledge, Att'y Gen., by: *Jason Michael Johnson*, Ass't Att'y Gen., for appellee.

Appendix E

Direct Appeal Opinion
(April 10, 2003)

Karl Douglas ROBERTS

v.

STATE of Arkansas.

No. CR 02–22.

Supreme Court of Arkansas.

April 10, 2003.

Defendant was convicted, after a jury trial in the Circuit Court, Polk County, Gayle K. Ford, J., of capital murder and was sentenced to death. On mandatory review, the Supreme Court, Donald L. Corbin, J., held that: (1) defendant knowingly and intelligently waived his right to a state appeal; (2) any false promise of leniency did not make defendant's confession involuntary; (3) evidence established the murder was committed in especially cruel or depraved manner, as aggravating circumstance at penalty phase; and (4) fact that jury left portions of verdict form blank did not establish that jury failed to follow fundamental safeguards at penalty phase.

Affirmed.

Ray Thornton, J., filed a dissenting opinion.

1. Sentencing and Punishment ⚿1788(2)

A defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

2. Sentencing and Punishment ⚿1788(9)

The appellate court will not reverse the trial court's conclusion, as to whether defendant knowingly and intelligently waived his right to a state appeal of his death sentence, unless it is clearly erroneous.

3. Sentencing and Punishment ⚿1788(2)

Defendant knowingly and intelligently waived his right to a state appeal of his death sentence for capital murder; defendant told the trial court he understood that the word "waiver" meant "to let something pass," he told the trial court "I want to die" when he was asked to say in his own words what he wanted, and he answered "yes" when asked whether he was requesting that the death sentence be carried out without any further action by his attorney on direct appeal.

4. Criminal Law ⚿520(1)

A confession induced by a false promise of reward or leniency is not a voluntary confession.

5. Criminal Law ⚿520(1)

In deciding whether there has been a misleading promise of reward or leniency, so that a resulting confession was not voluntary, the court views the totality of the circumstances and examines, first, the officer's statement, and second, the vulnerability of the defendant.

6. Criminal Law ⚿520(1)

If the court determines that the officer's statement was an unambiguous false promise of leniency, then there is no need to assess the vulnerability of the defendant, when determining whether the defendant's confession was voluntary.

7. Criminal Law ⚿520(2)

Factors to be considered in determining the defendant's vulnerability, as element for determining whether a false promise of leniency rendered the defendant's confession involuntary, include: (1)

the age, education, and intelligence of the defendant; (2) how long it took to obtain the confession; (3) the defendant's experience, if any, with the criminal-justice system; and (4) the delay between the *Miranda* warnings and the confession.

8. Criminal Law ⇨520(2)

For defendant's confession to be involuntary because it was induced by a false promise of leniency, the promise must have induced or influenced the confession.

9. Criminal Law ⇨520(1)

For a defendant to show that a false promise of leniency rendered his confession involuntary, the defendant must show that the confession was untrue, because the object of the rule barring confessions induced by false promises of leniency is not to exclude a confession of truth, but to avoid the possibility of a confession of guilt from one who is, in fact, innocent.

10. Criminal Law ⇨1158(4)

The appellate court will not reverse the trial court's denial of a motion to suppress a confession unless it is clearly erroneous or clearly against the preponderance of the evidence.

11. Criminal Law ⇨520(2)

Statement by police officer who gave polygraph examination to defendant, "Get it off your chest, we'll help," made after defendant had dropped his head and stated that he had messed up and that he needed help, was an ambiguous false promise of leniency, and thus, it was necessary to assess the vulnerability of the defendant, when determining whether defendant's confession was voluntary.

12. Criminal Law ⇨520(2)

Defendant was not vulnerable, and thus, police officer's ambiguous false promise of leniency did not render defendant's confession to capital murder involuntary; while defendant's IQ of 76 placed him at borderline range of intellectual functioning, he was 31 years old, he could read and write at high school level, he had held a job for the preceding six years, he had been married for ten years and had two children, defendant's brain injury at age 12 at most rendered him unable to control his emotions and actions but did not affect his ability to understand his rights or to appreciate the criminality of his actions, defendant had been at police station for four hours, and confession occurred less than two hours after defendant was advised of his *Miranda* rights, though defendant broke down and sobbed during his confession.

13. Criminal Law ⇨520(2)

Even assuming statement by police officer who gave polygraph examination to defendant, "Get it off your chest, we'll help," was a false promise of leniency, such promise did not induce or influence defendant's confession to capital murder, and thus, the confession was voluntary; defendant, immediately after being informed that his answers on the polygraph examination were deceptive, hung his head and stated that he had messed up and that he needed help, so that defendant had already incriminated himself and appeared ready to confess, before any false promise of leniency.

14. Criminal Law ⇨1137(1)

Defendant waived appellate review of claim that prospective juror should have been excused for cause in capital murder prosecution, where defense counsel, in the trial court, had essentially agreed with the trial court's ruling by conceding that there were no grounds to excuse the prospective juror for cause.

15. Criminal Law ⇨1030(1)
Sentencing and Punishment ⇨1788(3)

The four exceptions to the general rule that the appellate court will not re-

view plain error, i.e., an error not brought to the attention of the trial court by objection but nonetheless affecting substantial rights of the defendant, are: (1) a trial court's failure to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) error by the trial judge of which the defense has no knowledge and therefore no opportunity to object; (3) a trial court's failure to intervene without objection and correct a serious error by admonition or by declaring a mistrial; and (4) failure of the trial court to take notice of errors affecting substantial rights in a ruling admitting or excluding evidence, even though there is no objection.

16. Criminal Law ⇐1035(5)

Trial court's failure to strike prospective juror for cause, on its own motion, was not serious error or grounds for mistrial in capital murder prosecution, and thus, any error in failing to strike the juror for cause was not reviewable under plain error doctrine; prospective juror's statement that she had been sexually abused by her father when she was an adolescent was not sufficient evidence of bias to overcome presumption of impartiality, and prospective juror's answers to questions from defense counsel and prosecutor demonstrated she could lay aside any feelings she had about her abuse and decide defendant's case on the merits.

17. Jury ⇐132

A juror is presumed to be unbiased and qualified to serve.

18. Criminal Law ⇐1152(2)
Jury ⇐85

The decision to excuse a juror for cause rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion.

19. Criminal Law ⇐1163(1)

It is the appellant's burden to show that he was prejudiced by the allegedly biased juror being seated.

20. Jury ⇐97(1)

When a juror states that she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable.

21. Jury ⇐97(1)

Although the bare statement of a prospective juror that she can give the accused a fair and impartial trial is subject to question, any uncertainties that might arise from the juror's response can be cured by rehabilitative questions.

22. Sentencing and Punishment ⇐1684

Evidence established the murder was committed in an especially cruel or depraved manner, as aggravating circumstance at penalty phase of capital murder trial; when defendant took the 12-year-old victim, who was his niece, from her home, he would not tell her what was going to happen to her and he ignored her repeated pleas to be taken home, and defendant's violent rape of the victim, before her murder, caused deep-seated injuries to her vagina. A.C.A. § 5–4–604(8).

23. Sentencing and Punishment ⇐1777

Whenever there is evidence of an aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury for consideration, at the penalty phase of a capital murder trial. A.C.A. § 5–4–604.

24. Sentencing and Punishment ⇐1788(9)

Once the jury has found, at the penalty phase of a capital murder trial, that an aggravating circumstance exists beyond a reasonable doubt, the appellate court may

affirm only if the State has presented substantial evidence in support of each element therein. A.C.A. § 5–4–604.

25. Criminal Law ⚿560

"Substantial evidence" is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other and permits the trier of fact to reach a conclusion without having to resort to speculation or conjecture.

See publication Words and Phrases for other judicial constructions and definitions.

26. Sentencing and Punishment ⚿1788(9)

To determine whether substantial evidence supports the jury's finding of an aggravating circumstance at the penalty phase of a capital murder trial, the appellate court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. A.C.A. § 5–4–604.

27. Sentencing and Punishment ⚿1784(1)

Fact that jury left blank, by making no check marks, on two parts of verdict form which contained 14 mitigating circumstances did not establish that jury failed to follow fundamental safeguards at penalty phase of capital murder trial; jury found nine mitigating circumstances on another part of the form, and for the mitigating circumstances in the parts of the form the jury left blank, there was either no evidence or contested evidence regarding the mitigating circumstances. A.C.A. § 5–4–605.

28. Sentencing and Punishment ⚿1772, 1777

A jury may generally refuse to believe a defendant's mitigating evidence at the penalty phase of a capital murder trial; however, when there is no question about credibility and when objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion. A.C.A. § 5–4–605.

Buckley & McLemore, P.A., by: Tim Buckley, Fayetteville, for appellant.

Mike Beebe, Att'y Gen., by: Jeffrey A. Weber, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice.

Karl Douglas Roberts was convicted in the Polk County Circuit Court of the capital murder of twelve-year-old Andria Brewer, for which he was sentenced to death by lethal injection. Roberts filed a waiver of his rights to appeal and to pursue postconviction remedies. Following a hearing on the waiver, the trial court determined that Roberts had the capacity to knowingly and intelligently waive his appeal rights. This is an automatic review of the entire record pursuant to our holding in *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999).[1] We find no error and affirm both the conviction and sentence.

The record reflects that on May 15, 1999, Andria Brewer was reported missing

1. On July 9, 2001, this court adopted an amendment to Ark. R.App. P.-Crim. 10 that effectively codified the mandatory review in death cases provided in *Robbins*, 339 Ark. 379, 5 S.W.3d 51. That amendment became effective for all cases in which the death penalty is imposed on or after August 1, 2001. Roberts's death sentence was imposed on May 23, 2000, prior to the effective date of the amendment. We thus review this case under *Robbins*.

from her home, near Mena. She was last seen leaving her house in a small red pickup truck. Police initially thought that Andria may have run away from home. After a day or so, however, they decided that was unlikely, and they called in the FBI and the Arkansas State Police to help investigate. They first looked for people known to the family that drove small red pickup trucks. The only two people who fit that description were Roberts and Bobby Stone. Both men agreed to voluntarily go to the police station to be interviewed on May 17, and both submitted to polygraph examinations.

Roberts's polygraph exam was conducted by Corporal Ocie Rateliff of the Arkansas State Police. Rateliff read Roberts his *Miranda* rights prior to the exam and explained to him how the polygraph test worked. At the conclusion of the exam, Rateliff allowed Roberts to go outside to smoke a cigarette while he analyzed the polygraph. Before speaking with Roberts, Rateliff informed FBI Special Agent Mark Jessie that Roberts was being deceptive on the exam.

Rateliff then called Roberts back into the interview room and told him that the test revealed that he was being deceptive. Roberts immediately dropped his head and said, "I messed up." He then confessed that he took Andria from her home, drove her out on an old logging road, raped her, and then strangled her to death. Rateliff wrote down Roberts's statements as he made them, and then Roberts signed off on the written statement.

Roberts was subsequently convicted of the capital murder of the young girl and sentenced to death, in an order entered on May 23, 2000. Following his conviction and sentence, on June 13, 2000, Roberts filed a waiver of appeal. Thereafter, the trial court held a hearing on the waiver and determined that Roberts had knowingly and intelligently waived his appeal rights. This court granted the State's petition for a writ of certiorari to review the record in this case and appointed attorney Tim Buckley to abstract the record and prepare a brief setting out any points of error. *See Roberts v. State,* CR 02–22, slip op. (February 7, 2002) (*per curiam*).

Because Roberts waived his rights to appeal and to postconviction relief, this court must conduct a review of the record in this case to determine whether there is reversible error. In doing so, we must consider and determine: (1) whether Roberts properly waived his rights to appeal; (2) whether any errors raised in the trial court are prejudicial to Roberts in accordance with Ark.Code Ann. § 16–91–113(a) (1987) and Ark. Sup.Ct. R. 4–3(h); (3) whether any plain errors covered by the exceptions provided in *Wicks v. State,* 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (4) whether other fundamental safeguards were followed. *See Smith v. State,* 343 Ark. 552, 39 S.W.3d 739 (2001); *Robbins,* 339 Ark. 379, 5 S.W.3d 51.

Appointed counsel raises four points of error. The first two points concern the trial court's refusal to suppress Roberts's statement and the physical evidence gained as a result thereof. The third point concerns the seating of a juror that the defense attempted to remove for cause. The fourth point challenges the evidence to support the aggravating circumstance that the crime was committed in an especially cruel or depraved manner. Before reviewing these points or any other potential errors, we must first determine whether the trial court erred in ruling that Roberts was competent to waive his appeal rights.

I. Knowing and Intelligent Waiver of Appeal Rights

[1, 2] In this state, a defendant sentenced to death will be able to forego a

state appeal only if he or she has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his or her sentence. *Smith*, 343 Ark. 552, 39 S.W.3d 739. This court will not reverse the trial court's conclusion unless it is clearly erroneous. *Id.*

[3] In the present case, the trial judge had the benefit of having heard much psychological evidence during the pretrial competency hearing and throughout the course of the trial. The defense presented testimony from Dr. Lee Archer, a neurologist from the University of Arkansas Medical Sciences, and Dr. Mary Wetherby, a neuropsychologist from Texarkana. Both doctors testified that Roberts had experienced an injury to the frontal lobes of his brain when he was hit by a dump truck at age twelve. Both doctors stated that as a result of the brain injury, Roberts suffered from hallucinations and his ability to conform his conduct to the requirements of the law was impaired. Both doctors acknowledged that Roberts knew right from wrong, but they opined that he was not able to control his emotions, and that this lack of emotional control was directly responsible for his raping and murdering the victim.

The State presented testimony from Dr. Reginald Rutherford, a clinical neurologist, and Dr. Charles Mallory, a psychologist from the Arkansas State Hospital. Dr. Rutherford opined that Roberts's brain injury did not cause him to do what he did. Rutherford explained that Roberts had no dramatic behavioral problems that would indicate that he would do something of this nature. Rutherford also stated that it was evident that Roberts was involved in a complex series of actions that culminated in the crime, and that his actions demonstrated that he appreciated the criminality of his conduct.

Mallory determined that Roberts had a full-scale I.Q. of seventy-six, which placed him within the borderline-intellectual-functioning range. Despite his lower I.Q., Mallory found that Roberts had graduated high school, could read and write on a high school level, had held the same job for the last six years, and had a wife of ten years and a family. Mallory also stated that Roberts did very well on the Georgia Court Competency Test, which measures if a person understands the criminal-justice system and the procedure of the trial. Mallory stated that Roberts's responses demonstrated that he understood his legal rights and the trial process. Mallory ultimately concluded that, based on his tests and interviews with Roberts and his review of Roberts's medical and psychological records, Roberts knew the difference between right and wrong and that he had the ability to conform his conduct to the requirements of the law. Mallory relied on the foregoing facts as well as on Roberts's actions in the crime. Particularly, Mallory stated that Roberts was cognitive of his actions, and that he took steps to avoid apprehension both before and after the crime, by driving the girl to a remote location, raping and killing her, and then covering up her body and throwing away her clothes. Mallory also pointed to Roberts's statement that he decided to kill Andria because he knew that she could identify him as having raped her.

During the posttrial hearing, defense counsel asked Roberts if he was aware of the rights that he was waiving, specifically his right to appeal to this court, his right of postconviction challenge under Ark. R.Crim. P. 37.5, and his postconviction and *habeas* rights in federal court. Roberts stated that he understood the rights he was waiving and that it was his desire to

waive any right to appeal. Roberts stated that he was not under the influence of alcohol or any other substance that would affect his ability to understand or to make a decision.

The trial judge asked Roberts a series of questions about the rights he was waiving and, specifically, if he understood what it meant to waive a right. Roberts stated that the word waiver "means to let something pass." Roberts then reaffirmed that he understood all of his appeal rights. The trial judge asked Roberts to tell him in his own words what he was asking for, and Roberts stated: "I want to die." The trial judge then asked Roberts if he was asking that the death sentence be carried out without any further action by his attorney on direct appeal, and Roberts stated: "Yes."

We conclude that the foregoing evidence demonstrates that the trial court did not clearly err in determining that Roberts knowingly and intelligently waived his rights of appeal. We now turn to the points raised by appointed counsel in his brief.

II. Errors Alleged by Appointed Counsel

A. Motion to Suppress Statement and Physical Evidence

Appointed counsel first argues that the trial court erred in denying Roberts's motion to suppress his statement to police and any physical evidence gathered afterwards, as fruit of the poisonous tree. During the proceedings below, Roberts's attorneys argued that the statement was involuntary because the police made a false statement of leniency in order to secure Roberts's confession. At the suppression hearing, Officer Rateliff testified that when he confronted Roberts with his deceptive polygraph exam, Roberts "got that teared up look in his eye and dropped his head and said, 'I messed up last Saturday.' " Rateliff testified that Roberts also said that he needed help. Rateliff stated that he then rolled his chair over next to Roberts, put his hand on Roberts's shoulder and stated: "Get it off your chest, we'll help." When questioned by the defense, Rateliff explained that the help he was referring to was listening to Roberts and letting him get it "out in the open."

Agent Jessie testified that both he and Rateliff were present in the interview room when Roberts came back in, and that when Rateliff told him that the polygraph indicated that he was being deceptive, Roberts "teared up and began to cry and made a statement to the effect that he had done something terrible." Jessie also stated that Roberts asked for help. Jessie explained that, based on the general tone of the statement, he thought that the help Roberts was referring to was from a clergyman.

Defense counsel argued that by stating "we'll help," the officers made a false promise of leniency to induce Roberts's confession. The prosecutor responded that the statement was too vague to be a promise of leniency. The prosecutor argued that at the point that Rateliff made the statement, the officers did not even know what they were dealing with, *i.e.*, whether Andria had been kidnapped or whether she was dead. The prosecutor argued that it would be hard to make a promise of leniency if the officers did not know what they were promising. The prosecutor conceded, however, that all the physical evidence they gained was the result of Roberts's statement and that, therefore, if the statement were suppressed, the physical evidence would have to be suppressed as well.

The trial court denied the motion to suppress, finding that the statement by

Rateliff amounted to nothing more than an officer being courteous. The trial court found further that Roberts was over the age of twenty-one, that he could read and write, and that he was capable of functioning in society, as demonstrated by the facts that he was married and had a family, a home, and a job. The trial court noted the testimony of Dr. Mallory that although Roberts's intelligence was not overly great, he could function in society and was capable of understanding. The trial court also found that Roberts was not initially detained by the police, but that he came to the police voluntarily. The trial court found further that the actual period of detention, *i.e.,* from the point that Roberts stated that he had messed up and was thus no longer free to leave, was not lengthy. Based on all of these circumstances, the trial court concluded that the statement was not involuntary. We find no error on this point.

[4, 5] A statement induced by a false promise of reward or leniency is not a voluntary statement. *Bisbee v. State,* 341 Ark. 508, 17 S.W.3d 477 (2000). When a police officer makes a false promise that misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *See Conner v. State,* 334 Ark. 457, 982 S.W.2d 655 (1998); *Pyles v. State,* 329 Ark. 73, 947 S.W.2d 754 (1997). In deciding whether there has been a misleading promise of reward or leniency, this court views the totality of the circumstances and examines, first, the officer's statement and, second, the vulnerability of the defendant. *Id.*

[6, 7] If we determine in the first step that the officer's statement is an unambiguous false promise of leniency, there is no need to proceed to the second step. *Id.* If, however, the officer's statement is ambiguous, making it difficult for us to determine if it was truly a false promise of leniency, we must proceed to the second step of examining the vulnerability of the defendant. *Id.* Factors to be considered in determining vulnerability include: (1) the age, education, and intelligence of the accused; (2) how long it took to obtain the statement; (3) the defendant's experience, if any, with the criminal-justice system; and (4) the delay between the *Miranda* warnings and the confession. *Conner,* 334 Ark. 457, 982 S.W.2d 655 (citing *Hamm v. State,* 296 Ark. 385, 757 S.W.2d 932 (1988); *Free v. State,* 293 Ark. 65, 732 S.W.2d 452 (1987)).

[8–10] Additionally, for the statement to be involuntary, the promise must have induced or influenced the confession. *Bisbee,* 341 Ark. 508, 17 S.W.3d 477. Furthermore, the defendant must show that the confession was untrue, because the object of the rule is not to exclude a confession of truth, but to avoid the possibility of a confession of guilt from one who is, in fact, innocent. *Id.* We will not reverse the trial court's denial of a motion to suppress a statement unless it is clearly erroneous or clearly against the preponderance of the evidence. *Conner,* 334 Ark. 457, 982 S.W.2d 655.

[11] Here, the statement made by Officer Rateliff was, "Get it off your chest, we'll help." According to both Rateliff and Agent Jessie, the statement was made after Roberts had dropped his head and stated that he had messed up and that he needed help. The statement itself is ambiguous, especially given the context. The phrase "we'll help" could mean anything from letting Roberts cleanse his guilty conscience, as Rateliff testified, to allowing him to speak to a clergyman, as Jessie testified. It certainly was not specific enough to be viewed as a false promise to

get Roberts a reduced charge or a lesser sentence if he confessed. The prosecutor's point is well taken, that at the time Rateliff made the statement, the officers did not know what Roberts was about to tell them or whether the girl was dead or alive. Because the statement is ambiguous, we proceed to the second step and assess Roberts's vulnerability.

[12] The evidence showed that Roberts was thirty-one years old at the time and that he had graduated high school and had held a job for the last six years. The evidence also showed that Roberts had been married for ten years and that he had two children. Dr. Mallory testified that Roberts's overall I.Q. was seventy-six, which placed him in the range of borderline intellectual functioning. Mallory indicated, however, that Roberts could read and write at a high school level, and that he reads like a person who has a higher I.Q. This court has held that a low score on an I.Q. test does not mean that a suspect is incapable of voluntarily making a confession or waiving his rights. *See, e.g., Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000) (upholding confession of defendant who was twenty years old and had an I.Q. of seventy-seven); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702, *cert. denied*, 519 U.S. 898, 117 S.Ct. 246, 136 L.Ed.2d 174 (1996)(affirming the admission of a confession where the defendant was age seventeen, had an I.Q. of seventy-two, and was reading on a third-grade level); *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995) (affirming the admission of a confession where the defendant was fifteen years old, had an I.Q. of seventy-four, and read on a second-grade level). Accordingly, Roberts's I.Q. of seventy-six must be viewed in light of the facts that he was thirty-one years old, had graduated high school, and could read and write at a high school level.

Additionally, the record reflects that Officer Rateliff informed Roberts of his *Miranda* rights from a statement-of-rights form at 3:16 in the afternoon, before Roberts took the polygraph test. Roberts stated that he understood his rights, and he agreed to talk to the officer. Rateliff stated that the test took anywhere from forty-five minutes to an hour to complete. During this entire time, Roberts was not in custody and was free to leave. In fact, after completing the polygraph, Roberts went outside to smoke, while Rateliff evaluated the test. Roberts was told the results of his polygraph around 5:00. Thereafter, he confessed. Rateliff began writing Roberts's statement at 5:30. The statement was finally completed at 6:54. All told, Roberts was at the police station for approximately four hours, but he was only detained for a period of two hours. We agree with the trial court that this is not a lengthy period of detention. Moreover, there was not a lengthy delay between Roberts's confession and the time that he was informed of his *Miranda* rights.

As for Roberts's emotional vulnerability, there was testimony from Officer Rateliff that while Roberts was confessing, he was upset, crying, embarrassed, and mad at himself. Rateliff also stated that Roberts appeared remorseful. Agent Jessie stated that Roberts broke down and sobbed during his confession; however, he stated that Roberts's emotion and remorse seemed to stem less from the fact that he had taken the young girl's life and more because he had ruined his own life. Appointed counsel asserts that Roberts's emotional state combined with his lower intelligence and his limited experience with the criminal-justice system demonstrate that he was especially vulnerable to the officer's statement. Appointed counsel relies on the holding in *Pyles*, 329 Ark. 73, 947 S.W.2d 754. That case, however, is distinguishable. There, the interrogating officer as-

sured Pyles that he knew that Pyles was not a cold-blooded killer, and that he would "help him in every way in the world." *Id.* at 77, 947 S.W.2d at 755. In suppressing the statement, this court found the following facts significant: (1) that the interrogating officer had previously known the defendant through baseball and had a friendly relationship with him; (2) that the defendant was interrogated for a long period of time; and (3) that the defendant was emotional during the interrogation, as demonstrated by the fact that he held the officer's hands and wept as he confessed. This court also noted Pyles's testimony that the officers had repeatedly told him that if the murder was done in self-defense, a court would be more lenient. Additionally, the State conceded that the officer's promise in that case was questionable. This court held that the totality of the circumstances supported the conclusion that the confession was not voluntary. The same is not true here.

[13] In this case, the officer's statement, "Get it off your chest, we'll help," is ambiguous, at best, and the evidence does not demonstrate that this defendant was so vulnerable that the officer's statement rendered the confession involuntary. Moreover, even if the officer's statement could be considered to be a false promise of leniency, the confession was not invalid because the record does not demonstrate that the officer's statement induced or influenced Roberts's confession. This is evident from the fact that immediately after being informed that his answers on the polygraph exam were deceptive, Roberts hung his head and stated that he had messed up and that he needed help. Thus, Roberts had already incriminated himself before any alleged promise was made, and he appeared to be ready to confess to his crimes, regardless of Rateliff's statement. In contrast, the defendant in *Pyles* made no statement until after the police promised to help him.

Finally, we cannot say that the defense has succeeded in showing that Roberts's confession was untrue or that it was a false confession of guilt of one who is, in fact, innocent. To the contrary, the veracity of his confession is demonstrated by the physical evidence obtained thereafter.

We cannot leave this point without responding to the concerns raised by the dissent, regarding the brain injury that Roberts sustained when he was struck by a dump truck at age twelve. The dissent opines that this injury combined with his low I.Q. and his adolescent behavior patterns made Roberts especially vulnerable to Rateliff's statement. While we agree that the evidence of the *physical* extent of Roberts's brain injury was uncontroverted, we point out that the *effect* of the injury on Roberts's behavior was highly controverted. As noted in the previous section, the defense experts stated that his brain injury resulted in Roberts being unable to control his emotions and actions. They also indicated that the injury resulted in Roberts's behaving more like an adolescent, than an adult. However, neither defense expert opined that Roberts lacked the ability to understand his legal rights or that he lacked the capacity to appreciate the criminality of his actions. To the contrary, Dr. Wetherby stated that Roberts knew he was in trouble after he had raped Andria, and Dr. Archer specifically stated that Roberts could understand right from wrong.

Dr. Rutherford, one of the State's experts, testified that he agreed with Dr. Archer as to the extent of the physical injury to Roberts's frontal lobe. He opined, however, that the relationship between the loss of tissue and brain function was less clear cut. He stated that from his review of the medical records and Rob-

erts's reported history, he found no severe or dramatic behavioral problems that would indicate that his brain injury was the sole cause of his actions on the date in question. He further pointed out that the majority of the tissue loss to Roberts's brain was to the right frontal lobe, and that it was better to sustain an injury to that side of the brain, because loss on that side will result in less aberrant behavior. Finally, he stated that there are many reasons, besides a frontal-lobe injury, that a person may have behavioral problems, and that, in his opinion, Roberts's brain injury was not the cause of his criminal actions.

Based on this conflicting evidence of the effect of Roberts's brain injury on his behavior and actions, we are hard pressed to conclude, as the dissent does, that Roberts's brain injury made him especially vulnerable to Officer Rateliff's ambiguous statement of help. Instead, we conclude that the totality of the evidence in this case demonstrates that the trial court did not clearly err in denying Roberts's motion to suppress his statement. Because there was no error in refusing to suppress the statement, there is likewise no error in refusing to suppress the physical evidence gained as a result of the statement. Where the tree is not poisonous, neither is the fruit. *Jones v. State,* 348 Ark. 619, 74 S.W.3d 663 (2002); *Criddle v. State,* 338 Ark. 744, 1 S.W.3d 436 (1999).

B. Juror for Cause

[14] Appointed counsel next argues that the trial court erred in refusing to strike for cause juror Glenda Gentry, who was seated on Roberts's jury. During jury selection, defense counsel objected to Mrs. Gentry on the ground that she had stated that she had been sexually abused by her father when she was eighteen years old. Although the exact date of the abuse is unknown, it appears to have occurred many years earlier, given that Mrs. Gentry stated that she had children ages thirty, twenty-nine, and twenty-four. Mrs. Gentry indicated that her allegations had resulted in the prosecution of her father, but that he was ultimately acquitted of the crime.

When asked if she carried any resentment because of the incident or because of the failure of the criminal-justice system, Mrs. Gentry stated that her father was now dead, and that the matter was over and she could not change anything. When asked if she could be fair and impartial in this case, given that Roberts was charged with raping and killing a twelve-year-old girl while he was thirty-one years old, Mrs. Gentry stated that she could. She stated further that she could set aside anything that had happened to her personally and decide the case based on the facts and the law. When asked by the prosecutor if she could still be impartial in light of the fact that Roberts was the victim's uncle and there was a family relationship involved, she stated that she could. Mrs. Gentry then stated that the family relationship did not change any of the answers that she had given to defense counsel.

At the conclusion of the questioning, the prosecutor announced that the juror was acceptable to the State, but defense counsel asked to approach. At the bench, defense counsel informed the trial court that if they had any peremptory strikes left, they would use one on Mrs. Gentry. Counsel then stated: "It doesn't appear that her answers go to the level of moving for cause." However, defense counsel argued that had the trial court granted some of their prior motions to strike other jurors for cause, they would not have used up all of their peremptory strikes and would have been able to remove Mrs. Gen-

try from the jury.[2] Appointed counsel now asserts as a point of error that the trial court should have excused Mrs. Gentry for cause. However, this point was not preserved for appellate review, since defense counsel essentially agreed with the trial court's ruling, conceding that there were no grounds to excuse Mrs. Gentry for cause. This court has repeatedly stated that a defendant cannot agree with a trial court's ruling and then attack the ruling on appeal. *See, e.g., Camargo v. State,* 346 Ark. 118, 55 S.W.3d 255 (2001); *Bell v. State,* 334 Ark. 285, 973 S.W.2d 806 (1998). Accordingly, there is no reversible error reviewable under Rule 4–3(h) or section 16–91–113(a).

[15, 16] Nor does this point fall within one of the four plain-error exceptions set out in *Wicks,* 270 Ark. 781, 606 S.W.2d 366. Those exceptions are: (1) a trial court's failure to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) error by the trial judge of which the defense has no knowledge and therefore no opportunity to object; (3) a trial court's failure to intervene without objection and correct a serious error by admonition or declaring a mistrial; and (4) failure of the trial court to take notice of errors affecting substantial rights in a ruling admitting or excluding evidence, even though there is no objection. Only the third exception could possibly apply to this case; however, given our law on the presumption of impartiality of jurors, it cannot be said that the trial court's failure to strike Mrs. Gentry on its own motion amounted to a serious error or grounds for a mistrial.

[17–21] A juror is presumed to be unbiased and qualified to serve, and the burden is on the appellant to prove actual bias. *Spencer v. State,* 348 Ark. 230, 72 S.W.3d 461 (2002); *Smith,* 343 Ark. 552, 39 S.W.3d 739. The decision to excuse a juror for cause rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion. *Id.* It is the appellant's burden to show that he or she was prejudiced by the juror being seated. *Id.* When a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable. *Spencer,* 348 Ark. 230, 72 S.W.3d 461; *Taylor v. State,* 334 Ark. 339, 974 S.W.2d 454 (1998). Although the bare statement of a prospective juror that he or she can give the accused a fair and impartial trial is subject to question, any uncertainties that might arise from the juror's response can be cured by rehabilitative questions. *Id.*

The fact that Mrs. Gentry stated that she had been sexually abused by her father when she was an adolescent, in and of itself, is not sufficient evidence of bias to overcome the presumption of impartiality. Moreover, Mrs. Gentry's answers to questions from defense counsel and the prosecutor demonstrate that she could lay aside any feelings she had about her abuse and decide Roberts's case on the merits. Accordingly, the trial court did not commit error, plain or otherwise, by declining to remove Mrs. Gentry for cause.

C. Sufficiency of the Evidence to Support the Aggravating Circumstance

[22] Appointed counsel's last point of error is that there is insufficient evidence

2. After much discussion at the bench, the trial judge indicated that he would be inclined to reverse one of his prior rulings on a motion to strike for cause, so that the defense would receive an additional peremptory strike. In response, defense counsel stated that he was satisfied with the record as it was. However, the record reflects that sometime after Mrs. Gentry's selection, defense counsel exercised an additional peremptory challenge.

to support the jury's finding that the one aggravating circumstance submitted by the State existed beyond a reasonable doubt. That aggravating circumstance was that the murder was committed in an especially cruel or depraved manner, as set out in Ark.Code Ann. § 5–4–604(8) (Supp.2001), which provides in pertinent part:

> (B)(i) For purposes of this subdivision (8)(A) of this section, 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.
>
> (ii)(a) "Mental anguish" is defined as the victim's uncertainty as to his ultimate fate.
>
> (b) "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.
>
> (c) "Torture" is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

The State asserts that two of these elements were present in this case: (1) that Roberts intended to inflict mental anguish on the twelve-year-old victim by refusing to tell her what was going to happen to her, after she repeatedly inquired, and (2) that Roberts intended to and did inflict serious physical abuse on the girl when he violently raped her.

[23–26] Whenever there is evidence of an aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury for consideration. *Jones v. State,* 340 Ark. 1, 8 S.W.3d 482 (2000) (citing *Willett v. State,* 335 Ark. 427, 983 S.W.2d 409 (1998); *Kemp v. State,* 324 Ark. 178, 919 S.W.2d 943, *cert. denied,* 519 U.S. 982, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996); *Dansby v. State,* 319 Ark. 506, 893 S.W.2d 331 (1995)). Once the jury has found that an aggravating circumstance exists beyond a reasonable doubt, this court may affirm only if the State has presented substantial evidence in support of each element therein. *Id.; Greene v. State,* 335 Ark. 1, 977 S.W.2d 192 (1998). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other and permits the trier of fact to reach a conclusion without having to resort to speculation or conjecture. *Id.* To make this determination, this court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Jones,* 340 Ark. 1, 8 S.W.3d 482.

Here, the evidence showed that Andria was taken from her home by Roberts on May 15, 1999. According to his confession, Roberts knocked on the door, and Andria answered. Roberts knew that her parents were not home at the time. He told Andria to get into his truck. Andria then asked him what was wrong, and Roberts responded by telling her to just get in the truck. Andria complied. Roberts then proceeded on a journey of approximately ten miles that, according to Arkansas State Police Detective Lynn Benedict, would have taken twelve to thirteen minutes. Benedict also stated that the road that Roberts took continued to become darker and more remote, covered with low hanging trees and brush.

According to Roberts's statement, Andria asked him to take her home several times along the way. Roberts kept on driving. He eventually stopped his truck

on an old logging road and told Andria to get out. When she asked him what he was going to do, he told her he was going to "fuck" her. He told her to take off her shirt and lay down. He then took off the girl's pants and raped her. While he was violating her, Andria tried to get away from him, but he was able to hold her down. He told police that when he finished raping her, he knew that he could not let her live, because he had ejaculated inside her. He then decided to kill her by mashing his thumbs into her throat. Once the child turned blue and passed out, he dragged her body off into the woods and covered her up with limbs and brush. He then took her clothes and threw them off a nearby bridge, into a creek. Associate Medical Examiner Dr. Stephen Erickson testified that the child's vaginal vault was bruised in three different areas and, in his opinion, the area was subjected to a significant amount of trauma. Erickson further stated that the sexual encounter would have to have been pretty rough to cause such "deep-seated injuries."

The foregoing is substantial evidence that the murder was committed in an especially cruel or depraved manner. Roberts's intention to inflict mental anguish on the girl is evident from his own admission that when he took Andria from her home, he would not tell her what was going to happen to her and he ignored her repeated pleas to be taken home. Instead of taking her home, Roberts drove her down a long, dark, remote logging road, which took some twelve or thirteen minutes to travel. He then violently raped her, causing deep-seated injuries to the child's vagina. Accordingly, we find no error on this point.

III. Review under Rule 4–3(h) and Section 16–91–113(a)

In addition to the issues briefed by appointed counsel, we have further reviewed the transcript of the record in this case for adverse rulings objected to by Roberts and his counsel, pursuant to Rule 4–3(h) and section 16–91–113(a), and no such reversible errors were found.

IV. Review for Plain Error under Wicks

Arkansas does not recognize plain error, *i.e.,* an error not brought to the attention of the trial court by objection, but nonetheless affecting substantial rights of the defendant. *Smith,* 343 Ark. 552, 39 S.W.3d 739; *State v. Robbins,* 342 Ark. 262, 27 S.W.3d 419 (2000). We have, however, adopted four limited exceptions in *Wicks,* 270 Ark. 781, 606 S.W.2d 366, as set out above. In *Robbins,* this court mandated consideration of the *Wicks* exceptions in death-penalty cases where, as in the instant case, the defendant has waived his or her appeal rights. Our review of the transcript of the record in this case reveals no errors under the *Wicks* exceptions.

V. Other Fundamental Safeguards

[27] The final review requirement under *Robbins,* 339 Ark. 379, 5 S.W.3d 51, is to determine whether other fundamental safeguards were followed. This court did not define the term "fundamental safeguards" in that case, nor do we attempt to do so here. Suffice it to say, nothing in the instant record reveals any irregularity in procedure that would call into question the essential fairness of the process afforded Roberts.

The dissent asserts that the jury in this case did not properly complete Form 2 of the sentencing instructions, which pertains to mitigating circumstances. The dissent contends that because sections B and C of that form were left blank, it cannot be determined whether the jury properly considered the mitigating evidence prior to imposing the death penalty. We note that

neither trial counsel nor appointed counsel challenged the verdicts forms. However, out of an abundance of caution, we will address the concern raised by the dissent.

The record reflects that the defense submitted a total of sixteen possible mitigating circumstances. Part A of Form 2 reflects that the jury unanimously found that nine of those mitigating factors existed. Part B contains no check marks, reflecting that of the remaining seven factors, none were found by any of the jurors to have been mitigating circumstances. Part C also contains no check marks, reflecting that there was no evidence presented substantiating those remaining seven factors.

The dissent is apparently concerned that because there are no check marks on Parts B and C, the jury disregarded the instructions on filling out those forms. The dissent is further concerned that the lack of marks on these forms may indicate that the jury did not properly consider the evidence on these proposed mitigating circumstances. Based on the record before us, we conclude that these concerns are not well founded.

[28] This court has recognized that a jury may generally refuse to believe a defendant's mitigating evidence; however, when there is no question about credibility and when objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion. *See Echols v. State,* 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied,* 520 U.S. 1244, 117 S.Ct. 1853, 137 L.Ed.2d 1055 (1997) (citing *Bowen v. State,* 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied,* 517 U.S. 1226, 116 S.Ct. 1861, 134 L.Ed.2d 960 (1996); *Giles v. State,* 261 Ark. 413, 549 S.W.2d 479, *cert. denied,* 434 U.S. 894, 98 S.Ct. 272, 54 L.Ed.2d 180 (1977)). In the present case, the jury was faced with neither unquestionable credibility nor objective proof that would make a reasonable conclusion inescapable on any of the remaining seven proposed mitigating factors.

The first of the seven remaining factors was that the capital murder was committed while Roberts was under extreme mental or emotional disturbance. There was no credible evidence of this proposed factor. The second factor was that the murder was committed while Roberts lacked the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law due to a mental disease or defect or alcohol intoxication. There was no dispute on the first part of this factor, as all of the expert witnesses, even those for the defense, opined that Roberts knew right from wrong and therefore had the ability to appreciate the criminality of his conduct. However, there was conflicting testimony as to Roberts's ability to conform his conduct to the requirements of the law.

The third factor was that Roberts, although legally responsible, suffers from an intellectual deficit. This factor, like the first two, was the subject of conflicting testimony. Roberts's experts stated that he had low intellect and functioned like an adolescent. The State's experts, on the other hand, stated that while Roberts had a below-normal intellect, he functioned well in society, he could read and write on a high school level, and he was, as evidenced by his crimes, capable of engaging in a complex series of actions that included his efforts to conceal his crimes. Accordingly, the jury did not act arbitrarily in disregarding this conflicting proof.

The fourth and fifth factors were that as a result of Roberts's brain damage, his ability to control his emotions or impulses has been impaired and that his ability to accurately interpret social cues and communications with other persons has been

impaired. Again, these factors were the subject of expert debate. As stated earlier in this opinion, there was no debate among the experts that Roberts had incurred some loss of the brain tissue in his right and left frontal lobes. However, there was strenuous debate about the effect that his brain injury had on his behavior, specifically as it pertained to his ability to control his actions and emotions and to his ability to function in society.

The sixth factor was that Roberts exhibited remorse about Andria's disappearance when interviewed by police. There was specific evidence countering this factor by Agent Jessie, who stated that any remorse Roberts had was for himself. Jessie testified that the one thing that stuck out in his mind was Roberts's statement that he had managed to ruin *his* life in ten minutes.

Finally the seventh factor was that Roberts cooperated with police by leading them to Andria's body. Again, the evidence on this factor was conflicting. The record reflects that when Roberts was initially interviewed by police, the day after Andria was reported missing, he denied knowing anything about Andria's disappearance, and he lied to police about his whereabouts at the time. Roberts did not tell the truth until he was interviewed a second time and then only after he was confronted with the fact that he was being deceptive during the polygraph. The jury certainly could have concluded that Roberts's actions were less than cooperative.

Based on our case law, we cannot say that the jury erred in refusing to believe the defense's mitigating evidence. There was conflicting evidence presented on each of the remaining seven proposed mitigating factors. As such, the jury did not arbitrarily disregard unquestionably credible and objective proof. Accordingly, there was no error in the completion of the jury forms.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting.

Because I believe that Roberts's confession was the result of a false promise to help, I must respectfully dissent. Specifically, I believe that based on the totality of the circumstances, the statements made by law enforcement officials to Roberts coupled with Roberts's vulnerability led to an involuntary confession that should have been suppressed.

Guilt Phase

Statements made while in custody are presumed to be involuntary, and the burden is on the State to show that the statements were made voluntarily, freely, and understandingly, without hope of reward or fear of punishment. *Stephens v. State,* 328 Ark. 81, 941 S.W.2d 411 (1997). In *Bisbee v. State,* 341 Ark. 508, 17 S.W.3d 477 (2000), we outlined the standards for reviewing the voluntariness of an in-custody confession. In *Bisbee,* we explained:

> The State bears the burden of proving by a preponderance of the evidence the voluntariness of an in-custodial confession. *Davis v. State,* 275 Ark. 264, 630 S.W.2d 1 (1982).
>
> * * *
>
> A statement induced by a false promise of reward or leniency is not a voluntary statement. *Clark v. State,* 328 Ark. 501, 944 S.W.2d 533 (1997). For the statement to be involuntary the promise must have induced or influenced the confession. *McDougald v. State,* 295 Ark. 276, 748 S.W.2d 340 (1988).

* * *

> As with other aspects of voluntariness, we look at the totality of the circumstances. *Conner v. State,* 334 Ark. 457, 982 S.W.2d 655 (1998). The totality is subdivided into two main components: first, the statement of the officer, and second the vulnerability of the defendant. *Davis, supra.* We have articulated factors which we will look to in our determination of whether the defendant was vulnerable. Specifically, we have held that the factors to be considered in determining vulnerability include: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant's experience, if any, with the criminal-justice system; and 4) the delay between the Miranda warnings and the confession. *Conner, supra.*

Bisbee, supra.

In order to determine whether Roberts's confession was voluntarily given, it is necessary to review the facts surrounding Roberts's confession. On May 17, 1999, Karl Roberts went to the Polk County Police Station to take a polygraph exam. Following the exam, Officer Ocie Rateliff informed Roberts that the test results established that Roberts had been "deceptive" on the test. Immediately thereafter, Roberts stated that he had "messed up." Officer Rateliff testified that Roberts appeared "teary-eyed" while making this statement. Officer Rateliff also testified that after hearing Roberts's statement he moved his chair closer to Roberts, put his arm around Roberts, and told Roberts that he should "get it off your chest, we'll help."

As the majority correctly notes, the statement "get it off your chest, we'll help" is ambiguous. Because the alleged "promise" is ambiguous, we must look to Roberts's vulnerability to determine whether the officer's statement improperly induced Roberts's confession. *See Pyles v. State,* 329 Ark. 73, 947 S.W.2d 754 (1997).

A review of the evidence established that Roberts was thirty-one years of age at the time he made the custodial statements. The evidence showed that from the time Officer Rateliff gave Roberts his *Miranda* warnings, upon arriving at the police station, until he was told "we'll help," was two hours, and that from the time Roberts stated that he had "messed up" until his confession was completed, was approximately another two hours. The record does not reveal any prior experience Roberts may have had with the criminal-justice system.

The four hours between the *Miranda* warnings and the completion of the confession following the ambiguous promise "we'll help" are not excessive, but that does not resolve the question of whether Roberts was vulnerable.

I believe that the evidence establishing that Roberts's intelligence level was well below average was significant. Dr. Charles Mallory from the State Hospital testified that he had given Roberts an IQ test and that the results from the test revealed that ninety-five percent of the population would have performed at a higher level than Roberts. Dr. Mallory also testified that Roberts's IQ score of 76 was considered to be in the range of "borderline intellectual functioning." He explained that this meant that Roberts was not mentally retarded, but was of below normal intelligence.

This psychological assessment was echoed by Special Agent Mark Jessie and Officer Rateliff. Agent Jessie was in the interrogation room at the time Officer Rateliff offered his promise and at the time Roberts made his confession. Agent Jessie testified that he considered Roberts to

be a "man of below normal intelligence." He also testified that he "would have guessed [Roberts] to be a kid that would have been slow in school."

Officer Rateliff described Roberts as someone who was "a little slower than most people." He also explained that Roberts's voice was "monotone" and "not normal."

Not only was Roberts capable of only "borderline intellectual functioning," I believe it is even more significant that there was uncontroverted evidence that at age twelve Roberts suffered severe brain damage in an accident that destroyed one-fifth of his right frontal lobe and damaged other parts of his brain. Magnetic Resonance Imaging scans of Roberts's brain clearly revealed that a significant part of his right frontal lobe, as well as the medial aspect of his left frontal lobe, and part of his temporal lobe were missing.[3]

Dr. Lee Archer, a neurologist from UAMS, testified:

> My opinion is that if it were not for the injury that Karl Roberts sustained in 1980 he would not have committed this crime. Prior to Karl's accident in 1980 he had no behavioral problems.
>
> * * *
>
> During my examination of him, Karl acted more like an adolescent than an adult. Adults will make eye contact and will engage in some small talk. Karl avoids eye contact and he makes no small talk.
>
> * * *
>
> There are also some subtle findings that indicate a dysfunction of the brain. His handwriting is very laborious, his speech has a telegraphic quality where he uses just essential words to communicate, and his gait is a little bit abnormal.

From this testimony, it is clear that the combination of a borderline I.Q. and adolescent behavior patterns resulting from severe brain damage made Roberts vulnerable to the ambiguous promise "get it off your chest, we'll help."

Evidence presented at the hearing showed that Roberts, who was emotionally upset during the interrogation, was vulnerable to Officer Rateliff's false promise. Specifically, Officer Rateliff testified that prior to making the statement to Roberts he noticed that Roberts was "teary eyed." Officer Rateliff also testified that he had moved his chair close to Roberts and placed his arm around Roberts shoulder before he promised to "help" Roberts. Officer Rateliff further testified that after he had promised to help, Roberts was "very upset" and "had a quiver in his voice."

Agent Jessie also testified about Roberts's sensibilities. He stated that after Officer Rateliff put his arm around Roberts, and told him that they would help, Roberts "broke down and began to sob." Agent Jessie further explained that Roberts continued to cry for several hours.

Based on the totality of the circumstances, I would conclude that the State did not meet its burden of proving that Roberts's confession was voluntarily given. For that reason, the trial court erred in

3. Uncontroverted expert testimony showed that such destruction of the frontal lobes produces an effect similar to that suffered by Phineas Gage approximately 150 years ago when a dynamite blast drove a crowbar through his frontal lobes. Before that time Mr. Gage had been a hard-working family man. Although he survived the accident, he became animal-like in his behavior and as a result of scientific study over the century and a half following the injury, the role of the frontal lobes in controlling behavior has become well documented.

denying his motion to suppress. Because the confession was involuntarily given, any evidence recovered as a result of that confession would be fruit of the poisonous tree and would therefore be inadmissible.

I also dissent because I believe that *Pyles v. State,* 329 Ark. 73, 947 S.W.2d 754 (1997), is indistinguishable from the case now on review. In *Pyles,* we were asked to determine whether an officer had made a false promise to Pyles which induced him to confess. The facts surrounding Pyles' confession were outlined in the opinion. We explained:

> Following a long interrogation of several hours by other officers, Officer Howard began to interrogate Pyles. Officer Howard testified that he knew Pyles prior to the arrest through baseball and that he visited with Pyles about that. He testified that he told Pyles that it was important for him to tell the truth and that "they knew he did it." He also testified that he told Pyles that he did not believe that Pyles was a cold-blooded killer and that he told Pyles that he would "do everything in the world [he] could for him." Pyles claims that he confessed after Officer Howard made this statement.

Pyles, supra.

After reviewing other cases involving confessions, we noted:

> Often it is difficult to determine whether an officer's statement is a promise of reward or leniency, a statement meant to deceive, or merely an admonishment to tell the truth. In *Wright v. State,* 267 Ark. 264, 590 S.W.2d 15 (1979), we allowed a statement by an interrogating officer that, "things would go easier if you told the truth." However, in *Tatum v. State,* 266 Ark. 506, 585 S.W.2d 957 (1979), we determined that the statement, "I'll help you any way that I can" was a false promise. On several occasions, we have held statements to be false promises: when the officer claimed he "would do all that he can," *Hamm v. State,* 296 Ark. 385, 757 S.W.2d 932 (1988), and when the officer said "I'll help all that I can." *Shelton v. State,* 251 Ark. 890, 475 S.W.2d 538 (1972).

Pyles, supra.

We then went on to consider Pyles' vulnerability, and wrote:

> In the case before us, the record reflects that Pyles became emotional when he was interrogated by Officer Howard. Both Pyles and Officer Howard testified that Pyles held the officer's hands and wept. Pyles testified that he was emotional and tired from a long interrogation. The statement that Officer Howard made closely resembles those which we held unacceptable in *Tatum, Hamm,* and *Shelton, supra.* Therefore, we must conclude that the officer's action constituted a false promise that resulted in an involuntary confession.

Pyles, supra.

Pyles is squarely on point with the case now under consideration. Specifically, the statements made by the officers in each case amounts to a wide sweeping promise of "help." The criminal defendants in both cases were emotionally distraught and subject to police inducement. Moreover, the officers in both cases used the criminal defendant's vulnerability to induce a confession. Because *Pyles* is factually indistinguishable from the case now on review, and because we determined that the confession in *Pyles* should have been suppressed, I conclude that Roberts's confession should have been similarly suppressed. I dissent and would remand this case for a new trial on the charges.

Penalty Phase

I must also dissent from the imposition of the death sentence upon Roberts in the penalty phase because I cannot say with certainty that the verdict forms were completed in accordance with statutory requirements. We have consistently held that the death sentence may not be imposed unless the jury makes the required statutory finding. *Camargo v. State,* 327 Ark. 631, 940 S.W.2d 464 (1997).

In the case now before us, Form 2 sections "B" and "C," relating to mitigating circumstances, were left blank. Because a significant portion of Form 2 is blank, we cannot determine whether the jury properly considered the mitigating evidence prior to imposing the death penalty. The majority contends that while there was conflicting evidence with regard to the existence of seven mitigating circumstances, the jury did not have to consider those circumstances as having been established. That is correct. But, the jury was statutorily required to consider the evidence concerning those seven mitigators, and to make a written decision as to whether or not they had been established. This the jury did not do. Having failed to use Form 2B to indicate whether some jurors believed some of those mitigators existed, but that the panel did not agree that they were mitigators, the jury also failed to use Form 2C to indicate that the evidence supporting the other mitigators was not sufficient to prove the existence of those mitigators. In summary, after finding the existence of nine mitigators as marked on Form 2A, the jury did not execute any written disposition of the remaining seven mitigating circumstances for which some evidence was presented. The requirement to make this analysis is clear in Form 2B and 2C, and the jury made no use of those forms. In my view, the failure to make written findings as to the validity of those seven mitigators constitutes error requiring a new sentencing trial. Because we cannot determine whether the jury considered the seven mitigating factors for which some evidence was presented, I cannot join the majority opinion in approving Roberts's sentence even if there were no error in the guilt phase of the trial.

I respectfully dissent.

Duke E. ERVIN

v.

STATE of Arkansas.

No. CR 03–278.

Supreme Court of Arkansas.

April 10, 2003.

Defendant moved for belated appeal from his first-degree battery and being a felon in possession of a firearm convictions. The Supreme Court held that: (1) counsel's acceptance of complete responsibility for failing to timely file notice of appeal constituted good cause to allow filing of belated appeal, and (2) Supreme Court would not relieve public defender's office as defendant's appellate counsel, absent conflict of interest.

Granted in part and denied in part.

1. Criminal Law ⇨1081(6)

Counsel's acceptance of complete responsibility for failing to timely file notice of appeal from defendant's convictions constituted good cause to allow filing of belated appeal.

Appendix F

Circuit Court of Polk County
Pretrial Motions and Order for
Mental Health Evaluation
(October 29, 1999)

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS **PLAINTIFF**

VS. **NO. CR-99-70**

KARL DOUGLAS ROBERTS **DEFENDANT**

MOTION FOR HEARING TO DETERMINE COMPETENCY TO STAND TRIAL

Comes the defendant, Karl Douglas Roberts, by and through his attorneys, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Constitution of Arkansas and, A.C.A. § 5-2-309, states as follows:

1. The defendant is charged with having violated A.C.A. § 5-10-101, Capital Murder.

2. Defendant has entered a plea of not guilty of mental disease or defect and has been evaluated by the Arkansas State Hospital. A report from the State Hospital has been provided to defense counsel and the report states that the defendant competent to stand trial.

3. Pursuant to A.C.A. § 5-2-309(c), Plaintiff requests a hearing for the Court to determine his fitness to proceed to trial in this matter.

WHEREFORE, Defendant prays that his motion be granted and for all other just and proper relief to which he may be entitled.

Respectfully submitted,

ARKANSAS PUBLIC
DEFENDER COMMISSION
101 East Capitol, Suite 201
Little Rock, Arkansas 72201
(501) 682-9070

Attorneys for Defendant,
Karl Douglas Roberts

By: _____
Phillip M. Hendry (ABN 90118)

CERTIFICATE OF SERVICE

I, Phillip M. Hendry, hereby certify that a true and correct copy of the foregoing Notice has been served on Mr. Tim Williamson, Prosecuting Attorney, P.O. Box 109, Mena, Arkansas, 71953, via United States First Class Mail on this 22 day of Oct, 1999.

Phillip M. Hendry

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS **PLAINTIFF**

VS. **NO. CR-99-70**

KARL DOUGLAS ROBERTS **DEFENDANT**

MOTION FOR HEARING TO DETERMINE IF THE STATE MAY SEEK THE DEATH PENALTY

Comes the Defendant, Karl Douglas Roberts, by and through his attorneys, and for his motions states as follows:

1. Defendant is charged with having violated Ark. Code Ann. § 5-10-101, Capital Murder.

2. The State has announced its intention on seeking the death penalty, should the defendant be convicted of Capital Murder.

3. Ark. Code Ann. § 5-4-618(b) provides as follows:

> No defendant with mental retardation at the time of committing Capital Murder shall be sentenced to death.

4. Pursuant to Ark. Code Ann. § 5-4-618(d)(1), the defendant raises the issue of mental retardation and requests a hearing on this matter to determine whether the defendant suffers from mental retardation, thus, preventing the State from seeking the death penalty at trial.

WHEREFORE, Defendant prays that his motion be granted and for all other just and proper relief to which he may be entitled.

Respectfully submitted,

ARKANSAS PUBLIC
DEFENDER COMMISSION
101 East Capitol, Suite 201
Little Rock, Arkansas 72201
(501) 682-9070

Attorneys for Defendant,
Karl Douglas Roberts

By: _____
Phillip M. Hendry (ABN 90118)

CERTIFICATE OF SERVICE

I, Phillip M. Hendry, hereby certify that a true and correct copy of the foregoing Notice has been served on Mr. Tim Williamson, Prosecuting Attorney, P.O. Box 109, Mena, Arkansas, 71953, via United States First Class Mail on this 27 day of Oct, 1999.

Phillip M. Hendry

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS

V. CR-99-70

KARL ROBERTS	03/06/68	M	M
Full Name of Defendant	Date of Birth	Sex	Race

Offense Charged			Code Section
CAPITAL MURDER			5-10-101
Prosecutor's Name & Address	Def. Attorney's Name & Address	Custody Status	A.T. No.
Tim L. Williamson	Randy Rainwater	*in custody* X	533688
P.O. Drawer 109	P.O. Box 567	on bond/ROR___	
Mena, AR 71953	Mena, AR 71953		

ORDER FOR MENTAL HEALTH EVALUATION OF DEFENDANT

On the Motion of Defense Counsel, or upon reason to believe that mental disease or defect will become an issue in the cause, this Court orders:

1. That subject to the provisions in Ark. Code Ann. §§ 5-2-311 and 5-2-311 all further proceedings in the prosecution shall be immediately suspended.

2. That the Defendant shall undergo examination by:

___ a) One or more qualified psychiatrists or qualified psychologists at a designated receiving facility who has successfully completed a forensic certification course approved by the Department of Human Services: (name, address and phone number of psychiatrist/psychologist)_____

___ b) One or more qualified psychiatrists who has successfully completed a forensic certification course approved by the Department of Human Services and who is not practicing within the Arkansas State Hospital: (name, address and phone number of psychiatrist/psychologist)_____

___ c) To be determined by the Director of the Division of Mental Health Services of the Department of Human Services;

__X__ d) Committing him to the Arkansas State Hospital or other suitable facility: (specify facility and address)

for a period not to exceed 30 days, or for a longer period as determined by the Court, as follows: _____

3. The person/institution designated above to conduct the examination shall provide a report to this Court which shall include the following:

a) A description of the nature of the examination;

b) A diagnosis of the mental condition of the defendant;

c) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;

d) an opinion as to the extent, if any, to which the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged;

(check if needed) _X___ e) If directed by the Court, an opinion at to the capacity of the Defendant to have the culpable mental state that is required to establish an element of the offense charged; and

f) If the examination cannot be conducted because of the unwillingness of the Defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the Defendant is the result of mental disease or defect.

4. The report may include a separate explanation reasonably serving to clarify this diagnosis or the examiner's opinion.

5. All public agencies are hereby ordered to make all existing medical and pertinent records available for inspection and copying to the examiners and counsel.

6. The examiner shall mail a copy of the report to the defense attorney and prosecuting attorney and shall file a copy with the clerk of the court.

IT IS SO ORDERED.

Signature of Judge

Hon. Gayle Ford
(Print Judge's Name)

5/19/99
Date

FILED
OFFICE OF THE CIRCUIT CLERK
MAY 19 1999
LINDA K JONES-FRYAR
POLK COUNTY
ARKANSAS

Send copy to: Billy Burris, DHS, 4313 W. Markham, Little Rock, AR 72205

Appendix G

Circuit Court of Polk County
Excerpts of Competency Hearing
(November 18, 1999)

BY THE COURT: All right, sir.

BY MR. WILLIAMSON: The State at this time, Your Honor, would like to call Charles H. Mallory.

BY THE COURT: Dr. Mallory, would you raise your right hand, please, sir? Do you swear or affirm the testimony that you will give will be the truth, the whole truth and nothing but the truth so help you, God?

BY DR. MALLORY: I do.

BY THE COURT: If you'll have a seat right here, please, sir.

DR. CHARLES H. MALLORY,

having been called as a witness by the State and after first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMSON:

Q Hello, Dr. Mallory. If you would, please state your full name.

A Charles Mallory, Ph.D.

Q Where are you employed, sir?

A At the Division of Mental Health Services, the Forensic Services Unit of the State Hospital in Little Rock.

Q And, are you a - what's your position there at the state hospital?

A Staff psychologist.

Q Are you a licensed forensic psychologist in the State of Arkansas?
A I'm a licensed psychologist who is qualified to administer forensic examinations through the state training.
Q How long have you been a psychologist?
A For 26 years.
Q Where did you get your training and your degree from?
A I got an undergraduate degree in psychology at Little Rock University, a master's degree and doctoral degree in clinical psychology at Baylor University in 1973.
Q Since 1973, have you done any internships or residences anywhere?
A Yes, I did a two year internship at Arkansas State Hospital, completed in 1975.
Q After that, what did you do professionally?
A I worked as the clinical coordinator for the outpatient services for about 25 years at the Greater Little Rock Mental Health Center in Little Rock.
Q And, in your position as that coordinator, what were some of your duties during that period of time?
A Individual psychological evaluation, individual and group psychotherapy, primarily.
Q During your period of time as coordinator, were you certified at that time to give forensic type tests?
A Yes, I've been certified since 1989. That was the first

formal training in forensic examination given to psychologists and physicians.

Q And, where did you receive that forensic training?

A Little Rock through the Division of Mental Health Services.

Q How long have you been on the staff of the state hospital?

A A year and a couple of months, in September of '98.

Q Other than that position, do you do any other type of consulting or work outside the state hospital?

A Not currently.

Q On - I believe that you've had a chance and an opportunity this year to give several different type tests to Karl Douglas Roberts, is that correct?

A Yes, sir.

Q Did you administer those tests personally?

A I did.

Q Those tests that you administered to Mr. Roberts, have you administered those tests to others in the past?

A Yes.

Q Can you give the Court any idea of how many times you've done that?

A Well, I can be fairly specific in terms of the MMPI-2 which is what we typically give.

Q Okay.

A I've given about 30 of those. Since that's a new test, I can kind of count that one. The old MMPI, I've given hundreds, the Wechsler Intelligence Scale, I've given hundreds, Georgia Court Competency Test, I've done over a hundred and well over a few hundred of other competency evaluation procedures.

Q Can you tell as far as how many times that you have in your position as a forensic or as a psychologist licensed to administer forensic exams, done those in cases in which the Defendant has been charged with crimes?

A How many evaluations have I given in cases of forensics?

Q Yes.

A Oh, over 300.

Q Over 300?

A All the forensic defendants I've seen have had criminal charges against them.

Q Were those persons seen during the course of your employment either with the state hospital or on contract with the state hospital?

A Yes, sir, yes, they were.

BY MR. WILLIAMSON: Your Honor, I'd tender Dr. Mallory at this time as an expert.

BY THE COURT: Any voir dire?

BY MR. HENDRY: No, Your Honor.

BY THE COURT: Okay, the witness will be

received and declared to be an expert.

BY MR. WILLIAMSON: Thank you, Your Honor.

BY THE COURT: You may proceed.

CONTINUING DIRECT EXAMINATION

BY MR. WILLIAMSON:

Q Dr. Mallory, I'll turn your attention specifically to this Defendant, Mr. Karl Roberts. Did you personally examine and administer certain types of tests to Karl Roberts?

A Yes, sir.

Q Can you recognize Mr. Roberts here in the courtroom today?

A Yes, he's sitting there. (Pointing to the Defendant, Karl Roberts)

Q Between the attorneys?

A Yes.

Q The man wearing the checked shirt, I believe, you're pointing at?

A Yes.

Q Thank you. Do you recall the date of the examination that you interviewed Mr. Roberts and gave him this test?

A Well, he was in the state hospital for 4 or 5 nights, August 9th through 12th and I talked to him on the 9th and 10th and very likely toward the 12th, but over a period of at least 4 to 5 hours of personal interviews over those days.

Q All right, now, he was referred to the state hospital,

was he not, as a result of an order from this Court requesting that you examine his competency and various other issues?
A Yes.
Q And, do you recall what issues you were to examine as a result of that Court's order?
A Yes.
Q What were those?
A These are standard issues that we evaluate, the fitness to proceed, that is, criminal competency to proceed in a trial. And, criminal responsibility, that is one's state of mind at the time of the alleged offense.
Q What about criminal culpability? Did you provide a test for that?
A Yes, I was asked to do that, also and I made an assessment of that.
Q If you would, Doctor, and I'm referring, I think the most simplistic way would be to refer to your forensic report that you've prepared. If you would, on each of these elements, would you please explain to the Court the particular test that you gave and then the results of that test and what issues were defined by those tests?
A Okay, my own contribution to this evaluation was from the psychological and to be the primary evaluator, the person who writes up the findings of the evaluation. So, I wrote up the findings and summarized them all, but specifically on the

psychological part, I administered first of all the Wechsler Adult Intelligence Scale which is a test of cognitive efficiency and brightness. I administered a brief test of reading. I administered the Georgia Court Competency Test which is a standard questionnaire used in evaluating specifically the fitness to proceed issue. I administered the MMPI-2, an inventory of psychological problems and personality style.

Q And, from your previous testimony, you have stated you have administered the Wechsler test in the past, is that right?

A Yes, sir.

Q When you administered the Wechsler test in this particular case, what particularly were you looking for to form an opinion for?

A Well, I wanted to see - it's a standard way of assessing a person's general cognitive abilities. And, it's a standard way - psychologists use that to compare to others in the general population. So, it gives a real sense of how well a person does and you can contrast that with the amount of education they've had, there's a correlation between IQ levels and educational attainment levels. Sometimes you find people where - that have dropped out of school, but they're very bright but you wouldn't expect it if you just looked at their history. So, it's part of the general assessment to try to

get the best and full picture of the person you can.
Q The reading test, what's the purpose of giving it?
A Basically to see whether he could do the MMPI which was 566 reading items, but you need to be able to read at the 6th or 7th grade level in order to take it. He did well. He read on the high school level, so, there was no question about administering the MMPI.
Q On this Georgia Court Competency Test, what's it an indicator of?
A Again, it asks questions related to the Defendant's knowledge of the criminal trial process as well as whether they could recognize - identify the charges against them, know what the charges mean, know their lawyer and constructively work with their lawyer in their own defense, know the aspects of the Court procedure. That's it in a nutshell.
Q And, the MMPI-2, since that's a relatively new test, I'm not that familiar with it, of the second edition of this, you say you've given it approximately how many times to others?
A Better than 25 times.
Q And, the MMPI-2 is a diagnosis tool to look at what?
A Problems and personality style basically. 556 true-false items, it asks a variety of questions about oh, a wide gamut of mental or emotional problems, substance abuse problems, relationship problems and other issues.
Q Either during or prior to giving these tests, do you

look at any other history of the individual you're going to test?
A Sure.
Q What type history do you look at?
A Well, our social worker does a pretty complete history assessment and of course I do that, too in the course of talking to Defendants, to get a background history of their accomplishments and experiences and perhaps illnesses or injuries or physical or mental problems they've had in the past. I try to get a full picture that way.
Q Do you look at their employment history any?
A Yes.
Q Do you look at any information submitted from the Court or the State or the Defendant himself, any supplemental information that comes for referral?
A Sure.
Q In this case, do you know if any of that information was looked at?
A Well, I don't know what specific information you mean.
Q Well, let's say medical history.
A Yes, we got some copies of medical records on the Defendant. Some were from 1980 when he had a bad blow to his head, he had a brain injury with a bike. Then there was a follow-up about 10 years later, going back to a clinic and been re-assessed for a brain injury.

Q Reference the psychological testing of Defendant Roberts, let's look at this Wechsler Adult Intelligence Scale. Are there certain scores that you assess on that?
A Yes, sir.
Q Are they a numerical type score?
A Yes, there are three basic scores could come out of it. One has to do with language comprehension and skill called the Verbal Scale, Verbal IQ is a product of that and the other is called Performance Scale and it has more to do with visual perceptual, fluid problem solving, things that don't depend so much on one's vocabulary, but still tests one's ability to manipulate, to solve problems.
Q Is there a third scale then or are you combining those two together?
A The two are combined for a full scale IQ.
Q And, do you recall what scores Mr. Roberts had on his test?
A Yes, sir. Do you want those scores?
Q Yes, sir, please.
A Verbal IQ of 79, Performance IQ of 79, Full Scale IQ of 76.
Q Now, once you get one of these scores, do you somehow or another rank those in comparison with other persons who have taken this test or what are these scores compared to?
A The general population. The scores are comparable, when

I give a score - a score of 76 is in the 5th percentile of the general population. That means 95 people out of 100 can do better on this test.

Q Okay, then I take it then the 8th percentile would mean that 92 people out of 100 could do better with that?

A That's right.

Q On his Verbal IQ Score of 79, he was in the 8th percentile, is that right?

A Yes, sir.

Q And, I believe it's a 95% confidence level. What does that mean?

A Well, that means that within the confidence level, let's say for the score of 76 is on both sides of that, so, the lower limit of confidence level is 72. The score I got was 76, and the upper level is 81. Between the scores of 72 and 81, there is a 68% chance that the score I got or that the true score lies within - between the levels of 72 and 81. Whenever I give a test, I get a score. The score itself is the actual score, but there is something called the true score. If I gave this test to the Defendant 100 times, it's not possible, but if I gave it 100 times, I wouldn't get 76 every time, I'd get a range around that. Chances are very high is that within that range, 72 to 81, the true score falls meaning I can trust this score to be within that range, the true score to be there.

Q On this performance IQ of 79, you found a 95% confidence level on that, is that right?
A I used the 95% confidence level to derive that range. That range is the 95% level - I'm sorry. I misstated myself.
Q Okay.
A The confidence interval is 95%. I should have said it's 68% chance that the true score falls in that range, instead of a 95% chance.
Q That's what I was going back to ask you about that.
A I was thinking that was the error of measurement, that is the concept that I was giving.
Q All right.
A The confidence interval is 95% sure of being in that range.
Q When you tested his reading skills, did he get a certain score on that?
A Yes.
Q What was that score?
A He came out on the high school level and there's also a percentile in the standard score that you derive from that, let me find that. The reading test involves you as a person to first look at a list of words and pronounce the correct pronunciation, scored correct. He did well compared to his overall score on the Wechsler, remember that is at the 8th percentile level. Here he hit the 25 percentile level, his

reading level compared to the rest of the population is relatively higher and the resulting Standard Score of 90. The Standard Score is roughly comparable to the IQ score based on the same kind of distribution, so, he reads like a person who has a brighter, quicker mind than the intellectual score showed on the Wechsler. What I can say is, to try to simplify it, is that he learned a lot in school and he probably had to work pretty hard on his reading, but he did learn it pretty well compared to other students.

Q Were you able to get a score or a result from the MMPI-2?

A Yes. It produces a whole series of scores. The most important ones for examiners in my situation are the validity scales which in the Defendant's case were elevated to a level that made me reluctant to look at the rest of the test. In other words, the validity scales contain a number of items that measure basically test taking attitudes. If I answer a test in a way that makes me look perfect, like I never make mistakes, I answer items in that manner, I can get an elevated score on the validity scale. If I answer items in such a bizarre manner that even exceeds the extent that truly mentally disturbed people give, that is another index of - or indices of test taking attitudes. That might mean that a person is exaggerating their mental problem. In this case, I got a response inconsistency related scale that was elevated. Using the best available expert advice in my

library, I determined that I should throw these MMPI results out because of these two elevated scales. The second elevated scale for example for true response inconsistencies, that is when a person answers true to a variety of items and some of those items are contradictory like true, I never had a sleep problem and then later in the test they say true, I can hardly sleep at night. So, when you get that inconsistency, you wonder whether they are being consistent and whether these are representing things that are really going on with them or perhaps just the way they want to be seen.

Q If you end up with one of these elevated scores, saying it appears to you to be either invalid or overly inconsistent, do you try to administer any other tests that determine the cause of why in this case I guess his L score - is it his T score that was elevated on this case? Is that what you call it?

A T - TRIN, true response inconsistency and the L on the other elevated scale.

Q In this case, did you administer any test then to determine as to why he might have these elevated levels showing he's answering inconsistently?

A No, I didn't.

Q Are there any tests that you or any other mental health professional could give to try to determine why these scores would be elevated?

A I don't think it would probably be appropriate. The most appropriate reason would be to directly ask the person about the specific item. I did not do that in this case though because in my experience, getting an invalid MMPI or someone who exaggerates their complaints during a forensic examination is fairly common. In my experience, between 2 and 5 out of every 10 Defendants do that in some way or another either very grossly or very minimally, but they kind of exaggerate their problems. So, it's not unexpected. I gave the MMPI just as part of the standard protocol that Mr. Roberts qualified to take. He could read well enough and although at the time he hadn't given us any reports of mental or emotional problems that would normally say, hey, we've got to look real close at this MMPI. It was more like a standard protocol that I give routinely. In Mr. Robert's case as I mentioned, he wasn't complaining of severe mental problems and so, the MMPI really wasn't a necessary part, but I did throw it in for evaluation.

Q Now, in those cases where you administered the MMPI-2 and those 2 out of 5 you said that sometimes there's a 2 to 5 out of 10 that may either grossly exaggerate or end up with an invalid score for some reason or another, does that mean that they automatically get an invalid score if they've grossly exaggerated?

A Yes. The scoring is standard for everyone.

Q Having an elevated score as he did on his MMPI to make you believe this test would be invalid, or form an opinion that the MMPI-2 is invalid in this case, would any evidence of mental retardation cause this particular result on this test?

A It's possible. When you get a TRIN score high enough, you've got a person who is giving contradictory answers, it could be because of poor reading. It could be because of poor attention to the items. You could read well, but you are just flying over them too fast or could be because of, you know, saying oh, I think I'll say I've got this problem and you forget that you said you've got that problem over here and it's a contradiction; so, there's several hypotheses you could have about whether mental retardation is related, but I think his reading ability, his lack of demonstrating any symptoms over four days of in-patient care and observation by 10 or 20 nursing staff and so on and so forth, all that didn't point to any mental defect of such a significant nature that the MMPI would be affected by his mental abilities or lack of mental abilities.

Q So, it's your opinion that mental retardation is not the reason why he would have that score.

A Not mental retardation by any stretch of the imagination.

Q Okay, let's go then taking this one last time this Georgia Court Competency Test. Does that produce a score?

A Yes.
Q And, what score did he attain on this test?
A The Georgia has 50 scorable points, items. You double that to get a final score. The highest possible score could be 100, of course the lowest possible score could be zero. Generally, the expert opinion in using this test is to take the score of 70 or greater as indicating high likelihood of the Defendant being competent to proceed, that is, knowing the criminal trial process and able to help his or her attorneys. The Defendant made 90 out of 100 points on this test, so, it indicated to me that he had sufficient knowledge of the process and he was fit to proceed.
Q Looking at your report, reference the Georgia Court Competency Test, did you find that his responses to your questions showed that he understood the roles of the various court personnel?
A Yes.
Q Did you ask him about the judge and the attorneys and different folks in the courtroom?
A Yes, I did.
Q Did your report then also show that when asked the question about his defense attorney, that he had the capacity to relate to his attorney in a rational manner?
A Yes.
Q And, when asked about the charges that were against him,

did his responses indicate to you that he understood the nature of his charges and could appreciate the seriousness as well to show that he had the capacity to understand the range of possible verdicts and the consequences of a conviction in this case?

A Yes.

Q Briefly, three more questions here, let me ask you about the different types of pleas. Did his responses to your questions show that he's got the capacity to distinguish between the different pleas and the consequences of different pleas?

A He did.

Q Did you find that you believed him to be aware of the number of his legal rights?

A Yes.

Q When you questioned and examined him, did you find that he displayed the ability to listen to the testimony of witnesses and inform his attorney of any distortions or misstatements that others might make against him?

A Yes, in my opinion he has the capacity to do that.

Q Doctor, you gave, as all doctors give on these tests, current mental condition of the Defendant when you start talking about Axis I, Axis II and Axis III. Would you describe to the Court what Axis I means?

A On the five axis system derived by the American

Psychiatric Association over the years, the diagnostic nomenclature used is five axes. The first axis is usually the focus of treatment, psycho pathology. It can be things such as mental disorders of various sorts, depression, so on and so forth. The second axis, more enduring characteristics of personality or functioning. Mental retardation goes there, personality disorders go there, things that aren't generally perceived to be treatable or immediately responsive to treatment usually aren't the focus of treatment either, but they do influence a person's life and often their mental states. The third axis is the medical diagnosis axis, just standard, any medical diagnosis of significance is on Axis III. And, the other two axes we don't typically use at the hospital because they involve the person's general level of functioning and specific problem areas. They might have occupational problems, would be one area, so on and so forth. So, those are the five axes.

Q Were you able to make an informed opinion as to whether or not this Defendant has an Axis I issues?

A I couldn't - I didn't find any problems or symptoms that would rise to the level of a diagnosis on Axis I.

Q What about Axis II?

A Nor there, no Axis II diagnosis, either.

Q And, what about Axis III?

A Well, just the only significant medical history item was

that he had a closed head injury at age 12 or 13 and that's the injury I mentioned earlier.
Q After examining this Defendant, did you form an opinion as to whether or not he's got the capacity to understand the proceedings against him and effectively assist in his own defense?
A Yes.
Q He does?
A I do believe, yes.
Q And, did you form an opinion of whether or not he had the presence or absence of any mental disease or defect at the time of the offense?
A I didn't think so. That's a judgment you have to reach through family and the information available, but based upon the information I examined, no.
Q So, it's your opinion he did not, at the time of the offense, have mental - suffer from mental disease or defect.
A That's correct.
Q Reference to whether or not this Defendant has got the capacity to establish an element of the offense charged, to have that culpable mental state that's required, did you form an opinion as to that?
A Yes.
Q What was that opinion?
A That he did have an element of the charged offense - that

is the capacity for purposeful conduct.
Q Knowing conduct, is that also included in that, too?
A Yes.
Q Did you form an opinion as to whether or not at the time of the offense this Defendant had the capacity to appreciate the criminality of his actions and his conduct?
A Oh, yes.
Q What's your opinion on that?
A That he did have that capacity.
Q And, at the time of the offense did you form an opinion as to whether or not he had the capacity to conform his conduct to the requirements of the law?
A I did.
Q What was your opinion on that?
A That he did have that capacity.

BY MR. WILLIAMSON: Thank you, Doctor, and I'll pass the witness.

BY THE COURT: Cross-Examination.

CROSS-EXAMINATION

BY MR. HENDRY:
Q Dr. Mallory, what - forgive me for having you to repeat maybe some of your testimony but, what test did you actually administer? Did you administer all tests?
A Yes.
Q Given to Mr. Roberts?

A Yes.
Q So, you administered the MMPI, the Georgia Court Competency Test, the reading test and the Wechsler.
A Yes.
Q How long did those tests take to administer?
A The Wechsler, about an hour, Georgia about 30 minutes, the WRAT about 5 minutes, the MMPI a couple of hours of his time.
Q When you say you spent four hours with him, are you including the testing time?
A Actually I spent more than four hours with him.
Q According to your report, you stated that you spent - yes, Dr. Mallory, four hours.
A That was testing time, testing and interview time. But, we had staffing time, we get together and talk about the patient, too. I know I spent probably 12 to 20 hours on this case, I'm sure.
Q Specifically talking with Mr. Roberts?
A No.
Q About issues?
A No, four or so talking to him about issues, also deriving information from other people who had talked to him, like the social worker.
Q Right, but the actual time that you spent with him either administering a test or talking to him, how long was

that, four hours?
A At least four hours.
Q And, you mentioned also in your report that Dr. Kittrell - well, you state that approximately 8 hours was spent in face to face interviews and Dr. Kittrell spent 75 minutes.
A That's a rough estimate. He was the treating psychiatrist. It would be at least that, well, it may have been more than that.
Q And, then Angela Smith, a licensed social worker, I presume.
A Yes.
Q She spent approximately 2 ½ hours.
A Yes, sir.
Q So, when you say you had face to face interviews with Mr. Roberts for eight hours, that was not one person sitting down with him for eight hours and talking with him, correct?
A Correct.
Q You rendered your opinion on whether Mr. Roberts has mental disease or defect and I'm assuming you used these tests to determine that, is that correct, the IQ?
A Among other things, yes.
Q What other things did you consider?
A His history, reports of his parents, lack of previous treatment, mental treatment, his own reports.
Q Okay, is what you performed, is it considered a

neuropsychological evaluation?
A No.
Q What is a neuropsychological evaluation?
A It's a specific - examination specifically that attempts to find defects or dysfunction in a neurological system, but using psychological tests rather than x-rays to do so.
Q And, why didn't you do a neuropsychological evaluation?
A Well, two reasons. We didn't see a reason for it and I'm not qualified to do them.
Q Are you not? Why didn't you see a reason?
A Because of his lack of complaints about problems and a variety of factors.
Q Wouldn't someone complaining, wouldn't that require insight into an illness or mental condition according to the complaint?
A Yes, I think that's true.
Q And, if Mr. Roberts didn't have any insight into his illness or maybe was abnormal, he wouldn't report that, isn't that true?
A It's possible. You have complaints although you may not understand - insight is generally awareness of one's projected situation. I'm angry, I may not realize I'm looking that way to other people, I may not have insight into it. I know that I'm angry, though.
Q Right. Didn't you get some reports from him of impulse

control, anger problems?
A He had a history, he told us, of getting into arguments and fights.
Q Did that not indicate the possibility you needed to do more extensive testing on him other than the tests that you gave him?
A No, it didn't.
Q You mentioned his history. I'm assuming you reviewed the records from Sparks Medical Center.
A Yes.
Q And, I believe you quote from those records in your report. Could you tell me what Dr. Michael Dulligan stated that you reported under relevant medical history on Page 3?
A Sure. He reported that the Defendant had sustained a brain injury, a skull fracture, had been knocked unconscious, was belligerent when he came to. It said he had a complete change of personality.
Q Complete change of personality based on a blow, isn't that correct?
A Yes.
Q And, I'll just go ahead to expedite things, it further says, your report says that probably with bruising to both frontal lobes and to temporal lobe which we can obviously see. Are you understanding that he is looking at a CAT scan or an x-ray when he makes that determination?

A Right.
Q Based on your education and experience, can you tell me what type of problems can be suffered - someone can suffer from receiving damage to the lobes mentioned by Dr. Dulligan?
A I want you to understand I'm not an expert here, but of course—
Q What do you contend you're an expert in?
A Doing forensic evaluations.
Q Okay.
A Not in doing brain or physiological or neuropsychological evaluations.
Q Well, in your education, have you received some education on what parts of the brain, what lobes may control, what certain emotions or actions?
A Yes, but I could not say that I know enough to call myself an expert or delve into that.
Q So, the fact that he has had damage to both frontal lobes and the temporal lobe, you don't have the expertise to know if that should trigger certain types of tests to determine whether to quantify his brain damage, is that correct?
A Right.
Q Do you know if anyone did that?
A If anyone did that?
Q Yes, did anyone evaluate that brain injury to determine

if certain tests should be given him that has the expertise to make that decision?

A In a standard and gross manner, he was given a physical examination. He was given a psychiatric evaluation by Dr. Kittrell and those would uncover one would - I would presume signs of neurological problems if they existed.

Q There has been no review, as far as you know, of the x-rays or whatever diagnostic tests were given to Mr. Roberts when he was injured by any professionals at the Arkansas State Hospital.

A Dr. Kittrell saw the medical records, I believe, from Sparks and the 1980 and 1990 reports.

Q And, the records that you have that compose your file, you have no copies of x-rays, do you?

A I don't believe so, no, sir.

Q You mentioned also Dr. Earnest Serrano, a neurologist at the Holt-Krock Clinic, you also reviewed his records as well?

A Yes.

Q And, I believe you stated January of 1990 he was seen by Dr. Serrano for uncontrollable temper episodes.

A That's right.

Q I believe you go on to say that Mr. Roberts was seen a year post-injury at Sparks Medical Center, is that correct?

A I'm sorry, probably was, he was seen for follow-up visits

for the next year, that's correct.
Q Okay and I believe you arrived at the conclusion or made the conclusion that based on his follow-up a year after the accident and this visit to Dr. Serrano in 1990, that he had no further problems from this brain injury because he was seen by these doctors and there is no notation of any problem.
A Well, the problems with his temper, rage, they didn't attribute those to lasting neurological problems developing. Apparently they thought they were stress reactions.
Q And, do you know of tests at that time - they performed at that time to make that assumption, that he was not suffering further effects from the brain injury?
A No, I can't tell you for certain. I know the tests. I just looked at their summary reports.
Q Okay and you can't say that they did a neuropsychological evaluation.
A I couldn't, no.
Q At those times.
A No.
Q As far as you know, he's not had one since - he's not had one, period.
A It's very possible.
Q Would you agree with me that's the most thorough examination he could have to determine if he has any mental disease or defect?

A Sure.
Q Doctor, is it possible for someone to have cognitive defects or deficits that do not show up on an evaluation such as you performed on Mr. Roberts?
A Indeed.
Q What kind of tests would those be? What kind of tests could you give to make a determination like that?
A Well, it depends on what I was looking for.
Q Doctor, you mentioned in your report that Mr. Roberts had a normal pattern of speech, do you recall making that—
A With a slight impediment.
Q Stutter and also that his speech is in a mild monotone.
A Yes.
Q And, that just caught my eye. I was wondering why you first said it was a normal pattern of speech and then you go on and say he has a mild stutter and he talks in a monotone. Is the stutter and speech in mild monotone, is that normal?
A It was a very very, almost imperceptible stutter and the monotone, it's not unusual for a person in jail and based in a situation to have some kind of depressed effects or low emotional state.
Q Well, let's assume one is not in jail and they have the type of monotone speech that you observed in Mr. Roberts. Would that indicate a neurological deficit, damage?
A Could possibly.

Q Did you talk with his - you said you visited with his parents.
A Yes.
Q And, his wife. Did you discuss with them his monotone speech or stutter?
A Not that I have a recollection of.
Q So, you didn't determine whether he was doing this prior to being incarcerated.
A No.
Q If I could review with you again your IQ findings, mainly I want to focus on the full scale IQ which is 76, is that correct?
A Yes, sir.
Q And, I want to give the Court some perspective. Would you agree with me that an average intelligence IQ is 90 to 109?
A Yes.
Q And, a low average IQ is 80 to 89, is that correct?
A Yes.
Q And, 70 to 79 is what category?
A It's 70 to 84 or 85 in a DSM is called borderline intellectual functioning. It's above retardation, but below normal, so it could be a significant factor in judgment.
Q And, he's in that range.
A Yes.

Q And, I don't believe you used that terminology in your report.
A No, because to get any kind of mental diagnosis, you have to have a major impairment of some life activity and I couldn't determine that. Many folks can't do things in school or can't hold employment, so, if they have low IQ's plus a major impairment, then you could call it mental retardation.
Q Right.
A Borderline, but if you don't find an impairment, if you don't take the score alone as evidence.
Q So, you're saying there's got to be some practical limitation on that person and his ability to adapt to life before he can be put in the borderline intellectual status or in the mental retardation status?
A That's how I consider it and I believe I'm correct, borderline intellectual or mental retardation.
Q Okay and is that according to the DSM 4?
A I think so.
Q And, just for the record's sake, what does the DSM 4 stand for?
A Diagnostic Statistical Manual 4th Edition.
Q Okay and that would be out of a standard—
A Diagnostic system.
Q Doctor, you - well, you'd agree with me, he's on a low

end in the intellectual or the IQ scale, would you agree with me there?
A Yes.
Q You wouldn't classify him as mentally retarded, but he is—
A I can't technically do that. I can't do it as a DSM system.
Q You mentioned in your report that he functioned without difficulty in long term jobs. How did you arrive at that conclusion?
A Well, he told me, but as I recall, his parents gave me a positive report on how he got along and he held a job - he held a job, the longest lasting 6 or 7 years, that was as a concrete finisher, then he switched to this factory job, I don't know how long before the alleged offense.
Q You say he was working at a factory job before the alleged offense?
A Excuse me, I'm wrong. I'm getting mixed up. All I have is the last job he had was as a concrete finisher.
Q Did you ever talk to any of his - his last employer?
A No.
Q Do you always find that self-reports by a person in Mr. Roberts' shoes as being completely accurate on how he did on the job?
A No, but we talked to his parents, too.

Q Did his parents work with him on this job?
A (No response)
Q Did his parents work with him on the job that he had where they could observe what he did?
A I don't recall.
Q And, you said whatever impairment he had or his IQ did not affect his major life activities. When you say major life activities, what do you mean?
A Not that it didn't affect it, I would say there's no major impairment. He can hold a job. He can participate in normal or family life acceptably, it's just that his intellectual handicap didn't prevent any major life activity, participation at least didn't mean he could excel.
Q Let me talk a little bit more about the MMPI. You talked about his fluctuation or the elevated L Scale and the TRIN Scale.
A Yes.
Q Can you determine or did you determine whether there was any purposeful—
A No.
Q —things done by Mr. Roberts to make that scale read like that?
A I didn't do any post-test follow-up with him on those items.
Q Can you re-administer the MMPI-2? Could you have

re-administered that to him and talked to him about the issues of the elevated scales and therefore possibly gotten the true scale a little lower or the L Scale within range where you could interpret the data?

A I would be reluctant to administer it again.

Q Why is that?

A Well, first of all, to get a different result, I would have to give him some instructions, I'm presuming, otherwise I would expect the same result and if I told him, hey, you didn't quite give us the results we want, would you please be careful and be consistent this time? I'm not going to take those evaluation results as being worth anything.

Q Is there anything you can refer me to in professional journals or books that in your profession that say you cannot re-administer the MMPI-2 with an explanation to the person you are testing as to why you need to re-do it?

A No, there's no prohibition, but in certain cases, in forensic cases predominately, if you've already gotten a score that looks like the test taking attitude was not - doesn't allow you to score the rest of the test, I cannot conceive of going back later to give another test to see if he could be more honest this time. I can't see the reasoning, the reason for doing that.

Q Well, could part of the reason be is that there are other tests that you can give like the MMPI-2 to obtain the same

data?
A There's one that's coming up strong, the MILLON, but it's not as reliable - the literature certainly doesn't give it the high marks like it does the MMPI on being able to eliminate people who are approaching the test with maybe inconsistent or insincere answers.
Q So, what was the test that you said?
A The MILLON, Clinical Multi-Phasic Inventory.
Q Are there any other tests?
A Psycho pathology, as good as MMPI, no.
Q Are there any others that are a shade below, but that would give you some guidance on whether the test—
A There very well may be, but I don't know.
Q If someone re-administered the MMPI and obtained a valid score, are you saying you would discount that completely?
A If they administered it and got a valid score?
Q After there was a not-valid test.
A I don't know that I would ignore it, but I'd have to look at it and consider the context.
Q You could have done it in this case and taken it in context and possibly used it and possibly not, correct?
A Do you mean give him the MMPI again?
Q Right.
A I honestly have never heard of that.
Q Tell me again the purpose of the MMPI. You've gone

through the different axes of diagnoses. What does the MMPI do to help you fill in different axes and which axis within the MMPI-2 go to?
A Axis I and Axis II.
Q So, your test you gave is not valid, that does not rule out that Mr. Roberts doesn't have an Axis I or an Axis II diagnosis, does it?
A No.
Q It merely says you can't determine that, correct?
A Yes.
Q So, I don't know all the different diagnoses that are in the MMPI, I'm sorry, in the DSM 4, but you couldn't rule out in his case because of his tests bi-polar disorder, could you?
A I ruled it out, yes.
Q Is that anywhere in your—
A I mean, it's possible I would miss it, but given the serious dramatic symptoms of bi-polar disorder and so on, I ruled that out.
Q How about any disassociative disorders?
A Not in evidence to the extent that you would need to make that diagnosis.
Q My point is, you can - if you had a valid MMPI, you could rule out or rule in those types of things, but as it stands right now, you can't.
A No, I couldn't even do that with a valid MMPI. An MMPI

is just one piece of information, I mean, it's a self-report test, true/false. It's not ethical to make a diagnosis on the basis of that alone.

Q Well, in this case you had a reading test, an IQ test, and interview, correct?

A Yes.

Q And you made a determination that he had no diagnosis based on that. Is that right?

A Yes, I couldn't find any signs or symptoms of Axis I or Axis II.

BY MR. HENDRY: Your Honor, could I have just a moment with co-counsel?

BY THE COURT: Yes, sir.

BY MR. HENDRY: That's all, pass the witness.

BY THE COURT: Re-Direct, Mr. Williamson.

RE-DIRECT EXAMINATION

BY MR. WILLIAMSON:

Q I'll be brief, Your Honor. Doctor, I'll try to clarify one thing. If this Defendant let's say had - or since the date of this examination, assuming this Defendant had had a neurological assessment done by a physician or a neurologist or specialist and the results of that showed that he might be suffering a change in his physiological condition since the 1990 report, how would something like that affect your findings in this report?

A I would have liked to have known about that.
Q I'm saying assuming.
A But, the examination we give Defendants over a 4 to 5 day period is a fairly standard evaluation. We've done it with hundreds of people. We granted, can't tell every problem in their life from that, sometimes they don't talk about it, sometimes it's not presented, sometimes - obviously we can't know everything from that, but what we can know is that their basic functioning is intact, putting it a very general way. That is, they can communicate. They can think, solve problems, they can follow simple commands. They can read simple directions. They can engage in goal-directed behavior that - please get me a chair for this room and they will go outside the room and find a chair and bring it back in. So, they are - we evaluate those basic kinds of dimensions of every day functioning, along with a lot of specific questions and tests that try to pick up other problems that they may not tell us about.
Q So, in your opinion then, a change in medication condition might be a change in medical condition, but it really might not affect the results of these tests.
A Whether I could perform goal-directed behavior, it might make me slower, but in our evaluation we found that it would not affect the issues that we were bound to address in this evaluation. Those are specific issues. It isn't court

ordered to find if there is anything wrong with this person. There's a court order to find out if they have the capacity to help their lawyer to process and that they, within a reasonable medical or psychological certainty have a mental defect or disease, whether they are responsible for what happened at the scene at the time of the crime. So, those are broad questions and we do our best to ask the questions, get the data to address those issues, not every issue.

Q And, this may not be a fair question to you, you're probably not prepared for this one, you testified you've had over 300 cases that you can recall with this type of forensic evaluation that you've performed, is that right?

A Yes.

Q Can you recall any instance when you've been given - subsequently given amended medical history or amended information of any type that caused you to change your opinion on any of 300 that you can recall?

A One I can recall, but that would be the only one that I could recall.

Q Is that because of a change in medical history or medical history that had not been provided to you?

A Because the man that had committed murder told me he had had a stroke not long before that and had been hospitalized, so I sent him to the state hospital for a full exam not knowing whether I had enough information and needed a more

thorough evaluation and they found out that he'd had nothing of the sort.

Q Okay.

A So, he had exaggerated in a wrong direction, medical details.

BY MR. WILLIAMSON: Thank you. I'll pass, Your Honor.

BY THE COURT: Any further questions, Mr. Hendry?

BY MR. HENDRY: Yes, Your Honor.

RE-CROSS EXAMINATION

BY MR. HENDRY:

Q Dr. Mallory, do you recall any cases where you had an invalid MMPI to score or a not valid MMPI to score and you found the presence of mental disease or defect?

A Yes.

Q How many in those cases?

A I couldn't tell you, but—

Q These are out of the 300 cases that you're talking about?

A I'm sorry, I don't have records. The last time I kept a record, I was keeping records of people I found not competent and not responsible. But, it's not uncommon and I would not be surprised to find a person with active acute mental disease not to give the most valid MMPI. Optimally, under the best conditions you administer it when the person is calmed down,

not acute, the crisis is past, maybe on medication, at a time when they can really take the test and understand it and put effort into it.

BY MR. HENDRY: That's all I have, Your Honor.

BY THE COURT: Is there anything further?

BY MR. WILLIAMSON: No, Your Honor.

BY THE COURT: Doctor, you may step down and just have a seat over here.

Anything further from the State?

BY MR. WILLIAMSON: Not from this witness.

BY THE COURT: Mr. Hendry, anything?

BY MR. HENDRY: No testimony, Your Honor. We'd like to make argument.

BY THE COURT: I anticipate that and understand that, but if you don't mind, we'll do it after lunch.

BY MR. HENDRY: Yes, Your Honor.

BY THE COURT: Ladies and gentlemen, we will adjourn for lunch. I'm going to ask the audience to remain seated for a few minutes. We'll come back here at 1:30. Sheriff. We'll be in adjournment, but I'm going to ask the audience if you'll remain in the courtroom for about five minutes and then we'll go to lunch and we'll come back. So you'll understand what's happening, the attorneys will be

making argument with respect to the motion on competency to stand trial, is what this testimony has been about. Then after that, we'll have a hearing on motion to suppress statement and motion to suppress physical evidence. We'll do that also this afternoon after lunch. We need to - I'm getting to where I need to eat regularly. Bear with us please, ladies and gentlemen, and I'll ask you to wait a few more minutes and then we'll adjourn. Again, I'll remind you when we come back you'll be subject to the same requirements when you enter the courtroom. We'll be in adjournment for lunch until 1:30. Thank you, ladies and gentlemen.

(AT THIS TIME THERE IS A RECESS AFTER WHICH COURT IS RECONVENED. THE DEFENDANT IS PRESENT WITH MR. HENDRY, MR. MARCZUK AND MR. RAINWATER. MR. WILLIAMSON, MR. JOHN MADDOX AND MR. MARTIN ARE PRESENT FOR THE STATE OF ARKANSAS)

BY THE COURT: I believe we're at the stage where argument is to be presented concerning the competency to stand trial issue.

BY MR. WILLIAMSON: I believe it will be Mr. Hendry, Your Honor.

BY MR. HENDRY: Your Honor, I'd like to hand the Court two motions on competency and mental

retardation issue.

BY THE COURT: Thank you.

BY MR. HENDRY: As far as to whether the State can seek the death penalty, I've cited the statute there that states that the State cannot seek the death penalty if a Defendant suffers from retardation. The Court has heard the testimony of Dr. Mallory and I can't do anything but say the Court has the necessary information to make a ruling on that.

As far as the competency issue, our position is that under Arkansas Code Annotated 5—2-305(d)(2), it says a report of the examination prepared by the state hospital shall include the following: a diagnosis of the mental condition of the Defendant. It's our position that based on Dr. Mallory's testimony and the fact that the MMPI-2 test was not valid, that he cannot either rule out or conclude possible mental disease and defects that Mr. Roberts has and therefore his report should not be admitted, well, it should not be accepted for the fact that Mr. Roberts is competent and we would submit that before he can be found competent that he should have a second - another evaluation. Dr. Mallory referred to phonetically, he said the MILLON

test that deals with the same issues as the MMPI-2. Thank you.

BY THE COURT: Yes, sir. Thank you. Mr. Williamson.

BY MR. WILLIAMSON: Yes, Your Honor, in response to these motions, the State would refer the Court to Dr. Mallory and his testimony. Dr. Mallory said he did express an opinion reference all the issues that the Court ordered him to address and that being - he formed the opinion that the Defendant did not lack the capacity for purposeful conduct, that he did not have mental disease or defect, that he did not lack the capacity to appreciate the criminality of his conduct and he did not lack the capacity to conform his conduct to the requirements of the law. And, that he is currently aware of the nature of his charges and the proceedings against him and he's capable of cooperating effectively with his defense counsel and be present in the courtroom.

The issues raised about the MMPI-2 and the fact that it came back as invalid may sound like that technically would be a problem because anytime a test comes back invalid just sounds bad, but given the testimony of what Dr. Mallory testified to when asked about that, as to whether or not he could use

that as a diagnostic tool, I think he was real clear when he testified to us about the fact that he said that he didn't have to have that to make his opinions. And, that he found there was no Axis I, no Axis II, problems with this particular Defendant and therefore he based his opinions upon the other information found in the file, the Wechsler and the Georgia Court Competency Test and also the fact that this individual can read at a level at which he was capable of taking the MMPI. I don't think the State believes that the issue of the MMPI-2 as to whether not it was intentionally skewed or whether or not there were certain issues reference the inconsistency. Dr. Mallory, based upon what I can recall him testifying to, stated that in his experience as a licensed psychologist administering these forensic tests, that he didn't have to have an MMPI-2 test and have a score on that other than seeing whether or not it was valid or not.

So, the State would state that an additional competency hearing in this matter would be nothing more than to delay this, especially in light of the fact when Dr. Mallory was asked, Doctor, if this Defendant had subsequent physiological or medical tests performed since the time that you have formed

your opinion and filed your report, would that matter? If he had some new brain injury related to this - or element related to his closed head injury and he said no, because what I'm gauging is how this Defendant acts, behaves, relates to others and can assist in his own defense and communicate. And, so whether he had a disease, medical problem or not, doesn't affect the outcome of his scores on these exams. And, I think if the Court will recall, I asked him in the 300 exams that you have given that you've gotten later information and changed your mind on and he said, one and that's because the Defendant told him he had had a stroke when in fact the Defendant had not had a stroke.

The State understands the necessity since this is a death penalty case that the Court and any reviewing courts will look at this to determine whether or not the Defendant was properly examined and the diagnoses were based upon facts for this particular Defendant. However, I don't see where any subsequent testing of this Defendant would reveal any results other than what has already been found in this case.

BY THE COURT: Anything further?

BY MR. HENDRY: No, Your Honor.

BY THE COURT: Based on the testimony of Dr. Mallory, I feel that the Defendant is competent ar capable of standing trial and to be subject to the death penalty. I think he can assist his attorney: in his defense and the doctor's testimony states hi evaluation is sufficient to meet the requirements of the law. The doctor stated he'd never heard of re-administering the MMPI. He didn't think it would do any different. He's competent and capable to stand trial.

Now, the next issue is motion to suppress and you've got two of them.

BY MR. HENDRY: Yes, Your Honor.

BY THE COURT: Which one do you wish to start with?

BY MR. HENDRY: Judge—

BY THE COURT: The statement? That's the first one in order we have.

BY MR. HENDRY: Yes, Your Honor.

BY THE COURT: Mr. Williamson, are you ready?

BY MR. WILLIAMSON: Yes, the State is ready, Your Honor.

BY THE COURT: Okay, who are your witnesses?

BY MR. WILLIAMSON: Sheriff Oglesby, Investigator Ocie Rateliff and Special Agent Mark

Appendix H

Circuit Court of Polk County
Omnibus Order on Motions
(December 18, 1999)

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. CR. 99-70

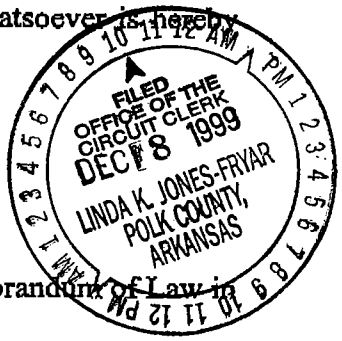
KARL DOUGLAS ROBERTS DEFENDANT

FINDINGS OF THE COURT

On November 18, 1999, the court does make the following rulings;

1. Motion for Defendant to Appear in All Court Appearances in Civilian Clothing and Without Restraint is hereby granted as to Defendant's jury trial, subject to Defendant's conduct.

2. Trial Memorandum of Points and Authorities in Support of all Motions, Objections, Exceptions, Requests, and Other Applications and Issues of any Nature Whatsoever is hereby granted.



3. Notice of Assertion of Right to be Present is hereby granted.

4. Motion for Full Recordation is hereby granted.

5. Motion for Production of Alleged § 404(b) Evidence and Memorandum of Law in Support Thereof is hereby granted.

6. Motion for Discovery and Disclosure is hereby granted.

7. Brief in Support of Motion for Disclosure and Discovery the Prosecution has a Constitutional Obligation to Disclose Mitigating Evidence and Exculpatory Evidence is hereby noted.

8. Motion for Disclosure of Impeaching Evidence is granted.

9. Motion to Disclose the Past and Present Relationships, Associations and Ties Between the Prosecuting Attorney and Prospective Jurors is hereby granted, and it is agreed upon by the parties that the obligation to disclose is reciprocal.

10. Motion to Require Investigative Officers to Retain Rough Notes is hereby granted.

11. Formal Notice of the Defendant's requirement of actual presence and testimony of employees of the Arkansas State Crime Lab and Arkansas Medical Examiner's Office is hereby noted.

12. Defendant's Motion in Limine is hereby agreed to by the parties with respect to the items listed except sections a, b, d, e, f and g of the Motion. The State specifically reserves the right to elicit testimony with respect to items c on rebuttal should the Defendant "open the door" for such testimony.

13. The Court's ruling on Defendant's Motion in Limine with respect to the admissibility of photos will be held in abeyance until trial and the court will review each photo that is not stipulated to or agreed to by the parties, and make its decision to admit or exclude if cumulative, overly prejudicial, etc. The State agrees not to attempt to introduce any autopsy photographs taken during the autopsy of the victim.

14. Motion for Submission for Supplement Jury Questionnaire is granted.

15. Motion to Assure Cross Section of Community for Jury is granted.

16. Motion to Allow Individual Sequestered Voir Dire is granted.

17. Motion to Prohibit Death Qualification of Jury is denied.

18. Motion to Prohibit Jury Dispersal and to Prohibit Jury's Exposure to Victim's Family and Friends is hereby granted. The Court further finds that this ruling will apply both to the victim and the defendant's families.

19. Motion to Prohibit Emotion, Displays of Approval or Disapproval and other Prejudicial Behavior in the Courtroom is hereby granted.

20. Motion to Sequester Witnesses is hereby granted with the regard to lay witnesses only.

21. Motion to Apply Heightened Standard of Review and Care in this Case Due to the State Seeking the Death Penalty is hereby granted.

22. Motion to Preclude the State from Impermissibly Diminishing the Capital Sentencing Jury's Sense of Responsibility is hereby granted and the State of Arkansas will comply with *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

23. Motion to Allow Opening Statement at Penalty Phase is hereby granted for both the State and defense.

24. Motion to Compel Disclosure of Aggravating Factors and Information Relating to Mitigating Factors is hereby granted. The State of Arkansas will only submit at the trial of this matter the aggravating circumstance that the crime was committed in an especially cruel or depraved manner.

25. Motion to Allow the Admission of Mitigating and Expert Evidence is hereby granted.

26. Motion to Prohibit Introduction of Aggravating Circumstances is denied.

27. Motion to Prevent "Victim Impact" Evidence or, in the Alternative, for Discovery and Pretrial Review of "Victim Impact" Evidence is denied in part and granted in part. The State will not be permitted to introduce "victim impact" evidence pertaining to the victim's family members characterizations and opinions about the crime, the defendant, and the appropriate sentence. The State of Arkansas will be allowed to introduce "victim impact" evidence regarding the character of the victim and the impact that the victim's death has had on her family. With respect to the pretrial review of the "victim impact" evidence, by agreement, the State of Arkansas will provide the defendant with a written summary of the "victim impact" evidence of each witness which will be

introduced at trial. Additionally, the State has agreed not to elicit testimony outside of the content of the summaries of each witness that have been provided to the defendant.

28. Motion to Preclude the Introduction of Victim Impact Evidence Pertaining to Victim's Family Members Characterizations and Opinions About the Crime, the Defendant and/or the Appropriate Sentence is granted.

29. Motion to Suppress Statement is hereby denied.

30. Amended Motion to Suppress Statement and Motion to Suppress Physical Evidence is hereby denied.

31. Motion for Hearing to Determine Competency to Stand Trial is hereby granted. Following the hearing to determine competence to stand trial, the court finds the defendant competent to stand trial.

32. Motion for Additional Courtroom Security is hereby granted.

33. Motion for Hearing to Determine if the State May Seek the Death Penalty is hereby granted. Following a hearing regarding the defendant's competency and after hearing testimony from Dr. Mallory of the Arkansas State Hospital regarding the defendant's IQ, the Court hereby finds that the State may seek the death penalty at the trial of the matter.

34. Motion to suspend all Further Proceedings Pending the Completion of a Psychiatric Examination is moot.

35. The Defendant's Petition for Change of Venue was not ruled upon by the court since the defendant withdrew the Motion in a filing with the court on November 16, 1999, and also, the Defendant verbally confirmed the withdrawal of the Motion on the record at the pretrial hearing on November 18, 1999.

36. Supplement to Petition to Change Venue was withdrawn.

37. Motion for In Camera Determination of Competence of Witnesses was not ruled upon by the Court, since the State of Arkansas stated on the record that they will not be calling the two juveniles, Samantha Ray Frost and Torrey Shane Drager, as witnesses in the trial of this matter.

38. Motion to Quash Information on Grounds that the Death Penalty is Cruel and Unusual Punishment Violative of the Eighth Amendment to the Constitution of the United States is hereby denied.

39. Motion to Hold the Provision of the Death Penalty Statute, Ark. Code. Ann. §5-10-101 (Supp. 1989) Unconstitutional is hereby denied.

40. Motion to Declare Death Penalty Unconstitutional as Violative of the Privileges and Immunities Clause of the Fourteenth Amendment is hereby denied.

41. Motion to Hold the Provisions of the Death Penalty Statute, Ark. Code Ann. § 5-4-604, et seq. Unconstitutional is hereby denied.

42. With respect to the defendant's Motion to Hold the Sentencing Provisions of the Death Penalty Statute, Ark. Code Ann. § 5-4-603 Unconstitutional, as a resolution of the motion, the State of Arkansas and Defendant have agreed that at the trial of this matter, the defendant may submit a modified jury instruction, AMCI 2nd 1008 Form 3 with paragraph (c) to read as follows:

> (c) The aggravating circumstances when weighed against any mitigating circumstances justify beyond a reasonable doubt a sentence of death.
>
> If you have checked paragraphs (a), (b), and (c), then you may sentence (Defendant) to death on Form 4.

43. Motion to Quash Information on the Ground that the Statutory Aggravating Circumstances are Vague and Overbroad and Have Not Been Narrowly Construed by the Appellate Court is hereby denied.

44. Defendant's Motion to Suppress Physical Evidence based on the assertion that the State of Arkansas did not first obtain a search warrant, is hereby denied.

The Court hereby adopts as its ruling, any agreement between the parties mentioned in the preceding paragraphs.

IT IS SO ORDERED *NUNC PRO TUNC.*

Honorable Gayle Ford
Circuit Judge

Dated: 12-8-99

Approved as to Form:

Phillip M. Hendry
Arkansas Public Defender Commission
Attorney for Defendant, Karl Douglas Roberts

Tim Williamson
Prosecuting Attorney

Appendix I

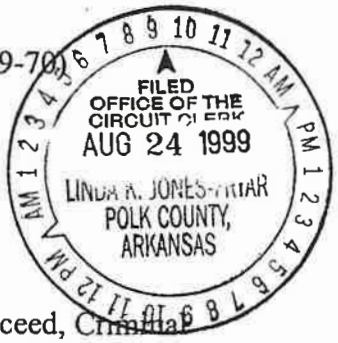
Arkansas State Hospital
Forensic Report
(August 24, 1999)

Arkansas Department of Human Services
Division of Mental Health Services
Arkansas State Hospital

Forensic Report

IDENTIFYING INFORMATION:

DEFENDANT: Karl Douglas Roberts
DEFENDANT'S HOSPITAL NUMBER: 61 10 36
CHARGE AND CIRCUIT NUMBER: Capital Murder (C.R. 99-70)
DATE OF REFERRAL: May 19, 1999
DATES OF EXAMINATION: August 9-12, 1999
DATE REPORT SUBMITTED: August 13, 1999



REFERRED BY: Circuit Court of Polk County, Arkansas

REFERRAL ISSUE: In accordance with ACA 5-2-305: Fitness to Proceed, Criminal Responsibility, Criminal Culpability, and Diagnosis of Defendant

SUMMARY OF OPINIONS:

1) Karl Roberts at the time of the examination had the capacity to understand the proceedings against him and had the capacity to assist effectively his attorney in his own defense.
2) At the time of the examination he had no evidence of mental disease or defect, apart from personality disorder. His diagnosis was:
   Axis I. No Diagnosis
   Axis II. No Diagnosis
   Axis III. History of Closed Head Injury at age 12
3) At the time of the alleged offense he had the capacity for purposeful conduct, an element of the offense charged.
4) At the time of the alleged conduct, should the fact finder conclude that he committed the alleged offenses, he did not lack the capacity to appreciate the criminality of his conduct nor did he lack the capacity to conform his conduct to the requirements of the law.

SOURCES OF INFORMATION: Face-to-face interviews of the defendant on the above dates for approximately 8 hours with Albert Kittrell, M.D. (75 minutes), Angela Smith, L.M.S.W. (two and one-half hours), and Charles Mallory, Ph.D. (four hours), including social/developmental history, physical examination and history, mental status examination and administration of the Wechsler Adult Intelligence Scale – III, the Wide Range Achievement Test – 3, and the Georgia Court Competency Test; observation of the defendant on an inpatient ward for four days; telephone interviews of Peggy and Bob Roberts, parents of the defendant, and Trina Roberts, wife of the defendant (a total of two

hours on 8-9-99); review of the files of Polk County Circuit Court, including Order for Mental Health Evaluation of Defendant (5/19/99); files of the Arkansas State Police, including a statement written by the defendant dated May 17, 1999; medical files of the Sparks Regional Medical Center, 7/17//80 to 5/20/81, and the Holt-Krock Clinic in Ft. Smith.

OFFICIAL VERSION OF THE OFFENSE: On May 15, 1999 the defendant took a female victim from her home and forcibly raped her, then strangled her to death. He removed the victim's clothes and disposed of the clothes and concealed the victim's body in a rural location. The defendant signed a statement admitting to the facts just described.

INTERVIEW: Deputies of the Polk County Sheriff Department transported Karl Roberts to the Forensic Unit. He presented as a married 31 year-old white male of small stature. Over the four days of the examination he showed an alert and cooperative manner during approximately eight hours of face-to-face interviews.

STATEMENT OF NON-CONFIDENTIALITY: At the outset of the examination Mr. Roberts was informed of the nature and purpose of the examination, that this evaluation was not confidential, that a report would be made to the court, and that testimony may be required. He indicated that he understood and was willing to be interviewed.

PERSONAL HISTORY: History information was gained from the defendant, his parents, and medical records. He was born n El Paso, Texas. He had two older sisters, one older adopted sister, and one younger brother. He described his family as having limited means but as being very close. He got along well with his parents, siblings, and peers. His mother was a clerk/bookkeeper and his father served for twenty years in the Army. The family was stationed in Germany for a period when Karl was a child. The family moved to the Cove, Arkansas area when his father retired from the service.

Karl never experienced any physical abuse or sexual abuse.

He worked during his school years at Cove and by age 19 he had saved enough for his own mobile home that he put on some property that his father had given him. He has lived on that land in the years since with his wife and children.

EDUCATION HISTORY: He graduated from Van Cove High School. He made average grades and was never held back for any of his school years. He was not a discipline problem at school. He once was in a fight with another student and was punished by a paddling.

He attended the Rich Mountain Vocational-Technical School in Mena for several months. He was studying a machine shop course but dropped out because he couldn't make his grades.

MARITAL HISTORY: At age 21 he married Trina Brewer and they have two children: Charlie, a daughter who is age five, and Bradley, a son who is one year old.

Mr. Roberts reported that he and his wife had had physical altercations during their marriage, and that on about four or five occasions he had choked her during these

conflicts. He and she concurred that she had lost consciousness on one of those occasions.

LEGAL HISTORY: He told ASH social work staff that in 1989 he had been arrested for fighting but the charges had been dropped. He reported to me that he had never been arrested prior to the current charge.

OCCUPATION HISTORY: He has worked a series of job involving manual labor and construction skills, the longest lasting about 6 or 7 years. That job, his most recent, was as a concrete finisher who made $11.00 an hour for Mine Creek Construction Company. He has never had a lengthy period of non-employment.

He was never in the military.

RELEVANT MEDICAL HISTORY: Records obtained from the Sparks Regional Medical Center in Ft. Smith indicated that the defendant was knocked unconscious and suffered a severe head injury at the age of 13 when his bicycle was struck by a dump truck. The records indicate that he showed bizarre behavior and affect due to the closed head injury and improved over several days of inpatient treatment. He was treated from July 17 to August 8, 1980 in the hospital. At one point the treatment note by Dr. Michael Dulligan observed: "His major injury is a skull fracture by skull X-rays. He was knocked unconscious for a period of time. He is alert but extremely belligerent. He has had a complete change of personality based on a blow, probably with bruising to both frontal lobes and to the temporal lobe which we can see obviously." He was noted to initially have headaches and double vision as a result of his head injury. He ambulated on crutches when he was discharged from the hospital. His discharge diagnosis was "Left Frontal Skull Fracture without Depression." He was seen in follow-up visits for the next year and observations and notes about his behavior indicated that he was not having any problems with headaches, seizures, or behavior that would indicate personality changes.

Dr. Earnest Serrano, a neurologist at the Holt-Krock Clinic, indicated that the defendant's parents brought him to that clinic in January 1990 due to their observations that he had uncontrollable temper episodes in which he would "shout, scream, and make obscene gestures at family or people walking down the street." At the time of the examination the defendant admitted that he could not keep his urges of anger under control, but that he did not lose consciousness during the episodes. Dr. Serrano's examination concluded that there were no neurological irregularities and that he thought the symptoms were due to "behavior disorder, situational stress reaction." The defendant was referred for counseling.

PSYCHIATRIC HISTORY: He has never been treated by a psychiatrist and he has never been an inpatient in a psychiatric treatment facility.

FAMILY HISTORY: Neither the defendant nor his family could think of any family members who had received mental health or substance abuse treatment.

DRUG AND ALCOHOL HISTORY: He has used alcohol and marijuana and he denied use of other psychoactive substances.

He reported that he has never had a DWI or other substance-related offense.

He reported that his first use of alcohol was at about age 16 and that he engaged in regular use of alcohol, mainly beer, beginning at about age 19. He reported that his usual consumption of beer was one or two six-packs each weekend and that he did not believe that he had an alcohol problem.

He reported that his first use of marijuana was at about age 17 and that he used it on a regular, daily basis until about age 23 when he discontinued use of that substance.

He denied that he was intoxicated at the time of the present offense, but he admitted that he had consumed about one six-pack of beer in about an hour and a half on the afternoon of the day of the offense.

RELATIONSHIP OF DEFENDANT TO THE VICTIM: He stated that he had known the victim for a number of years, as she was the daughter of his wife's brother. He said that he had seldom talked to the victim before the day of the offense. He mentioned that about two months before the offense he had been sitting across a room from the victim and that he had noticed that he could look up the victim's dress and see between her legs. He denied having any prior sexual attraction to the victim or to other female or male children. He denied that the victim had been sexually provocative with him prior to the day of the offense.

DEFENDANT'S ACCOUNT OF THE OFFENSE: Mr. Roberts signed a statement that he made to police investigators on May 15, 1999. In the statement he said that at about 7:45 in the evening, after eating dinner with his family and friends and drinking about a six-pack of beer, he reported "something hit me" and "I knew I was going to go by and pick up Andy (the victim)." He knew at the time that the victim's mother would not be at home and that her father might not be home. He arrived at Andy's house, knocked on the door and when she answered, he told her to get into his truck. He reported, "she asked me what was wrong and I told her to get in the pickup." He drove to a place in the woods about a quarter of a mile away from a highway: "She had told me to take her home several times." He stopped the truck and he and the victim got out: "She asked me what I was going to do. I said I'm going to fuck you. She asked why. I told her to shut up and take your shirt off..." He said that he had to hold the victim down as he had intercourse with her and "when I got through I knew I was in trouble and I could not take her home." He choked her until she "turned blue and went limp. I got scared and drug her over into the bushes to the right. I tried to cover her up with some old tree limbs." He later threw the victim's clothes in a creek. He then proceeded to his father's house.

MENTAL STATUS EXAMINATION: Mr. Roberts was friendly and cooperative during mental status and psychological examinations. He was alert and oriented appropriately. He showed good long and short-term memory and concentration in both a formal mental status examination with Dr. Kittrell and intellectual testing by Dr. Mallory. He showed fair verbal abstraction skills and fair arithmetic calculation skills.

He showed a normal pattern of speech, with some evidence of a very mild stutter, as he seemed to occasionally hesitate and elongate the initial sounds of his sentences. He commented that he had that problem ever since the head injury at age 12. He was able to

respond appropriately to all questions and tasks. His speech showed a mild monotone but there was no impairment of the clarity and volume of his speech.

He showed neutral, or normal emotions during interview and testing. He complained of feelings of fluctuations of his mood, varying between depression/hopelessness and feeling okay, which he associated with his current situation. He complained of fitful and inadequate sleep, loss of interest in daily activities, and loss of interest in socializing with others. He was noted to interact in a normal fashion with staff and patients during four days of inpatient residence on the ASH Forensic Unit.

He admitted that he had long had problems controlling his temper and that he had been in physical altercations with others including his wife and his brother. It was also learned that he was arrested in 1989 for fighting, but he wasn't charged with that offense. He reported, and his wife confirmed, that he had choked her in four or five altercations, and that she had lost consciousness due to one of the chokings.

It is unclear whether his anger control and impulse control problems are directly due to the brain injury he sustained in 1980. He has shown repeated problems with physical attacks or threatened attacks, on others including his wife and his brother. He has insight into the problems his poor anger control has caused him and others. There is some chance that the injury caused him to have mild learning problems. On the other hand, he learned to read as well as the average high school student and has performed adequately in the major activities of adulthood, including holding steady, semi-skilled employment, maintaining a marriage with parental obligations over ten years, and otherwise not having legal violations or marked substance abuse problems.

In the portion of the examination that concerned his perceptions of mental or emotional problems, he spoke mostly about his present feelings of being helpless and feeling hopeless about his future. He denied symptoms of psychosis as auditory hallucinations. No delusions were elicited or complained of. He denied that he has had periods of altered states of consciousness, uncontrollable behavior, or seizures.

In summary, a mental status exam and psychological testing did not find evidence that he has symptoms of mental disease or mental defect other than those normally associated with the condition of being a defendant in a criminal case.

SUMMARY OF PSYCHOLOGICAL TESTING: Mr. Roberts was administered the Wechsler Adult Intelligence Scale – III, a measure of general cognitive skills and efficiency. His scores on this scale were as follows: Verbal IQ 79 (8th percentile, 95% confidence level, 75-85; Performance IQ 79 (8th percentile, 95% confidence level, 73-87); and Full Scale IQ 76 (5th percentile, 95 % confidence level, 72-81). He appeared to put effort into his attempts at test items. This level of performance showed him to have below-average general intellectual skills. However, he has functioned without apparent difficulties in long-term jobs and in maintaining a marriage over the course of ten years, so his intellectual handicap has not affected any of his major life activities.

Assessment of Mr. Robert reading skills was accomplished with the Wide Range Achievement Test – 3. His scores on Reading scale placed him at the High School level, Standard Score of 90, and at the 25th percentile level.

Mr. Roberts was administered the MMPI – 2, a self-report, true-false inventory of items that assess attitudes, problems, and personality styles of individuals, as compared to a "normal" population employed in the development of the MMPI – 2. His approach to

items of the Minnesota Multiphasic Personality Inventory – 2 showed that he appeared to over-report psychological problems and over-endorse personal virtues, making his MMPI results appear to be invalid. He had an "L" scale T-score of 74, which placed that scale in the range of scores associated with dissimulation. His TRIN (True Response Inconsistency) t-score was 72 and in the range of clinical significance; this scale assesses indiscriminant over-endorsement of problems. He answered MMPI items in a manner that would suggest bizarre thinking and experiences, depressed mood, anxiety and social avoidance. Due to the circumstances L and TRIN scale elevations this examiner did not consider the profile to be interpretable for the purpose of determination of mental disease.

COMPETENCY TO STAND TRIAL ASSESSMENT: The defendant was administered the Georgia Court Competency Test (GCCT). This test is a structured interview that assesses a defendant's understanding of the trial process and issues related to his own defense. In addition, the defendant was asked a series of other questions to assess other aspects of trial competency not covered by the Georgia Test.

The GCCT began by showing the defendant a diagram of a typical courtroom. The defendant was asked to point to the various places in the picture that different people in the courtroom sit. The defendant was able to correctly point on the picture the correct seats of the judge, jury, defense attorney, prosecuting attorney, defendant, testifying witnesses, and spectators.

The defendant was then asked to tell the roles of each of the individuals pointed out in the courtroom diagram. He said that the role of the judge "he listens to what has happened. He can tell us what needs to be done, whether I'm going to go to prison or to death." He was aware that the role of the jury was to "they listen to what's said and they make a vote, whether you're guilty or innocent." He said that the job of the defense attorney was "he's supposed to be on my side. He would tell them how good I am." He said that the prosecuting attorney's job was "he's going to try to tell everybody how bad I am. He wants the worst, to kill me." He said that witnesses "Tell the truth." He said of spectators: "I don't know," and later he could repeat the response "they just watch." When asked what he would do during the trial, he said, "I'm going to be afraid. Listen and talk to my lawyer." *His responses to these questions showed that he understood the roles of various court personnel.*

The defendant was asked a series of questions about his defense attorney. He said that his attorney's name is Buddy Hendry, and that Mr. Hendry is a public defender from Little Rock. He knew he could contact his attorney by getting calling him on the telephone and he has talked to his attorney twice: "I think he wants to help me." He said that the best way he could help his attorney was to "Tell him I'm not so bad and something's wrong with me. He can talk to the judge for me." He was able to relate to me these answers in a rational and cooperative manner. *His responses to these questions suggest that he had the capacity to relate to his attorney in a rational manner.*

The defendant was asked a series of questions about his charges. He said that he was charged with "Capital Murder" but he couldn't tell me what acts would make up to the offense of Capital Murder. After he was prompted, he was able to answer, "I killed somebody and I raped the victim." He was aware that this was a serious charge, saying that if he were convicted he could "I'll either go to prison for life or be put to death." He was aware that he might be acquitted, convicted, or found not guilty by reason of

insanity. *His responses to these questions showed that he understood the nature of his charges and could appreciate their seriousness, as well as showed he had the capacity to understand the range of possible verdicts and the consequences of conviction.*

He was then asked to distinguish between different types of pleas. He said that pleading guilty means "you did it", while pleading not guilty means "you didn't do it." He initially said of people who are found not guilty by reason of insanity: "I don't know," but later he could correctly offer: "that means I don't understand what happened and didn't have no control." He was also aware of the consequences of different pleas, saying that people who are found guilty "you go to the pen," while those found guilty "get to go home." He said that if a person is found not guilty by reason of insanity, "I guess I, or they, would be at the State Hospital." *His responses to these questions showed that he had the capacity to distinguish between different pleas and knew the consequences of different pleas.*

He was aware of a number of his legal rights. He said that he didn't have to talk to me or to the police, and after he was prompted he understood that "in a jury trial the jury decides whether you're guilty and in judge trial he (the judge) decides." He was aware that if he could not afford an attorney, one would be appointed for him and that the state would pay for this attorney.

He displayed the ability to listen to the testimony of witnesses and inform his lawyer of distortions or misstatements of others. He said that if someone were to lie about him in court, that he would tell his lawyer. He showed the capacity to testify in his own defense. He stated that he would be willing to testify in court if he needed to. He was able to answer questions in an acceptable manner, suggesting that he should be able to do so in court.

He was able to participate in his psychological assessment. He was able to comprehend questions asked of him, follow instructions, and provide historical information. He was able to relate to the examiner in a rational and controlled manner. Based on this data, a number of conclusions can be drawn:

1) He had *the capacity to make simple decisions in response to well-explained alternatives*.

2) He had the *capacity to recall and relate facts pertaining to his actual whereabouts at certain times.*

3) *It is unlikely that his mental condition will deteriorate due to the stress of awaiting trial or the stress of trial itself.*

He had a score of 90 out of 100 on the Georgia Court Competency Test. A score greater than 70 is considered to be a passing score.

OPINION ON THE CURRENT MENTAL CONDITION OF THE DEFENDANT:

Axis I. No Diagnosis
Axis II. No Diagnosis
Axis III. History of Closed Head Injury at Age Twelve

OPINION ON THE DEFENDANT'S CAPACITY TO UNDERSTAND THE PROCEEDINGS AGAINST HIM AND TO ASSIST EFFECTIVELY IN HIS OWN DEFENSE: It is my opinion that at the time of the examination the defendant had a factual and rational appreciation of the proceedings against him and had the capacity to

assist effectively his attorney, based on his responses to the Georgia Court Competency Test and his clear mental status.

OPINION ON THE PRESENCE OR ABSENCE OF MENTAL DISEASE OR DEFECT AT THE TIME OF THE OFFENSE: It is my opinion that the defendant did not have mental disease or defect at the time of the alleged offense. In regard to his mental state during the time period of the present offense, I examined his statement about the offense made one day after the offense and found that there were no indications that he had mental illness or defect his account of his experiences at the time in question. Information collected by law enforcement personnel also failed to show that his family and friends had observed him to show unusual behavior in the tine periods before and after his alleged commission of the present offense. Further, he gave consistent accounts of his experiences on the day of the offense that were separated in time from the offense by one day and by one year (in the case of the present examination). These descriptions of his experiences were consistent, coherent and chronological accounts and did not show that his thinking or behavior was psychotic at the time.

Mr. Roberts does have a history of head injury at age 12 with subsequent behavioral and emotional disturbance and this examination sought to rule the possibility that a seizure or neurological disorder had influenced his conduct at the time of the present offense. There are several pieces of information that fail to show any connection between neurological problems and his conduct on the day in question. First, medical examinations one year (Sparkman Medical Center) and ten years (Holt-Krock Clinic) after the head injury did not show neurological problems or diagnoses. In an examination in 1990, Dr. Serrano noted that his continuing problem was with anger control and impulse control. Second, the complex series of actions involved in the present offense extended over at least one-half hour and could not be associated with any type of seizure, fugue state, or other neurological disorder. Third, while the defendant in the present examination made repeated references to having an altered state of reality ("feeling controlled" and "I knew I had to do it") at the time in question, there are numerous aspects of his conduct and thinking which suggest he had the ability to initiate, direct, change, and cease behaviors at the time in question and thus was interacting in a manner that to all appearances, was "normal."

OPINION AS TO THE CAPACITY OF THE DEFENDANT TO HAVE CULPABLE MENTAL STATE THAT IS REQUIRED TO ESTABLISH AN ELEMENT OF THE OFFENSE CHARGED: It is my opinion that the defendant did have the culpable mental state, purposefulness, that is required to establish an element of the offense charged.

Mr. Roberts was aware that he was **purposely** raping his niece. According to his confession, when Andy asked Mr. Roberts what he was going to do, he said "I'm gonna fuck you." Afterwards, he "started choking her and mashing my thumbs in her throat" until she "turned blue and went limp." Mr. Roberts said he choked her "because I knew I was in trouble and I could not take her home." Mr. Roberts was clearly aware that he was **purposely** intending to kill Andy and that he was **knowingly** engaged in behavior in which the death of Andy was overwhelmingly likely to occur.

OPINION ON THE DEFENDANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AT THE TIME OF THE OFFENSE:

It is my opinion that at the time of the offense the defendant had the capacity to appreciate the criminality of his conduct, based on a number of comments in his confession:

1. He took steps to avoid apprehension by the police, suggesting awareness that he was engaged in criminal behavior:

    a. He drove Andy to a remote wooded location, rather than committing the act in an area where there would be witnesses.

    b. He covered Andy's body in the bushes. The fact that he covered her body suggests that he did not want her body to be quickly found, suggesting that he was aware he was covering up a criminal act.

    c. He removed Andy's clothes and threw them in a creek away from the crime scene. The fact that Mr. Roberts engaged in the removal of evidence from the crime scene suggests that he was aware that he had engaged in criminal behavior.

2. Mr. Roberts said, "I knew I was in trouble and I could not take her home," after raping Andy, so he choked her to death. The fact that Mr. Roberts killed Andy to silence her about the rape shows he was aware of the fact that he had engaged in a criminal act.

3. His accounts to the police and to the present examiners indicated that he did not have any delusions or other psychotic beliefs that would have caused him to believe that it was *not* a criminal act to kill Andy. Rather, he had a nonpsychotic motive for engaging in the crime: to kill Andy in order to silence her from reporting that he had raped her.

OPINION ON THE DEFENDANT'S CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW AT THE TIME OF THE OFFENSE:

It is my opinion that at the time of the offense the defendant did not lack the capacity to conform his conduct to the requirements of the law, based on the following information:

1. Mr. Roberts said that he chose a time to get Andy when he believed that her mother would be away from the house. He did not get Andy until he saw that her father was not at home. The fact that Mr. Roberts chose to commit the act of kidnapping Andy at a time when her parents were not home demonstrates that he had the capacity to conform his criminal behavior to a time period in which it would be less likely for him to be stopped.

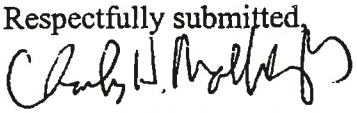
2. Despite the fact that Mr. Roberts admitted in his confession that "something hit him" to cause him to pick up Andy, he was able to refrain from raping and murdering her until he had taken her from her house and driven her some distance away to a remote wooded location where he would be less likely to be caught. The fact that he could refrain for the time that it took him to get to an isolated area shows that he had the capacity to refrain from committing his criminal behavior until he was in an environment that he perceived was a better place to commit the crime.

3. In the present examination Mr. Roberts did not report in his confession any delusional beliefs, hallucinations, or other psychotic thought processes that would have compelled him to commit the rape and murder of Andy. Rather, his behavior was consistent with someone who murdered for the specific purpose of silencing his victim from implicating him in raping her.

CONCLUSION: It is my opinion that Karl Roberts at the time of this examination had the capacity to understand the proceedings against him and the capacity to assist effectively in his own defense. It is also my opinion that he did not have mental disease or defect at the time of the examination.

It is my opinion that the time of the alleged conduct, should the fact finder conclude that he committed the alleged offense, 1) he had the capacity to form an element of the offense charged, purposefulness, 2) he did not lack the capacity to appreciate the criminality of his conduct, and 3) he did not lack the capacity to conform his conduct to the requirements of the law.

Respectfully submitted,



Charles H. Mallory, Ph.D.
Staff Psychologist

Appendix J

Arkansas Supreme Court
Order Appointing Tim Buckley
(February 7, 2002)

Office of the
CRIMINAL JUSTICE COORDINATOR
SUPREME COURT OF THE STATE OF ARKANSAS

Sue Newbery
Criminal Justice Coordinator

Justice Building
625 Marshall Street
Little Rock, Arkansas 72201
501-682-1637

February 7, 2002

Mr. Timothy M. Buckley
Attorney at Law
P. O. Box 4700
Fayetteville, 72702-4700

Re: *Karl Douglas Roberts v. State*, CR 02-22 [Circuit Court of Polk County, CR 99-70]

Dear Mr. Buckley:

Enclosed is an *per curiam* opinion issued today by the Arkansas Supreme Court. In the opinion the court appoints you to prepare an abstract and brief in accordance with Ark. S. Ct. Rule 4-3 (h) so that the court may conduct its mandatory review of the record in this capital case. As you will note, the opinion sets out the duties inherent in the appointment and explains that you are not representing the appellant but are instead performing a service for the court.

If you have questions concerning this matter, please contact me or Leslie W. Steen, the clerk of the court. Your acceptance of this appointment is much appreciated.

Cordially,

Sue Newbery

cc Office of the Attorney General

Clerk of the Arkansas Supreme Court

Circuit Clerk of Polk County

Mr. Karl Douglas Roberts
ADC No. SK 956
Maximum Security Unit
2501 State Farm Road
Tucker, Ar 71628-9503

San:Ram

Appendix K

Arkansas Supreme Court
Per Curiam Granting Direct Review
(February 7, 2002)

NOT DESIGNATED
FOR PUBLICATION

ARKANSAS SUPREME COURT

No. CR 02-22

Opinion Delivered FEB 07 2002

KARL DOUGLAS ROBERTS
Respondent

v.

STATE OF ARKANSAS
Petitioner

PETITION FOR WRIT OF CERTIORARI [CIRCUIT COURT OF POLK, NO. CR 99-70, HON. GAYLE K. FORD, JUDGE]

PETITION GRANTED; COUNSEL APPOINTED

PER CURIAM

On May 23, 2000, judgment was entered reflecting that Karl Douglas Roberts had been found guilty by a jury of capital murder and sentenced to death. Roberts subsequently filed in the trial court a waiver of appeal, requesting that the death sentence be executed without pursuit of further legal remedies. The court held a hearing on the waiver at which Roberts was advised on his right to appeal the judgment and sentence, on postconviction remedies available to him in state and federal court, and on his right to representation by counsel on direct appeal and in any postconviction action. After taking Roberts's testimony that he desired to forego all challenges to the judgment and sentence of death, as well as the testimony of Roberts's attorneys, medical doctors, and others, the court declared Roberts to be competent to understand the consequences and ramifications of waiving a direct appeal and other remedies and further that the waiver was intelligently and knowingly made.

The complete trial transcript has been lodged here, and pursuant to our in decision in *State v. Robbins*, 339 Ark 379, 5 S.W.3d .51 (1999), citing *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839

(1988), the State now submits to this court a petition for writ of certiorari seeking review of the case for prejudicial error and affirmance of the trial court's ruling that respondent Roberts is competent to waive both his direct and collateral attacks on the judgment and death sentence.

We held in *Robbins* that this court has an affirmative duty to review the record in all death-penalty cases for prejudicial errors. *State v. Robbins*, *supra*. In so holding, we noted that "a person sentenced to death may waive his personal right to appeal" and that an automatic review of the record by this court "does not interfere with a competent defendant's right to waive his right to appeal." *Id.* at 386, 5 S.W.3d at 55. We concluded that an automatic review of the entire record would be useful when we are evaluating whether a defendant's waiver of his right to appeal was proper under *Franz*. *Id.* Furthermore, we held that such a review of the entire record would enable us to determine (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with Ark. Code Ann. § 16-91-113 (a) (1987) and Ark. Sup .Ct. R. 4-3(h); (2) whether any plain errors covered by the exceptions outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (3) whether other fundamental safeguards were followed. *Id.* at 259

Pursuant to our decision in *Robbins v. State*, *supra*, we conclude that an automatic review is necessary in this case where the death penalty has been imposed and where Mr. Roberts has expressed his desire to waive his right to appeal the death sentence. *See State v. Smith*, 340 Ark. 257, 12 S.W.2d 629 (2000). Accordingly, we grant certiorari and accept the transcript as filed. We also appoint Timothy M. Buckley to assist this court in its review of the record as outlined in *State v. Robbins*, *supra*. Specifically, appointed counsel shall abstract the record pursuant to Ark. S. Ct. R. 4-3(h) and argue any errors prejudicial to Mr. Roberts.

Writ of Certiorari granted; counsel appointed.

Appendix L

Appellant's Brief

(October 30, 2002)

VI.

STATEMENT OF THE CASE

On May 15, 1999 Andria Brewer was found to be missing from her house and could not be located. After approximately 24 hours the State Police and FBI were called in to investigate. As a part of that investigation family members and people close to the family were being interviewed and some polygraphed. Karl Roberts, the victim's uncle, was interviewed by the State Police on May 17, 1999 and polygraphed. He was read his rights concerning the polygraph and Mirandized. **Ab. 20, Ab. 20** His polygraph result was determined to be deceptive and when confronted with his apparent deception he began to cry and said, "I messed up." The State Police investigator put his arm around Mr. Roberts' shoulder and stated, "Get it off your chest. We'll help you." At that point Mr. Roberts confessed and gave directions to the victim's body.

A pre-trial hearing was held on the Mr. Roberts' motion to suppress his statement as well as physical evidence. This was based upon a claim that the confession was the result of a false promise by police, and all physical evidence, obtained as a result of his confession, was fruit of the poisonous tree and therefore should also be suppressed. These motions were denied. **Ab. 30-32**

During voir dire, defense counsel moved to strike a juror for cause based on her statements that she had been sexually assaulted by her father while she was a teenager. The trial court denied the motion, and because the defense was out of peremptory challenges, this juror was seated on the jury. **Ab. 47-50**

The defendant was convicted of capital murder and at the close of testimony in the sentencing phase, defense counsel moved for a directed verdict on the aggravating

circumstance submitted by the state, that the crime was committed in a cruel and depraved manner. This motion was denied. The issue of punishment was submitted to the jury with the State submitting one aggravating circumstance, the cruel and depraved manner of the killing, and the defense submitting twelve possible mitigating circumstances. **Ab. 134-135** The jury decided that the aggravating circumstance existed beyond a reasonable doubt and that it outweighed the nine mitigating circumstance they found as a part of their verdict. **Ab. 145-148** Mr. Roberts was sentenced to death by lethal injection.

After the trial Mr. Roberts submitted a motion to the trial court stating that he wished to waive all appeals and post conviction relief. **Ab. 157** A hearing was held on this motion and the Court ruled that Mr. Roberts was competent to make such a waiver. **cAb.157-161** Pursuant to the opinion in State vs. Robbins, 339 Ark. 379, 5 S.W. 3d 51 (1999) a writ of certiorari was filed by the State in this Court seeking review of the entire record and affirmance of the trial court's rulings concerning Mr. Roberts' waiver. This Court appointed counsel to review, abstract and brief any prejudicial error. This abstract and brief follow that ruling.

VII.

ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPRESS THE DEFENDANT'S STATEMENT AS A PRODUCT OF AN INVOLUNTARY WAIVER OF HIS RIGHTS DUE TO A FALSE PROMISE BY POLICE OFFICERS.

Statements made while in custody are presumed involuntary, and the burden is on the State to show that the statements were made voluntarily and freely, without hope of reward or fear of punishment. Stephens v. State 328 Ark. 81, 941 S.W. 2d 411 (1997).

In this case the defendant, Karl Roberts, was at the Polk County Sheriff's Office to be polygraphed about the disappearance of Andria Brewer. Mr. Roberts was advised of his Miranda Rights and agreed to take a polygraph concerning her disappearance. **Ab. 20** After Mr. Roberts' polygraph, he was sent out of the room and the polygraph examiner huddled with an FBI agent to discuss the polygraph results. The polygraph examiner informed the FBI agent that he considered Mr. Roberts to be deceptive on the polygraph exam. Mr. Roberts was brought back into the room with Investigator Rateliff and Special Agent Jessie and was confronted with the results of the polygraph. **Ab. 21** According to the testimony of Investigator Rateliff, Mr. Roberts began to cry and stated, "I messed up." **Ab.25** Investigator Rateliff rolled his chair over to where Mr. Roberts sat, put his arm around his shoulder and said, "Get it off your chest, we'll help you." **Ab. 25** Based on this promise of help Mr. Roberts confessed to raping and killing Andria Brewer, and gave directions to the location of Andria Brewer's body. **Ab. 25-26**

A statement induced by a false promise of reward is not a voluntary statement. Davis v. State 275 Ark. 264, 630 S.W. 2d 1 (1982) At the Suppression Hearing, Investigator Rateliff testified that he told Mr. Roberts, "we'll help you." He and Special

Agent Jessie testified that no specific promise or particular kind of help was being offered. **Ab. 25-28** One of the officers even testified that he thought Mr. Roberts was asking for the help of a clergyman. **Ab. 29** bThis Court has ruled before that when police statements are clearly false promises of rewards, you do not have to look beyond the statement itself to decide that the confession was involuntary. Freeman v. State 258 Ark. 617, 527 S.W. 2d 909 (1975) and Teas v. State 266 Ark. 572, 587 S.W. 2d 28 (1979). That is not the case at bar.

In Pyle v. State 329 Ark. 73, 947 S.W. 2d 754 (1997) this Court stated "Often it is difficult to determine whether an Officer's statement is a promise of reward or leniency, a statement meant to deceive, or merely an admonishment to tell the truth" *Id.* at p.79. In Davis *supra* this Court held,

> "If a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly, and intelligently made. In determining whether there has been misleading promise of reward we look at the totality of the circumstances. The totality is subdivided into two main components, first is the statement of the officer and second the vulnerability of the defendant. *Id.* at p. 267

In Hamm v. State 296 Ark. 385, 757 S.W. 2d 932 (1988) this Court said,

> "In cases where the police statement and later action does not provide sufficient information to decide whether it constitutes a false promise of reward, in such cases it is the vulnerability of the defendant, as determined by the totality of the circumstances, which determines whether a false promise of reward was made. *Id.* at p.391.
> Factors to be considered in determining vulnerability include the age of the accused, his education, his intelligence, how long it took to get the statement, his experience, if any, in criminal law, and the delay between the Miranda warning, and the confession." *Id.* at p. 392.

In Mr. Roberts' case, he was 31 years old and had graduated high school. **Ab. 104-105** But testimony of the staff psychologist at the State Hospital revealed that Mr.

Roberts had a full scale IQ of 76 which placed him in the "borderline intellectual functioning range." **Ab. 14** Dr. Archer, a neuropsychologist, testified that Mr. Roberts presented himself more as an adolescent than as an adult. **Ab. 82** The police officers were aware that they were dealing with someone of limited intelligence. Special Agent Jessie described Karl Roberts as a man of below normal intelligence. **Ab. 60** Investigator Rateliff describe Mr. Roberts' voice as a monotone, and said he spoke with a stutter. **Ab. 56** It is also important to note that Mr. Roberts had only limited contact with law enforcement before that day. **Ab.95** Miranda warnings were given early in this encounter and his confession came a couple of hours later. **Ab.19,22**

When a statement is ambiguous, a second factor pointed out in Davis v. State, *supra*, the vulnerability of the defendant, becomes particularly important. In Pyle, the police officer testified that he would help the defendant "in every way in the world." When the police officer made this statement, he held the defendant's hand while the defendant wept. *Id.* at p. 79 These facts are remarkably close to the facts in the case before the Court. In this case the officer testified that Mr. Roberts began to whimper and sob, and that he rolled his chair close to Mr. Roberts and put his arm around him, and said, "Get it off your chest, we'll help you."

Because of Mr. Roberts' limited intelligence, highly emotional state, and limited contact with law enforcement, the police officer's statement "we'll help you" should have been ruled a false promise that induced Mr. Roberts to confess Therefore Mr. Roberts' statement should have been suppressed.

2. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPRESS PHYSICAL EVIDENCE AS FRUIT OF THE POISONOUS TREE.

After Mr. Roberts confessed to the murder of Andria Brewer, he gave police directions to her body. **Ab. 22** The police recovered her body, took photographs of the crime scene, photographs of the body, and took fluid samples from the body for laboratory testing. **Ab. 63-64** The police also recovered a few articles of clothing, a few personal effects of the victim at the crime scene, and recovered Mr. Roberts' clothing from his house. **Ab. 64-65** At the hearing on defendant's motion to suppress the State candidly conceded that all evidence in this case had been gathered as a direct result of Mr. Roberts' statement. **Ab. 31**

Since Mr. Roberts' statement was taken in violation of his fifth and fourteenth amendment rights under the United States Constitution, all evidence produced as a result of that statement should also be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 US 471, 83 S.Ct. 407 (1963).

3. THE TRIAL COURT ERRED BY NOT EXCUSING FOR CAUSE JUROR GLENDA GENTRY AFTER THE DEFENSE EXHAUSTED ALL PEREMPTORY CHALLENGES.

During Voir Dire, defense counsel asked a prospective juror if she, or any member of her family, had been the victim of a sexual assault. **Ab. 45** She replied in the affirmative and stated that the assailant was her father, and that this had happened when she was 18 years old. **Ab. 46** Defense counsel moved to strike her for cause based on this statement. **Ab. 47** This motion was denied. To preserve for appeal an objection to an empanelled juror, a party is required to have exhausted his or her peremptory challenges and must show that he or she was forced to accept a juror who should have

been excused for cause. Cooper v. State, 324 Ark. 135, 919 S.W. 2d 205 (1996). Defense counsel stated for the record that the defense had already exhausted all peremptory strikes and the Court acknowledged that they had. **Ab.47-50**

The persons comprising the venire are presumed to be unbiased and qualified to serve. Goins v. State, 319 Ark. 689, 890 S.W. 2d 602 (1995). The burden is on the party challenging a juror to prove actual bias, and when a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubt to which he is entitled by law, the trial court may find the juror acceptable. Scherrer v. State, 294 Ark. 227, 742 S.W. 2d 877 (1988).

The fact that the case being tried involved the rape and murder of a child perpetrated by a relative so closely paralleled the experience of this prospective juror that the court should have granted the motion to strike for cause, despite the prospective juror's answers to rehabilitative questions by the State and the court. **Ab.46** This Court has "recognized that the bare statement of a prospective juror that he can give the accused a fair and impartial trial is subject to question." Pruett v. State, 282 Ark. 304, 669 S.W. 2d 186 (1984). It has also been held that a juror, who holds a mistaken view of the law as to a defense, a particular principle of law, the burden of proof, the presumption of innocence or the weight or effect of the evidence, but is willing to abide by the law as explained or stated by the court and not by his own ideas, is not disqualified for cause. Jones v. State, 264 Ark. 935, 576 S.W. 2d 198 (1979).

This was not a situation in which the juror was confused about the law, but had actually experienced a traumatic event in her life which paralleled the allegations in the case being tried. This prospective juror even told the court that her father had been

prosecuted but acquitted. **Ab.46** So it was obviously a situation that made a lasting and deep impression on her attitude towards criminal defendants and the criminal justice system. Therefore the court should have stricken her for cause.

4. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE SENTENCING PHASE.

The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. Ricketts v. State, 292 Ark. 256, 729 S.W. 2d 400 (1987). The only aggravating circumstance that the State presented to the jury was that the crime was committed in an especially cruel or depraved manner. Arkansas Code Annotated § 5-4-604 provides in part (8)(a):

> If capital murder was committed in a specially cruel or depraved manner (B) for purposes of this subsection (8)(a) a capital murder is committed in a specially 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, metal anguish, serious physical abuse, or torture is inflicted. "Mental anguish" is defined as the victim's uncertainty as to his ultimate fate, "serious physical abuse" is defined as physical abuse that creates substantial risk of death, "torture" is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

Subsection (C) states:

> For purposes of this division (8), a capital murder is committed in a specially depraved manner when the person shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.

The only evidence that the State presented at the sentencing phase of the trial was the testimony of Sheriff Mike Oglesby who described the road leading to the crime scene and the crime scene itself. **Ab. 133-134** His testimony was that the road was a remote and nearly inaccessible lane and that the crime scene itself was overgrown and littered with briars, rocks, and sweetgum balls. **Ab. 134** The medical examiner testified previously that the only evidence of injury to the victim, beyond the strangulation, were

injuries sustained in the rape. There was no evidence of blows to the body or face. The medical examiner did testify to scratches and abrasions on the victim's back and legs, but according to him these were inflicted post mortem. **Ab. 73-74** The medical examiner also testified that the manner of death, strangulation, would have resulted in the victim's unconsciousness within 15 to 20 seconds. **Ab. 73** The defense moved for directed verdict at the close of the State's sentencing phase relying on the lack of evidence of serious physical abuse, or infliction of injury that would require medical treatment, beyond the strangulation which caused her death. **Ab. 134-135** This motion was denied. **Ab. 135** There was no testimony presented that showed the defendant evidenced a sense of pleasure in committing the murder.

The defense submitted twelve mitigating circumstances for consideration by the jury. **Ab.145-148** The jury ultimately found that nine of the twelve probably existed. **Ab. 157** Those mitigating circumstances were:

1. The defendant had no significant history of prior criminal activities.
2. The defendant's IQ places him in the borderline range of intellectual functioning.
3. The defendant, as a result of a closed head injury at age twelve, sustained significant brain damage.
4. Defendant has been married approximately ten years to Trina Roberts, and was the father of two children.
5. Prior to his arrest, the defendant adequately provided for the financial needs of his family.
6. The defendant cooperated with law enforcement officers by making a statement confessing to the homicide.

7. The defendant has maintained a relationship with his parents.

8. Since his arrest the defendant has maintained a relationship with his wife.

9. Since his arrest the defendant has maintained a relationship with his children.

Ab.157, Add. 64,65

The jury's ultimate finding that the aggravating circumstance (that the murder was committed in an especially cruel or depraved manner) outweighed the nine mitigating circumstances found, is not supported by substantial evidence, a standard required by this Court in reviewing such evidence Ricketts *supra*. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond supposition and conjecture. Hodge v. State, 303 Ark. 375, 797 S.W. 2d 432 (1990). As outlined above there was scant evidence presented to support statutory definitions for finding either of cruelty or depravity.

The testimony of Sheriff Oglesby indicates that the time from when the defendant took Andria Brewer until the time he ultimately killed her was less than a half hour. **Ab. 54-55** When she asked what he was going to do, the defendant told her, according to his own statement. **Ab. 55** In summary, there was so little proof of the aggravating circumstance, that the jury was forced to rely on supposition and conjecture to find that this aggravating circumstance was beyond a reasonable doubt and therefore the Court should have granted the Defendant's motion for directed a verdict on the aggravating circumstance and sentenced the defendant to life imprisonment without parole.

VIII.

CONCLUSION

WHEREFORE, appointed assistant to the Court respectfully submits that the Trial Court erred in not suppressing the Defendant's statement as the product of a false promise and failed to suppress physical evidence as fruit of the poisonous tree. The Trial Court also abused its discretion in denying defense counsel's motion to strike for cause a juror who stated she had been sexually assaulted by her father as a teenager. The Trial Court also erred in not directing a verdict for the defense in the sentencing phase of the trial. The special assistant to the Court further respectfully requests that this Court reverse the Trial Court's decision and remand this matter for further proceedings consistent with its ruling.

Respectfully submitted,

Tim Buckley
Special Assistant to the Court

Appendix M

Excerpts of Rule 37 Transcript
Dr. Andrews Testimony
(May 17, 2017)

BY MR. RINER: No, sir.

BY THE COURT: Dr. Fujii, you may stand down. Thank you. May this witness be released?

BY MS. VANDIVER: Yes.

BY THE COURT: Ladies and gentlemen, I believe this is the proper time to adjourn for the day. We will resume tomorrow morning at 10:00 a.m. it's going to be an hour later. I have some other business before court at 9:00 o'clock tomorrow, so, you all will get to sleep in a little later.

Before any of the people in the gallery leave the courtroom, I want to make sure that all of the Defense attorneys and their staff have left the courthouse before you all leave, okay? There's a reason for that. I won't get into it, but I want them all gone before you all leave.

(THIS CONCLUDES THE PROCEEDINGS HELD ON THE 16TH DAY OF MAY, 2017)

DAY THREE WEDNESDAY MAY 17, 2017)

(THE FOLLOWING PROCEEDING WAS HELD ON THE 17TH DAY OF MAY 2017. THE DEFENDANT IS PRESENT WITH MR. BRAEDEN, MS. VANDIVER, MR. KEARNEY AND MR. WILLIAMS. MR. RINER AND MR. HENDERSON ARE PRESENT FOR THE STATE. HONORABLE JERRY RYAN PRESIDING)

BY THE COURT: Mr. Braden, call your next witness.

BY MR. BRADEN: Your Honor, Mr. Williams will be with our next witness.

BY THE COURT: Mr. Williams, call your next witness.

BY MR. WILLIAMS: I'll call Dr. Garrett Andrews.

BY THE COURT: Do you swear or affirm that the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth?

BY DR. ANDREWS: I do.

BY THE COURT: Thank you.

DR. GARRETT ANDREWS,

Having been called as a witness by the Petitioner and after first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Good morning.

A Morning.

Q Please state your name for the record.

A Garrett Andrews.

Q And, what is your current occupation?

A I am a neuropsychologist.

Q And, are you licensed to practice here in Arkansas?
A I am licensed for the State of Arkansas and I also hold a national board certification.
Q Okay and where do you practice specifically?
A I work for the Central Arkansas VA in Little Rock and then also private practice.
Q I'm showing you what's marked as Exhibit 48. Can you identify that, please?
A This is my CV or resume'.

BY MR. WILLIAMS: I'd move to admit that as Exhibit 48.

BY THE COURT: Any objection?

BY MR. RINER: Not really.

BY THE COURT: Objection - excuse me, be received.

(AT THIS TIME THE CV RESUME' OF DR. ANDREWS IS INTRODUCED INTO THE RECORD AS PETITIONER'S EXHIBIT NO. 48)

Q So, tell us briefly what is a neuropsychologist and what do neuropsychologists do?
A A neuropsychologist is first a clinical psychologist and then they do extra training in brain and behavior relationships. And, then the main thing that we do is assess how the brain and deficits in the brain or injuries to the brain or diseases to the brain affects behavior.

Q Okay and how long have you been practicing in this field?
A Since 2004.
Q And, did you mention you had some board certifications in neuropsychology?
A Yes.
Q And, have you testified as an expert witness before in neuropsychology?
A Yes.
Q In Arkansas courts?
A Yes.
BY MR. WILLIAMS: I'd move to recognize him as an expert in neuropsychology at this time.
BY THE COURT: So recognized.
Q Now, in general are you familiar with the term intellectual disability?
A I am.
Q And, can you tell us briefly what that term means in your field?
A Intellectual disability as defined today is a deficit in general mental acts, reasoning, problem solving, memory, learning, some type of cognitive impairment. The additions of having functional, adaptive deficits in daily functioning and occurring before the age of eighteen.
Q So, are you articulating specific diagnostic criteria?

A Yes.
Q And, who sets those diagnoses criteria?
A The DSM 5 currently.
Q Okay so, how many specific criteria are there?
A Three.
Q Okay and the first would be—
A Intellectual impairment and cognitive of some sort.
Q Okay and the second would be—
A Adaptive functioning deficits.
Q Okay and the third would be—
A Onset before the age of eighteen.
Q And, do you recall when the offense occurred in this case?
A 1999.
Q And, do you have an opinion about whether he had an intellectual disability in 1999?

BY MR. RINER: Your Honor, at this time the State would object. Basically the objection is nowhere in the pleadings was this witness even discussed, even referenced, nothing about intellectual disability anywhere in the pleadings. The reason we have pleadings is so that people have notice and opportunity to at least defend. I know the rules are relaxed and whatever the ruling is but this is beyond the pale when it comes to

trial by ambush.

BY THE COURT: Well, Ground No. 18 of the Amended Petition which I have before me states as one of the grounds that Mr. Roberts is asking for is that - and I quote, "Mr. Roberts is exempt from the death penalty because he is intellectually disabled."

BY MR. RINER: That's correct, Your Honor, but that has nothing to do with a Rule 37 proceeding. That's correct that that's stated, but that has nothing to do with that. That's to be raised at some later time.

BY THE COURT: Well, I'll go ahead and allow him to testify. Objection overruled.

BY MR. WILLIAMS: Thank you, Judge.

Q So, do you have an opinion, Dr. Andrews, about whether Karl Roberts had intellectual disability in 1999?

A I reviewed the records and testing that occurred in 1999 after his arrest and I reviewed the raw data and based upon the raw data and reviewing the reports, I do conclude that he had an intellectual disability at that time.

Q Okay and did you personally examine Mr. Roberts?

A I did not.

Q And, why was that?

A I, on March 16th of this year, went to the prison to

evaluate him and see him and he would not come out of his cell.

Q Okay. Do you feel like you needed a personal evaluation in order to render an opinion about whether he was intellectually disabled in 1999?

A No, because there would be a record review since it was seventeen or eighteen years ago. So, it was based on data at the time, objective data that was given in 1999.

Q Okay, so I believe you said the first prong of intellectual disability is intellectual functioning?

A Yes.

Q So, how do you typically assess that as a neuropsychologist?

A So, you give an intellectual test. There are a couple of different kinds that are recognized by the American Disability. So, the WAIS, Wechsler Adult Competency Scale or the RIAS which is the Reynolds Intelligence Assessment Scale. And, then on top of that it's also recommended that you give a full real cadre of batteries that would include adaptive functions, memory retention, concentration, visual, spatial, things that are not included in the intellectual scales so that we would give a full testing battery of neural cognitive abilities.

Q And, do you know whether Mr. Roberts was given intellectual testing around the time of the offense?

A Yes, around August of 1999 or maybe September of 1999 is when he was given the full battery.
Q And, I think you referred to these earlier more generally, but what specifically were those tests?
A He was given a WAIS III by Dr. Mallory at the state hospital. And, then Dr. Weatherby gave a battery of - I don't remember the name of it, but a battery for memory. And then she also gave the Wisconsin Card Sorting Test, Trails B, Trails A and Trails B which are executive tests, verbal fluency tasks which were executive tests. So, she gave more of a neuro-psyche battery and Dr. Mallory gave intellectual tests.
Q Okay, so let's focus on the intellectual tests and we'll come back to the neuro-psyche in a second. You reviewed his - where was that score found? And, what was - did he have an intellectual score based on his testing?
A Yes, at the time the score was based on - he did the WAIS III which was the version at the time and he concluded that there was a full scale IQ of 76.
Q Okay and you said he did it—
A Dr. Mallory.
Q Okay and where is that score found? Did he do a report?
A Oh, yes, it's found in his report and I reviewed the raw data as well.

Q Okay. So, is that 76 IQ score consistent with intellectual disability?
A It can be, yes.
Q You say it can be. So, are you able to rule out a diagnosis of intellectual disability based on an IQ score of 76, 76 IQ score?
A No, and that's why the criteria includes other deficits that have to be assessed for and included. So, it's not based solely on one single test score.
Q Okay. So, let's talk about those other deficits a little bit. Are you talking about adaptive functioning prong of the tests?
A Yes.
Q And, can you say a little bit more specifically what we're talking about when you use the term adaptive functioning?
A So, adaptive functioning is really broken down into three areas. So, social functioning, practical functioning and conceptual functioning and then those categories, there's a little bit of - there's differences based upon each category. So, conceptual would be do they conceptualize how money works. Do they conceptualize time? Do they understand how time works, things of that nature. Social, do they understand social responsibility, are they able to interact socially appropriately with their peers?

Do they have appropriate peer relationships as sort of the social prong in practical is where you see most deficits people see with more mild forms and that is ability to shop for themselves, ability to pay bills on their own, ability to manage their money, ability to dress, clean and toilet and things like that.

Q Okay, so did you see any deficits in adaptive functioning in Karl?

A Could you repeat that?

Q Did you see whether Karl had any adaptive functioning deficits?

A So, based on the evaluation that I reviewed, they didn't look at that. So, there's—

Q Let's clarify that, whose evaluation?

A Dr. Mallory.

Q Okay, so he did not look at that functioning?

A He did not.

Q Okay.

A There are objective tests that could be given with a rate, adaptive functioning ability and then tell you if there is impairment in certain categories and what those are so that you can make that conclusion or the other option is to - and this happens a lot with adults is you have to go back and look at historical data and get reports from family members and friends and people that are around him, how he

functioned.
Q So, then how were you able to assess for adaptive functioning?
A So, I reviewed affidavits from his sister, Mr. Robert's sister, brother-in-law, brother, mother and wife. And, then I also reviewed school records.
Q Okay, so based on that review, what adaptive functioning - excuse me, adaptive functioning deficits did you find if any?
A So, it was fairly clear and a pattern that was consistent across reports that throughout his adult life and in growing up that the parents shopped for him, they managed his money, they gave him an allowance, they took his - they managed his accounts, he gave the money to them to manage and then when he got married, they transferred over to the wife and according to her affidavit, it was like living with a child which she had to take care of. So, again, managing all of his activities of daily living. And, then when we look at his work, same sort of process. So, he was able to do structured work where he was supervised, but when he wasn't supervised, he started having errors and having problems even with things that reportedly he should have been able to do because it was repetitive and he had learned how to do it. So, there is a clear distinction that over time he needed structure, he needed assistance with

activities from work to home to self-care.
Q So, you mentioned three adaptive functioning domains. What are those characteristics go to? The domains.
A Those are called practical adaptive functioning.
Q Okay and is that sort of deficit sufficient to find he had adaptive functioning deficits you need to diagnose for mental intellectual disability?
A Yes.
Q I'm going to show you what is marked as Exhibit 49. Would you please tell us what this is?
A This is a sorting called Wisconsin Card Sorting Test.
Q And, specifically, whose is it and what does it show?
A This is for Karl Roberts. It was given in September of 1999 and the doctor is Dr. Weatherby.
Q Okay, so did you rely on this when forming your opinion today?
A Yes.
Q And, tell us a little bit about what this is telling you as a neuropsychologist, why is it important?
A The Wisconsin Card Sorting Test is a test of novel problem solving. Where it is a task that we don't see - it's not a task that you can learn for instance, at least the first time you are given it. It requires a person to problem solve to figure out categories that certain parties match into. By doing so, they're giving corrective feedback

by the examiner to see if they actually can learn from the feedback to then get the category to correct. So, it measures novel problem solving, it measures mental flexibility and it measures what we refer to as perseveration. Dr. Mendel referred to that yesterday. Perseveration is staying on task and not being able to break task no matter if you're given feedback or not. His scores were profoundly impaired across all paths except for non-perseverative errors which was mildly impaired.

Q What are non-perseverative errors?

A Errors that were not - so for instance, if a category is color and the category previous to that was number and then he responded with number perseverating the previous answers and they don't learn from feedback. That would be preservative error. If they have an error all of the sudden where they change the set and say instead of numbers it's pattern, then that would be non-preservative error because it's a new error that they weren't having before.

Q So, is this ultimately testing for whether someone is able to recognize a pattern and make corrections based upon instruction? Is that a fair assessment?

A Yes, and problem solving and test hypothesis, so, the person being examined has to sort of test what the answers are and then get feedback that allows them to then figure out what the answers are based on that feedback. So, you

have no answers prior to when you start and then you slowly start to learn. He was unable to learn those patterns.

Q So, why is that important to your assessment of intellectual disability?

A So, from a neuro-cognitive standpoint, this is a test that is relied upon pretty strongly for what we refer to as executive functions is the ability to manage and solve abstract problems when they come at you. In addition, it is very sensitive to preservation errors which means that he was unable to then break patterns once he starts them. So, even if he's on the wrong path or has the wrong answers and you correct him, he's unable to then make that correction himself.

Q So does this speak to his adaptive functioning?

A This speaks to adaptive functioning, so, when I look back at the affidavit and the reports from his work and occupation, again, he was making errors to get corrected what I read was it was frustrating for the supervisors because then if he wasn't supervised, he would go back to making errors again. So, again, he was sort of perseverative, he wasn't able to problem solve and adapt to his environment.

Q So, you're not surprised to see these testing results after what you've read in the declarations.

A No, it absolutely coincides with his behaviors and the

testing correlate.

Q Have you been present—

BY MR. WILLIAMS: I haven't moved to admit this actually. May I admit this as Exhibit 49, please?

BY THE COURT: Any objection, Mr. Riner?

BY MR. RINER: I don't.

BY THE COURT: Be received.

(AT THIS TIME THE WISCONSIN CARD SORTING TEST RESULTS ARE INTRODUCED INTO EVIDENCE MARKED AS PETITIONER'S EXHIBIT NO. 49)

Q Have you been present for additional testimony from Karl's family and friends and people who have known Karl?

A Yes.

Q Did you find anything consistent in that testimony with your conclusions?

A Yes, there's also some concerns of continually losing tools and going to do work and forgetting to do those things. That's actually consistent with memory profile. We had visual and verbal learning deficits that Dr. Weatherby found in testing. When the teacher, educator spoke earlier, she was speaking of deficits that started occurring around the fifth grade that coincided with his test scores dropping and falling below his peers. That's consistent with what we're finding on the testing in 1999.

Q And, we'll talk about that in a second.
A Sure.
Q Karl did have - he could to things. I mean, he had a job, right?
A Yes.
Q Does that mean that he's not intellectually disabled?
A No, so, when you talk about the different severities of intellectual disability, they're really broken out in mild, moderate and severe. Basically, the severities are based upon adaptive functioning. And, for someone that's in the mild severity range, generally they - the idea or at least the theory they function on sixth to eighth grade level. So, they are able to work, but they need structure. They need assistance. They are able to do certain things, especially labor type jobs and so it's not - they can live in an apartment, but they may need assistance with paying bills and remembering to take medications and things of that nature, but mild intellectual disability does not exclude someone from holding a job.
Q So, they can have a job. Can they drive a car?
A Yes.
Q Can they play the drums?
A Yes.
Q Have you reviewed Karl's school records?
A Yes.

Q I want to refer you to what has previously been marked as Exhibit 43, I'll show it to you. So, Exhibit 43 previously admitted, have you seen this before? Do you know what it's depicting?
A Yes.
Q And, can you tell us about that?
A Yes, this is looking at basic standardized testing per grade is sort of how it functions intellectually per grade level. And, then it shows where someone should be for their grade versus where he is. What you see here and what was testified yesterday that I understand was around the fifth grade he starts to drop off and fall below his peers pretty significantly and he never really catches up at that point. Again, that's consistent with what you would see with someone who has a mild intellectual disability. They're going to start around fifth, sixth grade and start plateauing up until about eighth grade and that's the range that they stay in at that point and the testing and the scores here are consistent with that.
Q So, would you conclude that his mild intellectual disability onset before age eighteen?
A Yes, so if you look at the scores here, he starts falling below his peers around the fifth grade, fourth grade, but fifth grade is when he really falls behind his peers, so right around ten years old I guess. So, around

ten we're starting to see that he's falling behind his peers and his academic achievements and that is consistent with what you would expect.

Q So, I think you've been in the courtroom for some testimony about Karl being hit by a dump truck and an injury he had there.

A Yes.

Q If part of his impairment was due to the accident, does that mean he can't be intellectually disabled?

A No, so, he would have the intellectual disability that was diagnosed prior to based on these historical records and then on top of that he may have a neuro-cognitive disorder secondary to a traumatic brain injury. So, it would be two diagnoses.

Q Okay and so did his pre-existing intellectual deficits, did it affect his ability to recover from the dump truck accident?

A Absolutely, so when we look at recovery from brain injuries, one of the first things we look at is IQ and premorbid functioning and the higher someone is functioning prior to the brain injury, the better outcome they usually have. And, the term that we use or are likely to use for that is cognitive reserve a lot of times. So, cognitive reserve refers to - so if someone has an IQ of 120 which would be superior and I have a brain injury and my IQ then

drops to 100 which is completely average, I'm still functioning in the average range with testing. I may have some functional deficits, but because my IQ was high to start with, I'm still able to function in the average range. If you take someone who has an IQ of eighty and they have a brain injury and drop twenty points, now they have an IQ of sixty which would fall more into the moderate intellectual disability range and they would not be able to function very well at that point because they can't compensate. They don't have the cognitive ability to compensate as someone who functions higher.

Q I think you characterized Mr. Roberts' intellectual disability as mild.

A Yes.

Q What does that mean? Is he still intellectually disabled? How is that graded?

A So, the way it's currently looked at is based upon the deficits and adaptive functioning. So, when we look at his adaptive functioning, he was able to live alone for awhile, but he had some deficits based on what I read and reports were he didn't really cook for himself. He had to have - he either went home to have meals or he ate directly out of a can, things like that. So, he's able to live, but he needs structure and assistance. Someone who is more in the moderate may not live alone at all. They may need twenty-

four hour care. Someone who is severe, may need to live in the home or somewhere to where they have someone who actually watches them constantly. So, that's sort of different levels as far as independent living.

Q Are there stereotypes of people who are intellectually disabled?

A I think there are.

Q And, what are those stereotypes?

A I think people assume that someone that is intellectually disabled that they cannot take care of themselves at all and that they need twenty-four hour care and if you look at TV or movies, sometimes they are institutionalized and previously that's what they would do with people with intellectual disabilities they are institutionalized. They didn't know what to do with them because you can't really treat it. We made the case that you can't heal it, you can't fix it so, that's I think what people view it as.

Q But, not everybody who has an intellectual disability necessarily meets that stereotype?

A Absolutely not. So, I think when you have someone that can work and can hold labor jobs and you can sort of live independently, they assume that there's no intellectual disability. However, every case - the bell curve, people can still fall towards the lower end and have disability,

but be able to function at a very low level.

BY MR. WILLIAMS: Nothing further right now.

BY THE COURT: Cross-Examination, Mr. Riner.

CROSS-EXAMINATION

BY MR. RINER:

Q Doctor, you referenced the DSM-5. Is that what you use to determine whether someone is intellectually disabled?

A That's the current criteria that's used.

Q Okay and isn't it true that part of the DSM-5 requires you to look at diagnostic features of the illness or the condition that you're recognizing?

A Can you repeat that?

Q Well, let me just show you.

A Sure.

Q I've got - and be sure that it's a DSM-5. One of the witnesses the other day thought I was giving him a 4, he didn't know that it was a 4-TR. Do you see the underlined portion there?

A Sure, yes.

Q That's in the diagnostic features section, is that correct?

A Yes.

Q What's the diagnostic features section for?

A Well, that's just the description of the criteria used.

Q Right and you testified earlier - go ahead and take a

look at it.

BY MR. WILLIAMS: Could I clarify what page, you are on?

BY MR. RINER: Yes, 37.

A We're on 37.

Q You testified earlier that you were somewhat limited by the fact that you did not have an interview with Karl Douglas Roberts, isn't that true?

A Yes.

Q And, that's because it says it right there in the DSM, doesn't it?

A It says I would interview him?

Q Well, it says that it needs to be made by a clinical diagnosis.

A It says both a clinical assessment and standardized testing for intellectual adaptive functioning.

Q Please tell me what a clinical assessment is.

A A clinical assessment would be what we just talked about. So, the reports that are relied upon, that was a clinical assessment. So, it would include review of information, review of data, review of past historical records. If possible to even do an interview—

Q You'd want to do an interview frankly, wouldn't you?

A I would like to do an interview generally with them and the family, yes.

Q And, the family?
A Yes.
Q You didn't get to do that in this case?
A No.
Q When were you first consulted for this case?
A I don't know, maybe in the fall.
Q And, so you haven't had time to sit down with the family between the fall and now?
A I have not sat down with the family.
Q Probably because you're not being compensated enough, isn't it?
A No.
Q How much are you being compensated?
A I get paid $315 an hour.
Q $315?
A Yes.
Q And, you've been consulted on this since last fall?
A I think that's when I first received an email about it, yes.
Q What's your bill up to now?
A I have no idea. I've probably spent about five or six hours reviewing records.
Q Five or six hours.
A Yes.
Q Now, isn't it true that people with - did you hear

Arlene Kesterson describe - let's back up. Did you hear Arlene Kesterson's testimony in this courtroom yesterday?
A Remind me who Arlene—
Q School teacher.
A Yes.
Q Did you hear her say that sometimes people just don't like to do well on tests?
A That's true.
Q And, isn't true also that people with what you've termed to be a mild intellectual disability, can be goal directed in their behaviors?
A Well, yes.
Q Did you review the competency screening test that Dr. Weatherby gave?
A I reviewed it, but it wasn't really part of what I was asked to do.
Q Okay, this is Exhibit 41 from the Defense. Isn't it true that twice and I'll get you - give you time to look at it before -
A (Witness reviews exhibit)
Q Isn't it true that twice on that - on that piece of paper and I'll give you some time to look at it before - on that piece of paper, Mr. Roberts says I want to die?
A Yes.
Q Isn't it true that every time that he's been asked by

this Court, he said I want to die?
A That I don't know.
Q That wasn't part of what you reviewed?
A Well, I didn't review every question of the Court.
Q Isn't it true that he's written letters to this Court?
A I believe so, but I didn't review those.
Q Why didn't you review them? Wouldn't you want to know if he's intellectually disabled what he's written?
A Well, I based mine on objective data, so, I was actually looking at - I was hired to look at data.
Q Now hold on. You've based yours on objective data. What is a letter in the Defendant's own hand if it's not objective data?
A It's not normed and it's not based on peer reviews. It's not objective.
Q Well, neither is an interview with the Defendant, isn't that true?
A That's true, so, that's why you have to give actual validity measures and you have to look to see if it's actually valid.
Q So, if you're judging somebody for intellectual disability, you don't want to take a look at something that they've written?
A I would if that's what was given to me to review and I was doing an evaluation.

Q So, you weren't given that to review. I wonder who you got your records to review from.
A (No response)
Q Please tell the Court.
A I received my records from the Federal Attorney's Office.
Q Isn't it true that Mr. Roberts has also a painter?
A (No response)
Q Or do you know that?
A What do you mean painter?
Q As painting pictures.
A Yes, I've heard that, yes.
Q And, have you examined those pictures?
A No, I've not seen those pictures.
Q Why didn't you look at those pictures?
A They really wouldn't have made a difference as far as diagnostically, but I again wasn't given the pictures.
Q What someone drew, an artist perfected wouldn't give you an diagnostic picture?
A Well, let's go back to what I said. So, a mild intellectual—
Q No, let's go back to my question.
A Okay, I was going to answer your question.
Q No, you're trying to go around the mulberry bush and I want you to answer my question.

A All right.
Q My question is simply this, wouldn't that be something that would be helpful to look at?
A So, my answer is that sixth to eighth graders can draw, they can paint, some can paint very well.
Q Yes, but—
A Some can work. Some can - again it's consistent, they can write letters, it's consistent with the diagnosis. Those are all consistent.
Q Without even having looked at it, you can say that.
A I can say that someone who is at the sixth to eighth grade level can paint, yes.
Q And, can write.
A Absolutely.
Q You just didn't review anything that he wrote.
A (No response)

BY MR. RINER: Nothing further.

BY THE COURT: Any other questions of this witness?

BY MR. WILLIAMS: Just one question.

RE-DIRECT EXAMINATION

BY MR. WILLIAMS:
Q So, Mr. Riner asked you about his school testing and whether people sometimes don't do well on tests or something like that.

A Sure.
Q Are his school test scores consistent with the other testing you reviewed?
A Yes, they are consistent and they are consistent over time, so, that's the way you would rule out someone who pulled in on just one test.

BY MR. WILLIAMS: Thank you.

BY THE COURT: Anything else?

BY MR. RINER: No.

BY THE COURT: Thank you, Dr. Andrews. You may stand down. May this witness be released?

BY MR. WILLIAMS: He may.

BY THE COURT: Next witness.

BY MR. WILLIAMS: Call Michael Wiseman.

BY THE COURT: Do you swear or affirm that the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth?

BY MR. WISEMAN: I do.

MICHAEL WISEMAN,

Having been called as a witness by the Petitioner and having first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:
Q Good morning.

Appendix N

Circuit Court of Polk County
State's Post-Hearing Brief
(February 20, 2018)

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS **PLAINTIFF**

VS. **CIRCUIT NO. CR-99-70**

KARL DOUGLAS ROBERTS **DEFENDANT**

STATE'S BRIEF REGARDING PETITION FOR POST CONVICTION RELIEF

Following a hearing May 15-17, 2017 regarding the Post-Conviction Relief sought by Karl Douglas Roberts pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, the State of Arkansas through its Prosecuting Attorney, Andy Riner, submits the following brief.

1. The Petitioner was convicted by a jury of one count of Capital Murder and upon recommendation of the jury, was sentenced to death by then Circuit Judge Gayle Ford on May 19, 2000.

2. Even though the Petitioner waived his right to direct appeal, the Arkansas Supreme Court conducted its mandatory review, as it does in all capital cases, and in which both the conviction and death sentence of the Petitioner were affirmed. See Roberts v. State, 352 Ark. 489, 102 S.W.2d 482 (2003).

3. The Petitioner subsequently appeared in this Court and again waived his right to post-conviction review. The Arkansas supreme Court affirmed said waiver in Roberts v. State, 354 Ark. 399,123 S.W.3d 881 (2003).

4. Execution date was set for the Petitioner by the Governor of the State of Arkansas for January 6, 2004.

5. The Petitioner requested and received a stay of his execution on the evening of his scheduled execution to pursue legal challenges to his conviction and sentence in the United States District Court for the Eastern District of Arkansas. After the stay of execution was ordered and affirmed, a Petition for Writ of Habeas Corpus was filed in federal court; however, the relief sought therein and the proceedings were ordered stayed and held in abeyance at the request of the Petitioner, a state prisoner, until Petitioner could file a Rule 37 Petition in the state court seeking post-conviction relief.

6. On February 7, 2008, the Petitioner filed numerous pleadings, including a Petition for Post-Conviction Relief Pursuant to Arkansas Rule of Criminal Procedure Rule 37,a Motion for Leave to File Over-length Petition, and a Memorandum of Law Regarding Timeliness of Rule 37 Petition.

7. On February 27, 2008, the Petitioner filed his Motion for Leave to File Amended Petition along with his Amended Petition for Post-Conviction Relief Pursuant to Arkansas Rule of Criminal Procedure Rule 37.

8. On April 14, 2008, this Court held a hearing in which its decision to allow an over-length Rule 37 petition was continued until such time as counsel for Petitioner submitted a concise statement consisting of not more than ten (10) pages in length outlining the issues for the Court since the Rule 37 petitions consisted of two hundred fifty-two (252) pages; on June 2, 2008 said summary was filed; and upon consideration, this Court granted the motion for over-length Rule 37 petition by order filed on July 27, 2008.

9. On December 9, 2008, a hearing was held to consider whether an evidentiary hearing should be granted pursuant of Rule 37 of the Arkansas Rules of Criminal Procedure based upon pleadings filed seeking post-conviction relief and the arguments of counsel for Petitioner.

10. On December 31, 2008, the Court issued a ruling from said hearing in a letter to counsel. An order denying Rule 37 relief was entered June 30, 2010. Roberts appealed.

11. On December 1, 2011, the Supreme Court held that the Circuit Court was without jurisdiction to hear the Rule 37 Petition and the appeal was dismissed. State v. Roberts, 2011 Ark. 501 (2011).

12. A petition was filed in the Supreme Court to Recall Mandatory Review Mandate; Reinvest Jurisdiction in the circuit Court and consider a Writ of Error Coram Nobis. This petition was denied on February 14, 2013 State v. Roberts, 2013 Ark. 56 (2013).

13. Petitioner also filed a Motion to Reopen Proceedings and Reinvest the Circuit Court with Jurisdiction. This motion was granted on February 14, 2013 in State v. Roberts, 2013 Ark. 57 (2013), on the basis that at the time of Roberts' waiver of post conviction relief in 2003, no current examination regarding Roberts' capacity to waive rights to post conviction relief and to choose between life and death had been conducted.

14. In May 2013 Petitioner filed a new petition unsigned by Roberts for post conviction relief followed by a substituted (signed) petition.

15. On September 18, 2013 the Circuit court held a hearing regarding the assertion of Roberts that he did not wish to pursue further post conviction relief. The court determined that a competency evaluation should be conducted in accordance with the directive of the Supreme Court in State v. Roberts, 2013 Ark. 57 (2013).

16. On December 29, 2014 the Circuit Court held a hearing on Roberts competency to waive post conviction relief and entered an order accepting Roberts' waiver and dismissing the Rule 37 Petition (and substituted petition). The succeeding Judge issued a letter order indicating that all issues were addressed in the December 29, 2014 order and were moot.

17. An appeal followed and on March 17, 2016 the supreme Court reversed and remanded State v Roberts, 2016 Ark. 118 (2016).

18. On September 22, 2016, Petitioner filed a new petition for post conviction relief in a filing exceeding 172 pages in which he made seventeen claims most related to allegations ineffective assistance of counsel. An amended petition was filed December 9, 2016.

19. On May 15-17, 2017 the court conducted an extensive hearing on the Rule 37 Petition. Witnesses called by the Petitioner included; Trial jurors Glenda Gentry, Vicky Denton, Dennie Wornick; trial counsel Buddy Hendry, Darrel Blount and Cheryl Barnard; Robert Roberts Jr., Don Williams, Jim Alley, Arlene Kesterson, Michelle Roberts, Charles Lassiter, Lance Womack, Sheila Roberts, Dr. Matthew Mendel, Dr. Darrel Fujii and Dr. Garrett Andrews. Petitioner proffered testimony of Attorney Michael Wiseman. States' witnesses included former Circuit Judge Gayle Ford and former Sheriff Mike Oglesby.

The essence of Petitioner's claim for relief under Arkansas Rule of Criminal Procedure 37 is that Petitioner received ineffective assistance of counsel and, but for these errors, the outcome of the trial would have been different and the conviction and sentence should be vacated under Strickland v. Washington, 466 U.S. 618 (1984). The following specific enumerated claims for relief set out in the Petition are addressed. It should be noted that shortly before the scheduled hearing Petitioner filed a lengthy, and confusing, Pre-Hearing brief withdrawing some allegations.

Claim for Relief 1-1

Petitioner argues that trial counsel unreasonably and prejudicially failed to protect his right to be tried by a fair and impartial jury in that counsel (1) failed to secure a change in venue, (2) failed to conduct adequate voir dire, (3) failed to move to excuse for cause prospective jurors

who could not be fair and impartial and, (4) failed to accept an extra peremptory challenge offered by the trial court which could have been used to strike a specific juror.

Point 1-1-1; Change of Venue: The record reflects that a Petition for Change of Venue was filed prior to trial and was then withdrawn. The withdrawal, signed by Petitioner, waived any appeal on this issue, therefore, this is not a proper basis for a Rule 37 Petition. In any event, whether to pursue a change of venue is a matter of trial strategy and tactics through the exercise of professional judgment and normally does not form a bases for a finding of unreasonably deficient performance under Strickland; also see Lee v. State 343 Ark. 702, 385 W. 3d.334 (2001); Echols v. State, 354 Ark. 414, 127 S.W. 3d 496 (2003). A petitioner claiming ineffective assistance of counsel for failing to seek a change of venue must, at a minimum, show that the jury was biased in fact. The Arkansas Supreme Court has noted that voir dire provides adequate safeguard against pre-trial publicity and if an impartial jury was seated and each juror stated he or she could follow the law there is no error, Bell v. State, 324 Ark. 258 (1996).

Petitioner sets out some 49 allegations in the Petition which are presumably in support of the failure of counsel. However, at the hearing on May 15-17 the Petitioner apparently abandoned this claim and offered no evidence whatsoever and certainly none to show the jury was biased in fact. The testimony of Buddy Hendry, trial counsel, indicated that serious consideration was given regarding the transfer of the trial to Montgomery County (the only other county in the 18W Judicial Circuit) and the consensus was that this would not be advantageous. Thus, the withdrawal of the Petition for Change of Venue was a matter of trial tactics based on reasoned professional judgment.

Point 1-1-2; Inadequate Voir Dire: Petitioner alleges that trial counsel failed to adequately voir dire potential jurors concerning pretrial publicity. This, too, is a matter which

would have been addressed on direct appeal and is not a proper basis for a Rule 37 Petition. Even so, the Petitioner presented no evidence to support this claim but relies on conclusory allegations in the Petition. The Petition in section 1-1-1 sets out numerous examples of potential jurors who were struck for cause due to pretrial publicity which indicates that counsel made adequate inquiry on this point. Voir dire is designed to provide adequate safeguards against pretrial publicity and did so in this case, see, Bell v. State 324 Ark. 258 (1996). Each juror completed a questionnaire which focused on the opinions, if any, formed prior to voir dire. Certainly, the use of these questionnaires aided trial counsel in uncovering any implicit bias, if it existed, and Petitioner presented no evidence of actual bias by any juror. The testimony of the three jurors called as witnesses at the hearing indicates that all were impartial and without any preconceived bias against the Petitioner.

Point 1-1-3; Failure to Move to Excuse for Cause Potential Jurors: Petitioner raises questions concerning the failure of counsel to move to excuse for cause three members of the venire panel and instead, exercised peremptory strikes against these jurors. This, Petitioner argues, resulted in "other undesirable jurors" being seated. Jury composition is not a matter for a Rule 37 Petition. Jury composition could have been, and was, addressed on direct appeal. In any event, the trial transcript reflects that the three potential jurors all affirmed that they could be impartial, consider the evidence and follow the law.

As stated in State v. Roberts 352 Ark at 489 (2003): "Where a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable." 352 Ark at 489.

And, Petitioner presents no evidence that any jurors who were accepted were, in fact, biased. The Petitioner attempted to do so by calling three of the original jurors as witnesses:

Vicky Denton, Dennie Wornick and Glenda Gentry. None furnished any basis to show that they were not acceptable jurors. In the case of Glenda Gentry the Supreme Court in State v. Roberts 352 Ark. 489 (2003) had explicitly stated "The trial court did not commit error, plain or otherwise, by declining to remove Ms. Gentry for cause."

Point 1-1-4; Failure to Object to Arbitrary Deprivation of Full Complement of Peremptory Challenges: Apparently Petitioner chose not to pursue this claim although some reference to the issue was raised in other claims. (See point 1-1-5 below)

Point 1-1-5; Failure to accept an extra peremptory and strike Juror Glenda Gentry: As indicated above the acceptance of juror Glenda Gentry was not error. As such it cannot be in any way prejudicial for Petitioner's trial counsel to not exercise an additional peremptory strike (if one was, in fact, offered, a matter which is not clear from the record.)

Claim for Relief 1-2

Petitioner alleges that trial counsel was ineffective by failing to protect Petitioner from a prejudicial courtroom atmosphere. This is a matter which could have been raised on direct appeal and is not appropriate for a Rule 37 proceeding.

In any event, the only evidence related to the courtroom atmosphere was testimony of trial counsel Darrel Blount relating to buttons worn by some audience members, apparently with a picture of the deceased. The record reflects some attention to this issue by the court and the apparent conclusion that jurors would be unable to distinguish who was on the photograph and the court's decision to decline to order removal in order to not call attention to the issue.

Also, testifying was trial counsel Cheryl Barnard who described "a lot" of law enforcement present at trial and the "tense atmosphere". She admitted that defense had, in fact,

requested greater security and that Petitioner be outfitted with a bullet proof vest.

Any claim that these actions were prejudicial is purely speculative with no citations or legal authority offered in support.

Claim for Relief 1-3

Petitioner argues that trial counsel was ineffective in failing to challenge what he perceived as false and misleading testimony presumably involving Roberts' earnings capacity. Petitioner presented no evidence on this point during the hearing but did call a former instructor of Petitioner, Jim Alley who, in fact, was not called as a defense witness because he would have testified as to the Petitioner's capability.

Point 1-3-1; Failure to Challenge Salary Figure: During the trial, a former employer testified as to Petitioner having earned $50,000 per year which is challenged by Petitioner as inaccurate. While the precise salary might attest to Petitioner's lack of competence , the failure to present contradictory evidence is of little consequence given the extensive testimony of his work history and his competence otherwise.

Point 1-3-2; Failure to Challenge the Supposed Lack of Traffic Tickets: Petitioner alleges that the prosecutor, on cross examination of the defendant's expert, posited that the defendant had no history of traffic offenses, a matter which was apparently incorrect. Petitioner alleges that this should have been challenged by trial counsel. The trial record reflects that counsel did, in fact, on re-direct, present the accurate driving record reflecting numerous offenses. Thus, counsel was in no way ineffective with regard to this evidence.

Claim for Relief 1-4

Petitioner alleges that the Sheriff was both a witness and the bailiff and had extensive ex parte contact with the jury. The Petitioner alleges that counsel was ineffective for failing to raise a violation of Turner v. Louisiana, 379 U.S. 466 (1965). Perhaps, counsel did not raise the question of violation of Turner because the allegation is simply false. The record reflects that the court granted the defendants' motion to sequester lay witnesses and, at trial, instructed the attorneys to make sure no witnesses were in the courtroom and instructed witnesses to exit the courtroom. Sheriff Mike Oglesby was the first trial witness called by the state and at the conclusion of this testimony the state requested the Sheriff "remain subject to recall." At the hearing of May 15-17, 2017 former Sheriff Oglesby adamantly denied having any contact with the jurors during the trial nor did he serve as bailiff during the trial. Petitioner apparently abandoned this claim and did not cross examine the witness nor offer contradictory evidence.

Claim for Relief 1-5

Petitioner alleges that trial counsel was ineffective in failing to object to hearsay and to protect the defendant's confrontation clause rights. Petitioner then proceeds to set out several examples of objections that were, in fact, made and overruled by the court. Evidentiary rulings are not the proper subject of a Rule 37 Petition and could have been raised on direct appeal. Petitioner compounds the weakness of this claim by asserting additional examples of "inadmissible hearsay" that were not hearsay at all. In any event, Petitioner apparently chose not to pursue this claim.

Claim for Relief 1-6

Petitioner alleges that trial counsel failed to protect the defendant's right to be present and

thus were ineffective. The Petitioner then set out a number of bare allegations concerning contact between the bailiff and the jury and the outrageous and baseless allegation that the judge and the prosecutor went into the jury room while the jury was deliberating and discussed the case with the jury.

At the hearing none of the three jurors who testified were questioned concerning these matters and former Circuit Judge Gale Ford, who presided at the trial, denied that this occurred. At a previous hearing (December 9, 2008), the prosecutor denied on the record that any such communication ever occurred. Such bare and baseless allegations cannot offer Rule 37 relief. In any event, Petitioner apparently chose not to pursue this rather outrageous claim.

Claim for Relief 1-7

Petitioner alleges that trial counsel was ineffective for failing to support defendant's motion to suppress. Questions concerning the Motion to Suppress were the subject of appeal in State v. Roberts 352 Ark. 489 (2003) and was fully considered by the Supreme Court which upheld the trial court's ruling.

Petitioner now wishes to re-litigate this matter by suggesting that trial counsel could have done more to support the motion, perhaps, conducting additional investigation concerning defendant's mental disorders and defects and his academic abilities. At the hearing, the Petitioner, offered the testimony of Arlene Kesterson who testified as to defendants' lackluster academic records in upper grades. Interestingly, Petitioner also offered the testimony of Jim Alley who taught machine tool technology at the local community college. Alley testified that defendant was one of his students and was capable and a "good student."

While counsel has a duty to make a reasonable investigation, the attorneys judgment is

entitled to heavy deference, See Dixon v. State, 2014 Ark. 97 (2014). Certainly it appears that witnesses, such as presented by the Petitioner, would have added little to support the Motion to Suppress.

Claim for Relief 1-8

Petitioner alleges that trial counsel was ineffective for failing to raise prosecutorial misconduct. Allegations of prosecutorial misconduct should be raised on direct appeal and are not proper in a rule 37 proceeding. See Howard v State, 367 Ark. 18, 238 S.W 3d.24 (2006). The court has further indicated that if Petitioners' argument is that counsel should have raised an argument at trial, the Petitioner must show there was some meritorious ground for that argument. In spite of this clear guidance from the Arkansas Supreme Court, the Petitioner proceeds to set out six "points" to allege prosecutorial misconduct. Of the six "points" Petitioner has provided no evidence that they are anything more than bare allegations or are conclusory statements unsupported in the record. Petitioner apparently withdrew some claims in the pre-hearing brief and did not pursue others at the hearing.

Point 1-8-1: Petitioner alleges that trial counsel failed to object to "improper argument", presumably in the state's closing statement. Interestingly, the Petitioner then used several examples of objections made by trial counsel to the very points he now claims were improper.

Point 1-8-2: Without a shred of evidence, Petitioner alleges that the prosecutor "orchestrated" the wearing of buttons by some audience members which trial counsel failed to address by objection. First, there is nothing in the record to indicate the prosecutor "orchestrated" any such display. Second, the issue was addressed by the trial court when raised by counsel.

Point 1-8-3: Petitioner argues that the prosecution presented "false testimony" to which trial counsel did not object. This "false testimony" focused on the defendant's earning capacity

and on his driving record. The question of his earnings was presented by a recent employer. What the previous earnings figure had to do with the defendant's mental state is not clear.* And, the matter of the defendant's driving record was clarified so no prejudice resulted even if it was somehow relevant to his supposed inability to conform his conduct to the requirements of the law.

Point 1-8-4: Petitioner initially claimed trial counsel was ineffective for objecting to the prosecutor's failure to disclose Brady evidence. Petitioner withdrew this claim in the pre-hearing brief presumably because the material in question (salary and driving record) was not Brady material and the polygraph results were, in fact, discussed in the Motion to Suppress which was denied.

Point 1-8-5: Petitioner alleges, without a shred of evidence, that the prosecutor was responsible for the distribution of information to the media and that trial counsel failed to object. Nothing in the record or nothing presented at the hearing reflects that the prosecutor was responsible for media coverage. Apparently, the coverage had little effect on the ultimate selection of impartial jurors.

Point 1-8-6: Petitioner alleged, then withdrew the bare and unsupported allegations of prosecutor's ex parte contact with jurors. Since it did not occur, and Petitioner provides no evidence that it did, it was wise to withdraw this claim.

Claim for Relief 1-9

Petitioner focuses much of the petition, and the pre-hearing brief, on trial counsels'

**The defendant, in a recent letter to the court, strongly objects to his counsel portraying him as having little earning capacity.*

alleged failure to effectively litigate competency to stand trial. The standard for competency ("fitness") is set out in A.C.A § 5-2-301 et seq. which requires an evaluation to determine if the defendant suffers from a mental disease or defect and whether, as a result of the mental disease or defect, the defendant does not understand the proceedings or cannot assist counsel in preparation of a defense. The standard practice is for trial counsel to request such an evaluation and for the defendant to be evaluated by a state funded psychiatrist or psychologist. That was done in this case and Dr. Charles Mallory conducted the evaluation, filed a report with the court and testified at a competency hearing.

Apparently, Petitioner now argues that trial counsel was ineffective in not securing an additional independent evaluation of competency. Petitioner speculates that some other evaluator would have disagreed with Dr. Mallory's conclusions. But, even the Petitioner's suggested expert, Dr. Darrell Fujii, while firm about his opinion regarding the defendant's current mental state, equivocated during cross examination when confronted with evidence from the psychologists used at trial who had found the defendant competent at that time.

Furthermore, lack of fitness to proceed could have been raised at any point in the proceedings, had there been a basis for doing so. In Winston v State, 2011 Ark. 264 (2011) the Arkansas Supreme Court found no fault in counsel who did not request an independent evaluation after seeing the state's report. Here, counsel cannot be faulted when, in fact, they engaged their own experts who did not find or offer evidence of lack of fitness to proceed.

As pointed out by The Supreme Court in State v. Roberts, 352 Ark. 489 (2003) the examination by Dr. Mallory consisted of the usual review of defendants IQ (76), (indicating "borderline intellectual functioning"); but that Petitioner "graduated from high school, could read and write at a high school level, had held the same job for the last six years, and had a wife of ten

years and a family". Dr. Mallory administered the usual test to measure if a person understands the criminal justice system and the procedures at trial. Based on the results, the Petitioner was found competent to stand trial. Petitioner now speculates that some other evaluation, related to diagnosis of schizophrenia, would have suggested a lack of fitness to proceed. It should be noted this speculation is based on a current diagnosis of schizophrenia - a diagnosis that none of the experts at trial found although Dr. Weathersby, a defense expert, said it could not be ruled out.

There was some testimony from one trial attorney, Darrel Blount, indicating that the defendant was not truly engaged in assisting in his own defense*. There was no testimony indicating that he was unable to assist in his own defense or that he failed to understand the proceedings.

Petitioner, in his pre-trial brief, conflates the issue of competency to stand trial with competency to waive post-conviction relief. The Supreme Court has clearly indicated that these are separate questions requiring different types of evaluation.

Claim for Relief 1-10

As with the question of Petitioner's competency to stand trial, Petitioner also speculates that trial counsel was ineffective in presentation of the lack of capacity or lack of criminal responsibility defense. The crux of Petitioner's argument seems to be that trial counsel chose to focus on cognitive limitations resulting from a traumatic brain injury rather than the possibility of schizophrenia or other psychiatric illnesses, i.e, mental defect rather than mental illness.

This was, of course, a matter of trial strategy chosen by counsel based on the evaluation

** Defendant Roberts disputes this account in a post-hearing letter to the court.*

of the defendant by four mental health experts, two of which were retained by the defense. Not one expert noted a diagnosis of mental disease although Dr. Weathersby would not rule out schizophrenia. And, of course, Petitioner is relying on a diagnosis obtained in 2013, not one that any expert noted over seventeen years ago. To suggest that trial counsel was somehow ineffective for failing to obtain some different expert who might have asserted a different diagnosis is pure conjecture.

The major weakness of Petitioner's argument is that it focuses only on the first requirement of the lack of criminal responsibility defense, that is, whether the defendant was suffering from a mental disease or defect at the time of the crime. The focus must be on the second aspect of the statutory defense: whether the defendant could appreciate the criminality of his conduct or conform his actions to the requirements of the law.

In this case, even the defense trial expert admitted that defendant could appreciate the criminality of his conduct. His own actions following the crime support this conclusion. For example, he attempted find a remote location for the crime, to hide the victim's body, disposed of her clothing, etc. All are actions are consistent with one who knew that what he was doing was wrong.

That leaves Petitioner with this speculative claim that defendant could not conform his conduct to the requirements of the law, asserting that had trial counsel presented the lack of criminal responsibility defense based on mental disease rather than mental defect the outcome would have been different. This ignores the medical fact that most schizophrenia sufferers commit no violent acts and ignores the testimony that no prior acts of this nature had been committed by the defendant. Perhaps, he suffered psychological stress associated with his marriage and family, losing a relative, and other difficulties but none go to the question of his

inability to conform his conduct to the requirements of the law. The only evidence now suggested by Petitioner is his bad driving record. How a bad driving record supports a defendant's inability to avoid committing rape and murder is unclear.

Petitioner asserts that defendant's poor academic performance, his childhood trauma, and his difficulties with daily living support this statutory defense. What these matters do support is the logical and strategic choice of trial counsel to show mental defect rather than a strategy of focusing on mental disease. This choice is of little consequence due to the unconvincing evidence related to the second prong of the lack of criminal responsibility defense.

Claim for Relief 1-11

Petitioner asserts a failure to discover and present evidence of juror misconduct. In the Petitioners pre-hearing brief, Petitioner seems to withdraw this claim yet asserts it is covered in the other claims. To the extent that Petitioner is pursuing a claim of juror misconduct, he fails to support the multiple claims with any evidence. The Petition is replete with bare allegations, none of which were supported by testimony or other evidence. Even the evidence presented at the hearing from three jurors fails to establish even a scintilla of juror misconduct. Any exposure to "influences" and the "atmosphere" of the trial do not go to the issue of juror misconduct and, in any event, could have been raised on direct appeal.

Claim for Relief 1-12

Petitioner recognizes that the Arkansas Supreme Court has refused to recognize "cumulative" claims of ineffective assistance of counsel nonetheless sets out a string of citations to preserve the matter for review. No response is necessary.

Claim for Relief 2-1

Petitioner alleges ineffective assistance of counsel during the penalty phase, raising many of the points set out and addressed above. In the first point, Petitioner alleges that trial counsel failed to "life qualify" the jury or insist that the judge "life qualify" the jury. Petitioner points to no authority setting out such a requirement and presents no evidence regarding trial counsel's failure to properly voir dire the jury panel.

Claim for Relief 2-2

Petitioner claims that trial counsel was ineffective because certain family members were called to testify concerning the defendants behavior and that such testimony was "harmful". Trial counsel cannot be faulted for calling family witnesses who Petitioner claims would have been helpful on certain aspects but then criticized for having them testify as to the precise matters set out in the Petition. (See below).

Claim for Relief 2-3

Petitioner complains that trial counsel was ineffective in failing to present evidence "effectively" in mitigation. The Petition acknowledges that three family members testified during the penalty phase and presented mitigation evidence, Petitioner then sets out some 22 pages of "social", "life" and "family" history which he suggests could have been presented. How the family history, mental problems of other family members, and conjecture concerning the defendant's mental status would have been helpful to the jury is less clear. Petitioner premises much of this claim on the repeated, but unproven, assertion that the defendant was

schizophrenic at the time of the crime due somehow to a "multifaceted web of interdependent traumas and impairments that were more than the sum of their parts."

Claim for Relief 2-4

Petitioner initially claimed that trial counsel ineffectively failed to object to improper victim impact evidence but withdrew this claim in the Pre-Hearing brief.

Claim for Relief 2-5

Petitioner initially claimed trial counsel was ineffective for failure to claim that defendant was ineligible for the death penalty as a result of psychiatric illness and organic brain damage but withdrew this claim in the Pre-Hearing brief.

Claim for Relief 2-6

Petitioner claims trial counsel was ineffective for failing to challenge verdict forms. Petitioner acknowledges that the Arkansas Supreme Court held in State v. Roberts 352 Ark 489 (2003) that there was no error in the jury's completion of the verdict forms but, somehow, suggests this issue could now be re-litigated in a Rule 37 proceeding.

Claim for Relief 2-7

Petitioners recognize that the Arkansas Supreme Court has repeatedly rejected facial challenges to the Arkansas death penalty scheme yet proceed to allege that trial counsel should have litigated this issue. This is not a matter for this court to determine in a Rule 37 proceeding. The sub-claims submitted by Petitioner regarding failure to challenge aggravating circumstances

and to challenge Arkansas' capital sentencing procedures were withdrawn in the Pre-Hearing brief.

Petitioner apparently did not withdraw a sub-claim that trial counsel should have challenged "arbitrary discretion" granted by Arkansas' murder statute. Petitioner acknowledges that this issue has been rejected by Arkansas courts yet suggests it should have been raised at trial. This is not a matter for a Rule 37 proceeding.

Claim for Relief 2-8

Petitioner is aware that the Arkansas Supreme Court has refused to recognize "cumulative" claims of ineffective assistance of counsel yet argues the court should consider this matter in a Rule 37 proceeding.

Claim for Relief 3

Petitioner raises questions concerning ineffective assistance of counsel during the post-trial stage centered on the failure to file a motion for a new trial. Petitioner's basic argument is that trial counsel should have filed such a motion in spite of the voluntary waiver of the defendant a few days following the verdict, a waiver found to be effective by the trial court and upheld by the Arkansas Supreme Court in State v. Roberts, 352 Ark 489 (2003).

In spite of this, Petitioner now argues that trial counsel was ineffective for failing to file a motion for new trial that would have alleged matters such as juror misconduct, denial of right to be present and prosecutorial misconduct. In the Pre-Hearing brief Petitioner withdrew the claim that trial counsel should have alleged their own ineffectiveness in the motion. The Petitioner simply repeats the unsubstantiated allegations previously set out above in earlier claims for relief.

Interestingly, Petitioner suggests that trial counsel should have raised issues within the time period allowed for a new trial motion that Petitioner's current counsel spent years developing, albeit, without effect.

Claim for Relief 4

Petitioner sets out in great detail some twenty claims of ineffective assistance of counsel on appeal. In the Pre-Hearing brief Petitioner withdrew most of the claims but continues to assert that appellate counsel should have raised issues of prosecutorial misconduct, failure to argue " life qualification," the jury's failure to consider mitigation and failure to argue that the death penalty statute is unconstitutional and that the jury's consideration of aggravating circumstances in the case violated the constitution. Presumably, the issue regarding aggravating circumstances is merely a facial challenge since Petitioner withdrew any allegation that trial counsel failed to challenge aggravating circumstance at trial.

The question of prosecutorial misconduct was stated in Claim for Relief 1-8 and Petitioner failed to set out any legitimate basis for the allegation in the Petition or at the Hearing.

The question of "life qualification" was addressed in Claim for Relief 2-1 and neither in the Petition nor at the Hearing did Petitioner state a statutory or other legal basis for this claim.

The question of the jury's failure to consider mitigation was addressed in Claim for Relief 2-6. Neither in the Petition nor at the Hearing did Petitioner present evidence that this did not occur. In fact, the evidence reflects the opposite to be true.

Claim for Relief 5

Petitioner, again alleges that the "atmosphere" of the community and pre-trial publicity was prejudicial and deprived Roberts of a fair trial. This matter was argued in point 1-1-1 (above)

and fully addressed. No additional response is necessary.

Claim for Relief 6

Petitioner, again, argues that the "prejudicial atmosphere" during the trial violated Roberts constitutional rights. This matter was argued in point 1-2 (above) and fully addressed. No additional response is necessary.

Petitioner sets out additional claims for Relief which do not focus on ineffective assistance by trial counsel. Many of these claims were previously addressed in the mandatory appeal or are mere conjecture with no evidence presented at the Hearing to support the allegations. Each is briefly addressed below.

Claim 7: The question of the defendant's competency to stand trial was addressed in State v. Roberts 352 Ark 489 (2003). Petitioner wishes to project backwards and claims his current mental condition, if it existed at the time of trial, could have yielded a different outcome. This is pure speculation.

Claim 8: The question of juror misconduct is raised yet again. However, no evidence to support the allegation has been presented by Petitioner.

Claim 9: This claim raises, again, the false and debunked claim that the Sheriff was both a witness and bailiff.

Claim 10: This claim raises the question of the constitutionality of Arkansas' death penalty and aggravating circumstance scheme. This is not a matter for a Rule 37 proceeding.

Claim 11: Petitioner challenges the validity of the defendants waiver of direct appeal. This matter was addressed in State v. Roberts 354 Ark 389(2003). Furthermore, the present proceeding is a result of the court's reconsideration of similar issues in State v Roberts, 2013 Ark 57.

Claim 12: Petitioner continues to claim that the defendant was not present during all material proceedings at trial. No evidence was presented to support this claim and Petitioner, in the Pre-Hearing Brief withdrew any claim that appellant counsel was ineffective for failing to raise this issue.

Claim 13: Petitioner raises the question of the trial court's failure to suppress the defendant's statement. This matter was fully addressed in State v. Roberts, 352 Ark 489 (2003).

Claim 14: Petitioner raises the failure of the court to "life qualify" the jury but, again provides no legal basis to show that this is necessary in Arkansas.

Claim 15: Petitioner raises the question of whether defendants' current mental state disqualifies him from the death penalty. This is not a matter for the court to determine in a Rule 37 proceeding.

Claim 16: Petitioner, again, raises claims that the jury failed to consider mitigating evidence with no supporting evidence.

Claim 17: Petitioner raises the issue of cumulative error although recognizing that the Arkansas Supreme court has rejected the concept in Rule 37 proceedings.

Summary

The Petition, Pre-Hearing Brief, the Hearing and the files and record in this matter fail to substantiate the claims of Petitioner that relief is warranted. Much of the Petition and Pre-Hearing Brief is nothing more than bare allegations unsupported by affidavits or other proof. The witnesses presented at the hearing did not address many of the allegations and, to the extent that they did so, add little evidence to support the claims of Petitioner.

Most of the Claims for Relief in the Petition focus on allegations of ineffective assistance of counsel. The seminal case of Strickland v. Washington, 468 U.S. 668 (1986) sets out the two element test for ineffective assistance of counsel: (1) counsel's performance was deficient, so much so that counsel was not functioning as "counsel" as guaranteed by the Constitution and (2) that the deficient performance so prejudiced the defendant such that he was deprived of a fair trial. The essence of the two element test is whether counsel's performance fell below an objective standard of reasonableness. As the Supreme Court subsequently stated: "Strickland does not guarantee perfect representation, only a reasonably competent attorney." Harrington v. Richter, 131 S. Ct 770, 791 (2011).

The Arkansas Supreme Court has expounded on this theme and has found that counsel's decisions about the theory of the case and which should be pursued is the "epitome" of trial strategy and that matters of trial tactics and strategy are not grounds for post-conviction relief. See Sartin v State, 2012 Ark. 155 (2012) and Abernathy v State, 2012 Ark. 59 (2012).

The prejudice must be real and not some abstract or theoretical effect on the outcome. See Abernathy, at 8. No relief should be granted in this case based on the speculations and conjectures proposed by Petitioner.

The burden of proof is on petitioner to show specific acts or omissions which would not have been the result of reasonable professional judgment. Winston v. State 2011 Ark. 264 Petitioner has failed to show that to be true in this particular case.

A review of petitioner's filing and the evidence presented at the hearing suggest that petitioner's entire argument is based on the proposition that trial counsel should have submitted proof of Roberts' presumed schizophrenia (mental disease) rather than the choice counsel made to rely on a brain injury (mental defect). Aside from the fact that this was a reasoned trial tactic, the ultimate challenge was not in this part of the lack of criminal responsibility defense but rather the second prong to show the defendant did not appreciate the criminality of his conduct or that he could not conform his conduct to the requirements of the law. It matters not whether the assertion was of a mental disease or a mental defect, the second part of the test must be shown for an effective defense.

In this case the issue of Defendant's appreciation of criminality of the conduct was set out effectively by the testimony of Dr. Charles Mallory at trial. This testimony was summarized in Roberts v. State 352 Ark. 489 (2003).

Particularly, Mallory stated that Roberts was cognitive of his actions, and that he took steps to avoid apprehension both before and after the crime, by driving the girl to a remote location, raping and killing her, and then covering up her body and throwing away her clothes. Mallory also pointed to Roberts' statement that he knew that she could identify him as having raped her.

Also the court noted the testimony of Dr. Reginald Rutherford that it was evident that Roberts was involved in a series of complex actions that culminated in the crime.

Nothing offered by Petitioner at the hearing contradicts this trial testimony regarding the Defendants appreciation of the criminality of his conduct. In fact, there was evidence that Roberts has repeatedly stated that he wished to die and that a "guilty person should accept responsibility", showing, if nothing else, that he appreciated (and still does appreciate) the criminality of his actions.

As to the alternative prong of the criminal responsibility defense (could not conform his conduct to the requirements of the law) the testimony offered by petitioner does not establish this to be true in the instant case. If Roberts was schizophrenic at the time of the crime (i.e. had a mental disease rather than a mental defect) or even mental disease in conjunction with a mental defect: this, of itself, does not establish that he could not conform his conduct to the requirements of the law. At trial the experts presented by the Defendant suggested that his ability to conform his conduct to the requirements of the law was "impaired" but that he knew right from wrong. None of the experts who testified at the recent hearing could not provide any evidence to contradict that of the original trial experts. Only one of these experts had examined the Defendant at all and the one that had, Dr. David Fujii, had done so fourteen years after the crime. Their assertion that he was schizophrenic proves nothing. Few schizophrenics commit rape and murder and few schizophrenics are unable to conform their conduct to the requirements of the law. Petitioner offered no evidence to the contrary except to suggest that because Roberts had numerous speeding tickets, and thus, could not conform his conduct to the requirements of the law. The absurdity of this conclusion is evident, aside from the fact that most speeders do not commit rape and murder.

It was clearly reasonable for trial counsel to present the lack of criminal responsibility defense premised on mental defect rather that mental disease as the burden on the second prong of the test is the same and could not be overcome even had the present experts been called to testify at trial regarding schizophrenia. How the Defendant was prejudiced by the choice of mental defect rather than mental disease has not been made clear by any evidence presented at the hearing.

The Arkansas Supreme Court has stated that there is a strong presumption that if the conduct of counsel falls within a wide range of reasonable professional assistance it will not be found to fall below an objective standard of reasonableness. Winston v. State, 2011 Ark. 264. No such showing to the contrary appears here.

Wherefore, the State prays that the Petition be dismissed and for all other proper relief.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing pleading has been properly served upon the attorney or parties listed below by the following means of [ ] U.S. Mail postage prepaid and properly addressed, [ ] by fax transmission to (___)___-____, or [ ] by hand delivery on the 20th day of February, 2018, to Scott Braden, Attorney at Law.

Andy Riner

Appendix O

Circuit Court of Polk County
Order Denying Rule 37
(May 17, 2018)

(Excerpt, *Atkins* claim denial, pp. 93-95)

cumulative error is not recognized when assessing whether a Petitioner was afforded effective assistance of counsel. [Fletcher v. State, 2015 Ark. 106, 458 S.W. 3d 234 (2015)]. [Howard v. State, 367 Ark. 18, 238 S.W. 3d 24 (2006); Huddleston v. State, 339 Ark. 266, 5 S.W. 3d 46 (1999)]. Accordingly, this claim is denied.

Claim 18: Petitioner Suffered from Intellectual Disability At The Time of the Offense and is Therefore Ineligible for a Death Sentence.

Findings of Fact: At the Rule 37 post conviction evidentiary hearing, Dr. Garrett Andrews, a neuro-psychologist testified on behalf of the Petitioner. (TR. 1108-1134). Dr. Andrews did not interview Petitioner (TR. 1128) or members of his family. (TR. 1112), (TR. 1129). He reviewed the records of Petitioner for approximately five (5) or six (6) hours. (TR. 1129). He testified that he received the records that he reviewed from the Federal Attorney's Office. (TR. 1132). He did not review letters Petitioner had written to the Court. (TR. 1131).

Dr. Andrews testified after reviewing the raw data and reports that Petitioner had an intellectual disability in 1999. (TR. 1112). He testified that Petitioner had been given "the full battery" of intellectual testing in August or September, 1999 by Drs. Mallory and Wetherby. (TR. 1113-1114). He testified that Petitioner had an IQ score of 76 which would not standing alone rule out a diagnosis of intellectual disability. (TR. 1115). He stated that based on his review, Dr. Mallory did not look at any adaptive functioning deficits with respect to Petitioner. (TR. 1116). He characterized Petitioners intellectual disability as mild. (TR. 1125). He testified that a

person with mild intellectual disability is not excluded from holding a job and can live in an apartment, drive a car, and play the drums. (TR. 1122). Petitioner was tested until the eleventh grade and could not exceed an eighth grade level in any subjects. (TR.Exh. 35, 43).

Conclusion of Law: In Roberts v. State, 102 S. W. 3d 482 (2003), the Supreme Court found no error in the findings by the trial court that in 1999 Petitioner had a ful-scale I.Q. of seventy-six (76) which placed him within the borderline intellectual functioning range and that Petitioner had graduated from high school, could read and write on a high school level, held the same job for the previous six (6) years and had a wife of ten (10) years and a family. According to the testimony of Dr. Mallory, Petitioner understood the criminal justice system and the procedure of trial. The doctor stated Petitioner demonstrated to him that Petitioner understood his legal rights and the trial process. He testified that Petitioner knew the difference between right and wrong and that he had the ability to conform his conduct to the requirements of the law. Dr. Mallory also stated that Petitioner was cognitive of his actions and that he took steps to avoid apprehension both before and after the crime. Petitioner also had "decided to kill Andria because he knew that she could identify him as having raped her". Id. @ 497. The Supreme Court found no error in these conclusions of the trial court.

As the court has previously found, the rule governing petitions for post conviction relief does not provide an opportunity to reargue points that were settled on direct appeal.

[Davis v. State, 44 S.W. 3d 726, 345 Ark. 161 (2001)]. It should also be noted that the Davis court held that Rule 37 was never intended to provide a means to add evidence to the record or to refute evidence adduced at trial. (Id. @172) (Emphasis added).

In this case, Petitioner supports his claim with testimony of Dr. Andrews presented at the Rule 37 evidentiary hearing which refutes the evidence of Dr. Mallory introduced at trial. The question of the competency of the Petitioner at the time of the offense was settled on direct appeal and cannot be reargued or refuted in this post conviction proceeding.

Based on the foregoing findings of fact and conclusions of law, the Court denies the relief requested by Petitioner in his Rule 37.5 petition.

IT IS SO ORDERED this 17th day of May, 2018.

JERRY RYAN
CIRCUIT JUDGE