No. 24-

IN THE

Supreme Court of the United States

RODNEY DALE HARMON,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court or the Court of Appeals should have granted a certificate of appealability when the issue in habeas is the ineffectiveness of counsel in failing to contest a search conducted in flagrant violation of this Court's Fourth Amendment jurisprudence, even though the illegality was previously decided in a civil and not criminal context.

RELATED CASES

State v. Harmon, 23CR-15-702. Circuit Court of Faulkner County, Arkansas. Judgment of conviction entered on June 26, 2018. Amended judgment entered June 28, 2018.

Harmon v. State, CR-18-1057. Arkansas Court of Appeals. Opinion Delivered December 4, 2019. Rehearing Denied January 15, 2020. (direct appeal to intermediate appellate court.)

Harmon v. State, CR-18-1057. Supreme Court of Arkansas. (Case number remains the same.) Opinion Delivered: May 28, 2020. Rehearing Denied July 23, 2020

Harmon v. State, 23CR-15-702. Circuit Court of Faulkner County, Arkansas. (Case number remains the same in circuit court) Denial of postconviction relief. Judgment entered December 20, 2022.

Harmon v. State, CR-23-160. Supreme Court of Arkansas. Opinion Delivered: December 7, 2023. Rehearing Denied January 25, 2024. Affirming denial of postconviction relief.

Harmon v. Payne, 4:24cv00718 BRW-ERE. U.S. District Court, Eastern District of Arkansas. Magistrate Judge's recommended disposition. Entered January 7, 2025.

Harmon v. Payne, 4:24cv00718 BRW-ERE.U.S. District Court, Eastern District of Arkansas. Judgment entered January 24, 2025, accepting without change the recommended disposition.

Harmon v. Payne, 25-1184. U.S. Court of Appeals for the Eighth Circuit. Judgment entered April 2, 2025, denying certificate of appealability.

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None of the federal decisions has a reported citation. The recommended disposition of the Magistrate Judge is 2025 WL 44285. (App. 5a-14a) The District Court's acceptance of the recommendation is at 2025 WL 295362. (App. 3a-4a) The Eighth Circuit's denial of a certificate of appealability is not reported. (App. 1a-2a)

On direct appeal, the original decision in the Arkansas Court of Appeals is reported as *Harmon v. State*, 2019 Ark. App. 572, 591 S.W.3d 347. That opinion was vacated and replaced in the Arkansas Supreme Court in *Harmon v. State*, 2020 Ark. 217, 600 S.W.3d 586. The Arkansas Supreme Court's opinion affirming the denial of postconviction relief is *Harmon v. State*, 2023 Ark. 179, 678 S.W.3d 390. (App. 15a-23a)

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1). The denial of the certificate of appealability by the Court of Appeals for the Eighth Circuit was on April 2, 2025. This petition, being filed within 90 days thereof, is timely.

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,*

Sixth Amendment, United States Constitution:

> *In all criminal prosecutions, the accused shall enjoy the right ....to have the Assistance of Counsel for his defence.*

Fourteenth Amendment, United States Constitution:

> *...nor shall any state deprive any person of life, liberty or property without due process of law.*

28 USC § 2253:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or

to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 USC § 2254(d)(1):

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ....

STATEMENT OF THE CASE

Arkansas law enforcement officials obtained a search warrant for the residence of Rodney Harmon in Faulkner County, Arkansas. The search was conducted on September 17, 2015. Harmon was arrested and eventually charged and convicted of Simultaneous Possession of Drugs and Firearms. Ark. Code Ann. § 5-74-106; Trafficking Methamphetamine, Ark. Code Ann. § 5-64-440 (40 years); Possession of Drug Paraphernalia, Ark. Code Ann. § 5-64-443 (20 years); and Offenses Relating to Records, Ark. Code Ann. § 5-64-402 (20 years). Additionally, an enhancement was charged for commission of the offenses near a school bus stop. The sentences are concurrent with each other.

Relevantly to this petition, during the pretrial proceedings it was divulged by the prosecuting attorney that officers involved in the search had invited documentary filmmakers associated with Home Box Office to accompany them on the search, (R 458-473) The search was filmed by HBO. These filmmakers were making a documentary eventually broadcast under the title "Meth Storm." Apparently, the Harmon search was not in the finished product, although the prosecutor and judge in this case were actually thanked for their assistance in the credits in the finished product. The discovery materials originally provided to the defense made no mention of the presence of the filmmakers, nor did they mention that the U.S.

Attorney had declined to become involved in the search because of the prospective HBO presence.

Trial counsel moved for the prosecutor to provide the audio and video recordings, including all outtakes, of the Harmon search made by the filmmakers. The prosecutor did not do so and the circuit court would not order it. Defense counsel attempted to serve the filmmakers at an Arkansas address but were not able to achieve service. The Arkansas appellate courts declined to reverse on this point.

Trial counsel did not move for suppression of the search, although this Court in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), had held that such journalistic presence violated the Fourth Amendment.

After Harmon's convictions and sentences were upheld on direct appeal, he filed a petition for postconviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure in which he alleged, *inter alia*, that trial counsel had been ineffective for not moving for suppression. The Faulkner County Circuit Court denied relief and the Arkansas Supreme Court affirmed the denial in *Harmon v. State*, 2023 Ark. 179, 678 S.W.3d 390. (App. D) That court excused the failure to move to suppress that such a motion would have been a "novel" claim.

Harmon then filed a federal habeas petition seeking relief on the ineffectiveness claim, and asserting that the Arkansas courts' resolution was contrary to or an unreasonable application various decisions of this Court: *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984) (ineffective counsel); *Kimmelman v. Morrison*,

477 U.S. 365, 106 S.Ct. 2574 (1986) (ineffective counsel on Fourth Amendment issues); *Wilson v. Layne,* 526 U.S. 603, 119 S.Ct. 1692 (1999) (media ride-alongs illegal); *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), (good faith and its exceptions); *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), (remedy for willful Fourth Amendment violations); and *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901 (1984) (what is a novel issue)

The magistrate judge recommended that the petition be dismissed because she determined that the Arkansas Supreme Court's decision that such a claim would have been novel was reasonable. The magistrate judge also recommended denial of a certificate of appealability.(App. C) The District Court accepted the recommendations of the Magistrate Judge. (App. B) Harmon filed a notice of appeal and petitioned the Court of Appeals for a certificate of appealability, which was denied by that court as well. (App. A)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

THE DISTRICT COURT OR THE COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY WHEN THE ISSUE IN HABEAS IS THE INEFFECTIVENESS OF COUNSEL IN FAILING TO CONTEST A SEARCH CONDUCTED IN FLAGRANT VIOLATION OF THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE, EVEN THOUGH THE ILLEGALITY WAS PREVIOUSLY DECIDED IN A CIVIL AND NOT CRIMINAL CONTEXT.

This case presents the Court an opportunity to correct a much too restrictive view of what is required for the issuance of a certificate of appealability. Harmon meets this Court's criteria for issuance of a certificate of appealability as set forth in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000), assaying 28 U.S.C. § 2253, that a habeas petitioner must make a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Whether this Court resolves this case by summary reversal and remand or after plenary briefing and argument, this case at least presents an issue which merits the plenary attention of the Court of Appeals.

This Court decided in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), that the actions of law enforcement in bringing journalists to record execution of a search warrant violated the Fourth Amendment. The *Wilson* court held that the officers had qualified immunity because the principle had not been clearly established at the time of the search.

Of course, when the Harmon search was conducted more than 15 years after *Wilson*, the principle was indeed clearly established. Nonetheless, both the state and federal courts excused the failure of trial counsel to move to suppress on Wilson grounds on grounds of novelty. *Reed* held that a claim is novel only if its legal basis was not reasonably available to counsel at the time of the procedural default. When there has been an explicit decision of this Court on the books for 15 years at the time of the search, that cannot be correct. That *Wilson* was a civil case does not derogate its status as a Fourth Amendment precedent.

Moreover, Harmon clearly meets the criteria of 28 U.S.C. § 2254(d)(1) that 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."

Among the cases of this Court, in addition to *Wilson* and *Reed*, are *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986) (the latter recognizing cognizability of ineffective counsel on Fourth Amendment issues in habeas even though *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976), would preclude direct relief on Fourth Amendment claim). Additionally, refusal to

consider the hiding of the plan from the issuing magistrate and the scrubbing of mention of the media presence from documents provided in discovery, ignores the teachings of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), (good faith and its exceptions, the nondisclosure of the ride-alongs to the issuing magistrate being not in good faith) and *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978), (remedy for willful Fourth Amendment violations).

This Court held in *Andrew v. White*, 604 U.S. ___, 145 S.Ct. 75, 82 (2025), that "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court." Wilson certainly sets forth a sufficient clearly established legal principle.

CONCLUSION

This Court should grant the writ of certiorari, reverse the denial of a certificate of appealability and order the Court of Appeals to entertain and decide a plenary appeal.

Respectfully submitted,

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APPENDIX

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED APRIL 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 25-1184

RODNEY DALE HARMON,

Plaintiff-Appellant,

v.

DEXTER PAYNE, DIRECTOR, ADC,

Defendant-Appellee.

Appeal from U.S. District Court for the
Eastern District of Arkansas – Central
(4:24-cv-00718-BRW)

Filed April 2, 2025

JUDGMENT

Before GRUENDER, KELLY, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court,

and the application for a certificate of appealability is denied. The appeal is dismissed.

April 02, 2025

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

/s/ Susan E. Bindler

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CENTRAL DIVISION, SIGNED JANUARY 24, 2025

UNITED STATES DISTRICT COURT,
E.D. ARKANSAS,
CENTRAL DIVISION.

RODNEY DALE HARMON ADC #170497,

Petitioner,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION,

Respondent.

No. 4:24-cv-00718-BRW-ERE
|
Signed January 24, 2025

ORDER

Billy Roy Wilson, UNITED STATES DISTRICT JUDGE

I have received a Recommendation (Doc. No. 9) from United States Magistrate Judge Edie R. Ervin and Petitioner Rodney Dale Harmon's objections. After careful de novo review of the Recommendation, objections, and pertinent portions of the record, I approve and adopt the Recommendation in all respects.

Appendix B

It is therefore ordered that the Petition for Writ of Habeas Corpus is DISMISSED with prejudice. The Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)-(2); Rule 11(a), Rules Governing § 2254 Cases in United States District Courts. Judgment will be entered accordingly.

Respondent's motion for extension of time to respond to Petitioner's objections (Doc. No. 11) is MOOT.

IT IS SO ORDERED this 24th day of January, 2025.

APPENDIX C — RECOMMENDED DISPOSITION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CENTRAL DIVISION, SIGNED JANUARY 7, 2025

UNITED STATES DISTRICT COURT,
E.D. ARKANSAS,
CENTRAL DIVISION.

RODNEY DALE HARMON ADC #170497,

Petitioner,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION,

Respondent.

No. 4:24-cv-00718-BRW-ERE
|
Signed January 7, 2025

RECOMMENDED DISPOSITION

Edie R. Ervin, UNITED STATES MAGISTRATE JUDGE

This Recommendation ("RD") has been sent to United States District Judge Billy Roy Wilson. You may file objections to all, or part, of this RD. Objections should be

specific, include the factual or legal basis for the objection, and must be filed within fourteen days. If you do not file objections, you risk waiving the right to appeal questions of fact and Judge Wilson can adopt this RD without independently reviewing the record.

I. Introduction

Rodney Dale Harmon, an inmate at the Ouachita River Correctional Unit of the Arkansas Division of Correction, filed, through counsel, a petition for habeas corpus pursuant to 28 U.S.C. § 2254. *Doc. 1.* Mr. Harmon's petition should be dismissed with prejudice because the single claim he presents was adjudicated and rejected on the merits in state court, and relitigation is precluded under 28 U.S.C. § 2254(d).[1]

II. Background

In September 2015, officers with the United States Drug Enforcement Agency ("DEA"), the Faulkner County, Arkansas Sheriff's Office, and the Twentieth Judicial District Drug Task Force executed a search warrant for Mr. Harmon's home. *Harmon v. State*, 2020 Ark. 217, at 1 (2020). The officers found over six pounds of methamphetamine, multiple firearms, ammunition, baggies, scales, and cash. *Id.* Mr. Harmon was charged in the Faulkner County, Arkansas Circuit Court with multiple drug and gun-related crimes. *Id.*

1. This provision establishes the deferential review applied by federal habeas courts when reviewing claims resolved on the merits in state court. See *infra* discussion at Section III.

Appendix C

In January 2017, while the charges against Mr. Harmon were pending, the lead prosecutor learned that an HBO film crew, making a documentary called *Meth Storm*, was present during the September 2015 search of Mr. Harmon's home. *Id.* at 2. The prosecutor notified defense counsel about the film crew's presence but stated that she did not have possession of any related footage. *Id.* The prosecutor gave defense counsel contact information for a film crew member, the HBO legal department, and DEA personnel who had possibly approved the presence of the film crew. *Id.* at 2-3.

Mr. Harmon's attorney requested and received a trial continuance for the purpose of obtaining footage of the search, but he was unable to obtain the footage from HBO. *Id.* at 2. Mr. Harmon then asked the trial court to compel production of the footage. *Doc. 4-2 at 163-164.* The trial court declined to compel the state to obtain the footage but ordered "whomever" possessed it to turn it over to Mr. Harmon and his attorney. *Doc. 4-2 at 169.* That order produced no results.

On the first day of trial, the trial court: (1) denied Mr. Harmon's motion to continue trial until such time as the video was obtained; and (2) granted the State's motion in limine to prohibit mention of the film crew's presence during the search. *Harmon v. State*, 2020 Ark. 217, at 3. The jury convicted Mr. Harmon of trafficking methamphetamine within 1,000 feet of a school-bus stop, simultaneous possession of drugs and firearms, possession of drug paraphernalia, and maintaining a drug premises within 1,000 feet of a school-bus stop. Mr. Harmon was sentenced to forty years in prison. *Id.* at 3-4.

Appendix C

On direct appeal, the Arkansas Court of Appeals reversed Mr. Harmon's drug trafficking conviction based on the trial court's use of a non-model jury instruction, *Harmon v. State*, 2019 Ark. App. 572, 11 (2019), but the Arkansas Supreme Court reversed that decision, reinstating all original convictions. *Harmon v. State*, 2020 Ark. 217, at 1 (2020).

Mr. Harmon filed a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37 asserting that: (1) the presence of the HBO film crew during the search of his home violated his Fourth Amendment rights pursuant to *Wilson v. Layne*, 526 U.S. 603 (1999); and (2) he received ineffective assistance of counsel because his attorney failed to identify a *Wilson* violation and raise it as an independent ground to suppress the evidence seized in the search of his home.[2] *Doc. 4-9 at 13-21.*

The trial court denied the petition. *Doc. 4-9 at 39-40.* Mr. Harmon appealed. On December 7, 2023, the Arkansas Supreme Court affirmed the denial of postconviction relief, *Harmon v. State*, 678 S.W.3d 390, 392, 2023 Ark. 179, 2 (Ark., 2023), and on January 25, 2024, it denied a rehearing and issued its mandate. *Doc. 4-12.*

On August 23, 2024, Mr. Harmon filed the § 2254 petition now before the Court, raising a single claim: that

2. Mr. Harmon also argued that his trial attorney rendered ineffective assistance by failing to subpoena HBO to obtain footage of the search. *Doc. 4-9 at 17-19.* The trial court rejected this claim (*Id. at 40-51*), and Mr. Harmon did not pursue it in appealing the trial court's denial of postconviction relief. *Doc. 4-10 at 3.*

his trial counsel rendered ineffective assistance by failing to move for the suppression of evidence based on the HBO film crew's presence during the search of his home.

On September 19, 2024, Respondent filed a response (*Doc. 4*) asserting that the Arkansas Supreme Court's decision rejecting Mr. Harmon's claim is entitled to deference under 28 U.S.C. § 2254(d).

On October 31, 2024, Mr. Harmon filed a reply addressing Respondent's arguments for dismissal. *Doc. 8.*

III. Discussion

Mr. Harmon raises a single claim: His trial counsel was constitutionally ineffective for failure to move for suppression of evidence based on the film crew's presence during the search of his home "despite being made aware of a flagrant violation of the Fourth Amendment as construed by a unanimous . . . Supreme Court in *Wilson v. Layne*, 526 U.S. 603 (1999)." *Doc. 1 at 6.* The Arkansas Supreme Court rejected this claim on the merits on postconviction review.

Respondent argues that habeas relief is precluded under the deferential review standard for state court decisions mandated by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified at 28 U.S.C. § 2254(d). Section 2254(d) provides that when a state prisoner's federal claim has been adjudicated on the merits in state court, a federal court "shall not" grant an application for habeas relief unless the state courts'

adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court;[3] 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."[4] "The question under [the] AEDPA is thus not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable–'a substantially higher threshold' for a prisoner to meet." *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

The Arkansas Supreme Court assessed Mr. Harmon's ineffective assistance claim according to the standard set forth in *Strickland v. Washington*, 466 U.S. 668

3. A state court decision is "contrary to" clearly established federal law if the state court either "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent if it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

4. The state court's factual findings are subject to a deferential standard of review and presumed correct unless the petitioner can rebut those findings through "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see also *James v. Bowersox*, 187 F.3d 866, 871 (8th Cir. 1999).

(1984), which required Mr. Harmon to show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Harmon v. State*, 2023 Ark. 179, 4 (2023). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted).

The Arkansas Supreme Court concluded that Mr. Harmon's ineffective assistance claim depended on an overly broad application of *Wilson v. Layne*, 526 U.S. 603 (1999) and that his trial attorney, who aggressively pursued suppression on other grounds, did not render ineffective assistance by failing to raise a novel argument. *Harmon v. State*, 2023 Ark. at 5 (citing W*eaver v. State*, 339 Ark. 97, 102 (1999)).

The Arkansas Supreme Court's decision was entirely reasonable. In *Wilson v. Layne*, 526 U.S. 603 (1999), homeowners sued for civil damages, claiming that officers violated their Fourth Amendment rights by bringing a photographer and reporter into their home to observe and record the execution of an arrest warrant. Ultimately, the case reached the Supreme Court,[5] which declared: "[I]t is

5. In the proceedings below, the Fourth Circuit declined to decide whether officers violated the Fourth Amendment by permitting media ride-alongs during the execution of a warrant but held that given the uncertain state of law on the issue, the defendant officers were entitled to qualified immunity. *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998). Recognizing a circuit split on whether media ride alongs infringe Fourth Amendment rights, the

a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."[6] *Id.* at 614.

Pertinent to Mr. Harmon's ineffective assistance claim, the *Wilson* Court noted: "We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." *Id.* at 614 n.2. The Court thus left open whether evidence "discovered or developed by media representatives" could be subject to suppression under the exclusionary rule. Nothing in the *Wilson* ruling suggests that media presence alone would warrant the suppression of evidence seized by law enforcement.

Supreme Court granted certiorari. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages.").

6. The *Wilson* Court based its holding on the "overriding respect for the sanctity of the home embedded in our traditions since the origins of the Republic" and the fact that the presence of reporters at the home was unrelated to an objective of the authorized intrusion. *Wilson v. Layne*, 526 U.S. 603, 610-613 (1999). However, because the state of the law was not clearly established at the time of the search in *Wilson*, the Supreme Court held that the defendant officers in that case were entitled to qualified immunity.

Appendix C

Mr. Harmon does not contend that the HBO film crew present during the search of his home discovered or developed evidence, and he acknowledges that "the filmmakers were not acting in aid of the search, but rather were there for commercial purposes." *Doc. 1 at 21.* Instead, he faults his attorney for failing to move for the suppression of evidence that would have been seized by law enforcement with or without the film crew present.

The exclusionary rule deters police misconduct by preventing the use of evidence gained because of such conduct. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (explaining that a condition of applying the exclusionary rule is that a constitutional violation was a "but-for" cause of obtaining evidence). In this case, the film crew's presence may have infringed Mr. Harmon's Fourth Amendment rights, but it did not render the evidence seized a product of unlawful police conduct. *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (citations omitted) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."). Especially given the lack of any connection between the discovery and seizure of inculpatory evidence and the HBO film crew's presence during the search, the Arkansas Supreme Court reasonably rejected Mr. Harmon's ineffective assistance claim, and the decision is entitled to deference under § 2254(d).

IV. Conclusion

IT IS THEREFORE RECOMMENDED that:

1. Petitioner Rodney Dale Harmon's § 2254 Petition for Writ of Habeas Corpus (*Doc. 1*) be DISMISSED with prejudice.

2. A Certificate of Appealability be DENIED. *See* 28 U.S.C. § 2253(c)(2); Rule 11(a), Rules Governing § 2254 Cases in United States District Courts.

APPENDIX D — OPINION OF THE SUPREME COURT OF ARKANSAS, FILED DECEMBER 7, 2023

SUPREME COURT OF ARKANSAS.

RODNEY DALE HARMON,

Appellant,

v.

STATE OF ARKANSAS,

Appellee.

No. CR-23-160

|

Opinion Delivered: December 7, 2023

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Rehearing Denied January 25, 2024

OPINION

RHONDA K. WOOD, Associate Justice

Rodney Dale Harmon was convicted of multiple drug-related felonies and sentenced to forty years in prison. On direct appeal, Harmon challenged several rulings, including an issue about the presence of an HBO documentary film crew during the execution of a search warrant at his home. We affirmed. Harmon filed a petition for postconviction relief under Arkansas Rule of Criminal

Procedure 37. He centered his claims on issues involving the presence of the film crew during the search. The circuit court denied the petition in a written order without a hearing. Harmon appeals and we affirm.

I. Factual Background

Details of this case can be found in our opinion from Harmon's direct appeal. *Harmon v. State*, 2020 Ark. 217, 600 S.W.3d 586. Briefly, in 2015, law enforcement officers obtained a search warrant for Harmon's residence. Present during the search was an HBO film crew making a documentary called *Meth Storm*. Law enforcement seized drugs, paraphernalia, and firearms. Harmon was charged with a series of drug-related offenses. Well into the case, the State informed defense counsel about the film crew's presence at the search. This began an extended discovery dispute about who was responsible—the State or defense—for obtaining the footage of the search. Ultimately, the footage could not be obtained, nor was it included in the documentary.

Harmon was tried, convicted, and sentenced to forty years' imprisonment. We affirmed on direct appeal. *Id.* Subsequently, Harmon petitioned for postconviction relief under Rule 37. He raised claims related to the presence of the film crew at the search. The circuit court denied the petition and now Harmon appeals. We affirm.

II. Law and Analysis

We review the circuit court's grant or denial of postconviction relief for clear error. *Sales v. State*, 2014 Ark. 384, 441 S.W.3d 883. 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. *Id.*

A. Fundamental Trial Error

Harmon's first claim is one of an alleged Fourth Amendment trial error. We have consistently held that Rule 37 cannot be used to raise questions of trial error, even those involving alleged constitutional violations. *Lane v. State*, 2019 Ark. 5, at 5, 564 S.W.3d 524, 529. On an exceedingly rare occasion, there is a claim of trial error so fundamental that the judgment becomes subject to collateral attack. *Collins v. State*, 324 Ark. 322, 327, 920 S.W.2d 846, 848 (1996). (explaining the right to trial by a twelve-member jury is fundamental and subject to consideration in a Rule 37 petition). Harmon contends the violation here is one such fundamental violation.

Harmon argues that the presence of the HBO documentary film crew during the search of his home violated his Fourth Amendment rights as explained in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).[1] In *Wilson*, police invited a reporter

1. This argument is separate and independent from Harmon's *Wilson*-based ineffective-assistance claim discussed below.

and a photographer to accompany them while executing an arrest warrant in a private home. *Id.* The residents of the home sued the officers in their personal capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and 42 U.S.C. § 1983, arguing that the officers violated their Fourth Amendment rights. *Wilson*, 526 U.S. at 608, 119 S.Ct. 1692. The United States Supreme Court held that the "media ride-along" indeed violated the Wilsons' Fourth Amendment rights, but that the officers had qualified immunity because the illegality of such conduct was not clearly established at the time of the search. *Id.* at 617, 119 S.Ct. 1692.

Harmon contends that the filmmakers' similar presence at the search of his home violated his Fourth Amendment rights and article 2, section 15 of the Arkansas Constitution. He believes this is a fundamental trial error that mandates his convictions be reversed. Yet, we disagree. "[A] constitutional violation is not in itself enough to trigger application of Rule 37." *Cotton v. State*, 293 Ark. 338, 339, 738 S.W.2d 90, 91 (1987). Despite his argument, this court has consistently held that evidentiary issues, including claims that evidence may have been obtained by illegal search or seizure, are not errors of such a fundamental nature as to void the judgment. *See, e.g.*, *Williams v. State*, 2019 Ark. 289, at 3, 586 S.W.3d 148, 152 ("Claims of an illegal search . . . cannot be raised in a Rule 37 proceeding."); *Munnerlyn v. State*, 2014 Ark. 27, at 3, 2014 WL 260986 (per curiam) ("[T]he issue of whether there was evidence obtained by an illegal search in his case is not an issue of such fundamental nature that the judgment entered against petitioner would be rendered void by the error."); *Green v. State*, 2013 Ark. 455, at 9, 2013 WL 5968933 (per curiam)

("This allegation of a due-process violation that is based on alleged trial error regarding the admissibility of the Report is not cognizable in Rule 37.1 proceedings."). Thus, the circuit court did not clearly err by denying Harmon's petition for postconviction relief on this issue.[2]

B. Ineffective Assistance of Counsel

We review ineffective-assistance-of-counsel claims using the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires the petitioner to show both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Holland v. State*, 2022 Ark. 138, at 2, 645 S.W.3d 318, 320. Our review of counsel's performance begins with the presumption that counsel was effective. *Id.* at 2. To overcome this presumption and show a deficiency in counsel's conduct, "[t]he petitioner has the burden of identifying specific acts and omissions that, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment." *Id.* Even where counsel's conduct and professional judgment were

2. The circuit court denied Harmon's petition on the *Wilson* issue on the basis that *Wilson* was a civil case with no bearing on a criminal Rule 37 petition. We can affirm based on the circuit court's having reached the right result even if the reasons given were different. *Gipson v. State*, 2019 Ark. 310, at 3, 586 S.W.3d 603, 605. The concurrence contends the circuit court's reason for denying this claim was correct. The concurrence is wrong. There is no authority for the concurrence's argument that Rule 37 relief can be denied solely because the petitioner cites a civil section 1983 case. Harmon raised a fundamental-rights claim, which we address according to our precedent.

deficient, the petitioner's ineffective-assistance claim will fail unless petitioner can show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Id.* Once we determine that a petition fails on one prong, we need not address the other prong under *Strickland*. *Arnold v. State*, 2022 Ark. 191, at 12, 653 S.W.3d 781, 789.

Harmon argues that trial counsel was ineffective because counsel failed to identify the *Wilson* violation and raise it as an independent ground to suppress the evidence obtained in the search of Harmon's home. We find that Harmon's trial counsel was not ineffective for failing to raise this argument. While *Wilson* is established law, the remedy for such violation in the context of a criminal trial is not. As explained above, *Wilson* was a civil suit for money damages, not a criminal-suppression case. As Harmon has not cited a single case that has excluded evidence obtained during a media ride-a-long, we cannot find that Harmon can overcome the presumption of effectiveness to meet the deficiency prong of *Strickland*. Counsel was not deficient for failing to raise a novel argument. *Weaver v. State*, 339 Ark. 97, 102, 3 S.W.3d 323, 327 ("An attorney is not ineffective for failing to raise every novel issue which might conceivably be raised."). And counsel aggressively pursued suppression of the evidence on other grounds. Thus, the circuit court was not clearly erroneous in denying relief on this claim.[3]

3. We do not address Harmon's second point concerning counsel failing to take additional steps to obtain the HBO footage as he abandoned it on appeal.

Finally, Harmon challenges the circuit court's failure to hold a hearing on his Rule 37 petition. Rule 37(a) provides that "[i]f the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records, that are relied upon to sustain the court's findings." Ark. R. Crim. P. 37.3(a). None of Harmon's arguments in his petition, nor the record of the case, show that Harmon is entitled to any relief under Rule 37. Therefore, the circuit court did not err by dismissing the petition by written order without a hearing.[4]

In sum, we cannot find that the circuit court's decision to deny Harmon relief under Rule 37 was clearly erroneous.

Affirmed.

4. The concurrence states that in this one simple paragraph, we are trying to "usurp the role of the trial court" and that we suggest "the trial court's performance was lacking." We do nothing of the sort. We cite the same rule as the concurrence and reach the same conclusion that no hearing was necessary. The concurrence's accusation is perplexing.

Special Justice David W. Parker joins.

Webb, J., concurs.

Hiland, J., not participating.

Barbara W. Webb, Justice, concurring.

I agree that the circuit court did not err in denying Rodney Dale Harmon's petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37. However, I do not agree with the majority opinion's rationale. Specifically, I would affirm the circuit court's decision to deny Harmon's first point without resorting to the right for any reason doctrine which the majority has imported from our *habeas* corpus jurisprudence and is not applicable in this case. Furthermore, while I agree that the circuit court did not err in denying Harmon's petition without conducting a hearing; the majority's analysis does not comport with our extensive case law that deals with this very issue.

In Harmon's Rule 37 petition he concedes that *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), is "a civil rights action and not a criminal case." Furthermore, without citing a single case to the contrary, he acknowledges that "several lower courts have held that such a violation of the media ride-along prohibition does not necessarily require suppression." Given Harmon's own characterization of the very precedent that he urged the circuit court to apply, it is not clearly error for the circuit court to conclude that as a matter of law—as the majority concludes disposing of Harmon's second issue—that

Wilson is a civil case with no applicability to a criminal proceeding. Contrary to Harmon's argument on appeal and in the various motions and petitions that he filed during the pendency of this appeal, the circuit court not only ruled on his petition, it did so correctly.

Regarding the denial of Harmon's Rule 37 petition without a hearing, Arkansas Rule of Criminal Procedure 37.3(a) states:

> If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings.

The circuit court's order, however succinct, complies with the requirements of Rule 37.3(a). The law is well settled that there is no need conduct a searching review of the whole record if the circuit court's order complies with the requirements of Rule 37.3(a). *See, e.g.*, *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). Furthermore, Harmon's argument regarding the lack of a hearing is not based on disputed *facts.* He is only seeking a favorable disposition of his legal arguments. Accordingly, an *evidentiary* hearing, as contemplated by Rule 37.3 is not required in this case. It is not the role of this court to usurp the role of a trial court, and the suggestion that the trial court's performance here was lacking in any meaningful way is simply wrong.

I respectfully concur.