

No. _____

In The
Supreme Court of the United States

SHAWN T. RAINER,

Petitioner,

vs.

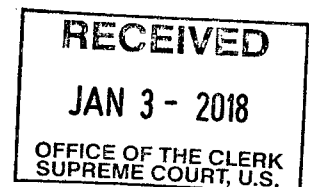
WENDY KELLEY,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

SHAWN T. RAINER
ADC 114199
P.O. Box 500
Grady, AR 71644



QUESTIONS PRESENTED FOR REVIEW

I

Should the Arkansas Supreme Court's ruling that A.R.E. 405 prohibited petitioner from admitting Ms. Douglas prior stabbing incidents violated petitioner Due Process rights to present a full and complete Defense. For the same reasons, petitioner is entitled to relief under A.E.D.P.A. defense and the District Court and 8th Circuit Court of Appeals conclusion was reversible error.

United States v. Rodriquez, 799 F.3d 1222 (2015) Chamber v. Mississippi, 410 U.S. 284, 294 (1973) Bound v. Delo, 151 F.3d 1116, 1119 (8th Cir. 1998) Nebinger v. Ault, 208 F.3d 695, 697 (8th Cir. 2000) Stallings v. Benson, 26 F.3d 817, 819 (8th Cir. 1994)

II

Since the trial judge which was also the Rule 37 hearing judge, ruled that at the end of the states argument trial counsel who was also the counsel on the direct appeal, should have renewed his objection where he could properly weigh both parties argument was failure to raise this Due Process claim either ineffective assistance of trial counsel or counsel on direct appeal.

Strickland v. Washington, 466 U.S. 668, 688 (1984) Kenley v. Armontrout, 937 F.2d 1298, 1301 (8th Cir. 1991) Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1998) Riley v. Wyrick, 712 F.2d 382, 385 (8th Cir. 1983)

PARTIES TO THE PROCEEDINGS

Shawn T. Rainer #114199 Petitioner
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United States

Solicitor General
Department of Justice

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceedings	ii
Table of Authorities	vi
Citations of Opinions and Orders in Case.....	1
Jurisdiction	1
Existence of Jurisdiction Below.....	2
Constitutional and Statutory Provisions In- volved.....	3
Statement of the Case	4
Course of Proceedings in the Section 2255 Case Before the Court.....	12
Reason for Granting the Petition Standard of Re- view.....	12
A. 2254 AEDPA Standard	12
B. The Pre-AEDPA Standard Applies to Mis- interpreted Claim	13
C. Deference Can Be Applied To The Circuit Court's Decision When the State Supreme Court fails to address the issue.....	15
D. Conclusion	16

TABLE OF CONTENTS – Continued

	Page
I. The Arkansas Supreme Court’s ruling that A.R.E 405 prohibited petitioner from admitting Ms. Douglas’s prior stabbing incidents, violated petitioner’s due process rights to present a full and complete defense for the same reasons, petitioner is entitled to relief under AEDPA deference and the District Court and 8th Circuit Court’s conclusion was reversible error	17
II. The Failure to raise this due process claim was either ineffective assistance of trial counsel or counsel on direct appeal.....	23
Conclusion.....	37

APPENDIX

Court of Appeals Opinion filed August 1, 2017 ..	App. 1
District Court Judgment filed February 2, 2016 ...	App. 23
District Court Order Adopting Proposed Findings and Recommendations filed February 2, 2016	App. 24
District Court Proposed Findings and Recommendations Instructions filed December 23, 2015	App. 26
District Court Order Adopting Proposed Findings and Recommendations filed October 14, 2015	App. 37

TABLE OF CONTENTS – Continued

	Page
District Court Proposed Findings and Recommendations Instructions filed September 18, 2015	App. 39
Supreme Court of Arkansas Dissenting Opinion on Denial of Rehearing filed September 11, 2014	App. 59
Supreme Court of Arkansas Opinion filed June 26, 2014	App. 62
Circuit Court of Mississippi County, Arkansas Order on Rule 37.1 filed July 22, 2013.....	App. 89
Circuit Court of Mississippi County, Arkansas Petition for Post-Conviction Relief Pursuant to Ark. R. Crim. P. 37.1 filed March 5 2013	App. 91

TABLE OF AUTHORITIES

	Page
CASES:	
Abernathy v. Hobbs, 748 F.3d 813 (8th Cir. 2014)	12
Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995)	24
Argo v. Buck, 59 Ark. App. 182, 954 S.W.2d 949 (1997)	30
Armstrong v. Kemna, 365 F.3d 622 (8th Cir. 2004)	13
Blakely v. Kelley, 2015 U.S. Dist. LEXIS 87979 (E.D. Ark. Apr. 2, 2015)	25
Blumberg v. Garcia, 687 F.Supp.2d 1074 (C.D. Cal. 2009)	16
Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009)	12
Bounds v. Delo, 151 F.3d 1116 (8th Cir. 1998)	18
Buckley v. State, 349 Ark. 53, 76 S.W.3d 825 (2002)	22
California v. Trombetta, 467 U.S. 479 (1984)	17
Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002)	14
Chambers v. Mississippi, 410 U.S. 284 (1973)	17
Collins v. Auger, 577 F.2d 1107 (8th Cir. 1978)	25
Cox v. Burger, 398 F.3d 1025 (8th Cir. 2005)	13
Crane v. Kentucky, 476 U.S. 683 (1986)	17, 21, 31
DeBerry v. Portuondo, 403 F.3d 57 (2d Cir. 2005)	13, 14
Garrison v. Burt, 637 F.3d 849 (8th Cir. 2011)	12
Gregory v. Carroll, 2003 U.S. Dist. Lexis 19872 (D. Del. Oct. 29, 2003)	14

TABLE OF AUTHORITIES – Continued

	Page
Harrington v. Richter, 131 S.Ct. 770 (2011).....	24
Holloway v. Arkansas, 435 U.S. 475 (1978).....	6
Holmes v. South Carolina, 547 U.S. 319 (2006)	17
Hood v. State, 329 Ark. 21, 947 S.W.2d 328 (1997).....	30
Jacobs v. State, 327 Ark. 498, 939 S.W.2d 824 (1997).....	30
Johnson v. Williams, 133 S.Ct. 1088 (2013)	13
Jones v. Barnes, 463 U.S. 745 (1983).....	28
Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).....	23
Lannert v. Jones, 321 F.3d 747 (8th Cir. 2003)	17
Link v. Luebbbers, 469 F.3d 1197 (8th Cir. 2006)	28
Logan v. Lockhart, 994 F.2d 1324 (8th Cir. 1993)....	17, 18
Mark v. Ault, 498 F.3d 775 (8th Cir. 2007).....	16
Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006).....	14
Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965).....	22
Nebinger v. Ault, 208 F.3d 695 (8th Cir. 2000).....	18
Nevada v. Jackson, 133 S.Ct. 1990 (2013).....	17
Rainer v. Kelley, 2015 U.S. Dist. Lexis 139864 (E.D. Ark. Oct. 14, 2015)	11
Rainer v. Kelley, 2015 U.S. Dist. Lexis 139866 (E.D. Ark. Sept. 18, 2015).....	11
Rainer v. Kelley, 2015 U.S. Dist. Lexis 175816 (E.D. Ark. Dec. 23, 2015)	11

TABLE OF AUTHORITIES – Continued

	Page
Rainer v. Kelley, 2016 U.S. Dist. Lexis 12264 (E.D. Ark. Feb. 2016)	12
Rainer v. State, 2012 Ark. App. 588 (2012)	4, 28
Rainer v. State, 2012 Ark. App. Lexis 798 (Dec. 5, 2012)	4
Rainer v. State, CR 12-979 (Ark. Jan. 10, 2013)	4
Riley v. Cockrell, 339 F.3d 308 (5th Cir. 2003)	14
Riley v. Wyriek, 712 F.2d 382 (8th Cir. 1983)....	25, 29, 31
Roe v. Flores-Ortega, 528 U.S. 470 (2000)	24
Rucker v. Norris, 2008 U.S. Dist. Lexis 18878 (E.D. Ark. Mar. 11, 2008)	21
Shaw v. Steele, 2011 U.S. Dist. Lexis 69553 (E.D. Mo. June 1, 2011)	25
Snethen v. Nix, 736 F.2d 1241 (8th Cir. 1984)	25
Stallings v. Benson, 26 F.3d 817 (8th Cir. 1994)	18
State v. Rainer, 2014 Ark. 306, 440 S.W.3d 315 (2014)	8, 9, 10, 14
Storey v. Roper, 603 F.3d 507 (8th Cir 2011)	14
Strickland v. Washington, 466 U.S. 668 (1984)	23, 24
Swagger v. State, 227 Ark. 45, 296 S.W.2d 204 (1965)	22
Swagger v. Zimmerman, 750 F.2d 291 (3d Cir. 1984)	14
Sweet v. Delo, 125 F.3d 1144 (8th Cir. 1997)	18

TABLE OF AUTHORITIES – Continued

	Page
Taylor v. State, 2015 Ark. 339, 470 S.W.3d 271 (2015).....	27
Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009) ...	13, 14, 15
Tornavacca v. State, 2012 Ark. 224, 408 S.W.3d 727 (2012).....	22
United States v. Lee, 2008 U.S. Dist. Lexis 109771 (E.D. Ark. Aug. 28, 2008).....	28
United States v. Rector, 2013 U.S. Dist. Lexis 156938 (W.D. Ark. Apr. 3, 2013).....	28
United States v. Rodriguez, 799 F.3d 1222 (2015).....	20
Walton v. State, 2013 Ark. 254	27
Wiggins v. Smith, 539 U.S. 510 (2003)	24
Winfield v. Roper, 460 F.3d 1026 (8th Cir. 2006).....	16
Worthington v. Roper, 631 F.3d 487 (8th Cir. 2011)	16
Ylst v. Nunnemaker, 501 U.S. 797 (1991).....	16
 STATUTES AND RULES:	
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2254	<i>passim</i>
Ark. R. App. P. Civ. 6	6, 29, 30
Ark. R. Crim. P. 37	<i>passim</i>
A.R.E. 404	6, 18, 32, 33
A.R.E. 404(b).....	5, 26, 33

TABLE OF AUTHORITIES – Continued

	Page
A.R.E. 405	<i>passim</i>
AMCI 2d 106.....	20

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgment of relief of petitioner in the United States District Court for the Mississippi District of Arkansas is attached hereto as Appendix “1”.

The original judgment of relief of petitioner was appeal to the United States Court of Appeal for the 8th Circuit, which reversed the relief, opinion attached hereto as Appendix “2”.

The report and recommendation of the United States Magistrate Judge for the Eastern District of Arkansas on Petitioner’s section 2255 is “unpublished” and attached hereto as Appendix “3”.

The opinion and order of the United States District Court for the Eastern District of Arkansas adopting the United States Magistrate Judges report and recommendation is unpublished and attached hereto as Appendix “4”.

The opinion of the United States Court of Appeals for the 8th Circuit is unpublished and is attached hereto as Appendix “5”.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 1st, 2017.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases for state courts:

The date on which the highest state court decided my case was 2014.

A copy of that decision appears at Appendix Ark. 373 440 S.W. 3d 315.

EXISTENCE OF JURISDICTION BELOW

Petitioner was indicted and convicted in the United States District Court for the Eastern District of Mississippi, County Division for 2nd Degree Murder A.C.A. 5-10-103. A section 2255 Motion was appropriately made in the convicting court and subsequently denied. A timely appeal to the United States Court of Appeal for the 8th Circuit was filed. The 8th Circuit Court denied the petition affirming the District Court for the Eastern District decision Aug. 1, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fourteenth Amendment

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

Rights to Assistance of Counsel, Sixth Amendment

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



STATEMENT OF THE CASE

Petitioner is in the custody of the Arkansas Department of Corrections, and assigned to the Cummins Unit.

On May 19th, 2011 a Mississippi County, Arkansas jury convicted Shawn Rainer of second degree murder and sentenced him to 80 years in the Arkansas Department of Correction. (47 CR09-193) [App. 595] The Judgment and Commitment Order was entered that same day. [App. 595-96] Rainer was represented at trial and on direct appeal by Jonesboro attorney William J. Stanley.

Rainer timely filed a motion for new trial on June 14, 2011, which the circuit court denied on June 23rd, 2011. [App. 598, 610] Rainer filed a notice of appeal on July 21st, 2011. [App. 274]

On direct appeal in the Arkansas Court of appeals (CR12-80), Rainer argued there was insufficient evidence to convict and thus the trial court erred in denying his motion for directed verdict and motion for new trial. [App. 209] The Court of Appeals affirmed October 24th, 2012. Rainer v. State, 2012 Ark. App. 588. [App. 315] Rainer petitioned for rehearing on November 9th, 2012, and the Court of Appeals denied his petition without opinion on December 5th, 2012. Rainer v. State, 2012 Ark. App. Lexis 798 (Dec. 5th 2012). [App. 321, 343] His petition for review in the Arkansas Supreme Court was summarily denied January 10th, 2013. Rainer v. State, CR12-979 (Ark. Jan. 10, 2013). [App. 399]

On March 5th, 2013. Rainer timely filed his state petition for post-conviction relief pursuant to Ark R. Crim. P. 37.1 in Mississippi County Circuit Court. [App. 407] He contended that trial counsel was ineffective for failing to appeal the trial court's ruling that Mr. Rainer could not put on proof of Ms. Douglas's prior conduct of stabbing others.¹ [App. 407-08] He argued that this was ineffective assistance of counsel because it denied him due process and a fair trial, [Id.]² These prior stabbings had been offered by the defense as reverse 404(b) evidence supporting the defense Ms. Douglas was running through the house with a knife chasing Petitioner like she'd done to him before, she tripped over a long twisted phone cord running throughout the house (shown in police photos in evidence), and fell and fatally stabbed herself. Rainer had nothing to do with the death.³ The State filed a written motion in limine to exclude, arguing it was irrelevant character evidence under A.R.E.

¹ There were three, probably four, prior stabbing incidents where Ms. Douglas was the aggressor with the knife. The State's written motion only mentioned one of them. They resulted in her going to jail in Michigan, Arkansas and maybe Missouri. There was also one in Mississippi County, Arkansas, where this case arose, where Petitioner was the victim, and Petitioner ask the State not to prosecute her for it. They dropped it, and now he ends up convicted instead of her.

² Rainer also argued that trial counsel was ineffective for failing to object to the case being presented to the jury as a "serious violent offender" when the defendant was actually charged as "small habitual offender." [App. 584] This second ground for relief, which the state post-conviction court held was moot, is not at issue in this appeal. [App. 588]

³ Because Rainer had a second degree murder prior, he chose not to testify at trial.

402 and 404. [App. 589] *the circuit court initially excluded them as prejudicial in an in-chambers and unreported conference on a scheduled trial date that ended up being continued for nearly a year.* In unrecorded conference. Judge Fogleman never heard both sides of evidence where he could properly weigh them.

A Rule 37 post-conviction hearing was held in Mississippi County Circuit Court on July 22nd, 2013 at which it became apparent that the court failed to make a record of the pre-trial conference and ruling which was at issue in the state post-conviction, [App. 419, 425] Thus, the court and the parties created a “bystander’s affidavit” about what happened that day. The trial counsel was witness, trial judge, and prosecutor participated in recreating what happened at the unrecorded hearing by making the “bystander record.”⁴ [App. 426]

Trial counsel testified that he was “confident” he provided the trial court with the details of all of Ms. Douglas’s prior stabbing conduct during the unrecorded motion conference.⁵ [App. 428] His memory of the details was fuzzy and he did not discuss what evidentiary rules and/or constitutional arguments he relied on at the pre-trial unrecorded hearing. However,

⁴ *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) (“[A]ttorneys are officers of the court, and “‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.’”). See Ark. R. App. P. Civ. 6 on page 28, *infra*, on recreating a record.

⁵ He had no time to file a written response to the State’s motion in limine.

trial counsel had described these prior stabbings during a trial bench conference as well:

Before we go into closing argument, prior to the case, a year ago, June, you made a ruling on a motion in limine about me bringing up any proof of Ms. Douglas's history of stabbing my client with a knife and being in prison two different times for using a knife as a weapon.

She stabbed my client six months earlier in the leg. She wasn't convicted of it because he wouldn't cooperate with the prosecutor. He said he didn't want to press charges. She has been to prison in Michigan for stabbing somebody with a knife earlier in her life and been in prison in Arkansas and Missouri for stabbing somebody with a knife.

[App. 161-63] *Trial counsel stated that this prior stabbing conduct "was pertinent to our defense to kind of thwart arguments of the State because it would show that when Rainer was on tape saying she had the knife and she fell, it was not outside her character or outside of her criminal history to stab people."* [App. 546]

Trial counsel also said he thought at the time that the court's pre-trial ruling was being made on the record, but when he received the transcript he realized it had not. [App. 548-49] *Therefore, the lack of a record is why trial counsel did not appeal this issue. And, no effort was to supplement the record.* [Id.] The beginning of my trial counsel's ineffectiveness.

As a result, Rainer's post-conviction counsel orally amended the Rule 37 petition, without objection from the State: *"I'll amend it with leave of the Court, it's got to be with leave of the Court. to say it's a straight [due] process issue because now we know why it wasn't appealed, there was no record on it."* [App. 556]

*The trial and post-conviction judge, Circuit Judge John N. Fogleman, granted Defendant's Petition for Rule 37 Relief from the bench,*⁶ and in an Order dated July 22nd, 2013, *because Rainer was denied "due process and a fair trial in violation of the constitutions."*⁷ [App. 558-60, 587-88]

The State filed its notice of appeal to the Arkansas Supreme Court on August 20th, 2013. [App. 615] The State argued on appeal that the trial court was clearly erroneous in granting the Rule 37 because: (1) the ruling was based on a reconsidered evidentiary ruling, not ineffective assistance of counsel, (2) counsel was not

⁶ In Judge Fogelman's 20+ years on the bench, on information and belief, this was the only Rule 37 he's ever granted.

⁷ Aside from the due process issues here, this is a perverse irony: Rule 37s are hardly ever granted. When this one is, the trial judge finds a defense argument moot and not necessary to be ruled on. When this is appealed by the State, the Arkansas Supreme Court holds that the defense is bound by the lack of a ruling on Ground 2, *State v. Rainer*, 2014 Ark. 306, at *15, 440 S.W.3d 315, 324 (2015) (4-3), but the Court turns around and then gives the State the benefit of an argument that it never even made or even thought of; *id.* at *8-9 & n.1, 440 S.W.3d at 331 & n.1; contrary to its own settled rules. *Id.* at *20-21, 440 S.W.3d at 326-27 (dissenting opinion). This is, we submit, is a bold example of the State court's arbitrariness in dealing with procedural default between the parties in criminal cases.

ineffective on direct appeal, (3) trial counsel's failure to ask the circuit court to reconsider its pre-trial evidentiary ruling was trial strategy, and (4) Rainer's "central claim" is an evidentiary challenge as opposed to ineffective assistance of counsel. [App. 564-78] *However, the State failed to appeal the due process issue, [Id.]* Never once mentioning a rule 405 or the Due Process.

The Arkansas Supreme Court reversed the circuit court's Rule 37 ruling granting new trial, and it reaffirmed Rainer's conviction, on June 26th, 2014. *State v. Rainer*, 2014 Ark. 306, 440 S.W.3d 315 (2014) (4-3). [App. 661-62] However, the Court misinterpreted Petitioner's argument as arguing that the failure of the court to make a record of the motion in limine hearing violated due process. *State v. Rainer*, 2014 Ark. 306, at *14-15, 440 S.W.3d at 324 (*"Next we address Rainers's contention that he is entitled to a new trial because the failure to record the motion in limine hearing constituted a due process violation."*) [App. 675] *In fact, Petitioner's argument is that trial counsel was ineffective for failing to preserve, or appellate counsel was ineffective for failing to appeal, the circuit court's ruling that Ms. Douglas's prior stabbing instances should not be admitted during trial because the trial court's ruling prevented Mr. Rainer from presenting a complete defense, in violation of the due process clause of the Fourteenth Amendment. [App. 741-42]*⁸

⁸ Petitioner makes both arguments in the alternative due to the record issues below. [App. 750-57]

Rainer timely filed a Petition for Rehearing on July 14th, 2014, which was denied on September 11th, 2014. [App. 703, 713] Only the three original dissenters issuing a further written opinion dissenting from denial of rehearing pointing out that the majority attributed an argument to the State that it never even made or thought of *State v. Rainer*, 2014 Ark. 373, at *1-2, 440 S.W.3d at 328-29 (2014) (Hart, J., dissenting with Hannah, C.J., and Baker, J.) [App. 714]:

I stand by my identification of the mistakes of law and fact that I noted in my dissent. The gross deviation from the previously settled standard of review, the abandonment of the most basic rules of argument preservation – that the argument be raised and ruled on by the trial court, and the application of an apparently new doctrine that this court may deny Rule 37 relief for any reason, are egregious enough to warrant a rehearing of this case is a grave mistake. In federal habeas corpus proceedings our procedural default jurisprudence is granted deference. We will likely lose that deference if federal habeas defendants successfully argue that we do not apply our rules consistently. The majority in this case before us has clearly deviated from the hitherto settled way in which we have procedurally limited and barred arguments raised on appeal.

First, Rainer notes in this rehearing petition, it was our settled practice to require that specific arguments are made to the circuit court before we consider the same on appeal. . . . (emphasis added) Course of Proceeding “in the section 2255 case before the Court”.

Rainer's Petition for Writ of Habeas Corpus was filed May 13th, 2015. [App. 4] The State filed its Response on June 15th, 2015 [App. 45] and Petitioner replied on July 22nd, 2015. [App. 715] On September 18th, 2015, the U.S. Magistrate Judge issued his Proposed Findings and Recommendations ordering further briefing on petitioner's fourth ground and denying petitioner's other claims. [Add. 15; App. 737] *Rainer v. Kelly*, 2015 U.S. Dist. Lexis 139866 (E.D. Ark. Sept. 18th, 2015). The District Court entered an Order adopting the proposed Findings and Recommendations on October 14th, 2015, with further briefing due 45 days later. [Add. 16; App. 738] *Rainer v. Kelly*, 2015 U.S. Dist. Lexis 139864 (E.D. Ark. Oct. 14th, 2015)

After the parties timely filed their further briefing [App. 740, 760], the Magistrate Judge entered his final Report and Recommendations on December 23rd, 2015. [Add. 18; App. 784] *Rainer v. Kelly*, 2015 U.S. Dist. Lexis 175816 (ED. Ark. Dec. 23rd, 2015). The court held it was required to defer to the Arkansas Supreme Court's decision, the Arkansas Supreme Court did not unreasonably apply U.S. Supreme Court precedent as to the due process claim, trial counsel was therefore not deficient, and the habeas petition should be denied with prejudice but a certificate of appealability should issue. [Add. 23-25; App. 789-91]

Rainer filed Objections to the December 23rd proposed findings on January 5th, 2016 and the State responded on January 12th, 2016. [App. 792, 796] The District Court adopted the magistrate's finding in all respects on February 2nd, 2016, including issuing a

certificate of appealability. [Add. 26; App. 799] *Rainer v. Kelly*, 2016 U.S. Dist. Lexis 12264 (E.D. Ark. Feb. 2nd, 2016). The corresponding Judgment was entered that same day. [App. 27; App. 800]

Rainer filed his notice of appeal on March 2, 2016. [App. 801] The Habeas Corpus was filed to the 8th Circuit Court of Appeal June 6th, 2016. The State responded Aug. 19th, 2016. Oct. 4, 2016 petitioner filed a Reply brief. March 8th, 2017 petitioner's attorney was issued an oral argument. Aug. 1st, 2017 the United States Court of Appeals denied petitioner's Habeas Corpus appeal. The Arkansas Supreme Court demonstrates a lack of understanding of the Circuit Court's ruling. A new trial was not ordered because the circuit court decided that it had incorrectly excluded evidence, that was not one of the circuit court eight findings of fact and conclusions of law.

A course of proceeding in the section 2255 case before this court.

◆

**REASON FOR GRANTING THE PETITION
STANDARD OF REVIEW**

A. 2254 AEDPA standard

On appeal from a 2254 dismissal, the district court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. *Abernathy v. Hobbs*, 748 F.3d 813, 816 (8th Cir. 2014); *Garrison v. Burt*, 637 F.3d 849, 853 (8th Cir. 2011); *Bobadilla v.*

Carlson, 575 F.3d 785, 790 (8th Cir. 2009). A § 2254 federal review of a “claim that was adjudicated on the merits in State court proceeding” is limited to an analysis of whether the state court’s decision was (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or (2) “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).

B. THE PRE-AEDPA standard applies to misinterpreted claims

If the state courts fail to adjudicate the federal claim on the merits, the pre-AEDPA standard applies: de novo review of conclusions of law and mixed questions, and clear error review of finding of facts. *Cox v. Burger*, 398 F.3d 1025, 1029 (8th Cir. 2005); *Armstrong v. Kemna*, 365 F.3d 622, 626 (8th Cir. 2004); *DeBerry v. Portuondo*, 403 F.3d 57, 67 (2d Cir. 2005); *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009). However, “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits – but that presumption can in some limited circumstances be rebutted.” *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013). For instance, merely mentioning the federal claim in passing is not necessarily sufficient. *Id.*

*Another scenario in which there is a failure to adjudicate the merits is where “the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim . . . ”*⁹ *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002). See also *Riley v. Cockrell*, 339 F.3d 308 (5th Cir. 2003); *DeBerry v. Portuondo*, 403 F.3d at 66; *Thomas*, 570 F.3d at 113; *Storey v. Roper*, 603 F.3d 507, 518 (8th Cir. 2011); *Middleton v. Roper*, 455 F.3d 838, 856 (8th Cir. 2006).

In this case, the Arkansas Supreme Court misinterpreted Petitioner’s argument as arguing that the failure of the trial court to make a record of the motion in limine hearing violated due process. State v. Rainer, 2014 Ark, 306, at* 14-15, 440 S.W.3d at 324. [App. 674-75]¹⁰ In fact, the State did not appeal Rainer’s due process claim to the Arkansas Supreme Court. *Rainer*, 2014 Ark. 306, at *6-7, 440 S.W.3d at 329-20. *Thus, the Arkansas Supreme Court did not address Petitioner’s actual due process argument* (although it mentioned it in passing before proceeding to completely misinterpret it): *that trial counsel was ineffective for failing to*

⁹ “The state courts failure to actually consider or discuss a ‘fairly presented’ federal habeas claim does not change the fact that the claim is exhausted.” See, e.g., *Gregory v. Carroll*, 2003 U.S. Dist. Lexis 19872, *7-9 (D. Del, Oct. 29th, 2003); *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984).

¹⁰ *The Magistrate Judge’s initial Proposed Findings and Recommendations correctly identified the nature of the Arkansas Supreme Court’s misinterpretation of Petitioner’s argument* [Add. 12-13; App. 734-35] However, the subsequent Proposed Findings and Recommendations appear to contain a drafting error which paraphrases and cites the dissent’s argument [Add. 20; App. 682, 786]

preserve, or appellate counsel was ineffective for failing to appeal, the circuit court's ruling that Ms. Douglas's prior stabbing instances should not be admitted during trial because the trial court's ruling prevented Mr. Rainer from presenting a complete defense, in violation of the due process clause of the Fourteenth Amendment. Clearly, then the Arkansas Supreme Court is not entitled to AEDPA deference on Petitioner's claims that are at issue in this brief.

C. Deference can be applied to the circuit court's decision when the state Supreme Court fails to address the issue.

The cases cited above involve appeals where the claim at issue was not adjudicated by any state court. *However, what about where the state court of last resort failed to adjudicate on the merits, but a lower state court did adjudicate on the merits? To Petitioner's knowledge this is a question of first impression in this Circuit. . . .* an "adjudication on the merits" can occur at any level of state court. Unlike other statutes that address federal review of state court decisions, the plain language of Section 2254(d) does not specify that the "adjudication on the merits" be from any particular state court. Compare 28 U.S.C. § 2254(d) with 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . ." (emphasis added)). Thomas, 570 F.3d at 115 (however, *the Pennsylvania Supreme Court's procedural ruling stripped the lower state court's*

substantive ruling of preclusive effect). Essentially, the federal habeas court “looks through” to the “last reasoned state decision.” See, e.g., *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Worthington v. Roper*, 631 F.3d 487, 497 (8th Cir. 2011); *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007); *Winfield v. Roper*, 460 F.3d 1026, 1037-38 (8th Cir. 2006); *Blumberg v. Garcia*, 687 F. Supp.2d 1074, 1106 (C.D. Cal. 2009). *That lower state courts’ decision – in the instant case, the Rule 37 hearing court which ruled in Petitioner’s favor on this issue – would then be analyzed under AEDPA.* *Worthington*, 631 F.3d at 497; *Mark*, 498 F.3d at 783.

D. Conclusion

The District court erred in holding that the Arkansas Supreme Court was entitled to AEDPA deference. For the reasons stated below, however, Petitioner is entitled to habeas relief regardless of whether this Court applies the AEDPA standard, reviews the Arkansas Supreme Court’s findings de novo, or gives AEDPA deference to the Rule 37 trial court’s decision granting Petitioner a new trial.

I.

The Arkansas Supreme Court's ruling that A.R.E. 405 prohibited petitioner from admitting Ms. Douglas's prior stabbing incidents violated petitioner's due process rights to present a full and complete defense. For the same reasons, petitioner is entitled to relief under AEDPA deference and the District Court's conclusion was reversible error.

Ordinarily, the admissibility of evidence is governed by state law. *Logan v. Lockhart*, 994 F.2d 1324, 1330 (8th Cir. 1993). *However, it becomes a matter for federal habeas if the "alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process."* *Id.*

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Accordingly, it is held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006); *Nevada v. Jackson*, 133 S.Ct. 1990, 1992 (2013). See also *Lannert v. Jones*, 321 F.3d 747, 753-54 (8th Cir. 2003). This not an absolute right to present whatever evidence the defendant wants. *Lannert*, 321 F.3d at 753-54. However, "[a] state court's evidentiary rulings can form the basis for federal habeas relief Under the due process clause only when they were so

conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process.” *Bounds v. Delo*, 151 F.3d 1116, 1119 (8th Cir. 1998) (citations omitted.) See also *Sweet v. Delo*, 125 F.3d 1144, 1157-58 (8th Cir. 1997); *Logan*, 994 F.2d at 1330. Thus, it is a violation of due process to exclude “critical, reliable and highly probative evidence.” *Nebinger v. Ault*, 208 F.3d 695, 697 (8th Cir. 2000). See also *Stallings v. Benson*, 26 F.3d 817, 819 (8th Cir. 1994). For instance, “significant exculpatory evidence” is “probative and critical.” *Stallings*, 26 F.3d at 819.

They filed a written pre-trial motion in limine on June 14th, 2010 to exclude the victim’s prior bad acts under A.R.E. 402 and 404. [App. 589] The Court granted the State’s motion over Petitioner’s objection but it was not recorded. [App. 424, 428] It appears though from a subsequent bench conference during the trial (May 2011) and the Rule 37 bystander’s record (July 22nd, 2013) that the court relied on 404(b). [App. 428, 512] The petitioner argued at Rule 37 that the evidentiary ruling violated his right to fair trial and due process, and the trial court agreed. “Defendant argues that this denied him due process and a fair trial in violation of the constitutions . . . As a result, the court finds defendant was denied a fair trial on Ground 1, and a new trial is granted.” [App. 587-88] The State’s argument below, that the trial court somehow found that petitioner was denied a fair trial but not denied his due process right to present a complete defense, is wholly illogical. It is clear from the Rule 37 Order that the trial court accepted the totality of petitioner’s

argument. However, the State failed to appeal the due process issue.

The Arkansas Supreme Court then subsequently reversed the trial court's Rule 37 ruling pursuant to A.R.E 405 but, as stated above, misinterpreted Petitioner's arguments and thus failed to adjudicate on the merits.¹¹

There were three separate stabbing incidents by the victim, and although the State's written motion only mention one of them, trial counsel testified during bystander's record that he was "confident" he provided the trial court with the details of all three during the unrecorded motion conference [App. 427-29], and this is undisputed. Trial counsel had described these three stabbing incidents during the trial bench conference as well [App. 161-63]:

Before we go into closing argument, prior to the case, a year ago, June, you made a ruling on a motion in limine about me bringing up any proof of Ms. Douglas's history of stabbing my client with a knife and being in prison two different times for using a knife as a weapon.

She stabbed my client six months earlier in the leg. She wasn't convicted of it because he wouldn't cooperate with the prosecutor. He said he didn't want to press charges. She has been to prison in Michigan for

¹¹ Although the Arkansas Supreme Court relied on a different state evidentiary rule than the trial court, the due process analysis is the same.

stabbing somebody with a knife earlier in her life and been in prison in Arkansas and Missouri for stabbing somebody with a knife.

The trial court's pre-trial evidentiary ruling, which was unmemorialized, and the Arkansas Supreme Court's reversal of the trial court's subsequent Rule 37 ruling (essentially affirming the initial pre-trial ruling but on different grounds). See *U.S. v. Rodriguez* never mentioning Rule 405 to the circuit or on the appeal, the state subjects appeal process that. Here, it completely hindered petitioner's ability to present his theory of the case that the victim was running after the petitioner with a knife in her hand, tripped over the phone cord, and accidentally fell on the knife. [App. 407-08, 546] She often assaulted people with knives, and it happened between them before. Indeed, she apparently went to prison in Michigan for stabbing somebody. Under the Arkansas circumstantial evidence instruction, Appellant likely would have been acquitted.

AMCI 2d 106 Circumstantial Evidence

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its

existence can reasonably be inferred from other facts proved in the case. However, circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion.

As trial counsel noted at the Rule 37 hearing, “it was pertinent to our defense to kind of thwart arguments of the State because it would show that when Rainer was on the tape saying she had the knife and she fell, it was not outside of her character or outside of her criminal history to stab people.” [App. 546] Another factor is that the testimony in the case was close, and the court almost granted a directed verdict. . . . [App. 411] Thus, this was significant exculpatory evidence, and it was critical and highly probative, but the jury heard none of it. In addition, this evidence was reliable because: (1) the incidents were reported to the police and/or Ms. Douglas was charged (as to stabbing petitioner) or convicted, and (2) trial counsel was seeking admission of police officer testimony and other documentation, i.e., certified records of conviction and medical records. [App. 426-29, 545-47] Petitioner was not able to get this evidence in through other means, so the error was not harmless. See *Rucker v. Norris*, 2008 U.S. Dist. Lexis 18878, *48 (E.D. Ark. Mar. 11, 2008) (citing *Crane*, 476 U.S. at 691).

For the above stated reasons, this Court should hold that the trial court’s Rule 37 determination of a due process violation was not contrary to or an unreasonable application of clearly established federal law and was not an unreasonable determination of the facts. In the alternative, this Court should hold, de

novo, that exclusion of this evidence under Rule 405 or any other evidentiary rule constituted a violation of due process. In the alternative, this Court should hold that the Arkansas Supreme Court's decision was contrary to or an unreasonable application of clearly established Federal law and/or an unreasonable determination of the facts.

This due process violation is sufficient, without consideration of ineffective assistance of counsel, to merit a new trial. It is well established under Arkansas law that post-conviction review is available where the petitioner is alleging a violation of fundamental rights, such as a lack of due process, which, if true, would render the judgment void. *Tornavacca v. State*, 2012 Ark. 224, *12-13, 408 S.W.3d 727, 736 (2012) (quoting *Buckey v. State*, 349 Ark. 53, 66, 76 S.W.3d 825, 833 (2002):

this court made it clear in *Swagger v. State*, 227 Ark. 45, 296 S.W.2d 204 (1965), that a judgment is void where there is an absence of due process. See also *Miller v. State*, 239 Ark. 826, 394 S.W.2d 601 (1965) (holding that the failure to observe the constitution safeguards of due process renders a criminal conviction illegal and void).

II.

The failure to raise this due process claim was either ineffective assistance of trial counsel or counsel on direct appeal.

Under *Strickland v. Washington*, an ineffective assistance of counsel claim has two components: deficient performance and prejudice. In order to establish performance, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In order to establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. As the Eighth Circuit stated in *Kenley v. Armontrout*, 937 F.2d 1298, 1301 (8th Cir. 1991):

With the prejudice test, we evaluate the outcome of the proceeding in question. The ineffective performance must create a reasonable probability that the result of the proceeding is unreliable; the ineffectiveness must undermine our confidence in the proceeding. This means more than just a conceivable effect on the outcome but something less than the oft used “more likely than not” or preponderance standards.

When conducting a *Strickland* analysis, defense counsel’s “strategy” is neither absolute nor bulletproof. Although there is a presumption that it was valid,

Strickland, 466 U.S. at 689, that presumption obviously can be overcome. *Id.* at 690-91; *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). When making strategic decisions counsel's conduct still must be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Wiggins v. Smith*, *supra*. A "post-hoc rationalization" is insufficient. *Wiggins*, 539 U.S. at 524.

Ordinarily, in the context of a § 2254 petition, the question is not "where defense counsel's performance fell below Strickland's standard" but rather "whether the state courts application of the Strickland standard was unreasonable." *Harrington v. Richter*, 131 S.Ct. 770, 778 (2011). Thus, "under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fair minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 786. However, in this case the Arkansas Supreme Court is not entitled to habeas deference, although the Rule 37 court might be. If this Court determines that the Rule 37 court is not entitled to AEDPA deference either, and thus de novo review applies, then this Court would conduct a straight Strickland analysis without the usual habeas double deference overlay.

A. Deficient performance of trial counsel

It is deficient performance for trial counsel to fail to make a meritorious objection. See e.g., *Anderson v.*

Goeke, 44 F.3d 675, 680 (8th Cir. 1995); *Blakely v. Kelley*, 2015 U.S. Dist. LEXIS 87979, *8 (E.D. Ark. Apr. 2nd, 2015). Put another way “failure to preserve a meritorious claim is ineffective assistant of counsel. . . .” *Shaw v. Steele*, 2011 U.S. Dist. Lexis 69553, *40 (E.D. Mo June 1, 2011) (citing *Riley v. Wyrick*, 712 F.2d at 386). Defense counsel’s objections must be “contemporaneous” and “adequate.” *Collins v. Auger*, 577 F.2d 1107, 1108 (8th Cir. 1978). “While it may not be necessary for a petitioner to refer to a specific provision of the Constitution, some indication of the nature of his or her constitutional claim must be given either by direct or indirect reference to federal law.” *Snethen v. Nix*, 736 F.2d 1241, 1244 (8th Cir. 1984). See also *Collins*, 577 F.2d at 1108-09.

Failure to object may be a matter of strategy, but the tactic cannot be “wholly without reason.” *Riley v. Wyrick*, 712 F.2d at 385. Thus, courts analyze whether there was a “reasonable basis” for trial counsel’s failure to object, such as the objection being inconsistent with the defense. *Id.*

In this case, it is difficult, if not impossible whether trial counsel argued that the exclusion of the victim’s prior bad acts would violate due process, and thus whether trial counsel was ineffective for failing to raise this argument. Trial counsel did not have time to file a written response to the State’s motion in limine. [App. 427] Trial counsel did an oral response, however, that evidentiary conference was inadvertently unrecorded. [App. 425, 428-29] The unrecorded evidentiary ruling subsequently came up during a trial bench

conference, however, although the parties discussed that the evidence was excluded under 404(b) there was no discussion of what other arguments the parties may have raised. [App. 161-63] Further, at the Rule 37 hearing, trial counsel discussed that he wanted the prior bad acts admitted because was vital to Petitioner's defense, that the court excluded the evidence under A.R.E. 404, and that he was "confident" he gave the trial court the necessary details regarding the prior bad acts. [App. 427-29] However, it was apparent that trial counsel had an understandably fuzzy recollection of the details (slight more than three years had elapsed), and he did not discuss what evidentiary rules and/or constitutional arguments he relied on at the pre-trial unrecorded evidentiary conference. [App. 424-31] This Court could infer from the lack of any mention of due process by trial counsel, either at the trial bench conference or during the Rule 37 hearing, that he did not raise due process at the unrecorded evidentiary conference. For the reasons discussed in Section I, a due process argument was consistent with Petitioner's defense and we have been meritorious, and thus failing to raise the argument and preserve it for appeal was deficient performance. Given the obvious centrality of the prior bad acts to Petitioner's defense, failing to argue that exclusion of the victim's prior bad acts violated due process could not have been reasonable trial strategy.

B. Deficient performance of counsel on direct appeal

On the other hand, this Court could assume that trial counsel, who clearly understood that the exclusion of the victim's prior bad acts was extraordinarily harmful to the defense, did not commit deficient performance at the pre-trial evidentiary hearing and did argue that granting the State's motion in limine would violate Petitioner's due process.[App. 427-28, 545-47] In that case, it was deficient performance to fail to raise the due process issue on direct appeal, and fail to take the necessary steps to be able to do so. To the extent Rule 37 is entitled to AEDPA deference, that court's apparent rejection of the ineffective assistance of appellate counsel argument [see App. 411-12, 447] is contrary to or an unreasonable application of clearly established Federal law or was an unreasonable determination of the facts.

The right to the effective assistance of counsel extends to direct appeal. *Taylor v. State*, 2015 Ark. 339, *5, 470 S.W.3d 271, 275 (2015). However, in order to establish deficient performance for failure to raise a claim on appeal, petitioner must show "that the issue was raised at trial, that the trial court erred in ruling on the issue, and that an argument concerning the issue could have been raised on appeal" (Id. citing *Walton v. State*, 2013 Ark. 254 (per curiam)). In other words, petitioner must establish that the argument, if raised on appeal, would have been meritorious, *Taylor*, 2015 Ark. 185, *10, 461 S.W.3d 337, 345 (2015) (per curiam.)).

Appellate counsel does not have to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *United States v. Rector*, 2013 U.S. Dist. Lexis 156938, *70 (W.D. Ark. Apr. 3, 2013). Courts assume the failure to raise a claim on appeal was strategy unless there is contrary evidence. *Rector* at *70; *United States v. Lee*, 2008 U.S. Dist. Lexis 109771, *155 (E.D. Ark. Aug. 28, 2008) “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Lee* at *156 (quoting *Link v. Luebbers*, 469 F.3d 1197, 1205 (8th Cir. 2006)).

Petitioner assumes for the purposes of this portion of the argument that trial counsel raised the due process argument during the pre-trial evidentiary conference. In addition, the trial court erred in excluding the victim’s prior bad acts because it violated due process as discussed supra in Section II. This due process argument was clearly stronger than the sufficiency of the evidence argument that was presented on direct appeal. Sufficiency of the evidence is limited to the record and viewed “in the light most favorable to the State, and deferring matters of credibility and weight to the jury. . . .” *Rainer v. State*, 2012 Ark. App. 588. On the other hand, the exclusion of the victim’s prior bad acts evidence clearly violated due process, and if admitted would have tipped an already close case. [App. 559]

The pre-trial evidentiary conference was not made on the record and counsel on direct appeal stated that was why he did not appeal that ruling. [App. 430-31] In fact, however, the improper exclusion of the victim’s

prior bad acts still could have been raised on appeal. Counsel on direct appeal was also trial counsel and so he knew the pre-trial evidentiary conference had occurred even if there was no transcript of it in the record. [Id.] Pursuant to Ark. R. App. P. Civ. 6:

If any difference arises as to whether the record truly discloses what occurred in the circuit court, the difference shall be submitted by motion to, and settled by, that court and the record shall be made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the circuit court before the record is transmitted to the appellate court, or the appellate court on motion made no later than 30 days after the appellee's brief is filed in the appellate court, or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted.

This is essentially the process utilized at the Rule 37 hearing, except all involved would have had a fresher memory of which evidentiary and/or constitutional arguments, including due process, were raised at that pre-trial hearing. If for any reason the parties were unable to recall the pre-trial evidentiary conference in sufficient detail slightly more than a year and a half had elapsed by the time the record was lodged on direct appeal Petitioner would have been entitled to a new evidentiary hearing. *Riley v. Wyrick*, 712 F.2d at 387 ("If the state is unable to . . . reconstruct the record

on accordance with its rules of procedure, it will be required to conduct a new evidentiary hearing on the matter and to use that transcript as the basis for the untimely appeal.”) See also *Jacobs v. State*, 327 Ark. 498, 502-03, 939 S.W.2d 824, 827 (1997); *Hood v. State*, 329 Ark. 21, 30, 947 S.W.2d 328, 333 (1997); *Argo v. Buck*, 59 Ark. App. 182, 185, 954 S.W.2d 949, 951 (1997):

According to Rule 6(d) of the Arkansas Rules of Appellate Procedure, if no record of the evidence or proceedings is made, the appellant may prepare a statement of the evidence or proceedings from the best means available, and the appellee may respond with amendments or objections. The trial court then settles and approves the record.

Thus, counsel on direct appeal was deficient for failing to appeal a meritorious issue which he knew was raised pre-trial, and for failing to take the steps necessary to be able to raise the issue on direct appeal.

C. Prejudice

If either trial counsel or counsel on direct appeal committed deficient performance with regards to the exclusion of the victim’s prior bad acts in violation of due process, then there is no question that Petitioner suffered Strickland prejudice. The exclusion of this evidence completely hindered Petitioner’s ability to present his theory of the case that the victim was running after the petitioner with a knife in her hand, tripped over the phone cord, and accidentally fell on the knife.

[App. 407-08, 546, 583-84] Specifically, the excluded evidence would have shown that she virtually habitually often assaulted people with knives, including stabbing Petitioner, and that she apparently went to prison in Michigan for stabbing yet somebody else. As trial counsel noted at the Rule 37 hearing, "it was pertinent to our defense to kind of thwart arguments of the State because it would show that when Rainer was on the tape saying she had the knife and she fell, if was not outside of her character or outside of her criminal history to stab people." [App. 546] In addition, "the testimony in the case was close, and the court almost granted a directed verdict. . . ." [App. 411] Petitioner was not able to get this evidence in through other means, and so the error was not harmless. See Rucker, *supra* at *48 (citing Crane, 476 U.S. at 691). "When, as here, a criminal defendant's only plausible defense rests on a motion to suppress, a fair trial depends on his counsel preserving that defense for review." Riley, 712 F.2d at 386.

In short, the due process argument not only would have been meritorious if raised by trial counsel or counsel on direct appeal for the reason discussed *supra*, there is a reasonable probability that, if the prior bad acts evidence were admitted at the original trial or a new trial, Petitioner either would have been granted motion for directed verdict or acquitted by the jury.



SUMMARY OF THE ARGUMENT

The record reveals that the State never mentioned Rule 405 at the Rule 37 hearing. In addressing the admissibility of Douglas's prior violent use of a knife, the State only argued relevance, which implicates Arkansas Rules of Evidence 401 and 402, and "prior bad acts," which involves Rule 404 subject to Rule 403 balancing. Having never mentioned Rule 405 to the circuit court, the State neither got a ruling on the issue nor has the State made a Rule 405 argument on appeal. Accordingly, the majority has violated the most basic of Arkansas appellate court principles – we do not make the appellant's argument. See, e.g., *McDaniels v. State*, 2012 Ark. App. 219, 2012 WL 1021529. Here the majority reverses on an issue that was never mentioned, much less ruled on by the circuit court, and that is not argued on appeal.

Furthermore, the majority misunderstands the purpose of Rule 405. It is not a rule that governs either exclusion or admission of character evidence – those decisions are governed by Rule 404. Rather, as title indicates, Rule 405 governs only the methods of proving character. Accordingly, the majority abandons logic when it claims that *Solomon* establishes a "principle of law" that under Rule 405(b), "specific instances of a victim's prior acts of violence are not relevant to a defense of accident." As stated in *United States v. Rodriguez* the government waived any argument that 405(b) Rule of evidence should apply. Ordinarily, we do not consider arguments raised for the first time on appeal.

The majority further errs in its review of the circuit court's finding that evidence of Douglas's prior bad acts would have been admitted under Rules 404(b) and 403 of the Arkansas Rules of Evidence, had Rainer's trial counsel sought to introduce the evidence at trial. The majority correctly notes that, pursuant to the State's motion in limine, "the circuit court excluded the testimony [about Douglas prior bad acts] under Arkansas Rule of Evidence 404." Further, the circuit court found that had Rainer's trial counsel renewed his challenge to the motion in limine it would have reversed the earlier ruling after the State presented its case because, at that time, when the context was more apparent, the circuit court would have ruled that Douglas's prior bad acts were more probative than prejudicial. Yet, the majority cites as its authority for reversing the circuit court *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996), in which this court affirmed a circuit court's exercise of discretion excluding evidence.

In *Solomon*, the appellant argued, unsuccessfully, that the proffered evidence, which the circuit court apparently excluded pursuant to Arkansas Rule of Evidence 405(b), should have been admissible under Arkansas Rule of Evidence 404(b). However, in the case before us, the majority, in making arguments for the appellant, essentially makes the same argument that the *Solomon* court rejected. The majority asserts that Douglas's prior bad acts, which the circuit court found to be admissible under Rules 404(b) and 403, should have been excluded under Rule 405(b). To the extent that *Solomon* has any applicability to the case

before us, it should be as authority to affirm the circuit court's ruling.

Further, the majority erroneously asserts that the failure by Rainer's trial counsel to renew his challenge to the State's motion in limine was "of no moment." Yet, it was the primary basis for the circuit court's decision to grant Rainer a new trial. The circuit court granted the State's motion in limine pursuant to Arkansas Rule of Evidence 404, because, the evidence seemed to malign the victim for no legitimate purpose. At the conclusion of the Rule 37 hearing, the circuit court found in its ruling from the bench.

By its very nature, this issue would have turned under Rule 403 on whether the probative value of this evidence that, because she had used a knife in the past she would use it now, whether or not it was substantially outweighed by the danger unfair prejudice because the definition of relevancy is so relaxed in the Rules of evidence which makes almost anything connected to something relevant. Because of that you get to the Rule 403 balancing, in order to balance it you have to weigh everything. A year before in chambers being told, look, this is what we want to do in a vacuum without knowing the rest of the case and how it weighs together, you know . . . If [Rainer's trial counsel] made a mistake, it was in not renewing the motion after I've heard the testimony where it's in my mind where I could properly weigh it. And after reviewing this and knowing what I know about the State's case . . . I don't really have any doubt that I would have at least allowed in the prior incident involving the two of them.

This oral ruling was translated into the circuit court's findings of fact and conclusions of law when it stated:

3. At the conclusion of the state's case, the motion should have been renewed because the context was more apparent, and the court likely would have granted it.

Clearly, the failure of Rainer's trial counsel to renew his challenge to the State's motion in limine was the issue. However, while missing the importance of the failure-to-renew issue, the majority has fixated on the circuit court's failure to make a record of the motion-in-limine hearing even though failure to make a record was not the basis for circuit court's decision to grant Rainer a new trial.

The majority has neither a sound legal nor factual basis for reversing the circuit court's grant of a new trial.

As noted previously, the circuit court found that trial counsel's ineffectiveness lay in not renewing the defense's challenge to the motion in limine at trial. The State does not directly challenge this key finding regarding Stanley's ineffectiveness. Likewise, the State does not appeal the circuit court's finding that trial counsel's failure to renew his challenge to the exclusion of Douglas's prior bad acts after the State had put on its case denied Rainer his constitutional right to present a complete defense. In fact, the State acknowledged that the "proper" time to renew Rainer's challenge to the motion-in-limine ruling was during the

trial or in the motion for a new trial. But here, the government advanced the 405(b) argument in support of the Magistrate judge, the District judge and the 8th Circuit's judgment and Petitioner had a full and fair opportunity to address in his supplemental brief whether 405(b) would apply.

Additionally, the State's assertion that trial counsel's failure to renew his challenge to the motion in limine was a matter of trial strategy was neither raised to nor ruled upon by the circuit court. Finally, the circuit court made it very clear in its order granting Rainer a new trial that its finding of ineffective assistance of counsel was not based on its reconsideration of an evidentiary ruling. Accordingly, this case should be affirmed.

The State appealed, and the Arkansas Supreme Court reversed, ascribing to the State an argument that it never made. This, petitioner submits, was entitled to no AEDPA deference because it subverts the appellate process and it holds the defense to default but does not hold the State to the same default. Alternatively, the decision is flatly contrary to clearly established Supreme Court precedent on "the right to put on a complete defense," and the District Court and the 8th Circuit erred in not granting the writ.



CONCLUSION

Petitioner Shawn T. Rainer has been deprived of basic fundamental rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and seeks relief in this court to restore those rights. Petitioner was deprived of his right to effective assistance of counsel and Due Process. Arkansas Supreme Court and the State advanced this violation through the District Court Magistrate Judge, the District Judge and the 8th Circuit Court of Appeals. Petitioner prays this Court will issue a Writ of Certiorari and reverse the judgment of the 8th Circuit Court of Appeals.¹²

Petitioner, Shawn T. Rainer, prays that this Honorable Court will issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the 8th Circuit, entered in the above proceeding on Aug. 1st, 2017.

Respectfully submitted on this 29th day of December 2017.

SHAWN T. RAINER
ADC 114199
P.O. Box 500
Grady, AR 71644

¹² If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter be remanded to the 8th Circuit Court of Appeals for reconsideration in light of this Court's opinion in Strickland, Kenley, Anderson and Riley.