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**United States Court of Appeals
For the Eighth Circuit**

No. 16-1773

Shawn Trevell Rainer,

Plaintiff-Appellant

v.

Wendy Kelley, Director, Arkansas
Department of Corrections

Defendant-Appellee

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

Submitted: March 8, 2017

Filed: August 1, 2017

Before RILEY,¹ Chief Judge, GRUENDER, Circuit
Judge, and GRITZNER,² District Judge.

¹ The Honorable William Jay Riley stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 10, 2017. He has been succeeded by the Honorable Lavenski R. Smith.

² The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

GRITZNER, District Judge.

Shawn Rainer (Rainer) was convicted of second-degree murder following a jury trial in Arkansas state court and sentenced as a habitual offender to eighty years' imprisonment. Rainer petitioned for a writ of habeas corpus under 28 U.S.C. § 2254, arguing ineffective assistance of counsel. The district court³ dismissed the petition but granted a certificate of appealability, *see* 28 U.S.C. § 2253(c)(1)-(2), on one ground. This appeal followed. We affirm.

I. BACKGROUND

On June 14, 2009, Takina Douglas, Rainer's girlfriend, placed a 911 call, telling the dispatcher she had been stabbed. First responders arrived at the apartment, but Douglas died of her injuries without communicating how she was stabbed. Rainer told law enforcement that he and Douglas had been arguing when Douglas came at him with a knife. Rainer said he and Douglas further exchanged words, then she ran down the hallway, tripped on the telephone cord, and fell on the knife.

³ The Honorable Brian S. Miller, Chief Judge, United States District Court for the Eastern District of Arkansas, adopting the report and recommendation of the Honorable Jerome T. Kearney, United States Magistrate Judge for the Eastern District of Arkansas.

A. Trial and Direct Appeal

Rainer was charged with first-degree murder in the Mississippi County Circuit Court, Arkansas Chickasawba District Criminal Division. The case proceeded to trial and the state moved in limine to exclude evidence Douglas had been incarcerated for committing assaults using knives and to exclude potential witness testimony that six months earlier, Douglas stabbed Rainer, although no charges were filed against her. During an unreported, pre-trial hearing, the circuit court granted the state's motion in limine. No record was made of the hearing or the circuit court's ruling. For other reasons, the trial was continued for almost one year.

When trial commenced, Rainer's counsel did not renew objections to the court's motion in limine ruling. No evidence or testimony regarding Douglas' past assaults with knives nor her prior attack upon Rainer came into evidence. Rainer did not testify. After the close of evidence, as the parties prepared to give their closing statements, Rainer's trial counsel brought up the circuit court's ruling in limine and requested assurances that the state would not make any statements regarding a lack of evidence to support Rainer's defense that Douglas had the knife and fell on it. It was agreed that no such statements would be made. The jury found Rainer guilty of second-degree murder. During the sentencing phase, Rainer was found to be a violent habitual offender and was sentenced to eighty years' imprisonment.

Rainer filed a motion for new trial arguing the state presented insufficient evidence to support the verdict. The circuit court denied the motion. Rainer appealed, and the sole issue on direct appeal was sufficiency of the evidence. The Arkansas Court of Appeals affirmed the conviction, *see Rainer v. State*, No. CACR 12-80, 2012 WL 5328599 (Ark. Ct. App. Oct. 24, 2012), and denied Rainer's petition for rehearing. The Arkansas Supreme Court denied his petition for review.

B. State Post-Conviction Relief Proceedings

Rainer filed a petition for post-conviction relief (PCR) under Arkansas Rule of Criminal Procedure 37.1. Represented by new counsel (PCR counsel), Rainer asserted two grounds for relief. Rainer's first ground was a claim of ineffective assistance by his trial and appellate counsel for not appealing the circuit court's ruling in limine disallowing evidence of Douglas' two assault cases that involved knives. As his second ground for relief, Rainer, who was charged with being a "small habitual offender," asserted his trial and appellate counsel provided ineffective assistance by not objecting during the sentencing phase to the presentation of evidence that he was a "serious violent offender."

The circuit court judge who presided over Rainer's trial also presided over Rainer's Rule 37 proceeding. At the Rule 37 hearing, a discussion ensued regarding the circuit court's oral ruling on the state's motion in limine. At the request of Rainer's PCR counsel, the

judge, prosecutor, and Rainer's trial counsel made a "bystander affidavit," detailing their recollection of the arguments and the oral ruling the circuit court made three years earlier. Rainer's trial counsel testified that he believed the circuit court granted the motion in limine under Arkansas Rule of Evidence 404. Thereafter, Rainer's trial counsel testified that he did not appeal the circuit court's motion in limine ruling because there was no record of the ruling. In support of ground one of the PCR petition, PCR counsel argued "the [c]ourt was incorrect in [granting the state's motion in limine] and you should reconsider that, and that's a new trial issue" that "fits all the elements of . . . the Rules of Evidence. . . ." J.A. at 442. PCR counsel reiterated, "I think the [c]ourt erred, respectfully, by not letting it come in in the first place." J.A. at 444. The circuit court asked, "[h]ow does this fit within Rule 37?" J.A. at 445. PCR counsel responded, "[i]f necessary I'll amend [the PCR petition] with leave of the Court . . . to say it's a straight process issue because now we know why it wasn't appealed, there was no record on it." *Id.* In resistance, the state argued that evidence of Douglas' propensity was irrelevant given that Rainer's defense was accident and not self defense.

Noting Rainer's trial and appellate counsel did an "excellent job defending" Rainer, J.A. at 449, the circuit court concluded that trial counsel had not been "ineffective for not appealing my [motion in limine] ruling, even had there been a record because frankly the [Arkansas] Supreme Court and the [Arkansas] Court of Appeals on those kinds of issues give such deference to

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the trial court.” J.A. at 447. The circuit court surmised that “*if* [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.” J.A. at 449 (emphasis added). The circuit court then speculated, “I have to believe that had the motion been made on the record and it had been fresh on my mind, I don’t know for certain that I would have allowed it in evidence. I don’t know for certain because I would have wanted a lot of details. . . .” J.A. 448. The circuit court reasoned, “I am not saying that every one of those things should come into evidence because at this point I don’t know enough of the details. But at the very least the prior incident between the two, I would have allowed into evidence had it been fresh on my mind and it had not been presented in the way that it was presented.” J.A. at 449-50. The circuit court announced from the bench, “[a]nd so for all of those reasons I’m granting the motion for a new trial.” J.A. at 450. The circuit court asked Rainer’s PCR counsel to prepare an order.

Within an hour of the hearing, the following written order on the Rule 37 petition was filed:

The Rule 37.1 petition came on for hearing today, July 22, 2013, and the court makes the following findings of fact and conclusions of law:

1. No proper record was made of the motion in limine where evidence was ruled out in a pretrial conference in chambers about a year before trial. That

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violates Administrative Order No. 4 because the court had a duty to have it on the record. No lawyer requested it be on the record.

2. By agreement of the parties, the record was supplemented at the hearing with the testimony of defense counsel, the prosecutor, and the recollections of the court. This was a de fact [sic] "bystanders's affidavit" where the court heard about three other incidents, one of which involved the alleged victim stabbing the defendant where he was hospitalized. There is a dispute, but it appears that he requested the state not to prosecute her for that.
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.
4. The testimony about the alleged victim having a propensity to use knives and to have previously stabbed defendant, too, on balance was probably more relevant than prejudicial and likely would have come in under [Arkansas Rule of Evidence] 403. (In any retrial, the scope of other such evidence is subject to review at retrial.)
5. Defendant argues that this denied him due process and a fair trial in violation of the constitutions. Rule 37.1(a)(i).

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6. The testimony in the case was close, and the court almost granted a directed verdict, but did not.
7. As a result, the court finds the defendant was denied a fair trial *on Ground No. 1*, and a new trial is granted. Rule 37.4.
8. Ground 2 is moot.

J.A. at 411-12 (emphasis added). Ground one was Rainer's claim for ineffective assistance of counsel *for not appealing* the circuit court's ruling in limine disallowing evidence of Douglas' two assault cases that involved knives.

The state appealed, arguing the circuit court's grant of a new trial was clearly erroneous because it was based on a reconsidered evidentiary ruling, not on ineffective assistance of counsel, which was the ground argued in Rainer's petition. The state asserted that a petitioner seeking PCR on an ineffective assistance claim must show that counsel could have made a successful argument, such that the fact-finder's decision would have been different. Rainer resisted, arguing the grant of a new trial was proper on two bases. First, "[t]he lack of any proper record of the [circuit] court's pretrial ruling on the state's motion in limine violated due process and Administrative Order No. 4 and rendered the judgment void." J.A. at 630. Second, "[t]rial counsel's failure to request reconsideration of, or make a record on, the circuit court's ruling on the state's motion in limine was ineffective assistance of counsel." J.A. at 636. In reply, the state challenged Rainer's

attempt to transform the requested relief in his Rule 37 petition – ineffective assistance of counsel for not appealing the motion in limine ruling – into relief based on due process grounds. The state further argued that unrecorded pretrial rulings and challenges to evidentiary rulings are insufficient bases to void a judgment.

With three justices dissenting, the Arkansas Supreme Court reversed the circuit court's grant of a new trial. *State v. Rainer*, 440 S.W.3d 315, 317 (2014). After recounting Rainer's trial, direct appeal, and PCR proceedings, the supreme court established that the circuit court's oral and written Rule 37 rulings on Rainer's ineffective assistance of counsel claim were reviewed under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).⁴ *State v. Rainer*, 440 S.W.3d at 317-20. The supreme court stated that an ineffective assistance of counsel claim premised on failing to make a motion or an argument requires a showing "that the motion or argument would have been meritorious because the failure to make an argument that is meritless is not ineffective assistance of counsel." *Id.* at 320 (quoting *Mitchell v. State*, No. CR 11-1204, 2012 WL 1950257, at *4 (Ark. May 31, 2012)). The supreme court noted that at trial, the circuit court excluded evidence of Douglas' prior

⁴ Under *Strickland*, a petitioner asserting ineffective assistance of counsel claims must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense, that is, counsel's errors were so serious the petitioner was deprived a fair trial. *Strickland*, 466 U.S. at 687.

bad acts involving knife violence, but after the Rule 37 hearing, the circuit court ruled specific instances of Douglas' prior bad acts may have come in under Arkansas Rule of Evidence 403. *Id.* at 320. The supreme court observed, "[t]he circuit court's decision to grant Rainer a new trial was based, in part, on its determination that the evidentiary ruling made at trial was erroneous." *Id.*

The supreme court explained that "proof of a victim's character by specific instances of conduct is admissible in cases in which character or a trait of character is an essential element of a charge, claim or defense," *id.* (citing *Solomon v. State*, 913 S.W.2d 288, 292 (1996)), but the "character trait must be 'an operative fact which under substantive law determines the rights and liabilities of the parties,'" *id.* at 321 (quoting *McClellan v. State*, 570 S.W.2d 278, 280 (Ark. 1978)). Because Rainer sought to use evidence of Douglas' prior knife violence circumstantially as proof of accident and not as evidence on a direct substantive issue, the evidence was properly excluded. *Id.* The supreme court discounted the circuit court's supposition that it might have ruled differently had trial counsel renewed the issue as being "of no moment." *Id.* The supreme court clarified that the proper standard is whether the argument or issue would have been meritorious, and because evidence of Douglas' prior conduct was not relevant to Rainer's defense of accident, "the circuit court clearly erred in concluding otherwise in its order granting Rainer's postconviction petition." *Id.*

Regarding the assertion that trial counsel was ineffective for failing to renew the objection to the motion in limine ruling, the supreme court reasoned there was no requirement to do so in order to preserve the issue for appeal. *Id.* at 322 (citing *Neal v. State*, 898 S.W.2d 440 (Ark. 1995)). Accordingly, “[t]rial counsel’s decision not to renew his objection to the motion in limine during Rainer’s trial did not fall below an objective standard of reasonableness, and was not deficient under the first *Strickland* prong.” *Id.* (internal citation omitted).

The supreme court next addressed Rainer’s contention, raised for the first time at the Rule 37 hearing, that by not appealing the circuit court’s failure to record the motion in limine hearing, trial counsel was ineffective, which constituted a due process violation. *Id.* The court first explained that Rule 37 generally does not provide a remedy for an issue that could have been raised at trial or on appeal, but there is an exception for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. *Id.* (citing *Rowbottom v. State*, 13 S.W.3d 904 (Ark. 2000)). Noting examples of fundamental error – such as double jeopardy, deprivation of a twelve-person jury, lack of jurisdiction to try the accused, prosecution’s reference to the defendant’s failure to testify, and acceptance of a plea from a defendant proceeding without counsel – the supreme court held that a trial court’s erroneous ruling on the admissibility of evidence did not fall within this exception, should be raised at trial or on direct appeal, and could not be raised for the first time in a Rule 37 petition. *Id.* at

322-23 (citing *Green v. State*, No. CR-13-517, 2013 WL 5968933, at *4 (Ark. Nov. 7, 2013) (unpublished per curiam)). The court added that “[a]ssertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal.” *Id.* at 323 (quoting *Watson v. State*, No. CR 11-148, 2012 WL 234634, at *1 (Ark. Jan. 26, 2012) (unpublished per curiam)).

Next, the supreme court rejected Rainer’s assertion his trial counsel could not have raised the circuit court’s failure to record the motion in limine hearing on direct appeal. *Id.* (“Arkansas Rule of Appellate Procedure – Civil 6 allows the appellant to prepare a statement of the evidence or proceedings from the best means available, including his recollection, if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable.”). Even if the issue could not have been raised on direct appeal, Rainer could not have shown prejudice from trial counsel’s decision not to raise the issue, because “specific instances of conduct are admissible only in cases in which character or a trait of character is an essential element of a charge, claim or defense.” *Id.*; see also *Solomon*, 913 S.W.2d at 292 (affirming the exclusion of testimony regarding the victim’s prior violent conduct toward the defendant, holding the defendant failed to meet the admissibility standard under Ark. R. Evid. 405(b) “because the victim’s violent character was not an essential element of the murder charge or of his defense of accident”). The supreme court added, “Where a defendant is claiming accident, specific instances of the victim’s character for violence are simply

irrelevant and inadmissible.” *Rainer*, 440 S.W.3d at 323. The supreme court concluded Rainer could not “show that the circuit court erred in its ruling or that the evidentiary ruling would have been sufficient to merit appellate relief,” adding, furthermore, “[t]he circuit court recognized that trial counsel was not ineffective for failing to appeal the ruling on the State’s motion in limine.” *Id.* at 323-24, 324 n.5.

The supreme court also disposed of Rainer’s contention that on due process grounds he was entitled to a new trial based on the circuit court’s failure to record the motion in limine hearing stating, “[w]here the existing record is sufficient to permit a review for errors prejudicial to the rights of the appellant, this court will not order a new trial.” *Id.* at 324. (citing *Scott v. State*, 139 S.W.3d 511, 515 (Ark. 2003)). To provide Rule 37 relief on an issue not raised at trial or on direct appeal, “the error alleged must be so fundamental as to render the judgment of conviction void and subject to collateral attack,” but that was not the circumstance in this case. *Id.* Rather, the record had “already been properly supplemented in order to recreate the motion in limine hearing, and reflects that Rainer suffered no prejudice as a result of the circuit court’s ruling.” *Id.*

As a final point, the supreme court held it would not reach Rainer’s second ground for relief regarding the serious violent offender designation because the circuit court, having found it moot, did not rule on the issue. *Id.*; see also *Strain v. State*, 423 S.W.3d 1, 6 (Ark. 2012) (per curiam) (“[T]his court cannot rule on issues where the circuit court fails to provide a ruling.”).

C. Section 2254 Proceedings

Rainer filed a petition for habeas corpus against Wendy Kelley, Director of the Arkansas Department of Corrections (the Director), asserting five grounds for relief. As ground four, Rainer asserted he was denied the opportunity to put on a complete defense, in violation of his right to due process. The magistrate judge issued proposed findings and recommendations (R&R), *see* 28 U.S.C. § 636(c), recommending that the district court deny the first, second, third, and fifth grounds for relief, and ordered further briefing on the fourth ground. No objections were filed, and the district court adopted the R&R.

After further briefing, the magistrate judge entered a second R&R recommending the court deny relief on the fourth ground, finding the Arkansas Supreme Court's decision reversing the circuit court was entitled to deference and that because the Arkansas Supreme Court did not unreasonably apply federal law, Rainer's underlying due process claim lacked merit. *Rainer v. Kelley*, 5:15-cv-00153-BSM-JTK, 2015 WL 9948257, at *3-4 (E.D. Ark. Dec. 23, 2015). The district court adopted the R&R and denied the petition but granted a certificate of appealability on the fourth ground. *Rainer v. Kelley*, 5:15-cv-00153-BSM-JTK, 2016 WL 409704, at *1 (E.D. Ark. Feb. 2, 2016). This appeal followed.

II. DISCUSSION

When considering the denial of a habeas petition, “we review the district court’s findings of fact for clear error and its conclusions of law de novo.” *Forrest v. Steele*, 764 F.3d 848, 853 (8th Cir. 2014) (quoting *Middleton v. Roper*, 455 F.3d 838, 845 (8th Cir. 2006)). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure state-court convictions are given effect to the extent possible under law.” *Id.* (quoting *Abernathy v. Hobbs*, 748 F.3d 813, 816 (8th Cir. 2014)). AEDPA limits our grant of habeas to instances in which the state’s adjudication

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

“Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be

unreasonable.” *Cole v. Roper*, 783 F.3d 707, 710 (8th Cir. 2015) (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). Moreover, the decision of a state court “may be incorrect, yet still not unreasonable, and we will grant relief only if the state court decision is both incorrect *and* unreasonable.” *Id.* (quoting *Cole v. Roper*, 623 F.3d 1183, 1187 (8th Cir. 2010)).

On appeal, Rainer argues the Arkansas Supreme Court’s ruling that Arkansas Rule of Evidence 405 prohibited Rainer from admitting evidence of Douglas’ prior stabbing incidents prevented him from presenting a full and complete defense and, therefore, violated Rainer’s right to due process. Rainer also argues failure to raise this due process claim was ineffective assistance by Rainer’s trial and appellate counsel. The Director resists, arguing Rainer did not challenge the Arkansas Supreme Court’s ruling on the exclusion of evidence of Douglas’ propensity on the basis that it violated his right to due process because it prevented him from putting on a complete defense. The Director further argues that since that issue was not before the district court, it is not preserved for appellate review; but even if it had been preserved, it is meritless. The Director similarly argues that Rainer’s ineffective assistance of counsel claim based on a failure to raise a due process violation claim at trial or on appeal was similarly not before the district court and therefore is not properly before this court on review. Again, the Director argues even if the claim were properly before this court, it is meritless. Finally, the Director argues

on de novo review this court can find Rainer's claims are meritless.

As an initial matter, we point out that Rainer's basis for PCR has repeatedly shifted without formality or amendment. The pivotal shift occurred at the Rule 37 hearing before the circuit court when Rainer's claim for ineffective assistance of trial and appellate counsel for not *appealing* the circuit court's ruling on the state's motion in limine transformed into an argument that the circuit court's allegedly incorrect evidentiary ruling deprived Rainer of a fair trial. The circuit court questioned PCR counsel as to how relief based upon this alleged error fit within Rule 37. PCR counsel asserted that "[i]f necessary I'll amend [the petition] with leave of the Court . . . to say it's a straight process issue because now we know why it wasn't appealed, there was no record on it." J.A. at 445. After reciting its recollection of events at Rainer's trial, the circuit court then announced that trial counsel had not been "ineffective for not appealing my [motion in limine] ruling," but "*if* [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." J.A. at 447, 449 (emphasis added). The circuit court then surmised that it "would have at least allowed in the prior incident involving [Douglas and Rainer]," and then made its oral ruling, stating, "for all of those reasons I'm granting the motion for a new trial." J.A. at 450. In its written order, however, the circuit court stated relief was granted on ground one of the petition – ineffective assistance of counsel for not appealing the

motion in limine ruling. J.A. at 411. PCR counsel never formally amended the petition to add a “straight process” claim. On state appellate review, PCR counsel raised an additional due process claim, alleging the circuit court’s failure to record the ruling in limine violated an administrative rule and deprived Rainer of his right to due process. PCR counsel also alleged ineffective assistance of counsel for failing to request reconsideration of, or make a record on, the motion in limine ruling.

On ground four of his § 2254 petition, Rainer attempted to disentangle his due process argument from his ineffective assistance of counsel claim, which was the basis upon which the circuit court granted relief. In ground four, Rainer asserted he was denied the opportunity to put on a complete defense, in violation of the due process clause of the Fourteenth Amendment. In his reply brief in this appeal, however, Rainer asserts his “ineffective assistance and due process claims are separate but intertwined,” and although his ineffective assistance claim requires a finding of a due process violation, the court could find a due process violation even if counsel was not ineffective. Reply 1. Mindful of this evolving framework, we review the district court’s denial of Rainer’s petition.

In the second R&R, the magistrate judge rejected Rainer’s contention that the Arkansas Supreme Court’s decision was not entitled to deference because it did not address his due process claim. *Rainer v. Kelley*, 2015 WL 9948257, at *1. The magistrate judge recommended denying Rainer’s fourth ground for relief.

Id. The magistrate judge observed that the supreme court’s opinion “mentions the claim, but analyzes it as an ineffective assistance of trial counsel claim for failing to renew the motion in limine either during trial or in a motion for a new trial.” *Rainer v. Kelley*, 2015 WL 9948257, at *2. The magistrate judge further stated, “[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,” and that only in “unusual” and limited circumstances can this presumption be rebutted. *Id.* at *3 (quoting *Johnson v. Williams*, 568 U.S. 289, 301, 302 (2013)). The magistrate judge concluded Rainer did not rebut the presumption, reasoning the supreme court’s mention of the claim “shows that the supreme court at least potentially considered it,” and therefore deference is required. *Id.* The district court adopted the R&R in all respects. *Rainer v. Kelley*, 2016 WL 409704. We agree that the Arkansas Supreme Court’s decision is entitled to deference.

The Arkansas Supreme Court not only mentions Rainer’s “straight process” claim but acknowledges PCR counsel’s oral amendment adding the claim at the Rule 37 hearing. *See State v. Rainer*, 440 S.W.3d at 319 (“*Rainer then orally amended his petition to say ‘it’s a straight process issue because now we know why it wasn’t appealed, there was no record on it.’*” (emphasis added)). However, the circuit court granted Rainer’s Rule 37 petition on ground one, which was an ineffective assistance of counsel claim, and thus that was the claim before the Arkansas Supreme Court on appeal.

Although Rainer acknowledges in his Reply on this appeal, his “ineffective assistance and due process claims are separate but intertwined,” Reply 1, Rainer faults the Arkansas Supreme Court for considering this intertwined argument as it was presented on appeal. Whether or not Rainer maintained a due process claim entirely independent of his ineffective assistance claim, Rainer did not rebut the presumption that the Arkansas Supreme Court’s decision adjudicated his due process claim on the merits, and the decision is therefore entitled to deference. *See* § 2254(d)-(e); *Nash v. Russell*, 807 F.3d 892, 897 (8th Cir. 2015) (recognizing the deferential AEDPA standard, noting this court will “take ‘only a limited and deferential review of underlying state court decisions’” (quoting *Worthington v. Roper*, 631 F.3d 487, 495 (8th Cir. 2011))).

We further hold that the district court, through the adoption of the second R&R, properly applied the deferential AEDPA standard of review to Rainer’s due process claim, concluding “the Arkansas Supreme Court did not unreasonably apply the United States Supreme Court precedent.” *Rainer v. Kelley*, 2015 WL 9948257, at *4. Under Arkansas’ rules of evidence, proof of a victim’s character is admissible “in cases in which character or a trait of character is an essential element of a charge, claim or defense.” *State v. Rainer*, 440 S.W.3d at 320-21. Rainer’s defense was accident, not self-defense. In holding the exclusion of evidence regarding Douglas’ prior assaults with knives did not violate Rainer’s right to due process, the Arkansas Supreme Court found Rainer’s evidence of Douglas’

character was not an essential element of his accident defense, and therefore was not admissible. *Id.* The supreme court went on to reason that because the exclusion of evidence was proper, Rainer's trial and appellate counsel could not have been ineffective for not renewing objections to the exclusion of that evidence, and thus Rainer's right to due process was not violated. *Id.* at 323-24.

Moreover, exclusion of evidence regarding Douglas' prior assaults with knives did not prevent Rainer from presenting his defense of accident. The trial transcript reveals the officers responding to Douglas' 911 call each testified that Rainer stated Douglas tripped and fell on the knife. *See, e.g.*, J.A. at 94, 98, 99. Rainer can be heard in the background of Douglas' recorded 911 call, which was played for the jury, saying Douglas fell on a knife. J.A. at 202. Nor would evidence of Douglas' prior assaults using knives have been relevant to counter evidence the state presented to prove its case against Rainer, which included the medical examiner's testimony that Douglas' wound was inconsistent with falling on the knife, J.A. at 134-36; that Douglas' blood was found throughout the apartment, not only in the hallway where Rainer alleged Douglas fell, J.A. at 91-92, 97, 101, 110-11, 119-20; and that Rainer's blood was found on the knife, J.A. at 92-93. In addition, an Arkansas State Crime Laboratory analyst testified that Rainer's thumb print was found on the knife. J.A. at 141. The issue before this court is whether the decision of the Arkansas Supreme Court on the question of whether Rainer was deprived of the right to a fair trial

and denied due process “was contrary to, or an unreasonable application of, clearly established federal law.” *See Williams v. Roper*, 695 F.3d 825, 831 (8th Cir. 2012). Applying that standard, we conclude it was not; therefore, Rainer is not entitled to relief.

To the extent Rainer’s intertwined claim for ineffective assistance of counsel for failing to renew objections to the circuit court’s exclusion of evidence ruling is properly before this court on appeal, the claim must be denied. The evidence was properly excluded under Arkansas law, and therefore counsel could not have been ineffective for failing to renew the issue or raise it on appeal. *See Dodge v. Robinson*, 625 F.3d 1014, 1019 (8th Cir. 2010) (finding counsel’s failure to raise a meritless claim at trial could not constitute ineffective assistance).

III. CONCLUSION

For the foregoing reasons, we affirm the denial of Rainer’s petition for writ of habeas corpus.

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

**SHAWN TREVELL RAINER
ADC #114199**

PETITIONER

v. CASE NO. 5:15CV00153 BSM

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

RESPONDENT

JUDGMENT

(Filed Feb. 2, 2016)

Consistent with the order entered on this date,
this case is hereby dismissed with prejudice.

DATED this 2nd day of February 2016.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

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

SHAWN TREVELL RAINER

ADC #114199

PETITIONER

v. CASE NO. 5:15CV00153 BSM

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

RESPONDENT

ORDER

(Filed Feb. 2, 2016)

The proposed findings and recommendations (“RD”) submitted by United States Magistrate Judge Jerome T. Kearney, petitioner’s objections thereto [Doc. No. 18], and respondent’s response [Doc. No. 19] have been reviewed. After carefully considering these documents and a *de novo* review of the record, the RD are hereby adopted in all respects.

IT IS THEREFORE ORDERED that:

1 Petitioner’s writ of habeas corpus [Doc. No. 1] is denied with prejudice because, just as petitioner’s first, second, third, and fifth grounds for relief, see Doc. No. 11, petitioner’s fourth ground for relief is without merit.

2 A certificate of appealability may, however, issue on petitioner’s fourth ground for relief because he

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has made a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253(c).

IT IS SO ORDERED this 2nd day of February 2016.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

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

SHAWN TREVELL RAINER PETITIONER
ADC #114199

V. 5:15-cv-00153-BSM-JTK

WENDY KELLEY, Director, RESPONDENT
Arkansas Department of Correction

PROPOSED FINDINGS AND
RECOMMENDATIONS INSTRUCTIONS

(Filed Dec. 23, 2015)

The following recommended disposition has been sent to United States District Court Chief Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before

the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

Petitioner Shawn Rainer, an inmate at the Arkansas Department of Correction, filed this timely petition for a writ of habeas corpus, pursuant to 28 U.S.C.

§ 2254, after a Mississippi County, Arkansas, jury found him guilty of second degree murder. (Doc. No. 1.) On October 14, 2015, the district court entered an order adopting the Court's recommended partial disposition, dismissing four of Mr. Rainer's five grounds for relief in his petition. (Doc. No. 14 (adopting Doc. No. 11)). Each party has submitted a brief addressing Mr. Rainer's remaining ground for relief (Docs. No. 15-16.) For the following reasons, the Court recommends the district court deny Mr. Rainer's petition.

I. PROCEDURAL HISTORY

The procedural history of this case is documented in detail in the Court's previous recommendation. (Doc. No. 11.) The State charged Mr. Rainer with first-degree murder for purposely stabbing Takina Douglas, causing her death. (Doc. No. 7-5 at 1.) Prior to trial, Mr. Rainer requested that the court allow him to introduce evidence that Ms. Douglas had stabbed him multiple other times to support his theory that Ms. Douglas was attempting to stab Mr. Rainer and accidentally fell on her knife. (Doc. No. 7-5 at 5.) In Mr. Rainer's post-conviction petition, pursuant to Arkansas Rule of Criminal Procedure 37.1 ("Rule 37"), he argued that "[d]efense counsel was ineffective for not appealing the trial court's ruling that he could not put on proof of Ms. Douglas's two assault cases using knives." (Doc. No. 7-8 at 7.) Within that argument, he argued that it was "ineffective assistance because it denied petitioner due process and 'a fair opportunity to defend against the State's accusations.'" (Doc. No. 7-8 at 8 (quoting

Chambers v. Mississippi, 410 U.S. 284, 294 (1973))). Without addressing the standard for ineffective assistance of counsel or Mr. Rainer's due process rights, the circuit court granted Mr. Rainer's Rule 37 petition on ground one. (Doc. No. 7-8 at 12.)

The Arkansas Supreme Court reversed the circuit court's decision over three dissenting justices. (Doc. No. 7-12.) However, the court did not analyze Mr. Rainer's right to present a full and complete defense. (*See id.*). The supreme court mentions the claim, but analyzes it as an ineffective assistance of trial counsel claim for failing to renew the motion in limine either during trial or in a motion for a new trial. (*Id.* at 22.) The dissent claimed that the State did not challenge the trial court's ruling on this issue, so it should have been affirmed. (*Id.*).

In his federal petition for a writ of habeas corpus, Mr. Rainer, through counsel, claimed that "[t]he State did not appeal the trial court's ruling that granting the State's motion in limine was ineffective assistance because it 'denied petitioner due process and a fair opportunity to present a complete defense.'" However, in the petition, his argument devolved into a discussion of whether a complete record of the motion in limine was made. (Doc. No. 1 at 38.) As such, the district court ordered further briefing on this issue, consistent with this Court's recommendation. (Doc. No. 14 (adopting Doc. No. 11 at 15)).

II. STANDARD OF REVIEW

A district court has jurisdiction to entertain writs of habeas corpus on behalf of people in custody pursuant to state court judgments. 28 U.S.C. § 2254(a) (2006). The only issue the district court may consider is whether a prisoner is in custody “in violation of the Constitution or laws or treaties of the United States.” *Id.*

A court may not grant a petition for a writ of habeas corpus unless the applicant exhausts the “remedies available in the courts of the State” prior to filing the petition. *Id.* at (b)(1)(A). A petitioner “must present his federal claims to the state courts in a timely or procedurally correct manner in order to provide the state courts an opportunity to decide the merits of those claims.” *Kennedy v. Delo*, 959 F.2d 112, 115 (8th Cir. 1992). Failure to do so will result in his claims being barred “unless [he] can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Harris v. Lockhart*, 948 F.2d 450, 452 (8th Cir. 1991) (quoting *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)).

If a petitioner raises a claim that was fairly presented and adjudicated on the merits in state court, the federal court can overturn the state court’s decision only if it

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2006). A factual determination by the state court is “presumed correct,” and a petitioner can only rebut that presumption with “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1) (2006).

III. ANALYSIS

In Mr. Rainer’s petition for a writ of habeas corpus, the only remaining ground for relief is whether 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.

To prevail on an ineffective assistance of counsel claim, a petitioner must show that “his counsel’s deficient performance prejudiced him.” *Porter v. McCollum*, 558 U.S. 30, 38 (2009); see *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner must prove his counsel was deficient by showing that “his counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The petitioner must then show that “there is a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” *Id.*

A. DEFERENCE

The first issue the Court asked the parties to brief is whether the Court should give the circuit court or supreme court deference regarding their rulings on this ground for relief.¹ (Doc. No. 11 at 13.) Mr. Rainer argues that the circuit court’s decision deserves deference because it is the last reasoned decision by a state court. (Doc. No. 15 at 2.) The Director argues that the supreme court’s reversal of the circuit court should be afforded deference. (Doc. No. 16 at 10.) The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) requires the Court to place a high deference on state courts’ decisions. *See* 28 U.S.C. § 2254(d)-(e) (2006). In order to effectuate that deference in cases where the state’s highest court summarily affirms the lower court, federal courts will give deference to the last reasoned opinion of a state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991); *Worthington v. Roper*, 631 F.3d 487, 497 (8th Cir. 2011). “When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that

¹ Although the Director briefs additional issues, the Court clearly stated in its previous order that if “a party wishes to address an additional issue other than the ones addressed above, it should file a motion explaining why it would be beneficial to brief that issue.” (Doc. No. 11 at 14.) Neither party filed a motion, nor did either party object to the Court’s previous recommendation. Therefore, the Court only considers the issues for which it ordered briefing.

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). The “unusual” circumstances that the presumption may be rebutted include when the state standard that the court applies is less protective than the federal standard, the state standard is different from the federal standard and the defendant’s papers make no effort to develop the federal claim, or if the federal precedent was simply mentioned in passing in a footnote or buried in a string citation. *Id.*

Here, Petitioner does not rebut the strong presumption that the state supreme court adjudicated this claim on the merits. The supreme court found that “Rainer contended that his trial counsel’s failure to appeal the trial court’s ruling granting the State’s motion in limine was ineffective because it ‘denied petitioner due process and a fair opportunity to present a complete defense.’” (Doc. No. 7-12 at 2.) Although it did not analyze this claim, this statement shows that the supreme court at least potentially considered it. Therefore, the Court is required to give deference to the state supreme court’s decision reversing the circuit court’s order granting Mr. Rainer a new trial.

B. THE UNDERLYING DUE PROCESS CLAIM

Before turning to the *Strickland* standard, the Court first must determine whether the underlying due process claim has merit. If the claim does not have merit, counsel cannot have been deficient for failing to

appeal the trial court's ruling on the motion in limine. *Dodge v. Robinson*, 625 F.3d 1014, 1019 (8th Cir. 2010).

The "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). However, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). This latitude is only "abridged by evidence that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (quoting *Scheffer*, 523 U.S. at 308). Typically, this rule is applied to admit evidence "proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id.* at 327.

In this case, the Arkansas Supreme Court did not unreasonably apply the United States Supreme Court precedent. Rather than show that someone else committed the crime, Mr. Rather sought to show that Ms. Douglas was running at him in an attempt to stab him, tripped, and fell on her knife. Admitting the prior instances where Ms. Douglas attempted to stab Mr. Rainer would not show that Ms. Douglas attempted to stab Mr. Rainer in this instance – rather, it would just be an attempt to prove that Ms. Douglas attempted to stab Mr. Rainer only because she had stabbed Mr. Rainer multiple times in the past. Therefore, the

Arkansas Supreme Court did not unreasonably apply federal law as determined by the United States Supreme Court, and this ground for relief has no merit.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Since Mr. Rainer's claim does not have merit, Mr. Rainer's counsel was not deficient for failing to the ruling on the motion in limine. *Dodge*, 625 F.3d at 1019. Therefore, this ground for relief should be denied.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Court, the District Court must determine whether to issue a certificate of appealability in its final order. In § 2254 cases, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)-(2) (2006).

The district court already indicated that it will not issue a certificate of appealability on Mr. Rainer's first, second, third, and fifth grounds for relief (Doc. No. 14 at 1.) However, reasonable minds could differ on the outcome of Mr. Rainer's fourth ground for relief. Therefore, the district court should grant a certificate of appealability on that ground.

V. CONCLUSION

Mr. Rainer does not present a meritorious ground for relief, and his petition for a writ of habeas corpus (Doc. No. 1) should be denied with prejudice. The district court should issue a certificate of appealability on Mr. Rainer's fourth ground for relief.

SO ORDERED this 23rd day of December, 2015.

/s/ [Illegible]
United States Magistrate Judge

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

**SHAWN TREVELL RAINER PETITIONER
ADC #114199**

v. CASE NO. 5:15CV00153 BSM

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

ORDER

(Filed Oct. 14, 2015)

The proposed findings and recommendations (“recommendations”) submitted by United States Magistrate Judge Jerome T. Kearney have been reviewed. No objections have been filed. After careful consideration, the recommendations are hereby adopted in all respects.

IT IS THEREFORE ORDERED that:

1 Petitioner Shawn Rainer’s first, second, third, and fifth grounds for relief are denied.

2 Consistent with the instructions set forth in the recommendations, the parties are directed to submit further briefings with regards to Rainer’s fourth ground for relief within forty-five days of this order. No extensions of time will be given.

3 A certificate of appealability will not issue because Rainer has not made a substantial showing of

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the denial of a constitutional right. *See* 28 U.S.C.
§ 2253(c)

IT IS SO ORDERED this 14th day of October
2015.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

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

SHAWN TREVELL RAINER PETITIONER
ADC #114199

V. 5:15-cv-00153-BSM-JTK

WENDY KELLEY, Director, RESPONDENT
Arkansas Department of Correction

PROPOSED FINDINGS AND
RECOMMENDATIONS INSTRUCTIONS

(Filed Sep. 18, 2015)

The following recommended disposition has been sent to United States District Court Chief Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before

the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

PARTIAL DISPOSITION

Petitioner Shawn Rainer, an inmate at the Arkansas Department of Correction ("ADC"), filed this timely

petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, after a Mississippi County, Arkansas, jury found him guilty of second-degree murder. (Doc. No. 7, Ex. A, at 30.) For the following reasons, the Court recommends the District Court deny Mr. Rainer's first, second, third, and fifth grounds for relief in his petition.

I. APPLICABLE FACTS

On August 3, 2009, the State filed a felony information against Mr. Rainer, charging him with first degree murder for stabbing Ms. Takina Douglas. (*Id.* at 4.) On June 14, 2010, the State filed a motion in limine, asking the court to prohibit Mr. Rainer from mentioning a previous incident where Ms. Douglas was charged with stabbing Mr. Rainer on October 18, 2008. (*Id.* at 25.) Although there is no record of the motion being heard, as explained in Part II of this Memorandum, the court ultimately granted the State's motion. (Doc. No. 7-8 at 25.)

At trial, the question for the jury was whether Mr. Rainer stabbed Ms. Douglas. (Doc. No. 7, Ex. A, at 90.) The prosecution alleged that Mr. Rainer and Ms. Douglas got in an argument that turned into a physical fight. (*Id.* at 266.) During the course of that fight, Mr. Rainer stabbed Ms. Douglas. (*Id.*). The defense argued that Ms. Douglas had the knife, fell, and landed on it. (*Id.* at 280.) In the motion for acquittal, Mr. Rainer argued that the only evidence the State presented to the jury was that Ms. Douglas was stabbed, but there was

no evidence that Mr. Rainer stabbed her. (*Id.* at 251.) The court denied Mr. Rainer's motion because (1) there was circumstantial evidence that Mr. Rainer did not call 9-1-1 after the stabbing, and (2) the medical examiner testified that it is unlikely that Ms. Douglas's stab wound to the chest was caused by falling on the knife because of the location and nature of the wound. (*Id.*).

II. PROCEDURAL HISTORY

On May 19, 2011, a Mississippi County jury found Mr. Rainer guilty of second-degree murder. (*Id.* at 290.) The jury sentenced Mr. Rainer to serve eighty years in the ADC. (*Id.* at 28.) That same day, the clerk filed the Judgment and Commitment Order in Mr. Rainer's case. (Doc. No. 30.)

On June 14, 2011, Mr. Rainer filed a motion for a new trial. (*Id.* at 32.) He argued that there was insufficient evidence to convict him of second-degree murder. (*Id.* at 33.) On July 21, 2011, the Mississippi County Circuit Court denied Mr. Rainer's motion. (*Id.* at 64.)

On July 21, 2011, Mr. Rainer filed a Notice of Appeal in the circuit court, appealing his conviction. (*Id.* at 66.) Mr. Rainer argued on appeal that the evidence at trial was insufficient to support a conviction of second-degree murder. (Doc. No. 7-2 at 143.) On October 24, 2012, the Arkansas Court of Appeals affirmed Mr. Rainer's conviction. (Doc. No. 7-5 at 1.) On November 9, 2012, Mr. Rainer petitioned the Arkansas Court of Appeals for a rehearing. (Doc. No. 7-6 at 1.) On

December 5, 2012, the court denied Mr. Rainer's petition. (*Id.* at 23.) On November 15, 2012, Mr. Rainer petitioned the Arkansas Supreme Court to review the court of appeals's decision. (Doc. No. 7-7 at 1.) On January 10, 2013, the court denied Mr. Rainer's petition. (*Id.* at 55.)

On March 5, 2013, Mr. Rainer filed a petition for post-conviction relief, pursuant to Arkansas Rule of Criminal Procedure 37 ("Rule 37 petition"). (Doc. No. 7-8 at 7.) In it, he raised two grounds for relief: (1) ineffective assistance of trial counsel for failing to appeal the trial court's ruling that Mr. Rainer could not put on proof of Ms. Douglas's two assault cases using knives, and (2) ineffective assistance of trial counsel for failing to object to the case being presented to the jury alleging Mr. Rainer was a "serious violent offender" when he was in fact a "small habitual offender." (*Id.* at 1-2.)

On July 22, 2013, the Mississippi County Circuit Court held a hearing on Mr. Rainer's Rule 37 petition. (*Id.* at 19.) At the hearing, the court realized that it did not make a record of the motion in limine during which it ruled that Ms. Douglas's two prior assault cases involving knives could not be introduced at trial. (*Id.* at 25.) Therefore, the Court made a "bystander's affidavit" of what happened at that motion in limine, with the help of both attorneys that were present. (*Id.* at 26.) At the end of the hearing, the court granted Mr. Rainer's Rule 37 petition. (*Id.* at 50.) The Court held that trial counsel was ineffective for not renewing his objection to the motion in limine to prevent Mr. Rainer from presenting Ms. Douglas's prior assault incidents

to the jury once it became apparent how they were relevant to his defense. (*Id.* at 48.) Mr. Rainer was prejudiced by this ineffectiveness because the court would have allowed him to introduce them. (*Id.*). On July 22, 2013, the court entered the order granting Mr. Rainer's Rule 37 petition and ordering a new trial. (*Id.* at 11.)

On August 20, 2013, the State filed a Notice of Appeal, appealing the circuit court's ruling on the Rule 37 petition. (*Id.* at 13.) It argued that the trial court should not have granted a new trial because the ruling was based on a reconsidered evidentiary ruling, not on ineffective assistance of counsel. (Doc. No. 7-9 at 92.) On June 26, 2014, the Supreme Court of Arkansas reversed the circuit court's ruling over three dissenting justices.¹ The court held that trial counsel was not deficient for not renewing its objection to the motion in limine because the evidence of the victim's prior conduct "was not relevant because Rainer's defense was accident," and therefore inadmissible pursuant to Rule 405. (Doc. No. 9-12 at 9.) Additionally, the court held that there is no requirement that counsel renew his objection to a motion in limine to preserve the issue for

¹ Justice Hart wrote for Justice Baker and Chief Justice Hannah that she would have affirmed the circuit court. First, she found that the majority's ruling that the evidence of Ms. Douglas's history is inadmissible under Arkansas Rule of Evidence 405 ("Rule 405") was not raised on appeal. (Doc. No. 7-12 at 19.) Second, she contends that Rule 405 was not intended to be a rule that "governs either the exclusion or admission of character evidence." (*Id.*). Lastly, she argues that the majority erred when it held that trial counsel was not deficient for failing to renew his challenge to the State's motion in limine. (*Id.* at 20-22.)

appeal, so counsel still could have appealed the evidentiary issue on direct appeal. (*Id.* at 10.) Finally, it held that the trial court's failure to record the motion in limine proceedings did not violate Mr. Rainer's due process rights because the error was not "so serious as to render the judgment of conviction void." (*Id.* at 15.) On July 14, 2014, Mr. Rainer filed a petition for rehearing in the Arkansas Supreme Court. (Doc. No. 7-13 at 11.) On September 11, 2014, the court denied the petition for rehearing over three dissenters. (Doc. No. 7-14 at 1.)

On May 13, 2015, Mr. Rainer filed this petition for a writ of habeas corpus. (Doc. No. 1.) On June 15, 2015, the Director of the ADC (the "Director") filed a response. (Doc. No. 7.) On July 22, 2015, Mr. Rainer filed a reply to the Director's response. (Doc. No. 10.)

III. STANDARD OF REVIEW

A district court has jurisdiction to entertain writs of habeas corpus on behalf of people in custody pursuant to state court judgments. 28 U.S.C. § 2254(a) (2006). The only issue the district court may consider is whether a prisoner is in custody "in violation of the Constitution or laws or treaties of the United States." *Id.*

A court may not grant a petition for a writ of habeas corpus unless the applicant exhausts the "remedies available in the courts of the State" prior to filing the petition. *Id.* at (b)(1)(A). A petitioner "must present his federal claims to the state courts in a timely or

procedurally correct manner in order to provide the state courts an opportunity to decide the merits of those claims.” *Kennedy v. Delo*, 959 F.2d 112, 115 (8th Cir. 1992). Failure to do so will result in his claims being barred “unless [he] can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Harris v. Lockhart*, 948 F.2d 450, 452 (8th Cir. 1991) (quoting *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)).

A procedural default does not bar a “substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez v. Ryan*, 132 S.Ct 1309, 1320 (2012). A “substantial claim” does not include claims that are without merit or “wholly without factual support.” *Id.* at 1319. The Eighth Circuit has applied this exception to Rule 37 petitions. *Sasser v. Hobbs*, 735 F.3d 833, 853 (2013). This exception only applies to ineffective assistance of trial counsel claims, and it is not extended to ineffective assistance of appellate counsel claims. *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014) (pet. for cert. filed, No. 14-8782 (Mar. 10, 2015)).

If a petitioner raises a claim that was fairly presented and adjudicated on the merits in state court, the federal court can overturn the state court’s decision only if it

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2006). A factual determination by the state court is “presumed correct,” and a petitioner can only rebut that presumption with “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1) (2006).

IV. ANALYSIS

In his petition, Mr. Rainer raises five grounds for relief: (a) the State did not preserve the argument that Ms. Douglas’s prior assaults were inadmissible pursuant to Rule 405, (b) ineffective assistance of trial counsel for failing to renew the motion in limine, (c) the Court should give the Arkansas Supreme Court no deference in this case because it applies its procedural rules inconsistently, in violation of the due process and equal protection clauses of the Fourteenth Amendment, (d) Mr. Rainer was denied the opportunity to put on a complete defense, in violation of the due process clause of the Fourteenth Amendment, and (e) Mr. Rainer is actually innocent. (Doc. No. 1 at 21-38.)

A. STATE PRESERVING ARGUMENT REGARDING
ARKANSAS RULE OF EVIDENCE 405

Mr. Rainer argues that the Arkansas Supreme Court's holding that the State preserved an argument that Rule 405 prohibited the admission of Ms. Douglas's prior conviction is an unreasonable determination of the facts. (Doc. No. 1 at 21.) The Director responds that the court's ruling is supported by the record. (Doc. No. 7 at 11.)

The Arkansas Supreme Court held that the State preserved the Rule 405 argument even though it never explicitly mentioned Rule 405 in its briefs. (Doc. No. 7-12 at 10 n.2.) It held that "the specific ground of an objection must be stated '*if the specific ground was not apparent from the context.*'" (*Id.* (citing Ark. R. Evid. 103(a)(1) (emphasis in original))). It found that "the State clearly argued that the proffered evidence of specific instances of the victim's conduct were not relevant to the defense of accident." (*Id.*). Therefore, the Rule 405 argument was apparent from the context. (*Id.*).

This claim is not cognizable in a federal habeas petition. Mr. Rainer argues that the state's supreme court unreasonably applied facts to a state evidentiary rule – Arkansas Rule of Evidence 103(a)(1). However, the United States Supreme Court has held multiple times that § 2254(d)(2) only applies to an unreasonable determination of facts as applied to a federal law. See *Swarthout v. Cooke*, 562 U.S. 859, 219 (2011) (reversing a lower court's granting of a petition for a writ of habeas corpus based on an unreasonable application of

facts to California's evidentiary "some evidence" rule); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (reversing a lower court's granting of a petition for a writ of habeas corpus based on an unreasonable application of facts to Indiana's sentencing law). Since Mr. Rainer's argument is that the Arkansas Supreme Court unreasonably applied the facts to an Arkansas rule of evidence, that claim is not cognizable in a federal petition for a writ of habeas corpus.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
FOR FAILING TO RENEW THE MOTION IN LIMINE

Mr. Rainer argues that his trial counsel was ineffective for failing to renew his objection to the State's motion in limine regarding Ms. Douglas's prior stabbing incidences. (Doc. No. 1 at 28.) The Director responds that the Arkansas Supreme Court's ruling on this issue properly applied the federal ineffective assistance of counsel standard to Mr. Rainer's claim. (Doc. No. 7 at 13.)

To prevail on an ineffective assistance of counsel claim, a petitioner must show that "his counsel's deficient performance prejudiced him." *Porter v. McCollum*, 558 U.S. 30, 38 (2009); see *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner must prove his counsel was deficient by showing that "his counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The petitioner must then show that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Mr. Rainer argues that his trial counsel was deficient in two ways: (1) that his trial counsel's failure to renew the motion in limine prohibited him from appealing the trial court's ruling on the motion in limine, and (2) that trial counsel should have renewed the motion in limine because it was meritorious. (Doc. No. 1 at 28-32.)

Regarding his first argument that trial counsel was deficient, Mr. Rainer argues that "there was no record of the motion ruling for an appeal to even be had." (Doc. No. 1.) The Director argues that whether or not a motion must be renewed is a question of state law that is not cognizable in a federal habeas petition. (Doc. No. 7 at 13.)

The Arkansas Supreme Court held that trial counsel was not deficient in this respect. (Doc. No. 7-12 at 10.) It held that Arkansas Rule of Appellate Procedure – Civil 6 "allows the appellant to prepare a statement of the evidence or proceedings from the best means available, including his recollection, if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable." (Doc. No. 7-12 at 13-14 (citing Ark. R. App. P.-Civ. 6(d))).² This rule

² Although this is a rule of civil appellate procedure, Arkansas Rule of Appellate Procedure – Criminal 4(a) requires "matters pertaining to . . . appeals where no stenographic record was made

essentially would allow Mr. Rainer to make a “by-stander’s affidavit,” as he did for the Rule 37 hearing. Based on the Arkansas Supreme Court’s interpretation of its own state law, Mr. Rainer could have appealed the trial court’s ruling on the motion in limine. Therefore, the Arkansas Supreme Court’s application of the *Strickland* standard is not contrary to clearly-established Supreme Court precedent, nor is it based on an unreasonable determination of the facts. This ground for relief should be denied.

Regarding his second argument that trial counsel was deficient, Mr. Rainer argues that “the trial court’s finding of deficient performance was hardly error” because “under the circumstances, it was deficient for trial counsel to fail to renew the objection.” (Doc. No. 1 at 31 (citing *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993))). The Director responds that the Arkansas Supreme Court reasonably applied *Strickland* to this argument. (Doc. No. 7 at 13-14.)

The Arkansas Supreme Court held that trial counsel was not deficient because an objection to the motion in limine would not have been meritorious. (Doc. No. 7-12 at 9.) It held that, under Rule 405, there was no ground to allow Mr. Rainer to introduce Ms. Douglas’s violent character at trial. (*Id.*). Therefore, even if Mr. Rainer’s counsel renewed its objection to the motion in limine, it would not have been a meritorious argument. (*Id.*). Counsel is not deficient for failing to renew an

[] shall be governed by the Rules of Appellate Procedure – Civil. . . .”

argument that is without merit. *Dodge v. Robinson*, 625 F.3d 1014, 1019 (8th Cir. 2010) (holding that counsel was not deficient for failing to raise a meritless double jeopardy claim); *Graves v. Ault*, 614 F.3d 501, 507 (8th Cir. 2010) (holding that trial counsel was not deficient for failing to raise meritless state law claims); *Gray v. Bowersox*, 281 F.3d 749, 756 n.3 (8th Cir. 2002) (“[B]ecause the underlying objection would have been without merit, a claim of ineffective assistance is not viable.”). Rainer argues that his objection has merit because the circuit court stated he would have granted the motion in limine. (Doc. No. 1. at 31.) However, the Court must defer to the highest state court to determine whether a state law claim has merit. *Wainwright v. Goode*, 464 U.S. 78, 83-84 (1983). Therefore, the Arkansas Supreme Court’s application of *Strickland* is not contrary to clearly established federal law as determined by the United States Supreme Court, nor did it unreasonably apply the facts to federal law. This claim should be denied.

C. DEFERENCE TO THE ARKANSAS SUPREME COURT

Mr. Rainer’s third ground for relief contends that the Arkansas Supreme Court inconsistently applies its procedural default rules, favoring the State over prisoners. (Doc. No. 1 at 11-16.) He asks for the Court to rule that the Arkansas Supreme Court gets no deference in habeas petitions because its inconsistent violations violate the Equal Protection Clause and the Due Process Clause of the Constitution. (*Id.*). The Director responds that this claim is collateral to Mr. Rainer’s

conviction, and therefore is not cognizable under habeas review. (Doc. No. 7 at 14.)

This claim is not a ground for relief under habeas review, but rather a question of statutory interpretation. The federal habeas statute does not give the Court discretion to change its standard of review of the state court based on its inconsistent application of state procedural rules. *See* 28 U.S.C. § 2254 (2006). Additionally, the United States Supreme Court does not allow a court to abandon the standard of review set forth in the statute. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 381 (2000) (“If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.”) Instead, the only recourse a petitioner has for an inconsistent application of state procedural rules come when a federal habeas petitioner’s claim is procedurally defaulted due to a state procedural rule that is either not firmly established or regularly followed. *See Oxford v. Delo*, 59 F.3d 741, 744 (8th Cir. 1995) (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). At that time, the procedural default can be excused. *See id.* However, this is not one of those cases, and the federal habeas statute does not allow the Court to reduce the amount of deference given to a state court. Therefore, this claim should be denied.

D. ABILITY TO PUT ON A COMPLETE DEFENSE

Mr. Rainer's fourth ground for relief is that he was deprived of the ability to put forth a complete defense, in violation of the due process clause and *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). (Doc. No. 1 at 36-37.) The Director's only response is that the Arkansas Supreme Court's opinion should be afforded deference. (Doc. No. 7 at 15.) Since this was presented as an ineffective assistance of counsel claim in the Rule 37 petition, the Court construes this as an ineffective assistance of counsel claim. (See Doc. No. 7-8 at 8.)

Mr. Rainer's argument is that the ineffective assistance of counsel for failing to appeal the trial court's ruling on the motion in limine deprived him of "a fair opportunity to defend against the State's accusations." (Doc. No. 7-8 at 8 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973))). The Arkansas Supreme Court appears to have misinterpreted Mr. Rainer's argument as arguing that the failure of the trial court to make a record of the motion in limine hearing violated due process. (Doc. No. 7-12 at 14-15.) However, Mr. Rainer did fairly present this claim to both the Rule 37 court and the supreme court in his brief (Doc. No. 7-8 at 8 ("Defense counsel's failure to appeal this ruling was ineffective because it denied petition due process and 'a fair opportunity to defend against the State's accusations.'" (quoting *Chambers*, 410 U.S. at 294); Doc. No. 7-10 at 17 ("The court's unmemorialized [evidentiary] ruling violated appellee's right to due process and 'a fair opportunity to defend against the State's accusations.'" (quoting *Chambers*, 410 U.S. at 294))). As this

was presented in ground one, and the Rule 37 court granted the petition for post-conviction relief on ground one, it appears that the Rule 37 court ruled in Mr. Rainer's favor on this issue. (Doc. No. 7-8 at 11-12 ("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."))

This claim has multiple issues that would benefit from further briefing:

1. Since the Arkansas Supreme Court misinterpreted Mr. Rainer's argument, how can the Court afford it the appropriate level of deference under 28 U.S.C. § 2254? Does the Rule 37 court deserve any deference on this issue?
2. Did the Arkansas Supreme Court's ruling that Rule 405 prohibited Mr. Rainer from admitting Ms. Douglas's prior stabbing incidents violate Mr. Rainer's due process right to present a full and complete defense? *See Bounds v. Delo*, 151 F.3d 1116, 1119 (8th Cir. 1998) (holding that a court may determine whether an evidentiary ruling constituted a constitutional violation).
3. Was either trial counsel or appellate counsel deficient for not raising this due process claim?

4. If either appellate counsel or trial counsel was deficient, was Mr. Rainer prejudiced by the deficiency?

The parties are instructed to brief these issues in accordance with the instructions in Part VI of this Memorandum. The Court will only entertain arguments in the parties' briefs regarding these issues. If a party wishes to address an additional issue other than the ones addressed above, it should file a motion explaining why it would be beneficial to brief that issue.

E. ACTUAL INNOCENCE

Mr. Rainer's fifth ground for relief is that he is actually innocent. (Doc. No. 1 at 38.) The Director responds that a freestanding actual innocence claim is not cognizable in a § 2254 petition, and even if it was cognizable, Mr. Rainer would not meet the high actual innocence standard. (Doc. No. 7 at 16-17.)

The Supreme Court has not decided whether to recognize a free-standing claim of actual innocence. *Dansby v. Hobbs*, 766 F.3d 809, 816 (8th Cir. 2014). If it did, it would be insufficient for a petitioner to show that it is "more likely than not that no reasonable jury would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The "extraordinarily high" standard would be even more difficult to prove. *House v. Bell*, 547 U.S. 518, 555 (2006).

Since the Supreme Court has not decided to recognize a free-standing claim of actual innocence, the

Court must hold that this claim is not cognizable in a § 2254 petition. Therefore, this claim should be denied.

Even if a freestanding actual innocence claim was cognizable, Mr. Rainer would not meet the “extraordinarily high” standard that the Supreme Court has set forth. Even if a jury heard the evidence of Ms. Douglas’s prior history, including the incident where she stabbed Mr. Rainer, a reasonable jury could still find Mr. Rainer guilty based on the testimony of the medical examiner at trial and the circumstantial evidence that Mr. Rainer was the only person with Ms. Douglas and Mr. Rainer did not call 9-1-1. Therefore, this claim should be denied.

V. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Court, the District Court must determine whether to issue a certificate of appealability in its final order. Therefore, the Court will not determine whether to issue a certificate of appealability on any of the five grounds for relief until its final order.

VI. CONCLUSION

1. The Court recommends the District Court deny Mr. Rainer’s first, second, third, and fifth grounds for relief.
2. The parties are ordered to further brief the fourth ground for relief consistent

with the instructions contained within this Memorandum. They are to submit simultaneous briefs within forty-five (45) days of this Order. No extensions for time will be given.

3. If either party wishes to brief an additional issue not addressed in this Memorandum, it should file a motion explaining why further briefing on that issue would be beneficial to the Court within twenty-one (21) days of this Order. Additionally, if either party needs to conduct discovery to complete its briefs, it should file a motion within twenty-one (21) days of this Order.

IT IS SO ORDERED this 18th day of September, 2015.

/s/ Jerome T. Kearney
United States
Magistrate Judge

App. 59

Cite as 2014 Ark. 373

SUPREME COURT OF ARKANSAS

No. CR-13-927

STATE OF ARKANSAS	Opinion Delivered
APPELLANT	September 11, 2014
V.	APPEAL FROM THE
SHAWN TREVELL RAINER	MISSISSIPPI COUNTY
APPELLEE	CIRCUIT COURT
	CHICKASAWBA
	DISTRICT
	[NO. 47CR-2009-193]
	HONORABLE JOHN N.
	FOGLEMAN, JUDGE
	<u>DISSENTING</u>
	<u>OPINION ON DENIAL</u>
	<u>OF REHEARING</u>

JOSEPHINE LINKER HART, Associate Justice

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. I, however, wish to note an additional reason why not rehearing 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 the 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 his 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. He cites as an example *Walker v. State*, 301 Ark. 218, 783 S.W. 2d 44 (1990), where this court refused to consider an argument based on Arkansas Rule of Evidence 403 when the appellant had only argued relevance to the trial court. Here, the State only argued relevance, yet the majority – on its own initiative – stated that a relevancy argument automatically preserved an argument based on Arkansas Rule of Evidence 405, which concerns methods of proving character.

Second, despite the fact that it is so well settled as to be axiomatic that we will not consider an argument raised for the first time on appeal and that preservation of an issue requires a contemporaneous objection and ruling by the trial court, the majority has chosen a different path. In the case before us the State argued to exclude evidence under Rules 402 and 404, and never broached the subject of applicability of Rule 405. Accordingly, the trial court never ruled on a Rule 405 argument. The majority's contention that it was "readily apparent" is simply not based on law or fact. As

Rainer points out, this court is bound to consider only the arguments actually raised to and ruled on by the trial court or risk jeopardizing the entirety of our procedural default law and the deference its entitled to in federal habeas because the State is getting special consideration that we have never afforded a criminal defendant.

HANNAH, C.J., and BAKER, J., join.

App. 62

Cite as 2014 Ark. 306

SUPREME COURT OF ARKANSAS

No. CR-13-927

STATE OF ARKANSAS	Opinion Delivered
APPELLANT	June 26, 2014
V.	APPEAL FROM THE
SHAWN TREVELL RAINER	MISSISSIPPI COUNTY
APPELLEE	CIRCUIT COURT,
	[NO. 47CR-2009-193]
	HONORABLE JOHN N.
	FOGLEMEN, JUDGE
	<u>REVERSED.</u>

COURTNEY HUDSON GOODSON,
Associate Justice

The State appeals a Mississippi County Circuit Court decision granting Shawn Trevell Rainer's petition for a new trial based on Arkansas Rule of Criminal Procedure 37. The circuit court granted a new trial based on its belief that, at trial, it had incorrectly excluded evidence pertinent to Rainer's defense of accident. For reversal, the State contends that the circuit court clearly erred in finding that Rainer's trial counsel was ineffective for failing to renew a challenge to the circuit court's decision granting the State's pretrial motion in limine regarding certain evidence of the victim's prior acts of violence. In addition, the State contends that the circuit court's failure to record the pretrial hearing on the motion in limine does not

amount to a due-process violation that would render Rainer's judgment of conviction void. As a threshold matter, we consider whether the State has properly brought its appeal pursuant to Ark. R.App. P. – Crim. 3 (2007). *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). We have held that because Rule 37 petitions are civil in nature, the State is not required to satisfy Rule 3. *Id.* In order to prevail on a Rule 37 petition, the petitioner must demonstrate that trial counsel was ineffective for not advancing a meritorious argument. Because the circuit court's initial decision to exclude the evidence was not in error, we must reverse the grant of postconviction relief.

The State charged Rainer with first-degree murder for the death of Takina Douglas, who died as a result of a single stab wound to the chest. A jury convicted Rainer of second-degree murder and sentenced him to eighty years' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed his conviction. *Rainer v. State*, 2012 Ark. App. 588. Subsequently, Rainer filed a motion for postconviction relief, alleging two points: (1) trial counsel was ineffective for failing to appeal a pretrial ruling granting the State's motion in limine to prohibit Rainer from mentioning that the victim had previously stabbed Rainer with a knife and had been involved in other altercations involving knives; and (2) trial counsel was ineffective for failing to object when the case was presented as involving a "serious violent offender," despite the fact that Rainer had been charged as a "small habitual offender."

With regard to his first point, Rainer contended that his trial counsel's failure to appeal the trial court's ruling granting the State's motion in limine was ineffective assistance because it "denied petitioner due process and a fair opportunity to present a complete defense." Additionally, Rainer contended that the trial court's ruling resulted in prejudice because the testimony would have been relevant to show that the victim often used knives; made his theory, that the victim tripped and fell and stabbed herself, more likely; and, it would have shown why the victim had a knife in the first place. Finally, Rainer asserted that the failure to appeal the circuit court's ruling excluding the evidence constituted ineffective assistance because it denied him due process and a fair opportunity to defend against the State's accusations.

During a hearing on Rainer's Rule 37 petition, Rainer pointed out that the pretrial motion-in-limine hearing had not been recorded. Consequently, the circuit court made a "bystander's affidavit" in an attempt to recreate what had occurred during the hearing. Trial counsel testified that, prior to trial, he had notified the prosecuting attorney that he intended to call two City of Gosnell police officers to testify about three prior incarcerations of the victim, all of which involved knife violence. Trial counsel testified that he intended to use that evidence to show that it was not outside the victim's character to stab people or to have a knife. In addition, trial counsel sought to introduce testimony that the victim had stabbed Rainer previously but was not prosecuted because Rainer would not

cooperate. According to trial counsel, either the day of or the day before trial, the prosecutor filed a motion in limine regarding testimony concerning the victim's history of knife violence. Trial counsel testified that he did not have time to prepare a written response, but he did respond orally to the motion and the case was continued. Trial counsel further testified that during the pretrial hearing, the circuit court excluded the testimony under Arkansas Rule of Evidence 404 and ruled that he could not use the victim's criminal history to support Rainer's defense of accident.

The circuit court then asked the prosecutor about the "level of detail" that trial counsel had provided regarding the victim's prior offenses. The prosecutor testified that "one had to do with a prior case that actually we had on her for stabbing Mr. Rainer." The prosecutor could not remember the details of the other cases. Trial counsel testified that he felt "confident that [he] would have given the Court the details, especially knowing the odds of the Court ruling against [him] that day."

In addition, trial counsel testified that he did not appeal on that issue because, "I thought there was a transcript, a more detailed transcript. . . . Truthfully, I didn't realize there wasn't a record on it until the transcript came back." Trial counsel testified that because there was no record on the motion-in-limine argument, he did not include it in the appeal. Rainer testified that he was "not around at the hearing when the record was supplemented."

After the circuit court had created the “bystander’s affidavit,” Rainer argued that the court erred in excluding the evidence of the victim’s prior acts of knife violence and that the evidence was admissible under Arkansas Rules of Evidence 401, 402, 403, 404, and 406. He contended that these specific instances of the victim’s conduct were relevant, explained why she had a knife, and were necessary for his defense. Rainer requested that the circuit court grant him a new trial pursuant to Rule 37. The State responded that the evidence of the victim’s prior bad acts “still has to be relevant to the defense.” The State asserted that the evidence of the victim’s prior use of knives was not relevant because Rainer was not claiming self-defense, instead, he was claiming that the victim “had a knife in her hand, tripped and fell on the knife.” The State asserted that “her reason for having the knife I think is irrelevant to the defense of accident.” Rainer acknowledged that his defense was accident, but he argued that the victim’s “own propensity to have knives, to use knives explains the whole crime, alleged crime, that there was no crime, it was an accidental death.” When asked how this issue “fit within Rule 37,” Rainer replied that “defense counsel did not appeal that issue. There was no record to appeal it because the record wasn’t made.” At that point, the circuit court stated that the responsibility to make a record falls on the court. Rainer then orally amended his petition to say “it’s a straight process issue because now we know why it wasn’t appealed, there was no record on it.”

The circuit court announced from the bench that it would grant the motion for a new trial because, "at the very least, the prior incident between the two, I would have allowed into evidence had it been fresh on my mind and it had not been presented in the way it was presented." In addition, the circuit court stated:

I don't know that [trial counsel] was ineffective for not appealing my ruling, even had there been a record because frankly the Supreme Court and the Court of Appeals on those kinds of issues give such deference to the trial court. However, of course, that doesn't at least end it. There is a question of having a fair trial. . . . And in reviewing it I remember how I was on the borderline of granting a directed verdict in regard to second-degree murder because I wasn't sure there was sufficient proof to meet the elements of second-degree murder at the time. Now, the Court of Appeals apparently had no problem with that, but I was troubled by it. And I have to believe that had the motion been made on the record and had it been fresh on my mind [I] would have, I don't know for certain that I would have allowed it in evidence. . . . If trial counsel made a mistake, it was in not renewing the motion after I've heard testimony where it's in my mind where I could properly weigh it.

After this oral pronouncement, the circuit court entered a written order granting Rainer's petition for Rule 37 relief and granting him a new trial. In its written order, the circuit court acknowledged that the court

has a duty under Administrative Order No. 4 to record trial proceedings. The circuit court also noted that the record was supplemented at the Rule 37 hearing with the testimony of trial counsel, the prosecutor, and the recollections of the trial court. The circuit court concluded that at the end 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." Finally, the circuit court concluded that the testimony regarding the victim's propensity to use knives was likely more relevant than prejudicial and "likely would have come in under A.R.E. 403." The circuit court granted Rainer's petition for Rule 37 relief on the basis that he was "denied a fair trial" because of the failure to record the pretrial motion-in-limine hearing. The circuit court ruled that the second issue, regarding Rainer's status as a "small habitual offender," was moot.

On appeal, the State contends that the circuit court's grant of Rainer's petition was clearly erroneous because the "alleged incorrectness of the evidentiary ruling," does not reach the level sufficient to render the judgment a complete nullity. In addition, the State asserts that Rainer "has not shown that counsel's representation was ineffective; rather, what he has shown is that the trial court decided that it had made an error in excluding the evidence." Further, the State maintains that a petitioner seeking postconviction relief on an ineffective-assistance claim due to the failure to make a motion or an objection must show that "counsel could have made a successful argument in order to

demonstrate . . . prejudice.” Finally, the State contends that even questions of constitutional dimension must be raised in the trial court in accordance with the controlling procedural rules, unless they are so fundamental as to void the judgment entirely. Thus, the State argues that because Rainer has failed to identify any fundamental ground sufficient to void his judgment and conviction, the circuit court clearly erred in granting his postconviction petition.

We do not reverse the grant or denial of postconviction relief unless the trial court’s findings are clearly erroneous. *Barrett, supra* (citing *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004)). 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. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On review, we assess the effectiveness of counsel under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). *Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143. In asserting ineffective assistance of counsel under *Strickland*, the petitioner must show that counsel’s performance was deficient. *Williams v. State*, 2011 Ark. 489, 385 S.W.3d 228. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the petitioner by the Sixth Amendment. *Id.* The reviewing court must indulge in a strong presumption that counsel’s conduct falls within the wide range of

reasonable professional assistance. *Scott v. State*, 2012 Ark. 199, 406 S.W.3d 1. The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.*

In order to satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Montgomery v. State*, 2011 Ark. 462, 385 S.W.3d 189. In doing so, the petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Adams v. State*, 2013 Ark. 174. There is no reason for a court deciding an ineffective-assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one. *Springs, supra*.

Where it is asserted that counsel was ineffective for failure to make a motion or argument, the petitioner must show that the motion or argument would have been meritorious because the failure to make an argument that is meritless is not ineffective assistance of counsel. *Mitchell v. State*, 2012 Ark. 242. During Rainer's trial, the circuit court excluded evidence of the victim's prior bad acts involving knife violence. After

the Rule 37 hearing, the circuit court concluded that the specific instances of the victim's prior bad acts were "probably more relevant than prejudicial and likely would have come in under [Rule] 403." The circuit court's decision to grant Rainer a new trial was based, in part, on its determination that the evidentiary ruling made at trial was erroneous.

Proof of the victim's character by specific instances of conduct is governed by our Rules of Evidence. We have acknowledged that proof of a victim's character by specific instances of conduct is admissible in cases in which character or a trait of character is an essential element of a charge, claim or defense. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996) (citing Arkansas Rule of Evidence 405(b)).¹ Such a character trait must be "an operative fact which under substantive law determines the rights and liabilities of the parties." *McClellan v. State*, 264 Ark. 223, 226, 570 S.W.2d 278, 280 (1978). In addition, we have previously recognized that a victim's violent character is not an essential element of the murder charge or of the

¹ In *Solomon*, the appellant argued that specific instances of the victim's prior acts of violence were *relevant* to the defense of accident and we rejected that argument. This court did not address any arguments regarding the admissibility of specific instances of conduct pursuant to Rule 404. Rather, we stated that, "[e]ven assuming . . . the excluded evidence was admissible under Rule 404, it was not admissible under Ark. R. Evid. 405, which governs methods of proving character." *Solomon*, 323 Ark. at 185, 913 S.W.2d at 292. The principle of law that specific instances of a victim's prior acts of violence are not relevant to a defense of accident controls, not the disposition of the case.

defense of accident. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991).

In the present case, Rainer sought to use the proffered testimony regarding three specific instances of the victim's knife violence circumstantially, as evidence of accident, rather than as evidence on a direct substantive issue. Therefore, the evidence of specific instances of the victim's prior knife violence were properly excluded during Rainer's trial. The circuit court's indication that it might have been willing to reconsider its ruling, had trial counsel renewed the issue, during trial is of no moment. The standard this court considers is whether the argument or issue would have been meritorious. *Mitchell, supra*. Here, the specific evidence of the victim's prior conduct was not relevant because Rainer's defense was accident and the circuit court clearly erred in concluding otherwise in its order granting Rainer's postconviction petition.²

² Unlike the dissent, we have no hesitation in concluding that the State made the argument that the specific instances of the victim's conduct were not relevant to Rainer's defense of accident during the Rule 37 hearing. The dissent specifically takes issue with the fact that Rule 405 was not explicitly mentioned. However, the specific ground of an objection must be stated "*if the specific ground was not apparent from the context.*" Ark. R. Evid. 103(a)(1) (emphasis added). In *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000), we rejected the State's contention that the appellant failed to preserve an argument based on Rule 404(b) because his objections at trial were premised solely on the admissibility of the evidence under Rules 402 and 403. We found that because the appellant contended that the admission of evidence would require him to defend against uncharged crimes, an argument based on Rule 404(b) was apparent from the context. Here,

Furthermore, there is no requirement that a defendant renew an objection to a motion in limine in order to preserve the issue for appeal. *See, e.g., Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995). Here, trial counsel raised the issue to the trial court by challenging the motion in limine and, consequently, cannot be ineffective for failing to raise the issue at trial. Moreover, trial counsel cannot be said to be ineffective for failing to preserve the issue for appeal because there is no requirement that a challenge to a motion in limine be renewed in order to preserve the issue for appeal. The dissent's conclusion that the failure to renew the motion in limine is a sufficient basis for finding ineffective assistance requires this court to accept that trial counsel can be ineffective for properly challenging a motion during trial and preserving an argument for appeal. This we will not do. Trial counsel's decision not to renew his objection to the motion in limine during Rainer's trial did not fall below an

the State clearly argued that the proffered evidence of specific instances of the victim's conduct were not relevant to the defense of accident. The State's 405 argument regarding the use of specific instances of the victim's conduct is apparent from the context. In addition, the circuit court ruled that the evidence was relevant under Rule 403. The circuit court's relevancy ruling is clearly erroneous because specific instances of the victim's conduct are not relevant or probative to prove a defense of accident. On appeal, the State maintains that Rainer's petition does not show that trial counsel was ineffective; rather, the order granting his petition shows that the circuit court reconsidered an evidentiary ruling. Thus, we are not making the State's argument on this point. The State has presented the argument that the evidence was not relevant and that the circuit court erred in granting a petition for postconviction relief on that basis.

objective standard of reasonableness, *Abernathy v. State*, 2012 Ark. 59, 386 S.W.3d 477 (per curiam), and was not deficient under the first *Strickland* prong.³

During the Rule 37 hearing, Rainer argued that trial counsel was ineffective because he did not appeal the circuit court's failure to record the pretrial motion-in-limine hearing and contended that the failure to record the hearing was a due-process violation. The circuit court agreed with Rainer's failure to appeal argument as well as his due-process argument. On appeal,

³ The dissent states that "[c]learly, Rainer's counsel's failure to renew his challenge to the State's motion in limine was the issue," in this case and that the circuit court made it very clear that its decision to grant Rainer's Rule 37 petition was not "based on its reconsideration of an evidentiary ruling." Yet, the dissent also chastises that the "State's assertion that trial counsel's failure to renew his motion in limine was a matter of trial strategy was neither raised nor ruled upon by the circuit court." However, the written order in this case clearly states, in relevant part:

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.

4. The testimony about the alleged victim having a propensity to use knives and to have previously stabbed defendant, too, on balance was probably more relevant than prejudicial and likely would have come in under A.R.E. 403.

Thus, it is clear that the circuit court ruled that a challenge to the motion in limine should have been renewed and that the circuit court also reconsidered its evidentiary ruling. Moreover, before this court, the State argues that "the trial court's ruling that counsel's failure to renew his motion at trial completely ignores counsel's routine expectation at trial: that he had the option to appeal the ruling in the direct appeal."

the State contends that the circuit court clearly erred because an argument based on the “alleged incorrectness” of an evidentiary ruling is not sufficient to render the judgment a complete nullity, and it should not be considered in a collateral attack on the judgment rendered at trial.

Generally, Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006) (citing *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001)). Stated another way, it is not appropriate to raise trial errors, including constitutional errors, for the first time in a Rule 37 proceeding. See *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000); *Finley v. State*, 295 Ark. 357, 748 S.W.2d 643 (1988). However, there is an exception to this general rule for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. *Rowbottom*, 341 Ark. at 37, 13 S.W.3d at 906 (double-jeopardy claim was a fundamental claim that appellant could raise for the first time in Rule 37 proceedings); see also *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996) (right to twelve-member jury is such a fundamental right that it could be raised for the first time in a Rule 37 proceeding); *Jeffers v. State*, 301 Ark. 590, 591, 786 S.W.2d 114, 114 (1990) (“ground sufficient to void a conviction must be one so basic that it renders the judgment a complete nullity, [as,] for example, a judgment obtained in a court lacking jurisdiction to try the accused. . . .”); *Miller v. State*, 239 Ark. 836, 394 S.W.2d 601 (1965) (holding on direct appeal

that the prosecuting attorney improperly commented on the defendant's failure to testify and thereby violated defendant's rights); *Swagger v. State*, 227 Ark. 45, 296 S.W.2d 204 (1956) (holding that the trial court's acceptance of a plea of guilty without the defendant having benefit of counsel violated the defendant's rights under the Fourteenth Amendment).

In *Howard*, this court held that alleged prosecutorial misconduct is an issue that should have been raised on direct appeal and is not a claim that may be raised for the first time in a Rule 37 petition. Likewise, we have acknowledged that erroneous rulings by the trial court on admissibility of evidence can be raised at trial or on direct appeal. *Rowbottom*, *supra*. This court has previously held that the allegation of a due-process violation based on alleged trial error regarding the admissibility of evidence is not cognizable in Rule 37.1 proceedings. *Green v. State*, 2013 Ark. 455 (citing *Davis v. State*, 2013 Ark. 118 (per curiam)). Assertions of trial error, even those of constitutional dimension, must be raised at trial and on appeal. *Watson v. State*, 2012 Ark. 27 (per curiam).

The petitioner who claims that appellate counsel was ineffective bears the burden of making a clear showing that counsel failed to raise some meritorious issue on appeal. *Moore v. State*, 2011 Ark. 269 (per curiam); *Howard*, *supra*. Counsel's failure to raise a specific issue must have amounted to error of such magnitude that it rendered appellate counsel's performance constitutionally deficient under the *Strickland* criteria. The petitioner must show that there could

have been a specific issue raised on appeal that would have resulted in the appellate court's declaring reversible error. *Walton v. State*, 2013 Ark. 254. It is petitioner's responsibility to establish that "the issue was raised at trial, *that the trial court erred in its ruling on the issue, and that an argument concerning the issue could have been raised on appeal to merit appellate relief.*" *Id.* at 6 (emphasis added).

Initially we note that Rainer has failed to establish that trial counsel could not have raised the circuit court's failure to record the motion-in-limine hearing on direct appeal. Arkansas Rule of Appellate Procedure – Civil 6 allows the appellant to prepare a statement of the evidence or proceedings from the best means available, including his recollection, if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable. Ark. R. App. P. – Civ. 6(d).⁴ However, were we to assume that the failure to record the motion-in-limine hearing could not have been raised on direct appeal, we would still conclude that Rainer has failed to show prejudice from counsel's decision not to raise the issue. To reiterate, specific instances of conduct are admissible only in cases in which character or a trait of character is an essential element of a charge, claim or defense. *Solomon, supra*. Where a defendant is claiming accident,

⁴ The dissent fails to acknowledge the basic principle that Rule 37 does not provide a remedy when an issue could have been raised at trial or argued on appeal. At no point does the dissent explain how Rainer was prevented from appealing the circuit court's motion-in-limine ruling.

specific instances of the victim's character for violence are simply irrelevant and inadmissible. *See, e.g., Thompson, supra*. Rainer cannot show that the circuit court erred in its ruling or that the evidentiary ruling would have been sufficient to merit appellate relief.⁵ While we commend the circuit judge for desiring to take responsibility for a perceived error, his initial ruling was actually correct because the proposed testimony was not admissible. Therefore, there is no basis on which to grant postconviction relief.

Next, we address Rainer'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. Where the existing record is sufficient to permit a review for errors prejudicial to the rights of the appellant, this court will not order a new trial. *Scott v. State*, 355 Ark. 485, 491, 139 S.W.3d 511, 515 (2003) ("[W]hile we agree that there is a preference for a complete record, a full and complete record is not necessarily required where the existing record is sufficient for us to perform a review for errors prejudicial to the rights of the appellant."). In order for an issue that was not raised at trial or on direct appeal to provide a basis for Rule 37 relief, the error alleged must be so fundamental as to render the judgment of conviction void and subject to collateral attack, *Rowbottom, supra*. We do not have such a situation here. The circuit court's failure to record the pretrial hearing does not amount

⁵ The circuit court recognized that trial counsel was not ineffective for failing to appeal the ruling on the State's motion in limine.

to an error so serious as to render the judgment of conviction void. The record has already been properly supplemented in order to recreate the motion-in-limine hearing, and reflects that Rainer suffered no prejudice as a result of the circuit court's ruling.

Finally, because the circuit court granted relief on the first point in Rainer's petition, it ruled that the second point was moot. As we have said on numerous occasions, the failure to obtain a ruling below bars review of the issue on appeal. *Ford v. Ark. Game & Fish Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998) (holding that a trial court's decision that an issue was moot is not a ruling for purposes of appeal); *see also Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998); *Higinbotham v. Junction City Sch. Dist.*, 332 Ark. 556, 966 S.W.2d 877 (1998). It is the obligation of an appellant to obtain a ruling from the trial court in order to preserve an issue for appellate review. *Strain v. State*, 2012 Ark. 184, 423 S.W.3d 1 (finding that a request that the trial court modify its order to include an omitted issue is not a request for a rehearing that is prohibited by our rules); *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144; *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000); *Huddleston v. State*, 347 Ark. 226, 61 S.W.3d 163 (2001). Thus, we need not reach the merits of Rainer's second point in his petition concerning trial counsel's failure to object to the "serious violent offender" designation because the trial court did not rule on that issue below.

Reversed.

DANIELSON, J., concurs.

HANNAH, C.J., and BAKER and HART, JJ., dissent.

JOSEPHINE LINKER HART, Justice, dissenting. In reversing the circuit court's grant of a new trial in this case, the majority 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's eight findings of fact and conclusions of law. A new trial was ordered because the circuit court found that Rainer's trial counsel was ineffective because he failed to renew his challenge to the circuit court's ruling, on a motion in limine after the State had presented its case and the circuit court was able to properly balance prejudice against probative value of the proffered evidence. In reversing, the majority fails to properly apply the standard of review and makes arguments for the appellant that were neither raised to nor ruled on by the circuit court, and are not raised on appeal. I dissent.

The circuit court found persuasive Rainer's argument that he had not received a fair trial. It recalled that the case was extremely close. Further, the circuit court stated that, given the context of Rainer's defense, if Rainer's trial counsel, Bill Stanley, had renewed his opposition to the State's motion in limine at trial, "I don't really have any doubt that I would have at least allowed the prior [stabbing] incident involving the two

of them.” In its written order, the circuit court made the following findings fact and conclusions of law:

1. No proper record was made of the motion in limine where evidence was ruled out in a pretrial conference in chambers about a year before trial. That violates Administrative Order No. 4 because the court had a duty to have it on the record. No lawyer requested it be on the record.
2. By agreement of the parties, the record was supplemented at the hearing with the testimony of defense counsel, the prosecutor, and the recollection of the court. This was a de facto “bystanders’s affidavit” where the court heard about three other incidents, one of which involved the alleged victim stabbing the defendant where he was hospitalized. There is a dispute, but it appears that he requested the state not to prosecute her for that.
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.
4. The testimony about the alleged victim having a propensity to use knives and to have previously stabbed defendant, too, on balance was probably more relevant than prejudicial and likely would have come in under A.R.E. 403. (In any retrial, the scope of other such evidence is subject to review at retrial.)

5. Defendant argues that this denied him due process and a fair trial in violation of the constitutions. Rule 37.1(a)(I).

6. The testimony in the case was close, and the court almost granted a directed verdict, but did not.

7. As a result, the court finds defendant was denied a fair trial on Ground 1, and a new trial is granted. Rule 37.4.

8. Ground 2 is moot.

Our standard of review in Rule 37 appeals has been clearly established.¹ We do not reverse the grant of postconviction relief unless the trial court's findings are clearly erroneous. *State v. Barrett* 371 Ark. 91, 263 S.W.3d 542 (2007). A finding is clearly erroneous when, although there is evidence to support it, the appellate

¹ In reversing the circuit court the majority relies on *Mitchell v. State*, 2012 Ark. 242. The majority claims that *Mitchell* stands for the proposition that "the circuit court's indication that it might have been willing to reconsider its ruling had the trial counsel renewed the issue during trial is of no moment. The standard this court considers is whether the issue would have been meritorious." The majority is wrong. In *Mitchell*, this court affirmed a circuit court's decision to summarily deny a prisoner's Rule 37 petition without an evidentiary hearing, pursuant to Rule 37.3(a) of the Rules of Criminal Procedure. The *Mitchell* court noted that because Mitchell's petition contained only "conclusory" allegations that were not supported by specific facts as required by Rule 37, the circuit court did not clearly err in denying postconviction relief without looking beyond the face of the petition. The *Mitchell* court held, "Bare assertions of ineffectiveness are not enough. Conclusory statements that counsel was ineffective will not sustain a Rule 37 petition." Thus, the majority's reliance on *Mitchell* is misplaced.

court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *Id.* Furthermore, we defer to the trial court's determination of credibility on Rule 37.1 appeals. *Id.*

Here, the State is the appellant and Rainer is the appellee. A basic rule of appellate issue preservation provides that an appellant is bound by the scope and the nature of arguments that it made to the circuit court, *Riley v. State*, 2012 Ark. 462, and failure get a ruling from the circuit court bars an appellant from raising that argument on appeal. *Norris v. State*, 2013 Ark. 205, ___ S.W.3d. ___.

The majority correctly notes that in creating the bystander's affidavit, it was established that, in the hearing on the State's motion in limine, "the circuit court excluded the testimony [about Douglas's prior bad acts] under Arkansas Rule of Evidence 404." The majority also correctly notes that in the Rule 37 hearing, Rainer's postconviction counsel asserted that the evidence of Douglas's history of knife violence was admissible under "Arkansas Rules of Evidence 401, 402, 403, 404, and 406." However, in reversing the circuit court's grant of Rule 37 relief, the majority finds that the circuit court's finding that it would have admitted the evidence is wrong because the evidence was not admissible under Arkansas Rule of Evidence 405.

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. 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."

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 Rainier'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 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 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 any almost anything connected to something relevant, almost. 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 finding 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 or factual basis for reversing the circuit court's grant of a new trial. For reversal the State argued 1) that the circuit court clearly erred in granting the new trial because its decision was based on its own reconsideration of an evidentiary ruling, not ineffective assistance of counsel; 2) there was no ineffectiveness of counsel in Stanley's appeal to the court of appeals; 3) Rainer's trial counsel's failure to ask the circuit court to reconsider its ruling was a matter of trial strategy; and 4) that Rainer's "central claim" is an evidentiary challenge to the circuit court's pretrial ruling, rather than his trial counsel's ineffectiveness.

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.² In fact, the State acknowledges 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.

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 an evidentiary ruling. Accordingly, this case should be affirmed.

² As the Supreme Court observed in *Crane v. Kentucky*, "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" 476 U.S. 683, 690 (1986) (quoting 467 U.S. 479, 485 (1984)).

IN THE CIRCUIT COURT OF
MISSISSIPPI COUNTY, ARKANSAS
CHICKASAWBA DISTRICT

STATE OF ARKANSAS

Plaintiff

v.

No. 47[cr]2009-193

SHAWN TREVELL RAINER

Defendant

ORDER ON RULE 37.1

(Filed Jul. 22, 2013)

The Rule 37.1 petition came on for hearing today, July 22, 2013, and the court makes the following findings of fact and conclusions of law:

1. No proper record was made of the motion in limine where evidence was ruled out in a pretrial conference in chambers about a year before trial. That violates Administrative Order No. 4 because the court had a duty to have it on the record. No lawyer requested it be on the record.

2. By agreement of the parties, the record was supplemented at the hearing with the testimony of defense counsel, the prosecutor, and the recollections of the court. This was a de fact "bystanders's affidavit" where the court heard about three other incidents, one of which involved the alleged victim stabbing the defendant where he was hospitalized. There is a dispute, but it appears that he requested the state not to prosecute her for that.

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.

4. The testimony about the alleged victim having a propensity to use knives and to have previously stabbed defendant, too, on balance was probably more relevant than prejudicial and likely would have come in under A.R.E. 403. (In any retrial, the scope of other such evidence is subject to review at retrial.)

5. Defendant argues that this denied him due process and a fair trial in violation of the constitutions. Rule 37.1(a)(i).

6. The testimony in the case was close, and the court almost granted a directed verdict, but did not.

7. As a result, the court finds defendant was denied a fair trial on Ground 1, and a new trial is granted. Rule 37.4.

8. Ground 2 is moot.

/s/ [Illegible]

Circuit Judge
Dated: July 22, 2013

Approved as to form:

/s/ Curtis Walker

Curtis Walker
Deputy Prosecuting Attorney

/s/ John Wesley Hall

John Wesley Hall

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IN THE CIRCUIT COURT OF
MISSISSIPPI COUNTY, ARKANSAS
CHICKASAWBA DISTRICT

STATE OF ARKANSAS Respondent-Plaintiff
v. No. 47CR2009-193
SHAWN TREVELL RAINER Petitioner-Defendant

**PETITION FOR POST-CONVICTION RELIEF
PURSUANT TO ARK. R. CRIM. P. 37.1**

(Filed Mar. 5, 2013)

Defendant-Petitioner petitions the court for post-conviction relief under Ark, R. Crim. P. 37.1 and he states as follows:

1. Petitioner was convicted in this court of murder in the second degree, and he was sentenced to 80 years imprisonment.

2. He appealed to the Arkansas Court of Appeals which affirmed. *Rainer v. State*, 2012 Ark. App. 588 (CACR 12-80, Oct. 24, 2012). The mandate issued January 10, 2013.

3. This Rule 37.1 petition (due March 11) is thus timely filed.

Issue 1:

Defense counsel was ineffective for not appealing the trial court's ruling that he could not

put on proof of Ms. Douglas's two assault cases using knives.

The court ruled out defendant putting on proof that Ms. Douglas had a propensity to use knives against people in assaults, including petitioner. This was ruled inadmissible at T. 253-65, but it was not raised on appeal.

The trial court's ruling was that this was admissible if defendant testified, but that was incorrect. That is a view for self-defense which this isn't.

This was offered as relevant evidence that Ms. Douglas was often using knives, and it made it more likely than not, therefore relevant under A.R.E. 401-403, that she had the knife in hand and was running, tripped over the phone cord, and fell on the knife accidentally stabbing herself. It was also admissible to show defendant's theory of the case under A.R.E. 404(a)(2) and 404(b) showing a reason for her to have a knife in her hand in the first place. This was also admissible under A.R.E. 406.

Defense counsel's failure to appeal this ruling was ineffective assistance because it denied petitioner due process and "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.*, 410 U.S. at 302.

The right to offer the testimony of witnesses, and to compel their attendance, if

necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). 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, 325-26 (2006).

It was prejudicial to petitioner's right to a fair trial and right to due process of law. Defense counsel should have appealed on this ground, too, and not just sufficiency of the evidence.

Issue 2:

The information in this case charged petitioner with being a "small habitual offender." The case was presented to the jury without defense objection as a "serious violent offender." Defense counsel was ineffective for not objecting to this.

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Defendant was charged as a small habitual offender in the information. When the case was presented to the jury, it was as a "serious violent offender," and defense counsel never objected. The difference is 6-50 years or 40-80 or life. That is prejudice from defense counsel's ineffective assistance.

CONCLUSION

The Rule 37 should be granted and petitioner granted a new trial.

/s/ Shawn Rainer
Shawn Rainer

VERIFICATION

STATE OF ARKANSAS)

COUNTY OF LINCOLN) ss:

Sworn and subscribed to before me this 3rd day of March, 2013.

My commission expires: 8-9-2016

/s/ Ricky Boyd
Notary Public

[SEAL]
