

Cite as 2010 Ark. 375

# SUPREME COURT OF ARKANSAS

No. CR08-1464

JUSTIN ANDERSON,  
APPELLANT,

VS.

STATE OF ARKANSAS,  
APPELLEE,

**Opinion Delivered** October 7, 2010

ATTORNEY RELIEVED;  
ATTORNEY APPOINTED;  
REBRIEFING ORDERED.

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## PER CURIAM

Appellant Justin Anderson appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.5. Anderson was convicted of capital murder and was sentenced to death. He appealed his conviction and sentence to this court, and we affirmed his judgment of conviction, but reversed and remanded for resentencing. *See Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004) (*Anderson I*). On remand, he was again sentenced to death, and we affirmed that sentence. *See Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006) (*Anderson II*). He then appealed the denial of his petition for postconviction relief and asserted nineteen points on appeal, one of which contained twenty-eight separate assertions of ineffective assistance by trial counsel. *See Anderson v. State*, 2010 Ark. 138 (per curiam). However, because Anderson was sentenced to death, and because the argument portion of the brief filed by appellate counsel on Anderson's

behalf was woefully deficient, we ordered rebriefing. *See id.* Although a substituted brief was timely filed by appellate counsel on Anderson's behalf, we again must order rebriefing as the brief remains woefully deficient. As a result of Anderson's current appellate counsel's noncompliance with our prior per curiam order, we relieve him as counsel and refer him to our Committee on Professional Conduct. Additionally, we appoint new appellate counsel for Anderson.

In our per curiam ordering rebriefing, we instructed that, among other things, appellate counsel should specifically articulate Anderson's allegations of error, support each allegation with applicable citation to recent authority, apply the authority cited to the facts of each claim, thoroughly analyze the issues, and advocate for a result that benefits Anderson. *See id.* However, appellate counsel made minimal changes before filing the revised brief and, once again, the majority of the arguments presented on behalf of Anderson were undeveloped and included nothing but conclusory statements.

We note once again that death-penalty cases are different from other criminal cases, and, because of this difference, Rule 37.5 appeals require a heightened standard of review. *See Ward v. State*, 347 Ark. 515, 65 S.W.3d 451 (2002) (per curiam). *See also Dansby v. State*, 347 Ark. 509, 65 S.W.3d 448 (2002) (per curiam). The purpose of the exacting requirements of Rule 37.5 is to provide a comprehensive state-court review of a petitioner's claims, thereby eliminating the need for multiple postconviction actions in federal court. *See Ward, supra.* However, Anderson would be denied that right to a comprehensive state-court review if we

were to review his claims as currently presented. This court would have no choice but to deny his request for relief based upon the failure to develop his arguments.

Current appellate counsel, Jeff Harrelson, was appointed by the circuit court on July 18, 2007, to pursue Anderson's Rule 37.5 petition. Once counsel has been appointed in a case where the right to appointed counsel exists, and the notice of appeal has been filed, this court has exclusive jurisdiction to relieve counsel and appoint new counsel. *See* Ark. R. App. P.–Crim. 16(a). Despite the serious nature of this case, and the instructions ordered by this court, Harrelson, yet again, failed to file an adequate brief on behalf of Anderson that would allow us to fully consider the issues. We do not foresee that giving him a third chance would change the outcome. Therefore, we hereby relieve Jeff Harrelson of his duties as counsel for Anderson and refer him to our Committee on Professional Conduct. Furthermore, we appoint Jeff M. Rosenzweig to serve as Anderson's new attorney in pursuit of his Rule 37.5 petition. Our clerk is directed to set a new briefing schedule.

Rebriefing ordered.

BROWN, J., concurs in part; dissents in part.

BROWN, J., concurring in part, dissenting in part. I concur with the majority's decision to once again order rebriefing in this case as the substitute brief remains woefully deficient. I, however, would require Jeff Harrelson, appellant's counsel, to show cause why he should not be held in contempt for his noncompliance with this court's first rebriefing order. *See Anderson v. State*, 2010 Ark. 138 (per curiam).

As the majority notes, in counsel's first brief appealing the denial of postconviction relief, he asserted nineteen points on appeal, one of which contained twenty-eight separate assertions of ineffective assistance by trial counsel. *Id.* We ordered rebriefing and instructed counsel to articulate specifically his allegations of error and support each allegation with applicable citation to recent authority, apply that persuasive authority to the facts of each claim, thoroughly analyze the issues, and advocate for a result that benefits Anderson. *Id.* Furthermore, we instructed appellate counsel to avoid the use of conclusory statements and arguments and refrain from making arguments that are not fully developed. *Id.*

Anderson is on death row and is entitled to a comprehensive state-court review of his claims pursuant to Arkansas Rule of Criminal Procedure 37.5. *See Ward v. State*, 347 Ark. 515, 65 S.W.3d 451 (2002). There is no question but that the death penalty is a unique punishment that demands unique attention to procedural safeguards. *Robbins v. State*, 353 Ark. 556, 561, 114 S.W.3d 217, 220 (2003). It is incumbent on the states to do a comprehensive state-court review in all death cases in order to eliminate the need for multiple federal habeas corpus proceedings. *Id.* at 565, 114 S.W.3d at 223; *see also* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241–54 (2006). Arkansas Rule of Criminal Procedure 37.5 was adopted by this court and evolved from Act 925 of 1997, now codified at Arkansas Code Annotated sections 16-91-201 to 206 (Repl. 2006). Act 925 was enacted in direct response to the federal act and expressly recognizes this policy in favor of thorough state-court review. *Id.* Were this court to fail to examine a claim of error in a

death case, we would not be fulfilling our obligation to complete a thorough state review under our rules and state law. *See, e.g., Robbins*, 353 Ark. at 565, 114 S.W.3d at 223. Due to counsel's failure to submit a proper brief for this court to review, we are once again unable to perform the required comprehensive review and are forced to appoint new counsel.

Arkansas Supreme Court Rule 4-2(c)(3) provides:

After the opportunity to cure deficiencies has been afforded pursuant to Rule 4-2(b)(3) or (c)(2), attorneys who fail to comply with the requirements of this rule may be referred to the Office of Professional Conduct, and in addition, may be subject to any of the following: (A) contempt, (B) suspension of the privilege to practice before the Supreme Court or Court of Appeals for a specified time or until the attorney can demonstrate a satisfactory competency of the rules, or (C) imposition of any of the sanctions listed in Rule 11(c) of the Rules of Appellate Procedure–Civil.

Ark. Sup. Ct. R. 4-2(c)(3) (2010).

In short, appellant counsel's substituted brief also fails to support his allegations of error with citation to authority, fails to thoroughly analyze the issues, and includes many of the same conclusory statements and underdeveloped arguments as the first submission, all in flagrant disregard of this court's prior instructions. Given our clear instructions in the per curiam order, I would require Mr. Harrelson to show cause why he should not be held in contempt pursuant to Arkansas Supreme Court Rule 4-2(c)(3) for noncompliance.