No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRAD HUNTER SMITH,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Arkansas Supreme Court's holding that a capital-sentencing jury permissibly declined to weigh an existent statutory mitigating circumstance against the existent aggravating circumstances after deeming the former subjectively unworthy of consideration facilitates the arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CITED AUTHORITIES

OPINION BELOW

The citations to the official and unofficial reports of the Arkansas Supreme Court's opinion are 2018 Ark. 277 and 555 S.W.3d 881, respectively.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment or order sought to be reviewed was entered October 4, 2018. App 1. Petitioner filed for rehearing under Arkansas Supreme Court Rule 2-3 on October 19, 2018. App. 38. The date of the order respecting rehearing is November 15, 2018. App. 28. The statutory provision believed to confer on this Court certiorari jurisdiction is Title 28, section 1257, subsection (a) of the United States Code inasmuch as rights are claimed under the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. CONST. AMEND. 8

[Reproduced at App. 48.]

U.S. CONST. AMEND. 14, § 1

[Reproduced at App. 48.]

ARK. CODE ANN. § 5-4-603 (REPL. 2013)

[Reproduced at App. 48-49.]

ARK. CODE ANN. § 5-4-604 (REPL. 2013)

[Reproduced at App. 49-50.]

ARK. CODE ANN. § 5-4-605 (REPL. 2013)

[Reproduced at App. 50-51.]

ARK. R. APP. P.—CRIM. 10 (2018)

[Reproduced at App. 51-52.]

ARK. SUP. CT. R. 2-3 (2018)

[Reproduced at App. 53-54.]

AMI CRIM. 2D 1008

[Reproduced at App. 54-56.]

STATEMENT OF THE CASE

This is a death-penalty case in which a federal question arose from the Arkansas Supreme Court's disposition of the fifth point of the direct appeal of Petitioner Brad Hunter Smith, who raised the issue via petition for rehearing. The paragraphs that follow provide a factual account of the relevant events as relayed by the opinion below, along with an overview of the arguments advanced in connection with Petitioner's fifth point on appeal, the Arkansas Supreme Court's disposition of that point, and the arguments advanced on rehearing.

In November of 2015, Cherrish Allbright informed Petitioner that she was pregnant with his child. App. 1. On multiple occasions thereafter, Petitioner remarked to friends, family members, and others that he needed assistance perpetrating a homicide. App. 1. Petitioner ultimately secured the assistance of two friends, Jonathan Guenther and Josh Brown, and by December 3, 2015, a plan

for Allbright's demise had developed. App. 1-2. Acting in accordance therewith, Brown invited Allbright to join him for a marijuana-smoking session. App. 2. She accepted, and he drove her to a field near which Petitioner and Guenther had concealed themselves. App. 2. Shortly after Allbright exited Brown's vehicle, Petitioner shot her through the back using a crossbow. App. 2. Before her attempt to re-enter Brown's vehicle could succeed, Petitioner ordered Allbright to her knees. App. 2. She complied, at which point Petitioner used a wooden baseball bat to administer two blows to the back of her head. App. 2. After Allbright succumbed to her injuries, the trio placed her on a trailer, transported her to a location behind Petitioner's residence, and buried her. App. 2.

Approximately one week later, sheriff's deputies contacted Brown about an unrelated matter, and he admitted complicity in Allbright's murder. App. 2. He later led authorities to her gravesite and provided information that prompted Petitioner's arrest. App. 2. Respondent State of Arkansas subsequently charged Petitioner with kidnapping, abuse of a corpse, and capital murder, and a jury found him guilty of all three offenses. App. 2.

Petitioner presented no evidence of his lack of a criminal history during the penalty phase of his jury trial. App. 10. After delivering Petitioner's penalty-phase closing argument, his counsel realized that he had neglected to mention Petitioner's youth and lack of a criminal history. App. 10. With the approval of both the circuit court and the prosecution, Petitioner's counsel addressed the jury again, informing it that Petitioner was 20 years old and that the defense and the prosecution agreed

that he had no prior convictions. App. 10. Similarly, the prosecuting attorney urged the jury to find that Petitioner's youth and "'minimal record'" constituted mitigating circumstances. App. 10. The jury nevertheless found that only one of the two mitigating circumstances, namely Petitioner's youth, existed. App. 11, 21-23. It sentenced him to 20 years' imprisonment for kidnapping, 10 years' imprisonment for abuse of a corpse, and death for capital murder. App. 2.

Noting the prosecuting attorney's closing-argument request and the absence of any evidence that he had a significant history of prior criminal activity, Petitioner's fifth point on appeal argued that the death sentence was imposed under the influence of an arbitrary factor inasmuch as the jury disregarded a clearly existent mitigating circumstance. App. 30. In its responsive brief, Respondent maintained that Petitioner had neither cited authority nor provided convincing argument in support of his position, that references to Petitioner's lack of a criminal history in counsels' arguments did not qualify as evidence, and that a determination of the weight and credibility of evidence fell to the jury alone. App. 32-34. In his reply brief, Petitioner asserted that he had provided convincing argument, that Rule 10(b)(vii) required consideration of whether the death sentence was imposed under the influence of an arbitrary factor even absent citation to authority, that a complete absence of evidence to the contrary established Petitioner's lack of a significant history of criminal activity, and that this objective absence of evidence did not lend itself to a weight or credibility determination. App. 36-37.

Observing that Petitioner had declined to present evidence of his nonexistent criminal history and that the circuit court had instructed the jury not to consider arguments of counsel as evidence, the Arkansas Supreme Court rejected Petitioner's arguments in an opinion dated October 4, 2018. App. 1, 12. Specifically, it held that "the jury did not act arbitrarily when it chose not to find [Petitioner]'s history of criminal activity (or lack thereof) to be worthy of mitigating his punishment for his crime in this case." App. 1, 11-12. It thereafter affirmed Petitioner's convictions in all respects, with one justice dissenting. App. 12.

Petitioner thereafter filed a petition for rehearing in connection with the fifth, and final, point on appeal. App. 38. In that submission, Petitioner provided a brief overview of Respondent's capital-sentencing scheme, in which juries must determine the existence of certain statutory aggravating and mitigating circumstances, weigh any existent statutory aggravating circumstance(s) against any existent statutory mitigating circumstance(s) and any other mitigating circumstance(s) found to exist, and sentence the defendant accordingly. App. 39-40. He then observed that the Arkansas Supreme Court's holding allows juries to decline to weigh an existent statutory mitigating circumstance by (1) finding that it does not exist despite the record's inability to support such a conclusion or (2) determining that the circumstance is not subjectively worthy of consideration in the "weighing" phase of deliberations. App. 41. Finally, Petitioner argued that the lack of criteria by which to make this "worthiness" assessment conferred upon juries unbridled discretion to determine whether to weigh an existent statutory mitigating

circumstance against any existent aggravating circumstance(s), thereby facilitating the arbitrary imposition of the death penalty to a constitutionally impermissible extent. App. 42.

In response, Respondent noted that Petitioner declined to present evidence that he lacked a history of prior criminal activity, asserted that Petitioner's new argument in support of his challenge to the jury's verdict did not constitute a proper ground for rehearing, and maintained that the absence of proof is not the equivalent of objective proof. App. 44-46. The Arkansas Supreme Court denied the petition without comment on November 15, 2018. App. 28.

REASON FOR ALLOWANCE OF THE WRIT

THE ARKANSAS SUPREME COURT'S HOLDING THAT A CAPITAL-SENTENCING JURY PERMISSIBLY DECLINED TO WEIGH AN EXISTENT STATUTORY MITIGATING CIRCUMSTANCE AGAINST THE EXISTENT AGGRAVATING CIRCUMSTANCES AFTER DEEMING THE FORMER SUBJECTIVELY UNWORTHY OF CONSIDERATION FACILITATES THE ARBITRARY IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) (per curiam), this Court held that the imposition of the death penalty in three cases originating from Georgia and Texas constituted cruel and unusual punishment in violation of the

United States Constitution's Eighth and Fourteenth Amendments. *Furman*, 408 U.S. at 239-40, 92 S. Ct. at 2727. Five of the justices wrote concurring opinions. *Id.* at 240-374, 92 S. Ct. at 2727-96. As one state's court-of-last-resort has astutely observed, the justices' concurring opinions evinced concern "that the death penalty was being applied arbitrarily because those empowered to impose the sentence had too much discretion, resulting in the wrong kind of selectivity, i.e., selectivity based on factors such as race, sex, and economic status." *Wilson v. State*, 295 Ark. 682, 684, 751 S.W.2d 734, 736 (1988).

In addition to prompting Respondent's highest court to declare its then-existing statutory capital-sentencing scheme unconstitutional, *Furman* induced the legislative bodies of death-penalty states to enact statutes narrowing sentencing discretion. *Graham v. State*, 253 Ark. 462, 463, 486 S.W.2d 678, 679 (1972) ("So long as the ruling in *Furman* . . . is made applicable to this State, we are obliged to reduce appellant's sentence from death to life imprisonment . . . ."); *Wilson*, 295 Ark. at 684, 751 S.W.2d at 736 ("Thereafter state legislatures enacted statutes which narrowed the sentencing discretion.") Respondent's General Assembly followed suit and enacted its current capital-sentencing scheme in 1975. *Wilson*, 295 Ark. at 684, 751 S.W.2d at 736.

Respondent's capital-sentencing-deliberation process consists of two phases. First, the jury must determine the existence of aggravating and mitigating circumstances and, second, it must weigh any aggravating circumstance(s) found to exist against any mitigating circumstance(s) found to exist and sentence the

defendant accordingly. Ark. Code Ann. § 5-4-603(a) & (b); AMI Crim. 2d 1008. Respondent's legislature has established 10 statutory aggravating circumstances that militate in favor of death-penalty imposition and has limited the consideration of juries to those circumstances only. Ark. Code Ann. § 5-4-604(1)—(8). Its legislature has also established statutory mitigating circumstances that militate against death-penalty imposition but has not similarly limited the consideration of juries to those circumstances. *Id.* § 5-4-605. The relevant statute reads as follows:

> A mitigating circumstance includes, but is not limited to, the following:
> (1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;
> (2) The capital murder was committed while the defendant was acting under an unusual pressure or influence or under the domination of another person;
> (3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
> (4) The youth of the defendant at the time of the commission of the capital murder;
> (5) The capital murder was committed by another person and the defendant was an accomplice and his or her participation was relatively minor; or
> (6) The defendant has no significant history of prior criminal activity.

Id.

Notably, section 5-4-605 states that a mitigating circumstance "includes," as opposed to "may include," the circumstances recited therein. As such, sections 5-4-605 and 5-4-603, when read in tandem, require juries to consider any existent circumstance recited in the former when weighing the competing circumstances per

the latter. *Cf. Marcum v. Wengert*, 344 Ark. 153, 164, 40 S.W.3d 230, 237 (2001) (referring to the permissive and discretional nature of the word "may").

Despite that requirement and the objective absence of any evidence that Petitioner had a significant history of prior criminal activity, the jury found the relevant mitigating circumstance non-existent, thereby excluding it from consideration in the second phase of sentencing deliberations. Although the Arkansas Supreme Court's comment on Petitioner's failure to present evidence and its reference to the instruction concerning the arguments of counsel suggest agreement with that finding, its holding reflects otherwise. Axiomatically, a circumstance that does not exist cannot be considered, and the Arkansas Supreme Court did not premise its disposition of this issue upon the non-existence of the circumstance in question. Instead, it concluded that the jury deemed the circumstance unworthy of consideration (as opposed to incapable of consideration) and therefore permissibly disregarded that circumstance when it weighed the competing circumstances. In so concluding, the court below tacitly approved a deviation from Respondent's post-*Furman* statutory requirement that capital-sentencing juries consider all existent mitigating circumstances, and its omission of criteria by which to assess the "worthiness" of a mitigating circumstance for consideration compounded that misstep by effectively vesting them with limitless discretion.

The ramifications of that holding extend far beyond the perpetuation of an injustice upon Petitioner. As binding precedent, it confers upon Respondent's

capital-sentencing juries unbridled discretion to determine whether to weigh an existent statutory mitigating circumstance against any statutory aggravating circumstance(s), thereby facilitating the arbitrary imposition of the death penalty in contravention of the Eighth and Fourteenth Amendments to the United States Constitution. When a state court-of-last-resort's holding on a point of state law creates or perpetuates a constitutionally intolerable outcome, this Court may vindicate the rights of the aggrieved. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964) (reversing on federal constitutional due-process grounds state supreme court's affirmance of convictions based upon unforeseeable, retroactive, and expansive judicial construction of narrowly-worded criminal statute). A grant of relief on certiorari review would remedy the constitutional violation that the holding below perpetuated upon Petitioner, prevent it from facilitating further constitutional violations via its status as binding precedent upon Respondent's courts, and discourage the courts of all death-penalty states from judicially expanding the limited discretion that constitutionally-sound statutory sentencing schemes afford capital juries.

CONCLUSION

Petitioner prays that this Court grant certiorari and reverse the decision of the Arkansas Supreme Court.

Respectfully submitted,

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APPENDIX

Cite as 2018 Ark. 277

SUPREME COURT OF ARKANSAS

No. CR-17-889

Opinion Delivered: October 4, 2018

BRAD HUNTER SMITH APPELLANT	APPEAL FROM THE CLEVELAND COUNTY CIRCUIT COURT
V.	[NO. 13CR-16-3-5]
STATE OF ARKANSAS APPELLEE	HONORABLE DAVID W. TALLEY, JR., JUDGE

AFFIRMED.

SHAWN A. WOMACK, Associate Justice

On December 10, 2015, the bodies of Cherrish Allbright and her unborn child were found buried in an unmarked grave. Cherrish had an arrow through her back and she had suffered two, severe, blunt-force impacts to the back of her head, which caused her death. Brad Hunter Smith was arrested and charged with her murder. Following a jury trial in Cleveland County, he was convicted of capital murder and sentenced to death. On appeal, he only raises issues regarding the punishment phase of his trial. We affirm the conviction and sentence.

Smith does not challenge the sufficiency of the evidence on appeal, so only a brief recitation of the facts is required. *Lee v. State*, 327 Ark. 692, 696, 942 S.W.2d 231, 233 (1997). In November 2015, Allbright disclosed to Smith that she was pregnant with his child. Throughout the following weeks he made numerous comments to friends, family, and coworkers that he needed help committing a murder. Ultimately, on December 3, 2015, Smith enlisted the help of his two

friends, Jonathan Guenther and Joshua Brown, to kill Allbright and hide her body. According to the plan, Brown would call Allbright under the pretenses of wanting to smoke marijuana and then drive her to a nearby field where Guenther and Smith would be lying in wait.

When Brown arrived at the field with Allbright, Guenther and Smith were hiding behind some trees. When Allbright exited and walked to the front of the vehicle, Smith stood up and shot her through the back with a crossbow bolt. She attempted to get back into the vehicle, but Smith ordered her to get down on the ground on her knees. He then used a wooden baseball bat to hit her twice in the back of the head, killing her. The trio then loaded the body onto the back of a trailer, transported it to a gravesite behind Smith's house, and buried her.

On December 10th, officers from the Cleveland County Sherriff's Department brought Brown in for questioning on an unrelated matter and, upon encouragement from his mother, he confessed to the murder and led officers to the grave.[1] Based on the information Brown provided, officers from the Arkansas Game and Fish Commission were ultimately able to arrest Smith at his family's cabin on Belcoe Lake.

Smith was charged with kidnapping, abuse of a corpse, and capital murder. The jury convicted him on all charges and he was sentenced to twenty years, ten years, and death respectively. He only challenges his sentence for capital murder on appeal.

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[1]Brown was a minor at the time of the murder.

I. *Prohibition of Aggravating Circumstances*

For his first point, Smith argues that prejudicial error occurred when the circuit court permitted the jury to consider the death of Allbright's unborn child as an aggravating circumstance. Arkansas Code Annotated section 5-4-604 sets forth the aggravating circumstances that the jury may consider for the imposition of the death penalty. *Bowen v. State*, 322 Ark. 483, 496, 911 S.W.2d 555, 561 (1995). The specific provision in question states that it is an aggravator if "[t]he person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim or caused the death of more than one (1) person in the same criminal episode." Ark. Code Ann. § 5-4-604(4) (2013). Arkansas Code Annotated section 5-1-102(13)(B)(i)(a) contains the definition of "person" as it relates to the homicide statutes and states, "As used in §§ 5-10-101 -- 5-10-105, 'person' also includes an unborn child in utero at any stage of development." Smith argues that the circuit court should have granted his motion prohibiting the aggravating circumstance from being presented because the definition of person in section 5-1-102 could not apply to section 5-4-604.

The State in turn argues that this issue is not preserved for appeal because it was abandoned below. At trial, Smith filed a motion to prohibit the State from submitting an aggravating circumstances form to the jury. Attached to the motion was the form the State intended to submit to the jury, which included the definition of person in Ark. Code Ann. § 5-1-102(13). However, at a hearing outside the presence of the jury, the court inquired whether Smith objected to the definition or

its placement on the form. Smith responded that he was objecting to the placement.[2] In his reply brief, Smith acknowledges that his argument was abandoned, but nevertheless contends that he may raise it on appeal based on our decision in *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981).

The general rule is that this court will not address errors raised for the first time on appeal. *Id.* at 129, 623 S.W.2d at 181; *Hicks v. State*, 2017 Ark. 262 at 10, 526 S.W.3d 831, 838. Likewise, parties cannot change their grounds for an objection on appeal, but are bound by the scope and nature of their objections as presented at trial. *Hicks*, 2017 Ark. 262 at 10, 526 S.W.3d at 838. However, in death-penalty cases we will consider errors argued for the first time on direct appeal when prejudice is conclusively shown by the record and this court would unquestionably require the trial court to grant relief under Rule 37 of the Arkansas Rules of Criminal Procedure. *Singleton*, 274 Ark. at 128, 623 S.W.2d at 181; *Hill v. State*, 275 Ark. 71, 77, 628 S.W.2d 284, 287 (1982); *Hughes v. State*, 295 Ark. 121, 122, 746 S.W.2d 557, 557 (1988).

In *Singleton* the defendant was sentenced to death for felony murder and life imprisonment for aggravated robbery. 274 Ark. at 128, 623 S.W.2d at 181. We affirmed the conviction for capital felony murder but set aside the conviction for the

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[2]The definition of "person" was never read to the jury. However, the prosecutor referenced the definition in its closing arguments, and the submitted jury form instructed the jury that it could consider the death of Allbright and her unborn child.

lesser included offense of aggravated robbery. *Id.* We noted that our recent decision in *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981), prohibited the entry of a judgment for capital felony murder and the underlying specific felony. *Id.* We therefore applied our holding to Singleton's case by invoking the death penalty exception. *Id.*

We decline to extend the exception to the circumstances argued here. Smith has not conclusively shown prejudice and he has failed to show that we would unquestionably grant him Rule 37 relief on the issue.[3] We note that enforcing a narrow interpretation of the death penalty exception ensures that it remains an exception and does not swallow the rule.

II. *Improper Rebuttal Testimony*

For his second point, Smith argues that the circuit court erred when it improperly permitted the prosecution to present rebuttal testimony. During the penalty phase of the trial, Smith presented testimony from Randall Jones, who worked for the Dallas County Detention Center. He testified that while Smith was awaiting trial, he was a model prisoner and never showed any signs of aggression or violence. After Smith rested, the State argued that it was entitled to present a rebuttal witness, Coby Rauls. Rauls testified that he was a deputy sheriff with Cleveland County and that he had transported Smith from one of his court appointments back to the detention center. During the transportation, Rauls

[3]We are not passing on the merits of Smith's claim. We hold that the issue is not properly preserved for our review.

recounted that Smith stated he would like to use the officer's night stick to beat the driver of the vehicle in front of him for excitement. Before Rauls testified, Smith's attorney argued that it wasn't rebuttal because the officer wasn't at the detention center to witness Smith's behavior. The court allowed the rebuttal noting that it related to Smith's behavior while he was still a prisoner.

Smith argues that the evidence was improper because Rauls's testimony was not in response to Jones's. The State in turn argues that this argument was not presented to the circuit court. *See Hicks*, 2017 Ark. 262 at 10, 526 S.W.3d at 838. In his reply, Smith admits that he did not present this specific argument to the circuit court below. However, even if we address his argument, it is meritless.

The decision to admit rebuttal testimony is at the circuit court's discretion and we will not reverse unless the circuit court abused that discretion. *Gillard v. State*, 2010 Ark. 135 at 11, 361 S.W.3d 279, 285. Here, Jones testified that Smith was a model prisoner. The State's rebuttal witness countered that assertion by Smith's comment in the squad car. Smith can't show that the circuit court abused its discretion by allowing Rauls to testify.

III. *Scope of Rebuttal Closing Argument*

Next, Smith argues that the court impermissibly allowed the State to go beyond the scope of the penalty-phase rebuttal closing argument and allowed the State to make emotionally charged comments. During the defense's closing, Smith's attorney stated, "[I]t doesn't matter if you give him life without parole or if you give him the death penalty. The only way my client will come out of that penitentiary is

on a funeral home director's gurney." Once the State began its reply, Smith objected and argued that the State could not rehash its arguments and could only respond to the points he raised in his closing argument. The court ruled that the State could address Smith's argument that there was no difference between sentencing him to life or death and that the State would have the opportunity to discuss the sentencing forms. However, the court clarified that while it would allow the State to discuss the aggravating circumstances pertaining to their choice to pursue the death penalty, it would be limited in how much it could discuss. The State then addressed the jury as follows:

> When we started this journey on Monday, counsel for the defendant said the State does not seek the death penalty very often. That is correct. The State seeks the death penalty when certain factors come before us. In this case, the motive was a factor. The fact that this young lady was pregnant and that means two lives are snuffed out at the same time.
>
> Another factor [t]he State takes into consideration is the manner of the murder. This morning when we were doing Closing Arguments, I was referring to this as a hate murder in that just go shoot her with a shotgun and put her out of her misery. That's not what happened. You have what we consider torture, to be a bow and arrow through your body. So, that is a factor that [t]he State took into consideration, a huge factor, huge.
>
> In these kinds of cases, lack of remorse. What happens in these cases? "Dear God, forgive me for what I have done." That's remorse, as opposed to, "Crack head, dope whore," all that stuff. Now, with that being said, no more emotion.

The State in turn argues that Smith did not make a contemporaneous objection to the prosecutions rebuttal. *See Lard v. State*, 2014 Ark. 1 at 26, 431 S.W.3d 249, 268. Smith objected when the prosecution expressed its intent to discuss the

sentencing forms and its decision to pursue the death penalty. The circuit court ruled against him. We hold that he has preserved this issue for our review.

Arkansas Code Annotated section 5-4-602(5)(C) (Repl. 2013) specifically permits the State to "reply in rebuttal" during closing arguments. The circuit court is given broad discretion to control counsel in closing arguments, and we do not interfere with that discretion absent a manifest abuse of it. *Lee v. State*, 326 Ark. 529, 532, 932 S.W.2d 756 (1996). Remarks made during argument that require reversal are rare and require an appeal to the jurors' passions. *Wetherington v. State*, 319 Ark. 37, 41, 889 S.W.2d 34, 36 (1994). The circuit court considered Smith's argument and specifically found that he stated that there would be no difference between life imprisonment and death. The court noted that there is a difference between death and life in prison and allowed the prosecution to discuss why it pursued the death penalty. The State briefly summarized the reasons why it chose to do so; namely, that Smith had shot the victim with a crossbow and that he lacked remorse. Smith cannot show that the circuit court manifestly abused its discretion or that the State's comments were specifically designed to appeal to the jurors' passions.

IV. *Failure of the Circuit Court to Draw the Jury's Attention to the Proper Definition of Person*

For his fourth point, Smith argues that the circuit court failed to bring to the jury's attention that a "person" could not be an unborn child as it applies to the aggravating circumstances listed in Ark. Code Ann. § 5-4-604. Under Arkansas Rule of Appellate Procedure –Crim. 10(b)(ii), this court must consider whether the

circuit court failed in its obligation to bring to the jury's attention a matter essential to its consideration of the death penalty. *See also Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). This court has recognized that an error in the completion of the penalty-phase verdict forms concerning mitigating circumstances can fall within the *Wicks* exception for matters essential to consideration of the death penalty. *Thessing v. State*, 365 Ark. 384, 408, 230 S.W.3d 526, 544 (2006); *Wertz v. State*, 2016 Ark. 249 at 8, 493 S.W.3d 772, 775-76 (court would review case where jury was erroneously submitted a single set of forms); *Camargo v. State*, 327 Ark. 631, 641-42, 940 S.W.2d 464, 469 (1997) (failure of jury to make the necessary written findings to impose the death penalty was essential to the jury's imposition of the death penalty); *Bowen v. State*, 322 Ark. 483, 499, 911 S.W.2d 555, 562 (1995).

Here, Smith's argument does not fall within the first *Wicks* exception. Our case law is clear that *Wicks* presents only narrow exceptions that are to be rarely applied. *Anderson v. State*, 353 Ark. 384, 398, 108 S.W.3d 592, 600 (2003). As it pertains to jury forms, we have applied the exception when the jury has incorrectly filled out forms, when forms have been missing, when the jury failed to make written findings as required by law, or when the jury was presented with an aggravator that violated the *ex post facto* clauses of the Constitution. In such instances we say the circuit court had an obligation to remedy the matter. Instead, Smith argues that the court should have instructed the jury that "person" does not include an unborn child. *See* Section I, *supra*. While the prosecutor chose not to file a separate homicide charge for the death of Cherrish Allbright's unborn child, there

is no question under Arkansas law that he could have. See Ark. Code Ann. § 5-1-102(13)(B)(i)(a). Smith would have us apply the exception here to his argument for a limited statutory interpretation; we decline to do so.

V. *Arbitrary Factor*

Lastly, Smith argues that the death penalty was imposed under an arbitrary factor because the jury did not find that he lacked a significant criminal history. During the penalty phase of the trial, Smith did not present any evidence of his lack of criminal history. Instead, after the defense had made its closing argument, Smith's attorney asked to readdress the jury because he forgot to mention that his client was young and had no previous criminal history. The prosecution and the court agreed that it was necessary to do so.

Thereafter, Smith's attorney readdressed the jury and stated that his client is 20 years old and "[t]he State and defense agree that my client has no prior convictions." Likewise, the State in its closing stated, "As the prosecuting attorney, I'm asking you to check the box that shows he has a minimal record and that he's young. We want you to fill that box." The jury form for mitigating circumstances instructs that "For each of the following mitigating circumstances, you should place a checkmark in the appropriate space to indicate the number of jurors who find that the mitigating circumstances probably exists." Despite the request in closing from both parties, the jury returned a signed form 2 and found the only mitigatory circumstance to be that Smith was young at the time of the murder. Specifically, on the section of the form that deals with mitigation of punishment based on criminal

history, it says "Brad Hunter Smith has no significant history of prior criminal activity. Check one of the following:". The jury checked the option that said, "No member of the jury finds that this circumstance probably exists." Significantly, we note, the instruction makes no reference to prior convictions but rather prior criminal activity.

Under Rule 10(b)(vii) of the Arkansas Rules of Appellate Procedure –Crim., this court must review whether the death penalty was administered under the influence of passion, prejudice, or any other arbitrary factor. A jury is not required to find a mitigating circumstance just because the defendant puts before the jury some evidence that could serve as the basis for finding the mitigating circumstance. *Miller v. State*, 2010 Ark. 1 at 41, 362 S.W.3d 264, 288. The jury alone determines what weight to give the evidence and may reject it or accept all or any part of it the jurors believe to be true. *Id.* However, when there is no question about credibility and when objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion. *Roberts v. State*, 352 Ark. 489, 509, 102 S.W.3d 482, 496 (2003).

In his reply brief, Smith acknowledges that no evidence was presented to the jury in this regard. Instead, he argues that the absence of evidence establishes this mitigating circumstance. Smith had the opportunity to present evidence of his lack of criminal history to the jury but declined to do so. Further, the circuit court specifically instructed the jury that arguments of counsel are not to be considered evidence. Clearly, the jury did not act arbitrarily when it chose not to find Smith's

history of criminal activity (or lack thereof) to be worthy of mitigating the punishment for his crime in this case.

The transcript of the record in this case has been reviewed in accordance with Arkansas Supreme Court Rule 4–3(i) (2018), which requires, in cases in which there is a sentence of life imprisonment or death, that we review all errors prejudicial to the defendant. None have been found.

Affirmed.

Special Justice RUSSELL MEEKS joins.

HART, J., dissents.

WYNNE, J., not participating.

JOSEPHINE LINKER HART, Justice, Dissenting. I would reverse for a new sentencing trial. First, I disagree with the majority's decision as to Part I of its opinion, which concludes that the issue of whether the jury should have been presented an aggravating circumstance pursuant to Ark. Code Ann. § 5-4-604(4) (Repl. 2013) (the Aggravating Circumstances Statute) is not preserved for our consideration. Smith's first argument is adequately preserved and is itself meritorious. Furthermore, regardless of whether this argument is adequately preserved, we still must address it because Rule 10(b)(ii) of the Arkansas Rules of Appellate Procedure –Criminal requires us to determine whether the circuit court satisfied its "obligation to bring to the jury's attention a matter essential to its consideration of the death penalty[.]" Second, as a separate matter, Rule 10(b)(ii)

also requires reversal for the circuit court's failure to instruct the jury that Smith's lack of a prior criminal history was an undisputed mitigating circumstance.

Prohibition of Aggravating Circumstance – The Statutory Definitions of "Person"

The majority opinion details the factual circumstances relevant to this issue. Ark. Code Ann. § 5-4-604 sets forth the aggravating circumstances that a jury is to consider when determining whether one convicted of capital murder should be sentenced to either death or life in prison without the possibility of parole. Subsection (4) of the Aggravating Circumstances Statute lists the following as an aggravating circumstance:

> (4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim or caused the death of more than one (1) person in the same criminal episode[.]

Ark. Code Ann. § 5-4-604(4) (emphasis added). The General Assembly added subsection (4) to the Aggravating Circumstances Statute in 1995. Act of Apr. 11, 1995, No. 1205, 1995 Ark. Acts 5783.

Ark. Code Ann. § 5-1-102 (the "Definitions Statute") sets out definitions to be used when interpreting the remainder of the criminal code set forth under Chapter 5, including the Aggravating Circumstances Statute.

Subsection (13) of the Definitions Statute provides the following definitions for "Person":

> (13)(A) "Person," "actor," "defendant," "he," "she," "her," or "him" includes:
>
> (i) Any natural person; and
>
> (ii) When appropriate, an organization as defined in § 5-2-501.

Ark. Code Ann. § 5-1-102(13)(A) (emphasis added). Subsection (13)(A)(i) defines "person" as "any natural person" without restricting this definition's application to any particular set of criminal statutes; this definition applies to the entire criminal code. In 1999, the General Assembly amended subsection (13) of the Definitions Statute, *see* Act of Apr. 9, 1999, No. 1273, 1999 Ark. Acts 5209, to add section "(B)," which supplied a second definition of "person" applicable to a particular set of criminal statutes:

> (B)(i)(a) As used in §§ 5-10-101 -- 5-10-105, "person" also includes an unborn child in utero at any stage of development.
> (b) "Unborn child" means offspring of human beings from conception until birth.

Ark. Code Ann. § 5-1-102(13)(B)(i)(a)–(b) (emphasis added).

Smith's argument is simple. Subsection (13)(A)(i)'s "any natural person" definition applies to the Aggravating Circumstances Statute, and subsection (13)(B)'s "unborn child" definition specifically does not; the latter definition applies only to §§ 5-10-101 to -105, which are the homicide-charging statutes. Accordingly, while the prosecution certainly would have been within its statutory right to charge Smith with a murder count for the death of Allbright's unborn child, the prosecution should not have been able to use the death of Allbright's unborn child as an aggravating circumstance in favor of sentencing Smith to death. There is no ambiguity or conflict in the plain language of these statutes, and even if there were, the Rule of Lenity would require us to interpret the statutes in favor of the defendant. "We construe criminal statutes strictly, resolving any doubts in favor of the defendant." *Thompson v. State*, 2014 Ark. 413, at 5, 464 S.W.3d 111, 114

(Arkansas Supreme Court ruling that defendant could not be convicted under statute for felony failure to appear when he had not yet been charged with a criminal offense).

Furthermore, when construing multiple legislative acts implicating the same issue, this court "must presume that when the General Assembly passed the later act, it was well aware of the prior act." *Reed v. State*, 330 Ark. 645, 649, 957 S.W.2d 174, 176 (1997). Subsection (4) of the Aggravating Circumstances Statute was already on the books when the legislature added subsection (13)(B) to the Definitions Statute. Accordingly, we must presume that the legislature knew what it was doing when it drafted subsection 13(B) of the Definitions Statute to apply only to §§ 5-10-101 to -105, and not to subsection (4) of the Aggravating Circumstances Statute.

I disagree with majority's decision not to address this argument for Smith's failure to preserve the issue for our review. Indeed, Smith's counsel acknowledges that he abandoned the argument below. However, Smith argues that this court should nonetheless consider the argument here because this is a death-penalty case, and counsel's abandonment of the argument would unquestionably warrant relief under Rule 37 of the Arkansas Rules of Criminal Procedure for ineffective assistance of counsel. *Singleton v. State*, 274 Ark. 126, 128, 623 S.W.2d 180, 181 (1981) ("In death penalty cases we will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and this Court would unquestionably require the trial court to grant relief under Rule 37.").

Smith's counsel has done the honorable thing and "fallen on his sword" for his client, acknowledging in his brief,

> Counsel abandoned that argument, which ultimately would have limited (the State) to the presentation of a single aggravating circumstance, in favor of an argument that accomplished little, if anything, left both aggravating circumstances intact, and thereby precipitated an unreliable result. This Court would unquestionably have required the circuit court to grant Rule 37 relief. Accordingly, Singleton applies, and the merits may be addressed.

Because counsel's decision to abandon this argument at trial prejudiced and in no way served his client's interests, and because the argument itself is plainly correct, I would address the argument and reverse for a new sentencing trial.

Indeed, this court must address this issue pursuant to Rule 10(b)(ii), as Smith argues and as set forth in greater detail below regarding Smith's lack of a prior criminal history. The majority declines to do so under the auspices that this case does not fall within one of the "*Wicks* exceptions" to the objection requirement, specifically ruling that "Smith would have us apply the exception to his argument for a limited statutory interpretation; we decline to do so," without more. This conclusion cuts directly against the cases the majority cites in support, which have acknowledged the applicability of such an exception in similar and even far less compelling circumstances. *See*, *e.g.*, *Wertz v. State*, 2016 Ark. 249, at 8, 493 S.W.3d 772, 775–76 (court reversing for new trial where case was erroneously submitted to jury on a single set of verdict forms); *Camargo v. State*, 327 Ark. 631, 641, 42, 940 S.W.2d 464, 469 (1997) (failure of jury to make the necessary written findings to impose the death penalty was essential to the jury's imposition of the death

penalty); *Bowen v. State*, 322 Ark. 483, 499, 911 S.W.2d 555, 562 (1995) (failure to object to application of ex post facto law did not waive argument on appeal because issue was essential to jury's consideration of the death penalty).

No Mitigating Circumstance for Smith's Lack of Criminal History

As the majority sets out in its opinion, the jury in this case did not find a mitigating circumstance for the fact that Smith has no significant prior criminal history. This transpired despite the fact that Smith's attorneys, the State's attorneys, and the trial court all agreed that Smith has no significant prior criminal history, and the fact that both Smith's attorneys and the State's attorneys specifically instructed the jury to check the box on the verdict form to indicate the jury's finding that this mitigating circumstance exists. Smith argues that this amounts to a verdict reached under an "arbitrary factor." The majority finds no basis for reversal on this issue because Smith's counsel only alleged his client's lack of criminal history during closing arguments (as opposed to actually presenting evidence of that fact during Smith's case-in-chief), and because the circuit court instructed the jury that closing arguments from counsel were not evidence. The circuit court did not instruct the jury that it should find that a mitigating circumstance exists for Smith's lack of significant prior criminal history, and the majority therefore concludes that the jury did not reach its decision under an arbitrary factor.

I take a different view of this issue from that expressed by the majority and argued by Smith. Rule 10 of the Arkansas Rules of Appellate Procedure –Criminal,

provides for "mandatory review" of certain issues in cases in which a jury returns a death sentence. Rule 10(b) of Arkansas Rules of Appellate Procedure –Criminal. One of those issues we must review is "whether the trial court failed in its obligation to bring to the jury's attention a matter essential to its consideration of the death penalty[.]" Rule 10(b)(ii). Whether formulated specifically as a formal "stipulation" or otherwise, I submit that in a death-penalty trial where literally every attorney participating in the proceeding, including the trial judge himself, all agree that a mitigating circumstance exists, the undisputed existence of that mitigating circumstance constitutes "a matter essential to [the jury's] consideration of the death penalty" under Rule 10(b)(ii). Indeed, it is difficult to conceive of an issue to which this rule, which is at play only in death-penalty cases, would more directly apply. The circuit court should have instructed the jury as to the existence of this mitigating circumstance, and Rule 10 provides that our review of this question is "mandatory" without regard to whether or how the underlying issue has been raised or argued. Accordingly, I would reverse and remand for a new sentencing trial.

Robinson & Zakrzewski, P.A., by: *Luke Zakrzewski*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Amanda Jegley*, Ass't Att'y Gen., and *Jason M. Johnson*, Ass't Att'y Gen., for appellee.

(Filed July 28, 2017)

AMCI 2D 8301

STAGE ONE: STANDARD VERDICT FORM

We, the Jury, find Brad Hunter Smith guilty of Capital Murder.

/s/ Mark K. Pitchford
FOREMAN

We, the Jury, find Brad Hunter Smith not guilty.

_____
FOREMAN

(Filed July 28, 2017)

Form 1
AGGRAVATING CIRCUMSTANCES

We, the Jury, after careful deliberation, have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstance or circumstances:

(✓) In the commission of the capital murder, Brad Hunter Smith knowingly created a great risk of death to a person other than the victim or knowingly caused the death of more than one person (Cherrish F. Allbright and unborn child) in the same criminal episode.

(✓) The capital murder was committed in an especially cruel or depraved manner.

A capital murder is committed in an especially cruel manner when, as a part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse or torture is inflicted. Mental anguish is defined as the victim's uncertainty as to his ultimate fate. Serious physical abuse is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Torture is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

A capital murder is committed in an especially depraved manner when the defendant relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.

/s/ Mark K. Pitchford
FOREMAN

(Filed July 28, 2017)

Form 2
MITIGATING CIRCUMSTANCES

For each of the following mitigating circumstances, you should place a checkmark in the appropriate space to indicate the number of jurors who find that the mitigating circumstance probably exists.

The capital murder was committed while Brad Hunter Smith was under extreme mental or emotional disturbance.

Check one of the following:

( ) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

(✓) No member of the jury finds that this circumstance probably exists.

The capital murder was committed while Brad Hunter Smith was acting under unusual pressures or influences or under the domination of another person.

Check one of the following:

( ) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

(✓) No member of the jury finds that this circumstance probably exists.

The capital murder was committed while the capacity of Brad Hunter Smith to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

Check one of the following:

( ) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

(✓) No member of the jury finds that this circumstance probably exists.

The youth of Brad Hunter Smith at the time of the commission of the capital murder.

Check one of the following:

(✓) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

( ) No member of the jury finds that this circumstance probably exists.

The capital murder was committed by another person and Brad Hunter Smith was an accomplice and his participation relatively minor.

Check one of the following:

( ) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

(✓) No member of the jury finds that this circumstance probably exists.

Brad Hunter Smith has no significant history of prior criminal activity.

Check one of the following:

( ) All members of the jury find that this circumstance probably exists.

( ) At least one, but not all members of the jury find that this circumstance probably exists.

(✓) No member of the jury finds that this circumstance probably exists.

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

Other mitigating circumstances. Specify below in writing any other mitigating circumstances that at least one but not all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

/s/ Mark K. Pitchford
FOREMAN

(Filed July 28, 2017)

FORM 3

CONCLUSIONS

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

WE THE JURY CONCLUDE:

(a) (✓)The State has proved beyond a reasonable doubt one or more aggravating circumstances.

(If you do not unanimously agree to check paragraph (a), then skip (b) and (c) and sentence **Brad Hunter Smith** to life imprisonment without parole on Form 4.)

(b) (✓)The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist.

(If you do not unanimously agree to check paragraph (b), then skip (c) and sentence **Brad Hunter Smith** to life imprisonment without parole on Form 4.)

(c) (✓) The aggravating circumstances justify beyond a reasonable doubt a sentence of death.

(If you do not unanimously agree to check paragraph (c), then sentence **Brad Hunter Smith** to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b), and (c), then sentence Brad Hunter Smith to death on Form 4.

Otherwise, sentence Brad Hunter Smith to life imprisonment without parole on Form 4.

/s/ Mark K. Pitchford
FOREMAN

(Filed July 28, 2017)

FORM 4

VERDICT

We, the Jury, after careful deliberation, have determined that Brad Hunter Smith shall be sentenced to:

A.( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B.(✓) DEATH.

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

/s/ Mark K. Pitchford **FOREMAN**	/s/ Ailene Taylor
/s/ Bruce A. Bohlmann	/s/ Patsy Norton
/s/ Bryan K. Grice	/s/ Randall K. Reed, Jr.
/s/ James Wilson	/s/ Deborah Wright
/s/ Jessica Aud	/s/ Jason Phillips
/s/ Travis Scott Stover	/s/ Debrah Jones

(Filed August 8, 2017)

SENTENCING ORDER AMENDED
IN THE CIRCUIT COURT OF CLEVELAND COUNTY, ARKANSAS
13TH JUDICIAL DISTRICT 6TH DIVISION

On JULY 28, 2017 the Defendant appeared before the Court, was advised of the nature of the charge(s), of Constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing.

Defendant		**DOB**
[Last, First, MI]	SMITH, BRAD HUNTER	11/28/1995

Sex ■ Male □ Female **Total Number of Counts** 3

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment of conviction is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. The Defendant is sentenced to the Arkansas Department of Correction (A.D.C.) for the term specified on each offense shown below.

A.C.A. # of Offense/ Name of Offense 5-10-101 CAPITAL MURDER **Case #** 13CR-16-3

Offense Date 12/03/2015 **Offense is** ■ Felony □ Misd. □ Viol.

Offense Classification ■ Y □ A □ B □ C □ D □ **Number of Counts** 3

Criminal History Score 0 **Seriousness Level** 9

Presumptive Sentence ■ Prison Sentence of 240 months □ Community Corrections Center □ Alternative Sanction

Defendant Sentence	**Victim Info**	**Age**	**Sex**
□ Life □ LWOP ■ Death		21	■ Male □ Female

Defendant was found guilty at a jury trial and sentenced by □ Court ■ jury.

Sentence is a Departure
■ Yes □ No
Sentence Departure is □ Durational or ■ Dispositional.

Departure Reason
Aggravating # _____ or Mitigating # _____. For Agg. #16 or Mit. # 10,
or if departing from guidelines, please explain: VICTIM WAS PREGNANT

Sentence will run: ■ Consecutive □ Concurrent
to Offense # 2 & 3

Circuit Judge (Print Name): DAVID W. TALLEY, JR.
Signature: /s/ David W. Talley, Jr. **Date:** AUGUST 8, 2017

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

NOVEMBER 15, 2018

RE: SUPREME COURT CASE NO. CR-17-889
BRAD HUNTER SMITH V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE ABOVE STYLED CASE:

"APPELLANT'S PETITION FOR REHEARING IS DENIED. SPECIAL JUSTICE RUSSELL MEEKS AGREES. HART, J., WOULD GRANT. WYNNE, J., NOT PARTICIPATING."

SINCERELY,

/s/ Stacey Pectol

STACEY PECTOL, CLERK

CC: LUKE ZAKRZEWSKI
JASON MICHAEL JOHNSON, ASSISTANT ATTORNEY GENERAL
CLEVELAND COUNTY CIRCUIT COURT
(CASE NO. 13CR-16-3)

(Filed January 22, 2018)

CR-17-889
IN THE ARKANSAS SUPREME COURT

BRAD HUNTER SMITH — APPELLANT

V.

STATE OF ARKANSAS — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF CLEVELAND COUNTY, ARKANSAS
THIRTEENTH JUDICIAL CIRCUIT
FIFTH DIVISION
NO. 13CR-16-3-5

THE HONORABLE DAVID W. TALLEY, JR.
PRESIDING CIRCUIT JUDGE

ABSTRACT, BRIEF, AND ADDENDUM OF APPELLANT BRAD HUNTER SMITH

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V.

THE SENTENCE OF DEATH WAS IMPOSED UNDER THE INFLUENCE OF AN ARBITRARY FACTOR, NAMELY THE DISREGARD OF A CLEARLY EXISTENT MITIGATING CIRCUMSTANCE.

During its rebuttal closing argument, the prosecution stated in pertinent part as follows:

> You must consider the mitigating circumstances. As the prosecuting attorney, *I'm asking you to check the box that shows he has a minimal record* and that he's young. There would be all kinds of trouble if you didn't consider mitigating circumstances, so we want you to fill in the blank on that.
>
> * * *
>
> *You should check the box* young, *no significant prior record*.

Ab 204, 205 (emphasis supplied) (internal citations to record omitted).

"[Appellant] has no significant history of prior criminal activity[.]" appears among the mitigating circumstances on Form 2. Add 178. Despite the prosecution's admonition and the lack of evidence that Appellant has a significant history of prior criminal activity, no member of the jury found that that circumstance probably existed. Add 178. The sentence of death thus appears to have been imposed under the influence of an arbitrary factor, namely the disregard of a clearly existent mitigating circumstance.

(Filed April 9, 2018)

CR-17-889

IN THE SUPREME COURT OF ARKANSAS

BRAD HUNTER SMITH — APPELLANT

VS. — CASE NO. CR-17-889

STATE OF ARKANSAS — APPELLEE

AN APPEAL FROM THE
CLEVELAND COUNTY CIRCUIT COURT

THE HONORABLE DAVID W. TALLEY
CIRCUIT JUDGE

BRIEF OF APPELLEE

Respectfully submitted,

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ATTORNEYS FOR APPELLEE

V.

THE JURY WAS NOT REQUIRED TO FIND THAT APPELLANT'S LACK OF SIGNIFICANT CRIMINAL HISTORY WAS A MITIGATING CIRCUMSTANCE AND ITS IMPOSITION OF THE DEATH PENALTY WAS NOT ARBITRARY.

For his fifth and final point on appeal, Appellant claims that the death penalty was imposed under the influence of an arbitrary factor, because no member of the jury found that Appellant's lack of a significant criminal history was a mitigating circumstance. Appellant has failed to cite any legal authority supporting his claim. (Arg. 15, 16). "This [C]ourt has held, even in a capital case, that where the party fails to cite to authority or fails to provide convincing argument, [it] will not consider the merits of the arguments." *Anderson v. State*, 357 Ark. 180, 209, 163 S.W.3d 333, 350 (2004). This Court should affirm Appellant's sentence on this basis alone. Should this Court decide to reach the merits, it should affirm the jury's imposition of the death penalty because the jury was not required to find that Appellant's lack of criminal history was a mitigating factor.

In this case, the jury heard arguments from both the State and Appellant that he was 20 years old when he murdered Cherrish. It also heard argument from both the State and Appellant that he had no significant criminal history. Appellant appears to suggest that the fact that the State conceded his lack of criminal history somehow demonstrates that the jury's imposition of the death penalty was arbitrary. However, this jury was instructed that arguments of counsel are not

evidence. (R. 1570).[4] Moreover, this Court previously has held that "[a] jury is not required to find a mitigating circumstance just because the defendant puts before the jury some evidence that could serve as the basis for finding the mitigating circumstance." *E.g.*, *Bowen*, 322 Ark. at 483, 497, 911 S.W.2d at 561. This Court has held further that the jury alone determines what weight to give the evidence, and may reject it or accept all or any part of it the jurors believe to be true. *E.g.*, *Id.*

Given this broad authority of the jury to determine whether mitigating circumstances exist, this Court found no error on direct appeal, for example, in *Williams v. State*, 347 Ark. 728, 751, 67 S.W.3d 548, 562 (2002), where the jury failed to conclude that unrefuted evidence concerning Williams's mental and familial dysfunction was sufficient to establish a mitigating circumstance. On post-conviction review, this Court observed further in *Williams v. State*, 369 Ark. 104, 116, 251 S.W.3d 290, 298 (2007) that "the mere fact that evidence is presented by trial counsel that an issue constitutes a mitigator does not mean that the jury is required to conclude that it is."

Here, all members of the jury found that Appellant's youth at the time he murdered Cherrish was a mitigating circumstance that probably existed, but no member of the jury found that Appellant's lack of criminal history was a mitigating

---

[4]Supreme Court Rule 4-2(a)(7) (2017) requires that citation be made to the abstract and addendum. Appellant's abstract does not contain all of the relevant information, but the Court can go to the record to affirm. *See*, *e.g.*, *McGehee v. State*, 344 Ark. 602, 605, 43 S.W.3d 125, 127 (2001).

circumstance that probably existed. (R. 225, 226, Add. 177, 178). Under this Court's precedent, it simply was not required to make that finding. Appellant's argument is meritless, and the sentence imposed by the jury should be affirmed.

(Filed May 11, 2018)

CR-17-889
IN THE ARKANSAS SUPREME COURT

BRAD HUNTER SMITH — APPELLANT

V.

STATE OF ARKANSAS — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF CLEVELAND COUNTY, ARKANSAS
THIRTEENTH JUDICIAL CIRCUIT
FIFTH DIVISION
NO. 13CR-16-3-5

THE HONORABLE DAVID W. TALLEY, JR.
PRESIDING CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT BRAD HUNTER SMITH

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V.

THE SENTENCE OF DEATH WAS IMPOSED UNDER THE INFLUENCE OF AN ARBITRARY FACTOR, NAMELY THE DISREGARD OF A CLEARLY EXISTENT MITIGATING CIRCUMSTANCE.

Appellee argues that a lack of citation to legal authority supporting this claim requires affirmance. *Brief* at 25. However, Appellant has provided convincing argument and, more importantly, consideration of whether the death sentence was imposed under the influence of an arbitrary factor is mandatory and not conditioned upon citation to authority. See Ark. R. App. P.—Crim. 10(b)(vii).

Addressing the merits, Appellee cites precedent stating that a jury is not required to find a mitigating circumstance simply because evidence of its existence is presented. *Brief* at 26-27. The rationale underlying that proposition is that the jury alone determines what weight to give the evidence. *Nooner v. State*, 2014 Ark. 296, at 15-16, 438 S.W.3d 233, 243. However, the discretion accorded juries is not unfettered. *Echols v. State*, 326 Ark. 917, 942, 936 S.W.2d 509, 520 (1996) ("[W]hen there is no question about credibility and, when, in addition, objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion.").

The decisions Appellee cites involve the presentation of evidence and thus do not apply. The absence of evidence of a criminal history establishes the existence of this particular circumstance, and something that is not present cannot be weighed or otherwise evaluated. The objective absence of proof in this regard divested the

jury of the discretion it may ordinarily exercise, and its refusal to find the lack of a significant criminal history therefore constituted an arbitrary decision that, by extension, rendered imposition of the death penalty arbitrary.

(Filed October 19, 2018)

CR-17-889
IN THE SUPREME COURT OF ARKANSAS

BRAD HUNTER SMITH APPELLANT

V.

STATE OF ARKANSAS APPELLEE

APPELLANT'S PETITION FOR REHEARING

A Cleveland County jury convicted Appellant Brad Hunter Smith of capital murder and sentenced him to death. *Smith v. State*, 2018 Ark. 277, at 1. This Court affirmed both the conviction and sentence by opinion delivered October 4, 2018. *Smith*, 2018 Ark. 277, at 1. For his final point on appeal, Appellant argued that he was sentenced under an arbitrary factor because the jury declined to find that he lacked a significant history of prior criminal activity despite the absence of any evidence of such a history. *Id.* at 10, 11. Noting that Appellant did not present evidence that he lacked a significant history of prior criminal activity, the Court rejected this contention, holding that "the jury did not act arbitrarily when it chose not to find [Appellant]'s history of criminal activity (or lack thereof) to be worthy of mitigating the punishment for his crime in this case." *Id.* at 11. This holding both conflicts with Arkansas' statutory capital-sentencing scheme and confers a constitutionally impermissible level of discretion upon capital-sentencing juries.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court concluded that Georgia and Texas had, in three cases collectively, imposed the death penalty in violation of the Eighth Amendment's prohibition of

cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process. *Wilson v. State*, 295 Ark. 682, 684, 751 S.W.2d 734, 736 (1988). The justices' concurring opinions evinced concern "that the death penalty was being applied arbitrarily because those empowered to impose the sentence had too much discretion, resulting in the wrong kind of selectivity, i.e., selectivity based on factors such as race, sex, and economic status." *Wilson*, 295 Ark. at 684, 751 S.W.2d at 736 (1988). *Furman* prompted this Court to declare Arkansas' then-existing capital-sentencing scheme unconstitutional shortly after its delivery. *Graham v. State*, 253 Ark. 462, 463, 486 S.W.2d 678, 679 (1972). It also prompted the legislative bodies of death-penalty states to enact statutes narrowing sentencing discretion. *Wilson*, 295 Ark. at 684, 751 S.W.2d at 736. Arkansas' General Assembly followed suit and enacted this State's current capital-sentencing scheme in 1975. *Id.*, 751 S.W.2d at 736.

Arkansas' capital-sentencing-deliberation process consists of two phases. First, the jury must determine the existence of aggravating and mitigating circumstances and, second, it must weigh any aggravating circumstance(s) found to exist against any mitigating circumstance(s) found to exist and sentence the defendant accordingly. Ark. Code Ann. § 5-4-603(a) & (b); AMI Crim. 2d 1008. The General Assembly has established 10 statutory aggravating circumstances that militate in favor of death-penalty imposition and has limited the consideration of juries to those circumstances only. Ark. Code Ann. § 5-4-604(1)—(8). The General Assembly has also established statutory mitigating circumstances that militate

against death-penalty imposition but has not similarly limited the consideration of juries to those circumstances. *Id.* § 5-4-605. The relevant statute reads as follows:

> A mitigating circumstance includes, but is not limited to, the following:
> (1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;
> (2) The capital murder was committed while the defendant was acting under an unusual pressure or influence or under the domination of another person;
> (3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
> (4) The youth of the defendant at the time of the commission of the capital murder;
> (5) The capital murder was committed by another person and the defendant was an accomplice and his or her participation was relatively minor; or
> (6) The defendant has no significant history of prior criminal activity.

Id.

Notably, section 5-4-605 states that a mitigating circumstance "includes," as opposed to "may include," the circumstances recited therein. As such, sections 5-4-605 and 5-4-603, when read in tandem, require juries to consider any existent circumstance recited in the former when weighing the competing circumstances per the latter. Cf. *Marcum v. Wengert*, 344 Ark. 153, 164, 40 S.W.3d 230, 237 (2001) (referring to the permissive and discretional nature of the word "may").

Appellant acknowledges that, in many instances, two different juries considering the same factual scenario could reach two different, yet permissible, conclusions as to the existence of the same statutory mitigating circumstance. For example, a jury deciding a capital case involving a thirty-year-old defendant might

conclude that thirty-year-olds qualify as "youthful" for purposes of the fourth statutory mitigating circumstance, find that circumstance existent, and weigh it, along with other existent mitigating circumstances, if any, against any existent aggravating circumstance(s). However, a different jury deciding the same case might conclude that thirty-year-olds do not qualify as "youthful" for purposes of the fourth statutory mitigating circumstance, find that circumstance nonexistent, and therefore decline to weigh it against any existent aggravating circumstance(s). Because controlling law does not definitively indicate whether section 5-4-605(4)'s reference to "youth" encompasses thirty-year-olds, neither conclusion is objectively erroneous.

This case presents no such scenario with respect to the statutory mitigating circumstance at issue. A review of the record not only fails to reveal evidence of a significant history of prior criminal activity, it fails to reveal evidence of *any* history of prior criminal activity. Accordingly, the jury's finding that Appellant did not lack a significant history of prior criminal activity was objectively erroneous, and Appellant's failure to present proof that he lacked such a history is of no consequence.

The holding at issue allows juries to decline to weigh an existent statutory mitigating circumstance in accordance with section 5-4-603 by (1) finding that the circumstance does not exist despite the record's inability to support such a conclusion or (2) determining that the circumstance is not subjectively worthy of consideration in the "weighing" phase of deliberations. Such a holding conflicts

with the statutory requirement that juries weigh all existent mitigating circumstances against any existent statutory aggravating circumstance(s). Moreover, the lack of criteria by which to assess the "worthiness" of a statutory mitigating circumstance confers upon juries unbridled discretion to determine whether to weigh such a circumstance against any existent aggravating circumstance(s). The holding at issue therefore facilitates the arbitrary imposition of the death penalty to such an extent that it violates the Eighth and Fourteenth Amendments to the United States Constitution. For these reasons, Appellant respectfully petitions for rehearing.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

By: /s/ Luke Zakrzewski
Luke Zakrzewski (2000097)
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CERTIFICATE OF MERIT

I certify that this petition is not filed for the purpose of delay.

/s/ Luke Zakrzewski
Luke Zakrzewski

CERTIFICATE OF SERVICE

I certify that on October 19, 2018 I served a copy of the foregoing petition for rehearing upon Ms. Amanda Jegley and Mr. Jason Johnson, Assistant Attorneys General, STATE OF ARKANSAS, by depositing it at the desk of the Clerk of this Court.

/s/ Luke Zakrzewski
Luke Zakrzewski

(Filed October 26, 2018)

IN THE SUPREME COURT OF ARKANSAS

BRAD HUNTER SMITH **APPELLANT**

VS. **CASE NO. CR-17-889**

STATE OF ARKANSAS **APPELLEE**

RESPONSE TO PETITION FOR REHEARING

Comes now the Appellee, the State of Arkansas, by and through counsel, Leslie Rutledge, Attorney General, and Jason Michael Johnson, Assistant Attorney General, and for its response, states:

1. On October 4, 2018, this Court affirmed Appellant's conviction and sentence for the capital murder of Cherrish Allbright. *Smith v. State*, 2018 Ark. 277, 1 (2018). Appellant now seeks rehearing under Ark. Sup. Ct. R. 2-3 (2017), claiming this Court erred by holding that the jury was not arbitrary in declining to find Smith's alleged lack of a history of criminal activity to be a mitigating factor in his punishment. *Smith*, 2018 Ark. 277, at 11; Pet. 1.

Appellant contends that the decision "conflicts with Arkansas' statutory capital-sentencing scheme and confers a constitutionally impermissible level of discretion upon capital-sentencing juries," Pet. at 2, but this claim is meritless for three reasons.

2. First, Appellant is merely dissatisfied with this Court's application of the law to the facts of this case. Here, no evidence regarding Appellant's history of prior criminal activity, or lack thereof, was presented to the jury. *See Smith*, 2018

Ark. 277 at 11. It is clear that a jury is not required to find a mitigating circumstance just because the defendant puts before the jury some evidence that could serve as the basis for finding the mitigating circumstance. *Miller v. State*, 2010 Ark. 1 at 41, 362 S.W.3d 264, 288. This Court can hardly be said to have erred in holding that a jury did not act arbitrarily when Appellant declined to present any evidence to support finding that the mitigating circumstance exists. Appellant's dissatisfaction with this Court's application of the law to these facts is not grounds for rehearing, and the petition should be denied.

3. Second, petitions for rehearing are entertained for the limited purpose of calling attention to an opinion's specific errors of law or fact. *See*, *e.g.*, *Pannell v. State*, 320 Ark. 390, 391, 897 S.W.2d 552, 552 (1995). New arguments are not proper in a petition for rehearing. *Id.* Here, Appellant argues for the first time that Arkansas' statutory capital-sentencing scheme mandates that certain findings are not discretionary even in the absence of evidence supporting them. Pet. 2-4. Appellant did not make this argument in either his initial brief or his reply brief. *Cf.* Pet. 2-4, Br. 16, Reply Br. 14-15. Appellant's presentation of new argument in support of his challenge to the jury's verdict is not a proper ground for rehearing, and the petition should be denied.

4. Third, although Appellant claims that his "failure to present proof that he lacked . . . a history [of prior criminal activity] is of no consequence," this assertion lacks merit. Pet. at 5. Appellant would have this Court hold that the absence of evidence is evidence of absence. However, in rejecting this argument on

appeal, this Court correctly applied its longstanding rule that only *objective proof* makes a reasonable conclusion inescapable. *See Howard v. State*, 367 Ark. 18, 49, 238 S.W.3d 24, 47 (2006). This Court did not err by holding that the absence of proof is not the equivalent of objective proof, and the petition should be denied.

5. Appellant's petition for rehearing fails to establish that this Court's opinion contains any errors of law or fact. He has given the Court no reason to rehear this case, and his restatement of previously argued and decided claims does not demonstrate error. Consequently, his petition should be denied.

WHEREFORE, the State respectfully asks the Court to deny Appellant's petition for review.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

BY: /s/ Jason Michael Johnson

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ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, Jason Michael Johnson, certify that on October 26, 2018, I electronically filed the foregoing document with the Clerk of the Court using the eFlex system which shall send notification of such filing, which is deemed service, to:

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Luke Zkrzewski
Robinson & Zakrzewski, P.A.
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Tel.: 1-870-850-6000
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/s/ JASON MICHAEL JOHNSON
JASON MICHAEL JOHNSON

U.S. CONST. AMEND. 8

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONST. AMEND. 14, § 1

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

ARK. CODE ANN. § 5-4-603 (REPL. 2013)

5-4-603. Findings required for death sentence—Harmless error review.

(a) The jury shall impose a sentence of death if the jury unanimously returns written findings that:
(1) An aggravating circumstance exists beyond a reasonable doubt;
(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.
(b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:
(1) Aggravating circumstances do not exist beyond a reasonable doubt;
(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or
(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.
(c) If the jury does not make any finding required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

(d)(1) On an appellate review of a death sentence, the Supreme Court shall conduct a harmless error review of the defendant's death sentence if:
(A) The Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance for any reason; and
(B) The jury found no mitigating circumstance.
(2) The Supreme Court shall conduct a harmless error review under subdivision (d)(1) of this section by determining that a remaining aggravating circumstance:
(A) Exists beyond a reasonable doubt; and
(B) Justifies a sentence of death beyond a reasonable doubt.
(e) If the Supreme Court concludes that the erroneous finding of any aggravating circumstance by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

ARK. CODE ANN. § 5-4-604 (REPL. 2013)

5-4-604. Aggravating circumstances.

An aggravating circumstance is limited to the following:
(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;
(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;
(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;
(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim or caused the death of more than one (1) person in the same criminal episode;
(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;
(6) The capital murder was committed for pecuniary gain;
(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function;

(8)(A) The capital murder was committed in an especially cruel or depraved manner.
(B)(i) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.
(ii)*(a)* "Mental anguish" means the victim's uncertainty as to his or her ultimate fate.
(b) "Serious physical abuse" means physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.
(c) "Torture" means the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.
(C) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially depraved manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder;
(9) The capital murder was committed by means of a destructive device, bomb, explosive, or similar device that the person planted, hid, or concealed in any place, area, dwelling, building, or structure, or mailed or delivered, or caused to be planted, hidden, concealed, mailed, or delivered, and the person knew that his or her act would create a great risk of death to human life; or
(10) The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because:
(A) Of either a temporary or permanent severe physical or mental disability which would interfere with the victim's ability to flee or to defend himself or herself; or
(B) The person was twelve (12) years of age or younger.

ARK. CODE ANN. § 5-4-605 (REPL. 2013)

5-4-605. Mitigating circumstances.

A mitigating circumstance includes, but is not limited to, the following:
(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under an unusual pressure or influence or under the domination of another person;
(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
(4) The youth of the defendant at the time of the commission of the capital murder;
(5) The capital murder was committed by another person and the defendant was an accomplice and his or her participation was relatively minor; or
(6) The defendant has no significant history of prior criminal activity.

ARK. R. APP. P.—CRIM. 10 (2018)

Rule 10. Automatic appeal and mandatory review in death-sentence cases; procedure on affirmance.

(a) *Automatic appeal*.
(1) Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty (30) days after entry of judgment. The notice of appeal shall be in the form annexed to this rule. The court reporter shall transcribe all portions of the criminal proceedings consistent with Article III of the Rules of the Supreme Court and shall file the transcript with the circuit clerk within ninety (90) days after entry of the judgment. Within thirty (30) days after receipt of the transcript, the circuit clerk shall compile the record consistent with Article III and shall file the record with the clerk of the Arkansas Supreme Court for mandatory review consistent with this rule and for review of any additional issues the appellant may enumerate.
(2) *Extension of time*.
(A) If the court reporter needs an extension of time to file the transcript, the court reporter shall notify the circuit court and all parties explaining the reasons for the requested extension. A party has ten (10) days to file an objection, in which case the circuit court shall provide all parties the opportunity to be heard, either at a hearing or by responding in writing. Otherwise, the court may proceed to decide on the extension.

(B) The court may order an extension if it finds, in writing, (i) the time to file the record on appeal has not yet expired and (ii) an extension of time is necessary for the court reporter to file the transcript. The court must enter its extension order before the end of the 90-day period afforded the court reporter in Rule 10(a) or by a prior extension order.

(C) This subdivision, 10(a)(2), supersedes Rule 4(c)(1), but Rule 4(c)(2) and (3) otherwise remains the same.

(b) *Mandatory review*. Whenever a sentence of death is imposed, the Supreme Court shall review the following issues in addition to other issues, if any, that a defendant may enumerate on appeal. Counsel shall be responsible for abstracting the record and briefing the issues required to be reviewed by this rule and shall consolidate the abstract and brief for such issues and any other issues enumerated on appeal. The Court shall consider and determine:

(i) pursuant to Rule 4-3(h) of the Rules of the Supreme Court and Ark. Code Ann. 16-91-113(a), whether prejudicial error occurred;

(ii) whether the trial court failed in its obligation to bring to the jury's attention a matter essential to its consideration of the death penalty;

(iii) whether the trial judge committed prejudicial error about which the defense had no knowledge and therefore no opportunity to object;

(iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;

(v) whether the trial court erred in failing to take notice of an evidentiary error that affected a substantial right of the defendant;

(vi) whether the evidence supports the jury's finding of a statutory aggravating circumstance or circumstances; and

(vii) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

(c) *Procedure on affirmance*. When a judgment of death has been affirmed, the denial of post-conviction relief has been affirmed, or a mandate has been returned from the United States Supreme Court, and the day of execution has passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance or return of mandate and judgment, to the end that a warrant for the execution of the judgment may be issued by the Governor. Such certificate shall operate to dissolve any stay of execution previously entered by the Supreme Court or any stay of execution previously entered by a circuit court pending disposition of a petition for post-conviction relief.

ARK. SUP. CT. R. 2-3 (2018)

Rule 2-3. Petitions for rehearing.

(a) *Filing and service*. A petition for rehearing, a brief in support of the petition, and evidence of service of the petition, brief, and a certificate of merit stating that the petition is not filed for the purpose of delay, shall be filed within 18 calendar days from the date of decision.

(b) *Response*. The respondent may file a brief on the following Monday (in the Supreme Court) or Wednesday (in the Court of Appeals) or within seven calendar days from the filing of the petition for rehearing, whichever last occurs, or may, on or before that time, obtain an extension of one week upon written motion to the Court.

(c) *Additional time*. Neither party will be granted further time than as indicated above, except upon written motion to the Court and a showing of illness of counsel or other unavoidable casualty.

(d) *Number of copies to be filed*. The petition must be filed with the Clerk, and no copies are required. A copy must be served upon opposing counsel.

(e) *Page length*. In all cases, both civil and criminal, the petition and supporting brief, if any, including the style of the case and the certificate of counsel, shall not exceed ten 8½" × 11" double-spaced, typewritten pages.

(f) *Ground(s) stated*. The petition must specifically state the ground(s) relied upon.

(g) *Entire case not to be reargued*. The petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain. Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the Court.

(h) *Previous reference in abstract or Addendum*. In no case will a rehearing petition be granted when it is based upon any fact thought to have been overlooked by the Court, unless reference has been clearly made to it in the abstract of the transcript or the Addendum of the record prescribed by Rules 4-2 and 4-3.

(i) *No oral argument*. Oral argument will not be permitted on a petition for rehearing.

(j) *Limited to one petition*. A party may submit only one petition for rehearing.

(k) *New counsel*. Litigants will not be permitted to substitute new counsel for the purpose of filing a petition for rehearing. Additional counsel may, however, participate in a petition for rehearing, or in

opposition to the petition, by joining with the original counsel in the petition and brief, or by obtaining permission of the Court by motion.

(l) *Compliance with Administrative Order 19 required.* Every petition for rehearing, brief in support, and brief in response must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

AMI CRIM. 2D 1008

AMCI 2d 1008

CAPITAL MURDER — BIFURCATED TRIAL — PUNISHMENT

Members of the Jury, you have found _____ (defendant(s)) **guilty of capital murder. After hearing arguments of counsel, you will again retire to deliberate and decide** [separately as to each defendant] **whether** [he] [she] **is to be sentenced to death by lethal injection or to life imprisonment without parole.**

In determining which sentence shall be imposed, you are required to make specific written findings as to the existence or absence of aggravating and mitigating circumstances. Appropriate forms will be provided for you, and I will now instruct you on the procedures that you must follow.

[The instructions I will now give you apply to each of the defendants individually. You will be given a complete set of forms for each defendant. Your verdict may or may not be the same for each defendant, but you must consider the case of each one separately.]

[As to each defendant] **there are three forms for you to use in reaching your decision, and a verdict form for you to use when your verdict has been reached.**

Form 1, which will be handed to you later, deals with aggravating circumstances. The appearance of any particular aggravating circumstance on the form does not mean that it actually existed in this case. These are specified by law and are the only aggravating circumstances that you may consider. The State has the burden of proving beyond a reasonable doubt one or more of the listed aggravating circumstances. If you find unanimously and beyond a

reasonable doubt that the State has proved one or more of these aggravating circumstances, then you will indicate your findings by checking the appropriate space on Form 1. If you do not unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, then you will cease deliberations and indicate on the verdict form a sentence of life imprisonment without parole.

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably exists.

With respect to each mitigating circumstance listed on Form 2 you should indicate by placing a check mark in the appropriate space the number of jurors who believe that the circumstance probably exists. By checking the first space under a circumstance, you indicate that all members of the jury find that the circumstance probably exists. By checking the second space under a circumstance, you indicate that at least one, but not all members of the jury find that the circumstance probably exists. By checking the third space under a circumstance, you indicate that no member of the jury finds that the circumstance probably exists.

You may use the blank lines under "Other mitigating circumstances" to list any other mitigating circumstances that all or at least one juror finds probably exists.

After making the determinations required to complete Form 1 and Form 2, if applicable, you will then complete Form 3.

In no event will you return a verdict imposing the death penalty unless you unanimously make three particular written findings on Form 3. These are:

> First: That the State has proved beyond a reasonable doubt one or more aggravating circumstances.
>
> Second: That such aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances any of you found to exist; and
>
> Third: That the aggravating circumstances justify beyond a reasonable doubt the sentence of death.

If you make those findings, you will impose the death penalty. Otherwise, you will sentence the [particular] defendant to life imprisonment without parole.

After you have made your determinations on Forms 1 and 2 and have reflected your conclusions on Form 3, then you must check the appropriate verdict on Form 4. Each of you must sign [the] [each] verdict form.

You may now retire to consider your decision.