No. 18-8002

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

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BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ARKANSAS

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QUESTION PRESENTED

Whether a capital-sentencing jury's finding that a mitigating circumstance did not exist, where the defendant offered no evidence of that mitigating circumstance, violates the Eighth Amendment.

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JURISDICTION

The judgment of the Arkansas Supreme Court was entered on October 4, 2018; that court denied the petitioner's petition for rehearing on November 15, 2018. The petitioner filed his petition on February 12, 2019. This Court lacks jurisdiction under 28 U.S.C. 1257 to review the Arkansas Supreme Court's judgment because the federal questions petitioner presents were first presented to the Arkansas Supreme Court in his petition for rehearing.

STATEMENT OF THE CASE

In November of 2015, Cherrish Allbright told the petitioner, Brad Smith, that she was pregnant with his child. App. 1. In the following weeks, Smith asked various relatives, friends, and coworkers to help him murder Allbright. *Id.* He eventually succeeded in enlisting the help of two friends, one of whom agreed to lure her to a nearby field. App. 1–2. On December 3, 2015, after Allbright was lured to the field to smoke marijuana with Smith's friend, Smith shot her in the back with a crossbow bolt, and then beat her to death with a baseball bat. App. 2. Smith and his friends then moved her body and buried her behind Smith's house. *Id.*

Smith was apprehended and charged with kidnapping, abuse of a corpse, and capital murder. *Id.* The jury convicted him on all three charges. *Id.* At the penalty phase of the trial, Smith presented no mitigation evidence. App. 10. However, after the defense made its closing argument, his counsel asked to readdress the jury so he could argue two mitigating circumstances—Smith's youth, and his lack of a significant history of prior criminal activity, *id.*, both of which are statutory

mitigating circumstances to capital murder under Arkansas law. *See* Ark. Code Ann. 5-4-605(4), 5-4-605(6). The trial court agreed, and Smith's counsel told the jury that Smith was twenty years old and that Smith "ha[d] no prior convictions." App. 10 (internal quotation marks omitted). The prosecution, in turn, "ask[ed the jury] to check the box that shows [Smith] has a minimal record and that he's young." *Id.* The jury was then instructed to find mitigating circumstances if they "believe[d] from the evidence that it probably exists," App. 55, and that "arguments of counsel are not to be considered evidence." App. 11.

After hearing those instructions and Smith's counsel's arguments, the jury unanimously found that Smith's youth was a mitigating circumstance, App. 10, 22, but no juror found that Smith had no significant history of prior criminal activity. App. 11, 22. The jury then concluded that the aggravating circumstances—the "especially cruel or depraved manner" in which the murder was committed and Smith's intentional killing of his and Allbright's unborn child, App. 20—outweighed the mitigating circumstance of Smith's youth. App. 24. It sentenced Smith to death. App. 25.

Smith appealed only his sentence to the Arkansas Supreme Court. App. 2. On appeal, Smith argued, inter alia, that the jury arbitrarily disregarded "a clearly existent mitigating circumstance," namely his lack of a significant history of prior criminal activity. App. 30. Smith argued there was no dispute that he had proven that mitigator, since the prosecution had asked the jury to check the nonexistent "minimal record" box on the verdict form. *Id.* Neither Smith's opening brief nor his

reply brief cited any provision of the United States or Arkansas Constitutions that the jury's failure to find the criminal-history mitigator violated, and his opening brief cited no federal or state authority in support of this argument. App. 30, 37. Smith's reply brief, however, belatedly cited a case holding that as a matter of Arkansas evidentiary law, a jury cannot refuse to find a mitigating circumstance when "objective proof makes [a finding of that circumstance] inescapable[.]" App. 37 (quoting *Echols v. State*, 936 S.W.2d 509, 520 (Ark. 1996)).[1]

The Arkansas Supreme Court rejected Smith's argument. Acknowledging that, under Arkansas law, a jury cannot refuse to find a mitigating circumstance when the evidence makes a finding of that mitigator "inescapable," that court held that the jury's finding was non-arbitrary because "no evidence was presented to the jury . . . of [Smith's] lack of criminal history[.]" App. 11. That conclusion was underscored by the trial court's "specific[] instruct[ion] . . . that arguments of counsel are not to be considered evidence." *Id.* Alone in dissent, Associate Justice Josephine Hart argued that under an Arkansas rule of *appellate* procedure, the jury must find a mitigating circumstance "where literally every attorney participating in the proceeding . . . all agree [it] exists," which she implied was the case here. App. 18 (Hart, J., dissenting).

Smith petitioned for rehearing, arguing for the first time that the jury's failure to find that he lacked a significant history of prior criminal activity somehow

[1] *Echols* cited *Giles v. State*, 549 S.W.2d 479 (Ark. 1977), for that proposition, which in turn cited a series of Arkansas civil cases on review of jury findings generally for the proposition. *See Giles*, 549 S.W.2d at 485. Neither case suggested the rule was one of federal or even state constitutional law.

violated the Eighth and Fourteenth Amendments. App. 42. The Arkansas Supreme Court summarily denied his petition. App. 28.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction to review the Arkansas Supreme Court's judgment.

"Congress has given this Court the power to review 'final judgments or decrees rendered by the highest court of a State in which a decision could be had where any right is *specially set up or claimed* under the Constitution or the treaties or statutes of the United States.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (alterations omitted) (quoting 28 U.S.C. 1257(a)). This Court has long interpreted the emphasized language, and its predecessor formulations, to require that a federal question be either "properly presented to the state court that rendered the decision [the Court has] been asked to review," or *sua sponte* addressed by it. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam).

Consistently with that requirement, this Court "generally refuse[s] to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the [federal] question" raised, *id.* at 89 n.3, unless rehearing was "the first opportunity" to raise it. *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010) (federal issues raised for the first time in a state-court petition for rehearing, though "ordinarily . . . not consider[ed]" by this Court, may be considered "where the state-court decision itself is claimed to

constitute a violation of federal law"). Here, Smith only raised a *federal* question regarding the jury's failure to find the criminal-history mitigator in his petition for rehearing, previously only challenging the jury's finding under state evidentiary law. There is no reason why he could not have raised his federal arguments sooner. This Court therefore lacks jurisdiction to review the Arkansas Supreme Court's decision, which was rendered without the benefit of any briefing on the federal question Smith now seeks to raise.

II. This case does not present Petitioner's question presented.

This Court should also decline review because this case does not raise the question Smith presents. Smith's question presented asks whether the Arkansas Supreme Court's ostensible "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[.]" Pet. i. But the Arkansas Supreme Court rendered no such holding, and this case therefore does not present that question. Rather, even the most cursory review of the decision below demonstrates that court merely concluded that Smith failed to prove he lacked a significant history of criminal activity.

The first step in the Arkansas Supreme Court's analysis—which Smith omits—is its observation that the instruction in question "makes no reference to prior *convictions* but rather prior criminal *activity*." App. 11 (emphasis added).

This was not a casual observation. The mitigating circumstance in question, a lack of a "significant history of prior criminal activity," *id.*, is codified in an Arkansas statute. Ark. Code Ann. 5-4-605(6). Consistent with that provision's plain language, the Arkansas Supreme Court has long held that provision encompasses criminal activity even if it did not result in a conviction, indictment, or even arrest. *See Echols v. State*, 936 S.W.2d 509, 520–21 (Ark. 1996) (jury "did not arbitrarily refuse to find that [a defendant] had no significant history of criminal activity" where he admitted in the penalty phase of his trial that he had an altercation with his father involving a knife, that he attempted to claw a student's eyes out, and where his psychologist testified that he said in therapy that he bit and cut people and drank their blood, and that his solution to his rage was to "hurt someone"). Therefore, under Arkansas law, even conclusive proof of the lack of a significant criminal *record* would not compel a finding of "no significant history of prior criminal *activity*." Ark. Code Ann. 5-4-605(6) (emphasis added).

Next, after expressly stating that a jury "cannot arbitrarily disregard th[e] proof" of a mitigator when that proof makes finding it "inescapable," App. 11, the Arkansas Supreme Court noted that: 1) "no evidence was presented to the jury" regarding Smith's history of criminal activity or lack thereof, *id.*; 2) the jury only heard arguments of counsel on the point; and 3) the trial court "specifically instructed the jury that arguments of counsel are not to be considered evidence." *Id.* Indeed, even if counsel's arguments were evidence, Smith's counsel's submission that Smith merely "has no prior convictions," App. 10 (internal quotation marks

omitted), would not prove he lacked a significant history of prior criminal activity. Nor would the prosecution's suggestion that the jury "check the box that shows [Smith] has a minimal record," *id.*, alter that conclusion since there is no such box. Instead, as noted, the mitigator at issue requires more than proof of a minimal record. In light of this total "absence of evidence" on the question of prior criminal activity, *id.*, the jury was forced to conclude that Smith—who kidnapped and murdered his pregnant girlfriend with a baseball bat after soliciting friends, relatives, and even coworkers to assist him—failed to show he "probably" lacked a prior history of criminal activity. App. 22, 55.

Smith's only argument that the Arkansas Supreme Court held capital-sentencing juries may refuse to weigh existent statutory mitigators is that the court wrote that "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." App. 11–12. But contrary to Smith's claims, that sentence does not say that a jury may refuse to weigh an existent statutory mitigator. To start, it does not suggest—let alone hold—that the mitigator at issue actually existed. And as discussed at length above, the court below held that there was simply no evidence on that point. Moreover, the cited sentence says nothing about whether a jury may refuse to *weigh* mitigators. It merely says that Smith's jury could permissibly find that his unclear history of criminal activity (or lack thereof) was insufficient to mitigate his punishment to a sentence less than death—or, put another way, that the jury could permissibly conclude the aggravating

circumstances outweighed whatever mitigation his uncertain criminal history provided. Ultimately, the Arkansas Supreme Court correctly decided the state evidentiary law issue Smith raised on state evidentiary law grounds. That holding presents no federal question worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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