*****THIS IS A CAPITAL CASE*****

No. _____

In the Supreme Court of the United States

JUSTIN ANDERSON,

Petitioner

v.

STATE OF ARKANSAS

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment permits a State to present victim-impact evidence arising from a crime other than the murder for which the defendant is being sentenced.
2. Whether in this case the admission of victim-impact evidence from a prior offense was so excessive as to violate due process.

PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *State v. Anderson*, No. 37CR-00-61, Circuit Court of Lafayette County, Arkansas, trial proceedings, judgment entered January 31, 2002.

- *Anderson v. State*, No. CR 02-910, Arkansas Supreme Court, direct appeal from conviction and sentence, judgment entered April 29, 2004.

- *State v. Anderson*, No. 46CR-05-354, Circuit Court of Miller County, Arkansas, resentencing, judgment entered September 8, 2005.

- *Anderson v. State*, No. CR 06-29, Arkansas Supreme Court, direct appeal from resentencing, judgment entered November 2, 2006.

- *Anderson v. Arkansas*, No. 06-9889, United States Supreme Court, petition for writ of certiorari, petition denied June 18, 2007.

- *Anderson v. State*, No. 46-CR-05-354-2, Circuit Court of Miller County, Arkansas, state postconviction, judgment entered August 20, 2008.

- *Anderson v. State*, No. CR 08-1464, Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered November 17, 2011.

- *Anderson v. Kelley*, No. 5:12-cv-279, United States District Court for the Eastern District of Arkansas, federal habeas, judgment entered March 28, 2017.

- *Anderson v. Kelley*, No. 17-2456, United States Court of Appeals for the Eighth Circuit, appeal from denial of federal habeas, judgment entered September 11, 2019.

- *Anderson v. Payne*, No. 19-8105, United States Supreme Court, petition for a writ of certiorari, petition denied October 5, 2020.

- *Anderson v. State*, No. CR 06-29, Arkansas Supreme Court, motion to recall the mandate, motion denied March 11, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Justin Anderson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas.

OPINIONS BELOW

The Arkansas Supreme Court's order denying Anderson's motion to recall the mandate is unreported and is set out in Appendix A. The Arkansas Supreme Court's order denying Anderson's petition for rehearing is set out in Appendix B.

JURISDICTION

The Arkansas Supreme Court entered its order denying the motion to recall the mandate on March 11, 2021. App. A. It denied a timely petition for rehearing on May 6, 2021. App. B. Per this Court's order of March 19, 2020, a petition for a writ of certiorari is due 150 days from the date of an order denying a timely petition for rehearing. 589 U.S. ___ (2020). That order remains in effect where, as here, the lower court denied a timely petition for rehearing before July 19, 2021. *See* Order, 594 U.S. ___ (July 19, 2021). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

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

U.S. Const. amend. XIV:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION

Arkansas has permissibly chosen to allow victim-impact testimony in capital cases. But the Eighth Amendment does not allow States to wield such evidence in a freewheeling manner. Consistent with this Court's limitation of victim-impact evidence to "evidence about *the victim* and about the impact of *the murder* on the victim's family," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasis supplied), state courts of last resort typically hold that the Eighth Amendment forbids introduction of victim-impact testimony concerning crimes other than the murder for which the defendant is being sentenced. The Arkansas Supreme Court departed from that majority view here, joining the Supreme Courts of California and Florida in doing so. The Court should grant certiorari to resolve the split of authority on this important issue in capital sentencing.

STATEMENT OF THE CASE

In October 2000, nineteen-year-old Anderson killed Clara Creech with a single gunshot as she was gardening in her yard. This offense came six days after Anderson shot and injured Roger Solvey, an Ohio truck driver who was passing through Arkansas. The State sought the death penalty for Creech's murder. The attempted capital murder of Solvey, for which Anderson was first convicted, served as the sole aggravating factor.

In 2002, a jury found Anderson guilty of Creech's capital murder and sentenced him to death. The Arkansas Supreme Court affirmed the conviction but vacated the sentence because the verdict forms indicated that the jurors had failed to consider

the mitigating evidence Anderson presented. *Anderson v. State*, 163 S.W.3d 333, 357–60 (Ark. 2004).

Resentencing was held in 2005. The State again sought death and again used the Solvey attempt as the sole aggravating factor. Before trial, Anderson sought to exclude testimony from Solvey or his wife, Nancy, "regarding how they have been impacted by Defendant's actions." Tr. 1080. The motion elaborated:

> *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)] specifically limits victim impact testimony to the impact of the victim's death to the victim's family and those close to the victim who were profoundly affected by the victim's death. Any testimony from Roger or Nancy Solvey regarding how they have been impacted by Defendant's actions will be irrelevant under A.R.E. 402, will have absolutely no probative value in this trial, and will violate Payne v. Tennessee, the 8th and 14th amendments to the United States Constitution, and the corresponding Arkansas constitutional provisions.

Tr. 1080–81. The trial court denied the motion. Tr. 3246–47.

At trial, Solvey testified about the circumstances of the prior offense, but also went well beyond that topic to establish the long-term troubles the assault had caused him. He informed the jury that the shooting had led him to have thirty-five surgeries, that his arm was nearly amputated, that he had since suffered from short-term memory problems, and that he was no longer able to work as a truck driver. Tr. 3253–59.

Over Anderson's renewed objection to evidence concerning "victim impact of another crime" (Tr. 3271), the State also presented Nancy Solvey's emotional description of the suffering that Anderson's prior crime had caused her family. After relating her journey from Ohio to Texarkana to care for her husband, crying

throughout, Mrs. Solvey offered extensive testimony covering their medical, financial, and emotional difficulties:

PROSECUTOR: We were talking a little bit about when you left here and got back to Ohio. There still was some stuff to deal with with Roger rehabbing himself and trying, at least, to have some kind of life after he couldn't be a truck driver. Correct?

N. SOLVEY: That's correct.

PROSECUTOR: All right. Has he been able to be employed at all since that time?

N. SOLVEY: No.

PROSECUTOR: And is he currently disabled?

N. SOLVEY: Yes.

PROSECUTOR: All right. And what is his income from Social Security Disability?

N. SOLVEY: $900.00 a month.

PROSECUTOR: All right. Now, your husband testified that he lost the truck because of this, obviously, because he couldn't work?

N. SOLVEY: That's correct.

PROSECUTOR: All right. And what about the medical bills? Did he have some insurance at that time, being a self-employed truck driver? Or what was his status?

N. SOLVEY: No, he didn't. We didn't have insurance at that time. I just started working back at a hospital. I'm a registered nurse.

PROSECUTOR: All right.

N. SOLVEY: As I was only part time, and he was driving, and we didn't have insurance.

PROSECUTOR: All right. So the burden of the medical came on you? Did he have some worker's comp held out?

N. SOLVEY: No. Nothing.

PROSECUTOR: All right.

N. SOLVEY: Nothing.

PROSECUTOR: He was self-employed, so.

N. SOLVEY: Right.

PROSECUTOR: All right. All right. And did that cause a financial burden on your family?

N. SOLVEY: Yes, it has. We owe Wadley Hospital $75,000.00 (cries) for his stay down here, and since I started working, just to keep our home and save everything, uh, we still owe another $20,000.00 in hospital bills in Ohio.

PROSECUTOR: Okay. And since your husband left Texarkana, how many surgeries has he had since he left here?

N. SOLVEY: Thirty-eight.

PROSECUTOR: All right. And have all of those been on the elbow, or have some of them been elsewhere?

N. SOLVEY: All of them was on the elbow, and one was on his chest to remove the bullet.

PROSECUTOR: All right. And the bullet finally moved to a location where they felt they could safely get it?

N. SOLVEY: Yes.

PROSECUTOR: And uh, the rest has been on the elbow trying to . . .

N. SOLVEY: . . . Save his arm.

PROSECUTOR: Now, since this incident occurred, has Roger had some problems, I mean, since this incident occurred, has Roger had some problems with his memory?

N. SOLVEY: He can't remember. He has no short term memory at all.

PROSECUTOR: All right. And was he having that problem prior to this incident?

N. SOLVEY: No, he was not.

PROSECUTOR: Does he recall this incident in your presence on any occasions?

N. SOLVEY: He has back flashes all the time. He's up at night sometimes, thinking someone is coming to kill him again. (Cries).

PROSECUTOR: All right. And is he emotional then?

N. SOLVEY: Oh, yes. Yes.

PROSECUTOR: Does he need any special care at home now, or is he able to take care of himself, like you know, as far as bathing and that sort of thing? Has he learned how to do all of that?

N. SOLVEY: He's learned how to do that. I had to help him. My daughter has also had to help him. This happened when she was only twelve and so she's helped him, too. Last year we had a severe infection. They almost had to take his whole arm off, so we had to teach her how to give him IVs while I was working so that we'd save his life, and keep his arm.

PROSECUTOR: But this condition is ongoing, and requires some care?

N. SOLVEY: Yes.

PROSECUTOR: From day to day?

N. SOLVEY: Yes. They said if he gets those infection [sic] they'll probably have to remove his arm.

Tr. 3273–76.

Before jury deliberations on the appropriate sentence, the trial court rejected Anderson's proposed instruction that "[e]vidence of victim impact testimony from Roger Solvey or Nancy Solvey is not to be considered by you for any reason relating to Justin Anderson's punishment." Tr. 3907.

In closing, the prosecutor encouraged the jury to count the Solveys' suffering as an aggravating circumstance and to weigh it against mitigation:

> And I submit to you that the aggravating circumstances that we've presented in this case to you is a, it's not like somebody pulling a knife on somebody and threatening them. This is a real, life changing, aggravating circumstance. It's one that you saw Mr. Solvey here, who lost his employment, almost lost his arm. Y'all saw how much of his elbow is gone and how his arm is shorter. Y'all got to see him in court. Thirty-five surgeries, in debt with hospital bills, has to stay at home and can't work. His wife went to work. Those are life-changing, aggravating circumstances. No doubt about it, and that's something when you weigh that aggravating circumstance in this case, it's a big circumstance to weigh against anything, what happened to Mr. Solvey, and that was at the hands of Mr. Anderson.

Tr. 3993–94.

During deliberations, the jurors requested "clarification for the aggravating circumstances. Which do we consider, the Roger Solvey circumstance, the Clara Creech circumstances, or both of them?" Tr. 4073. The court instructed the jury that it may "consider all of the evidence and give it whatever weight that you believe appropriate." Tr. 4097.

After over six hours of deliberations, the jury unanimously found the aggravating factor and thirty of the thirty-five mitigating circumstances Anderson proposed. Tr. 1091–1104. It decided that aggravation outweighed mitigation and justified death. Tr. 1105.

The Arkansas Supreme Court affirmed this death sentence. *Anderson v. State*, 242 S.W.3d 229 (Ark. 2006). Appellate counsel did not raise the issue of whether the Solveys' testimony violated the Eighth Amendment or the Due Process Clause by introducing victim-impact evidence from crimes apart from the murder for which he

was being sentenced. Anderson's state postconviction counsel did not raise this issue, either. State postconviction relief was denied and the Arkansas Supreme Court affirmed. *Anderson v. State*, 385 S.W.3d 783 (Ark. 2011).

Anderson next filed a federal habeas corpus petition in which he alleged, among other things, that the Solveys' testimony violated the Eighth Amendment because it was impermissible victim-impact evidence from another offense and that it was so excessive as to violate due process. The district court denied these claims as procedurally defaulted because they were not fairly presented in state court. *Anderson v. Kelley*, No. 12-279, 2017 WL 1160583, at *23 (E.D. Ark. Mar. 28, 2017). The district court dismissed the petition, and a split panel of the Eighth Circuit affirmed the dismissal after considering issues unrelated to the Solveys' testimony. *Anderson v. Kelley*, 938 F.3d 949 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 273 (2020).

Anderson then returned to Arkansas state court to vindicate the other-crimes-victim-impact issue. He did so through an Arkansas procedure called a motion to recall the mandate. This remedy allows death-sentenced prisoners to reopen their appeals in situations where there has been a "defect in the appellate process." *Wertz v. State*, 493 S.W.3d 772, 775 (Ark. 2016). Such a defect occurs when the Arkansas Supreme Court has overlooked an error in its "independent review of death cases"—an independent review mandated by state procedural rules. *Id.* at 776 (citing *Nooner v. State*, 438 S.W.3d 233, 239 (Ark. 2014)). In sum, a motion to recall the mandate offers Arkansas death-sentenced prisoners a mechanism by which to present errors of federal law for the first time after the completion of postconviction

review—even if the prisoner failed to raise the claim at trial or on appeal as required by state procedural rules.

As is relevant here, Anderson asked the Arkansas Supreme Court to recall the mandate to correct the Eighth Amendment error of allowing other-crimes victim impact or, alternatively, the due-process problem inherent in the excessive other-crimes testimony. App. 3a–33a. These are errors that the Arkansas Supreme Court should have identified during its independent review of the trial record. The Arkansas Supreme Court denied the motion to recall the mandate without written opinion. App. 1a. Three justices would have ordered further briefing. Anderson then filed a timely motion for reconsideration, which the Arkansas Supreme Court denied in another unreasoned 4–3 order. App. 2a.

REASONS FOR GRANTING THE PETITION

I. State courts of last resort are split on whether the Eighth Amendment permits victim-impact evidence from other crimes.

Statements of the sort the Solveys provided at Anderson's resentencing are regulated by a series of opinions in which this Court has outlined the bounds of victim-impact evidence in capital cases. The proper application of these principles to victim-impact statements concerning a defendant's *prior* crime—as opposed to the crime for which he is being sentenced—has divided state courts of last resort.

In *Booth v. Maryland*, 482 U.S. 496 (1987), the Court considered statements from the family of the victim of the murder for which the defendant was being sentenced. The Court analyzed the statements in two categories: (1) those concerning "the personal characteristics of the victims and the emotional impact of

the crimes on the family" and (2) those concerning "the family members' opinions and characterizations of the crimes and the defendant." *Id.* at 502. The Court held that neither category was permissible under the Eighth Amendment because such evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503.

In *Booth*, the Court added a caveat that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." *Id.* at 507 n.10. The Court expanded upon this caveat in *Gathers v. South Carolina*, 490 U.S. 805 (1989), a case in which the prosecutor seized upon the religious nature of papers found near the victim's body to urge the jury that the victim was a religious person. As the Court concluded, the fact that papers were strewn about the victim's body was a relevant circumstance of the crime but the religious nature of the papers was not, particularly where the prosecutor had not shown that the victim's religion had motivated the murder. *Id.* at 811–12. The sentence thus violated the Eighth Amendment under *Booth*'s reasoning.

In *Payne v. Tennessee*, 501 U.S. 808, 817 (1991), the Court overruled *Booth* and *Gathers* insofar as they prevented States from introducing evidence concerning "the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." The Court held that a State "may legitimately conclude that evidence about *the victim* and about the impact of *the murder* on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827 (emphasis supplied); *see also id.* at 832–33 (O'Connor, J.,

concurring) ("The Eighth Amendment does not prohibit a State from choosing to admit evidence concerning a *murder victim*'s personal characteristics or the impact of *the crime* on the victim's family and community." (emphasis supplied)). As the Court has explained, *Payne*'s holding "was expressly 'limited to' this particular type of victim impact testimony" and did not disturb prohibitions on other types, such as commentary on "the crime, the defendant, and the appropriate sentence." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (quoting *Payne*, 501 U.S. at 830 n.2).

In situations involving victims of the crime for which the defendant is being sentenced, *Payne* sets clear boundaries. However, courts have disagreed on how *Payne* applies to statements from victims of a defendant's other crimes. The majority view is that *Payne* does not go so far as to permit a State to introduce victim-impact evidence from victims of other crimes.

In *People v. Hope*, 702 N.E.2d 1282, 1286–89 (Ill. 1998), the State sought the death penalty and alleged the defendant's prior murder as an aggravating circumstance. It called the prior murder victim's widow and a surviving witness to "testify as to the effects of the [prior] shooting on them and their families." *Id.* at 1286. The Illinois Supreme Court rejected this evidence. It held that "*Payne* clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." *Id.* at 1288. The Court also concluded that the victim-impact evidence was impermissible even if the State charged the prior offense as an aggravating factor: "While the details of prior crimes

are considered relevant aggravation because they illuminate the character and record of a capital defendant, the unforeseen effects of those prior crimes on their victims are of no such assistance." *Id.* (citations omitted).

In *Cantu v. State*, 939 S.W.2d 627, 635–37 (Tex. Ct. Crim. App. 1997), the defendant participated in a double rape-murder but was charged and convicted for the death of only one victim. At sentencing the State called the mother of the second victim to testify about her. The appellate court held that the testimony should not have been admitted because "evidence as to her good character, activities she enjoyed and the impact of her on her family is not relevant as appellant was not on trial for her murder and such evidence serves no purpose other than to inflame the jury." *Id.* at 637. The second victim was "not the 'victim' for whose death appellant has been indicted and tried, and Payne does not contemplate admission of such evidence as permissible under the Eighth Amendment." *Id.*

St. Clair v. Commonwealth, 451 S.W.3d 597, 624–29 (Ky. 2014), arose from the defendant's resentencing for his sixth murder. The State presented testimony from the fifth murder victim's widow about that victim's work as a youth pastor. The Kentucky Supreme Court found error because "[t]estimony from a victim of a crime for which the defendant is not being tried is not relevant to sentencing for the tried crime." *Id.* at 626. Reasoning that the other-crimes victim impact was neither a "circumstance of the crime" nor "part of the character of the accused," the court concluded that the testimony "affected [the defendant's] Eighth Amendment rights and would not be permissible under *Payne v. Tennessee*." *Id.* at 629 & n.19.

In *People v. Dunlap*, 975 P.2d 723, 744–46 (Colo. 1999), during sentencing for the defendant's quadruple murder, the State introduced evidence concerning the effect of the defendant's prior robberies on their victims. The court explained that "evidence consisting of facts concerning a defendant's prior convictions is also relevant in the penalty phase, because it addresses the defendant's character as well as the existence of the statutory aggravators and mitigators related to the defendant's prior record." *Id.* at 745. By contrast, "[e]vidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced." *Id.* (citing *Payne*, 501 U.S. at 821). Such evidence is not "sufficiently tied to the jury's inquiry concerning the character, background, and history of the defendant, or to any of the aggravating or mitigating factors." *Id.*

The Louisiana Supreme Court has also ordered that the prosecution may not question prior-crime victims about "the emotional impact those crimes may have had on their lives" because "it does not 'inform[] the sentencing authority about the specific harm caused by the crime in question . . . necessary to determine the proper punishment for a first degree murder." *State v. Jacobs*, 880 So.2d 1 (La. 2004) (citing *Payne*, 501 U.S. at 825) (alterations in original).

Other States have reached a similar result, though without holding that it is required by the Eighth Amendment or *Payne*. For example, the Nevada Supreme Court has held that "evidence of the impact to victims of prior crimes alleged as

aggravating circumstances is not relevant to the sentencing decision in a first-degree murder case, and therefore such evidence is inadmissible during the penalty phase." *Kaczmarek v. State*, 91 P.3d 16, 34–35 (Nev. 2004) (citing *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998)); *see also Andrews v. Commonwealth*, 699 S.E.2d 237, 270–72 (Va. 2010); *State v. Bigbee*, 885 S.W.2d 797, 812 (Tenn. 1994).

In contrast to Colorado, Illinois, Kentucky, Louisiana, Nevada, Tennessee, Texas, and Virginia, the Supreme Courts of California and Florida have allowed prosecutors to urge a death sentence based upon the impact of the defendant's prior crime on its victim.

In *People v. Duong*, 471 P.3d 352, 380 & n.20 (Cal. 2020), the California Supreme Court rejected an Eighth Amendment challenge to testimony from two victims of uncharged shootings alleged to have been committed by the defendant. *Duong* applied the California Supreme Court's rule that "victim impact evidence related to a defendant's uncharged crimes" is impermissible under *Payne* only when it is so prejudicial as to render the trial fundamentally unfair—the same standard that applies when assessing victim-impact evidence concerning the loss caused by the crime for which the defendant is charged. *People v. Adams*, 336 P.3d 1223, 1246 (Cal. 2014). Similarly, though not addressing *Payne* or the Eighth Amendment, the Florida Supreme Court has held that testimony from the victim of a prior violent felony is "proper presentation of victim impact evidence." *Belcher v. State*, 961 So.2d 239, 256–57 (Fla. 2007).

The Court should step in to resolve this disagreement—particularly as it involves a conflict among the three States that have issued the most death sentences in the past decade.[1] Whereas Defendants in California, Florida, and Arkansas may be sentenced to death based upon prior-crime victim impact, such evidence is forbidden other prominent death-penalty jurisdictions such as Texas, Nevada, and Louisiana. Whether a defendant receives a death sentence should not depend upon the happenstance of whether he comes from a State that permits the victims of other crimes to provide emotion-laden testimony, notwithstanding *Payne*'s narrow circumscription of victim impact to "evidence about *the victim* and about the impact of *the murder* on the victim's family." *Payne*, 501 U.S. at 827 (emphasis supplied).

II. Anderson would not have a death sentence but for the use of victim-impact evidence from another offense.

Certiorari is also warranted because the victim-impact testimony from the Solveys had a palpable influence on the verdict given the circumstances of this case. The Eighth Amendment error produced Anderson's death sentence.

In the litany of murders that unfortunately occur in this country every day, Anderson's was not a particularly heinous one, such that it would be almost impossible to mitigate. While, as the federal habeas court aptly explained, there

[1] *See* Death Penalty Info. Ctr., "Death Sentences in the United States Since 1977," *available at* https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (showing that from 2010 to 2020, California issued 133 death sentences, Florida issued 110 death sentences, and Texas issued 68 death sentences).

was a "randomness about it," 2017 WL 1160583, at *1, there was no indication that the victim suffered or that the crime itself was otherwise aggravated. The aggravation emerged from Anderson's assault on Solvey six days earlier.

Undoubtedly the facts concerning that assault were relevant to the aggravating factor, and the prosecutor was entitled to present testimony, including the victim's, to prove that Anderson "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." Ark. Code Ann. § 5-4-604(3). However, the testimony here went well beyond that permissible realm into detailed descriptions of how the Solveys suffered physically, financially, and emotionally. Nancy Solvey's testimony, in particular, served no purpose other than to inject emotion into the trial, as Roger Solvey had already established facts that went to existence of the aggravating factor.

Against this aggravation, Anderson presented, and the jury unanimously found, significant mitigating evidence. *See* Tr. 1092–1104 (verdict form). Anderson's mother was intellectually disabled and unable to care for Anderson or his older brother. Her live-in boyfriend abused her in front of the children and was convicted of assaulting Anderson when he was very small. Child protective services removed Anderson from his mother's custody at the age of five after he came to school with noticeable welts and bruises on his body. Following a stint in foster care, Anderson went to live with his father, whom he had not known before. His father was an alcoholic who would leave Anderson and his brother alone and without food for long

periods of time. Anderson never had any sort of stable home life before he committed the murder at age nineteen. Some jurors, but not all, also found that Anderson was under extreme emotional distress and acting under unusual pressures or influences at the time of the offense, having heard testimony that Anderson's older brother, with whom Anderson had been living at the time, had recently pressured him to engage in armed robbery. *See* Tr. 3706–09.

The jury's task was to weigh this mitigation against the aggravating factor and to impose death only if it unanimously found that "aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist" and that "aggravating circumstances justify a sentence of death beyond a reasonable doubt." Ark. Code Ann. § 5-4-603(a)(2)–(3). In Arkansas, aggravating factors are statutorily limited, *see id.* § 5-4-604, and the State alleged only one. The emotional impact of the Solvey's testimony significantly enhanced the power of the single aggravating factor. The prosecutor strongly emphasized the Solveys' victim-impact testimony in his closing appeal for a capital sentence, and the trial court instructed the jurors to consider that evidence alongside everything else. Under all the circumstances, it is difficult to conclude otherwise than that the Solveys' powerful—but constitutionally impermissible—descriptions of their suffering tipped the scales definitively toward death. At least one juror would have opted for a life sentence in the absence of that testimony.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

OCTOBER 1, 2021

Respectfully submitted,

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