Appendix

FORMAL ORDER

STATE OF ARKANSAS,)
) **SCT.**
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON MARCH 11, 2021, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-06-29

JUSTIN ANDERSON APPELLANT

V. APPEAL FROM MILLER COUNTY CIRCUIT COURT – 46CR-05-354

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION TO TAKE AS A CASE IS DENIED. BAKER, HUDSON, AND WYNNE, JJ., WOULD GRANT. APPELLANT'S MOTION TO RECALL THE MANDATE IS DENIED. BAKER, HUDSON, AND WYNNE, JJ., WOULD TAKE AS A CASE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 11TH DAY OF MARCH, 2021.

Stacey Pectol

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: JOHN C. WILLIAMS
JACOB H. JONES, ASSISTANT ATTORNEY GENERAL
HON. BRENT HALTOM, CIRCUIT JUDGE

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON MAY 6, 2021, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-06-29

JUSTIN ANDERSON APPELLANT

V. APPEAL FROM MILLER COUNTY CIRCUIT COURT – 46CR-05-354

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION TO RECONSIDER DENIAL OF MOTIONS TO RECALL THE MANDATE AND TO TAKE AS A CASE IS DENIED. BAKER, HUDSON, AND WYNNE, JJ., WOULD GRANT MOTION TO RECONSIDER THE DENIAL OF THE MOTION TO TAKE AS A CASE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 6TH DAY OF MAY, 2021.

Stacey Pectol

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: JOHN C. WILLIAMS
JACOB H. JONES, ASSISTANT ATTORNEY GENERAL
HON. BRENT HALTOM, CIRCUIT JUDGE

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IN THE ARKANSAS SUPREME COURT

JUSTIN ANDERSON **Movant/Appellant**

v. **No. CR-06-29**

STATE OF ARKANSAS **Respondent/Appellee**

MOTION TO RECALL THE MANDATE

Justin Anderson asks the Court to recall the mandate and vacate his death sentence. In its independent review of this case, the Court missed several claims of well-preserved, prejudicial error concerning the jury's use of impermissible evidence to sentence Anderson to death. The federal courts declined to hear these claims because they had not been raised in state court. In this most serious of cases, the Court should exercise its power to recall its mandate and order resentencing.

Under Arkansas law governing capital sentencing, the State may present evidence going to punishment, including victim-impact evidence, and the jury must then determine whether at least one of ten specific aggravating circumstances outweighs mitigation and justifies death. Ark. Code Ann. §§ 5-4-602, -603, -604. The jury's discretion to impose death is thus narrowly circumscribed. Here, despite objections, the circuit court committed errors that led it to exceed constitutional and statutory limitations on evidence in capital sentencing. It did so in two ways.

First, the circuit court allowed the prosecutor to introduce extensive "victim impact" evidence related to a separate, non-capital crime. This testimony, though powerful, was irrelevant to whether Anderson should be sentenced to death, because it had nothing to do with "the human cost of *the crime of which the defendant stands convicted*." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasis supplied). Long before Anderson's trial, this Court had explained that it "cannot sanction evidence of another crime as legitimate victim-impact evidence." *Walls v. State*, 336 Ark. 490, 500, 986 S.W.2d 397, 402 (1999).

Second, the circuit court erroneously instructed the jury that it could weigh as aggravation *any* evidence that had been presented at the trial. This instruction allowed the jury to weigh matters in aggravation that went well beyond the scope of the narrow aggravating factors stated in Ark. Code Ann. § 5-4-604.

The Court should have corrected these prejudicial errors in its automatic review of Anderson's death sentence and should recall the mandate to do so now.

LEGAL STANDARD

"[T]his court has the inherent authority to recall its mandate in extraordinary circumstances." *Rayford v. State*, 2020 Ark. 299, at 4. A motion to recall the mandate is typically "applicable to redress errors that this court made or overlooked while reviewing a case in which the death penalty was imposed." *Id.* at 5. To determine whether the motion is warranted, the Court considers three factors:

(1) the presence of a defect in the appellate process; (2) a dismissal of proceedings in federal court because of unexhausted state-court claims; and (3) an appeal in a death case that required heightened scrutiny. *Wertz v. State*, 2016 Ark. 249, at 5, 493 S.W.3d 772, 775. The Court has held that "these factors are not necessarily to be strictly applied but rather that they serve as a guide in determining whether to recall a mandate." *Id.*

A "defect in the appellate process" is defined as "an error alleged to have been made by this court in its appellate review of a death-penalty case," specifically in its automatic review for prejudicial error under Sup. Ct. R. 4-3 and R. App. Pro. – Crim. 10. *Id.* at 7, 493 S.W.3d at 776. As established below, the prejudicial errors upon which Anderson relies were preserved—repeatedly—at trial.

BACKGROUND AND PROCEDURAL HISTORY

A. Conviction and appeal from first death sentence.

Anderson, then nineteen years old, shot and killed Clara Creech as she was gardening in her yard on the morning of October 12, 2000. Six days earlier he had shot Roger Solvey, a truck driver, and injured him severely. Anderson's guilt for these crimes is not in dispute. In 2001, a jury found him guilty for the attempted capital murder of Solvey and sentenced him to fifty years' imprisonment. *See* CR-02-582, 2003 WL 549121 (Ark. App. Feb. 26, 2003). In 2002, a separate jury found him guilty for the capital murder of Creech and sentenced him to death. The

theory of capital murder was that he caused Creech's death with premeditated and deliberated purpose. *See* Ark. Code Ann. § 5-10-101(4); R. 1 (information).[1] The Court upheld Anderson's capital-murder conviction on appeal. *Anderson v. State (Anderson I)*, 357 Ark. 180, 163 S.W.3d 333 (2004). This motion does not challenge Anderson's convictions.

Anderson's capital sentence, on the other hand, has been consistently marred by problems that undermine the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This Court corrected one such problem in *Anderson I.* There, though the defense introduced extensive proof concerning Anderson's abusive upbringing, the jury filled out a portion of the verdict form stating that no mitigating evidence had been presented. The Court concluded that resentencing was required because the "the jury eliminated from its consideration all evidence presented of mitigating circumstances and sentenced Anderson to death solely based on the aggravating circumstance." *Anderson I*, 357 Ark. at 224, 163 S.W.3d at 360. Unfortunately, upon remand the circuit court committed additional errors that, while preserved at trial, eluded Anderson's appellate counsel and escaped this Court's attention. The procedural history relevant to these errors is provided below.

[1] Citations to the record in No. 06-29 are denoted "R."

B. Resentencing and appeal.

At resentencing the State alleged a single aggravating circumstance: another violent felony (the Solvey attempt). *See* R. 919 (amended information). This is the third aggravating factor in the Arkansas capital-murder statute: that the defendant "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).

Because a new jury was empaneled for resentencing, the prosecutor put on extensive evidence concerning the facts of the capital offense and the attempted murder. Anderson does not contest the use of evidence connected to his commission of the prior violent felony—for example, photographs of the Solvey crime scene and Roger Solvey's own testimony about how the crime was committed. Nor does he take issue with victim-impact testimony from Clara Creech's family, which is (and was) clearly permissible under federal and Arkansas law. He does, however, challenge Mr. Solvey's testimony concerning how the attempted capital murder affected him personally. He also challenges the testimony of Mr. Solvey's wife, Nancy Solvey, as its only function was to inform the jury of victim impact from the non-capital crime.

Before the resentencing trial, Anderson submitted several motions objecting to victim-impact evidence. *See* R. 834–64. Most relevant here, he "object[ed] to any

testimony from either Roger or Nancy Solvey regarding how they have been impacted by Defendant's actions." R. 1080. He elaborated:

> *Payne* 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.

R. 1080–81. The prosecutor responded that the Solveys' testimony was not victim-impact evidence but rather was linked to the aggravating circumstance of Anderson's prior violent felony because it would cover "strictly the things that resulted and flowed from this injury." R. 3243–45. The circuit court overruled the objection and permitted the testimony under *Ward v. State*. R. 3246–47. Though the court provided no citation, it presumably meant the *Ward v. State* reported at 338 Ark. 619, 1 S.W.3d 1 (1999).

Roger Solvey began his testimony by focusing on the facts of the prior offense: how Anderson shot him twice, once in the arm and once in the chest area, and the immediate circumstances of that incident. R. 3250–3253. However, the prosecutor soon went beyond the facts of the assault into its effect on Mr. Solvey's life more generally. The prosecutor established that Mr. Solvey had required thirty-five surgeries, that his arm was nearly amputated, that he suffered from short-term memory problems, and that he had been unable to drive a truck since the attack. R.

3253–3259. Mr. Solvey also discussed his financial troubles, explaining that he had to get rid of his truck because he could no longer pay for it. R. 3259.

If Mr. Solvey's testimony at least had elements of establishing the facts of a prior felony, Nancy Solvey's testimony was devoted purely to illustrating the impact of the assault on her and her husband's lives. Mrs. Solvey began by describing her journey from Ohio to Texarkana to care for her husband, crying throughout. *See* R. 3266–70. Anderson's counsel once again objected to testimony about the "after effects" of the attempted capital murder and "victim impact of another crime." R. 3271. The circuit court allowed the testimony as "relevant to the extent of the injuries, and the extent of the sequela of the violent act." R. 3273. It later rejected a proposed jury instruction stating 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." R. 3907.

Mrs. Solvey continued to offer extensive testimony covering medical, financial, and emotional troubles that she and Mr. Solvey had suffered because of the assault:

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 they'll probably have to remove his arm.

R. 3273–76.

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.

R. 3993–94.

During deliberations, the jurors requested "a clarification on form three, item B, where we need a clarification for the aggravating circumstances. Which do we consider, the Roger Solvey circumstance, the Clara Creech circumstances, or both of them?" R. 4073. After a lengthy discussion, during which defense counsel argued that the jury should only weigh the prior violent felony and the State argued that all the evidence was fair game, the court agreed with the State's position and instructed: "[Y]ou may consider all of the evidence and give it whatever weight that you believe appropriate in answering form three B, and following." R. 4097.

The jury was out for six and a half hours. *See* R. 4031 (jury retires at 11:47 am); R. 4102 (verdict at 6:28 pm). It unanimously found the aggravating factor and thirty of the thirty-five mitigating circumstances counsel proposed. R. 1091–1104. It decided that aggravation outweighed mitigation and justified death. R. 1105.

Anderson's appellate counsel briefed a number of challenges to the state victim-impact statute and the role of victim-impact evidence in the weighing of aggravation and mitigation. In affirming the death sentence, this Court rejected

those challenges. *See Anderson v. State (Anderson II)*, 367 Ark. 536, 543–46, 242 S.W.3d 229, 235–36 (2006), *cert. denied*, 551 U.S. 1133 (2007). Appellate counsel did not raise the issue of impermissible other-crimes "victim impact" evidence through the Solveys' testimony.

Appellate counsel did argue that "the trial court erred by instructing the jury to consider all evidence presented as aggravating circumstances to be weighed against the mitigators in determining Appellant's eligibility for the death penalty." Appellant's Br. at Arg. 4. The brief continued that "the trial court erroneously encouraged the jury to sentence Appellant to death based upon an invalid aggravator." *Id.* at Arg. 25. Anderson's reply brief likewise asked the Court to "declare that in this case, the trial court erred by giving an erroneous supplemental instruction to the jury." Reply Br. at Arg. 7. The Court's *Anderson II* opinion does not address this argument.

C. Postconviction proceedings.

Jeff Harrelson was appointed to represent Anderson in Rule 37 proceedings. Upon denial of relief in the circuit court, Harrelson twice filed appellate briefing that this Court rejected as inadequate. After the second rejection, the Court removed Harrelson from the appeal and appointed Jeff Rosenzweig. *See Anderson v. State*, 2010 Ark. 375. Rosenzweig filed two motions to remand, one for the circuit court to consider a claim of intellectual disability and another to allege

Harrelson's ineffectiveness in the Rule 37 proceeding. The Court denied those motions and affirmed the circuit court's ruling. *See Anderson v. State*, 2011 Ark. 488, at 2–3, 14, 385 S.W.3d 783, 786, 792.

Anderson then filed a federal habeas corpus petition in the United States District Court for the Eastern District of Arkansas. Among other challenges, the federal petition argued that the Solveys' victim-impact testimony and the court's supplemental jury instruction violated his rights. The federal district court held these claims to be procedurally defaulted for failure to present them to this Court. *See Anderson v. Kelley*, No. 12-cv-279, 2017 WL 1160583, at *12, 22–23 (E.D. Ark. Mar. 28, 2017). The district court held an evidentiary hearing on a question not at issue here: whether resentencing counsel was ineffective for failing to uncover Anderson's brain damage arising from his mother's binge drinking during her pregnancy with him. Anderson presented extensive evidence of his brain damage—evidence the State did not contest. However, the district court found that resentencing counsel's failure to uncover it did not rise to the level of constitutional error. *Id.* at *4–8.

By split decision, the Eighth Circuit affirmed the district court's brain-damage ruling. *Anderson v. Kelley*, 938 F.3d 949 (8th Cir. 2019). It also considered and rejected arguments concerning the supplemental instruction. The court found that

the claim was procedurally defaulted and that the violation of state statute alone does not create a federal constitutional violation. *Id.* at 961–62.

Anderson filed a certiorari petition asking the United States Supreme Court to consider the brain-damage issue. The Court denied the petition on October 5, 2020.

THIS COURT OVERLOOKED CLAIMS OF PREJUDICIAL ERROR

In its automatic review of Anderson's death sentence, the Court overlooked two serious errors: the prosecutor's use of victim-impact evidence arising from a prior offense and the circuit court's instruction that the jury could weigh evidence in aggravation that was unrelated to the charged aggravating factor. The errors prejudiced Anderson by giving the jury weighty—but legally impermissible—reasons to choose death. Trial counsel preserved these claims of prejudicial error, but they evaded the Court's automatic review. The Court should now recall the mandate and remand for a resentencing at which the evidence that factors into the sentencing decision is kept within legal boundaries.

I. OTHER-CRIMES "VICTIM IMPACT" EVIDENCE

May the State show that the devastating effects of a defendant's *previous* criminal activity justify a harsh sentence for a *later* offense? The resounding answer from the courts that have decided this issue—including this Court—is "no." Admission of this evidence was irrelevant, unduly prejudicial, and in violation of Anderson's rights under the Eighth Amendment, Fourteenth

Amendment, and corresponding provisions of the Arkansas Constitution. Moreover, the error was not harmless under the circumstances here.

A. Admission of other-crimes "victim impact" violated Anderson's rights.

1. Eighth Amendment/Ark. Const. art. 2, § 9

When the State uses victim-impact evidence to seek death, Eighth Amendment concerns arise. Analysis of this issue begins with *Payne v. Tennessee*, in which the Supreme Court partially overruled two precedents—*Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)—forbidding the introduction of any victim-impact evidence under the Eighth Amendment.

In *Payne*, the Court did not give states carte blanche to offer victim-impact statements. Rather, the Court cabined its holding to victim impact related to the homicide of conviction: "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." *Payne*, 501 U.S. at 827 (emphasis added). Justice O'Connor's concurrence included the same limitation: "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." *Id.* at 832–33 (O'Connor, J., concurring) (emphasis added). *Cf. Bosse v. Oklahoma*,

137 S. Ct. 1 (2016) (holding that the *Booth* and *Gathers* continue to apply except insofar as *Payne* expressly limited them).

After *Payne*, Arkansas passed Act 1089 of 1993, which allowed victim-impact evidence at capital sentencing. *See* Ark. Code Ann. § 5-4-602(4). Section 2 of the Act specifically ties the statutory language to the ruling in Payne: "It is the express intention of this act to permit the prosecution to introduce victim impact evidence as permitted by the United States Supreme Court in *Payne v. Tennessee*." *See Noel v. State*, 331 Ark. 79, 90–91, 960 S.W.2d 439, 445 (1998). By incorporating *Payne* into the statute, the legislature also incorporated its limitations—limitations that preclude the State from using a prior victim's testimony about the lingering effects of the defendant's non-capital crime to obtain a death sentence. Allowing the State to use victim impact from *an entirely separate crime* to support a death sentence undermines the reliability of the capital proceeding, in violation of the Eighth Amendment and Article 2, Section 9 of the Arkansas Constitution.

2. Irrelevant, prejudicial testimony.

Other-crimes victim impact presents additional problems under the Arkansas Rules of Evidence. It is not relevant, and even if relevant the danger of unfair prejudice from its admission outweighed its probative value here.

To be admitted, evidence must be relevant, meaning it must have a "tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401, 402. Victim-impact evidence from the victim's family is relevant after *Payne*. Other-crimes victim-impact evidence is not, because it has nothing to do with the defendant's blameworthiness *for the crime of conviction*.

This Court has not hesitated to find reversible error where a circuit court has admitted other-crimes victim impact. For example, in *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999), the defendant pleaded guilty to several rapes. The State introduced additional testimony that the defendant had been complicit in an uncharged murder, including "background information about the [witness's] murdered . . . family members." *Id.* at 497–98, 986 S.W.2d at 401. The Court explained that it "cannot sanction evidence of another crime as legitimate victim-impact evidence. Clearly, it is not relevant." *Id.* at 500, 986 S.W.2d at 402.

The Court has likewise constrained other sorts of victim-impact evidence that exceeded the bounds of "the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated." Ark. Code Ann. § 16-90-1112(a)(1). In *Kitchell v. State*, 2020 Ark. 102, 594 S.W.3d 848, the State introduced evidence at the defendant's *Miller* resentencing that he had previously been sentenced to life without parole, and the victim's family testified that participating in the resentencing had taken an emotional toll. The Court reversed, finding that "[e]vidence regarding the effect on the victim's family

from a previous sentence that has later been overturned" is not relevant victim impact. *Id.* at 8, 594 S.W.3d at 853.

Here, the prosecutor attempted to establish the link absent elsewhere by arguing that the other-crimes victim impact went to proof of the aggravating factor: that the defendant "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).

Contrary to the prosecutor's argument, the *effect* of a prior felony on the victim and his family was not relevant to whether Anderson in fact *committed* that felony. Mr. Solvey's testimony about the facts of the prior crime went to that issue. Testimony about Mr. Solvey's medical bills, loss of income, and trouble sleeping did not. Likewise, insofar as it departed from an account of the crime itself, the testimony did not concern whether the attempted murder contained as an "element" a "threat of violence" or "the creation of a substantial risk of death or physical injury." The testimony informed the jury, among other things, that the Solveys lacked insurance at the time of the offense, that they had sustained almost $100,000 in medical bills, that Mr. Solvey could no longer work, that he took in only $900.00 per month from Social Security, that his wife had to reenter the workforce, and that flashbacks prevented him from sleeping at night. This evidence was extraordinarily powerful. But, unlike evidence tied to the offense itself, it did

not go to show that attempted murder involves violence or risk of injury as an element.

Even if the evidence were relevant to proof of the aggravating factor, it should have been excluded under Arkansas Rule of Evidence 403 because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The testimony at issue contributed little, if at all, to proof of a prior violent felony. The State amply proved the prior violent felony with the judgment and commitment order for the attempted murder and with Mr. Solvey's account of the incident. Additional evidence about Mr. Solvey's financial and emotional troubles was unnecessary for the State to prove the aggravating circumstance.

The testimony was wrenching. It would be difficult for anyone to meet it without sympathy for the Solveys. But Anderson had already been sentenced for his crime against them. The Solveys testified at that trial and a separate jury accounted for their pain. This case, on the other hand, was about whether Anderson should be sentenced to death for a capital murder. The State was entitled to prove that Anderson's criminal record aggravated the offense and made death a necessary punishment, but it veered into prejudice and jury confusion here by urging a sentence of death on the basis of gratuitous emotion. *Cf. Diemer v. State*, 365 Ark. 61, 225 S.W.3d 348 (2006) (prejudice outweighed probative value where state

introduced criminal history despite defendant's offer to stipulate to that fact); *Johnson v. State*, 337 Ark. 477, 989 S.W.2d 525 (1999) (same where state introduced fact of prior incarceration to show origins of conspiracy); *Williams v. State*, 2016 Ark. App. 507, 505 S.W.3d 234 (2016) (same where state introduced facts of close-in-time assault to show offense timeline); *Lee v. State*, 266 Ark. 870, 587 S.W.2d 78 (Ark. Ct. App. 1979) (same where state introduced evidence of manslaughter victim's "dreadful condition and the treatment administered during the four days that she lived after being admitted to the hospital").

3. Violation of due process.

Finally, admission of the victim-impact evidence violated the due-process clause of the federal and Arkansas constitutions. As the Court held in *Payne*, even testimony from the victim of the crime itself may be "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. at 825. That is the case here, much for the same reasons that the prejudicial impact of the evidence substantially outweighed its probative value. The testimony did not consist of stray remarks about the impact that Anderson's prior offense had on the Solveys. It consisted of a sustained effort, guided by the prosecutor, to arouse the jury's sympathy for the Solveys' physical, emotional, and financial condition. It rendered the sentencing fundamentally unfair by encouraging the jury to mete out the ultimate sentence not because Anderson had a record of violent felony conduct, but

because he had caused lingering pain to victims of a prior felony. The harm caused to the victims of a different offense was not a part of the underlying aggravating factor and was not relevant to the crime of conviction. It was fundamentally unfair for the State to encourage a death sentence by evoking this emotional testimony.

B. The circuit court erred in allowing the other-crimes victim impact.

At trial, the circuit court cited two reasons for overruling Anderson's objections to the Solveys' testimony. Neither withstands scrutiny.

First, the circuit court questioned whether the Solveys' testimony should be considered victim-impact evidence at all. *See* R. 3273 (stating the testimony is "improperly characterized as victim impact" because it goes to the "sequela of the violent act"). To the contrary, testimony about a person's medical history, financial difficulties, and emotional problems falls squarely under the rubric of victim-impact as the Supreme Court and the Arkansas General Assembly has defined it. The Supreme Court has explained that victim impact is "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." *Payne,* 501 U.S. at 825. State statute permits a "victim impact statement" concerning "the effects of the crime on the victim." Ark. Code Ann. § 16-90-1112(a)(1). It blinks reality to say that the Solveys' testimony about how Anderson's crime changed their lives is not victim-impact evidence.

Second, the circuit court found the evidence permissible under *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999). R. 3246–47. But that case does not concern the admission of other-crimes victim impact, so it does not speak here. In *Ward*, the State established a prior murder through the testimony of a detective who "described the crime scene, the victim's injuries and cause of death, and the circumstances connecting *Ward* to the homicide." *Id.* at 625, 1 S.W.3d at 4. The Court held that the State was entitled to present the testimony, even though Ward offered to stipulate to the crime, and that the testimony was relevant to Ward's commission of the prior offense. Framing the question as "what evidence the State may present to prove the defendant's prior commission of a violent felony," the Court concluded that the State may "present evidence showing circumstances that explain the act, show a motive for killing, or illustrate the defendant's state of mind." *Id.* at 628, 1 S.W.3d at 6.

Testimony concerning Mr. Solvey's corrective surgeries, medical bills, memory loss, and psychological troubles had nothing to do with the circumstances of the attempted murder or Anderson's motive. It went purely to create sympathy for the victim of a crime for which Anderson had already been sentenced to fifty years in prison. As established above, such testimony violated Anderson's rights.

C. Other courts widely view this sort of testimony as impermissible.

The admissibility of other-crimes victim impact is not a novel issue. As already discussed, the Court considered and rejected it in *Walls*, long before Anderson's resentencing. *Walls* agrees with almost every court to have considered whether victim impact from one crime may support a penalty for a separate crime.[2]

In *People v. Hope*, 702 N.E.2d 1282, 1286–89 (Ill. 1998), the state 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 the 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 irrelevant 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,

[2] Only California and Florida allow other-crimes victim impact. *People v. Duong*, 10 Cal. 5th 36, 72–73 (2020); *Belcher v. State*, 961 So.2d 239, 257 (Fla. 2007).

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. 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.*[3]

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 the 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

[3] *Cantu*, as well as some other cases discussed below, found harmless error under the specific circumstances. As explained later, the error is not harmless here.

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.*

Other states have likewise 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); *see also Andrews v. Commonwealth*, 699 S.E.2d 237, 270–72 (Va. 2010); *State v. Jacobs*, 880 So.2d 1 (La. 2004); *State v. Bigbee*, 885 S.W.2d 797, 812 (Tenn. 1994). In short, the inadmissibility of the Solveys' victim-impact evidence finds strong grounding in *Walls* and in the opinions of many other courts.

D. The "victim impact" error was prejudicial.

It is difficult to show that a capital-sentencing error is harmless. "[T]o hold as harmless an error occurring in the penalty phase of a capital murder trial . . . , we must be able to reach the conclusion that the error was harmless beyond a reasonable doubt." *Miller v. State*, 2010 Ark. 1, at 36, 362 S.W.3d 264, 286. In *Miller*, for example, two of the victims' family members testified, in violation of the Eighth Amendment, that the defendant should receive the death penalty. *Id.* The Court held that the error is not harmless, even in the presence of "several aggravating factors," because "there is no way for us to determine the effect of the victim-impact evidence on the jury's decision to impose the death sentence." *Id.* at 36–37, 362 S.W.3d at 286; *cf. Kitchell*, 2020 Ark. 102, at 11, 594 S.W.3d at 854.

Here, the harmfulness of the error is even clearer than in *Miller*. There, two witnesses gave fairly brief statements asking the jury for death. 2010 Ark. 1, at 32–33, 362 S.W.3d at 284. Here, two witnesses gave extensive extralegal victim-impact testimony and the prosecution encouraged the jury to consider it. Moreover,

Anderson's was a very close sentencing case. Aggravation was limited to the prior violent felony. Counsel presented, and the jury found, extensive mitigating evidence concerning the appalling physical abuse and neglect Anderson was subjected to as a youth before he committed the offense at age nineteen. The length of the jury's deliberations shows that it was having some difficulty coming to a resolution on sentence. And its question about whether it could consider the "Roger Solvey circumstance" indicates that it considered the Solveys' testimony significant. In these circumstances the use of protracted, emotional testimony from prior crime victims cannot be said to be harmless.

II. INSTRUCTIONAL ERROR

The circuit court was wrong to instruct the jury that it could "consider all of the evidence and give it whatever weight that you believe appropriate in answering form three B, and following." R. 4097. This instruction permitted the jury to weigh evidence in aggravation that Arkansas law precludes it from weighing.

To reach a death verdict, the jury must complete a three-step process under Ark. Code Ann. § 5-4-603(a). First, it must find at least one aggravating circumstance beyond a reasonable doubt. Importantly, under Arkansas law, *aggravating circumstances are limited to ten specific scenarios*. *See* Ark. Code Ann. § 5-4-604. Second, it must determine whether, beyond a reasonable doubt, the aggravating circumstances it found outweigh the mitigating circumstances it found. Third and

finally, it must find that aggravating circumstances justify a death sentence beyond a reasonable doubt. In Anderson's case, these requirements were presented to the jury on Form 3. R. 1105. Form 3B asked the jury to report the results of its weighing aggravation against mitigation. Form 3C asked the jury to report whether the aggravation justified death notwithstanding its weight against mitigation.

The jury exhibited confusion about its task when it asked whether the aggravation to be weighed against mitigation consisted of the "Roger Solvey circumstance, the Clara Creech circumstances, or both of them?" R. 4073. Under Arkansas law, the answer to this question is clear: a jury may only weigh an aggravating circumstance that is listed in Ark. Code Ann. § 5-4-604 and that the State proves beyond a reasonable doubt. Here, there was one aggravating circumstance that fit that description: a prior violent felony. However, the circuit court's instruction allowed the jury to weigh *any and all of the evidence presented*. Thus, the jury was allowed to count as aggravating any aspect of the crime or Anderson's background introduced at the resentencing, including such patently irrelevant material as Anderson's juvenile record. *See* R. 3571–72, 3759.

Some states have sentencing schemes that allow broad, unguided discretion to assign aggravating weight to any of the evidence presented at trial. *See Zant v. Stephens*, 462 U.S. 862, 872–74 & n.12 (1983) (describing Georgia system). Arkansas clearly does not. It limits the jury's discretion to weighing a limited

number of possible aggravating factors against mitigation, and then to determining whether any of the limited aggravating factors present in the case justify death. The trial court's instruction was error, and it was not harmless error. Allowing the jury to count the entire universe of fact from resentencing as aggravation materially heightened the risk that it would find the scales tipped in favor of death, or that non-statutory factors would justify a capital sentence.

III. ANDERSON SATISFIES THE STANDARD FOR RECALLING THE MANDATE

Anderson's claims satisfy the standard this Court has articulated for exercising its authority to recall the mandate and reopen a case—whether there was a defect in the appellate process because the Court failed to address a prejudicial error that is apparent from the record in a death-penalty case and that evades federal review because it was not presented in state court.

This is obviously a case in which the death penalty has been imposed. The federal courts dismissed the claims after finding them defaulted for lack of adequate presentation in state court. Prejudicial error occurred, as established above. And, importantly, the errors were well-preserved at trial through Anderson's repeated objections. He raised the other-crimes victim-impact problem by pretrial motion, again by objection at trial, and yet again by offering an instruction. The Solveys' testimony and the relevant objections all appeared in the abstract and addendum. *See* Ab. 530–42 (testimony and objections); Add. 379–

409, Add. 480–82 (motions); Ab. 725–26, Add. 727 (proposed instruction). So too did the long colloquy with the court in which Anderson objected to the supplemental jury instruction. *See* Ab. 771–81. Indeed, as discussed in the background section, appellate counsel even raised the instructional error in her appellate brief—yet it evaded review by the Court.

In sum, the Court's failure to correct these errors created a defect in the appellate process. As a result, the prosecutor obtained a death sentence using evidence that the jury never should have considered or weighed. The Court should recall the mandate and order a resentencing that properly limits the evidence the jury uses in its sentencing calculation.

CONCLUSION

For the reasons stated above, the Court should recall the mandate and vacate Anderson's death sentence.

Dated: November 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2020, I filed the foregoing Motion to Recall the Mandate with the Clerk of Court via the eFlex electronic filing system, which shall send notification to counsel for Appellee.

I have also mailed and emailed copies to counsel for the Appellee at the following address:

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