

**In the Supreme Court of the United States**

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JUSTIN ANDERSON,  
*Petitioner,*

v.

STATE OF ARKANSAS  
*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## CAPITAL CASE

### QUESTIONS PRESENTED

(1) Whether 28 U.S.C. 1257 provides this Court with jurisdiction to review a State-court decision declining to disturb a decade-old criminal judgment by recalling its mandate, as opposed to “final judgments” rendered by that court?

(2) Whether a State supreme court’s discretionary decision declining to grant an extraordinary remedy such as recalling its own mandate is supported by an adequate and independent state-law ground where that decision necessarily involves judgments about the court’s confidence regarding its own prior review of an appeal?

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## INTRODUCTION

After breaking into a home and stealing two guns, Justin Anderson went looking for people to kill. His following actions were both horrific and senseless. He first attempted to kill truck driver Roger Solvey, firing five shots into his sleeper, hitting him twice. Solvey survived but was left badly injured and permanently disabled. Less than a week later, Anderson shot 87-year old Clara Creech in the back while she was working in her garden, killing her.

Anderson never denied committing those crimes. And an Arkansas jury determined that Anderson's attempt to kill Solvey just before murdering Creech was an aggravating circumstance warranting a death sentence. After exhausting his appeals in both state and federal court, Anderson asked the Arkansas Supreme Court to recall its mandate to consider his arguments that testimony regarding his shooting of Solvey violated the Eighth Amendment as improper victim-impact testimony. Given the extraordinary nature of that discretionary remedy, the Arkansas Supreme Court unsurprisingly declined.

Anderson now asks this Court to review that decision. His request suffers numerous fatal problems. First, this Court lacks jurisdiction to review an order of a State supreme court declining to recall its own mandate to correct an error in its own appellate process because such an order is not a final judgment within the meaning of 28 U.S.C. 1257. Second, the discretionary character and the extraordinary nature of the remedy provide an adequate an independent state-law ground for its denial. Finally, Anderson's case does not present any issue regarding victim-impact testimony, let alone one involving a split of authority. His Petition should be denied.

## STATEMENT

1. Justin Anderson went on a crime spree in October 2000 that ended in a senseless murder. Anderson first broke into a home and stole two handguns. *Anderson v. State*, 242 S.W.3d 229, 231 (Ark. 2006) (“*Anderson II*”). Four days later he attempted to rob a tractor-trailer and shot Roger Solvey, the driver who had been asleep in the cab, with one of the stolen pistols. *Id.* Solvey was hit twice and wounded, but fortunately survived. Unfortunately, Anderson was not immediately apprehended.

Six days later, 87-year old Clara Creech was bent down gardening in her front yard in the small town of Lewisville, Arkansas. *Id.* Anderson “did not know her.” *Id.* Apparently intending to steal Creech’s car, Anderson walked up from the street and shot Creech from behind with a .38 caliber pistol, killing her—a senseless murder that Anderson shockingly describes as “not a particularly heinous one” but just one of “the litany of murders that unfortunately occur in this country every day.” Pet. 15. Anderson confessed to killing Creech. *See Anderson v. State*, 163 S.W.3d 333, 336 (Ark. 2004) (“*Anderson I*”) (Anderson told police he “shot the old lady in the back”). He admitted to shooting Solvey, too. *Id.* at 339.

Anderson was first tried and convicted of attempted capital murder for the Solvey shooting, ultimately being sentenced to fifty years’ imprisonment. *See Anderson v. State*, No. CR-02-582, 2003 WL 549121, at \*1 (Ark. Ct. App. 2003).

2. He was then charged with capital murder for killing Creech. Arkansas offered the attempted murder of Solvey as the aggravator supporting a sentence of death. The specific aggravating circumstance alleged was that Anderson “previously com-

mitted 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). Anderson’s first trial ended in a guilty verdict and death sentence. *Anderson I*, 163 S.W.3d at 339. Anderson’s conviction was affirmed, but his sentence was reversed because of juror confusion about how to properly complete the sentencing form. *Id.* at 357-60. The case was sent back to the trial court for resentencing.

3. At resentencing, Arkansas again offered the Solvey attempted murder as the aggravating circumstance underlying the capital murder charge. To establish that aggravating circumstance, Arkansas offered the testimony of both Roger Solvey and his wife Nancy Solvey regarding the shooting and the significant injuries Roger Solvey had suffered as a result. Anderson objected to that testimony, arguing that *Payne v. Tennessee*, 501 U.S. 808 (1991), prohibited victim-impact testimony where the victims of separate crimes had no relation to one another. R. 1080.<sup>1</sup> Arkansas responded that it was not offering the testimony as victim-impact evidence, but as evidence establishing the aggravating circumstance of a prior violent felony, a purpose for which the testimony was admissible independent of its potential value as victim-impact evidence. R. 3243; *see* Ark. Code Ann. 5-4-602(4)(i) (Repl. 1997) (providing that “in determining the sentence evidence may be presented to the jury

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<sup>1</sup> Record citations are to the record on appeal in Arkansas Supreme Court Case No. CR-06-29.



as to any [[m]atter relating to an aggravating circumstance”). The trial court thus allowed the testimony. R. 3246.

Roger Solvey testified as to the circumstances of the shooting: Anderson fired five shots into the cab of Solvey’s truck, one hitting Solvey in the neck and lodging in his back and another destroying his elbow. *See* R. 3253. He was hospitalized for nearly a month and had dozens of surgeries on his arm. R. 3253-54. He was disabled as a result of his injuries and could no longer continue driving a truck for a living. *Id.* Because Roger Solvey had issues remembering things since being shot by Anderson, his wife Nancy testified as well. R. 3257-58. She provided more details about the surgeries Roger underwent, including 55 surgeries on his arm and one to remove a bullet lodged in his torso, and the continuing care that Roger required due to the extent of his disability. R. 3269-75.

Anderson’s counsel again objected to this testimony, arguing that it was irrelevant victim-impact evidence. R. 3270-71. The trial court overruled Anderson’s objection, concluding that the testimony was independently relevant as proof of the alleged aggravator because it showed the extent of Roger Solvey’s injuries. R. 3272-73.

At the conclusion of the second sentencing phase, the jury found one aggravating circumstance, Anderson’s attempted murder of Roger Solvey. R. 1105-06. It determined that aggravator outweighed all the mitigators, and the jury sentenced Anderson to death. R. 1105-06.

4. Anderson appealed his sentence, raising *inter alia* six issues related to victim-impact testimony regarding the Creech murder. *Anderson v. State*, 242 S.W.3d 229,

235-36 (Ark. 2006) (“*Anderson II*”). Given the trial court’s ruling that, apart from any value it might have had as victim-impact evidence, the Solveys’ testimony was admissible to prove the aggravating circumstance of a prior violent felony, Anderson’s counsel did not argue that this Court’s decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *Payne v. Tennessee*, 501 U.S. 808 (1991), prohibited that testimony.

The Arkansas Supreme Court affirmed Anderson’s death sentence. *Anderson II*, 242 S.W.3d at 237, *cert. denied sub. nom. Anderson v. Arkansas*, 551 U.S. 1133 (2007). It concluded its opinion by noting that it had independently reviewed the record in Anderson’s case for “prejudicial error” pursuant to State appellate rules and Ark. Code Ann. 16-91-113 (Repl. 2006), and it stated that it had found none. *Id.*

5. Anderson then unsuccessfully sought post-conviction review in state court, and the Arkansas Supreme Court affirmed the denial of relief. *Anderson v. State*, 385 S.W.3d 783 (Ark. 2011).

6. Anderson then filed a petition for federal habeas corpus relief, bringing “twenty-one claims, which embrace[d] seventy-eight subclaims, some of which ha[d] subparts.” *Anderson v. Kelley*, No. 5:12-cv-279-DPM, 2017 WL 1150583 (E.D. Ark. Mar. 28, 2017). The district court dismissed Anderson’s petition in its entirety, granting a certificate of appealability on three claims not at issue here. *Id.* at \*52. Among the dismissed claims was Anderson’s argument that the trial court allowed “inadmissible victim-impact testimony from a prior offense (the Solvey shooting)”. *Id.* at 23. The district court rejected this claim as procedurally defaulted, concluding that any

error related to the testimony was not “so prejudicial that Anderson’s trial was rendered fundamentally unfair.” *Id.*

7. The Eighth Circuit affirmed the district court’s dismissal of Anderson’s petition and denied his petition for rehearing en banc. *Anderson v. Kelly*, 938 F.3d 949 (8th Cir. 2019). This Court denied his petition for certiorari. *Anderson v. Payne*, 141 S. Ct. 273 (2020).

8. Anderson then asked the Arkansas Supreme Court to recall its mandate in his decade-stale direct appeal. Pet. App. 3a. Under State law, recalling the mandate is an “extremely narrow remedy . . . to be granted only in extraordinary circumstances as a last resort to ‘avoid a miscarriage of justice’ or ‘to protect the integrity of the judicial process.’” *Nooner v. State*, 438 S.W.3d 233, 239 (Ark. 2014) (quoting *Robbins v. State*, 114 S.W.3d 217, 222 (Ark. 2003)). It is “a discretionary act, . . . ‘an act of grace by the state that is not constitutionally mandated.’” *Id.* at 240 (quoting *Wooten v. Norris*, 578 F.3d 767, 784 (8th Cir. 2009)). The Arkansas Supreme Court limits recall to instances of “an error alleged to have been made by [that court] during the course of its appellate review of a death-penalty case, and it emphasize[s] that such error is to be distinguished from an error . . . within [its] independent review of death cases” pursuant to State law. *Id.* at 239 (quoting *Engram v. State*, 200 S.W.3d 367, 370 (Ark. 2004)).

Given that Anderson’s trial counsel raised the issue of the Solveys’ testimony violating the Eighth Amendment and that the trial court ruled against him, that ruling

was—pursuant to the Arkansas Supreme Court’s state-law duty to independently review all adverse trial rulings—reviewed for prejudicial error by the Arkansas Supreme Court during his direct appeal. *See Anderson II*, 242 S.W.3d at 237 (“The record has been reviewed for prejudicial error pursuant to Ark. Sup.Ct. R. 4–3(h), Ark. R.App. P.-Crim. 10(b), and Ark.Code Ann. § 16–91–113 (Repl. 2006). None has been found.”). Because the issue thus fell outside of the extraordinary circumstances warranting recall of the mandate, the court denied Anderson’s motion in an unreasoned order, as is its usual practice. Pet. App. 1a.

9. Anderson then filed this Petition, seeking this Court’s review of the Arkansas Supreme Court’s decision not to exercise its discretion to disturb Anderson’s decade-old criminal judgment.

## REASONS FOR DENYING THE PETITION

Anderson asks this Court to grant his Petition to resolve a purported split among State courts as to whether in capital cases the Eighth Amendment permits victim-impact testimony from other crimes. That might be a cert-worthy issue in a case that properly presents it, but Anderson's Petition does not.

First, the decision below was not a final judgment of a State court of last resort over which this Court has jurisdiction under 28 U.S.C. 1257. Instead, the Arkansas Supreme Court declined to exercise its discretionary authority to recall its mandate and reopen the long-final judgment in Anderson's case. This Court has already declined to grant review in this case—including just last year—and filing a frivolous motion to reopen the Arkansas Supreme Court's mandate does not entitle Anderson to yet another bite at the apple.

Second, the order Anderson asks this Court to reverse is a discretionary denial of a motion to recall the mandate, a tool the Arkansas Supreme Court reserves for an incredibly narrow set of circumstances. A recall of the mandate is limited to circumstances evidencing a defect in the State appellate process, as judged by the Arkansas Supreme Court's confidence in its own prior review of a case. Whether those circumstances exist is a patently state-law issue and is an adequate and independent ground supporting the denial of Anderson's motion to recall the mandate, irrespective of any federal issues he may have raised.

Third, Anderson's case does not involve victim-impact evidence. The testimony of Roger and Nancy Solvey was introduced to prove the aggravating circumstance supporting a sentence of death: Anderson's shooting of Roger Solvey and the horrific

injuries he incurred as a result. That testimony was plainly admissible under State law, and resolution of the purported split of authority Anderson relies on would not change the outcome in his case. Anderson’s Petition should be denied.

**I. This Court lacks jurisdiction because the decision below presents no final judgment for review.**

More than a decade ago, Anderson asked this Court to review the final judgment below—his conviction and sentence—and this Court declined. That was the only opportunity that Congress gave this Court for reviewing that judgment, and Anderson cannot win another bite at the apple by filing a motion for an extraordinary, discretionary state-court remedy and petitioning this Court to review the Arkansas Supreme Court’s decision not to disturb that decade-old judgment.

This Court is generally “precluded from taking cases unless the petition is from a ‘final judgment’ within the meaning of 28 U.S.C. § 1257.” *Bateman v. Arizona*, 429 U.S. 1402, 1406 (1976) (Rehnquist, J., in chambers). Anderson has failed to affirmatively establish this Court’s jurisdiction under that provision, as is his burden. *See, e.g., Republic Nat. Gas Co. v. Oklahoma*, 332 U.S. 62, 70-71 (1948) (petitioner has burden of affirmatively establishing Court’s jurisdiction). He claims that “this Court has jurisdiction under 28 U.S.C. § 1257(a),” Pet. 1, but fails to explain how an order denying a motion to recall its mandate is a “judgment” under Section 1257.

In a criminal case, “[t]he sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212-13 (1937). In this case, the sentence, and hence the final judgment, was issued by the State trial court when Anderson was resentenced, and it became final for purposes of jurisdiction under Section 1257 when it was affirmed on direct

review by the Arkansas Supreme Court in 2007. *Anderson v. State*, 242 S.W.3d 229 (Ark. 2006). The Arkansas Supreme Court’s 2021 decision denying Anderson’s motion to recall the mandate is not itself a final judgment subject to review under Section 1257.

Nor did the Arkansas Supreme Court’s discretionary denial of Anderson’s motion modify Anderson’s final criminal judgment or reopen it for another round of direct review, whether in State court or in this Court on certiorari review. *Cf. Jimenez v. Quarterman*, 555 U.S. 113, 120 & n. 4 (2009) (“[W]e have previously held that the possibility that a state court may reopen direct review ‘does not render convictions and sentences that are no longer subject to direct review nonfinal[.]’”) (quoting *Beard v. Banks*, 542 U.S. 406, 412 (2004)).

A denial of a wholly discretionary state-court mechanism for reopening a judgment does not fall within this Court’s certiorari jurisdiction under Section 1257. Anderson’s Petition should be denied.

## **II. The decision below rested on independent and adequate state-law grounds.**

“This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). “This rule applies whether the state law ground is substantive or procedural.” *Id.* “In the context of direct review of a state court judgment,” this doctrine is “jurisdictional” because “resolution of any independent federal ground . . . would . . . be advisory.” *Id.*

In some cases where questions of both state and federal law are decided by a state court, it is difficult to discern whether a state court’s decision rested on federal or state law. In cases where “a state court decision fairly appears to rest primarily on federal law,” this Court will presume it rested solely on federal law, absent a clear statement to the contrary by the state court. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). But the opposite presumption applies “[i]n the absence of a clear indication that a state court rested its decision on federal law . . . .” *Coleman*, 501 U.S. at 739-40. “That presumption grows out of the principle that there must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause.” Stephen M. Shapiro, et al., *Supreme Court Practice* 213 (10th ed. 2013). In cases like here, “[w]here the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review that judgment.” *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (quoting *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952)).

The Arkansas Supreme Court’s denial of Anderson’s motion to recall the mandate was adequately supported by its discretion under State law. That court has made clear that recall of the mandate is a “discretionary act” to “be ‘held in reserve against grave, unforeseen contingencies.’” *Nooner*, 438 S.W.3d at 240 (quoting *Calderon v. Thomason*, 523 U.S. 538, 558 (1998)). Indeed, the Arkansas Supreme Court described those circumstances in its landmark decision establishing the factors that guide its discretion to recall its mandate as “one of a kind, not to be repeated.” *Robbins v.*



*State*, 114 S.W.3d 217, 223 (Ark. 2003). Those factors are: “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) the appeal was a death case that required heightened scrutiny.” *Lee v. State*, 238 S.W.3d 52, 56 (Ark. 2006).

Applying those factors, the Arkansas Supreme Court has exercised its discretion to recall the mandate only in truly extraordinary circumstances. *Robbins*, for example, involved a death-row inmate who had initially waived his right to direct appeal and post-conviction review prior to death-penalty appeals becoming automatic in Arkansas. 114 S.W.3d at 218. The court reopened the case on direct appeal, appointing *amicus* to assist it in reviewing the record, and affirmed the conviction and death sentence. *Id.* at 219. Robbins later began contesting his death sentence for the first time in federal habeas corpus proceedings, and he presented the district court with an Eighth Amendment claim regarding allegedly inconsistent jury findings regarding mitigating circumstances. *Id.* at 221. That claim was dismissed without prejudice because Robbins had not exhausted his state remedies. *Id.* Robbins returned to state court, arguing that in a prior decision, the Arkansas Supreme Court had granted relief on the very claim he was raising in a case that court observed was “on all fours legally” with his case. *Id.* at 222. Given “the unique circumstances of th[at] case,” the court recalled the mandate to decide that issue.

Anderson didn’t come close to showing extraordinary circumstances warranting the discretionary relief that he requested. Though this is a death-penalty case, he met neither of the other two *Robbins* factors. First, his Eighth Amendment argument

regarding the Solveys' testimony was rejected in habeas proceedings by the federal courts. *Anderson v. Kelley*, No. 5:12-cv-279-DPM, 2017 WL 1150583, at \*23 (E.D. Ark. Mar. 28, 2017). Second, he failed to demonstrate a defect in the appellate process. Anderson raised this argument before the trial court, R. 1080-81, and the court ruled against him. R. 3246. Though he did not pursue that theory on direct appeal, the Arkansas Supreme Court reviewed the trial court's adverse ruling (along with all other adverse rulings per state-law requirements) for error and found none. *Anderson II*, 242 S.W.3d at 237. That is a far cry from what occurred in *Robbins*, which came before the Arkansas Supreme Court prior to its establishment of automatic and searching review in death-penalty cases.

Ultimately, recall of the mandate is limited to "error[s] made during [the Arkansas Supreme Court's] review . . . and [is] intended to give [that court] an opportunity to address an error that it should have addressed before." *Engram v. State*, 200 S.W.3d 367, 371 (Ark. 2004) (emphasis omitted). In determining whether to recall its own mandate, the Arkansas Supreme Court thus considered not only the strength of Anderson's case, but its confidence about its own review of the case when it came on direct appeal over a decade ago. That decision is far removed from any federal issue and cannot possibly fall within this Court's review. Anderson's Petition should be denied.

### **III. Anderson's Petition does not implicate the questions he purports to present for review.**

Anderson argues that this Court should grant his Petition to resolve a purported split among State courts regarding whether victim-impact evidence about other

crimes is permissible under the Eighth and Fourteenth Amendments. But resolution of that question would not affect Anderson's case because the Solveys' testimony was not introduced as victim-impact evidence.

Arkansas sought the death penalty for Anderson's murder of Clara Creech, and it alleged as the supporting aggravating circumstance Anderson's commission of a prior violent felony, *i.e.*, the Solvey shooting. In particular, Arkansas alleged 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). Under Arkansas law, "serious physical injury" is defined as "physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ." Ark. Code Ann. 5-1-102(19) (Supp. 1999). Arkansas was required to prove that aggravator beyond a reasonable doubt, Ark. Code Ann. 5-4-603(a)(1) (Repl. 1997), and it was allowed to present to the jury evidence "as to any matters relating to aggravating circumstances," Ark. Code Ann. 5-4-602(4). *See also Ward v. State*, 1 S.W.3d 1, 6 (Ark. 1999). Thus, the Solveys' testimony regarding the circumstances of the shooting and the magnitude of the injuries suffered by Roger Solvey was relevant to the aggravating circumstance alleged by Arkansas.

Before resentencing began, Anderson's counsel objected to the Solveys' testimony as victim-impact evidence barred by the Eighth and Fourteenth Amendments.

R. 1080-81. In *Payne v. Tennessee*, this Court overruled two prior cases that prevented States from introducing evidence concerning “the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family.” 501 U.S. 808, 817 (1991). It held that States “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. Anderson argued that the Solveys’ testimony fell outside what *Payne* allows because it was victim-impact testimony regarding a crime other than the Creech murder.

But Arkansas explained that the testimony was not being offered as victim-impact evidence. Rather, the testimony was intended to establish the aggravating circumstance of a prior violent felony by proving the crime occurred and showing “the things that resulted and flowed from this injury.” R. 3243-45. The trial court agreed with Arkansas, ruling that Roger and Nancy Solvey’s testimony regarding Roger’s injuries and necessary medical care were relevant proof of the aggravator, and it held it was not more prejudicial than probative. R. 3240-47; R. 3270-73.

Thus, the Solveys’ testimony simply was not introduced as victim-impact evidence, as Anderson argues. The split of authority on which Anderson relies in urging this Court to grant review has no bearing on his case. The Solveys’ testimony provided proof of Arkansas’s alleged aggravating circumstance, including its impact on Roger Solvey. In deciding Anderson’s sentence, the jury was required to weigh the aggravating circumstance it found against the many mitigating circumstances it

found. *See* R. 3706-09. Under Arkansas law, the jury was entitled to hear any evidence relevant to the magnitude of that aggravating circumstance. It stands to reason that Anderson's view of the evidence would be quite different if all five of the shots he fired into Roger Solvey's truck had missed. But unfortunately for Solvey, they didn't, and the jury was entitled to hear the consequences of Anderson's shooting spree in determining his sentence.

\* \* \*

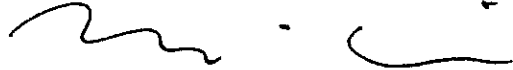
Anderson's Petition is rife with issues precluding this Court's review. It seeks review of an order over which this Court lacks jurisdiction. It asks this Court to displace a State court's discretionary ruling to recall its own mandate, a tool that court uses only in extraordinary circumstances. And the questions that it purports to present wouldn't impact Anderson's case. Anderson's Petition should be denied.

**CONCLUSION**

This Court should deny the petition for certiorari.

Respectfully submitted,

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