

THIS IS A CAPITAL CASE

No. 21-5900

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

PETITIONER'S REPLY BRIEF

LISA G. PETERS
FEDERAL PUBLIC DEFENDER

JOHN C. WILLIAMS
Counsel of Record
Ass't Federal Public Defender
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

The State agrees that Anderson's first question presented is worthy of the Court's review in some case. BIO at 8. It says that this is not the case, for three reasons. Each of these reasons is based in error.

First, this Court has jurisdiction under its authority to consider "final judgments or decrees" rendered by a state court of last resort. 28 U.S.C. § 1257(a). The State takes a legally unsupported and illogical view of this Court's authority to review the actions of state courts when denying collateral attacks on criminal judgments.

Second, there is good reason to think that the Arkansas Supreme Court's rejection of Petitioner's claim is not independent of federal law. Under this Court's precedents, the state court's failure to say otherwise means there is no adequate and independent state ground to deprive the Court of jurisdiction.

Finally, the State alleges that evidence concerning the long-term impact of Anderson's prior crime on the victim and his wife is not victim-impact at all, but goes rather to the facts of the offense. The Court should not be fooled by this resort to labels over substance.

Because the petition raises an important question worthy of consideration—one that the Court has jurisdiction to address—the Court should grant the petition for a writ of certiorari. Insofar as the Court remains in doubt about jurisdiction, it should order the parties to brief the jurisdictional questions or, as to the question of whether there is an adequate and independent state ground, vacate and remand to the Arkansas Supreme Court for clarification.

I. The Court has jurisdiction.

The State is mistaken in its view that the Court lacks jurisdiction in this case. Insofar as jurisdiction remains in question, the proper course is not to deny the petition but to seek additional briefing or, on the question of adequate and independent state grounds, clarification from the Arkansas Supreme Court.

A. Section 1257(a) grants jurisdiction.

This Court has jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). There can be little question that the order under review—the Arkansas Supreme Court’s denial of Anderson’s motion to recall the mandate in the direct appeal from his resentencing—is final. This is not a case “where anything further remains to be determined by a State court.” *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). And the State does not argue that that the Arkansas Supreme Court’s order is non-final. Rather, the State argues that the Arkansas Supreme Court’s decision is not a “judgment” subject to review. Its logic appears to be that the judgment in this case occurred in 2007, and thus that a later motion attacking that judgment cannot create a different “judgment” subject to this Court’s review.

The State does not point to a case that supports this reasoning. *Bateman v. Arizona*, 429 U.S. 1302 (1976) (Rehnquist, J., in chambers), and *Berman v. United States*, 302 U.S. 211 (1937), go only to the question of finality. In *Bateman*, Justice Rehnquist found that there was unlikely to be a final judgment where, in the order from which review was sought, the Arizona Supreme Court remanded “for the

initial imposition of a sentence.” *Bateman*, 429 U.S. at 1306. And in *Berman* the Court held that suspending the execution of the sentence did not render the judgment of conviction non-final. *See Berman*, 302 U.S. at 212.

Nor does the State offer an argument based on statutory text. Even if one were to accept, for the sake of argument, that the Arkansas Supreme Court’s order is not a “judgment,” the State ignores that the statute also provides jurisdiction over “decrees.” A decree is simply a court order. *See Black’s Law Dictionary* 471 (9th ed. 2009); Merriam-Webster, “Decree,” <https://www.merriam-webster.com/dictionary/decreed> (defining “decree” as “an order usually having the force of law”). Regardless of whatever happened in Anderson’s earlier litigation, there can be little question that the Arkansas Supreme Court issued an order in denying Anderson’s motion to recall the mandate.

The State’s proposed rule is also illogical. It calls into question this Court’s jurisdiction over *any* state high-court ruling denying a collateral attack on a final criminal judgment. An order denying a garden-variety state postconviction petition does not disturb the earlier criminal judgment, nor, using the state’s conception of the term, does it create a “judgment” by itself. On the state’s logic such orders should not be reviewable either, but obviously they are or else decades’ experience is wrong. *Cf., e.g., Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (reviewing denial of state postconviction petition by Texas Court of Criminal Appeals).

And if the shoe were on the other foot—if the Arkansas Supreme Court had *granted* Anderson’s petition on federal grounds and the State wished to challenge

that decision—surely the State would not contend the absence of a “judgment or decree.” The State suggests that the reopening of an earlier judgment might make a difference, but it is difficult to see how that is so. Had the Arkansas Supreme Court reopened Anderson’s case and ordered resentencing, there would be no criminal “judgment” at all until the state court entered a resentencing order. That state of affairs might affect whether the Arkansas Supreme Court’s hypothetical order was final for the purpose of this Court’s jurisdiction. But the absence of an underlying judgment of conviction would have nothing to do with whether an order requiring resentencing amounts to a “judgment or decree” under § 1257(a). Surely it does, just as does the order denying collateral relief here. Whether the State’s highest court has issued a “judgment or decree” does not depend on the substance of the order.

B. The Arkansas Supreme Court did not base its decision on an independent and adequate state ground.

Contrary to the State’s argument, this Court has jurisdiction because the Arkansas Supreme Court’s rejection of Anderson’s claim was not independent of federal law, and the Arkansas Supreme Court did not issue a plain statement that it was. The procedural mechanism by which Anderson sought relief—a motion to recall the mandate—required the Arkansas Supreme Court to consider the merits of Anderson’s federal claim.

The State correctly states the three factors the Arkansas Supreme Court consults to determine whether to grant a motion to recall the mandate: whether there is a “presence of a defect in the appellate process,” whether there has been a “dismissal of proceedings in federal court because of unexhausted state court

claims,” and whether the case involves a death sentence. BIO at 12 (citing *Lee v. State*, 238 S.W.3d 52, 56 (Ark. 2006)). However, the State’s discussion of the first two factors is misleading.

Anderson’s motion in the Arkansas Supreme Court hinged on whether there was a “defect in the appellate process.” Obviously this is a death case, and the State is wrong to suggest that the federal district court dismissed Anderson’s Eighth Amendment claim on the merits. It dismissed the claim because Anderson had not exhausted it and it was thus procedurally defaulted. *See Anderson v. Kelley*, No. 12-279, 2017 WL 1160583, at *23 (E.D. Ark. Mar. 28, 2017).

The State presents an unduly narrow view of how the Arkansas Supreme Court assesses for a “defect in the appellate process.” The Arkansas Supreme Court conducts an automatic, independent review of death cases, which includes review for errors that appellate counsel did not raise. *See Ark. R. App. P. Crim. 10(b)*; *Ark. S. Ct. R. 4-3(i)*. A motion to recall the mandate asks the Arkansas Supreme Court to take a closer look. If the court later identifies an error that it failed to identify in its initial independent review—including a federal constitutional error—then it will recall the mandate and vacate the death sentence. *See Wertz v. State*, 493 S.W.3d 772, 776–77 (Ark. 2016). Given the Arkansas Supreme Court’s self-professed independent responsibility to review “matter[s] essential to the determination of the death penalty,” *id.* at 777, denial of a motion to recall the mandate entails a negative assessment of the claim’s merits if, as here, the other two prongs of the test cannot explain the denial.

The State contends that the Arkansas Supreme Court’s decision “was adequately supported by its discretion under State law.” BIO at 11. But the important question is whether the court touched upon federal law in exercising that discretion. It did so here because assessment of “defect in the appellate process” required an assessment whether Anderson articulated a colorable violation of the federal constitution.

“When application of a state law bar ‘depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and [the Court’s] jurisdiction is not precluded.” *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). That is true even if “a state law determination is” merely “influenced by’ a question of federal law.” *Id.* at 1747 n.4 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984)).

Though the absence of a reasoned state court opinion makes it more difficult to determine whether there is an adequate and independent state ground, the task is not impossible. In that situation, the Court looks to other parts of the record such as pleadings and motions to determine whether there was federal content to the state-court’s ruling. *See id.* at 1746 n.3. Here, the State based its argument for denial at least partially on the merits. After suggesting, much as it does here, that the claim should be denied because the Arkansas Supreme Court did not overlook it on its earlier automatic review, the State contended that “Anderson’s insistence that the testimony of Roger and Nancy Solvey amounted to unlawful victim-impact testimony is simply wrong.” Resp. to Mot. to Recall the Mandate at 14. This is not a

case where the materials below make it obvious that only an adequate and independent state ground could explain the court’s ruling—that is, a case like *Coleman v. Thompson*, 501 U.S. 722, 740 (1991), in which the state court’s unreasoned decision followed a motion to dismiss that was “based solely on Coleman’s failure to meet the [state] Supreme Court’s time requirements” for an appeal. The State cannot rely on *Coleman*’s holding here when it argued to the Arkansas Supreme Court that the Eighth Amendment claim “is simply wrong.”

For all these reasons, the Arkansas Supreme Court’s ruling is at the very least “interwoven with” the merits of the Eighth Amendment claim Anderson presented in his motion to recall the mandate. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). The conclusive presumption is that this Court has jurisdiction absent a plain statement from the state court that its decision rested on an independent and adequate state ground. The Arkansas Supreme Court offered no such statement, though Anderson invited it to do so in seeking reconsideration of denial of the motion to recall the mandate. As a result, this Court has jurisdiction.¹

¹ The State cites *Durley v. Mayo*, 351 U.S. 277, 281 (1956), to argue that “[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 the judgment.” But the Court has never again cited *Durley* for this proposition, which has not survived the Court’s later holdings. The question is whether the lower-court opinion—reasoned or not, based on a state ground or not—is independent of federal law. *Cf. Long*, 463 U.S. at 1066 (Stevens, J., dissenting) (citing *Durley* to argue that the presumption should go against jurisdiction rather than for it).

C. The Court should order briefing on the jurisdictional questions or seek clarification from the Arkansas Supreme Court.

Because, by the State's own admission, the first question presented is one worthy of certiorari, the Court should grant the petition. If the Court has any questions about its jurisdiction, it should resolve those questions not by denying certiorari but by ordering the parties to brief the issue on merits review.

Alternatively, the Court should vacate and remand to the Arkansas Supreme Court so that it may clarify whether its denial of relief was based on a ground independent of the merits of Anderson's federal claim. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 555–56 (1940); *Long*, 463 U.S. at 1041 & n.6 (stating that there “may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action”). Clarification is particularly appropriate to resolve any ambiguity about whether the Arkansas Supreme Court's order was interwoven with federal law. *See* Stephen M. Shapiro et al., *Supreme Court Practice* ch. 3.25 (11th ed. 2019) (explaining that where a federal basis is unclear the Court has reserved its power to “take whatever appropriate action may be necessary or desirable to clear the confusion”).

II. Contrary to other state courts of last resort, the Arkansas Supreme Court permitted testimony from prior-crime victims about the crime's effects.

The State also tries to persuade the Court that testimony about the long-term emotional, physical, and financial impact of the crime on the victim was not victim-impact evidence, and thus that Anderson's case does not implicate the questions presented. It says that the testimony “provided proof of Arkansas's alleged

aggravating circumstance, including its impact on Roger Solvey.” BIO at 15. But the long-term impact of the crime on the victim (and his wife) had nothing to do with whether 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) (emphasis supplied). Whether a prior felony contains an “element” of violence or risk of injury concerns the statute that defines the felony, not the facts surrounding the crime. *Cf. Dansby v. Hobbs*, 766 F.3d 809, 839 (8th Cir. 2014) (analyzing whether first-degree-felony-imprisonment statute contains an element of risk of injury such as to qualify as aggravating under Ark. Code Ann. § 5-4-604(3)).

The substance of the Solveys’ testimony was to portray for the jury the effect that Anderson’s prior conduct had on its victims. Other courts have found such testimony to be impermissible under the Eighth Amendment—notwithstanding the government’s profession that it was presented to support a prior-felony aggravator. These courts explain that while the facts of the prior crime may be used to prove the aggravating factor, and while those facts may even come from the mouth of the victim or her family, testimony about the “unforeseen effects of those prior crimes on their victims” is inadmissible. *People v. Hope*, 702 N.E.2d 1282, 1288 (Ill. 1999). Such evidence, these courts hold, violates the Eighth Amendment 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.” *People v. Dunlap*, 975 P.2d 723, 745 (Colo. 1999) (citing *Payne v. Tennessee*, 501 U.S. 808, 821 (1991)).

In short, Anderson's case very much implicates the lower-court disagreement about the permissible extent of testimony from other-crime victims. The victims of Anderson's prior felony portrayed for the jury their long-term suffering at great length. Calling this anything other than victim-impact testimony belies common sense and is inconsistent with the way courts typically handle such evidence.


CONCLUSION

The Court should grant the petition for a writ of certiorari. Insofar as the Court is uncertain about its jurisdiction, it should either order the parties to address the issue during merits briefing or else vacate and remand to the Arkansas Supreme Court to clarify the basis for its ruling.

NOVEMBER 19, 2021

Respectfully submitted,

LISA G. PETERS
FEDERAL PUBLIC DEFENDER



JOHN C. WILLIAMS
Counsel of Record
Ass't Federal Public Defender
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner