

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 2020 TERM

SCOTTY RAY GARDNER

PETITIONER

VS.

NO. \_\_\_\_\_

STATE OF ARKANSAS

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

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## CAPITAL CASE

### QUESTIONS PRESENTED

I. In a state in which the death penalty is authorized only upon a finding of an enumerated aggravating circumstance, does due process require that every statutory element of the aggravating circumstance be proven beyond a reasonable doubt?

II. Where the Arkansas Supreme Court has interpreted the capital sentencing statute to allow a jury to extend mercy in determining whether the aggravating circumstances justify a penalty of death, does failure to instruct the jury of that option violate due process?

III. Did the failure of the Arkansas Supreme Court to consider and rule upon issues raised and argued on direct appeal violate Petitioner's due process rights of access to the courts and to a meaningful opportunity to be heard by rendering appellate review inadequate, ineffective or unmeaningful?

### PARTIES

The parties to this action are Scotty Ray Gardner and the State of Arkansas.

TABLE OF CONTENTS

QUESTIONS PRESENTED. . . . . i

PARTIES. . . . . i

TABLE OF CONTENTS. . . . . ii

TABLE OF AUTHORITIES. . . . . iv

PROCEEDINGS IN STATE TRIAL AND APPELLATE COURTS. . . . . 1

JURISDICTIONAL STATEMENT. . . . . 1

CONSTITUTIONAL, STATUTORY AND CASE LAW  
PROVISIONS INVOLVED . . . . . 2

STATEMENT OF THE CASE. . . . . 6

REASONS TO GRANT THE WRIT AND ARGUMENT. . . . . 10

I. The Arkansas Supreme Court’s decision affirming the jury’s finding of a statutory aggravating circumstance upon sufficient proof of only one of the two statutory elements conflicts with this Court’s relevant decisions under the Due Process Clause of the Fourteenth Amendment. . . . . 10

II. This Court has not previously decided whether the Due Process Clause of the Fourteenth Amendment requires a capital sentencing jury to be instructed of its option to extend mercy when that option is unquestionably allowed by state law. The Court should grant certiorari to decide this important question of federal constitutional significance. . . . . 13

III. This Court has not previously decided whether the refusal of a state court of last resort to consider and rule upon issues raised and argued on appeal violates a criminal

appellant’s due process rights of access to the courts and to a meaningful opportunity to be heard by rendering appellate review inadequate, ineffective or unmeaningful. The refusal of the Arkansas Supreme Court to consider and rule upon specific arguments raised by Petitioner Gardner in the direct appeal from his conviction and death sentence presents an opportunity for this Court to decide this question of vital constitutional significance. . . . . 20

CONCLUSION. . . . . 24

TABLE OF CONTENTS OF APPENDIX. . . . . 26

TABLE OF AUTHORITIES

CASES:

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). . . . . 12,

Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418 (1983). . . . . 17

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971). . . . . 22

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1976). . . . . 22

Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990). . . . . 18, 19

Camargo v. State, 337 Ark. 105, 987 S.W.2d 680 (1999). . . . . 14 - 15

Carter v. Bowersox, 265 F.3d 705 (8<sup>th</sup> Cir. 2001). . . . . 17

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963). . . . . 24

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). . . . . 21

Greene v. State, 335 Ark. 1, 977 S.W.2d 192 (1998). . . . . 15

Griffen v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956). . . . . 23

Hicks v. Oklahoma, 447 U.S. 343, 100 S. Ct. 2227 (1980). . . . . 17, 24

In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970). . . . . 12

Johnson v. State, 308 Ark. 7, 823 S.W.2d 800 (1992). . . . . 15

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999). . . . . 12

Kansas v. Carr, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). . . . . 19

M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555 (1996) . . . . . 22

Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934 (1989) . . . . . 19

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). . . . . 13, 18

Sheridan v. State, 313 Ark. 23, 852 S.W.2d 772 (1993) . . . . . 15

Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994). . . . . 19

State v. Pruitt, 347 Ark. 355, 64 S.W.3d 255 (2002). . . . . 23

Tennessee v. Lane, 541 U.S. 509, 124 S.Ct. 1978 (2004). . . . . 23

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990). . . . . 18

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the United States Constitution. . . . . 11

Fourteenth Amendment to the  
United States Constitution. . . . . 11, 13, 14, 20, 22, 24

STATUTES AND RULES:

Ark. Code Ann. § 5-4-603 . . . . . 11, 17

Ark. Code Ann. § 5-4-603(a)(1-3). . . . . 14

Ark. Code Ann. § 5-4-603(C). . . . . 14

Ark. Code Ann. § 5-4-604(8)(A) . . . . . 11

Ark. Code Ann. § 5-4-604(8)(B) . . . . . 11

Ark. Code Ann. § 5-4-604(8)(B)(I). . . . . 22

Ark. Code Ann. § 5-4-604(8)(B)(ii)(a). . . . . 11

Ark. Code Ann. § 16-91-101(a). . . . . 23

Ark. Code Ann. § 16-91-113 . . . . . 23

Arkansas Rules of Appellate Procedure – Criminal 1(a). . . . . 23

Arkansas Rules of Appellate Procedure – Criminal 14. . . . . 23

MISCELLANEOUS:

AMCI 2d 1008. . . . . 15, 16, 18

## PROCEEDINGS IN STATE TRIAL AND APPELLATE COURTS

Scotty Ray Gardner was convicted of capital murder and sentenced to death by the Circuit Court of Faulkner County, Arkansas in Case No. CR 16-194. On appeal to the Arkansas Supreme Court in Case No. CR-19-257, Mr. Gardner argued that the trial court violated his Sixth Amendment right to self-represent when it failed to conduct the inquiry required by *Faretta v. California*, that the trial violated due process by failing to instruct the jury of its legal option, indisputable under Arkansas law, to extend mercy in assessing punishment, and that the evidence was insufficient to establish two aggravating circumstances found by the jury.

The Arkansas Supreme Court affirmed the conviction and sentence in an opinion cited as *Gardner v. State of Arkansas*, 2020 Ark. 147, 598 S.W.3d 10. Gardner filed a timely petition for rehearing, App. 11-19, which was denied by the Arkansas Supreme Court. App. 10.

### JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The original opinion was issued on April 16, 2020, and a timely petition for rehearing was denied on May 28, 2020. This petition, being filed



within 90 days of the denial of rehearing, is timely under Rule 13.3 of the Rules of the Supreme Court of the United States. The Arkansas Supreme Court issued the mandate on May 28, 2020, having denied a motion to stay its issuance. App. 10.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be . . . deprived of life, liberty, or property,  
without due process of law . . . .

Fourteenth Amendment to the United States Constitution:

No State shall . . . deprive any person of life, liberty, or  
property, without due process of law . . . .

Ark. Code Ann. § 5-4-603:

(a) The jury shall impose a sentence of death if the jury  
unanimously returns written findings that:

(1) An aggravating circumstance exists beyond a  
reasonable doubt;

(2) Aggravating circumstances outweigh beyond a  
reasonable doubt all mitigating circumstances

found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt;

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make any finding required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

Ark. Code Ann. § 5-4-604:

An aggravating circumstance is limited to the following:

\*\*\*\*\*

(8)(A) The capital murder was committed in an especially cruel . . . manner.

(B)(i) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish . . . upon the victim prior to the victim's death, mental anguish . . . is inflicted.

(ii)(a) "Mental anguish" means the victim's uncertainty as to his or her ultimate fate.

Ark. Code Ann. § 16-91-101:

(a) Any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this state has the right of appeal to the Supreme Court.

Ark. Code Ann. § 16-91-113:

(a) The Supreme Court need only review those matters briefed and argued by the appellant, except that where either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant.

Arkansas Rules of Appellate Procedure – Criminal 1:

(a) Right of Appeal. Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas.

Arkansas Rules of Appellate Procedure – Criminal 14:

The Supreme Court need only review those matters briefed and argued by the appellant, provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

AMCI 2d 1008:

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In no event will you return a verdict imposing the death penalty unless you unanimously make three particular written findings on Form 3. These are:

First: That the State has proved beyond a reasonable doubt one or more aggravating circumstances.

Second: That such aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances any of you found to exist; and

Third: That the aggravating circumstances justify beyond a reasonable doubt the sentence of death.

If you make those findings, you will impose the death penalty.

Otherwise, you will sentence the defendant to life imprisonment without parole.

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### STATEMENT OF THE CASE

Scotty Gardner was charged with capital murder in the March 6, 2016, death of Susan Heather Stubbs. At a pretrial hearing in which his attorneys requested a continuance of the jury trial, Gardner informed the trial court that he was unhappy with his lawyers and wished to represent himself. The trial court granted the request for continuance without addressing Gardner's expressed desire to self-represent. The court did not make any inquiry of Gardner to establish a knowing and intelligent waiver of the right to counsel. Gardner proceeded to trial represented by

counsel.

Following his conviction of capital murder, Gardner requested one of Arkansas's model jury instructions on sentencing, AMCI 1008, be modified to instruct the jury that it could "show mercy simply by finding that the aggravating circumstances do not justify imposition of the death sentence." This request was denied and the proposed modified instruction was proffered. App. 28. The jury was not instructed of its option to extend mercy, app. 21, which is indisputably granted under state law.

Arguing lack of evidentiary support, Gardner objected to two proposed aggravating circumstances: 1) that the capital murder was committed for pecuniary gain; and 2) that the capital murder was committed in an especially cruel or depraved manner. Overruling Gardner's objection as to pecuniary gain and to the "mental anguish" formulation of the especially-cruel-manner aggravating circumstance, the trial court submitted those aggravating circumstances, along with the especially-depraved-manner formulation, to the jury. App. 24. The jury found the existence of all submitted aggravating circumstances, app. 24, found no mitigating circumstances, app. 25, and sentenced Gardner to death. App. 27.

On direct appeal to the Arkansas Supreme Court, Gardner argued that his conviction and sentence must be reversed due to the trial court's constitutional error in failing to make an inquiry to determine whether Gardner desired to waive his right to counsel and to represent himself. App. 12. Gardner next argued that the trial court denied federal constitutional due process by failing to instruct the jury of the well-established state law that it could choose to extend mercy in determining the sentence. App. 4. Finally, Gardner argued, in part, that there was insufficient evidence of the statutory aggravating circumstance "that the murder was committed in an especially cruel . . . manner." Gardner specifically argued that this aggravating circumstance consists of two elements, one of which is intent to inflict mental anguish, and that evidence on the element of intent was entirely lacking. App. 2; 7.

The Arkansas Supreme Court affirmed the conviction and sentence. It rejected the Faretta issue "because Gardner's request to self-represent was not unequivocal." App. 4. Although Gardner's specific argument was that he was "deprived [ ] of his opportunity to waive his right to counsel and to represent himself" as a result of the failure of the trial court to conduct the inquiry "required by the Sixth Amendment . . . [and] Faretta

. . . ,” app. 2, the opinion of the Arkansas Supreme Court makes no mention the trial court’s constitutional obligation to make such an inquiry of the defendant as would allow a determination of whether he chooses to waive his right to counsel and proceed as his own counsel. App. 2-4.

The Arkansas Supreme Court rejected the argument regarding the mercy instruction, holding that the model instruction “permits the jury to conclude that the aggravating circumstances do not justify beyond a reasonable doubt a death sentence,” and that it “properly informs the jury of the gravity of its decision and that it has the discretion to weigh the factors and determine whether to impose the death penalty.” App. 5.

Regarding the asserted lack of sufficient evidence of the “especially cruel manner” aggravating circumstance, the Court affirmed, holding only that “the State presented substantial evidence that Heather suffered mental anguish as Gardner murdered her.” The opinion does not mention the element of intent. App. 8.

In his timely petition for rehearing, Gardner argued that the Arkansas Supreme Court failed to “address, rule upon or even acknowledge” his argument that the trial court abdicated its constitutional responsibility in failing to conduct the Faretta inquiry. As a result, Gardner argued that



he was denied fundamental due process by the court's failure to comply with state law requirements to review matters argued and briefed, and because it rendered the appellate process fundamentally unfair, denying adequate, effective and meaningful review. This argument was also made regarding the court's failure to address the element of intent in the statutory "especially cruel" aggravating circumstance. App. 11 - 15.

For rehearing, Gardner also argued that the federal Due Process Clauses of the Fifth and Fourteenth Amendments require proof beyond a reasonable doubt of all elements of an alleged statutory aggravating circumstance. Thus, the Court's failure to require proof of the element of intent violated due process. App. 17 - 19.

On May 28, 2000, the Arkansas Supreme Court denied, without comment, the petition for rehearing. App. 10.

### REASONS TO GRANT THE WRIT AND ARGUMENT

I. The Arkansas Supreme Court's decision affirming the jury's finding of a statutory aggravating circumstance upon sufficient proof of only one of the two statutory elements conflicts with this Court's relevant decisions under the Due Process Clause of the Fourteenth Amendment.

Arkansas law authorizes a sentence of death only upon a finding, among others, of the existence of an enumerated aggravating circumstance. Ark. Code Ann. § 5-4-603. In its decision of Gardner's direct appeal, the Arkansas Supreme Court apparently determined that proof of every fact necessary to establish the existence of a statutory aggravating circumstance is not necessary. That ruling is contrary to this Court's relevant decisions under the Due Process Clause of the Fourteenth Amendment.

Arkansas Code Annotated § 5-4-604(8)(A) provides an aggravating circumstance if the "capital murder was committed in an especially cruel or depraved manner." Ark. Code Ann. § 5-4-604(8)(B) provides, in pertinent part, "a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish . . . upon the victim prior to the victim's death, mental anguish . . . is inflicted." "Mental anguish" is defined as "the victim's uncertainty as to his or her ultimate fate." Ark. Code Ann. § 5-4-604(8)(B)(ii)(a).

This statute requires proof not only of the actual infliction of mental anguish, but of the intent to inflict mental anguish. In his direct appeal, Gardner specifically argued lack of evidence to support the element of

intent to inflict mental anguish, app. 12 - 13; 17. However, the Arkansas Supreme Court affirmed upon only a showing of evidence “that Heather suffered mental anguish as Gardner murdered her.” It failed to address the element of intent, app. 7 - 8, even when the omission was brought to its attention in the petition for rehearing. App. 11, 12 - 13, 17.

This Court has made clear that federal due process requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999) extended this requirement, among others, to sentencing considerations under the Due Process Clause of the Fifth Amendment. Any fact, other than prior conviction, that increases the maximum penalty for a crime must be proven beyond a reasonable doubt. *Id.* at 243, n. 6. This requirement applies to the states through the Fourteenth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355 (2000). “*Winship's* due process . . . protections extend, to some degree, ‘to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.’” *Id.* at 484, 120 S. Ct. at 2359 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 251, 118 S.Ct.

1219, 1234 (1998)(SCALIA, J., dissenting)). This principle applies to findings of aggravating circumstances necessary for imposition of the death penalty. See *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

Contrary to the holdings of this Court, the Arkansas Supreme Court chose to affirm the jury's finding of a statutory aggravating circumstance upon determining there was sufficient proof of only one of the two statutory elements. Specifically, the Arkansas Supreme Court failed to address sufficiency of the intent element of the "especially cruel" aggravating circumstance, app. 7 - 8, and then refused to do so in its summary denial of Gardner's petition for rehearing. App. 10.

By affirming the finding of a statutory aggravating circumstance upon proof of less than every fact necessary to establish it, the decision of the Arkansas Supreme Court violates the Due Process Clause of the Fourteenth Amendment. The holding is contrary to this Court's relevant decisions. This Court should grant certiorari and take corrective action.

II. This Court has not previously decided whether the Due Process Clause of the Fourteenth Amendment requires a capital sentencing jury to be instructed of its option to extend mercy when that option is unquestionably allowed by state law. The Court should grant

certiorari to decide this important question of federal constitutional significance.

The Arkansas Supreme Court, which is a state court of last resort, specifically interprets the state capital sentencing scheme as allowing a jury to exercise mercy. In deciding Gardner's direct appeal, however, the court concluded that the jury need not be advised of that option. This decision is contrary to the due process guarantees of the Fourteenth Amendment.

The Arkansas death penalty statutory scheme provides that a death sentence may be imposed only if the jury makes three unanimous findings: 1) that an aggravating circumstance exists beyond a reasonable doubt; 2) that aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and 3) that aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Code Ann. § 5-4-603(a)(1-3). Failure to unanimously make any of the three findings results in a sentence of life imprisonment without parole. Ark. Code Ann. § 5-4-603(c).

The Arkansas Supreme Court has repeatedly held, and it is now well-established state law, that an Arkansas capital sentencing jury may

choose to extend mercy by finding that the aggravating circumstances do not justify a sentence of death beyond a reasonable doubt. *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999); *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998); *Sheridan v. State*, 313 Ark. 23, 34, 852 S.W.2d 772, 778 (1993); *Johnson v. State*, 308 Ark. 7, 18, 823 S.W.2d 800, 806 (1992). Its cases make clear that the option to extend mercy is available when the jury considers the final step, not when it weighs aggravating and mitigating circumstances: A “jury may show mercy to the defendant simply by finding that the aggravating circumstances, even though they exist and ‘outweigh’ the mitigating circumstances, do not ‘justify’ imposition of the death sentence.” *Greene* at 33, 977 S.W.2d at 207-08.

Arkansas trial courts utilize model jury instructions. The model instruction at issue here is AMCI 2<sup>nd</sup> 1008, which provides, in pertinent part:

In no event will you return a verdict imposing the death penalty unless you unanimously make three particular written findings on Form 3. These are:

First: That the State has proved beyond a reasonable doubt one or more aggravating circumstances.

Second: That such aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances any of you found to exist; and

Third: That the aggravating circumstances justify beyond a reasonable doubt the sentence of death.

If you make those findings, you will impose the death penalty. Otherwise, you will sentence the defendant to life imprisonment without parole.

App. 22 - 23.

Because AMCI 2<sup>nd</sup> 1008 provides no notice to the jury of its option to extend mercy, Gardner requested the trial court instruct the jury using a slightly modified version of the model instruction which tracks the language used by the Arkansas Supreme Court regarding mercy. The proposed modified instruction added only the following language after detailing the three necessary findings: “If you find that aggravating circumstances exist and outweigh the mitigating circumstances, you may show mercy simply by finding that the aggravating circumstances do not justify imposition of the death sentence.” App. 30.

The trial court denied the request for the modified instruction, and instructed the jury using AMCI 2d 1008. App. 21 - 23. Accordingly, the jury was not informed of its unquestionably legal option to extend mercy, and it sentenced Petitioner to death. App. 27. The Arkansas Supreme Court found no error, stating that although the jury was not instructed on

its option to extend mercy, the model instruction “permits the jury to conclude that the aggravating circumstances do not justify beyond a reasonable doubt a death sentence. . . . The instruction properly informs the jury of the gravity of its decision and that it has the discretion to weigh the factors and determine whether to impose the death penalty.” App. 5. The opinion did not address Petitioner’s argument that failure to instruct the jury of its option to extend mercy was a violation of federal due process.

The state’s provision for imposition of the death penalty subject to the procedural protections in Ark. Code Ann. § 5-4-603 and the judicial interpretations of that statute create a due process liberty interest protected by the Fourteenth Amendment. See *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227 (1980); *Barclay v. Florida*, 463 U.S. 939, 985, 103 S.Ct. 3418, 3443 (1983). An “instructional error in violation of state law” violates due process rights of the Fourteenth Amendment. *Carter v. Bowersox*, 265 F.3d 705, 714 (8<sup>th</sup> Cir. 2001). Petitioner’s “substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [is a] liberty interest [ ] that the Fourteenth Amendment preserves against



arbitrary deprivation by the State.” *Id.* (citing *Hicks* at 346, 100 S.Ct. 2227).

“When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.” *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047 (1990) (overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002)). Where an instruction is ambiguous and subject to an erroneous interpretation, the proper inquiry is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Boyd v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990).

The specific language of AMCI 2d 1008 does not inform or even suggest that a jury may opt to extend mercy. Although state law allows a jury to show mercy by finding that the aggravating circumstances do not justify imposition of the death sentence, the language of the instruction focuses only on the aggravating circumstances. The instruction cannot be considered “ambiguous,” as it is subject to only one interpretation: that the jury, in the final step, considers only the aggravating circumstances in determining whether the sentence of death is justified. This singular

possible interpretation is legally incorrect and erroneous. There is nothing in this instruction, or in the instructions as a whole, app. 20 - 27, that would lead the jury to the conclusion that it could consider and extend mercy if it chose to do so. More than a reasonable likelihood, there is near certainty that the jury applied the instruction in a way that prevented it from considering mercy.

“Jurors do not ‘pars[e] instructions for subtle shades of meaning in the same way that lawyers might.’” *Kansas v. Carr*, 136 S. Ct. 633, 643, 193 L. Ed. 2d 535 (2016) (quoting *Boyde v. California*, 494 U.S. 379, 381, 110 S.Ct. 1190). The instructions failed to provide a vehicle for the jury to give effect to its lawful ability to extend mercy. See *Penry v. Lynaugh*, 492 U.S. 302, 324, 109 S. Ct. 2934, 2950 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)).

Because Arkansas law unquestionably permits a capital sentencing jury to show mercy, failure of the trial court apprise the jury of that option infected the entire sentencing trial. The resulting death sentence constitutes a violation of Gardner’s federal due process rights. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154, 164, 114 S. Ct. 2187, 2194 (1994) (“The trial court's refusal to apprise the jury of information so

crucial to its sentencing determination . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause.”)

III. This Court has not previously decided whether the refusal of a state court of last resort to consider and rule upon issues raised and argued on appeal violates a criminal appellant’s due process rights of access to the courts and to a meaningful opportunity to be heard by rendering appellate review inadequate, ineffective or unmeaningful. The refusal of the Arkansas Supreme Court to consider and rule upon specific arguments raised by Petitioner Gardner in the direct appeal from his conviction and death sentence presents an opportunity for this Court to decide this question of vital constitutional significance.

The Arkansas Supreme Court’s opinion deciding Petitioner’s direct appeal failed to address, rule upon or even acknowledge two issues which were briefed and argued by Gardner. That failure was brought to the court’s attention in Gardner’s petition for rehearing. App. 11 - 13. The court again refused to address and rule upon those issues when it summarily denied the petition. App. 10. In refusing to address those issues, the court violated Gardner’s Fourteenth Amendment due process rights of access to the courts and to a meaningful opportunity to be heard

by rendering appellate review inadequate, ineffective and unmeaningful.

The first instance of the court's refusal to address, acknowledge or rule upon Gardner's arguments pertains to his first point on appeal:

"When Appellant expressed a desire to represent himself, the trial court erred in failing to fulfill its constitutional obligation to determine if Appellant knowingly and intelligently chose to waive the benefits of counsel." Gardner argued that the trial court, by failing to conduct the inquiry required by the Sixth Amendment to the United States Constitution and *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), "deprived Gardner of his opportunity to waive his right to counsel and to represent himself." App. 12. Gardner's argument, both in his initial brief and his reply brief, focused on the trial court's complete abdication of its constitutional obligation to conduct the inquiry, yet the opinion of the Arkansas Supreme Court makes no mention whatsoever of that duty. App. 2 - 4.

The second instance pertains to Gardner's argument regarding insufficiency of the evidence of the "especially cruel" aggravating circumstance. Gardner specifically argued that there are two elements of the aggravating circumstance dealing with mental anguish. The first is

intent to inflict mental anguish, and the second is infliction of mental anguish. Regardless of any evidence that mental anguish was actually inflicted, Gardner argued “[t]he element of intent, required by Ark. Code Ann. § 5-4-604(8)(B)(i), was entirely lacking in the analysis as well as in the evidence.” App. 12 - 13. Despite this specific argument, the opinion of the Arkansas Supreme Court did not address or even mention the element of intent, but affirmed based only on “substantial evidence that Heather suffered mental anguish as Gardner murdered her.” App. 7 - 8.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a State to afford to all individuals a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780 (1971). The fundamental right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491 (1976), is grounded in “both equal protection and due process concerns.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 117 S.Ct. 555 (1996). “The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,” whereas “[t]he due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.” *Id.* While those concerns converge in some cases,

id., the due process concern, alone, is a “sufficient basis” for analyzing cases involving access to the courts. *Id.* at 129 (Kennedy, J., concurring). See also *Tennessee v. Lane*, 541 U.S. 509, 523, 124 S.Ct. 1978 (2004)(The right of access to the courts is protected by the Due Process Clause of the Fourteenth Amendment).

Although the federal constitution does not require States to provide a right to appeal, *Griffen v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585 (1956), when the State chooses to grant that right, it must, consistent with these principles of federal due process, afford adequate, effective and meaningful review. See *Bounds v. Smith*, 430 U.S. at 822 - 823. If the State has a “general policy of allowing criminal appeals,” it cannot create an “effective bar to the exercise of this opportunity.” *Griffen v. Illinois*, 351 U.S. at 24 (Frankfurter, J., concurring).

The State of Arkansas grants all defendants convicted of a crime in circuit court the right to appeal. Ark. Code Ann. § 16-91-101(a); Rules of Appellate Procedure – Criminal 1(a); *State v. Pruitt*, 347 Ark. 355, 359, 64 S.W.3d 255, 258 (2002). When that right is exercised, Ark. Code Ann. § 16-91-113 and Arkansas Rules of Appellate Procedure – Criminal 14 require the Arkansas Supreme Court to “review those matters briefed

and argued by the appellant. . . .”

The Arkansas Supreme Court denied fundamental due process to Gardner by failing to rule upon each of his specific arguments. It denied due process first by failing to comply with the state statutes and rules requiring it to review those matters argued and briefed. See *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980). Second, due process was denied by the court’s refusal to rule, rendering the appellate process, granted as of right, fundamentally unfair, and thereby denying Gardner adequate, effective and meaningful review of his conviction and sentence. Failure to decide issues raised effectively forecloses the exercise of the right to appeal, rendering the process a “meaningless ritual” rather than a “meaningful appeal.” See *Douglas v. California*, 372 U.S. 353, 358 (1963). There is no significant difference between denying the right to appeal and ignoring the arguments made on appeal.

The refusal of the Arkansas Supreme Court to address and rule upon specific issues raised is particularly egregious in light of Gardner’s sentence of death. This Court should grant certiorari to decide if that refusal violates the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

This Court should grant certiorari and, upon plenary argument, vacate the judgment of the Arkansas Supreme Court.

Respectfully Submitted,

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TABLE OF CONTENTS OF APPENDIX

Opinion of the Arkansas Supreme Court . . . . . 1

Order denying petition for rehearing. . . . . 10

Petition for rehearing. . . . . 11

Sentencing instructions.. . . . 20

Sentencing verdict forms . . . . . 24

Proffered modified AMCI 1008. . . . . 28