SUPREME COURT OF ARKANSAS

No. CR-19-257

SCOTTY RAY GARDNER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** April 16, 2020 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CR-16-194] HONORABLE CHARLES E. CLAWSON, JR., JUDGE AFFIRMED.

RHONDA K. WOOD, Associate Justice

Scotty Gardner appeals his capital-murder conviction and death sentence. For reversal, he argues that the circuit court erroneously (1) denied him the right to self-representation, (2) refused to offer a non-model "mercy" jury instruction, and (3) included two aggravating jury instructions offered by the State. We affirm.

I. *Background*

In March 2016, Scotty Gardner and his girlfriend, Heather Stubbs, were living together in a motel room in Conway. On the day of the murder, Gardner and Heather returned to the motel room from church when an argument ensued. Heather pushed Gardner, and he threw her onto the bed. As the pair struggled, Gardner tried to choke Heather with his hands. When she continued to fight him, he took the cord from a curling iron and wrapped it several times around her neck, strangling her. The motel clerk found Heather lying face down in the room later that day.

After the murder, Gardner took $240 and two cell phones from Heather's possessions. Gardner drove to Hot Springs and then Oklahoma, where he and two other men went gambling. Gardner sold one of Heather's phones for $150. He also sold an iPad and a watch in the casino parking lot. The men returned to Hot Springs the following morning.

After Gardner was arrested, he confessed to strangling Heather. He also confessed in a recorded telephone conversation with his ex-wife, Jewel McGinty, and in a letter to McGinty. During the telephone call, Gardner reminded McGinty that he had previously told her "that bitch [Heather] is going to make me kill her." In the letter, Gardner wrote that prior to the murder he had told McGinty that he would "kill [Heather's] punk ass" and stated that she "got what she deserved."

A Faulkner County Circuit Court jury convicted Gardner of capital murder and sentenced him to death. On appeal, Gardner argues that the circuit court should have allowed him to represent himself, that it erred in refusing to use his non-model jury instruction stating the jury had the option of extending mercy in assessing his punishment, and that it erroneously instructed the jury on two aggravating circumstances.

II. *Analysis*

A. Self-Representation

Gardner first argues that the circuit court erroneously denied his right to self-representation under the United States and Arkansas Constitutions. *See Faretta v. California*, 422 U.S. 806 (1975). We affirm because Gardner's request to self-representation was not unequivocal.

A defendant has a constitutional right to self-representation under the Sixth Amendment of the United States Constitution and Article 2, Section 10 of the Arkansas Constitution. A defendant may invoke his right to defend himself provided that (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Pierce v. State*, 362 Ark. 491, 498, 209 S.W.3d 364, 368 (2005). Every reasonable presumption must be indulged against the waiver of a fundamental constitutional right. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001).

When determining whether an attempt to waive counsel and begin self-representation is sufficiently unequivocal, we must view the defendant's statements in their entirety. *See Finch v. State*, 2018 Ark. 111, 542 S.W.3d 143; *Reed v. State*, 2017 Ark. 246, 524 S.W.3d 929. A request to waive counsel must not leave any doubt that the waiver of counsel is what the defendant wants. *See Reed*, 2017 Ark. 246, at 3, 524 S.W.3d at 930 (explaining that "Reed's statements in this case presented an inconsistent picture to the court of his commitment to the idea of self-representation").

Here, Gardner's request to waive was not unequivocal. During a pretrial hearing on a motion to continue filed by his attorneys, Gardner interjected and told the court that he did not want it to grant the motion to continue. When the circuit court indicated that it would defer to Gardner's counsel regarding the time they needed to prepare his defense, Gardner stated, "I don't want them on my case. . . . Your Honor, I'd ask to represent myself or get some other attorney. She's lied to me three times. He's lied to me. I don't want

people lying to me. This is my life." When the circuit court ruled that it would grant the motion to continue, Gardner stated simply, "I ain't got nothing else to say to 'em."

Gardner's statements, taken in their entirety, represent his frustration with his counsel, not an unequivocal request to waive his right to counsel. Gardner previously had filed three pro se pleadings asking the circuit court, among other things, to appoint him new counsel. He never mentioned self-representation in any of these motions. Gardner made no other statements during any of the pretrial hearings or at trial indicating that he wanted to represent himself. "We have repeatedly held that a request to proceed pro se is not unequivocal if it is an attempt on the part of the defendant to have another attorney appointed." *Dennis v. State*, 2016 Ark. 395, 10–11, 503 S.W.3d 761, 768. Because Gardner's request was not unequivocal, the circuit court did not err in denying his right to waive counsel.

B. Non-Model "Mercy" Jury Instruction

Gardner next argues that the circuit court erred in refusing to give his non-model jury instruction informing the jury that it had the option to extend mercy in assessing his punishment for capital murder. Gardner's proffered instruction informed the jury that it "may show mercy simply by finding that the aggravating circumstances do not justify imposition of the death sentence." Instead, the circuit court instructed the jury with AMI Crim. 2d 1008, which states that in order to return a death sentence, it must find "[t]hat the aggravating circumstances justify beyond a reasonable doubt the sentence of death."

"Non-model instructions are to be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction

on the subject." *Perry v. State*, 2014 Ark. 535, at 6–7, 453 S.W.3d 650, 654. The circuit court does not have to give a proffered instruction simply because it contains a correct statement of the law. *Id.* We will not reverse the circuit court's decision on whether to submit a jury instruction absent an abuse of discretion. *Id.*

Here, the circuit court was not required to give the proffered "mercy" instruction because the model jury instruction accurately states the law. Although AMI Crim. 2d 1008 does not contain the word "mercy," it permits the jury to conclude that the aggravating circumstances do not justify beyond a reasonable doubt a death sentence. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996). 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. Therefore, we affirm the circuit court's refusal to give Gardner's proffered jury instruction.

C. Aggravating Circumstances

Third, Gardner argues that in the penalty phase of trial, substantial evidence did not support the circuit court's submission of two aggravating circumstances to the jury. The circuit court instructed, and the jury concluded, that Gardner had committed capital murder for pecuniary gain and in an especially cruel or depraved manner.

We review the circuit court's decision to submit an aggravating circumstance for substantial evidence. *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238. Evidence is substantial if it is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture. *Reid v. State*, 2019 Ark. 363, 588 S.W.3d 725. We view the evidence in the light most favorable to the State. *Id.*

Gardner first argues that the State did not offer substantial evidence that he murdered Heather for pecuniary gain. Although he admitted that he took Heather's property after he murdered her, he claims the State did not offer substantial evidence that his motive at the time of the killing was financial gain.

We have previously held that "proof of theft from the victim can support a finding that a capital murder was committed for pecuniary gain." *Thessing v. State*, 365 Ark. 384, 401, 230 S.W.3d 526, 539 (2006); *see also Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995). In *Thessing*, the defendant took the victim's car, television set, silverware, Bible, and other items of personal property from her home after he killed her. 365 Ark. at 401, 230 S.W.3d at 539. We stated that given "the vast array of items [Thessing] removed from the victim's home," the State presented substantial evidence to the jury that he committed the murder for pecuniary gain. *Id.*

Here, Gardner admitted that he removed $240 and two cell phones from Heather's possessions or belongings after he murdered her. In his taped confession to police, Gardner also admitted that he had planned to go to Hot Springs with a friend before the murder. After the murder, Gardner went to Hot Springs and then to Oklahoma to gamble with two other men. One of the men testified that he purchased one of Heather's phones from Gardner. The State also introduced evidence that Gardner sold an iPad and a watch in the casino parking lot and surveillance video footage showing Gardner gambling in the casino the day he murdered Heather.

Gardner argues that taking the property was merely an afterthought and not the motive for Heather's murder. However, there was evidence that in addition to the cash, he

took personal property and sold it. Although Gardner told police and Jewel McGinty that he committed the murder because the couple had been arguing and he was tired of her complaining, the jury was not required to believe him and was free to draw its own conclusions after considering all the evidence presented at trial. *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998). Therefore, we conclude that substantial evidence supported the circuit court's giving the jury instruction on murder for pecuniary gain.

Second, Gardner argues that the circuit court should not have instructed the jury on the aggravating circumstance of "especially cruel or depraved murder" and that substantial evidence did not support the jury's finding. On the aggravating circumstance of cruelty, the jury was instructed as follows:

> A capital murder is committed in an especially cruel manner when, as a 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 ultimate fate.

No particular length of time is required for a victim to face uncertainty as to her ultimate fate. *See Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). In *Anderson*, the defendant's initial shot did not kill the victim, and the defendant heard him moaning before shooting him again in the back of the head. *Id.* The State presented evidence that the victim would have lived several minutes after the first shot even though it was fatal. *Id.* And although several seconds passed between the first and second shot, during that time the victim was uncertain as to his ultimate fate, and therefore, suffered mental anguish. *Id.*

Similarly, here, the State admitted evidence that Gardner and Heather struggled before he killed her. Gardner admitted that Heather was trying to get out of the room when he shoved her onto the bed and began choking her. When Heather continued fighting him,

Gardner grabbed the curling iron and wrapped the cord around her neck. According to the medical examiner, once Gardner started choking Heather with the cord, she would have had ten to fifteen seconds of consciousness and would have flailed in an effort to get away as her air supply was being restricted. Heather's murder was not instantaneous. She certainly would have been uncertain as to her own fate as she began losing consciousness. Physical evidence suggested she struggled for a period of time. We therefore agree that the State presented substantial evidence that Heather suffered mental anguish as Gardner murdered her.

Gardner also argues that the circuit court erroneously instructed the jury on depraved-circumstance murder. This instruction stated, "A capital murder is committed in an especially depraved manner when the defendant relishes the murder or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder." At trial, the argument surrounding the cruel-and-depraved-murder aggravating circumstance focused on whether there was substantial evidence of mental anguish. Gardner's trial counsel did not raise the particular argument of lack of substantial evidence of the depraved manner. On appeal, he argues that while the argument was unpreserved, the fourth *Wicks* exception should apply because the error affected his substantial rights. *Wicks v. State*, 270 Ark. 781, 787, 606 S.W.2d 366, 370 (1980). But as we have previously noted, the fourth *Wicks* exception, which is based on Ark. R. Evid. 103(d), "at most applies only to a ruling which admits or excludes evidence," which is not the issue here. *Buckley v. State*, 349 Ark. 53, 66, 76 S.W.3d 825, 833 (2002). Therefore, we do not consider on appeal whether this depraved-manner instruction should have been given

because the issue is not preserved for our review. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001).

D. Rule 10 and Rule 4-3(i)

Finally, when a sentence of death is imposed, we conduct an additional review of the record under Rule 10 of the Arkansas Rules of Appellate Procedure-Criminal, and Rule 4-3(i) of the rules of the Arkansas Supreme Court. Pursuant to Rule 10 and Rule 4-3(i), the record has been examined and no reversible error exists.

Therefore, we affirm the Gardner's capital-murder conviction and sentence.

Affirmed.

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

MAY 28, 2020

RE: SUPREME COURT CASE NO. CR-19-257
SCOTTY RAY GARDNER V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE ABOVE STYLED CASE:

"APPELLANT'S PETITION FOR REHEARING IS DENIED. APPELLANT'S MOTION FOR STAY OF MANDATE IN ORDER TO PETITION FOR WRIT OF CERTIORARI IS DENIED. HUDSON, HART, AND WYNNE, JJ., WOULD GRANT."

SINCERELY,

STACEY PECTOL, CLERK

CC: TERI L. CHAMBERS
CHRISTOPHER R. WARTHEN AND JOSEPH KARL LUEBKE, ASSISTANT ATTORNEYS GENERAL
FAULKNER COUNTY CIRCUIT COURT
(CASE NO. 23CR-16-194)

IN THE ARKANSAS SUPREME COURT

SCOTTY RAY GARDNER **APPELLANT**

VS. **NO. CR-19-257**

STATE OF ARKANSAS **APPELLEE**

PETITION FOR REHEARING
AND BRIEF IN SUPPORT

The appellant, Scotty Ray Gardner, by and through his attorney, Teri L. Chambers, for his Petition for Rehearing pursuant to Rule 2-3 of the Rules of the Supreme Court, states that:

1. A Faulkner County jury convicted Mr. Gardner of capital murder and sentenced him to death. On April 16, 2020, this Court affirmed the conviction and sentence. *Gardner v. State*, 2020 Ark. 147, 2020 WL 1887776.

2. This Court's opinion contains errors of law and fails to address two issues raised, briefed and argued by Gardner. For these reasons, Gardner respectfully requests that this court grant a rehearing to correct the errors of law and to address issues briefed and argued by Gardner but not decided by this Court.

3. The Court's opinion fails to address, rule upon or even acknowledge two issues which were briefed and argued by Gardner.

A. The first instance pertains to Gardner's 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, *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." *Brief of Appellant* at Argument 1. 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 this Court's opinion makes no mention whatsoever of that duty which was imposed upon trial courts by the United States Supreme Court in *Faretta* forty-five years ago.

B. The second instance pertains to Gardner's argument regarding insufficiency of the evidence of the "especially cruel" aggravating circumstance. Gardner 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 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. If the jury's finding that the murder was committed in an especially cruel or depraved manner was based upon this section, that finding must be eliminated." *Brief of Appellant* at Argument 22-23. The lack of proof on the element of intent was also discussed in Gardner's reply. *Reply Brief of Appellant* at Argument 12-13. Despite this specific argument, the Court's opinion does not address or even mention the element of intent, but affirms based only on "substantial evidence that Heather suffered mental anguish as Gardner murdered her." 2020 Ark. 147, 8, 2020 WL 1887776, 4.

4. 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 (1971). The fundamental right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821 (1976), is grounded in "both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,"[1]

[1]Gardner does not contend that the Court's failure or refusal to rule upon his arguments stems from unequal treatment as a result of his indigency. Accordingly, the equal protection concern is not invoked.

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 (2004)(The right of access to the courts is protected by the Due Process Clause of the Fourteenth Amendment).

5. Although the federal constitution does not require States to provide a right to appeal, *Griffen v. Illinois,* 351 U.S. 12, 18 (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. Due process guaranteed by Art. 2 §§ 3 and 8 of the Constitution of Arkansas demands the same. 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 (Frankfurther, J., concurring).

6. 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); Rule 1(a) of the Rules of Appellate Procedure – Criminal; *State v. Pruitt,* 347 Ark. 355, 359, 64 S.W.3d 255, 258 (2002). When that right is exercised, Arkansas Code Annotated § 16-91-113 and Rule 14 of the Rules of Appellate Procedure – Criminal require the

Arkansas Supreme Court to "review those matters briefed and argued by the appellant. . . ."

7. This Court denies fundamental due process to Gardner by failing to rule upon each of his specific arguments. The Court denies due process first by failing to comply with these 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 is denied by the Court's inaction in this regard, 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.

8. Because this Court must, pursuant to its statutory and constitutional obligations, decide all matters briefed and argued by an appellant, Gardner respectfully requests a rehearing be granted and the matters described in paragraph 3 be reviewed and ruled upon in a written opinion. If this petition and this relief is granted, Gardner will be entitled to reversal of his convictions and sentences.

9. Two additional errors of law pertain to the first issue regarding self-

representation.

A. The opinion imposes a requirement of repeated requests for self-representation before a request can be found unequivocal. Specifically, the opinion notes that Gardner did not mention self-representation in correspondence to the trial court, and states, "Gardner made no other statements during any of the pretrial hearings or at trial indicating that he wanted to represent himself." 2020 Ark. 147, 4, 2020 WL 1887776, 2. Although this Court has the authority to impose such a requirement when analyzing the right to self-representation under the Constitution of the State of Arkansas, it may not impose such restrictions with regard to the United States Constitution if the United States Supreme Court has not done so. *See Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219. The United States Supreme Court did not require numerous requests in *Faretta,* nor has it imposed such a restriction in subsequent cases. The imposition of this restriction by this Court is error.

B. This Court's opinion that expressions of frustration with attorneys equates to equivocation, 2020 Ark. 147, 4, 2020 WL 1887776, 2, is in direct conflict with its decision in *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005). In *Pierce*, where the defendant "informed the trial

court that he was unhappy with his representation, and requested to appear *pro se*," and where, upon inquiry by the trial court, he affirmed his desire to self-represent and that he believed himself to be competent to do so, this Court stated that the trial court "was on notice that appellant wished to appear pro se," and held that the request to waive the right to counsel was unequivocal. *Id.* at 504, 209 S.W.3d at 371. The only difference here is that the trial court did not afford Gardner, by inquiry, the opportunity to affirm his request to waive counsel and to express his belief in his competence to represent himself. This Court's opinion in the case at bar is irreconcilable with its decision in *Pierce*. As such, it either errs on the law or it changes the law. Either way, the Court should rehear the matter and issue a clarifying opinion.

10. The finding of substantial evidence to support the "especially cruel" aggravating circumstance without requiring substantial evidence of all elements of that aggravating circumstance constitutes an error of law. Specifically, the Court found substantial evidence of the actual infliction of mental anguish, 2020 Ark. 147, 8, 2020 WL 1887776, 4, but did not find substantial evidence of the intent to inflict mental anguish. The opinion fails to even mention the element of intent in its analysis. The federal "Due Process Clause protects the accused against conviction

except upon 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) (emphasis added). *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)).

Because a jury's verdict of guilt of the charge of capital murder results in a life sentence unless additional aggravating circumstances are proven beyond a reasonable doubt, due process demands that all elements of alleged aggravating circumstances be proven beyond a reasonable doubt. Further, as the opinion fails to address the intent element of the aggravating circumstance, the Court has failed to fulfill its mandatory review of "whether the evidence supports the jury's finding of a statutory

aggravating circumstance . . . ." Rule 10(b)(vi) of the Rules of Appellate Procedure – Criminal. Its failure to do so results in a violation of due process under the dictates of *Winship, Jones, Apprendi* and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002), as well as *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980).

WHEREFORE, Appellant, Scotty Ray Gardner, respectfully requests that a rehearing be granted, that the matters described in paragraph 3 be reviewed and ruled upon in a written opinion, that it correct the errors of law contained within the opinion, and that the conviction and sentence be reversed.

Respectfully submitted,

/s/ Teri L. Chambers
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Attorney for Appellant
Scotty Ray Gardner

INSTRUCTION NO. _____

AMCI 2d 9001-INTRO

STAGE TWO:
ADDITIONAL EVIDENCE RESPECTING SENTENCING

You have found Scotty Ray Gardner guilty. The law provides that after a jury returns a verdict of guilty, but before it sentences, the State and the Defendant may present additional evidence to be considered by the jury in its deliberations on sentencing. In your deliberations on the sentence to be imposed, you may consider both the evidence presented in the first stage of this trial where you rendered a verdict of guilty, and the evidence to be presented in this part of the trial. You will now hear evidence that you may consider in arriving at an appropriate sentence.

INSTRUCTION NO. ___

AMCI 2d 1008

CAPITAL MURDER – BIFURCATED TRIAL – PUNISHMENT

Members of the Jury, you have found Scotty Ray Gardner, guilty of Capital Murder. After hearing arguments of counsel, you will again retire to deliberate and decide whether he is to be sentenced to death by lethal injection or to life imprisonment without parole.

In determining which sentence shall be imposed, you are required to make specific written findings as to the existence or absence of aggravating and mitigating circumstances. Appropriate forms will be provided for you, and I will now instruct you on the procedures that you must follow.

There are three forms for you to use in reaching your decision, and a verdict form for you to use when your verdict has been reached.

Form 1, which will be handed to you later, deals with aggravating circumstances. The appearance of any particular aggravating circumstances on the form does not mean that it actually existed in this case. These are specified by law and are the only aggravating circumstances that you may consider. The State has the burden of proving beyond a reasonable doubt one or more of the listed aggravating circumstances. If you find unanimously and beyond a reasonable doubt that the State has proved one or more of these aggravating circumstances, then you will indicate your findings by checking the appropriate space on Form 1. If you do not unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, then you will cease deliberations and indicate on the verdict form a sentence of life imprisonment without parole.

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some factors that you may consider as mitigating circumstances.

However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably exists.

With respect to each mitigating circumstance listed on Form 2 you should indicate by placing a check mark in the appropriate space the number of jurors who believe that the circumstance probably exists. By checking the first space under a circumstance, you indicate that all members of the jury find that the circumstance probably exists. By checking the second space under a circumstance, you indicate that at least one, but not all members of the jury find that the circumstance probably exists. By checking the third space under a circumstance, you indicate that no member of the jury finds that the circumstance probably exists.

You may use the blank lines under "Other mitigating circumstances" to list any other mitigating circumstances that all or at least one juror finds probably exists.

After making the determinations required to complete Form 1 and Form 2, if applicable, you will then complete Form 3.

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 exists; 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.

After you have made your determinations on Forms 1 and 2 and have reflected your conclusions on Form 3, then you must check the appropriate verdict on Form 4. Each of you must sign the verdict form.

You may now retire to consider your decision.

INSTRUCTION NO. ___

Form 1

AGGRAVATING CIRCUMSTANCES

We, the Jury, after careful deliberation, have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstances:

(✓) Scotty Ray Gardner previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

(✓) The capital murder was committed for pecuniary gain.

(✓) The capital murder was committed in an especially cruel or depraved manner.

A capital murder is committed in an especially cruel manner when, as a 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 ultimate fate.

A capital murder is committed in an especially depraved manner when the defendant relishes the murder or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.

Kenneth C. Williams

Foreperson

Kenneth C. Williams

INSTRUCTION NO. ___

Form 2

MITIGATING CIRCUMSTANCES

For each of the following mitigating circumstances, you should place a checkmark in the appropriate space to indicate the numbers or jurors who find that the mitigating circumstance probably exists.

____ Other mitigating circumstances. Specify below in writing any other mitigating circumstances that all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

____ Other mitigating circumstances. Specify below in writing any other mitigating circumstances that at least one but not all members of the jury find probably exists. If no member of the jury finds that other mitigating circumstances probably exist, leave the space below blank.

_____

_____

_____

Kenneth C. [illegible]

Foreperson

INSTRUCTION NO. ___

Form 3

CONCLUSIONS

The Jury, having reached its final conclusion, will so indicate by having its Foreperson place a check mark in the appropriate space ( ) in accordance with the Jury's findings. In order to check any space, your conclusions must be unanimous. The Foreperson of the Jury will then sign at the end of this form.

WE THE JURY CONCLUDE:

(a) (✓) **The State has proved beyond a reasonable doubt one or more aggravating circumstances.**
(If you do not unanimously agree to check paragraph (a), then skip (b) and (c) and sentence Scotty Ray Gardner to life imprisonment without parole on Form 4.)

(b) (✓) **The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by any juror to exist.**
(If you do not unanimously agree to check paragraph (b), then skip (c) and sentence Scotty Ray Gardner to life imprisonment without parole on Form 4.)

(c) (✓) **The aggravating circumstances justify beyond a reasonable doubt a sentence of death.**
(If you do not unanimously agree to check paragraph (c), then sentence Scotty Ray Gardner to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b), and (c), then sentence Scotty Ray Gardner to death on Form 4.

Otherwise, sentence Scotty Ray Gardner to life imprisonment without parole on Form 4.

Kenneth C. [illegible]

Foreperson

INSTRUCTION NO. ___

Form 4

VERDICT

We, the Jury, after careful deliberation, have determined that Scotty Ray Gardner shall be sentenced to:

A. ( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B. (✓) DEATH.

(If you return a verdict of death, each juror must sign this verdict.)

Foreperson

AMCI 2d 1008 - Modified
CAPITAL MURDER -- BIFURCATED TRIAL -- PUNISHMENT

Members of the Jury, you have found Scotty Gardner guilty of capital murder. After hearing arguments of counsel, you will again retire to deliberate and decide whether he is to be sentenced to death by lethal injection or to life imprisonment without parole.

In determining which sentence shall be imposed, you are required to make specific written findings as to the existence or absence of aggravating and mitigating circumstances. Appropriate forms will be provided for you, and I will now instruct you on the procedures that you must follow.

There are three forms for you to use in reaching your decision, and a verdict form for you to use when your verdict has been reached.

Form 1, which will be handed to you later, deals with aggravating circumstances. The appearance of any particular aggravating circumstance on the form does not mean that it actually existed in this case. These are specified by law and are the only aggravating circumstances that you may consider. The State has the burden of proving beyond a reasonable doubt one or more of the listed aggravating circumstances. If you find unanimously and beyond a reasonable doubt that the State has proved one or more of these aggravating circumstances, then you will indicate your findings by checking the appropriate space on Form 1. If you do not unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, then you will cease deliberations and indicate on the verdict form a sentence of life imprisonment without parole.

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some

factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably exists.

With respect to each mitigating circumstance listed on Form 2 you should indicate by placing a check mark in the appropriate space the number of jurors who believe that the circumstance probably exists. By checking the first space under a circumstance, you indicate that all members of the jury find that the circumstance probably exists. By checking the second space under a circumstance, you indicate that at least one, but not all members of the jury find that the circumstance probably exists. By checking the third space under a circumstance, you indicate that no member of the jury finds that the circumstance probably exists.

You may use the blank lines under "Other mitigating circumstances" to list any other mitigating circumstances that all or at least one juror finds probably exists.

After making the determinations required to complete Form 1 and Form 2, if applicable, you will then complete Form 3.

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 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.

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

After you have made your determinations on Forms 1 and 2 and have reflected your conclusions on Form 3, then you must check the appropriate verdict on Form 4. Each of you must sign the verdict form.

You may now retire to consider your decision.