No. 20-5517

In the Supreme Court of the United States

SCOTTY RAY GARDNER,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari To the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Scotty Ray Gardner strangled his girlfriend, Heather Stubbs, with the cord of her curling iron, left her dead on the floor of their motel room, and then went gambling. Gardner confessed as much in a recording played at trial, and he has never retracted his confession to murdering Heather. The jury unanimously convicted Gardner of capital murder. At sentencing, the jury heard that, about 25 years earlier, Gardner had also attempted to murder his first wife. He shot her seven times while she was six months pregnant with his son. The jury found three aggravating circumstances and no mitigating circumstances, and sentenced Gardner to death. The questions presented are:

(1) Did the trial evidence permit the jury to find that Gardner murdered Heather in an especially cruel manner, one of the three aggravating circumstances it found?

(2) As a matter of state law, was Gardner entitled to a nonmodel jury instruction?

(3) When a state court rejects an issue raised by a party for one sufficient reason, does the Due Process Clause require the state court to address alternative reasons for its holding, simply because they were raised in a party's brief?

LIST OF RELATED PROCEEDINGS

Gardner v. State, No. CR-19-257 (Ark.) (judgment entered Apr. 16, 2020).

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INTRODUCTION

Scotty Ray Gardner does not deny—indeed, he has repeatedly confessed—that he strangled his girlfriend, Heather Stubbs, with the cord of her curling iron in a motel room in Conway, Arkansas. Gardner then took her cash and two cell phones, and went gambling in Oklahoma, where he sold one phone in a casino parking lot. And this was not Gardner's first violent outburst. He spent much of his adult life in prison for attempting to murder his first wife, whom he shot seven times while she was six months pregnant with his child, with her 12-year-old son standing nearby. After convicting Gardner of capital murder, an Arkansas jury found three aggravating circumstances: that he murdered Heather in an especially cruel and depraved manner; that he murdered her for pecuniary gain; and that he had previously committed another violent felony. Finding no mitigating circumstances, the jury unanimously sentenced Gardner to death.

Since that death sentence, Gardner has continued confessing to Heather's murder, including in a recent letter to the Arkansas Supreme Court Justice who authored the decision below. In that letter, which was filed on the docket below, Gardner took issue with the pecuniary-gain aggravating circumstance but nevertheless admitted his guilt. *See* Supp. App. 3 ("I killed her because she lied on me when she fi[l]ed that No-Contact order." (emphasis removed)). He also asked the Arkansas Supreme Court to expedite execution of his death sentence. *See id.* ("Please order my sentence of death be fulfilled without any delays or appeals.").

Faced with the overwhelming evidence of Gardner's guilt, the petition does not dispute it. Instead, it manufactures three due-process questions that all reduce to

essentially the same claim: by allegedly failing to follow state law, the decision below violated the Due Process Clause. But the petition nowhere claims that the Arkansas Supreme Court's application of Arkansas law creates a conflict with any other court's precedent. Worse, the petition admits that this Court has never addressed two of the three questions presented. The decision below cannot conflict with nonexistent precedent of this Court. For the reasons that follow, even assuming this Court has jurisdiction to consider the essentially state-law claims in the petition, it should not exercise its discretion to grant the petition.

STATEMENT

1. At the time Gardner strangled Heather, the two were in a romantic relationship. R. 1317.[1] Gardner had left his second wife for Heather, R. 1444, 1514, and they were living at a Days Inn in Conway, Arkansas, R. 1317. Heather had a daughter, then living with Heather's parents, and two younger sons, who usually stayed with the couple at the motel. R. 1316-17.

Gardner and Heather's relationship was troubled. Heather had, a few months earlier, obtained a temporary restraining order against Gardner because of an incident during which he "put his hands on her and threw her around and was threatening her with all sorts of things." R. 1333-34. During the incident, he "held her down on the bed." R. 1525. In response, Heather "blew up and took off and went up [t]here to the Prosecutor's Office and filed charges on [Gardner] for throwing [her] [o]n the

[1] The citation designation "R." refers to the record filed with the court below on March 19, 2019. A supplemental record was later filed on August 1, 2019, but its contents are not relevant to Gardner's current claims.

bed." *Id.* After this incident, Gardner found his anger even more difficult to control. *See* R. 1534 ("I'd get madder and madder cause I can't—I can't just grab her no more and throw her on the bed or she's going to go get a charge on you, and so I just ran—I was scared to even get mad at her.").

The morning before Heather's murder, Gardner, Heather, and her children went to church together. R. 1319-20, 1364. After church, the children parted ways with Gardner and Heather. R. 1319-20, 1365. At some point during the afternoon, Gardner and Heather returned to the Days Inn and began to argue. Pet. App. 1; *see* R. 1536. As Gardner later told the police, he became angry when Heather "wouldn't shut up." R. 1539; *see* R. 1507-83 (full transcript of Gardner's confession); *see also* R. 1453-65 (transcript of Gardner's recorded phone call to his second wife, during which he describes Heather's murder in substantially similar detail). The argument escalated, and Heather tried to leave the motel room. R. 1539. She "kind of pushed" Gardner. R. 1531. Then Gardner "just . . . snapped on her." *Id.*; *see* R. 1538. He threw her onto the bed. Pet. App. 1. She tried to kick and scratch him. R. 1552; *cf.* R. 1631 (describing pictures taken of Gardner shortly after his arrest, which did not appear to show any injuries caused by Heather).

At this point, Gardner succumbed to his anger against Heather for taking out a restraining order against him. He had already told at least three people that it was "just a matter of time" before he "was going to kill her" as a result of that order. R. 1462; *see* R. 1455 ("I told you I was going to do that when she called the police on me that time. I told you just give me time."). Once their argument became physical,

Gardner later said, "I didn't know what the h*** to do but *I knew she wasn't going to tell this Prosecutor nothing*." R. 1531 (emphasis added); *see* R. 1534 ("[T]he only thing I know is I wasn't going to let her go tell the police nothing."). He became "afraid she was going to tell on [him] anyway," R. 1579, and he "said, 'Man, screw it,'" R. 1463. Gardner "grabbed her by the throat and was trying to . . . choke her out or something." R. 1539. "And then she started screaming." *Id.* Gardner thought this was "go[ing] overboard." *Id.* "So [he] grabbed that d*** cord and wrapped it round her neck." *Id.* Gardner pulled the cord so tightly round Heather's neck that the cord snapped. R. 1353-54.

Gardner quickly realized that he "might have killed her," R. 1540, though he would later claim to the police that he "was trying to knock her out . . . . so she'd shut up," R. 1539; *see* R. 1552 ("You know, I'm trying to knock her out."). In any event, rather than seeking help for Heather, Gardner "took $240 from her and all the phones and left." R. 1541.

Later that evening, with two other men, Gardner drove to Oklahoma to gamble. Pet. App. 2. Gardner sold one of Heather's phones to one of those men, who said Gardner "seemed like he wanted to win some money." R. 1431; *see* R. 1426, 1546, 1549. Gardner also sold an iPad and a watch in a casino parking lot. R. 1426. The three men went to two different casinos, where they gambled until early the next morning, when they returned to Arkansas. *See* R. 1391-92, 1399, 1400-01, 1404-06, 1425.

2. The police immediately suspected Gardner. R. 1475-76. Cell-phone location information showed them Gardner had left town. R. 1585. So the police coordinated with the U.S. Marshals Service to find Gardner. *Id.* The Marshals Service arrested Gardner on March 7, 2016, the day after he murdered Heather. *See* R. 1585, 1587.

Gardner's confessions began shortly after his arrest. The next day, Gardner requested to speak with a Conway detective. During his interview with the detective, Gardner repeatedly confessed to strangling Heather. *See, e.g.*, R. 1529, 1543, 1555, 1570. And he described the crime in considerable detail. *See* R. 1507-83. Around this same time, Gardner twice confessed to his second wife, from whom he had divorced shortly before Heather's murder. *See* R. 1451-65 (transcript of a phone call between them); R. 1437-39 (letter Gardner wrote her). In a letter, Gardner showed little remorse: "I was gonna shoot her but I made her pawn that gun. . . . She got what she deserved. I wasn't going to let her call the police." R. 1438.

3. At trial, the jury heard each of Gardner's confessions. It also heard Victoria, Heather's daughter, lay out the timeline of the day Gardner murdered Heather. The other guilt-phase witness most relevant for present purposes was Dr. Charles Kokes, the Chief Medical Examiner at the Arkansas State Crime Lab. *See* R. 1642-1727.

Dr. Kokes explained to the jury, step-by-step, how Gardner strangled Heather, how he wrapped the curling-iron cord twice around Heather's neck—how, although Gardner did not tie the cord, he pulled it with such force that "it was still tightly applied to [Heather's] neck" at the time of the autopsy. R. 1659. Heather would have remained conscious for at least 10 to 15 seconds while Gardner pulled on the curling-

iron cord. R. 1653. During this interval, Heather would have experienced "air hunger"—"a very primitive response that people have to that feeling of pressure on the neck." R. 1655; *cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1139 (2019) (Breyer, J., dissenting) (discussing expert testimony about "air hunger"). Air hunger would have caused Heather to suffer "an immediate sense of panic and fear." R. 1655. Also during her last moments of consciousness, Heather struggled against Gardner enough that the curling-iron cord, which "is not particularly abrasive," was able to "abrade the skin." R. 1690-91. Gardner would have seen Heather "f[l]ailing and struggling about up until when consciousness is lost and then [she went] limp." R. 1724-25. Dr. Kokes also explained that, even once Heather had lost consciousness—once she had gone limp—Gardner would have needed to apply "at least two to four minutes of sustained pressure" to Heather's neck "to cause irreparable brain damage and death." R. 1651; *see* R. 1654.

After Dr. Kokes's testimony, the jury heard closing argument and retired to reach a guilt-phase verdict. The jury deliberated for 19 minutes before finding Gardner guilty of capital murder. R. 1778-79.

During the penalty phase, the jury first heard from Heather's father, and heard additional testimony from Victoria, Heather's daughter. *See* R. 1801-13. The last witness the jury heard was Sue Orendorff, to whom Gardner was married decades ago. *See* R. 1815-25.

In the fall of 1990, at their home in Stuttgart, Arkansas, Gardner attacked Sue and a friend of hers, nearly killing Sue. *See* R. 1815-25. The day of the attack, Gardner, Sue (six months pregnant with Gardner's son), and one of Sue's two sons (12 years old at the time) "went out in the country" with Sue's friend and the friend's boyfriend. R. 1817-18. The group "went riding" and drinking, eventually stopping to listen to music and to dance. R. 1817-18. At some point, Sue asked Gardner to take her home but "had this feeling [that] something was not right." R. 1818. So Sue asked her friend to stay the night. *Id.*

At home, Gardner unexpectedly attacked Sue. She climbed out of their truck, and he came around, "spit a wad of spit in [her] face," and said, "This is for your Jesus." *Id.* Then Gardner punched Sue in the mouth. *Id.* She saw that Gardner ran to the back of the truck, reached in, "and pulled out—it was a rifle." R. 1819. Sue first thought Gardner would kill himself. *Id.* But then Gardner pressed his rifle into Sue's stomach, though she was six months pregnant with his son. *Id.* They struggled. She managed to "grab[] the barrel of the gun and [to] push[] it up." *Id.* This kept Gardner at bay long enough for Sue to run to a truck where her friend had opened the door for her. *Id.* Gardner did not relent. Sue described the scene to the jury: Her friend "opened the door for me and I got up in the truck and I just remember my body going back and forth, back and forth. I didn't have no idea he was shooting me in the back." *Id.* And while Gardner was shooting Sue, she "looked over and there stood [her] son on the outside of the car looking." *Id.* Sue screamed for him to "jump

on the side of truck" and reached for him, *id.*, but when she looked at her hand, all she could see "was blood and guts," R. 1820. Sue "couldn't reach [her] son." *Id.*

With Sue in the truck, her friend tried and failed to start it. *Id.* By this time, the friend's boyfriend had reached the two women and was able to start the truck. *Id.* Sue's friend "shoved [Sue] in the floorboard of the truck," while Sue begged Gardner to stop shooting. *Id.* "But he didn't stop." *Id.* "He kept on and glass was everywhere; in [Sue's] hair, in [her] hands." *Id.* As the truck dove away, Sue could see her "son's face standing there . . . . left alone with him." *Id.* The other couple drove Sue to the hospital. R. 1821.

For nearly killing Sue Orendorff and her friend, Gardner was convicted of first-degree attempted murder and first-degree battery. R. 1825-26; *see Gardner v. State*, 963 S.W.2d 590, 591, 593 (Ark. 1998). Gardner had shot both women multiple times. He shot Sue's friend three times. R. 1821. And he shot Sue seven times. R. 1822. Sue's doctors were unable to remove some of the bullets, one of which remained lodged in her hand, another in her spine. *Id.* Early on, it was feared this last bullet would keep Sue from walking ever again. R. 1821-22. But at Gardner's trial for murdering Heather, Sue walked across the courtroom to show the jury the bullet remaining in her hand. R. 1823. Sue was the last witness the jury heard.

After deliberating for 65 minutes, the jury unanimously sentenced Gardner to death for strangling Heather Stubbs. R. 1873-76; *see* Pet. App. 27. The jury unanimously found that the State had proved three aggravating circumstances beyond a reasonable doubt: (1) "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"; (2) "[t]he capital murder was committed for pecuniary gain"; and, (3) "[t]he capital murder was committed in an especially cruel or depraved manner." Pet. App. 24. The jury found no mitigating circumstances. Pet. App. 25. Finally, the jury found that the aggravating circumstances justified beyond a reasonable doubt a sentence of death. Pet. App. 26.

4. As required by Arkansas law, Gardner's death sentence for strangling Heather was automatically appealed to the Arkansas Supreme Court. *See* Ark. R. App. P.—Crim. 10(a).

a. Gardner made three arguments for reversal: (1) that the trial court "denied him the right to self-representation"; (2) that it should have "offer[ed] a non-model 'mercy' jury instruction"; and (3) that it should not have instructed the jury about two of the State's three aggravating circumstances. Pet. App. 1. The Arkansas Supreme Court considered and rejected each of these arguments, and it affirmed Gardner's conviction and sentence. *See id.*

First, it held that Gardner had not in fact ever waived his right to counsel and expressed a desire to represent himself. Pet. App. 2-4. The only time he even alluded to such a desire was during a hearing about whether the trial court would grant his attorneys' request for a continuance. *See* Pet. App. 3-4. Gardner told the court he was frustrated with how long the process was taking and said, "I don't want them on my case. . . . Your Honor, I'd ask to represent myself or get some other attorney."

R. 567. As the decision below noted, this statement viewed in context clearly "represent[s] his frustration with his counsel, not an unequivocal request to waive his right to counsel." Pet. App. 4. Because Gardner never invoked his right to self-representation, the trial court could not have denied it to him.

Second, the Arkansas Supreme Court rejected Gardner's argument that the trial court should have "give[n] his non-model jury instruction informing the jury that it had the option to extend mercy." Pet. App. 4. The model instruction used by the trial court in this case "permit[ted] the jury to conclude that the aggravating circumstances do not justify beyond a reasonable doubt a death sentence." Pet. App. 5. In other words, said the Arkansas Supreme Court, although the model instruction "d[id] not contain the word 'mercy,'" it "properly inform[ed] the jury of the gravity of its decision and that it ha[d] the discretion to weigh the factors and determine whether to impose the death penalty." *Id.* And under Arkansas law, the trial court could not give a nonmodel instruction unless it found "that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject." Pet. App. 4-5 (quoting *Perry v. State*, 453 S.W.3d 650, 654 (Ark. 2014)). Because the model instructions accurately stated Arkansas law, and contained all the necessary instructions, the Arkansas Supreme Court saw no error in the trial court's refusal to use a nonmodel jury instruction. Pet. App. 5.

Third, Gardner challenged the sufficiency of the evidence regarding two of the three aggravating circumstances found by the jury. *See* Pet. App. 5-8. Gardner did not challenge the jury's finding that he had "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); *see* Pet. App. 5. Given the incontrovertible facts of Gardner's attempted murder of Sue Orendorff—in addition to her graphic testimony, the jury received a certified copy of Gardner's conviction, *see* R. 1825-26—any challenge to that finding would have been futile.

Gardner thus contended only that there was not substantial evidence for the jury's finding that he had murdered Heather for pecuniary gain, nor for its finding that, by strangling Heather, he killed her "in an especially cruel or depraved manner." Pet. App. 5; *see* Ark. Code Ann. 5-4-604(6), (8). Regarding pecuniary gain, the Arkansas Supreme Court noted that "Gardner admitted that he removed $240 and two cell phones from Heather's possessions or belongings after he murdered her." Pet. App. 6. He then went "to Oklahoma to gamble with two other men," where he sold one of Heather's phones and other items, which sufficed to support the pecuniary-gain finding. Pet. App. 6-7.

The court also found substantial evidence in the record to support the jury's especially-cruel-or-depraved-murder aggravating circumstance. *See* Pet. App. 7-8. The trial court instructed the jury consistently with Arkansas law, which contains a detailed statutory definition of this aggravating circumstance. *Compare* Pet. App. 24, *with* Ark. Code Ann. 5-4-604(8)(B)-(C). To find an "especially cruel manner," the trial court told the jury it needed to find that "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." Pet. App. 24; *see* Ark. Code Ann. 5-4-604(8)(B)(i). And it defined "mental anguish" for the jury "as the victim's uncertainty as to his ultimate fate." Pet. App. 24; *see* Ark. Code Ann. 5-4-604(8)(B)(ii)(a). Under well settled Arkansas law, "[n]o particular length of time is required for a victim to face uncertainty as to her ultimate fate." Pet. App. 7.

As the Arkansas Supreme Court noted, "Gardner admitted that Heather was trying to get out of the room when he shoved her onto the bed and began choking her." *Id.* And expert medical testimony established that even "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." Pet. App. 8. Indeed, the "[p]hysical evidence suggested she struggled for a period of time." *Id.* Based on these facts, the Arkansas Supreme Court held "that the State presented substantial evidence that Heather suffered mental anguish as Gardner murdered her." *Id.*

Gardner separately challenged the trial court's decision to instruct the jury on especially-depraved-manner murder. *See* Pet. App. 8-9; *see also* Ark. Code Ann. 5-4-604(8)(C). But Gardner's trial counsel failed to challenge this instruction in the trial court. Pet. App. 8. So the Arkansas Supreme Court refused to consider this unpreserved issue. Pet. App. 8-9; *cf. Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (refusing to consider an issue raised in the Alabama Supreme Court because nothing "in the record . . . indicate[d] that this issue was raised in the trial court").

b. After the Arkansas Supreme Court affirmed Gardner's conviction, *see* Pet. App. 9, he filed a rehearing petition, *see* Pet. App. 11-19. Gardner primarily argued that the Arkansas Supreme Court denied him due process "by failing to rule upon each of his specific arguments." Pet. App. 15. For instance, he faulted the court below for not considering whether he had "knowingly and intelligently" waived his right to counsel. Pet. App. 12; *see Faretta v. California*, 422 U.S. 806, 835 (1975). As already discussed, however, because the court found no waiver whatsoever, it had no need to consider—indeed, could not possibly consider—the follow-up question whether any waiver was knowing and intelligent. *See* Pet. App. 3-4.

Finally, he argued that the decision below failed to address whether substantial evidence supported the jury's finding that he *intended* to murder Heather in an especially cruel manner. Pet. App. 17-18. But the decision below noted that the jury instruction included the need to find intent. *See* Pet. App. 7 (recounting jury instruction, which included requirement that Gardner "intended to inflict mental anguish upon the victim prior to the victim's death"). And the same evidence that showed Heather in fact suffered mental anguish—including that Gardner shoved her on a bed as she tried to escape from him, choked her with his hands, and then wrapped a curling-iron cord around her neck—supported the jury's necessary finding that Gardner intended these actions. *See* Pet. App. 7-8.

On May 28, 2020, therefore, the Arkansas Supreme Court denied Gardner's petition for rehearing.

c. A little over a week later, on June 8, Gardner sent a letter to the Arkansas Supreme Court, addressed to the author of that court's opinion. *See* Supp. App. 1-3. Yet again Gardner confessed to murdering Heather: "I'm guilty," he wrote. Supp. App. 1. He continued: "The reason I killed that b**** was due to her and her ex putting a restraining order on me. By l[y]ing on me they put a No-Contact order on me. That was all lies." Supp. App. 2 (emphasis removed); *see id.* ("I don't deny I killed her."); Supp. App. 3 ("I killed her because she lied on me when she fi[l]ed that No-Contact order." (emphasis removed)). In this letter, Gardner again asked—not to represent himself—but "for different lawyers." Supp. App. 1. And Gardner said to the Arkansas Supreme Court, "I don't want more appeals." Supp. App. 3; *see id.* ("Please order my sentence of death be fulfilled without any delays or appeals.").

Gardner then timely filed his petition for certiorari.

REASONS FOR DENYING THE PETITION

I. Disguised as a due-process claim, the petition attacks the sufficiency of the evidence supporting the jury's penalty-phase verdict.

Gardner's first question is a poorly disguised attempt to challenge the sufficiency of the evidence supporting one of the aggravating circumstances that led the jury to impose a death sentence. Gardner contends that to sustain the jury's finding that he intended to murder Heather in an especially cruel manner, the Arkansas Supreme Court *itself* had to determine beyond any reasonable doubt that he intended to do so. *See* Pet. 12-13. That contention rests on a fundamental misunderstanding of appellate review, and at its core, simply ignores the fact that the Arkansas Supreme Court's review was limited to determining whether sufficient evidence supported the

jury's finding that he intended to kill Heather in an especially cruel manner. Indeed, at the end of the day, Gardner's petition amounts to little more than an assertion that the Arkansas Supreme Court made a factual error, and that's not a basis for review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

A.i. Before addressing the issues the petition purports to raise, it's worth noting the issues it doesn't raise. Gardner does not challenge the jury's determination that he murdered Heather for pecuniary gain, nor that he had committed a prior violent felony (namely, attempting to murder his first wife). *See* Pet. App. 24. Gardner almost entirely omits any discussion of those other two aggravating circumstances. In fact, the petition does not even acknowledge the testimony of Sue Orendorff, Gardner's ex-wife who recounted how he'd shot her seven times while she carried his unborn son. Neither does it mention that her testimony undoubtedly established that Gardner had "previously committed another felony an element of which was the use or threat of violence to another person." *Id.* Although Gardner does make a brief reference to the pecuniary-gain aggravating circumstance, *see* Pet. 7 (mentioning it but not the prior-violent-felony circumstance), he nowhere challenges the jury's finding on this point. And the petition's incomplete discussion understates the overwhelming evidence of aggravating circumstances the State presented at Gardner's trial.

ii. Compounding this incompleteness, Gardner also does not address the entirety of the sole aggravating circumstance that he does challenge. The jury found

that Gardner had murdered Heather "in an especially cruel or depraved manner." Pet. 11 (quoting Ark. Code Ann. 5-4-604(8)(A)). Under Arkansas law, this aggravating circumstance is disjunctive, requiring evidence only of either cruelty or depravity. *See, e.g.*, Pet. App. 7-8 (discussing cruelty and depravity separately); *Anderson v. State*, 108 S.W.3d 592, 607 (Ark. 2003) (noting that the jury there had been "instructed solely on the statutory aggravating circumstance of cruelty"). The Arkansas Supreme Court held that Gardner had failed to preserve any challenge to the depraved-manner aggravating circumstance. Pet. App. 8; *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) ("declin[ing] to entertain such forfeited arguments"). The petition's discussion of the penalty-phase case against Gardner has significant holes.

B. On the merits, Gardner's due-process claim hinges on his contention that the decision below relaxed the burden of proof for intent to inflict mental anguish on Heather. He implies that the Arkansas Supreme Court should have considered for itself whether it thought beyond a reasonable doubt that he intended to murder Heather in an especially cruel manner. *See* Pet. 11-13. That implication misunderstands the nature appellate review. The decision below did not change the State's burden of proof but simply did what appellate courts always do: It deferred to the jury's factual determinations. Thus, Gardner has no due-process claim. Granting the petition and adopting Gardner's framing of this issue would upset well-established rules for appellate review of factual issues.

i. Consistent with due process, appellate courts routinely defer to the fact-finder's determinations. For example, this Court, on direct review of a state-court judgment, "view[s] 'the evidence in the light most favorable to the prosecution.'" *Tibbs v. Florida*, 457 U.S. 31, 45 n.21 (1982) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Even on issues of constitutional significance, this Court reviews factual findings only for clear error. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion); *id.* at 372 (O'Connor, J., joined by Scalia, J., concurring in the judgment). So in this case, it was for the jury, "not the appellate court," to review the evidence in Gardner's trial and "'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Tibbs*, 457 U.S. at 45 n.21 (quoting *Jackson*, 443 U.S. at 319). This Court would only find a due-process violation on the basis of insufficient evidence in Gardner's case if "it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 317.

The decision below applied the state-law analogue of this deferential appellate standard to the cruel-manner aggravating-circumstance factor. As this Court (or a federal court of appeals) would, the Arkansas Supreme Court considered only whether "substantial evidence" supported the aggravating circumstance—whether the evidence "is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture." *Reid v. State*, 588 S.W.3d 725, 733 (Ark. 2019); *see* Pet. App. 5. The question, therefore, is not whether the Arkansas Supreme Court found "sufficient proof of only one of the two statutory elements." Pet.

13. Rather, the only question is whether a reasonable jury could have determined beyond a reasonable doubt that Gardner intended to inflict mental anguish on Heather when he strangled her. *See Jackson*, 443 U.S. at 317; *Reid*, 588 S.W.3d at 733.

ii. A reasonable jury certainly could have determined that based on the evidence at Gardner's trial. *See* Pet. App. 7-8. Arkansas law acknowledges that "intent must usually be inferred from the circumstances surrounding the killing." *Greene v. State*, 37 S.W.3d 579, 541 (Ark. 2001); *see Willett v. State*, 983 S.W.2d 409, 412 (Ark. 1998) (inferring intent to inflict mental anguish), *unrelated holding abrogated by Dimas-Martinez v. State*, 385 S.W.3d 238, 249-52 (Ark. 2011). To find an "especially cruel manner," the trial court instructed the jury it needed to find that "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." Pet. App. 24; *see* Ark. Code Ann. 5-4-604(8)(B)(i). And it defined "mental anguish" for the jury "as the victim's uncertainty as to his ultimate fate." Pet. App. 24; *see* Ark. Code Ann. 5-4-604(8)(B)(ii)(a). Under well settled Arkansas law, "[n]o particular length of time is required for a victim to face uncertainty as to her ultimate fate." Pet. App. 7.

The decision below summarized the evidence supporting the jury's findings that Gardner inflicted mental anguish on Heather, and that he intended it. "Gardner admitted that Heather was trying to get out of the room when he shoved her onto the bed and began choking her" with his bare hands. Pet. App. 7. When this proved less effective than he desired, he wrapped a curling-iron cord around her neck and pulled

with such force that the cord eventually snapped. Pet. App. 8; R. 1353-54. And expert medical testimony established that even "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." Pet. App. 8. Indeed, the "[p]hysical evidence suggested she struggled for a period of time." *Id.*

In short, the jury heard that Gardner trapped Heather in their motel room as she tried to flee his escalating violence and that he strangled her, continuing to do so even as she struggled against him, trying to breathe. These facts amounted to "substantial evidence from which the jury could infer intent to inflict mental anguish, as well as to murder [Heather]." *Willett*, 983 S.W.2d at 412. The Arkansas Supreme Court correctly held that substantial evidence supported the cruel-manner aggravating circumstance. *See* Pet. App. 5, 7-8.

None of this Court's decisions required the Arkansas Supreme Court to do anything more than that. *See* Pet. 12-13. Together, the decisions cited by Gardner stand only for the proposition that a jury must "find an aggravating circumstance necessary for the imposition of the death penalty" beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *see Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000). And there is no dispute that the jury was instructed to find the cruel-manner aggravating circumstance—including the requirement that he have "intended to inflict mental anguish upon" Heather—only if "the State ha[d] proved [it] beyond a reasonable doubt." Pet. App. 24; *see* Ark. Code Ann. 5-4-604(8)(B)(i). It is also undisputed that the jury unanimously made that finding. Pet. App. 26.

Gardner does not, therefore, present any due-process *question* at all—let alone a potential due-process *violation*. He simply challenges the sufficiency of the evidence supporting the cruel-manner aggravating circumstance. And the Arkansas Supreme Court has already said, as a matter of state law, that sufficient evidence supported that circumstance. Given that, and given this Court's lack of any "supervisory authority over state judicial proceedings," *Smith v. Phillips*, 455 U.S. 209, 221 (1982), the petition's first issue raises no federal question over which this Court might exercise jurisdiction, *see* 28 U.S.C. 1257(a); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Regardless, this Court has long seen neither "reason nor necessity" for considering questions like the first one Gardner purports to raise, "questions of common law, of State statutes, of controverted facts, and conflicting evidence." *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874). The petition does not warrant review.

II. Whether a defendant is entitled, as a matter of state law, to a nonmodel jury instruction does not implicate any of this Court's due-process decisions.

The second question presented, too, is really one of Arkansas law, couched in terms of due process in an attempt to invoke this Court's jurisdiction. Gardner claims that the trial court, as a matter of state law, should have used a nonmodel jury instruction "to instruct the jury of its option to extend mercy." Pet. 17; *see* Pet. 14-17. Then Gardner seeks to convert that state-law question into a federal one by claiming a due-process violation based on the trial court's supposed failure to follow state law. *See* Pet. 17-19. The second question presented, therefore, hinges on whether the trial court followed Arkansas law. That's not a basis for review because it amounts to little more than a claim that this Court should check the Arkansas Supreme Court's state-

law work. And in any event, the decision below correctly applied longstanding state-law precedent.

As an initial matter, Gardner does not claim the decision below conflicts with this Court's precedent, a decision of any other state court of last resort, or a decision from any federal court of appeals. *See* Pet. 13 (noting that "[t]his Court has not previously decided" the petition's novel due-process question). Gardner's novel due-process theory does not even truly rest on a claim about a supposed "misapplication of a properly stated rule of law," at least not any rule of *federal* law. Sup. Ct. R. 10. Yet even assuming Gardner has raised a due-process question, he has offered no "compelling reasons" for this Court to consider it. *Id.* And there are at least two important reasons not to consider it.

A. The petition's second question presented hinges on a pure question of state law: Was Gardner entitled to a nonmodel jury instruction? Unless the Arkansas Supreme Court misapplied its own precedent, Gardner's novel due-process question never arises. That is, to reach the federal question that Gardner purports to raise, this Court would first need to hold that the Arkansas Supreme Court misapplied Arkansas law—a task that lies beyond this Court's certiorari jurisdiction. *See* 28 U.S.C. 1257(a).

The first reason not to take up this question, therefore, is that it asks this Court to interpret Arkansas law. But the Arkansas "courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law." *Murdock*, 87 U.S. at 626; *see, e.g.*, *Eagerton*, 462 U.S. at 181 n.3 ("Suffice

it to say that the weight to be given to the legislative history of an Alabama statute is a matter of Alabama law to be determined by the Supreme Court of Alabama."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[T]he voice adopted by the State as its own . . . should utter the last word.") (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928)).

The need to give a wide berth to the decision below is particularly acute in a case like this, where Gardner's due-process theory turns on the assertion that the Arkansas Supreme Court *misapplied* state law. This Court should not "lightly . . . presume[]" to decide this case "upon a principle which implies a distrust" of that court's "ability to construe [its] laws correctly." *Murdock*, 87 U.S. at 626; *see Beard v. Kindler*, 558 U.S. 53, 63 (2009) (Kennedy, J., concurring) ("By refraining from deciding cases that rest on an adequate and independent state ground, federal courts show proper respect for state courts and avoid rendering advisory opinions."). This Court should not tell the Arkansas Supreme Court how to apply Arkansas law.

B. The second reason not to take up this question presented by Gardner's petition is that the decision below correctly applied established Arkansas law to reject Gardner's claim that the trial court should have used a nonmodel jury instruction.

If the Court took up this question, the only issue before it would be "whether the asserted nonfederal ground independently and adequately supports the judgment." *Abie State Bank v. Weaver*, 282 U.S. 765, 773 (1931). This sort of issue often arises in the context of what amounts to an "adequate" state-law procedural ground for the decision below that would foreclose this Court's review. Although the question

whether Gardner was entitled to a nonmodel jury instruction is a matter of substantive state law, not a procedural question like forfeiture or wavier, the Court would still likely consider only whether "the state ground is inadequate." *Wright v. Georgia*, 373 U.S. 284, 291 (1963). In *Wright*, for instance, the state ground was novel and unfairly sprung upon the defendant. This Court saw no adequate state-law ground for the Georgia court's judgment "because no prior Georgia case which respondent has cited nor which we have found [gave] notice of" the purported independent-and-adequate state-law ground in that case. *Id.* There are no similar novelty concerns in this case. The Arkansas Supreme Court has consistently rejected claims nearly identical to Gardner's.

i. In cases like this one, Arkansas law has long required trial courts to use the model instruction used by the trial court below. The jury at Gardner's trial was instructed that it must sentence Gardner to life imprisonment without parole unless it unanimously found that "[t]he aggravating circumstances justify beyond a reasonable doubt a sentence of death." Pet. App. 26. To hold that Gardner was not entitled to his requested nonmodel jury instruction, the Arkansas Supreme Court expressly relied on a 24-year-old decision, which itself relied on an even older decision. *See* Pet. App. 5 (citing *Kemp v. State*, 919 S.W.2d 943, 957 (Ark. 1996)); *see also Dansby v. State*, 893 S.W.2d 331, 336-37 (Ark. 1995).

The model jury instruction that the trial court used in Gardner's case in fact predates even those decisions, and Arkansas courts have for decades interpreted its language just like the decision below. The current language of the model jury instruction

dates to the 1975 rewrite of Arkansas's criminal code. *See* Act 280, sec. 1302(1)(c), 70th Ark. General Assembly, Reg. Session, 1974-1976 Ark. Acts 500, 590-91 (Mar. 3, 1975) ("The jury may impose a sentence of death only upon unanimously returning written findings . . . that any such aggravating circumstances justify a sentence of death beyond a reasonable doubt."), *current version codified as* Ark. Code Ann. 5-4-603(a)(3). The Arkansas Supreme Court has always said, interpreting this language, "that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death." *Clines v. State*, 656 S.W.2d 684, 686 (Ark. 1983). The decision below simply applied this longstanding interpretation of Arkansas state law. *See* Pet. App. 4-5.

Gardner's attempt to warp this uncontroversial application of state law into a due-process violation rests on a misunderstanding of what he terms the jury's "unquestionably legal option to extend mercy." Pet. 16. The principle of state law that he calls "extending mercy" is in fact the Arkansas Supreme Court's response to the oft-repeated argument that the State's death-penalty statute is impermissibly mandatory. *See Camargo v. State*, 987 S.W.2d 680, 682-83 (Ark. 1999). Death-row inmates regularly claim that the statutory language as used in the model jury instructions "results in a mandatory death sentence." *Dansby*, 893 S.W.2d at 336. But the Arkansas Supreme Court has rebuffed this claim by making clear that state law "permits the jury to show mercy, as it allows the jury to find that the aggravating circumstances do not justify a sentence of death." *Kemp*, 919 S.W.2d at 957-58.

In other words, the "mercy" principle that Gardner purports to identify in Arkansas law is not independent of the instruction that his jury received. Instead, it is derived from the very text of that instruction. Gardner cites no decision purporting to identify a state-law "mercy" power independent of the jury's power to find that the aggravating circumstances do not justify the death penalty. *See* Pet. 15. Each of the decisions he cites itself interprets the same language used by the trial court when instructing the jury after the penalty phase of Gardner's trial. *See Camargo*, 987 S.W.2d at 682-83; *Greene v. State*, 977 S.W.2d 192, 207-08 (Ark. 1998); *Johnson v. State*, 823 S.W.2d 800, 806 (Ark. 1992) (citing *Clines*, 656 S.W.2d at 686).

In fact, Gardner expressly acknowledged to the Arkansas Supreme Court that his mercy-instruction argument "has been rejected repeatedly in prior cases." Appellant's Br.,[2] Argument at 9. (quoting *Cox v. State*, 853 S.W.2d 266, 270 (Ark. 1993)). Gardner's "argument is in essence identical to one [the Arkansas Supreme Court] ha[s] repeatedly rejected," *Cox*, 853 S.W.2d at 270, and his jury was appropriately instructed under state law.

ii. As a result, Gardner's due-process theory evaporates. The crux of his theory is that "the jury was not informed of its unquestionably legal option to extend mercy." Pet. 16. But the jury's "legal option to extend mercy," *id.*, is entirely encompassed within the *requirement* that it determine "[t]he aggravating circumstances justify beyond a reasonable doubt a sentence of death," Ark. Code Ann. 5-4-603(a)(3). Beyond

[2] The citation designation "Appellant's Br." refers to the Appellant's Brief below, *Gardner v. State*, CR-19-257 (Ark. Nov. 1, 2019)

this requirement, the Arkansas Supreme Court has not created some freestanding option to extend mercy, about which Gardner's jury received no instruction. *See* Pet. App. 26. Neither has this Court, although Gardner attempts to suggest one with an inapt citation to *Penry v. Lynaugh*, 492 U.S. 302 (1989), which held that the jury must be instructed "that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty," *id.* at 328.

The appropriate method for an Arkansas jury to extend mercy is for it to determine that the aggravating circumstances do not justify beyond a reasonable doubt a sentence of death. And the model instruction on this point that Gardner's jury received mirrored the instruction the Arkansas Supreme Court has approved, time and again. *See* Pet. App. 24-26. The model jury instruction, therefore, "accurately state[d] the law" and also contained every "necessary instruction on the subject." Pet. App. 4-5 (quoting *Perry v. State*, 453 S.W.3d 650, 654 (Ark. 2014)). Because of that, the trial court would have erred if it had instead given Gardner's proffered nonmodel instruction. *Id.*; *see Perry*, 453 S.W.3d at 654.

The trial court did not "refus[e] to apprise the jury of information . . . crucial to its sentencing determination." *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994) (plurality opinion). Both it and the Arkansas Supreme Court correctly applied Arkansas law. Even if this Court were inclined to review Gardner's state-law-dependent due-process theory, it would find no constitutional violation.

III. The decision below did not fail to consider or rule upon any issue properly raised.

The petition's third and final question purports to ask whether a so-called "refusal" by the Arkansas Supreme Court "to consider and rule upon issues raised and argued on appeal violate[d]" the Due Process Clause. Pet. 20. But the Arkansas Supreme Court considered and *rejected* each claim presented by Gardner. *Compare* Pet. App. 1 (identifying three claims from Gardner's brief), *with* Appellant's Br. xxviii (identifying these same three claims as Gardner's "Points on Appeal"). He apparently claims that the court nevertheless violated his due-process rights because it did not reject two of those claims—one regarding his supposed waiver of his right to counsel, the other mirroring his earlier claim about the especially-cruel-manner aggravating circumstance—for precisely the reasons presented in his brief. *See* Pet. 22-24. In each instance, however, the Arkansas Supreme Court relied on sufficient reasons to reject Gardner's claims. Whether or not *additional* sufficient reasons exist for rejecting those claims, the Arkansas Supreme Court had no constitutional duty to address them. This third question presents no "compelling reasons" for granting the petition. Sup. Ct. R. 10.

A. Besides the fact that the petition mischaracterizes the decision below, this third question presented faces a host of threshold problems. It cites many of this Court's decisions regarding the general principle that the Due Process Clause requires that, once a State allows appeals, they must not become "a meaningless ritual." *Douglas v. California*, 372 U.S. 353, 358 (1963); *see* Pet. 22-24. But even if the Court adopted Gardner's framing of the third question, he admits that the decision below

does not conflict with any of this Court's prior decisions. *See* Pet. 20 (admitting that "[t]his Court has not previously decided" this question). Nor does he claim that the decision below splits with some other court's interpretation of this Court's due-process-on-appeal precedent. *See* Pet. 20-24 (citing no lower federal or state precedent whatsoever).

More foundationally problematic, the petition's due-process theory would require this Court to subject state courts' appellate review to a detailed, argument-by-argument analysis under the Due Process Clause. Taken at face value, the petition reads the Due Process Clause to require state appellate courts to expressly rule not just on *every issue* a party raises but also on *every argument* a party raises regarding each issue—no matter whether ruling on a given argument is necessary to dispose of a given issue. *See* Pet. 24 ("The Arkansas Supreme Court denied fundamental due process to Gardner by failing to rule upon *each of his specific arguments*." (emphasis added)).

Gardner identifies no precedent for this due-process theory. For good reason: Adopting it would impose on state appellate courts a constitutional duty to include pronouncements in their opinions that are "not essential to [the] disposition of any of the issues contested." *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001). Such pronouncements would be "unquestionably dictum." *Id.* The Due Process Clause cannot require state courts to pronounce "general expressions" that "go be-

yond the case"—expressions which would "not . . . control the judgment in a subsequent suit." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). Any other conclusion would change well-settled principles of appellate review.

The Arkansas Supreme Court did not violate Gardner's due-process rights by failing to announce alternative holdings in dicta.

B. Assuming the petition does not mean to suggest that this Court further constitutionalize state-court appellate procedure, it might be understood to claim, at most, that the Arkansas Supreme Court violated Gardner's federal due-process rights by failing to follow controlling state law on two issues. *See* Pet. 24 ("It denied [him] due process first by failing to comply with the state statutes and rules requiring it to review those matters argued and briefed." (citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980))). But the decision below correctly applied state law on both points.

i. First, the petition complains about how the decision below handled Gardner's supposed waiver of his right to counsel. Of course, when a criminal defendant "clearly and unequivocally declare[s] to the trial judge that he want[s] to represent himself," then he must be allowed to proceed pro se, as long as he is "literate, competent, and understanding, and [is] voluntarily exercising his informed free will." *Faretta*, 420 U.S. at 835. But Gardner never "clearly and unequivocally declared" his waiver of counsel. *See* Pet. App. 3-4. So the Arkansas Supreme Court rejected his claim that the trial court should have conducted any further *Faretta* inquiry. *See* Pet. 21.

The decision below correctly held that Gardner had never unequivocally requested to represent himself. *See* Pet. App. 2-4. The evidence shows that, at times,

Gardner found himself frustrated with trial counsel but that he never made "an unequivocal request to waive his right to counsel." Pet. App. 4. Early in the proceedings below, he wrote a letter to the trial court, voicing frustration with counsel and asking the court to "give [him] some lawyers that [he] can relate to cause this is not gonna work out." R. 124; *see* R. 125 (similar). His frustration intensified when one of the attorneys made a comment he perceived as racist against him as a white man. *See* R. 133 (recounting in a letter to trial court an exchange where Gardner said he assumed he would "get pulled over and the cops would shoot [him]," with his attorney responding that he "was white is why the cops didn't shoot [him]"; and requesting replacement for this attorney). Shortly thereafter, on the motion of the Arkansas Public Defender Commission, this lawyer was replaced with another lawyer. R. 134.

As the decision below noted, despite this history of conflict with counsel, Gardner "never mentioned self-representation" in his letters to the trial court. Pet. App. 4. On appeal, he has identified only a single, equivocal mention of self-representation to the trial court. *See* Appellant's Br., Argument 3-4; Pet. 21. After the incidents just described, Gardner's new counsel requested a continuance, "based on [her] need to prepare this case properly so that whatever happens at trial, stands." R. 566. At a hearing on this requested continuance, Gardner said that he thought counsel had already had enough time to prepare. *See* R. 566-67 ("Your Honor, that woman has had 20 months to do the same thing she's doing now. We don't need to go nowhere except to court."). Although the trial court acknowledged Gardner's frustration, saying it "want[ed] to get [his] case tried," it made clear that in a capital-murder case

like Gardner's, counsel needed "every opportunity to prepare the case properly." R. 567. Gardner responded: "I don't want them on my case. . . . Your Honor, I'd ask to represent myself or get some other attorney." *Id.* To which the court said, "I'm just going to tell you straight up that I think you need to give your defense team an opportunity to do what they're supposed to do and then we'll go forward from there." *Id.* Gardner did not make any further requests. R. 567-68.

Because "Gardner's statements, taken in their entirety, represent his frustration with his counsel, not an unequivocal request to waive his right to counsel," there was nothing more for the Arkansas Supreme Court to consider. Pet. App. 4. It interprets the *Faretta* inquiry to encompass three separate questions: (1) whether "the request to waive the right to counsel is unequivocal and timely asserted"; (2) whether "there has been a knowing and intelligent waiver"; and (3) whether the defendant has "engaged in conduct that would prevent the fair and orderly exposition of the issues." Pet. App. 3. If a defendant has not unequivocally waived his right to counsel, then there is no reason to consider any other aspect of the inquiry.

Neither in this Court nor the court below has Gardner offered any argument about why his fleeting comment amounted to an unequivocal waiver. *See* Pet. 21; Appellant's Br., Argument at 3-4. Indeed, the petition cites no precedent whatsoever for Gardner's *Faretta* claim. It simply asserts that despite the fact that the Arkansas Supreme Court determined Gardner never unequivocally waived his right to counsel, it should have proceeded to consider whether a hypothetical waiver was knowing and intelligent. *See* Pet. 21. But that is logically impossible. Because Gardner did not

clearly and unequivocally express his desire to waive his right to counsel, the Arkansas Supreme Court did not need to address whether the trial court properly walked through the *Faretta* inquiry. *See* Pet. 21.

By treating the question whether Gardner had unequivocally waived his right to counsel as an independent reason for rejecting his *Faretta* claim, the Arkansas Supreme Court followed its longstanding precedent. *See* Pet. App.3. And it analyzed Gardner's *Faretta* claim the same way that any other court would have approached it. The federal courts of appeals speak with one voice on this issue: *Faretta* requires an unequivocal waiver. *See, e.g.*, *United States v. Jones*, 778 F.3d 375, 389 (1st Cir. 2015); *LaValle v. Artus*, 403 F. App'x 607, 609 (2d Cir. 2010); *United States v. Robinson*, 844 F.3d 137, 146-47 (3d Cir. 2016); *Fields v. Murray*, 49 F.3d 1024, 1028-34 (4th Cir. 1995) (en banc); *Randolph v. Cain*, 412 F. App'x 654, 658-59 (5th Cir. 2010); *United States v. Cromer*, 389 F.3d 662, 682-83 (6th Cir. 2004); *United States v. Oakey*, 853 F.2d 551, 553 (7th Cir. 1988); *Bilauski v. Steele*, 754 F.3d 519, 522-23 (8th Cir. 2014); *Burton v. Cate*, 546 F. App'x 624, 626-27 (9th Cir. 2013); *United States v. Reddeck*, 22 F.3d 1504, 1510-11 (10th Cir. 1994); *United States v. Garey*, 540 F.3d 1253, 1267 n.9 (11th Cir. 2008) (en banc).

Any of these courts would, just like the Arkansas Supreme Court, reject a *Faretta* claim absent an unequivocal waiver, without conducting any further analysis. Because the decision below rejected Gardner's *Faretta* claim on this sufficient basis, it was unnecessary for it consider any other arguments he had raised in his brief.

ii. Second, the petition essentially reasserts the first question presented. As discussed above, the first question claimed that the Arkansas Supreme Court required less than a reasonable doubt as the burden of proof for the intent element of the cruel-manner aggravating fact. *See supra* pp. 16-20. The third question presented simply recasts this question in terms of a supposed failure to address each "specific argument" raised in the brief below. Pet. 22. But the only question before the Arkansas Supreme Court was whether substantial evidence supported the jury's finding that Gardner murdered Heather in an especially cruel manner. *See Reid*, 588 S.W.3d at 733; *see also Jackson*, 443 U.S. at 317.

As already discussed, the undisputed evidence showed the jury that, despite Heather's attempt to escape from Gardner's attack, he trapped her in their motel room and strangled her to ensure that she would not turn him in to the police. *See* Pet. App. 1, 7-8; R. 1531, 1534. The Arkansas Supreme Court did not need "to rule upon each of [Gardner's] specific arguments." Pet. 24. Recounting these facts made clear that it saw "substantial evidence from which the jury could infer intent to inflict mental anguish, as well as to murder [Heather]." *Willett*, 983 S.W.2d at 412; *see* Pet. App. 5, 8. The decision below did not deny Gardner his right to due process and this Court's review is not warranted.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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November 25, 2020

SUPPLEMENTAL APPENDIX

Supreme Court of Arkansas
Associate Justice
Rhonda K. Wood

Date
May 7th 2020

CR-19-257

Re; Scotty Ray Gardner SK 935

Ma'am this is Scotty Ray Gardner a death row inmate writing this letter to you on his on behalf.

I recieved your ruling of case 23CR-16-194 tonight per my attorney on 5-6-2020 and it is urgent that I write you a personal letter in responce to your ruling.

Respectfully please accept this as notice that never since March 16 have I had a chance to speak on my own behalf. I was arrested in March of 2016. Would you please listen to my plea.

Facts. Im guilty. The jury found me guilty. I do not argue that.

What I argue is; I ask for different lawyers or to represent myself. It was denied in court. I was sent back to prison so I called my lawyers boss and argued with him for a month or more for him to give me different lawyers. Check the phone records to prove I argued for over a month. He denied my request.

By me being angry over all of this. I would not let the attorneys put on a defense nor would I let them put up a arguement during the penality phase.

If someone would check bank records it would show I had $200.00 put into the account and that $240.00 was my money. The victom did not have a job. That $240.00 was my money. Check bank and it will show it was sent from a attorney in Okla to the bank here in Arkansas.

Next the cell phones and I pads were mine. I signed for them. If someone checks the phone company it will show I bought them.

One last thing. Page 6 of your ruling it says (Gardner also admitted that he planned to go to Hot Springs with a friend before the murder.) I have never in my life said that to no one. I never said that period.

The reason I killed the bitch was due to her and her ex putting a restraining order on me. By lieing on me they put a No-Contact order on me. That was all lies.

I dont deny I killed her. But I will not

be executed over lies. Tell the truth. Don't lie on me again.

I don't want more appeals. No Rule 37 or any other delays.

I want the sentence to be carried out so the victims family can have closer.

My only plea is that the record be true and not lies.

I want it to state true facts, I killed her because she lied on me when she filled that No-Contact Order.

Would you please make everyone in my case stick to the truth and not lies. That is all I ask. No lies.

Please order my sentence of death be fulfilled without any delays or appeals.

Sincerly
Scotty Ray Gardner SK 955

I will accept any of the 5 executions - Gun Gas - Rope - Chair - Drugs. No more delays.