

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

IN THE  
SUPREME COURT OF THE UNITED STATES

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RICKY LEE SCOTT,  
*PETITIONER,*

v.

DEXTER PAYNE, DIRECTOR  
ARKANSAS DEPARTMENT OF CORRECTION,  
*RESPONDENT.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ARKANSAS

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J. THOMAS SULLIVAN  
MEMBER, BAR OF THE  
SUPREME COURT  
1122 WEST CAPITOL  
LITTLE ROCK, ARKANSAS 72201  
501/376-6280  
sullivanatty@gmail.com

COUNSEL OF RECORD FOR PETITIONER,  
RICKY LEE SCOTT

## QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER SCOTT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CONVICTED IN A JURY TRIAL OF FIRST-DEGREE MURDER AND SENTENCED TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF ELIGIBILITY FOR PAROLE WHERE JURORS WERE NOT INSTRUCTED BY THE TRIAL COURT ON THE NECESSARY ELEMENTS OF PROOF OF THIS OFFENSE, AND THE STATE COURTS HELD THAT HIS CHALLENGE TO THE CONVICTION RAISED AN ISSUE OF *TRIAL ERROR* WHICH WAS WAIVED WHEN NOT URGED ON DIRECT APPEAL

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## OPINION BELOW

Petitioner Scott appealed from the denial of his petition for a writ of habeas corpus pursuant to ARK. CODE ANN. § 16-112-103(a)(1). The Arkansas Supreme Court upheld the Lincoln County (Arkansas) Circuit Court’s dismissal of his petition.<sup>1</sup> *Scott v. Payne, Director, Arkansas Department of Correction*, 2022 Ark. 178, 652 S.W.3d 562. It held that Petitioner’s claim involved an issue of trial error that had to have been raised in the direct appeal from his conviction and was not cognizable in a habeas corpus action. A copy of the opinion is appended as Exhibit A. The supreme court denied his petition for rehearing in an order appended as Exhibit C.

## JURISDICTION

Scott invokes the Court’s jurisdiction pursuant to 28 U.S.C. § 1257(a), authorizing review of the decision rendered by the Arkansas Supreme Court upholding denial of relief and dismissal of his petition for a writ of habeas corpus. The court denied rehearing on December 1, 2022. This petition is timely if filed on or before March 1, 2023.

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<sup>1</sup> In this petition, the “trial court” refers to the Cross County (Arkansas) Circuit Court, the court in which Petitioner Scott was tried and convicted of Murder in the First Degree. The “habeas court” refers to the Lincoln County (Arkansas) Circuit Court is the circuit court having jurisdiction over the state habeas corpus action brought under Ark. Code Ann. §§ 16-112-103(a), *et seq.* The Arkansas Supreme Court is referred by that designation, or as the “state supreme court,” or “the court” in discussing its opinion in the case.



## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Under Arkansas law, an individual is afforded a remedy in habeas corpus for challenges to unlawful detention by statute. The remedy provides, in pertinent part:

### ARK. CODE ANN. § 16-112-103. APPLICATION BY PETITION

(a)(1) The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in § 16-112-102(a) to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted.

The state habeas corpus statute also identifies a series of circumstances under which a petitioner challenging detention may seek relief from a conviction or sentence. These circumstances identifying grounds for issuance of the writ provide, in pertinent part:

### ARK. CODE ANN. § 16-112-118. DISCHARGEMENT RESTRICTIONS

(b)(1) If it appears that the prisoner is in custody by virtue of process from any court legally constituted or issued by any officer in the exercise of judicial proceedings before him or her, the prisoner can only be discharged in one (1) of the following cases:

(A) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum, or person;

(B) Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the party has become entitled to his or her discharge;

(C) Where the process is defective in some matter or substance required by law, rendering the process void;

(D) Where the process, though in proper form, has been issued in a case, or under circumstances, not authorized by law;

(E) Where the process, though in proper form, has been issued or executed by a person who is not authorized to issue or execute the process, or where the person having the custody of the prisoner, under the process, is not the person empowered by law to detain him or her; or

(F) Where the process is not authorized by any judgment, order, decree, or by any provision of law.

The Arkansas Criminal Code defines the offenses of first-degree and second-degree murder, as they relate to the homicide charged in Petitioner's case and in effect on the date of the offense, as follows:

ARK. CODE ANN. § 5-10-102. MURDER IN THE FIRST DEGREE

(a) A person commits murder in the first degree if:

....

(2) With a purpose of causing the death of another person, the person causes the death of another person; or

....

(c) Murder in the first degree is a Class Y felony.

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ARK. CODE ANN. § 5-10-103. MURDER IN THE SECOND DEGREE

(a) A person commits murder in the second degree if:

(1) The person knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the purpose of causing serious physical injury to another person, the person causes the death of any person.

(b) Murder in the second degree is a Class B felony.

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The penalty upon conviction for Murder in the First Degree, a Class Y felony, is a sentence of ten (10) to forty (40) years, or life, in prison. ARK. CODE ANN. § 5-4-401(a)(1).

The Arkansas General Assembly increased the range of punishment for commission of Murder in the Second Degree from a Class B to a Class A felony in adopting Act 1352 in 2005, effective at least nine years after the date of the charged offense. 2005 Arkansas Laws Act 1532 (H.B. 1445), ARKANSAS 2005 SESSION LAWS, 85th GENERAL ASSEMBLY, REGULAR SESSION, 2005. The penalty range for the sentence imposed upon conviction for a Class B felony is five (5) to twenty (20) years. ARK. CODE ANN. § 5-4-401(A)(3). The penalty range for a Class A felony is six (6) to thirty (30) years. ARK. CODE ANN. § 5-4-401(A)(2).

## STATEMENT OF THE CASE

### A. *Summary of material facts*

Petitioner Scott was initially charged with the offense of capital murder; the State dropped the charge to Murder in the First Degree on the morning of trial. (R/138-140; T/7-8). In discussing the change in the charge and applicable mandatory jury instructions adopted by the Arkansas Supreme Court, defense counsel objected to the omission of wording from the proposed instruction offered by the State relating to the necessary element of criminal intent, that Petitioner acted with “purpose” in the alleged murder. The prosecuting attorney conceded the error and agreed to substitute the correct instruction required for proof of first-degree murder. (R/145-148; T/14-16). The trial judge then told the assembled venirepersons that Scott was charged with the offense of first-degree murder, stating on the record:

Now, as I said earlier, this is the case of the State of Arkansas versus Ricky Lee Scott. It’s in the Circuit Court of Cross County, Arkansas, Case Number CR-96-61. The defendant was charged by information, “Comes Fletcher Long, Jr., the duly elected and qualified prosecuting attorney for the First Judicial District of the State of Arkansas of which Cross County is a part and in the name of and by the authority of the State of Arkansas on oath accuse the defendant of the crime of Murder in the First Degree, Arkansas Code Annotated 5-10-102 in that he did unlawfully on or about the 4<sup>th</sup> day of March, 1996 *purposely caused the death* of Robert Smith and caused the death of Robert Smith in violation of Arkansas Code Annotated 5-2-102 against the peace and dignity of the State of Arkansas.” (R/148; T/17, emphasis added).<sup>2</sup>

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<sup>2</sup> The references to the record of trial and on appeal include the page of the record proper prepared by the Clerk of the court (R/--) and the transcript (T/--prepared by the Official Court Reporter).

The testimony at trial regarding evidence supporting Scott's conviction for the murder offense was summarized by the Arkansas Supreme Court in affirming his conviction on direct appeal:

Because Appellant does not challenge the sufficiency of the evidence used to convict him, we need not recite the facts of this case in great detail. Suffice it to say that Appellant was arrested on March 5, 1996, for the murder of fifteen-year-old Robert Smith, which had occurred the previous day at Smith's aunt's house. The evidence showed that Smith and four other persons were in the driveway, changing a tire on his aunt's car, when Appellant came around the side of the house and began firing a gun. Several eyewitnesses identified Appellant as the person who shot the boy. Appellant was tried on March 11, 1998, more than two years after his arrest. He contends that the trial court thus erred in denying his motion to dismiss the charge due to the State's failure to bring him to trial within twelve months from the date of his arrest.

*Scott v. State*, 337 Ark. 320, 322, 989 S.W.2d 891, 892 (1999).

The trial court conducted an instructions conference and neither the prosecutor--Mr. Long, nor defense counsel—Mr. Wilson, objected to the court giving jurors the mandatory instruction, AMCI 2d 1002, explaining the elements of Murder in the First Degree:

THE COURT: The next one we have is AMCI 2d 1002, which says, First Degree Murder with the definition of purpose. This is the one, gentlemen, that apparently Mr. Wilson prepared. Mr. Long has looked at it. Is there any objection to this one?

MR. LONG: No objections from the State.

MR. WILSON: No objections, Your Honor.

(R/516; T/385). The trial court subsequently read the instructions to the jurors selected to try the case. (R/541-549; T/410-418).

However, in the course of instructing the jury on the law governing its consideration of Petitioner's guilt and, upon conviction, its recommendation with respect to the sentence to be imposed, the trial court failed to read AMCI 2d 1002, the mandatory instruction explaining the necessary elements of proof for conviction on the charge of Murder in the First Degree. Based on the alleged violation and facts on which Petitioner was charged, this mandatory instruction provides:

*(Defendant(s))* [is] [are] charged with the offense of murder in the first degree. To sustain this charge, the State must prove [the following things] beyond a reasonable doubt:

(b) [That with the purpose of causing the death of [ *(victim)*] (or) [ *(another person)*], *(defendant(s))* caused (his death) (the death of [ *(victim)*].]

#### Definitions

“Purpose.”—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

#### AMCI 2d FIRST DEGREE MURDER (Arkansas Model Criminal Instruction 2d)

Despite the references in the trial record relating to defense counsel's objection to the first-degree murder instruction as originally worded and the prosecutor's concession that the objection was correct, resulting in counsel's

submission of an instruction confirming to the mandatory jury instruction, the court failed to instruct jurors on the elements of that offense. Instead, it instructed:

The defendant, Ricky Lee Scott, is charged with Murder in the First Degree. This charge includes the lesser offenses of Murder in the Second Degree, Manslaughter and Negligent Homicide.

You may find a defendant guilty of one of these offenses or you may acquit him outright.

If you have a reasonable doubt as to which offense a defendant may be guilty of, you may find him guilty on of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all offenses, you must find him not guilty.

#### AMCI 110

Reasonable doubt is not a mere possible or imaginary doubt. It is a doubt that arises from your consideration of the evidence and one that would cause a careful person to pause and hesitate in the graver transactions of life. A juror is satisfied beyond a reasonable doubt if after an impartial consideration of all the evidence he has an abiding conviction of the truth of the charge.

#### AMCI 302

If you have a reasonable doubt of the defendant's guilt on the charge of murder in the First Degree, you will then consider the charge of murder in the second degree.

#### AMCI 2d 1003

Ricky Scott is charged with he (sic) offense of murder in the Second Degree. To sustain this charge, the State must prove beyond a reasonable doubt that:

(A) That Ricky Scott knowingly caused the death of Robert Smith under circumstances manifesting extreme indifference (sic) to the value of human life.

(B) Ricky Scott, with the purpose of causing serious physical injury to another person, caused the death of Robert Smith.<sup>3</sup>

(R/545-546; T/414-415). The court continued, instructing jurors in accordance with the mandatory instruction, AMCI 2d 1003, on the culpable mental states of “Purpose,” “Knowingly,” and “Serious physical injury.” (R/546; T415). These definitions of “purpose” and “knowingly” included in the mandatory instruction on Murder in the Second Degree, AMCI 2d 1003, serve to instruct the jury on the culpable mental state required for proof of criminal intent with respect to the alternative theories of the offense set forth in ARK. CODE ANN. § 5-10-103.

Not only did the trial court fail to instruct jurors on the elements requiring proof beyond a reasonable doubt in order to sustain conviction, it also failed to instruct jurors during its oral instructions on the option of reaching a verdict on the first-degree murder charge. It instructed jurors on AMCI 8104:

Members of the jury, when you reach the jury room, you will elect one of your members as foreman. You will consider and complete one of the following verdict forms:

All twelve of you must agree on the verdict, but only the foreman need sign the verdict form.

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<sup>3</sup> AMCI 2d 1003 is technically flawed in the omission of the statutory wording that separates subsections (a)(1) and (2)—the inclusion of the word “or” providing that the elements of second-degree murder may be demonstrated by proving that the accused acted “knowingly” in causing the death of the deceased, as provided in Section 5-10-103(a)(1), or caused death of another with the “purpose of causing serious physical injury” to the deceased, as provided by Section 5-10-103(a)(2).



## STANDARD VERDICT FORM

We, the jury, find the defendant, Ricky Lee Scott, guilty of Murder in the Second Degree. \_\_\_\_\_ (Foreman)

We, the jury, find the defendant, Ricky Lee Scott, guilty of Manslaughter. \_\_\_\_\_ (Foreman)

We, the jury, find the defendant, Ricky Lee Scott, guilty of Negligent Homicide. \_\_\_\_\_ (Foreman)

We, the jury, find the defendant, Ricky Lee Scott, not guilty.

(R/548-549; T/417-418). At the conclusion of closing arguments of counsel, the court instructed jurors concerning deliberations and advised them that they would be receiving the written copy of the jury instructions. (R/579-580; T/448-449).<sup>4</sup>

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<sup>4</sup> The Arkansas Supreme Court accepted Scott's reference to the record and conclusion that the trial court did not orally instruct jurors on the elements of the first-degree murder charge in the appeal from denial of his petition for writ of habeas corpus. The jury instructions, in hard copy form, were not included in the record on appeal, as noted. The court explained in an endnote:

<sup>2</sup> The record establishes that the circuit court did not orally instruct the jurors on the elements of first-degree murder at the conclusion of evidence; rather, instead of reading the first-degree-murder instruction, the circuit court proceeded directly to read the second-degree-murder instruction. It appears that the circuit court intended to instruct the jury on first-degree murder because during the jury-instructions conference, the circuit court agreed to adopt defense counsel's requested instruction on first-degree murder. The record demonstrates that the circuit court did provide written instructions to the jury prior to deliberations. However, the written instructions are not in the record. As Scott acknowledged in his petition, it was not until 2019 when subsection (b) of Rule 33.6 of the Arkansas Rules of Criminal Procedure was added to require that "[t]he verdict forms and written jury instructions shall be filed in the clerk's case file at the conclusion of the jury's deliberations."

Despite the fact that the trial court never read AMCI 2d 1002, setting out the elements of Murder in the First Degree, while instructing the jury in open court, jurors returned a verdict finding Scott guilty of Murder in the First Degree. The verdict on guilt and the sentence of life imprisonment then imposed by the jury were recorded on verdict forms not included in the trial record.<sup>5</sup>

*B. Procedural history of the litigation*

The single issue raised by appellate counsel on direct appeal argued that Scott was denied a speedy trial afforded by Rule 28 of the Arkansas Rules of Criminal Procedure which provided that an accused must be tried within 12 months of being charged or denied liberty due to arrest. The Arkansas Supreme Court rejected his claim and affirmed his conviction. *Scott v. State*, 337 Ark. 320, 325, 989 S.W.2d 891, 894 (1999). The court also confirmed that it had reviewed the record to determine whether there were issues preserved for appellate review not argued on appeal, but found none. *Id.* at 326, 989 S.W.3d at 894.

Following affirmance of his conviction, Petitioner Scott unsuccessfully sought relief from his conviction and sentence by petitioning for post-conviction relief under Arkansas rule, and by raising a series of challenges in the state supreme

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*Scott v. Dexter Payne, Director, Arkansas Department of Correction*, 2022 Ark. 178, at \*3, 652 S.W.3d 562, 564 (APP. Exhibit A).

<sup>5</sup> The verdict forms executed by the foreman of the jury were not included in the record on appeal. *See*, n.3, *supra*.

court based on violations of the discovery rule imposed in *Brady v. Maryland*, 373 U.S. 83 (1963). After the Arkansas Supreme Court denied his fifth effort at reopening his conviction based on allegations of *Brady* violations, Petitioner filed for relief under the state habeas corpus statute, ARK. CODE ANN. § 16-112-103(a)(1).

In his petition, Scott argued that he was entitled to relief because his continuing incarceration pursuant to a conviction in which jurors had not been required to find the evidence sufficient to prove all elements of the offense charged beyond a reasonable doubt. Thus, he petitioned for relief because the trial court's entry of the conviction and sentence violated state and federal constitutional protections which establish the requirements for the assignment of the burden of proof to the prosecution in order to sustain a conviction for the offense charged.

Pursuant to statute, the habeas corpus petition was filed in the Lincoln County (Arkansas) Circuit Court which has jurisdiction over the county in which the unit of the Arkansas Department of Correction where Scott is incarcerated is located. That court denied relief and ordered the dismissal of the habeas corpus petition. (APP. Exhibit B: ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS). Scott filed a Motion for New Trial, contesting the habeas court's conclusion that he had failed to offer evidence in support of his habeas corpus petition demonstrating "probable cause to believe" that he is *illegally detained*. The habeas court again denied relief and ordered the petition dismissed but, in

responding to Scott's references to the record included in the petition and supporting appendix, it reversed its finding that he failed to offer support sufficient to meet the probable cause standard, holding:

Petitioner states that because he attached an appendix with a complete reference to the record, and exhibits, the finding that petition failed to make a showing, by affidavit or other evidence, of probable cause to believe he is illegally detained, is in error. The substance of petitioner's documents *supports his claim of error* in the instructions given at his trial. (emphasis added).

(APP. Exhibit B: ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL AND DENYING PETITION FOR WRIT OF HABEAS CORPUS, at 2).

Petitioner Scott appealed from the habeas court's denial of relief and dismissal of his petition for the writ of habeas corpus to the Arkansas Supreme Court, which upheld the trial court's disposition. *Scott v. Dexter Payne, Director, Arkansas Department of Correction*, 2022 Ark. 178, 652 S.W.3d 562 (APP. Exhibit A).

Petitioner Scott now petitions this Court to grant a writ of certiorari to review the decision of the state supreme court.

*C. Preservation of the federal constitutional claim*

Scott argues that the Cross County (Arkansas) Circuit Court acted beyond its jurisdiction in imposing the conviction for the offense of Murder in the First Degree and sentence of life imprisonment where the jury's verdict of guilty was returned without the court including the necessary elements of first-degree murder when it instructed the jury on the applicable law in open court at the close of the evidence.

He relied on long-standing decisions of this Court in support of his argument that he is illegally detained and entitled to relief from his conviction because the record fails to reflect that jurors found that the prosecution proved that he acted with the requisite intent under Arkansas law—that he acted with “purpose”—necessary for proof of first-degree murder.

Expressly relying on the due process protection afforded by the 14<sup>th</sup> Amendment, Scott cited *In re Winship*, 397 U.S. 358 364 (1970) and *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), for the rule that the prosecution bears the burden of proving each element of an offense beyond a reasonable doubt in order to sustain a criminal conviction. (PETITION FOR WRIT OF HABEAS CORPUS, hereinafter “Petition”, at 19-21, ¶¶ 43-45).

Petitioner also relied, by analogy, on *Cole v. State of Arkansas*, 333 U.S. 196, 197 (1948). There, the Court held that the accused’s conviction on an offense not charged violated due process, as the Court explained the Question Presented for Review that it addressed in the case:

Were the petitioners denied due process of law . . . in violation of the Fourteenth Amendment by the circumstance that their convictions were affirmed under a criminal statute for violation of which they had not been charged?

The *Cole* Court concluded that the conviction of the petitioners for offenses on which they were not charged violated due process of law, and that in providing for a right of appeal in which federal constitutional claims could be raised, the Arkansas court

was bound to enforce the protection afforded by the federal constitution. In affording relief from the convictions, it concluded:

To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

*Id.* at 202. (PETITION, at 46-47, ¶¶ 111-112).

Further, Petitioner argued that although the jury was not instructed on the elements of first-degree murder, resulting in a conviction violating the protection afforded by due process, it was instructed on the elements of Murder in the Second Degree and the trial evidence was sufficient to support his conviction on that lesser-included offense. He argued that the Arkansas Supreme Court should exercise its jurisdiction to modify the conviction from first-degree to second-degree murder and modify the sentence reflect a term consistent with the statutory range for second-degree murder. (PETITION, at 38-44; ¶¶ 88-105).

Additionally, Scott argued that because he had effectively served the equivalent term as the lawful maximum period of imprisonment on a second-degree murder conviction based on the statute at the time of the offense, any retrial or resentencing that would violate the protection against multiple trials would be barred by the guarantee of due process under the 14<sup>th</sup> Amendment, citing *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 357 (2016) and *Abney v. United States*, 431 U.S. 651, 660-661 (1977). (PETITION, at 47-48; ¶ 113).

Moreover, because he had effectively discharged the maximum sentence for Murder in the Second Degree, the lesser included offense on which the jury had been properly instructed as to the necessary elements the State was required to prove, Scott argued that imposition of any additional sentence potentially available once the first-degree murder conviction is reversed would also violate the 14<sup>th</sup> Amendment due process protection. Consequently, he prayed that he be afforded relief in habeas corpus and ordered released from further incarceration on the conviction and sentence imposed unlawfully due to the trial court's failure to instruct his jury on the elements of Murder in the First Degree, on which the jury convicted him. (PETITION, at 48-49; ¶¶ 113-114, Conclusion and Prayer for Relief).

The Arkansas courts mischaracterized Scott's claim that the trial court had exceeded its jurisdiction in imposing the fatally-flawed conviction for first degree murder as a matter of *trial error*. In upholding dismissal of his habeas corpus petition, the Arkansas Supreme Court validated the trial court's conclusion that the claim constituted jury instruction error that could only be raised in the trial, direct appeal, or Rule 37 post-conviction process. The refusal to treat the claim as a matter of jurisdictional or fundamental error—as opposed to *trial error*—unfairly applied a state procedural default rule to bar consideration of the constitutional error that neither court denied had occurred. In his rehearing petition, Scott argued that the application of the state procedural default rule to this claim violated the holding in

*Lee v. Kemna*, 534 U.S. 362, 366-67 (2002), requiring that such rules reflect reasonableness in application.

*D. Disposition of Petitioner's claim by the Arkansas courts*

*1 The ruling of the Lincoln County (Arkansas) Circuit Court*

The habeas court denied relief on Petitioner's claim that the entry of the conviction and sentence by the trial court was unlawful because the trial jury had not been instructed on the elements of first-degree murder before returning the conviction. It did not address the merits of Scott's constitutional arguments, but instead, held the claim it was essentially procedurally defaulted:

Petitioner relies on numerous cases, but the cases are ones seeking relief on direct appeal. Petitioner cannot provide precedent that his claims are cognizable in a habeas (\_\_\_\_). Petitioner's allegations are ones that should have been addressed at trial, on direct appeal, or in a timely Rule 37 petition. Assertions of defective jury instructions are allegations of *trial error* that do not implicate the facial validity of the judgment or the jurisdiction of the trial court. . . .Claims of due process violations do not implicate the facial validity of the judgment or jurisdiction of the trial court, and those claims are not cognizable in proceedings for the writ. (emphasis added).

(APP. Exhibit B: ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS, at 2). While overruling the Motion for New Trial, the habeas court did conclude that the evidence submitted in support of the writ "supports his claim of error in the jury instructions given at his trial," as previously noted at page 12.



2. *The disposition by the Arkansas Supreme Court on appeal*

On appeal from denial of relief and dismissal of Scott's petition by the habeas court the Arkansas Supreme Court did not address Petitioner Scott's constitutional challenge on the merits. Instead, it incorporated the habeas court's findings in its amended order denying relief and dismissing the petition, which found substantive support for his claim. *Scott v. Payne, Director*, 2022 Ark. 178 at \*4-\*5, 652 S.W.3d at 565-566. The court reiterated the test for issuance of the writ of habeas corpus under the state statute:

A writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a circuit court lacks jurisdiction over the cause. *Finney v. Kelley*, 2020 Ark. 145, 598 S.W.3d 26. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Id.* When the circuit court has personal jurisdiction over the appellant and also has jurisdiction over the subject matter, the court has authority to render the judgment. *Id.*

. . . Unless the petitioner can show that the circuit court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Fields v. Hobbs*, 2013 Ark. 416, 2013 WL 5775566.

*Id.* at \*5-\*6, 652 S.W.3d at 566. It then explained:

Scott concedes that the circuit court had both personal and subject-matter jurisdiction because it had jurisdiction over the prosecution of a murder committed in Cross County and personally over him under the information charging the offense. Rather than challenging the court's personal or subject-matter jurisdiction, Scott's jurisdictional argument focuses on the limitations of the circuit court's authority to act even when it has personal and subject-matter jurisdiction. Stated differently, it is Scott's position that his jurisdictional argument presents a case of first impression based on the circuit court's lack of jurisdiction to

impose his first-degree-murder conviction because the court did not instruct the jury on the elements of first-degree murder in open court.

*Id.* at \*6-\*7, 652 S.W.3d at 566-567.

The court then rejected Petitioner's argument that his claim rested on an argument that the trial court had exceeded its jurisdiction in rendering entry of the judgment of conviction where the record reflects that the jury was not instructed on the elements of first-degree murder during its instructions at the close of the evidence did not amount to jury instruction error. *Id.* at \*7, 652 S.W.3d at 567. It explained:

Despite Scott's attempt to frame his trial-error argument as a jurisdictional argument, our case law is clear. Scott points out the narrow view taken by this court that a writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a trial court lacked jurisdiction over the cause. We acknowledge that this view is narrow in scope. However, we decline to expand our habeas review in a manner that would encompass Scott's argument on appeal.

*Id.* at \*7-\*8, 652 S.W.3d at 567.

The court rejected Scott's reliance on the specific grounds recognized in ARK. CODE ANN. § 16-112-118(b)(1)(A)—(F) for challenging detention as unlawful due to violation of process, finding that none would provide relief in habeas corpus. It explained, after addressing the specific arguments advanced in his petition, that:

As conceded by Scott, the order was facially valid, and the circuit court had both personal and subject-matter jurisdiction over Scott's case. Thus, we hold that the order issued in his case was authorized by law.

*Id.* at \*8, 652 S.W.3d at 569.

The court then concluded that Scott's claim that the conviction was invalid

because the record failed to show that the jury found each element of the offense supported by the requisite evidence, characterizing this line of argument as a challenge to the sufficiency of the evidence supporting the conviction, a matter not cognizable in habeas corpus “because this claim does not invoke either the facial validity of the commitment order or the jurisdiction of the trial court.” *Id.* The court thus rested its discussion of Scott’s initial argument—that the conviction is fatally defective because jurors were not instructed on the elements of first-degree murder—on its characterization as instruction error not cognizable in habeas corpus:

We hold that despite Scott’s attempt to formulate his argument as one invoking jurisdiction, his argument is really one of trial error. Stated differently, his trial-error argument is not within the purview of habeas proceedings because it does not implicate either the facial validity of the judgment or the jurisdiction of the trial court. *Wade v. Payne*, 2021 Ark. 116, 623 S.W.3d 568. Accordingly, the circuit court did not clearly err when it dismissed Scott’s petition for habeas relief.

*Id.* at \*10-\*11, 652 S.W.3d at 568-569.

The state supreme court then addressed Scott’s second argument, that due process protections required relief from the first-degree murder conviction because the evidence supported conviction on the lesser-included offense of second-degree murder upon which jurors had been properly instructed on the elements of the offense. The court held, however, that the trial court’s authority to impose the sentence fixed by the jury was not compromised by the fact that jurors had not been instructed on the elements of first-degree murder, upon which they had returned a

verdict of conviction. *Id.* at \*11, 652 S.W.3d at 569.

The state supreme court then addressed Scott's due process argument that relief on his federal constitutional claim regarding the imposition of the first-degree conviction would have resentencing consequences. Should relief entail reversal or an order vacating the first-degree murder conviction require retrial or imposition of a sentence greater than that applicable to the statutorily-authorized sentence range for second-degree murder, Scott argued that any additional period of incarceration would violate due process protections and the prohibition of multiple prosecution barred by the Fifth Amendment. The court adopted the State's position on this point, explaining:

The State responds that Scott's assertions of due-process and double-jeopardy violations are premature, at best, because Scott has not established that he has been detained for an illegal period of time, and he has not been subjected to, nor is he at risk of, a second prosecution or of multiple punishments for the same offense. We agree. Again, our habeas jurisprudence is well established, and unless the petitioner can show that the circuit court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Fields, supra*. [*Fields v. Hobbs*, 2013 Ark. 416, 2013 WL 5775566]. Accordingly, the circuit court did not clearly err when it rejected Scott's claim for habeas relief.

*Id.* at \*12, 652 S.W.3d at 569. The court, thus, concluded its disposition by returning to the limitation imposed upon the availability of the writ, based on Scott's failure in the court's view of establishing that the trial court lacked jurisdiction in enforcing the jury's verdict of conviction on the first-degree murder charge, in light of his

agreement that the commitment order was not invalid on its face. *Id.*

## REASONS FOR GRANTING THE WRIT

Petitioner Scott remains incarcerated on a conviction and sentence unlawfully imposed by the state trial court where jurors who returned the conviction were not instructed on the elements of the offense of Murder in the First Degree when the court instructed the jury orally at trial. The record fails to show that the jury was ever instructed on these elements, as the Arkansas Supreme Court implicitly conceded, where the hard copy version of the jury instructions were not included in the record on appeal and could not be located. By mischaracterizing this flaw in the trial procedure as *trial error*, subject to forfeiture if not objected to at trial and thereafter asserted in the direct appeal, the Arkansas courts have effectively insulated the constitutionally-defective conviction and sentence from further attack in federal proceedings, an unreasonable application of the state procedural default depriving Scott of an opportunity for correction of this due process violation. Certiorari is the appropriate and at this stage, the only remedy, for correction of this violation of Scott's constitutionally protected right to due process of law.

### A. *The conviction and sentence were imposed in violation of due process*

This Court has established the core rule of due process that a criminal conviction requires proof beyond a reasonable doubt of each element of the offense charged and on which the accused is being tried. The test for sufficiency of the

prosecution's evidence in support of conviction was recognized in *In re Winship*, 397 U.S. 358, 364 (1970) and, later, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), where the Court explained:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995), the Court confirmed:

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without “due process of law”; and the Sixth, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” We have held that these provisions require criminal convictions to rest upon *a jury determination that the defendant is guilty of every element of the crime with which he is charged*, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277–278 (1993). (emphasis added).

What is clear from the record in Petitioner Scott's case is that the jury at his trial on the charge of Murder in the First Degree was obligated, as a matter of due process of law, to only reach a verdict of conviction if it determined that the evidence adduced at trial established each element of the offense beyond a reasonable doubt. On appeal from denial of relief and dismissal of his petition, Scott also cited Arkansas authority requiring the trial jury to be instructed on the elements of the offense charged. In *Pridgeon v. State*, 266 Ark. 651, 652, 587 S.W.2d 225, 226 (1979), the Arkansas Supreme Court admonished:

[T]he jury must be told what the elements of the offense charged are, *Johnson v. State*, 142 Ark. 573, 219 S.W. 32 (1920), and that the prosecution must prove each element beyond a reasonable doubt.

The record in this case, however, fails to ensure that jurors were actually instructed on those necessary elements the State was required to prove. While rejecting Scott's constitutional challenge, the supreme court acknowledged that the trial court did not include the elements of first-degree murder in its oral instructions to the jury, and that the record on appeal did not include a copy of the written instructions provided jurors before they commenced deliberations:

The record establishes that the circuit court did not orally instruct the jurors on the elements of first-degree murder at the conclusion of evidence; rather, instead of reading the first-degree-murder instruction, the circuit court proceeded directly to read the second-degree-murder instruction.

*Scott v. Payne, Director*, 2022 Ark. 178, at \*3, fn. 2, 652 S.W.3d at 564.

Presuming that the trial court read from the written jury instructions when addressing jurors orally, the failure to instruct on the elements of the offense seems less likely to result from a reading error than from an omission in the jury instructions as prepared for trial. Not only did the instructions given the jury orally not include the instruction on Murder in the First Degree, AMCI 2d 1002, but contained no reference to a verdict on conviction for this offense when jurors were orally instructed on the alternative verdict forms at the trial court's conclusion of its oral instructions prior to the jury beginning their deliberations *See*, pages 7-9, *supra*.

Neither the state habeas court nor the supreme court directly addressed the issue of whether the imposition of the conviction returned by the jury without having been instructed on the elements of first-degree murder rendered the conviction violative of Scott's right to due process of law. Their silence certainly suggests that had the omission of the elements of this offense would have required reversal of the conviction had the issue of its lawfulness been preserved by objection at trial raised on direct appeal since the state courts are bound to enforce federal constitutional protections. *Michigan v. Long*, 463 U.S. 1032, 1043 (1983):

The state courts handle the vast bulk of all criminal litigation in this country. . . .*The state courts are required to apply federal constitutional standards*, and they necessarily create a considerable body of "federal law" in the process.") (emphasis added).

*B. The mischaracterization of the constitutional violation as "trial error"*

The Arkansas courts avoided addressing Scott's claim that the entry of the conviction by the trial court where jurors returned their verdict without instruction on the necessary elements of first-degree murder by categorizing his claim as "jury instruction error." *Scott v. Payne, Director*, 2022 Ark. 178, at \*4, 652 S.W.3d at 565, referencing circuit court's characterization of claim as an issue of "defective jury instructions," implicating "trial error" not cognizable in habeas corpus. (APP. Exhibit B, ORDER, at 2; ORDER DENYING NEW TRIAL, at 2).



The supreme court concurred with the habeas court's conclusion that because Scott's claim amounted to an allegation of trial error based on defects in the jury instruction process, it was not cognizable under the state habeas corpus statute:

Unless the petitioner can show that the circuit court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue.

*Scott v. Payne, Director*, 2022 Ark. 178, at \*6, 652 S.W.3d at 566. The supreme court then explained that because the trial court had personal jurisdiction over both the accused, Scott, and the subject matter of the case, prosecution of an offense committed within the trial court's jurisdiction, noting that Scott conceded both, his claim was not cognizable in habeas corpus. *Id.* Scott agrees that he did not contest the facial validity of the commitment order, nor complain that the trial court lacked jurisdiction over him personally or the murder prosecution. The supreme court did appropriately explain:

Rather than challenging the court's personal or subject-matter jurisdiction, Scott's jurisdictional argument focuses on the limitations of the circuit court's authority to act even when it has personal and subject-matter jurisdiction. Stated differently, it is Scott's position that his jurisdictional argument presents a case of first impression based on the circuit court's lack of jurisdiction to impose his first-degree-murder conviction because the court did not instruct the jury on the elements of first-degree murder in open court.

*Id.* at \*6-\*7, 652 S.W.3d at 566-567. But, in recognizing that his challenge did not attack the trial court's exercise of personal or subject-matter jurisdiction, nor the facial validity of the commitment order, Scott did not concede that the supreme

court's strict limitation on availability of habeas corpus.

Instead, Scott relied on Arkansas precedent recognizing an additional basis for the habeas court's exercise of its jurisdiction to afford relief in his petition:

While jurisdictional error typically rests on the finding that the court has exercised its jurisdiction as a matter of law, such as in imposing an illegal sentence—one beyond the statutory authority afforded the court, *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002)—the Court has held that jurisdictional error may involve imposition of a facially-correct sentence when the court lacks authority to impose the sentence. *Cantrell v. State*, 2009 Ark. 456, at \*9, 343 S.W.3d 591, 596 (2009), citing *Donaldson*, 370 Ark. 3, at \*6, 257 S.W.3d at 76 (2007) (“We define[d] an illegal sentence as one which the trial court lacks the authority to impose, *even if on its face the sentence is within the statutory range.* (emphasis added)).

(PETITION, at 34, § 79). Thus, even though the commitment order might validly provide that a conviction for first-degree murder and sentence of life imprisonment have been imposed following jury trial, these decisions recognize that a trial court may lack authority to impose a sentence which is otherwise facially valid. Scott persisted in this alternative theory of jurisdictional or fundamental error rendering a conviction or sentence subject to collateral attack, even without objection at trial and at any point in the proceedings.

The Arkansas Supreme Court rejected Scott's argument that its own precedents supported alternative grounds for relief in habeas corpus, holding instead:

The State responds that however Scott may characterize his claim, Scott cannot escape the fact that his claims hinge on purported trial error in instructing the jury. We agree. Despite Scott's attempt to frame his trial-error argument as a jurisdictional argument, our case law is clear. Scott

points out the narrow view taken by this court that a writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a trial court lacked jurisdiction over the cause. We acknowledge that this view is narrow in scope. However, we decline to expand our habeas review in a manner that would encompass Scott's argument on appeal.

*Scott v. Payne, Director*, 2022 Ark. 178, at \*8, 652 S.W.3d at 567. Scott never conceded that the more restricted view of the habeas remedy was correct, pressing his reliance on *Flowers*, *Cantrell* and *Donaldson*, in his brief on appeal. (BRIEF FOR THE APPELLANT, at 21-22). By mischaracterizing Scott's claim as a defect in the jury instructions, the state supreme court avoided the implication of the consequences of finding the conviction and sentence imposed by the trial court as *void*, which would have left the trial court's actions as subject to attack as violative of his right to due process.

The state supreme court persisted in its characterization of the trial court's action in imposing the conviction and sentence without a jury finding of guilt on the elements of first-degree murder as beyond the scope of habeas corpus since Scott's claims did not address a facial defect in the commitment order. In so doing, it avoided application of the statutory grounds set out in Ark. Code Ann. § 16-112-118(b)(1)(A)—(F) for attacking a detention as unlawful relied on by Scott. *Scott v. Payne, Director*, 2022 Ark. 178, at \*9-\*11, 652 S.W.3d at 568.

C. The “trial error” determination is inconsistent with Arkansas precedent applying this Court’s approach to harmless error analysis.

In mischaracterizing Scott’s claim as one of *trial error*, the Arkansas courts misapplied its adoption of this Court’s approach in *Arizona v. Fulminante*, 499 U.S. 299, 307-309 (1991), confirmed in *Sullivan v. Louisiana*, 508 U.S. 274 (1993). The Arkansas Supreme Court adopted the test for *trial error* in *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999), later confirmed in *Clark v. State*, 374 Ark. 292, 305, 287 S.W.3d 567, 576 (2008).

*Fulminante* held that “trial error” may be evaluated for harmfulness based on review of the record, 499 U.S. at 307-309, so that some jury instruction error in terms of a missing element of the offense—for instance, the level of intent required for conviction--may be evaluated on its likely harm to the defendant in compromising his right to due process of law in the trial process. *California v. Roy*, 519 U.S. 2, 6 (1996) (*misdescription* of an element of the offense in a jury instruction is not “structural error” which would otherwise require relief if it defies analysis by harmless error standards). However, here, there is no way to assess harm based on the trial record where the record does not show that jurors were instructed on all elements of the first-degree murder offense charged. While this omission may not qualify as *structural error* under this Court’s decisions, requiring reversal without proof of prejudice, it is beyond reasonable application of the test for harmlessness.

Petitioner recognizes that the Court held that the instruction error addressed in *Neder v. United States*, 527 U.S. 1, 9 (1999), deletion of a single element of the offense in the jury instructions may be subjected to harmless error analysis. (“We have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense.”). Here, in contrast, the record does not support the jury’s verdict of conviction where it fails to show that jurors were ever instructed on the necessary elements for proof of first-degree murder. The error was not one in which a review of the totality of the record shows that evidence leads to a conclusion that the exclusion of a single element did not result in harm to the accused’s right to fair trial.

At Scott’s trial, omission of the elements instruction set out in AMCI 2d 1002, cannot be evaluated for harmlessness in finding that the jury must have found that he acted with the requisite degree of criminal intent—with a purpose of causing the death of the shooting victim—necessary for a conviction for first-degree murder. AMCI 2d 1002 explained that the necessary degree of culpability required proof of his “purpose” in shooting:

“Purpose.”—A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

On direct appeal the Arkansas Supreme Court related no evidence specifically establishing that Scott acted with a purpose to kill, as opposed to knowingly

committing a random shooting done with extreme indifference to human life, or with a purpose to injure the victim, but causing his death, either of which would have supported a verdict on Murder in the Second Degree. *See*, pages 8-9, *supra*.

Here, the omission of all elements of first-degree murder from the instructions orally given jurors by the trial court comprises any credible ability to engage in harmless error analysis, in contrast to those decisions in which the Court has found that the harmlessness test is appropriate when considering omission of single elements of an offense from the instructions provided jurors. The record, including the factual evidence related by the state supreme court on direct appeal, *supra*, at page 6, provides absolute no insight into the degree of criminal intent evident in Scott's action sufficient to distinguish between first and second-degree murder and offers no basis for finding that the trial court's failure to instruct jurors on the elements of the first-degree level of the murder can reasonably be seen as harmless.

*D. The application of a state procedural default rule to foreclose review of the claim of a due process violation is unreasonable under Lee v. Kemna.*

Following the state supreme court's decision upholding the characterization of Scott's claim of a federal due process violation by the habeas court as a matter of jury instruction error characterized as *trial error*, Petitioner Scott petitioned for rehearing of the court's decision that habeas corpus relief was properly foreclosed because his claim should have been litigated in the trial and direct appeal process.

(APP. Exhibit D: APPELLANT SCOTT’S PETITION FOR REHEARING, at 7-9). The habeas court rejected Scott’s claim as a matter of jury instruction error, not distinguishing error in the wording of an instruction or refusal to grant an instruction requested by the defense from the failure of the record to show that the jury’s verdict of conviction on the charge of first-degree murder was not returned with jurors having been instructed during the trial court’s oral instructions on the necessary elements of proof required of the prosecution for conviction on this offense. The Arkansas Supreme Court adopted the position taken by the habeas court, (APP. Exhibit C, ORDER, at 2, and ORDER DENYING MOTION FOR NEW TRIAL, at 2). *Scott v. Payne, Director*, 2022 Ark. 178, at \*3-\*4, 652 S.W.3d at 565.

Petitioner Scott recognizes, of course, that procedural default rules applied by state courts that bar federal courts, including this Court, from reviewing claims not preserved for review in state proceedings reflecting a long-standing approach to designed to afford state courts a reasonable opportunity to correct error and enforce a policy favoring finality in criminal proceedings. *James v. Kentucky*, 466 U.S. 341, 348 (1984). And, Petitioner also recognizes that Arkansas has consistently followed a policy of applying procedural to bar consideration of claims not properly preserved at the appropriate stage of state court proceedings, including claims asserting violations of federal constitutional protections. In *Hinkston v. State*, 340 Ark. 530, 539, 10 S.W.3d 906, 909 (2000), for instance, trial counsel, counsel had only argued

that the exclusion of expert forensic opinion to be offered on the accused's ability to form the requisite culpable mental state for conviction reflected an abuse of discretion based on the liberal rules governing admission of expert opinion. Counsel did not rely on the Sixth Amendment or the Arkansas Constitution, but appellate counsel's attempt to argue these alternative grounds led the state supreme court to hold that the alternative theories of error had been waived: "We do not consider arguments, even constitutional ones, raised for the first time on appeal."

Nevertheless, Scott argues that the error in his trial resulting his conviction and sentence being imposed upon jury findings that did not necessarily involve a determination that the prosecution's evidence was sufficient to support the elements of Murder in the First Degree, a violation of due process protected by the 14<sup>th</sup> Amendment, constituted error rendering his conviction and sentence substantively void. In *Lee v. Kemna*, 534 U.S. 362, 366-67 (2002), the Court noted that exceptions to the general principle of deference by federal courts to state procedural default rules exist. It explained: "There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* at 376. Petitioner asserts that the error in this case presents just such an exceptional situation because he stands convicted of first-degree murder and is serving a life sentence where the record does not establish that his convictions reflect proof beyond a reasonable doubt of the elements of first-



degree murder. Moreover, as Scott argues, the evidence is not sufficient for a determination that his conviction for first-degree murder, as opposed to second-degree murder, was based upon the jury's reasonable conclusion that his guilt for conviction of murder with "purpose" was established beyond a reasonable doubt.

Petitioner Scott's claim of constitutional violation of due process in the trial court's imposition of the conviction and sentence for an offense on which jurors were never properly instructed with respect to their duty to base their verdict on their obligation to assess the sufficiency of the evidence for proof of each element of the offense warrants review by this Court. The Arkansas Supreme Court embraced the habeas court's rejection of his constitutional challenge when it complained:

Petitioner seeks to expand habeas relief to include a boundless opportunity to challenge a conviction. He cannot offer any precedent to support his contention because none exist. The cases he cited are ones that address a defendant's claims at trial, on direct appeal, or presented in a timely Rule 37 petition. The Court has reviewed each of petitioner's claims and finds that his theories do not fall within the purview of a habeas.

(APP. Exhibit B: ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL, at 2); *Scott v. Payne, Director*, 2022 Ark. 178, at \*5, 652 S.W.3d at 565-566. Scott's petition does not reflect some questionable motivation in seek[ing] to expand habeas relief to "include a boundless opportunity to challenge a conviction," however. Instead, he simply asks the Court to examine whether the state courts' application of an otherwise regularly applied rule of procedural default in this unique

situation reflects application of the procedural default which will other preclude federal review of his federal constitutional claim is proper in insulating his procedurally defective state court conviction and life sentence from consideration.

In *Lee*, the Court explained that while a state's procedural default rule does not necessarily warrant foreclosure of review of a significant federal constitutional claim. It explained that while the application of even a reasonable state rule regarding preservation of error and assertion of federal claims is typically appropriate, it should not always warrant deference:

[U]nyielding application of the general rule would disserve any perceivable interest. is unassailable in most instances, *i.e.*, it ordinarily serves a legitimate governmental interest; in rare circumstances.

*Lee*, 534 U.S. at 379-380. Scott's claim, as the habeas court implicitly recognized, is based on an issue of first impression, is *novel*, as the lack of supporting precedent noted in its order demonstrates. The restricted availability of habeas relief noted by the state supreme court in limiting the remedy by rejecting his reliance on Arkansas precedent in *Flowers*, *Cantrell* and *Donaldson*, effectively precludes review on the merits of his claim that would then permit review by the federal courts. Scott has consistently admitted the lack of authority in Arkansas law supporting his federal claim, but that fact merely substantiates his argument that it warrants review on the merits as a matter of first impression.

Scott brings this petition in a reasonable search for justice implicated by the

admittedly rare circumstances of his continuing incarceration on the life sentence imposed by jurors who were not instructed during the trial court's oral instructions at the close of evidence on the constitutional requirement that a conviction must be supported by evidence establishing each element of the offense charged beyond a reasonable doubt. It is not an academic exercise designed to open a door to "boundless opportunity" to challenge convictions through habeas corpus proceedings.

*Lee* recognizes the need for the rare exception to the routine application of otherwise reasonable state rules of procedural default that will bar federal review of constitutional claims. The Court should grant Scott's petition to provide a reminder to state courts that the application of those reasonable rules must give way in *rare circumstances*. This is just such a case and review of Scott's claim is warranted to avoid the "unyielding application" of a procedural default rule to bar review when its application serves no *perceivable interest*. Here, the application of the procedural default rule by the state courts serves only to enforce continued imprisonment on the basis of a life sentence questionably imposed in light of the record. Scott has served the maximum sentence warranted by the evidence supportive of the lesser-included offense of Murder in the Second Degree. His plea in this Court is one for justice based on *rare circumstances*. The grant of certiorari will reinforce the continuing vitality of *Lee* in precluding the bar to review on the merits in rare cases.

## CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing analysis, the Court should not defer to the application of the unreasonable state procedural default rule asserted by the Arkansas Supreme Court and should grant the writ and reverse the conviction and sentence, remanding for reconsideration of its holding that failure to instruct on the necessary elements of first-degree murder raises a cognizable claim of due process violation under the 14<sup>th</sup> Amendment in light of this Court's holding in *Lee v. Kemna, supra*.

Respectfully submitted this 28th day of February, 2023.

/s/ J. Thomas Sullivan  
J. Thomas Sullivan  
Member of the Bar of the  
Supreme Court of the United States  
1122 West Capitol  
Little Rock, Arkansas 72201  
(501) 376-6277  
sullivanatty@gmail.com

Attorney for the Petitioner  
Ricky Lee Scott