No. 17-1449

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

v.

JASPER PHILLIP RUSHING,

Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION
(CAPITAL CASE)

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INTRODUCTION

The State frames its first question presented as whether the Arizona Supreme Court erred in holding that "introduction of a defendant's *past violent conduct* in the penalty phase of a capital trial *automatically* requires that jurors be informed about the defendant's parole ineligibility" under *Simmons v. South Carolina*, 512 U.S. 154 (1994). Pet. i (emphasis added). But this case does not present that question. Far from holding that evidence of respondent Jasper Rushing's past violent conduct automatically triggers a *Simmons* instruction, the Arizona Supreme Court concluded, instead, that the prosecution's "introducing evidence of Rushing's past violent acts, *his associations with violent groups, and his plans upon release from prison*" all combined to put his future dangerousness at issue for purposes of *Simmons*. Pet. App. 18-19 (emphasis added).

The Arizona Supreme Court's conclusion that Rushing's future dangerousness was at issue does not "br[eak] new ground," Pet. 5, with respect to this Court's jurisprudence. Nor can the State show that the decision of the Arizona Supreme Court conflicts with precedent from any other state. No jurisdiction holds that a *Simmons* instruction can be withheld under the circumstances here.

The State also advances a novel claim that *Simmons* does not apply to defendants convicted of in-prison crimes. But the State did not ask the court below to adopt this rule. Nor has the State identified any other court that has even considered the question the State now asks this Court to decide. In any event, the State's proposed rule finds no support in the logic of *Simmons*. That case was about

ameliorating a jury's false fear that a defendant sentenced to life in prison may someday be released and commit future crimes outside of prison. Accordingly, so long as the jury might incorrectly think the defendant could be released (as was the case here, Pet. App. 19-20), it does not matter where the crime took place.

Finally, it is worth noting that Arizona sentencing statute for premeditated murder changed in 2012, after the crime in this case was committed. As explained below, therefore, *Simmons* has little if any forward-looking relevance in the State. No further review is warranted.

STATEMENT OF THE CASE

A. Legal Background

The prosecution in capital cases is always free to introduce evidence concerning the defendant's future dangerousness. But in a line of cases beginning with *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court has held that "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility.'" *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001) (alteration in original) (quoting *Ramdass v. Angelone*, 530 U.S. 156, 165 (2000) (plurality opinion)). The *Simmons* rule rests on the premise that informing the jury that a defendant will never be released from prison "will often be the only way that a violent criminal can successfully rebut" an argument that he will be a danger to

society if not given a death sentence. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment); *see also id.* at 163-64 (plurality opinion).

Simmons did not elaborate what exactly it meant for a defendant's future dangerousness to be at issue. In *Kelly v. South Carolina*, 534 U.S. 246 (2002), however, this Court explained that a *Simmons* instruction is required where the prosecution introduces and "accentuate[s]" evidence with "a tendency to prove dangerousness in the future." *Id.* at 254-55. The Court explained that a jury that hears "evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior." *Id.* at 253.

Most recently, in *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam), this Court held that Arizona's sentencing scheme governing first-degree murders contained the state-law prerequisite for a *Simmons* instruction. *Id.* at 1818-19. That scheme, which governed not only in *Lynch* but also in the present case, provided for life sentences that made defendants eligible for release by executive clemency after twenty-five years. *Id.* at 1819. Before this Court's decision in *Lynch*, the Arizona Supreme Court had held that the potential for clemency rendered *Simmons* inapplicable. *See id.* at 1819-20. But this Court explained that *Simmons* had "expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Id.* at 1819. It summarily reversed the Arizona Supreme Court's holding that a *Simmons* instruction was not required. *Id.* at 1820.

B. Factual and Procedural Background

1. This case arises from respondent Jasper Rushing's conviction for premeditated first-degree murder. During the penalty phase, Rushing introduced evidence that he was physically and sexually abused as a child. R.T. 7/20/15 at 28-29, 35-36, 40. One of his abusers was his stepfather, who beat and molested Rushing repeatedly. R.T. 7/6/15 at 68; R.T. 7/20/15 at 40. Upon hearing that the stepfather had also sexually molested Rushing's sister, Rushing shot and killed him. R.T. 7/20/15 at 40. Eventually, Rushing pleaded guilty to first-degree murder for that crime and was sentenced to life in prison with the possibility of release by executive clemency after twenty-five years. R.T. 7/6/15 at 85.

Despite Rushing's suffering from posttraumatic stress disorder (PTSD) and bipolar mood disorder, Pet. App. 21, the prison repeatedly ignored Rushing's requests for mental health medication, R.T. 7/7/15 at 116-17. The prison also placed Rushing in solitary confinement for at least one and a half years. R.T. 7/20/15 at 93. What is more, while in prison, Rushing was the victim of additional sexual abuse and was targeted by prison gangs. R.T. 7/7/15 at 114-15. In 2010, after Rushing expressed fear for his safety, the prison placed him in an isolation cell with Shannon Palmer. Pet. App. 2-3. Palmer was schizophrenic, R.T. 7/6/15 at 62, and he had a reputation in prison for being a sex offender with an "interest in small children," R.T. 7/8/15 at 31. The two men were forced to share a single isolation unit—designed for one person—that had one cot and a mattress on the floor, and no window to the outside world. Pet. App. 2-3; R.T. 7/7/15 at 103-04.

Rushing and Palmer shared this cell for twenty-two days. Appellant's Opening Brief in Ariz. S. Ct. at 2-3. According to Rushing, Palmer gradually "became delusional" and began speaking incessantly about having sex with children. Pet. App. 21, 27. At one point, Palmer made sexual comments about Rushing's young niece. *Id.* 21. Eventually, Rushing "snapped." *Id.*

Rushing bludgeoned Palmer unconscious with a rolled-up soft-cover book placed in a sock, then used a razor blade to slit his neck and cut off his penis. Pet. App. 4. Rushing called for prison officials, telling them, "I think I just killed my cellie." *Id.* 3. Palmer died on the way to the hospital. *Id.* 4.

2. The State indicted Rushing on one count of premeditated first-degree murder and sought the death penalty. Pet. App. 4. At the conclusion of the guilt phase of the trial, the jury found Rushing guilty. *Id.*

During the penalty phase, the prosecution disputed Rushing's version of the crime. In contending that Rushing should be given a death sentence, the State suggested that Rushing killed Palmer to "carry out the goals of the Aryan Brotherhood." R.T. 7/20/15 at 123. Although Palmer was white, the prosecution suggested that Rushing killed him because Palmer was schizophrenic, arguing that "Hitler didn't have any tolerance for mentally ill people either." *Id.* The State thus portrayed Rushing as an "up-and-comer" for the Aryan Brotherhood, R.T. 7/8/15 at 77, likely to continue his violent history and pursue violent plans upon release.

Most notably, the prosecution asked a defense witness to read a letter that Rushing had written to his mother years earlier, in which Rushing described his

plans following his release from prison to form a white supremacist group and take action "to bring things back in order" in Prescott, Arizona. Pet. App. 18. The jury heard, for example, "I've been racist and prejudiced . . . since I was little, nine or 10 years old, but only now am I going to do something proactive with it"; "Our race is dying. I feel I need to do something . . . to ensure a safe environment for our white children"; and "If there was one thing in life I was meant to do, it was this, and I'm dedicating myself to this course." R.T. 7/8/15 at 63, 67-68. During the prosecution's closing argument, it again read portions of the letter to the jury:

> Dear mother, you've always known I've been racist and something to an extent. Well, I'm not sure you know exactly how racist I was. I have been that way since I was little, 9 or 10. But only now I'm going to do something proactive with it. When I get out of here, me and some other people from in here are starting our own group of skinheads in Prescott. AWA Skins. It means Aryan Warriors of Arizona. All I'm trying to do is continue my perfect Aryan folk have been trying to do for over 6,000 years. We're not going to go around just smashing people. Our race is smarter than that. Please don't say anything about this to anybody. I mean, I could—you could tell Wayne—that was her husband at the time—but other than that, please don't. We're starting this group legally but we can't do that until we're out. It would just jam me up here longer. I'm getting out on August 14th. After that, I don't care who knows. This isn't another Timothy McVeigh thing so don't freak. It's just white boys who want their town back. Can you blame them. Our race is dying. I feel I need to do everything possible to ensure a safe environment for our white children. The Aryan race culture and destiny are my priority. I was meant to do this and I'm dedicating myself to this cause. Then he writes: Sieg Heil 88/14. And remember 88—the 8 is the eighth letter in the alphabet which is H. 88 means HH, which is Heil Hitler. And he draws pictures of swastikas and lightning bolts.

R.T. 7/20/15 at 120-21.

The State also suggested during the penalty phase that Rushing was "a psychopath or sociopath." R.T. 7/20/15 at 114. It highlighted that Rushing shot and

killed his stepfather while he slept, threatened corrections officers, got into fights in prison, and had hidden two shanks inside his rectum. Pet. App. 18.

As was common in Arizona before this Court decided *Lynch v. Arizona*, the trial court denied a *Simmons* instruction on the ground that if the jury imposed a life sentence, the potential to receive executive clemency after twenty-five years rendered *Simmons* inapplicable. Min. Entry 5/27/15 at 3-4. Accordingly, the trial court instructed the jury that if it imposed a life sentence, the judge would have the choice to sentence the defendant *either* to life imprisonment without the possibility of release from prison *or* to life imprisonment with the possibility of release after twenty-five years. Pet. App. 16.

The jury returned a verdict that Rushing should be sentenced to death. Pet. App. 5.

3. On appeal, the Arizona Supreme Court recognized that before *Lynch* it had held that "even when a defendant's future dangerousness [was] at issue, the type of instruction given by the trial court here [did] not violate *Simmons*." Pet. App. 17. But it acknowledged that in *Lynch*, this Court rejected the Arizona Supreme Court's holding, and held that Arizona law governing crimes such as this one (committed before 2012), contained the prerequisite for a *Simmons* instruction. Pet. App. 17.

Applying *Simmons* and its progeny, the Arizona Supreme Court vacated Rushing's death sentence and remanded for a new penalty phase proceeding. After considering the evidence of "Rushing's past violent acts, his associations with

violent groups, and his plans upon release from prison," the Arizona Supreme Court held that Rushing's future dangerousness was at issue, such that denying Rushing a *Simmons* instruction was in error. Pet. App. 18-20.

REASONS FOR DENYING THE WRIT

I. The State's question whether evidence of a defendant's past violent conduct automatically implicates future dangerousness does not warrant review here.

A. This case is not a vehicle for deciding whether evidence of a defendant's past violent conduct suffices to trigger a *Simmons* instruction.

The State asks this Court to decide whether the "introduction of a defendant's past violent conduct in the penalty phase of a capital trial automatically requires" a *Simmons* instruction. Pet i. But this case does not present that question. The Arizona Supreme Court did not hold that evidence of a defendant's "past violent conduct," standing alone, "automatically" triggers a *Simmons* instruction. Rather, in holding that the State placed Rushing's future dangerousness at issue, the Arizona Supreme Court relied not only on the prosecution's evidence of Rushing's past violent acts, but also the State's highlighting (1) his plans upon release from prison and (2) his inherently violent character. Pet. App. 18-19.

First, the State put Rushing's future dangerousness at issue by repeatedly reminding the jury of his stated "plans[,] upon release from prison," to take violent, gang-related action. Pet. App. 18. As the Arizona Supreme Court explained, the prosecution emphasized Rushing's affiliation with the Aryan Brotherhood and his

intention, "[w]hen I get out of here," R.T. 7/20/15 at 120, to form a "Skinhead group." Pet. App. 18. Through two readings of a letter Rushing wrote to his mother while in prison, the prosecution highlighted Rushing's stated plans "to bring things back in order" in Prescott upon his release and his desire "to ensure a safe environment for our white children." R.T. 7/8/15 at 66; R.T. 7/20/15 at 121. The State also reminded the jury of Rushing's gang-related tattoos and referred to him as a "skinhead" and a "torpedo" who "get[s] into protective segregation" to commit violent acts on behalf of a gang. R.T. 7/20/15 at 120, 122; R.T. 7/8/15 at 118-19.

Second, wholly apart from "aggravating circumstances or the facts of the [charged offense]," Pet. 11, the State portrayed Rushing as inherently prone to violence. The prosecution argued that Rushing is what "would be called a psychopath or sociopath." R.T. 7/20/15 at 114. To support that characterization, the State pointed all the way back to Rushing's history of fist fighting and fire-setting as an adolescent. R.T. 7/6/15 at 159, 168; R.T. 7/20/15 at 74-77, 119. As the Arizona Supreme Court noted, the State also emphasized that Rushing threatened prison officers, got into fights in prison, and smuggled shanks in his rectum. Pet. App. 18; *see also* R.T. 7/6/15 at 85-86; R.T. 7/20/15 at 98, 100. Finally, the State compared Rushing to Adolf Hitler. R.T. 7/20/15 at 123.

In short, the Arizona Supreme Court based its future dangerousness holding on far more than "past violent conduct," Pet. i. Evidence of Rushing's past violent

conduct was only a single component—and not even the dominant one—of the court's conclusion that future dangerousness was at issue.[1]

B. The Arizona Supreme Court's decision faithfully applies this Court's precedent.

The Arizona Supreme Court correctly determined that "the prosecutor placed Rushing's future dangerousness at issue." *See* Pet. App. 18-19. "Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future." *Kelly*, 534 U.S. at 254; *see also Simmons*, 512 U.S. at 165 (plurality opinion).

In *Kelly*, this Court determined that evidence that the defendant participated in escape attempts and carried a shank—along with the prosecution accentuating that evidence—put future dangerousness at issue. 534 U.S. at 253-55. According to the Court, evidence of such "violent behavior in prison can raise a strong implication of 'generalized . . . future dangerousness.'" *Id.* at 253 (quoting *Simmons*, 512 U.S. at 171 (plurality opinion)). "A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior." *Id.* at 253-54.[2]

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[1] The State is also wrong that this case implicates the question whether a *Simmons* instruction is warranted "when the State's evidence shows future dangerousness but the prosecutor *does not argue it*," Pet. 10 (emphasis in original) (quoting *Kelly*, 534 U.S. at 255 n.4). In addition to introducing the above evidence, the State accentuated that evidence—and used it as a platform for further argumentation—at closing. Indeed, in holding that Rushing's future dangerousness was at issue, the Arizona Supreme Court relied on the fact that the prosecution "highlighted" evidence at closing. Pet. App. 18. Both *Simmons* and *Kelly* similarly relied on the prosecution's closing argument in determining that future dangerousness was at issue. *See Simmons*, 512 U.S. at 157 (plurality opinion); *Kelly*, 534 U.S. at 249-50, 255-56.

[2] To be sure, the prosecution in *Kelly* also explicitly spoke of the defendant as a cold-blooded murderer and described qualities that made him "a little more dangerous." 534 U.S. at 249-50. But the Court explained that "[e]ven if [it] confine[d] the evidentiary consideration to the evidence" showing a propensity for violence, that evidence alone put the defendant's future dangerousness at

So too here. The State introduced, and highlighted at closing, an abundance of evidence regarding "Rushing's past violent acts, his associations with violent groups, and his plans upon release from prison." Pet. App. 18. Accordingly, this case is even easier than *Kelly*. In that case, the prosecution introduced evidence solely regarding the defendant's past actions. Here, the State introduced—and stressed at closing—what Rushing would do "upon release from prison." Pet. App. 18. The State coupled that evidence and argumentation with implications during its opening and closing statements "that Rushing could be released" if not given a death sentence. *Id.* 19; R.T. 7/20/15 at 58-59. Accordingly, the State created a "false dilemma by advancing generalized arguments regarding [Rushing's] future dangerousness while, at the same time, preventing the jury from learning that [Rushing] never will be released on parole," *see Simmons*, 512 U.S. at 171 (plurality opinion).

C. The Arizona Supreme Court's decision does not conflict with precedent from any other jurisdiction.

The State is incorrect that if the California, South Dakota, or Pennsylvania Supreme Court had decided Rushing's case, "the outcome would have been different." Pet. 15.

1. The California and South Dakota cases that the State cites decided whether particular *Simmons* instructions were sufficient—not whether a *Simmons* instruction was required.

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issue. *See id.* at 253. The dissenting opinions recognize as much. *See id.* at 261 (Rehnquist, C.J., dissenting) (stating that the "test" is whether the evidence at trial raises an "implication" of future dangerousness to society, as the majority established); *id.* at 263 (Thomas, J., dissenting).

In California, state law requires parole ineligibility instructions in capital cases, regardless of whether future dangerousness is at issue. *See* Cal. Penal Code § 190.3 (requiring a jury instruction that a life term is "without the possibility of parole"). Accordingly, the issue in *People v. Wilson*, 114 P.3d 758 (Cal. 2005), was not whether a *Simmons* instruction was required. Rather, it was whether a particular instruction on "life without possibility of parole" adequately conveyed that the defendant would never be released from prison. *Id.* at 788-89. Because the California Supreme Court held that it did, "the defendant's claim based on *Simmons* and its progeny fail[ed]." *Id.* at 790.

Thus, the State is wrong to contend that the *Wilson* court "held that *Simmons* and *Kelly* did not apply," Pet. 14. To the contrary, the court assumed without deciding that the defendant's future dangerousness was at issue, thus requiring a *Simmons* instruction. *Wilson*, 114 P.3d at 790.

The State's contention (Pet. 14-15) that *Moeller v. Weber*, 689 N.W.2d 1 (S.D. 2004), conflicts with the decision here fails for a similar reason. In *Moeller*, the jury received an instruction defining a life sentence as "life imprisonment without parole," and the trial court there refused to give any additional instruction when the jury asked whether, once a life sentence without parole was imposed, the defendant would ever have a chance to appear before a parole board. *Id.* at 8. The South Dakota Supreme Court reiterated its earlier holding that the instruction given was an "accurate and complete reflection of the law" and, therefore, satisfied all that

Simmons would have required. *Id.* at 8-9 (quoting *State v. Moeller*, 616 N.W.2d 424, 461 (S.D. 2000)).

To be sure, the *Moeller* court held in the alternative that "future dangerousness was not specifically raised as a concern by [the] State." 689 N.W.2d at 8 (quoting *State v. Moeller*, 616 N.W.2d at 461). But the State acknowledges in its petition that the evidence presented in *Moeller* "concerned only . . . the crime for which the defendant was charged." Pet. 14. Here, in contrast, the Arizona Supreme Court based its holding on far more than mere evidence of the crime charged, pointing to the prosecution's presentation of evidence that Rushing planned to form a skinhead group upon release, shot and killed his stepfather while he slept, threatened corrections officers, got into fights in prison, and hid shanks in his rectum. Pet. App. 18.

2. The State's contention (Pet. 12-13, 15) that the Pennsylvania Supreme Court would have decided this case differently is also unpersuasive. The Pennsylvania Supreme Court has reversed death sentences where, as here, the prosecution introduced evidence of a defendant's propensity for future violence and the trial court denied the defendant a *Simmons* instruction. In *Commonwealth v. Trivigno*, 750 A.2d 243 (Pa. 2000), for example, the Pennsylvania Supreme Court vacated the defendant's death sentence on *Simmons* grounds because the prosecution characterized the defendant's prior convictions as "a determinant of where the man is, where he's going, not just where he's been." *Id.* at 253-54. The State cites three other Pennsylvania cases (Pet. 12-13) that rejected *Simmons*

claims. But none denied a *Simmons* instruction where the prosecution presented evidence—as it did here—of a defendant's violent future plans and inherently violent character.

In *Commonwealth v. Chmiel*, 889 A.2d 501 (Pa. 2005), the only conceivable evidence of future dangerousness related to the facts of the crime charged, not whether the defendant had a "dangerous 'character.'" *See id.* at 536-38 (quoting *Kelly*, 534 U.S. at 254-55). Similarly, in *Commonwealth v. Baumhammers*, 960 A.2d 59 (Pa. 2008), the Pennsylvania Supreme Court held that evidence of the defendant's non-violent mental disorders and the prosecution's calling him "a liar, a rule-breaker, and irresponsible" did not place his future dangerousness at issue. *Id.* at 91. And in *Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011), the court rejected the defendant's argument that he was entitled to a *Simmons* instruction simply because the prosecution introduced evidence of his past violent felonies and "antisocial features." *Id.* at 299, 302-03. Here, in contrast, the State placed Rushing's future dangerousness at issue by introducing evidence of "his associations with violent groups[] and his plans upon release from prison," as well as his "past violent acts." Pet. App. 18. This accumulation of evidence—most notably, Rushing's letter to his mother detailing his future plans to commit violence upon his release—rises far beyond that at issue in any of the three Pennsylvania cases that the State cites.

Finally, the Pennsylvania Supreme Court in *Spotz* limited its holding to cases in which the prosecution "sets forth a capital defendant's history of prior violent

offenses, *without* graphic description of violence" and does not "use epithets suggestive of violence to describe" the defendant. 18 A.3d at 302-03 (emphasis added). Here, the prosecution did both. In its closing argument, the State graphically described Rushing "grabb[ing] a handful of pecker, pull[ing] it out as far as [he] could get it" and "cutting until it fell off," despite some "unexpected ligaments and whatnot in there." R.T. 7/20/15 at 140. The State also used epithets suggestive of violence, comparing Rushing to Hitler and describing him as a "psychopath or sociopath." *Id.* at 114, 123.

D. Questions regarding the *Simmons* rule have little ongoing relevance in Arizona or anywhere else.

1. Two changes in the legal landscape make it increasingly unlikely that cases like Rushing's will arise in the future in Arizona.

First, at the time of Rushing's trial, the Arizona Supreme Court had held that Arizona's sentencing scheme governing premeditated murders did not trigger the need for *Simmons* instructions. Pet. App. 17; *see also, e.g.*, *State v. Benson*, 307 P.3d 19, 32-33 (Ariz. 2013). On that basis alone, the trial court denied Rushing's request for such an instruction. *See* Min. Entry 5/27/15 at 3-4.

But in *Lynch*, this Court held to the contrary, explaining that the possibility of executive clemency did not eliminate the need for a parole ineligibility instruction. 136 S. Ct. at 1819-20. Therefore, if Rushing's trial had occurred after *Lynch*, it would have been clear that insofar as his future dangerousness was at issue, he was entitled to a *Simmons* instruction.

Second, Arizona's sentencing scheme itself has changed since Rushing's crime, thereby rendering disputes over whether a defendant's future dangerousness has been put at issue less likely to arise. When Rushing committed the charged offense in 2010, Arizona law provided for three possible sentences for first-degree murder: death, life imprisonment without the possibility of release from prison, or life imprisonment with the possibility of release after twenty-five years. Rushing's jury was instructed accordingly (although it was not informed that the sole mechanism for release after twenty-five years was executive clemency, not parole). Pet. App. 16; *see also Lynch*, 136 S. Ct. at 1819.

But for defendants convicted of premeditated murder occurring after August 2, 2012, the possibility of release after twenty-five years is no longer available. Instead, the only available sentences are death or imprisonment for "natural life," which means the defendant is "not eligible" for parole or release "on any basis." Ariz. Rev. Stat. Ann. § 13-751(A)(1). Assuming courts instruct juries in accordance with Arizona law, juries will now always understand—whether or not future dangerousness is at issue—that a life sentence precludes parole. *See* Arizona Pattern Jury Instructions – Criminal, Capital Case 1.1 (State Bar of Ariz. 2016) ("The sentence of 'life without possibility of release from prison' means the defendant will never be eligible to be released from prison for any reason for the rest of the defendant's life").

2. Questions regarding the type of evidence and argumentation that triggers the need for a *Simmons* instruction are unlikely to arise going forward in other jurisdictions, either.

When this Court decided *Simmons*, it observed that "a large majority of States which provide for life imprisonment without parole as an alternative to capital punishment inform the sentencing authority of the defendant's parole ineligibility." 512 U.S. at 166-67 (plurality opinion). The *Simmons* plurality noted that only six states employed juries in capital sentencing, provided for life imprisonment without parole, and either "refuse[d] to inform sentencing juries" of parole ineligibility or had "not considered" whether to do so. *Id.* at 167-68 nn.7-8.

That majority has become close to universal. Today, virtually all states with capital punishment inform juries as a matter of state law or practice—regardless of whether future dangerousness is at issue—that life sentences preclude the possibility of parole.[3] Federal courts likewise make juries aware of capital

[3] The six states the Court cited in *Simmons* were Florida, Pennsylvania, South Carolina, South Dakota, Virginia, and Wyoming. In Florida, judges now always instruct juries that they may impose a sentence of life imprisonment without the possibility of parole as an alternative to death. *See* Florida Standard Jury Instructions – Criminal § 7.11(a) (Fla. Bar 2017). In South Carolina and Virginia, judges are now required to issue the instruction upon a defendant's request. *See* S.C. Code Ann. § 16-3-20(A); Va. Code Ann. § 19.2-264.4(A). While South Dakota does not have a statute or pattern jury instruction explicitly requiring a parole-ineligibility instruction in all capital cases, the instruction appears to be given as a matter of practice. *See Moeller*, 689 N.W.2d at 8-9; *Rhines v. Weber*, 608 N.W.2d 303, 311 (S.D. 2000).

Arizona was not among these six states because, at the time of *Simmons*, capital sentencing decisions were made by judges, who were necessarily "fully aware of the precise parole status of life-sentenced murderers." *Simmons*, 512 U.S. at 167 n.7 (plurality opinion). The same was true in Idaho, Montana, and Nebraska. Today, juries in Idaho issue sentences in capital cases, and judges are required to instruct juries that they may sentence the defendant to life without possibility of parole. *See* Idaho Code § 19-2515(7). And judges in Montana and Nebraska continue to issue sentences in capital cases without recommendation from juries, rendering *Simmons* irrelevant there. *See* Mont. Code Ann. §§ 46-18-301, -305; Neb. Rev. Stat. §§ 29-2520, -2522.

When *Simmons* was decided, five other states—Kansas, Kentucky, North Carolina, Ohio, and Texas—did not provide for life-without-parole sentences as an alternative to death. These states

defendants' parole ineligibility as a matter of course, regardless of whether future dangerousness is at issue. *See* 18 U.S.C. § 3593(e).

II. The State's question whether *Simmons* applies when a defendant is charged with an in-prison crime does not warrant review.

The State also asks this Court to grant certiorari to announce a new rule that defendants have no right to a *Simmons* instruction when they are accused of committing crimes in prison. But the State never raised this precise argument in the state courts, and no state court addressed it. Nor has the State pointed to any other court that has even considered it. In any event, the State's argument is incorrect on the merits.

1. This case is an improper vehicle for deciding the State's question. It has long been "this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion). Moreover, when deciding whether to review state court decisions, "'due regard for the appropriate relationship of this Court to state courts may suggest greater restraint in applying [this] 'pressed or passed upon' rule." *United States v. Williams*, 504 U.S. 36, 44 n.5 (1992) (citation omitted) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940)).

Here, the State never argued before the trial court or the Arizona Supreme Court for a per se rule that "*Simmons* does not apply" to capital defendants accused

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do so today. But their trial courts—just as in virtually every other jurisdiction—instruct juries that they may opt for a sentence of life imprisonment without the possibility of parole. *See* Pattern Instructions Kansas – Criminal § 54.090 (Kan. Judicial Council 2017) (instructing on life in prison without the possibility of parole for crimes committed after June 30, 2004); Ky. Rev. Stat. Ann. § 532.030(4); N.C. Gen. Stat. § 15A-2002; Ohio Official Jury Instructions: Criminal § 503.011 (Ohio Judicial Conf. 2018); Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(2)(B).

of in-prison crimes. Pet. 17 (capitalization removed). To be sure, the State argued that any *Simmons* error was "harmless" because Rushing "committed this murder while in custody on a life sentence for another first degree murder." Appellee's Answering Brief in Ariz. S. Ct. at 81-82 (emphasis removed). But arguing that a constitutional right does not apply at all is not the same as arguing that a violation of the right is harmless. The Arizona Supreme Court rejected the State's harmless-error argument, Pet. App. 19-20, and the State does not renew it here.[4]

2. Not only was the Arizona Supreme Court not asked to consider the question whether *Simmons* applies to cases involving in-prison crimes, the State points to no conflict—or any lower court authority at all—on this question. Indeed, respondent is aware of no case that has considered the question the State raises, let alone held that defendants who commit crimes in prison are not entitled to a *Simmons* instruction.

3. Regardless, defendants retain their right to a *Simmons* instruction when they are accused of committing crimes while incarcerated. *Simmons* addressed the concern that a jury will draw a false inference that a defendant, who is in fact ineligible for parole, would eventually be released if given a life sentence and thereby "pose a continuing threat to the community." *Simmons*, 512 U.S. at 176 (O'Connor, J., concurring in the judgment). This concern is present regardless

[4] Even the State's harmless-error argument relied on the *length* of Rushing's previous sentence, not the *setting* of his offense. The State argued that any *Simmons* error was harmless because Rushing "*was already serving a life sentence* for murdering his stepfather." Pet. App. 19 (emphasis added). In other words, the State argued that the jury knew from the evidence at trial that Rushing would never be released from prison. That is distinctly different from arguing, as the State does now, that any "defendant who has killed while in prison"—regardless of the length of the defendant's preexisting sentence—should not receive a *Simmons* instruction, Pet. 18.

of where the homicide for which a state seeks the death penalty occurred. That is, even if a homicide occurs in prison, a jury may realistically fear that the defendant could eventually be released and thereby pose a threat outside prison. In fact, the Arizona Supreme Court pointed to that precise fear, noting that the prosecutor had told jurors that "the court had rejected the State's request for a natural life sentence for the step-father's murder and instead imposed a life sentence with the possibility of release after 25 years," and that, in view of the fact that Rushing was 35 years old at the time of sentencing, some jurors "might have believed that if the court again refused to impose a natural life sentence, Rushing could be released after serving twenty-five years of a second life sentence." Pet. App. 19, 20.

The State's argument to the contrary relies on isolated language plucked from inapposite cases. *See* Pet. 17. In *O'Dell v. Netherland*, 521 U.S. 151 (1997), this Court never reached the question whether a parole ineligibility instruction was warranted, because it held that *Simmons* did not apply retroactively to O'Dell's case. *Id.* at 153. Similarly, the sole issue in *Ramdass* was whether *Simmons* applied to a defendant who was *not* ineligible for parole at the time of sentencing. 530 U.S. at 159 (plurality opinion). The State's quoted language—that "[e]vidence of potential parole eligibility is of uncertain materiality," Pet. 17 (quoting *Ramdass*, 530 U.S. at 170)—applies only to defendants who are "potential[ly]," rather than definitively, ineligible for parole. *See Ramdass*, 530 U.S. at 170.

The State also protests that "for a defendant who has killed while in prison, a sentence of incarceration has already proven ineffective in preventing him from

killing again. Pet. 18. But the prosecution is always "free to argue that the defendant will pose a danger to others *in prison* and that executing him is the only means of eliminating the threat" to prison inmates and staff. *Simmons*, 512 U.S. at 165 n.5 (plurality opinion) (emphasis added). This case does not raise the question whether such argument alone would require a *Simmons*-type instruction. Regardless, a jury's concern that the defendant is a danger to people inside prison is wholly independent of the need to accurately inform the jury that the defendant's poses no potential future threat to people outside prison. Here, for instance, the State's introduction of Rushing's letter to his mother illustrated future dangerousness *outside* of prison, thus reinforcing the need for a *Simmons* instruction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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