CAPITAL CASE

No. 17-1449

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

JASPER PHILLIP RUSHING,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF FOR PETITIONER

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At issue in this appeal is the recurring question of how far lower courts should stretch the due process right this Court announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The Arizona Supreme Court below reversed a jury's capital sentence on the grounds that *Simmons* entitles a capital defendant, on trial for an in-prison killing, to a parole-ineligibility instruction where the prosecutor never argued future dangerousness. To make matters worse, applying *Kelly v. South Carolina*, 534 U.S. 246 (2002), the evidence the lower court identified as enabling jurors to infer future dangerousness concerned matters Rushing himself placed at issue. Thus, the court essentially interpreted *Simmons* and its progeny to afford a capital defendant a due process right to rebut his own mitigation evidence. Rushing's opposition to certiorari only emphasizes the confusion created by this Court's fractured *Simmons* jurisprudence and the need for the Court to clarify the application and boundaries of this limited due process right.

I. This Court should grant certiorari to hold that evidence of a defendant's past conduct does not always imply future dangerousness.

This case illustrates the difficulty in applying a limited rebuttal right created by a plurality opinion in *Simmons* and initially confined to a situation "where the State puts the defendant's future dangerousness in issue" and "the only available alternative sentence to death is life imprisonment without possibility of parole." 512 U.S. at 178. This initially narrow right to "deny or explain" a defendant's lack of future dangerousness due to parole ineligibility became

murkier with *Kelly*'s reference to a "logical inference from the evidence." 534 U.S. at 252; Pet. 10–11. By stretching this line of cases yet further, the Arizona Supreme Court erred in reversing the capital sentence imposed by a jury with adequate instruction in the law.

A. The testimony of a defense witness alone should not trigger *Simmons* because a jury might infer future dangerousness.

In *Kelly*, the Court applied the *Simmons* due process rebuttal right if future dangerousness is "a logical inference from the evidence" or is "injected into the case through the State's argument." 534 U.S. at 252. The two pairs of *Kelly* dissenters foresaw the issue now raised in the present case. As the Chief Justice explained, a due process violation would no longer arise via "any contention made by the State, but only by existence of evidence from which a jury *might* infer future dangerousness." *Id.* at 260 (Rehnquist, C.J., dissenting; emphasis added). And as Justice Thomas noted, efforts to distinguish when the State has introduced evidence, argued or emphasized that a defendant poses a future danger outside of prison is an "imprecise standard" that "amounts to hairsplitting." *Id.* at 263–64 (Thomas, J., dissenting).

The record in the instant case is clean. The prosecutor did not argue that Rushing should be executed because he posed a future danger to society, thus contradicting Rushing's position (*e.g.*, Br. in Opp. at 9) that this case is anything less than the ideal vehicle to decide the question expressly left open in *Kelly*: what rule applies "when the State's evidence shows future dangerousness but the *prosecutor does not argue it*"? *Id.* at 254–56 n.4 (emphasis added); Pet. at

10. In arguing otherwise, Rushing points to evidence the prosecutor offered in response to matters Rushing himself put at issue and speculates that the jurors could have drawn an inference of future dangerousness from that evidence. Specifically, Rushing presented mitigation evidence that he was *not* a future danger, in the form of a "prison expert" who opined that Rushing could be "safely housed," despite having committed first-degree murder while in prison. R.T. 7/8/15 at 4, 35–36, 49–50. On cross-examination, the prosecutor tested the witness's opinion by questioning him on Rushing's record of prison disciplinary problems and other past conduct, including his enlistment with the Aryan Brotherhood while incarcerated, as evidenced in a letter to his mother. *Id.* at 49–50, 61–92. Thus, it was the defense expert's testimony that provided the basis for the Arizona Supreme Court's conclusion that *Kelly* mandated application of a defense due process rebuttal right—turning *Simmons* into both sword and shield.

By their nature, virtually all capital cases include evidence from which jurors could infer future dangerousness—without any urging by the State. And here, to the extent such evidence existed (beyond the facts of the case itself), it was placed at issue by Rushing's own mitigation witness. Transforming the mere existence of evidence from which jurors *could* infer that a defendant poses a future danger to society into a due process entitlement to a parole-ineligibility instruction strays far from the narrow rebuttal right identified in *Simmons*. Even the more expansive language in *Kelly* does not support recognizing a defendant's due process right to explain or deny evidence resulting from his own mitigation expert's

opinion that the defendant can be safely housed in prison.

Rushing's Brief in Opposition therefore highlights the confusion regarding the scope of the narrow *Simmons* due process rebuttal right and the need for this Court to clarify when that right arises and answer the questions brewing in state courts by virtue of the question left open in *Kelly*. Only this Court can determine when a capital defendant's "future dangerousness" is at issue and solidify the boundaries of what was intended to be a narrow requirement.

B. Confusion regarding the application of *Simmons* has a continuing impact on Arizona and other jurisdictions.

Rushing argues that statutory changes in Arizona and other States militate against certiorari. However, changes in state statutes or practices resulting from this Court's fractured *Simmons* jurisprudence illustrate precisely the danger Justice Thomas feared in his *Kelly* dissent: that the narrow *Simmons* due process right of rebuttal would morph into a federal mandate regarding state jury instructions. 534 U.S. at 265. That some States have adopted mandatory *Simmons* instructions confirms that the dissenters were correct about the expanding wake *Simmons* would leave.

In opposition, Rushing paints an overly simplistic picture of state law. While Arizona has eliminated all forms of early release for an adult convicted of first-degree premeditated murder, Ariz. Rev. Stat. § 13–751(A)(1) (2012), early release remains available for defendants convicted of felony murder, who remain

eligible to receive the death penalty in some circumstances. *See* Ariz. Rev. Stat. § 13–751(A)(3) (2012). Thus, the problem this case illustrates is far from "unlikely [to] arise in the future." Br. in Opp. at 15.

In any event, to the extent States have decided, in reaction to *Simmons*, to change their sentencing statutes, Br. in Opp. at 17, those changes militate in favor of review. *Simmons* and *Kelly* might have included language that some readers interpret to answer the question expressly left open—*i.e.*, what happens when the defendant's actions naturally lead a jury to think of future dangerousness—but neither decision intended to mandate a jury instruction in every case. "The Due Process Clause does not compel such 'micromange[ment of] state sentencing proceedings.'" *Lynch v. Arizona*, 136 S. Ct. 1818, 1822 (2016) (Thomas, J., dissenting).

As such, the differences in application of the narrow *Simmons* rebuttal right by at least three other state supreme courts, *see* Pet. at 11–17, remains salient and ripe for this Court's clarification. Rushing's silence in response to this split among the lower courts—occasionally acknowledged among the courts themselves—is deafening. *See, e.g., State v. Hulsey*, 408 P.3d 408, 436 (Ariz. 2018) (recognizing and declining to follow contrary approach to Simmons in *Commonwealth v. Baumhammers*, 960 A.2d 59, 91 n.23 (Pa. 2008)). Despite pages of briefing in the Petition, Rushing offers no explanation for why this Court should forgo an opportunity to restore a single, national understanding of the Due Process Clause that should protect all Americans in a uniform way.

Moreover, the Arizona Supreme Court continues to address the challenge of applying *Simmons* to several Arizona capital cases in the direct appeal process, as demonstrated in two recent oral arguments. *State v. Bush*, CR–11–0107–AP (argued June 5, 2018) (whether lack of a *Simmons* instruction was fundamental error where future dangerousness could be inferred from defense evidence even though the State did not argue it) and *State v. Sanders*, CR–14–0302–AP (argued June 6, 2018) (whether lack of a *Simmons* instruction was error where only the facts of the capital crime arguably implied future dangerousness). In addition, the Arizona Supreme Court has ordered new penalty phase proceedings in two other capital cases based solely on "future dangerousness" implied from evidence of a defendant's past conduct. *See State v. Escalante-Orozco*, 386 P.3d 798, 829–30, ¶¶ 116–27 (Ariz. 2017), and *Hulsey*, 408 P.3d at 435–39, ¶¶ 124–44. The need for this Court's guidance is clear.

II. Simmons should not apply to an in-prison killing.

The stated concern addressed by this Court's creation of a limited due process rebuttal right was to deny or explain a defendant's future danger to society by informing a jury that he was parole ineligible. *See Simmons*, 512 U.S. at 169. The "explanation" that a capital defendant poses no future danger to society because state law prevents his release on parole does not rebut the continuing danger posed by a capital defendant who committed first-degree murder while in prison. No reasonable juror would harbor a latent fear that such a defendant posed a future threat to society based on an erroneous belief that the defendant will be

paroled. *See Kelly*, 534 U.S. at 261 (Rehnquist, J., dissenting); *O'Dell v. Netherland*, 521 U.S. 151, 167 n.4 (1997).

Rushing's only response to this conspicuous error is to assert that the State failed to precisely present it to the court below. Br. in Opp. at 18–19. This assertion is mistaken. As Rushing acknowledges, the effect of the in-prison setting of Rushing's first-degree murder on the application of *Simmons* was addressed in state court briefing (Br. in Opp. at 19), and was also discussed at length during oral argument. *See State v. Rushing*, CR-15-0268-AP (argued September 13, 2017, available at http://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video, at minutes 41:33–50:38). Whatever other limits apply to the rule from *Simmons* and *Kelly*, the bare minimum must exempt cases in which a defendant kills while already incarcerated. For these individuals, the possibility that they might remain in prison does nothing to convince a jury to reject a capital sentence on grounds that further violence can be avoided by incarceration. *See O'Dell*, 521 U.S. at 167 n.4 ("Informing his sentencing jury that petitioner [who killed while in prison] would spend the rest of his days in prison would not, then, necessarily have rebutted an argument that he presented a continuing danger.").

All three opinions in *Kelly* forecast that the day was coming when the Court would need to decide how that precedent might apply where the facts alone might imply dangerousness to reasonable jurors. 534 U.S. at 254–56 & n.4 (opinion of the Court), 260 (Rehnquist, C.J., and Kennedy, J., dissenting), 263–65 (Thomas and Scalia, JJ., dissenting). That day has now arrived, and

the Court should grant certiorari to prevent a special exception from becoming an inflexible mandate.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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