NO. ____________

In The
Supreme Court of the United States

LESLEY EUGENE WARREN,
Petitioner,

v.

EDWARD THOMAS, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED:

I. Is it an unreasonable application of Simmons v. South Carolina for a State court to deny a parole ineligibility instruction where the prosecution repeatedly implied and suggested that the defendant would kill again if he were not sentenced to death?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

LESLEY EUGENE WARREN,

Petitioner,

v.

EDWARD THOMAS, Warden,
Central Prison, Raleigh North Carolina,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lesley Eugene Warren respectfully prays that a writ of certiorari issue to review the attached opinion of the United States Court of Appeals for the Fourth Circuit.

OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Warren v. Thomas*, 894 F.3d 609 (2018) and reprinted in the Appendix to this Petition. The decision of the United States Court of Appeals for the Fourth Circuit denying rehearing is attached in the Appendix. The decision of the United States District Court for the Middle District of North Carolina is attached in the

Appendix. The decision of the North Carolina Supreme Court is attached in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 10, 2018. The court denied Mr. Warren's petition for rehearing and for rehearing en banc on August 7, 2018. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2254(d) provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Introduction

When the State argues that a defendant is likely to commit murder again, accurate and truthful information about whether he may be released from prison is an indispensable prerequisite to a reasoned determination of whether to impose the death penalty. When the prosecution relies on an implication of future dangerousness in asking for the death penalty, due process requires that a defendant not be sentenced to death based on the jury's incorrect understanding of his parole eligibility. *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, this Court was clear that if there is any chance a jury may mistakenly fear the defendant will be free to kill again, this misunderstanding "pervade[s] its deliberations" and violates due process. *Simmons* 512 U.S. at 162. This Court's holding underscores the importance of eliminating jury misunderstanding, and instead requiring lower courts to ensure jurors make their decisions based on truthful and accurate information about parole ineligibility. In this case, *Simmons* mandated that once the State made Mr. Warren's future dangerousness an issue, the trial court was required to clarify for the jury that Mr. Warren was parole ineligible. Its failure to do so left the jury with a misunderstanding of its true sentencing options, and a false belief that if it did not sentence Mr. Warren to death, he might someday be released from prison and kill again.

II. Procedural Overview

This is an appeal from the order of the Fourth Circuit Court of Appeals denying Mr. Warren's Petition and denying rehearing and rehearing en banc.

In the Circuit Court, Mr. Warren filed a motion to hold the case in abeyance because he has three pending state court post-conviction proceedings: one in Buncombe County, North Carolina, one in Greenville County, South Carolina, and one in the present case in Guilford County, North Carolina. All these proceedings involve issues that, if resolved in Mr. Warren's favor, could have been dispositive of the Fourth Circuit's opinion in the present appeal. If Mr. Warren should prevail in any one of those proceedings, the decision reached by the Fourth Circuit will rest on an incorrect factual basis. That motion was denied.

Mr. Warren filed his brief in the Circuit court, raising two issues, and included a request for a certificate of appealability. The Court granted a certificate of appealability on the question of whether the prosecutor's request that the jury sentence Mr. Warren to death because he would be dangerous in the future entitled Mr. Warren to a parole ineligibility instruction under *Simmons v. South Carolina*, 512 U.S. 154 (1994).

After briefing, oral argument was held. The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 10, 2018. The court denied Mr. Warren's petitions for rehearing and for rehearing en banc on August 7, 2018.

III. Factual Background Relevant to the Question Presented

Petitioner Lesley Warren was convicted by a jury of the first-degree murder of Katherine Johnson. At sentencing, the State introduced evidence that Mr. Warren had been convicted of killing two other women. In one of those cases, he received the death penalty, therefore was not eligible for parole even if he were to be sentenced to life imprisonment for the murder of Ms. Johnson. Throughout closing argument, the prosecutor argued Mr. Warren would be dangerous in the future and urged the jury to sentence him to death as a preventative measure.

Mr. Warren's trial counsel asked three times for a *Simmons* instruction to inform the jury that Warren was not eligible for parole. The trial court denied those requests. In response to trial counsel's final request, the judge admonished: "We will not discuss it." The trial court refused to instruct the jury on parole eligibility because of its incorrect determination that, because Mr. Warren's prior death sentence could eventually be overturned, he was not parole ineligible. This was clear error. The court's ruling was not based on whether the trial court believed an argument of future dangerousness had been made by the State. Acting on incomplete and misleading information about Mr. Warren's parole eligibility, the jury sentenced Mr. Warren to death.

The Fourth Circuit panel concluded the prosecutor had not argued "future dangerousness" because it considered his statements to be "backward-looking." The panel did not address significant portions of the prosecutor's argument—including portions that directly echo the arguments other Circuits have found to be allusions to

future dangerousness in similar cases, and that are consistent with this Court's analysis in *Simmons* and its progeny.

REASON FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN ORDER TO ADDRESS THE CIRCUIT SPLIT ON THE APPLICATION OF *SIMMONS* AND BECAUSE DUE PROCESS WAS VIOLATED WHEN PETITIONER WAS SENTENCED TO DEATH BASED ON THE JURY'S INCORRECT UNDERSTANDING OF HIS PAROLE ELIGIBILITY.

This Court has clearly and unequivocally held that when a prosecutor insinuates a capital defendant may be dangerous in the future, due process requires the sentencing jury be informed if the defendant is parole ineligible. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *see also Shafer v. South Carolina*, 532 U.S. 36, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001); *Kelly v. South Carolina*, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002). Truthful information regarding a defendant's parole ineligibility allows him to "deny or explain" the showing of future dangerousness, and without such an instruction, the jury has a "false choice" between sentencing a defendant to death or sentencing him to a limited period of incarceration that may result in his eventual release to society. *Simmons*, 512 U.S. at 162. The common thread throughout the separate opinions written by the Justices that joined in the *Simmons* judgment is the emphasis on the importance of *truthful* information about parole ineligibility. *See Simmons*, 512 U.S. at 169 (Blackmun, J., plurality opinion) ("Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense

counsel or an instruction from the court."); *id.* at 172 (Souter, J., concurring) ("when future dangerousness is an issue in a capital sentencing determination, the defendant has a due process right to require that his sentencing jury be informed of his ineligibility for parole."); *id.* at 174 (Ginsburg, J., concurring) ("To be full and fair, [a defendant's opportunity to rebut an argument of future dangerousness] must include the right to inform the jury, if it is indeed the case, that the defendant is ineligible for parole."); *id.* at 175 (O'Connor, J., concurring) ("But 'where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain' [requires that the defendant be afforded an opportunity to introduce evidence on this point.]"). The *Simmons* court was clear that if there is any chance a jury may mistakenly fear the defendant will be free to kill again, this misunderstanding "pervade[s] its deliberations" and violates due process. *Simmons*, 512 U.S. at 162.

Knowing Mr. Warren was not eligible for parole, the prosecutor asked the jury repeatedly to "stop him" and to stop giving him "chances"—because he did not have the ability to control his behavior. It was not just the arguments made by the State, but the frequency with which these arguments were made during closing argument that created such a dilemma for the jury. By repeatedly referring to future conduct, the State clearly stated its position that Mr. Warren was a continuing danger to society and therefore the jury must choose death as the only way to stop him.

This Court has consistently acknowledged that a jury's understanding of a defendant's ability to be released on parole is a crucial consideration in sentencing and is central to a jury's sentencing decision. *Jurek v. Texas*, 428 U.S. 262, 275 (1976). Based on the *Simmons* "future dangerousness" analysis made by this Court and in other Circuits, the Fourth Circuit panel should have held that the prosecutor in Mr. Warren's case argued future dangerousness, and that an instruction should have been given by the trial court as to Mr. Warren's parole eligibility.

A. The Fourth Circuit's determination of what kinds of argument constitute future dangerousness is inconsistent with the decisions in other circuits.

Neither in *Simmons*, nor in the cases that followed, did this Court provide an exclusive list of "trigger words" that would automatically alert a trial court the State was making an argument about "future dangerousness." However, Circuit Courts have been consistent, until now, about what constitutes an argument of future dangerousness, and have found that "a prosecutor may expressly implicate a defendant's future dangerousness without actually saying those particular words." *Robinson v. Beard*, 762 F.3d 316, 327 (3d Cir. 2014).

i. The Fifth Circuit has held that arguments about failed second "chances" implicate a defendant's future dangerousness under *Simmons*.

Parole ineligibility instructions have been required in other Circuits where the prosecutor argues to the jury about the risk of giving a defendant another "chance" to commit crime. In *Hodges v. Epps*, 648 F.3d 283, 290 (5th Cir. 2011), the prosecutor argued that the defendant had received "a series of failed second chances." *Id.* at 289. For example, the prosecutor argued that Hodges had been given "a second chance of

monumental proportions" and a "huge measure of grace." *Id.* at 290. Additionally, near the end of closing argument, the prosecutor stated: "He stands before you and asks you for a second chance. A second chance to do what to who and when and where?" *Id.* The Fifth Circuit found the prosecutor was clearly attempting to persuade the jury to sentence Hodges to death so that he would not have another "chance" to hurt someone. In other words, the prosecutor was arguing Hodges would be a future danger.

In Mr. Warren's case, the prosecutor asked the jury "How many more chances do we have to give him? How many more chances do we have to give him? One, two, three." J.A. 1760-61. *See also* J.A.1740 ("A person who doesn't care, and who is a sociopath . .. who has a habit .. . of violating the rights of others with no guilt, no conscience, and no remorse. . . He has done it over and over and over. What will stop him?") The Fourth Circuit's determination that this was not an argument about future dangerousness under *Simmons* is inconsistent with the Fifth Circuit's interpretation of *Simmons* instructions.

ii. Both the Third and Tenth Circuits have held that arguments regarding a defendant's anti-social behavior implicate future dangerousness under *Simmons*.

Arguments that a defendant is "anti-social" have been found to refer to the defendant's "future dangerousness" because they indicate an inability to reform. In *Bronshtein v. Horn*, 404 F.3d 700, 717 (3d Cir. 2005), the prosecutor pointed the jury to "the medical testimony," that Bronshtein was "anti-social," "prone to living a life of crime," and "can't conform to the needs of society." *Id.* at 718. This was, the Third Circuit reasoned, an argument that the defendant would pose a threat to society in

the future. The Third Circuit held that "even without considering the medical testimony" to which the prosecutor referred, it was "evident that these comments, although more clinical than those in *Simmons*, conveyed the message that Bronshtein presented a threat of future lawlessness." *Id.* at 718. (*See also Robinson v. Beard*, 762 F.3d 316 (3d Cir. 2014) (no finding that the prosecution argued future dangerousness when there was no mention of the defendant's ability to conform to society.))

In the Tenth Circuit, the court also held the prosecutor placed the defendant's future dangerousness "squarely at issue" when he said the defendant's criminal history indicated he had anti-social behavior. *Mollett v. Mullen*, 348 F.3d 902 (10th Cir. 2003).

Similarly, in this case, the State described Mr. Warren as a "sociopath" or labeled him as "anti-social" multiple times throughout its closing argument. J.A. 1740 (sociopath, habit, no guilt, no conscience, no remorse, habit, pattern, repeated series of acts), 1742 (no guilt, no remorse, sociopath), 1745 (propensity to commit violent crimes, character analysis), 1748 (sociopath, habit, no guilt, no remorse, no conscience), 1749 (sociopath), 1750 (without remorse, without guilt, no conscience, no remorse, no guilt), 1760 (sociopath, habit, without guilt, without remorse). However, contrary to the application of *Simmons* in the Third and Tenth Circuit courts, the Fourth Circuit panel did not find the many references to Mr. Warren being described as a "sociopath" were arguments about his potential dangerousness in the future.

iii. The Fifth Circuit has held that evidence about a defendant's lack of remorse implicates his future dangerousness under *Simmons*.

Statements about a defendant's lack of remorse indicates that a prosecutor is making a *Simmons* "future dangerousness" argument. *See Hodges v. Epps*, 648 F3d 283 (5th Cir. 2011).

The Fifth Circuit found that, under *Simmons*, evidence of future dangerousness includes statements by defendants indicating a lack of remorse. The argument from the prosecutor in *Hodges* was: "You didn't see remorse [from Hodges]. Not one tear. Not a quiver in his voice. Not an ounce of sincerity in his apology." *Hodges* at 289. The court held that a defendant's lack of remorse is evidence of future dangerousness. *Id.*

In Mr. Warren's case, the prosecutor repeatedly told the jury that Mr. Warren had no conscience, no guilt, and no remorse. See J.A. 1735 (no remorse), J.A. 1736 (no remorse), J.A. 1739 (no remorse), J.A. 1740 (no remorse), J.A. 1742 (no remorse), J.A. 1748 (no remorse), J.A. 1750 (without remorse), J.A. 1760 (without remorse). Despite other Circuits' interpretation of how to identify a future dangerousness argument under *Simmons*, the Fourth Circuit declined to find the repeated, specific references to Mr. Warren's "lack of remorse" to be evidence of future dangerousness in this case.

iv. The Fourth Circuit previously has held that evidence of repeated murders implicates a defendant's future dangerousness under *Simmons*.

The decision of the Fourth Circuit is not only inconsistent with other Circuits but with its own precedent. The Fourth Circuit has previously held that arguments

emphasizing a defendant's repeated murders tend to show "future dangerousness." *See Richmond v. Polk*, 375 F.3d 309 (4th Cir. 2004).

In this case, the prosecutor argued that Mr. Warren had no conscience, no guilt, no remorse and that he had a habit, a pattern, a repeated series of acts. "He has done it over and over and over. What will stop him? Over and over and over." J.A. 1739-40. The Fourth Circuit erred when it concluded that arguments about Mr. Warren's repeated bad acts, combined with the arguments about Mr. Warren's inability to change or to conform his behavior, were not sufficient to invoke a *Simmons* instruction.

v. The Fourth Circuit has previously held that arguments about the State's effort to make the jurors feel as if they could be the "next victim" implicates a defendant's future dangerousness under *Simmons*.

The Fourth Circuit opinion was also inconsistent with its own precedent when it failed to find that the state's effort to make the jurors feel as if they could be the "next victim" was an argument about future dangerousness. *Richmond v. Polk*, 375 F.3d 309 (4th Cir. 2004). In *Richmond*, following guidance from *Simmons*, the Fourth Circuit court held that by asking the jury, "Are you convinced Richmond won't kill now," the State highlighted Richmond's future threat and sought to make the jurors feel as if they could be Richmond's next victim.

In Mr. Warren's case, the prosecutor discussed the need to carry cellular phones "because you never can tell when Lesley Warren is going to be coming down the road and offering to give you help. That's why *you* need that cell phone." (emphasis added) J.A.1734. This intentional comment was designed to make the

jurors feel as if they could be the next victim if they did not vote for death. The panel in this case erroneously failed to find this argument alluded to Mr. Warren's dangerousness in the future.

B. The Panel Improperly Applied the *Simmons* Standard in Contravention of Longstanding Supreme Court Precedent

The Fourth Circuit panel found the prosecutor did not argue "future dangerousness" because his comments only suggested Mr. Warren's case merited the death penalty based upon what he had "already had done in the *past* – namely, his actions and state of mind in committing the three murders of which he was convicted." The panel's decision indicates it failed to consider many of the prosecutor's statements regarding future dangerousness. For example, the prosecutor told the jury: " . . . this is why women carry cellular phones, because *you never can tell when Lesley Warren is going to be coming down the road* and offering to give you help. That's why you need that cell phone." J.A. 1734 (emphasis added). In its decision, the panel stated what matters is "whether the prosecutor urged the jury to look forward, to the possibility that the defendant eventually would be released from prison if not sentenced to death and hence become a danger to the community." The prosecutor's reference to the jurors' need for a cell phone to protect themselves is forward looking. It puts each member of the jury in a position of one day seeing himself or herself stranded on a lonely road, in danger, as Mr. Warren advances towards them.

The prosecutor also talked extensively about Mr. Warren's "pattern" of killing, J.A. 1738, 1739, 1740, 1741, his "habit" of killing women, J.A. 1740, 1748, 1760, and his "addiction" to killing women, J.A. 1761, 1762, all of which communicated to the

jury that this behavior would continue into the future because Mr. Warren could not control himself. The panel's decision did not address these specific arguments.

The panel also misconstrued how extensive the references to future dangerousness were in the prosecutor's closing argument. The panel found that "a few words and phrases in an extensive closing argument" may be read as commenting on past crimes and character. However, in this case, there were much more than merely "a few words and phrases" referring to future dangerousness. Indeed, references to future dangerousness were made in 16 out of 33 pages of the State's closing argument. The "repeated" suggestions of future dangerousness were what the *Simmons* Court used to describe the prosecution's "reliance" on a prediction of future dangerousness in that case.

The closing argument began on JA 1732. Words, phrases and arguments which have found to be references to future dangerousness in circuits around the country appeared on the following pages:

- J.A. 1734 (jurors as the next victim),
- J.A. 1735 (no remorse),
- J.A. 1736 (no remorse),
- J.A. 1738 (pattern),
- J.A. 1739 (pattern, no remorse),
- J.A. 1740 (sociopath, habit, no guilt, no conscience, no remorse, habit, pattern, repeated series of acts, over and over and over, what will stop him, over and over and over),

- J.A. 1741 (pattern, pattern),
- J.A. 1742 (no guilt, no remorse, sociopath),
- J.A. 1745 (propensity to commit violent crimes, character analysis),
- J.A. 1748 (sociopath, habit, no guilt, no remorse, no conscience),
- J.A. 1749 (sociopath, sociopath),
- J.A. 1750 (without remorse, without guilt, no conscience, no remorse, no guilt) (J.A. pages 1751 through 1759 exclusively reviewed mitigating factors),
- J.A. 1760 (sociopath, habit, without guilt, without remorse),
- and J.A. 1761 (second chances).

The conclusion to the closing argument was on J.A. 1765.

On almost half of the pages of the State's closing argument the prosecutor used the exact language or terminology that has been held to reference "future dangerousness" by courts in other Circuits.

In closing argument, the prosecutor asked the jury to choose death because of Mr. Warren's character, including his habit and addiction to killing, his diagnosis of being anti-social, his lack of remorse, and because he had already had failed chances. The prosecutor made the jury feel as though they could be Mr. Warren's next victim when he told them: "you never can tell when Lesley Warren is going to be coming down the road and offering to give you help." J.A. 1734. These kind of statements, made over and over again by the prosecutor in closing argument, were intentionally directed at Mr. Warren's *future* dangerousness, implying that the jury should vote for

death in order to "stop him" from killing again. "How many more chances do we have to give him?" implies the jury will be giving Mr. Warren another chance to kill if it does not impose a death sentence. "What *will* stop him?" does not ask the jurors what stopped him in the past, but what will stop him in the future. In asking these direct questions to the jurors, the prosecutor focused on the future consequences of Mr. Warren's inability to change, not just an event or series of events that happened in the past. The Fourth Circuit's failure to find these arguments referenced Mr. Warren's future dangerousness was error under the rule set out in *Simmons*.

i. Under *Simmons*, references to future dangerousness are not required to be direct in order to require a parole eligibility instruction from the trial court.

In its briefing to the Fourth Circuit, the State acknowledged that the prosecution implied future dangerousness in Mr. Warren's case. Doc. 27 at 12.[1] However, the State mistakenly asserted, and the panel evidently agreed, that something less than a "direct" argument related to future dangerousness would only be enough to trigger a *Simmons* instruction under the rule in *Kelly v. South Carolina*, 534 U.S. 246 (2002).

Simmons did not require specific words or phrases to establish that a prosecutor argued future dangerousness; to the contrary, the facts that give rise to the decisions in both *Kelly* and *Simmons* are based on "implications" from the arguments made to the jury. *Compare Kelly*, 534 U.S. at 253 ("evidence of violent

[1] The State conceded that "at most, the prosecutor *implied*—or as Petitioner puts it, "insinuate[d]"—future dangerousness, but that would suffice under *Kelly*, not *Simmons* itself. Doc. 27 at 17 (citation omitted) (emphasis in original).

behavior in prison can raise a strong *implication* of 'generalized future dangerousness'") with *Simmons*, 512 U.S. at 178 ([T]he prosecutor, by referring to a verdict of death as an act of 'self-defense,' strongly *implied* that petitioner would be let out eventually if the jury did not recommend a death sentence.").

In *Simmons*, the "implication" of future dangerousness was enough to require a parole ineligibility instruction. The *Kelly* Court was clear that its decision was not an "extension" of *Simmons*, but rather a straightforward application of the same rule.[2] The *Kelly* Court reiterated the rule of *Simmons* because the South Carolina Supreme Court had continued to apply the *Simmons* standard incorrectly and reversed South Carolina's holding that evidence of future dangerousness is relevant under *Simmons* only when the State "introduces evidence for which there is *no other possible inference* but future dangerousness to society." *Kelly* 534 U.S. at 254.

Because a direct reference to future dangerousness is not mandated under *Simmons*, the Fourth Circuit's requirement that the prosecutor must introduce evidence for which there is *no other possible inference* but future dangerousness to society in order for the defendant to get an instruction on parole eligibility was inconsistent with this Court's ruling in *Simmons* and *Kelly* and it should be corrected.

[2] This Court stated the facts in *Kelly* came within the "four corners" of *Simmons*. *Id.* at 255; *see also id.* at 254, fn. 4 ("[W]e need go no further than *Simmons* in our discussion.") This Court has also stated that the *Kelly* decision "reiterated" the holding in *Simmons*. *See Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016). Thus, this Court has been consistent that its decision in *Kelly* did not extend its prior decision in *Simmons*. Instead, *Kelly* is a straightforward application of the *Simmons* rule.

ii. *Simmons* does not require specific trigger words to alert the trial court that the state is arguing future dangerousness.

The panel's opinion suggests that to demonstrate the prosecution argued future dangerousness under *Simmons*, the prosecution must have used "trigger words" or met some other specific threshold. There was never such a threshold set out in *Simmons.* "A prosecutor may expressly implicate a defendant's future dangerousness without actually saying those *particular* words." *Robinson v. Beard*, 762 F.3d 316, 327 (3d Cir. 2014) (emphasis added). The State's description of Mr. Warren as someone who cannot control his habit and addiction to killing women, combined with the direct questions asking how many *more* chances he will get and what *will* stop him are more than enough to meet the standard for future dangerousness as set out in *Simmons*. Mr. Warren is entitled to relief under the consistent principle that is contained in both *Simmons* and *Kelly* that no trigger words or formal threshold exists for determining whether future dangerousness has been argued, because the prosecutor in his trial "implied" he was a continuing threat to kill, and that he had a propensity to kill, thus raising the specter of future dangerousness.

iii. Evidence of dangerous "character" may show "characteristic" future dangerousness.

The prosecutor's comments in this case did more than merely point to Mr. Warren's depraved character; by questioning what would happen in the future, he raised "the specter of . . . future dangerousness generally." *Simmons*, 512 U.S. at 165. In *Kelly v. South Carolina*, 534 U.S. 246 (2002), this Court applied the established

Simmons rule*:* a parole eligibility instruction must be given where the prosecution makes arguments that have a "tendency to prove dangerousness in the future"—even if the evidence might also support other inferences as well. *Id.* at 254. This includes evidence of dangerous "character." *Id.* If a jury hears evidence of a defendant's "propensity for violence," they "reasonably will conclude that he presents a risk of violent behavior . . . whether free as a fugitive or as a parolee." *Id.* In *Kelly*, this Court rejected the State's argument that evidence of future dangerousness invokes the requirements of *Simmons* only when the State "introduces evidence for which there is no other possible reference but future dangerousness to society." *Kelly* at 254. The *Kelly* court cautioned that such arguments should not be "compartmentalized" because even though they may relate to retribution or other "backward looking" issues, they are no less arguments that the defendant would be dangerous "down the road." *Kelly* at 255.

In this case, the prosecutor made arguments that could be both backward and forward looking. His arguments were designed to show dangerous character and a propensity for violence. The jury repeatedly heard references to Mr. Warren's propensity for violence when they were told he "liked killing people," and that it was "fun" and "gratifying" for him. J.A. 1735. They heard Mr. Warren had committed murder "over and over and over"—a clear argument about "propensity." J.A. 1740. The jury also heard descriptions of Mr. Warren's dangerous character when the prosecution stated that he was "a person who doesn't care." J.A. 1739. *See also* J.A. 1734, 1735, 1760.

The prosecutor's descriptions of Mr. Warren's "habit" and "addiction" illustrated characteristic future dangerousness in this case, especially when the jury was asked what future chances should be given to Mr. Warren to feed his habit or addiction and what would stop him. This argument falls squarely within the scope of *Simmons*. However, contrary to this Court's instruction in *Simmons*, the Fourth Circuit did not consider the many arguments about Mr. Warren's dangerous character, including arguments referring to his propensity to commit violent crimes, him being a sociopath, or his character analysis, J.A. 1745, (*See also* J.A. 1740, 1742, 1748) to implicate his future dangerousness.

Even if these arguments about Mr. Warren's character also suggested that Mr. Warren "merited" the death penalty because of his past behavior, "evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *Kelly*, 534 U.S. at 254. "A prosecutor may expressly implicate a defendant's future dangerousness without actually saying those particular words." *Robinson v. Beard*, 762 F.3d 316, 327 (3d Cir. 2014). In other words, even though some of the prosecutor's arguments could refer to Mr. Warren's past behavior, they can, and did, also refer to his future dangerous behavior as well. Because the Fourth Circuit did not follow the holding of *Simmons* in determining whether future dangerousness was argued in this case, this Court should accept the case for certiorari.

CONCLUSION

This Court has made clear that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he never will be released on parole." *Simmons*, 512 U.S. at 163-64.

Lesley Warren will never be eligible for parole because of his death sentence from another jurisdiction, yet his jury did not have the benefit of knowing that critical fact when they sentenced him to death in this case.

The trial judge's refusal to instruct the jury about Mr. Warren's parole ineligibility created a "false choice" between sentencing him to death and sentencing him to a limited period of incarceration. This was the very scenario the *Simmons* Court tried to prevent because it gave the jury a "false choice," thus violating the defendant's due process rights.

The Fourth Circuit panel overlooked critical facts and misapplied its own precedent, as well as precedent from this Court and from other Circuits, in determining that future dangerousness was not argued in this case. Given the clear similarity between the language used by the prosecutor in this case and in *Simmons*, and the descriptions of future dangerousness that have been acknowledged and applied in other Circuit courts, this Court should hear this case in order to establish

a clear rule for identifying arguments of future dangerousness, and to resolve the disagreements in the application of *Simmons* among lower courts. The resolution of these differences among the Circuits is important to uphold the requirement that juries get truthful and accurate information when sentencing a defendant – especially in a capital case – which is of utmost importance to the public and to our legal system.

For all the foregoing reasons, Mr. Warren's case is an extraordinary one, deserving of review by this Court. Certiorari by this Court is warranted not only to secure fair appellate review for Mr. Warren, but to ensure that this Court's decisions will not continue to be misapplied in the Circuits.

In the alternative, Mr. Warren respectfully requests that the Court enter a summary reversal (a grant, remand, and vacate order) because of the mountain of evidence that the prosecutor argued "future dangerousness," and the Fourth Circuit's misapplication of Supreme Court precedent, which puts it at odds with other Circuit Courts of Appeal.

Respectfully submitted, this the 5th day of November, 2018.

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