No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAUNTORIAN LYNDEL SANDERS

Petitioner

vs.

STATE OF ARIZONA

Respondent

On Petition for a Writ of Certiorari

to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Arizona follows the precedent of *Simmons v. South Carolina*, 512 U.S. 154 (1994), as set forth in *Lynch v. Arizona*, 136 S. Ct. 1818 (2016).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of Arizona Supreme Court, the highest state court, appears at Appendix A to the petition and is published.

JURISDICTION

The Supreme Court of Arizona affirmed Mr. Sanders' convictions and sentences on direct appeal on September 13, 2018. A copy of that opinion is attached hereto as Appendix A. Mr. Sanders thereafter filed a motion for reconsideration, attached hereto as Appendix B, which was summarily denied on October 2, 2018. This petition is due on December 12, 2018. S.Ct.R. [13.1]. This Court has jurisdiction under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

2. Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a capital case. Petitioner was convicted and sentenced to death for the 2014 murder of a three-year-old girl.

Sanders was one of two defendants convicted of one murder in 2014. Sanders was sentenced to death and timely appealed. The facts of the case are recounted in *State v. Sanders*, ___ Ariz. ___, ___P.3d ___, (Sept. 13, 2018).

The State did not seek the death penalty in the case of the co-defendant.

REASONS FOR GRANTING THE PETITION

I. Arizona does not follow the *Simmons* doctrine as set forth by *Lynch v. Arizona*.

***A. Simmons* Doctrine.** In *Simmons*, the United States Supreme Court held that if "the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994)(plurality opinion); *see also id.* at 178 (O'Connor, J., concurring).

In *Lynch v. Arizona*, 136 S.Ct. 1818 (2016), the United States Supreme Court held that "the Due Process Clause entitles the defendant to inform the jury of his parole ineligibility by a jury instruction or in arguments by counsel." *Lynch* supra, citing *Simmons*, supra, *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001); and *Ramdass v. Angelone*, 534 U.S. 246 (2002).

B. Arizona's Interpretation of *Simmons* doctrine.

1. The Arizona Court Interpretation.

In their opinion, the Arizona Supreme Court said, "if Sanders' future dangerousness was at issue, the trial court's erroneous instruction violated his due

process right to inform the jury that he was ineligible for parole or release." ¶ 17 The Arizona Supreme Court stating that future dangerousness was not a "logical inference from the evidence" then downplayed every act of violence presented by the prosecution as not sufficient for the jury to have determined that the Sanders was a future danger to the community if released.

Prior to trial, Appellant objected several times to the trial court incorrectly instructing the jury that a sentence of life included the possibility of release. Consistent with the Sixth, Eighth and Fourteenth Amendments, the Supreme Court has repeatedly held that whenever future dangerousness is at issue in a capital sentencing, the jury must be able to consider and be instructed upon the defendant's parole ineligibility. *Simmons*, 512 U.S. at 168-169. Specifically, *Simmons* held that if the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. *Simmon*s, 512 U.S. at 156, and *Lynch v. Arizona*, 136 S. Ct. 1818, 1820 (2016).

The contrary position to the Simmons doctrine, where future dangerousness is not alleged, is to remain silent on the issue of the release. The Arizona Supreme Court has espoused a new doctrine that it is permissible to mislead the jury by instruction into believing that release is possible. Deception of

the jury by the court and prosecutor cannot be intention of the Simmons future dangerousness doctrine. . *Shafer*, 532 U.S. at 39; *Simmons,* 512 U.S. at 168-69; *Ramdass, 530 U.S. at 39; Cf*., *Kelly*, 534 U.S. 246 (2002); *See also, West v. State*, 725 So.2d 872, 879 (Miss. 1998) ("fundamental fairness requires that capital juries must have as much information as possible in front of them when making their sentencing determination" including the fact of parole eligibility) *Bruce v. State*, 616 A.2d 392, 402 (Md. 1992); *Doering v. State*, 545 A.2d 1281, 1308-09 (Md. 1988). Nevertheless, the jury was improperly instructed in the Sanders case as future dangerousness was brought up by the prosecutor, both in its case-in-chief, rebuttal and closing arguments.

The Arizona Supreme Court, in an attempt to avoid the need to reverse the trial court's decision, incorrectly determined that future dangerousness was not an issue.

Future dangerousness is at issue if it is a logical inference from the evidence, or was injected into the case through the State's closing argument. *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002); *State v. Escalante-Orozco*, 241 Ariz. 254, 386 P.3d 798 (2017). In *Lynch*, the United States Supreme Court noted that it was sufficient that the prosecutor had "suggested … that Lynch could be dangerous." *Lynch*, 136 S.Ct. at 1819.

Here, future dangerousness was at issue, parole was unavailable, and yet the trial court and prosecution not only failed to inform the jurors that Appellant could never be released, it actively misled them by instructing that Sanders could one day be released if they did not sentence him to death. The Appellant argued the issue in a hearing held months before trial began, and again just before trial. On both occasions, the trial court incorrectly overruled the Appellant's objection.

The State acknowledged that Appellant timely objected to the trial court's improper jury instruction. However, the State argued they never introduced any evidence during the penalty phase that suggested, implicitly or otherwise, that Appellant posed a future danger to society. Instead, the State argued it presented evidence, "solely on the horrible manner in which Sanders murdered [the victim]." As such, according to the State, a *Simmons* instruction was inapplicable to these circumstances, and the trial court properly denied Appellant's request for the instruction.

In Arizona, the only alternative to a death sentence for first degree murder is natural life. *Lynch,* 136 S.Ct. 1818. Accordingly, once convicted of first-degree murder Petitioner was ineligible for release. *See id.*, 136 S. Ct. at 1819; *see also* 1993 Ariz. Sess. Laws (First Reg. Sess.), ch. 9, 255; A.R.S. § 41-1604.09(1).

Despite this fact, and despite the fact that future dangerousness was inherent in the facts of the case and suggested by the prosecutors, the state court erroneously and repeatedly instructed the jurors that if they did not sentence petitioner to death he could one day be released.

The Arizona Supreme Court acknowledged that Sanders was not eligible for parole and could not be released from prison without a commutation by the Governor. *Sanders* at ¶ 17. The court also agreed that the trial court's instruction was "erroneous," if future dangerousness was at issue. *Id*. Thus, if Appellant's future dangerousness was at issue, the court conceded that his due process rights to inform the jury that he was ineligible for parole or release were violated.

However, the Arizona Supreme Court held that there were significant factual differences between Appellant's case and those Arizona cases where a defendant's future dangerousness were at issue. Ultimately, the Arizona Supreme Court ruled that future dangerousness was not at issue in Sanders' case, and no *Simmons* error occurred. Therefore, the question rests solely on whether the issue of future dangerousness was presented to the jury, either by logical inference, or injected into the case by the State. *Escalante-Orozco*, 241 Ariz. at 285, 386 P.3d at 829 (2017).

2. Allegation of Future Dangerousness Included:

a. Rape

The Arizona Supreme Court began its reasoning with the incorrect statement that Appellant had "no prior arrests or convictions for violent acts, and there was no evidence that he had a history of violent or assaultive behavior." *Sanders* at ¶ 19. The Court then went to great lengths to minimize a rape allegation and a "choking incident" presented at trial. The ruling that "the circumstances surrounding the victim's murder did not place Sanders' future dangerousness at issue by suggesting that the death penalty was the only means to protect society," was not borne out by the evidence. *Sanders* at ¶ 20.

The State sought to cement Appellant's dangerousness by eliciting testimony that he was investigated for a rape allegation while serving in the Marines. Specifically, the prosecutor questioned a mitigation expert about the rape investigation. (RT 7/16/14, p. 42). The question resulted in a mistrial motion by Appellant. (*Id.* p. 65). Although Appellant was never prosecuted for the rape allegation, nevertheless, it had the effect of showing he was extremely dangerous with a propensity for violent acts.

b. Domestic Violence - Choking

In diminishing the rape allegation, the Arizona Supreme Court stated it recognized that the prosecutor should have been more careful about the question's potentially prejudicial impact. *Sanders* at ¶ 25. Yet, this court diminished the rape allegation by calling it a "fleeting" episode. (*Id*). However, in other cases, the court cited similar episodes where future dangerousness was found. For example, in *State v. Escalante-Orozco*, the Arizona Supreme Court held that future dangerousness was at issue when the defendant, among other things, "choked his ex-wife." Here, though an incident of Sanders choking the mother of the victim was brought out by the prosecution, the trial court diminished it as an example of domestic assault saying it was "an anomaly." Future dangerousness was found by the Arizona Supreme Court in *State v. Hulsey*, 243 Ariz. 367 (2018), where a choking incident was also used as an example.

c. Cold, Callous, Ruthless, Mean and Deceptive.

The Arizona court found that even though the prosecutor described Appellant's conduct as "horrific, cold, ruthless, callous, and mean," that was not done to show Sanders was a danger to society. *Sanders* at ¶ 30. Moreover, the State argued that Appellant had a history of deception. (RT, 8/18/24, p. 55.) The State said he was very thoughtful about what he was willing to admit. (Id.) "He is able to conceal

parts of his personality and can portray himself in the manner he wants to." (Id., p. 56.) "He is a liar. He deliberately omits key facts." (Id.)

During closing argument in the penalty phase, the State described to the jury how the Appellant planned for future beatings of the victim. "Schala's murder was not an impulsive act. These beatings were intentional. We know that because he took the time to tape that belt, for his own protection. **And that tells us that he knew in the future he was going to continue these beatings, and he was preparing himself for it**." (RT 8/18/14, p. 62) (emphasis added). The State used this specific incident to warn the jurors that Appellant this was not a one-time act. That Sanders was planning further abuse. This is a specific example of future dangerousness.

As a result, the State placed future dangerousness directly in issue, both generally, and in the particular. The State's argument referring to the prior choking incident and observing that even a person with PTSD would not do it again referred not only to Appellant's repeatedly beating Schala, but also implied that such a cold, callous person would do it again in the future.

In *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002). the Court concluded, "[t]he prosecutor accentuated the clear inference of future dangerousness raised by the evidence and placed the case within the four corners of *Simmons*." *Id*. at 252.

Here, the prosecutor's accentuation of Appellant's actions, the examples of violence, and his willingness to lie, similarly placed Appellant's future dangerousness directly at issue in violation of *Simmons*.

"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." (Quoting *Kelly v. South Carolina*, 534 U.S. 246, 254 (2002). The Arizona Supreme Court stated that inferences in other cases that the defendant posed a danger to society were far stronger than this case. *Sanders* at ¶ 21. That is not an accurate portrayal. Even if it were the case, a "weaker" reference to future dangerousness…is still a reference to future dangerousness, that creates a *Simmons* violation.

d. Worst Case Ever Seen.

The Arizona Court reviewed numerous statements by the trial prosecutor exclaiming that this was the worst case of child abuse ever witnessed or imagined by dedicated and experienced professionals, including police officers and medical examiner, who the public would expect to be hardened from this type of statement from their prior professional experience. The "worst case ever" statement combined with the possibility of release is a suggestion of future

dangerousness which this court found in *Lynch* and should have found here. *Lynch*, 136 S.Ct. at 1819. The trial court initially allowed, over objection, the "worst case" statements, but eventually even the trial court tired of the statement and ordered the prosecutor to refrain from using the "worst case" statement or eliciting such a comment from other witnesses. (ROA 329).

C. **CONCLUSION**

The Arizona Supreme Court stated that in all other *Simmons* cases in Arizona, future dangerousness "entailed a random or predatory murder involving a stranger who had the misfortune of crossing the defendant's path. Citing to *State v. Hulsey*, 243 Ariz. 367 (Ariz. 2018), where a police officer was shot by the passenger in a car stopped for a traffic violation, and *Escalante-Orozco*, 241 Ariz. 254 (2017), where an apartment manager beat, raped and stabbed to death a resident, fled and remained at-large for six years.

The *Lynch-Simmons* standard that the jury in a death penalty case must be correctly instructed regarding the parole ineligibility of the defendant was abandoned in favor of a new standard that the jury must only be correctly informed of the parole ineligibility when the prosecution shows that the defendant is likely to harm a complete stranger in the future.

The prosecution went to great lengths to demonstrate that Sanders was a danger to society when it elicited over and over again that this was the most extreme case of child abuse ever seen, when it brought out evidence that Sanders was accused of rape while in the military, when it stressed that Sanders laughed and smiled after brutally murdering the child, and that Sanders choked the child's mother. These are all examples of the propensity for future dangerousness. The Arizona Supreme Court's determination that there was no discussion of future dangerousness, and thus no *Simmons* violation, is at odds with the facts of the case, and a remand is appropriate.

This Court has held that the due process clause of the fourteenth amendment requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 484 (1984).

The petition for a writ of certiorari should be granted. Petitioner's death sentences vacated and the matter remanded for a new sentencing trial.

Respectfully submitted,

___/s/Natman Schaye_____
Natman Schaye
Attorney for Petitioner

Date:
____12 December 2018_____