No. 18–7242

IN THE
SUPREME COURT OF THE UNITED STATES

DAUNTORIAN LYNDEL SANDERS,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

DOMINIC E. DRAYE
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL

ANDREW STUART REILLY
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
2005 N. CENTRAL AVE.
PHOENIX, ARIZONA 85004-1580
CADOCKET@AZAG.GOV
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to review the Arizona Supreme Court's conclusion that Sanders was not entitled to an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), because his future dangerousness was not at issue during his capital-sentencing proceeding, where Sanders seeks only to correct what he perceives to be an erroneous factual finding that is specific to his case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

OPINION BELOW

On September 13, 2018, the Arizona Supreme Court unanimously affirmed Petitioner Dauntorian Lydel Sanders' first-degree-murder conviction and death sentence. Pet. App. A. The court's opinion is reported at *State v. Sanders*, 425 P.3d 1056 (Ariz. 2018). The court subsequently denied Sanders' motion for reconsideration on October 2, 2018. Pet. App. B.

STATEMENT OF JURISDICTION

Sanders timely filed his petition for writ of certiorari on December 11, 2018, *see* U.S. SUP. CT. R. 13.1, 13.3, and this Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION INVOLVED

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

During the summer of 2009, Sanders lived with his girlfriend, Susan Whitbracht, and her three-year-old daughter from a previous relationship, Schala Vera. Pet. App. A. at 2. On August 31st, Sanders called 911 to report that Schala was not breathing, and the responding officer found her unresponsive on a bathroom floor. *Id.* She was blue in color, and her eyes were "rolled back in her head." *Id.* Her body was also "heavily" bruised. *Id.* The officer performed CPR,

and paramedics rushed her to a nearby hospital, but Schala could not be revived. *Id.*

Detectives questioned Sanders at the hospital, and he initially claimed ignorance when asked why Schala became unresponsive. *Id.* Sanders simply said he found Schala on the bathroom floor after returning from a nearby drugstore. *Id.* He explained that the bruising on Schala's body resulted from spankings she received for misbehaving. *Id.* at 2–3. Sanders said he routinely spanked Schala with his hand and a belt, but he claimed he had not spanked her that day. *Id.*

Detectives later interviewed Sanders at the police station, where he again claimed he did not know why Schala became unresponsive. *Id.* at 3. Sanders confirmed he had been hitting Schala with a belt for months as a form of punishment. *Id.* He initially claimed he and Susan used a cloth belt, but he later admitted to using a leather belt. *Id.* Officers found the leather belt in the bathroom where Schala died. *Id.* Sanders had wrapped the buckle and prong with tape to prevent his hand from being injured from repeatedly using the belt to beat Schala. *Id.* Although Susan also hit Schala with the belt, Sanders admitted that he beat Schala much more regularly and much more severely. *Id.* Ultimately, Sanders admitted to the detectives that he severely beat Schala with the belt before he went to the drugstore. *Id.*

An autopsy, however, revealed that Schala suffered a traumatic death that could not have been caused by a belt. *Id.* at 4. She had innumerable injuries to her head, face, shoulders, arms, back, torso, genitals, and legs. *Id.* The injuries to Schala's arms and legs were especially severe and numerous. *Id.* Her arms and

legs had been crushed and beaten so brutally that the muscle tissue had died. *Id.* Schala's injuries were not consistent with being hit with a belt—the injuries were caused by a significant crushing force, such as being "squeezed, kicked, punched and/or thrown against a surface or object in addition to being struck with a belt." *Id.*

The State charged Sanders and Susan with first-degree murder and four counts of child abuse and sought the death penalty against both defendants. *Id.* at 5. The cases were severed, and Sanders was the first to go to trial. *Id.* A jury found Sanders guilty of first-degree murder and two counts of child abuse. *Id.* The jury then found three statutory aggravators during the aggravation phase—namely, that Sanders was previously convicted of a serious offense, *see* Ariz. Rev. Stat. § 13–751(F)(2); the murder was committed in an especially heinous, cruel or depraved manner, *see* Ariz. Rev. Stat. § 13–751(F)(6); and Sanders murdered a child under fifteen years of age, *see* Ariz. Rev. Stat. § 13–751(F)(9). *Id.* The jury also made an additional finding that Sanders had personally killed Schala, in accordance with *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). *Id.*

During the penalty phase, the State argued that the jury should sentence Sanders to death as retribution for this crime, focusing the jury's attention on the "moral outrage" and "affront to humanity" of his conduct in brutally murdering a 3-year-old child in his care. *Id.* at 9–10. As the State summarized in concluding its closing argument:

> *But Schala's death could have been prevented.* All it would have required is that he stopped. When he saw those bruises forming on her body, that he stopped. And he chose not to. And *for that*, ladies and gentlemen, he does deserve the ultimate punishment, the death

penalty. Ladies and gentlemen, *the State is asking you to impose a just sentence for what this defendant did to Schala.*

Id. at 10 (emphasis in original).

The jury determined Sanders should be sentenced to death.[1] *Id.* at 5. Sanders subsequently appealed, and the Arizona Supreme Court affirmed his convictions and sentences. *Id.* at 29. This petition followed.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. SUP. CT. R. 10. As a result, this Court grants certiorari "only for compelling reasons." *Id.* Sanders, however, has presented no such reason. In fact, he does not even attempt to argue that the Arizona Supreme Court's conclusion conflicts with a decision from another state court of last resort, or that the court decided an important federal question in a way that conflicts with this Court's jurisprudence.

Instead, Sanders presents a fact-intensive claim that involves the application of straightforward and well-defined legal principles. The alleged factual error only affects Sanders' case and, therefore, does not warrant this Court's intervention. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[This Court's] burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of

[1] After Sanders was found guilty and sentenced to death, Susan pleaded guilty and stipulated to a natural-life sentence.

accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (Quotations omitted); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."). This Court should deny certiorari.

I. THE ARIZONA SUPREME COURT CORRECTLY APPLIED *SIMMONS* AND HELD THAT SANDERS WAS NOT ENTITLED TO A PAROLE-INELIGIBILITY INSTRUCTION UNLESS THE STATE PUT HIS FUTURE DANGEROUSNESS AT ISSUE DURING HIS CAPITAL-SENTENCING PROCEEDING.

Sanders claims initially that the Arizona Supreme Court incorrectly applied *Simmons* and "espoused a new doctrine" permitting Arizona trial courts to deceive juries in capital-sentencing proceedings. (Pet. at 4–5.) Sanders' claim is meritless. The Arizona Supreme Court correctly recognized and identified the rule from *Simmons* and its progeny 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." Pet. App. A. at 5 (citing *Simmons*, 512 U.S. at 156). The court then correctly applied this rule by first considering whether Sanders' future dangerousness was at issue before concluding that the trial court did not err when it refused to instruct the jury on Sanders' parole ineligibility. *Id.* at 6.

Sanders asserts the court's analysis was erroneous because it allows trial courts to "remain silent on the issue of release" when the State does not allege

future dangerousness. Pet. at 4. Sanders claims that such silence will deceive juries, which "cannot be the intention of the Simmons future dangerousness doctrine." *Id.* at 5. Thus, he appears to argue a *Simmons* instruction must always be given in Arizona capital cases.

But the trial court did not remain silent on the issue of release or deceive the jury, as Sanders claims. The trial court correctly instructed the jury on Arizona law, which provides for a life-with-release (though not parole) option after 35 years for Sanders' murder conviction. *See* Ariz. Rev. Stat. § 13–751(A). And under the plain holding of *Simmons*, Sanders was not entitled to the additional parole-ineligibility instruction unless or until the State created a "false dilemma" in the jury's mind by putting his future dangerousness at issue, while allowing the jurors to believe parole was possible. *See Simmons*, 512 U.S. at 161–62, 171 (holding that due process requires a parole-ineligibility instruction only when the defendant's future dangerousness is at issue). Thus, the Arizona Supreme Court correctly identified and applied the rule from *Simmons*, and this Court should deny certiorari on the issue.

II. SANDERS' FUTURE DANGEROUSNESS WAS NOT AT ISSUE DURING HIS CAPITAL-SENTENCING PROCEEDING.

Sanders argues next that the Arizona Supreme Court erroneously found that the State did not put Sanders' future dangerousness at issue. Pet. at 8–13. Even if this alleged error could warrant certiorari, which it cannot, *see* SUP. CT. R. 10, Sanders' argument is meritless. The court correctly found that the State did not present any evidence or argue in a manner that allowed the jury to reasonably infer Sanders posed a future danger to society. Pet. App. A. at 6–11.

A defendant's future dangerousness is at issue when 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, 252 (2002) (quotation marks omitted). In *Kelly*, the state presented evidence demonstrating, among other things, that Kelly "had been caught carrying a weapon and planning or participating in escape attempts." *Id.* at 253. The state then called him "the Butcher of Batesburg," "Bloody Billy," and "Billy the Kid," while arguing that he was a sadistic serial killer and inclined "to kill anyone who rubbed him the wrong way." *Id.* at 249–50, 255.

Unlike *Kelly*, the State in Sanders' case did not introduce any evidence to suggest that he had a history of violent behavior or that he posed a danger to society. Pet. App. A. at 7. The State also made clear during its closing argument that the jury should sentence Sanders to death as retributive punishment for beating Schala to death—*not* because he posed a future danger to society. *Id.* at 9–10. Accordingly, the Arizona Supreme Court correctly held that the evidence and argument in Sanders' case was dissimilar from *Kelly* and did not put Sanders' future dangerousness at issue. *Id.*

Sanders points to evidence that he was investigated for rape while in the Marine Corps and that he once grabbed Susan by the throat during an argument. Pet. at 8–9. This evidence did not place Sanders' future dangerousness at issue. First, the supposed evidence regarding the rape investigation came as a question during the State's cross-examination of Sanders' expert witness. Pet. App. A. at 8. The question impeached the expert's opinions and did not constitute substantive

evidence that Sanders actually committed a rape. *Id.* In any event, the expert testified that police investigated the allegation and did not pursue any charges against Sanders. *Id.* Moreover, Sanders strategically refused to present additional evidence that no rape occurred and did not request a limiting instruction on how the jury could consider the impeachment question; thus, he may not speculate now that the jury considered it as evidence of his future dangerousness. *See Simmons*, 512 U.S. at 161–62 (explaining that *Simmons* is grounded in the Due Process Clause, which "does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain") (quotation marks omitted).

Second, Sanders himself introduced evidence that he once grabbed Susan by the throat during a fight. Pet. App. A. at 8. Sanders cannot use evidence that he chose to introduce to establish that the State injected his future dangerousness into the capital-sentencing proceeding. *See Simmons*, 512 U.S. at 171 (stating that a *Simmons* instruction is meant to prevent the State from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole"); *id.* at 177 (O'CONNOR, J., concurring in judgment) ("*When the State seeks to show the defendant's future dangerousness* . . . the defendant should be allowed to bring his parole ineligibility to the jury's attention . . . as a means of responding to the State's showing of future dangerousness.") (Emphasis added).

Additionally, as the Arizona Supreme Court found, the State did not argue the incident with Susan showed that Sanders was a violent or dangerous person.

Pet. App. A. at 9. To the contrary, the State argued the incident was an anomaly in an otherwise good relationship. *Id.* The State supported this argument by eliciting evidence from its own witnesses that there was no police report confirming the details of the incident and that no other domestic violence incidents occurred between Sanders and Susan. *Id.* Accordingly, the Arizona Supreme Court correctly held that the evidence and argument regarding the throat-grabbing incident was different from *Kelly* and did not suggest to the jury that Sanders posed a future threat to society. *Cf. Kelly*, 534 U.S. at 249, 252–53 (holding that the defendant's future dangerousness was at issue based on testimony and argument that Kelly was a sadistic serial killer and would kill anyone "who rubbed him the wrong way").

Sanders argues lastly that the State placed his future dangerousness at issue by emphasizing the brutality of the murder. Pet. at 9–11. The Arizona Supreme Court, however, correctly rejected that argument because the State "never suggested that based on the brutality of the murder, Sanders posed a danger to society." Pet. App. A. at 9. Nor could it have reasonably done so. This is because the brutality that Sanders exhibited towards a 3-year-old girl in his care does not demonstrate that he posed a threat to society as a whole. *Id.* at 9–10. Instead, as the State argued, Sanders' crime was an "affront to humanity" that in and of itself warranted the death penalty, notwithstanding his otherwise normal upbringing and lack of prior violent behavior. *See Gregg v. Georgia*, 428 U.S. 153, 184 (1976) ("[C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."). Such an argument does not invite the jury to infer future dangerousness. *See, e.g., Commonwealth v. Chmiel*,

889 A.2d 501, 537–38 (Pa. 2005), *cert denied*, 549 U.S. 848 (2006) (finding that statements during closing argument did not speculate about the defendant's future dangerousness because, when "viewed in context, [they] were proper commentary on Appellant's crimes as an appropriate predicate for the death penalty").

Ultimately, the evidence and argument presented in Sanders' capital-sentencing proceeding is simply not comparable to that in *Kelly*, which "invited [the jury] to infer 'that petitioner [was] a vicious predator who would pose a continuing threat to the community.'" *Kelly*, 534 U.S. at 256 (quoting *Simmons*, 512 U.S. at 176 (O'Connor, J., concurring)). The State did not present any evidence of prior violent behavior by Sanders, or suggest that he posed a future danger to society. Pet. App. A. at 10. Thus, the Arizona Supreme Court correctly determined that Sanders' future dangerousness was not at issue and, therefore, he was not entitled to a *Simmons* instruction. *See Simmons*, 512 U.S. at 156. This Court should deny certiorari.

///

///

///

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully request that this Court deny Sanders' petition for writ of certiorari.

Respectfully submitted,

Mark Brnovich
Attorney General

Dominic E. Draye
Solicitor General

Lacey Stover Gard
Chief Counsel

s/_____
Andrew Stuart Reilly
Assistant Attorney General
(Counsel of Record)
Attorneys for Respondent

7578524