No. 18-7242

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

REPLY TO 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.

Table of Contents

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

SUPREME COURT CASES

STATE SUPREME COURT CASES

STATE STATUTES

IN THE

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REPLY TO PETITION FOR WRIT OF CERTIORARI

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

REPLY

The State's response flaunts United States Supreme Court case law already aimed at the State of Arizona. The response cites a dissenting opinion for the proposition that petitions for certiorari are rarely granted in cases asserting erroneous factual findings or misapplication of properly stated rule of law. *Butler v. McKellar*, 494 U.S. 407, 429 (1990. This petition raises an important federal constitutional claim intended to bar the State of Arizona from misleading its juries in capital cases.

The straight forward legal principle ignored by the State of Arizona is the first sentence of the *Lynch v. Arizona* opinion, "under *Simmons v. South Carolina,* 512 U.S. 154 (1994), and its progeny, '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 the possibility of parole,' the Due Process Clause 'entitles the defendant to 'inform the jury of [his] parole ineligibility, either

by a jury instruction or in arguments by counsel.'"" *Lynch v. Arizona,* 136 S.Ct. 1818, 1818 (2016).

As the majority pointed out in *Butler v. Kellar*, 110 S.Ct. 1212, 1219 (1990), "the threat of habeas relief serves as a necessary and additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." The follow through on this "threat" is made easier for the Court when the Petitioner can simply point to the Respondent's clear disregard for the established constitutional standard.

The dissent in *Butler* argued that the majority opinion would allow habeas relief only where the precedent is susceptible to debate among reasonable minds. "[P]ut another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge is so clearly invalid under then prevailing legal standards that the decision could not be defended by any reasonable jurist." *Ante*, at 1222. Even if such is now the position of the majority, the Court should accept this petition and to correct Arizona's continued apprehension in correctly applying *Simmons* doctrine.

The intention of *Simmons* is that juries be accurately informed of a defendant's parole ineligibility. In this case, as in *Lynch*, the Arizona Supreme Court confirmed that parole was unavailable under state law. "*Simmons* and its

progeny establish Lynch's (as well as Sanders') right to inform his jury of that fact." Nevertheless, the Arizona Supreme Court failed to properly apply *Simmons* and *Lynch* to assure that the death qualified jury was properly informed of Sanders' parole ineligibility.

Sanders' position is consistent with longstanding capital jurisprudence. Consistent with the Eighth and Fourteenth Amendments, the Court has repeatedly held that in capital sentencing the jury must be able to consider and be instructed upon the defendant's parole ineligibility. See, *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001); *Simmons v. South Carolina,* 512 U.S. 154, 168-69 (1994); *Ramdass v. Angelone, 530 U.S. 36, 39 (2001); Cf.*, and *Kelly v. South Carolina*, 534 U.S. 246 (2002).

"The Due Process Clause entitles the defendant to inform the jury of his parole ineligibility either by a jury instruction or in arguments by counsel." *Lynch, supra,* citing *Simmons, supra, Shafer, supra., Ramdass, supra.* Yet here when the prosecution highlights that the three-year old victim was brutally murdered, (Response at p. 3.) the real effect was to show that Sanders was a dangerous person, now and in the future. The State's comments at trial were designed to implicate Sanders' future dangerousness. The comments included:

1.) This was the worst case of abuse ever seen by a cadre of law enforcement officials;

2.) The child's muscles had died;

3.) Sanders was accused of rape while in the Marines;

4.) Sanders struck his girlfriend/codefendant;

5.) Sanders admitted hitting the child with a belt, but he must have done more to cause the injuries.

These statements are the precise kind of comments that implicate future dangerousness under *Simmons,* which then permit a defendant to inform the jury that if they convict, the defendant would never leave the confines of prison.

Sanders was parole ineligible. Under Arizona law, "parole is available only to individuals who committed a felony before January 1, 1994." A.R.S. 41-1604.09(I). Appellant was convicted of crimes committed in 2014. Release on "community supervision" replaced parole on January 1, 1994—but such release is unavailable to those convicted of class 1 felonies (murder). *Ibid.* In spite of this Court's clear mandate in *Lynch*, Arizona continues to refuse to provide clear guidance to juries regarding a murder defendant's parole ineligibility after evidence of future dangerousness is introduced.

The jury must be properly informed of the parole ineligibility from the very beginning of the jury selection process. One of the perils in death qualifying a jury was recognized by the Court two decades ago: "'death qualification' in fact produces juries more 'conviction prone' than non-death-qualified' juries." *Lockhart v. McCree*, 476 U.S. 162, 173 (1986); *see also, Buchanan v. Kentucky*, 483 U.S. 402, 415, n. 16 (1987). This is particularly true in the circumstance where the jury *venire* might be informed that a life sentence includes the possibility of release. The "conviction prone" jury will clearly be less inclined to grant an accused murderer the benefit of any reasonable doubt; it is already predisposed to impose a death sentence in the event of conviction.

As Justice Sevens observed in *Baze v. Rees*, 554 U.S. 35, 78-79 (2008):

> A recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.

The purpose of jury instructions is to correctly inform the jury of the applicable law in understandable terms. *State v. Noriega,* 187 Ariz. 282, 928 P.2d 706 (App., 1996). A capital defendant has as a fundamental right under the Fifth, Sixth, Eighth and Fourteenth Amendments to an accurately instructed jury. *Taylor v. Kentucky,* 436 U.S. 478 (1978). While instructions need not be faultless, they

must not *mislead* the jury *in any way* and are a guide to the proper verdict. *Noriega, supra.; Lay v. City of Mesa*, 168 Ariz. 552, 815 P.2d 921 (App., 1991). Instructions that potentially mislead the jury on the law compel reversal. *Bollenbach v. United States*, 326 U.S. 607, 613 (1946); *accord, State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097 (1994); *State v. Schrock,* 149 Ariz. 433, 330, 719 P.2d 1049 (1986); *State v. McNair*, 141 Ariz. 475, 481, 687 P.2d 1230 (1984).

The State's misapplication of the *Simmons* rule cannot be allowed to continue. It is not enough that a jury is instructed, as suggests the State, that "Arizona law provides for a life-with-release (though not parole) option after 35 years for the murder in this case." Such a statement is intentionally and knowingly misleading in direct violation of *Simmons* doctrine.

CONCLUSION

Arizona is attempting to re-write the *Lynch-Simmons* standard that the jury in a death penalty case must be correctly instructed regarding the parole ineligibility of the defendant. Such misinformation is not the proper role of the court, or of the prosecutor.

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 sentence vacated, and the case remanded for a new trial.

Respectfully submitted,

___/s/Natman Schaye_____

Natman Schaye
Attorney for Petitioner

Date:
____20 February 2019_____