No. 19-1100

IN THE

Supreme Court of the United States

LEROY D. CROPPER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Arizona, Maricopa County

BRIEF OF AMICI CURIAE JOHN H. BLUME, STEPHEN P. GARVEY, SHERI LYNN JOHNSON, PAUL MARCUS, MARLA SANDYS, SCOTT E. SUNDBY, AND ELIZABETH S. VARTKESSIAN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

BRIEF OF AMICI CURIAE[1]

INTEREST OF THE AMICI

This case concerns whether reasonably competent defense counsel in a capital case has the responsibility to ensure that jurors have at their disposal accurate information about the unavailability of parole when selecting the appropriate punishment at the penalty phase of the proceedings. Amici are legal academics whose scholarship has relied on the work of the Capital Jury Project (CJP) to better understand the administration of the death penalty in the United States.

The CJP is a study originally funded by the National Science Foundation to determine how jurors in capital cases decide between life and death sentences. The CJP has in-depth standardized interviews (lasting on average three to four hours) with 1,350 jurors from 360 capital cases from 14 different states, of which roughly half served on juries that returned a life sentence and half served on juries that returned a sentence of death. Since its inception, CJP researchers have published over 70 articles and two books based on the data.[2]

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[1] Pursuant to Rules 37.2(a) and 37.6, Amici certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of Amici's intent to file this brief more than ten days prior to its due date and all parties consented to filing of this brief.

[2] The Capital Jury Project's original purpose and methodology, is described in William J Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J.

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Amici's collective research on the capital jury decision-making process has provided key insights for understanding how jurors respond to the prosecution's argument that the defendant poses a future danger and into the importance of the defense addressing future dangerousness through measures

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1043 (1995). Further interviews were conducted pursuant to a NSF grant in 2006 to elaborate on earlier findings bringing the total number of jurors interviewed to 1,350. *See* William J. Bowers, Christopher E. Kelly, Ross Kleinstuber, Elizabeth S. Vartkessian, & Marla Sandys, *The Life or Death Sentencing Decision: It's at Odds with Constitutional Standards; Is It Beyond Human Ability* in James R. Acker, Robert M. Bohm, & Charles S. Lanier, *America's Experiment with Capital Punishment: Reflections on the Past, Present and Future of the Ultimate Penal Sanction* 447 ff (3d ed. 2014).

such as an instruction from the trial court explaining that a life sentence does not have the possibility of parole.

SUMMARY OF ARGUMENT

CJP research has long revealed the fundamental role that future dangerousness plays in a capital juror's penalty decision. From a capital juror's perspective, future dangerousness is always "at issue," and a crucial factor in sentence selection is the concern that the defendant will some day be released from prison. One CJP researcher has called this critical lesson the capital juror's Hippocratic Oath: having convicted the defendant of capital murder, they will above all else want to ensure the defendant will never pose a risk to the public, no matter how compelling the mitigating evidence. For a capital defense lawyer, addressing this question is an essential prerequisite for presenting a successful case for life.

For the defense to address future dangerousness, a jury instruction making clear that parole is not available is an indispensable tool. This is particularly true because confusion abounds among jurors about the availability of parole and the actual length of a life sentence. And when jurors believe a "life" sentence may result in release, they are much more likely to vote for a sentence of death. Thus having the trial judge clarify that a sentence less than death will not result in parole addresses one of capital jurors' most pressing concerns and has played a pivotal role for many jurors who voted for a life sentence. Failing to make it clear to the jury that parole is not an option, particularly when, as here, the prosecution has built its case for death on future

dangerousness, greatly raises the chance of a death sentence.

ARGUMENT

I. FUTURE DANGEROUSNESS IS "ALWAYS AT ISSUE" FOR CAPITAL JURORS DURING SENTENCING DELIBERATIONS

One of the earliest findings from the Capital Jury Project data was the critical importance that future dangerousness played in capital jurors' decision making. As Professors Eisenberg and Wells found in 1993 from examining data from South Carolina: "Other than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues that jurors discuss most." Theodore Eisenberg & Martin Wells, *Deadly Confusion: Juror Instruction in Capital Cases*, 79 Cornell L. Rev. 1, 6 (1993). They explained that concerns over "dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it." *Id.* And their research confirmed that "the more jurors agree [that the defendant poses a future danger,] the more likely they are to impose a death sentence." *Id.*

This early finding as to the importance of future dangerousness to the jurors' decision has been repeatedly confirmed by the CJP as extending throughout states with capital punishment. *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999) (using nationwide CJP data to examine role of future dangerousness); Stephen P. Garvey &

Paul Marcus, *Virginia's Capital Jurors*, 44 Wm. & Mary L. Rev. 2063, 2089–93 (2003) (using Virginia data on this question); Wanda D. Foglia, 20 Justice Quarterly 187, 197 (2003) (Pennsylvania); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Jurors Perceive Expert and Lay Testimony*, 83 Virginia L. Rev. 1109, 1166 (1998) (California).

This fundamental concern on the part of jurors is so prevalent in the Project's data that one researcher has called it "the capital juror's Hippocratic Oath": having convicted the defendant of capital murder, jurors will above all else want to ensure the safety of the public. Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103, 117 (2010). Given the pivotal role that future dangerousness plays in the jurors' decision, addressing the defendant's future dangerousness is a critical prerequisite for defense counsel to present a persuasive case for life. Without assurances that the defendant will not be released, jurors are far less likely to be receptive to mitigating evidence no matter how compelling. *Id.*; *see also*, John Blume, Sheri Johnson, & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1047–49 (2007). Unsurprisingly, therefore, a fundamental part of defense counsel's obligations in putting together the case for life is taking all reasonable steps to ensure that the jury understands that the only alternative sentence to death for a defendant is life without parole. Blume, et al., *Competent Capital Representation*, *supra*, at 1047–49. Failing to meet the obligation to ensure jurors have accurate information about parole un-

does whatever other efforts capital defense counsel has made in support of a life outcome.[3]

Indeed, CJP researchers have found that future dangerousness is so intrinsic to jurors' decision making that it is "always at issue," even when the prosecution has neither argued nor presented evidence on the issue to the jury. John Blume, Stephen Garvey, & Sheri Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 406 (2001). This study used the South Carolina CJP data to examine in what type of cases future dangerousness is "at issue" given that this Court had held that a defendant is entitled "to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel" whenever future dangerousness is "at issue." *Ramdass v. Angelone*, 530 U.S. 156, 165 (2000) (citing *Simmons*, 512 U.S. at 171).

The study revealed that even where jurors reported that the prosecutor had not argued that the defendant would pose a danger to the public, the topic of future dangerousness still was a centerpiece of the jury's deliberations, Blume, et al., *Always at Issue*, *supra*, at 406 (Table 1), and that seven out of

[3] Neither amici nor this brief takes any position on whether the Court should extend the protections outlined in *Simmons v. South Carolina*, 532 U.S. 36 (2001) (plurality opinion) to cases where the prosecution does not place future dangerousness at issue, either through its argument or evidence. The Court need not address that question here because there is no question it was at issue. Pet. 7–9. Rather, amici note the ever presence of future dangerousness in deliberations to demonstrate the prejudice from failing to provide jurors information about parole eligibility: it always affects deliberations. Pet. 20–23 (arguing that *Simmons* errors renders "sentencings fundamentally unfair and unreliable").

every ten jurors in these cases reported that concerns over future dangerousness was either a "very" (43%) or "fairly" (26%) important consideration in their penalty decision. *Id*. at 497 (Table 2).

From CJP research, therefore, it has been known and repeatedly confirmed for over twenty-five years that future dangerousness constitutes one of the most critical aspects of a capital juror's sentencing decision. When defense counsel does not ensure that jurors understand the meaning of a life sentence, the resulting misperception feeds directly into jurors' concerns about future dangerousness, and makes it far more likely the case in mitigation to fall on deaf ears and prejudice the defense.

II. WITHOUT GUIDANCE, CONFUSION ABOUNDS AMONG JURORS ABOUT THE MEANING OF A "LIFE" SENTENCE, WEIGHTING THE SCALES IN FAVOR OF DEATH

"The State may not create 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 will never be released on parole." *Simmons*, 512 U.S. at 171. Where future dangerousness is placed "at issue" (as it is for jurors in all capital cases), yet the defendant is ineligible for parole and consequently will pose no substantial risk to the public, the false dilemma arises. *Schafer v. South Carolina*, 532 U.S. 36, 39 (2001) (citing *Ramdass*, 530 U.S. at 165). As a result, *Simmons* recognized a defendant's right in such cases to have the jury informed of parole ineligibility, a right the Court

recently re-affirmed. *See Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam).

CJP interviews confirm the wisdom of this protection. CJP researchers have found that jurors are not only more likely to vote for death the more strongly they believe the defendant poses a future danger, but are also more likely to vote for death the earlier they think the defendant will be released. *See* Eisenberg & Wells, *supra*, at 6–8; Bowers & Steiner, *supra*, at 666–70. In their 1993 study of South Carolina jurors in capital cases, Eisenberg and Wells first reported the empirical basis for this finding. Among those who voted for life, the jurors on average believed that the non-death sentencing alternative was a 23.8 years. Eisenberg & Wells, *supra*, at 7. Among those voting for death, the jurors on average believed that the alternative was 16.8 years. *Id.* In their 1999 article, Bowers and Steiner report "jurors who estimate release in 20 or more years are consistently and substantially less likely to vote for death than those who thought release would come in 0-9 or 10-19 years." Bowers & Steiner, *supra*, at 666. They were, across the board, "at least nineteen percentage points less likely to vote for death than one or (usually) both groups of their more mistaken counterparts." *Id.*

In sum, belief in an early release itself plays into a juror's perception that the defendant poses a future danger to the public. *See* Bowers & Steiner, *supra*, at 667–68. This Court in *Simmons* observed that "[h]olding all other factors constant, it is entirely reasonable for a sentencing juror to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not." *Simmons*, 512 U.S.

at 163. The CJP data show that jurors are acting precisely in the manner that the Court predicted.

This finding is particularly important because analysis of CJP data has documented that, left to their own surmises, "[j]urors grossly underestimate how long capital murderers not sentenced to death usually stay in prison." Bowers & Steiner, *supra*, at 648 (documenting state-by-state the divergence of juror estimates from what state law provides). If jurors are not given accurate information through the trial judge, therefore, they are likely not only to erroneously believe the defendant will be released into society at a far earlier date than is true, but also that misperception will make them significantly more likely to vote for death.

As this Court recognized in *Simmons*, *Schafer*, and most recently *Lynch*, the magnitude of the risk that jurors will vote for death based on mistaken assumptions about future dangerousness is amplified where the jurors do not realize that "life" in their case means "life without parole." Properly understanding a defendant's parole ineligibility is also critical for some jurors who would find that the defendant spending the rest of his life in prison would be sufficiently retributive for the murder, but who, without such an assurance, would vote for death because a life sentence that might allow the defendant to someday return to society would not be sufficiently severe. *See* Bowers & Steiner, *supra*, at 687–88, 703–04.

One of the positive developments that more recent CJP interviews, conducted outside of Arizona, have revealed is that following the widespread adoption of life without parole and this Court's ruling in *Simmons*—jurors' misperceptions about early release,

while still occurring, have diminished. Bowers, et al., *Life or Death Sentencing Decision*, *supra*, at 454. Of course, these developments occurred in the years after *Simmons* as states began to properly provide juries information about parole ineligibility, something Arizona did not do until very recently. *See Lynch*, 136 S. Ct. 1818.

A proper instruction that the defendant will not be eligible for parole can thus provide the jurors assurance that the defendant will not be released back into society; an assurance that, as discussed earlier, CJP data has shown is crucial for addressing juror concerns over future dangerousness and laying the foundation necessary for juror receptiveness to hearing mitigating evidence. Blume, et al., *Competent Capital Representation*, *supra*, at 1047–49. Without accurate information about the available sentences, on the other hand, jurors' misperceptions dramatically skew the decision making process towards death.

CONCLUSION

Since Capital Jury Project researchers began publishing their findings in 1993, one of the most fundamental and consistent findings has been the pivotal role that future dangerousness plays when a juror is deciding between a life and death sentence. The empirical lessons of the CJP show that the failure of defense counsel to exercise his client's Due Process right to have the jury informed of parole ineligibility, a right that this Court recognized as early as *Simmons* in 1994, manifested incompetence that gravely increased the chances of a death sentence.

By failing to request an instruction on parole ineligibility, defense counsel deprived the jurors of the knowledge that a life sentence meant that the defendant would not be released and, as a result, made it far more likely the jurors would see the defendant as posing a future danger and vote for death.

Amici urge the Court to grant the Petition for Writ of Certiorari.

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