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 IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did trial counsel render ineffective assistance by failing to request an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), where state law at the time held that *Simmons* did not apply?

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INTRODUCTION

While an inmate, Petitioner Leroy Cropper planned and carried out the murder of a corrections officer as retaliation for the search of his cell. Although he was "locked down" in his cell after the search, Cropper convinced neighboring inmates to retrieve and pass him a knife through the vent between the cells. He then enlisted another inmate to "spin" the lock on his cell, enabling him to leave. After escaping his cell with the knife, Cropper found Corrections Officer Brent Lumley in the control room and stabbed him repeatedly in the neck, killing him.

Despite Cropper's attempts to make it appear otherwise, this case is not about *Simmons* error, which is present when a court wrongly refuses to give a defendant's requested parole-ineligibility instruction. Cropper's counsel did not request a parole-ineligibility instruction, and therefore the trial court did not err by failing to give one. This case does not provide a vehicle to determine whether prejudice should be presumed from a *Simmons* error, *see* Pet. 20–23, or whether Arizona courts are complying with *Simmons*, *see* Pet. 27–29. Instead, Cropper merely asks this Court to correct the error he perceives in the post-conviction court's ruling on his ineffective-assistance claim.

This Court should deny review. Cropper presents no compelling reason for this Court to grant review on his mine-run, fact-specific claim that counsel were ineffective in failing to request a parole-ineligibility instruction on the facts of this case.

STATEMENT

On March 7, 1997, Leroy Cropper was an inmate at the Perryville State Prison in Goodyear, Arizona. Pet. App. 69a. When corrections officers discovered that some mops were missing, Officers Brent Lumley and Deborah Landsperger began searching the nearby cells. *Id*. While searching cell number 258, which held Cropper and Lloyd Elkins, Officers Lumley and Landsperger found contraband including a knife, tattooing equipment, and a possible "hit" list. *Id*. During the search, Cropper repeatedly entered the cell, yelling at the officers. Cropper believed the officers disrespected him and his property and damaged a photograph of his mother. *Id*. After searching the cell, Officers Lumley and Landsperger placed Cropper and Elkins on "lockdown" status in their cell. This resulted in the inmates being locked inside their cell from the control room master panel, unable to leave. *Id*.

Because Cropper believed Officer Landsperger had been disrespectful to him and his property during the search, he decided to retaliate. Pet. App. 93a. But Cropper did not want to be known as a "ladykiller," so he planned to kill Officer Lumley. *Id*. Because he was on lockdown, Cropper spoke through a common vent to the occupants of a neighboring cell, Eugene Long and Bruce Howell. Pet. App. 69a. Long and fellow inmate Joshua Brice retrieved an eight-inch steel carving knife that had been buried in one of the yards. *Id*. Long passed Cropper the knife through the vent between the cells. Pet. App. 69a–70a. Long then passed a right-handed glove through the vent. Pet. App. 70a. Cropper

wrapped a shoelace around the knife handle to provide a better grip. *Id*.

To get out of his cell to commit the murder, Cropper enlisted two inmates to "spin the lock" to his cell door. Pet. App. 70a. After opening the cell door, the inmates went looking for Officers Lumley and Landsperger. Howell and Long informed Cropper that Officer Lumley was in the control room with the door unlocked. *Id*. Cropper found Officer Lumley alone in the control room, opened the door, rushed at Officer Lumley, and stabbed him in the neck. Pet. App. 93a. The men crashed into a desk, and Cropper pinned the officer up against a wall while the two men struggled violently for up to two minutes. *Id*. Officer Lumley suffered a total of six stab wounds. Cropper left the knife protruding from Officer Lumley's neck. Pet. App. 70a.

Cropper returned to his cell, but the cell door was locked. He found the door to the neighboring cell unlocked and entered it, telling Howell, who was inside, "I got him." *Id*. Cropper removed his sweatshirt and undershirt, which were covered with blood, and threw them into Howell's trash can. *Id*. Cropper removed the name-tag sewn on the collar of his shirt and flushed it down Howell's toilet. Pet. App. 70a–71a.

Another inmate spun the lock to Cropper's cell door, and Cropper returned to his cell. Pet. App. 71a. Cropper's cellmate helped Cropper clean the blood from his body. Cropper cleaned the blood from his pants and shoes by soaking them in a mixture of water and laundry detergent. *Id*. Howell put Cropper's bloody clothes inside a garbage bag, which he threw onto the roof of the building. *Id*.

Meanwhile, prison officers were changing shifts. Officers coming on duty discovered Officer Lumley and attempted to resuscitate him. Pet. App. 93a. Despite their efforts, Officer Lumley did not survive.

Cropper pleaded guilty to the first-degree murder of Officer Lumley. Pet. App. 91a. The trial judge initially sentenced Cropper to death, but the Arizona Supreme Court vacated that sentence on direct appeal pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), which was decided while Cropper's appeal was pending, and remanded for a new sentencing. Pet. App. 91a–92a. On remand, a jury found two aggravating circumstances: Cropper had been convicted of a prior serious offense, A.R.S. § 13–703(F)(2) (1993), and Cropper committed the murder while he was incarcerated, A.R.S. § 13–703(F)(7) (1993). Pet. App. 92a. The jury, however, hung as to whether the killing was especially cruel, A.R.S. § 13–703(F)(6) (1993), and also failed to reach a verdict on the sentence. At resentencing pursuant to A.R.S. § 13–703.01(K) (2002), a second jury found the (F)(6) circumstance proven and sentenced Cropper to death. *Id.*

On independent review, the Arizona Supreme Court affirmed the jury's aggravation findings and Cropper's death sentence. Pet. App. 98a–100a, 105a. On February 8, 2017, the post-conviction court summarily dismissed Cropper's petition for post-conviction relief, finding no colorable claims. Pet. App. 61a. With respect to the ineffective-assistance claim at issue here, the court found that trial counsel did not perform deficiently in failing to request a parole-ineligibility instruction pursuant to *Simmons* because at the time

the court instructed the jury, the Arizona Supreme Court had held that *Simmons* did not apply in Arizona. The court further found that Cropper was not prejudiced by the absence of a parole-ineligibility instruction because there was no reasonable probability that the jury would have imposed a life sentence had it known Cropper could not be released on parole. The Arizona Supreme Court denied review.

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Cropper has presented no such reason. In particular, Cropper has not established that the state court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, Cropper "assert[s] error consist[ing] of erroneous factual findings [and] the misapplication of a properly stated rule of law," for which this Court "rarely grant[s]" certiorari review. Sup. Ct. R. 10. Because Cropper merely seeks correction of the Arizona post-conviction court's perceived error in denying his ineffectiveness claim, this Court should deny the petition.[1]

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[1] Cropper's Amici are misfocused on claims of stand-alone *Simmons* error and otherwise present arguments already made by Cropper. *See* Sup. Ct. R. 37.1 (an amicus that does not address a "relevant matter not already brought to [the Court's] attention by the parties … burdens the Court, and its filing is not favored").

I. CROPPER ALLEGES INEFFECTIVE ASSISTANCE (NOT *SIMMONS* ERROR), AND IN ANY EVENT ARIZONA ADHERES TO *SIMMONS*.

In *Simmons*, this Court held that, "where 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*, 512 U.S. at 156; *see also Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001). In *State v. Cruz*, 181 P.3d 196, 207, ¶ 42 (Ariz. 2008), the Arizona Supreme Court held that *Simmons* did not apply in Arizona. *See also State v. Benson*, 307 P.3d 19, 32, ¶ 56 (Ariz. 2013) ("Arizona law does not make Benson ineligible for parole."); *State v. Hargrave*, 234 P.3d 569, 582, ¶ 53 (Ariz. 2010) ("[T]he instructions here correctly reflected the statutory potential for Hargrave's release."); *State v. Garcia*, 226 P.3d 370, 387, ¶ 77 (Ariz. 2010) ("[T]he trial court was not required to give an instruction on parole eligibility because ... Garcia was not technically ineligible for parole."). In *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), however, this Court held that *Simmons* applies in Arizona and as a result Arizona courts must instruct juries, when the State argues future dangerousness in capital sentencing proceedings, that the defendant cannot receive a parole-eligible sentence.

Cropper asserts that, even after *Lynch*, "Arizona courts are still reluctant to adhere to" *Simmons*. Pet. 28. But the question whether Arizona courts have complied with this Court's rulings in *Simmons* and

Lynch is not encompassed in the ineffectiveness claim Cropper presents for this Court's review, which asks whether counsel's failure to seek a *Simmons* instruction was ineffective. This case does not provide a vehicle to consider the state courts' adherence to *Simmons*. The post-conviction court's resolution of Cropper's routine ineffective-assistance claim has no bearing on the question whether Arizona courts adhere to *Simmons*' requirements.

In any event, Arizona courts correctly apply *Simmons*. Since *Lynch*, the Arizona Supreme Court has considered at least five cases alleging that trial courts erred by failing to give *Simmons* instructions. In three of these cases, the court found the trial court's error in failing to give the requested instruction not harmless and reversed for a new penalty phase. *See State v. Hulsey*, 408 P.3d 408, 435–39, ¶¶ 124–44 (Ariz. 2018); *State v. Escalante-Orozco*, 386 P.3d 798, 828–30, ¶¶ 116–27 (Ariz. 2017); *State v. Rushing*, 404 P.3d 240, 249–51, ¶¶ 36–44 (Ariz. 2017). In *State v. Sanders*, 425 P.3d 1056, 1064–67, ¶¶ 15–32 (Ariz. 2018), the court held that the State had not put the defendant's future dangerousness at issue, and therefore the trial court did not err in failing to give a *Simmons* instruction. And in *State v. Bush*, 423 P.3d 370, 385–88, ¶¶ 63–75 (Ariz. 2018), the court held that the defendant failed to request a *Simmons* instruction, and as a result the trial court did not err by failing to give one.

Further, Arizona's standard jury instructions now instruct that a sentence of life with the possibility of release does not include parole:

> If the defendant is sentenced to "life with the possibility of release," parole is not currently available. The defendant's only option is to petition the Board of Executive Clemency for release. If that Board recommends to the Governor that the defendant should be released, then the Governor would make the final decision regarding whether the defendant would be released.

Revised Arizona Jury Instructions, Capital Case Instruction 1.1.

Cropper characterizes his case as "the latest in a series of cases where a handful of state courts have refused to adhere to the teachings of this Court's decision in *Simmons*." Pet. 10–11. As just discussed, however, Arizona courts are complying with *Simmons*. Further, Cropper ignores that his claim is one of ineffective assistance of counsel, not *Simmons* error. This case does not present an important legal question related to *Simmons*. Cropper has failed to demonstrate any need for the Court's intervention in this case, which involves a state court's resolution of a routine ineffectiveness claim that presents no novel issue or conflict with decisions of this or any other court.

II. THE POST-CONVICTION COURT CORRECTLY DETERMINED THAT CROPPER'S COUNSEL WERE NOT INEFFECTIVE.

The question presented for this Court's review is not whether the state court "adhered to" *Simmons*, but whether it correctly decided Cropper's ineffective-

assistance claim under the standard this Court set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an "objective standard of reasonableness," and that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687–88.

To prove deficient performance, a defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted).

To establish prejudice resulting from counsel's deficient performance, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only those … petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted [relief]." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

A. The post-conviction court correctly concluded that counsel were not deficient in failing to request a *Simmons* instruction.

The post-conviction court held that, even if counsel erroneously believed that Cropper could receive a parole-eligible sentence, the failure to request a *Simmons* instruction was objectively reasonable "[i]n

light of the law in Arizona as it existed until 2016." Pet. App. 44a. Cropper was sentenced to death 12 years ago, when *Cruz* established that Arizona defendants were not entitled to *Simmons* instructions. The post-conviction court reasoned that counsel's failure to request a *Simmons* instruction "tracked with subsequent precedent that remained in effect in Arizona until 2016. Counsel had no reason to anticipate a change in the law." *Id.* Counsel were not deficient in failing to request an instruction to which, under Arizona law, Cropper was not entitled. *See Government of Virgin Islands v. Lewis*, 620 F.3d 359, 372 (3d Cir. 2010) ("[C]ounsel cannot be ineffective for failing to request an instruction to which [defendant] was not entitled."); *Lopez v. Thurmer*, 594 F.3d 584, 587 (7th Cir. 2010) (court reasonably concluded that counsel was not deficient in "fail[ing] to request an instruction that, as a matter of state law, the defendant [was] not entitled to in the first place").[2]

Cropper notes that other attorneys have unsuccessfully sought *Simmons* instructions in other Arizona capital cases, asserting that his counsel were deficient in failing to make the same futile request. *See* Pet. 17–19. But this does not show deficient performance. Rather, it demonstrates that counsel's decision was objectively reasonable because *Simmons*

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[2] Cropper's sentencing trial began on March 5, 2008, and the jury rendered its verdict sentencing him to death on May 2, 2008. The Arizona Supreme Court decided *Cruz* on April 21, 2008. Thus, although counsel could not have relied on *Cruz* when they filed their proposed jury instructions, it was decided well before the instructions were finalized and thus presumably guided the decision making process. *See* Pet. 15–16.

instructions were routinely refused. It also shows a lack of prejudice. *See* § II(B)(2), *infra*. Further, Cropper cites pre-*Strickland* case law interpreting the cause and prejudice standard for excusing the procedural default of a claim in a federal habeas proceeding. *Id*. at 19 (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982)). The cause and prejudice standard has no application to a deficient performance analysis under *Strickland*. "*Strickland* does not compel an attorney to urge an argument which he reasonably finds to be futile." *Bush v. Singletary*, 988 F.2d 1082, 1092, (11th Cir. 1993) (internal quotation marks omitted).[3] The post-conviction court correctly held that Cropper's counsel did not perform deficiently by failing to request a *Simmons* instruction. Cropper's disagreement with that conclusion does not warrant certiorari review.

B. The post-conviction court correctly held that Cropper was not prejudiced by counsel's failure to request a *Simmons* instruction.

The post-conviction court found that Cropper was not prejudiced by counsel's failure to request a

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[3] Cropper also asserts that the ABA Guidelines required his counsel to make a futile request for a *Simmons* instruction. Pet. 18. But this Court has never held that failure to comply with the ABA Guidelines amounts to deficient performance. *See Bobby v. Van Hook*, 558 U.S. 4, 13–14 (2009) (Alito, J., concurring) (Justice Alito writing to "emphasize [his] understanding that the opinion in no way suggests that the [ABA Guidelines] have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment").

Simmons instruction because (1) the trial court accurately instructed the jury on the possible sentences Cropper could receive, and (2) in light of the facts and circumstances of the murder, and the aggravating circumstances, there was no reasonable probability that the jury would have imposed a life sentence had a *Simmons* instruction been given. Pet. App. 46a.

Cropper disagrees with the court's factual conclusions, but he presents no reason for this Court to review them. Further, in complaining of the post-conviction court's no-prejudice finding, Cropper presents meritless arguments he forfeited by failing to raise below. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) ("The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party."); *United States v. Jones*, 565 U.S. 400, 413 (2012) (finding argument forfeited because government did not raise it below).

1. Prejudice may not be presumed.

This case does not provide a vehicle to determine whether prejudice may be presumed when *Simmons* error is present. Cropper asserts that "*Simmons* errors render sentencings fundamentally unfair and unreliable" and therefore prejudice from such errors should be presumed. Pet. 20. But to the extent Cropper assumes *Simmons* error is present here, he is incorrect: because Cropper did not request a *Simmons* instruction, the trial court did not err by failing to give

one. *See Bush*, 423 P.3d at 388, ¶ 75 (*Simmons* error is not present where "the trial court neither refused to instruct, nor prevented [defendant] from informing, the jury regarding his parole ineligibility").

Cropper nevertheless asserts—for the first time—that counsel's failure to request a *Simmons* instruction qualifies as "an error [that] impacts the fundamental fairness of criminal proceedings," such that prejudice should be presumed under *Strickland*. *Id*. (citing *United States v. Cronic*, 466 U.S. 648 (1984); *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017)). Because Cropper did not argue below that counsel's failure to request a *Simmons* instruction amounted to a complete deprivation of counsel under *Cronic*, or otherwise entitled him to a presumption of prejudice under *Weaver*, he has forfeited the argument.[4] *See* PCR Supplement, at 43–49; *Kingdomware Techs.,* 136 S. Ct. at 1978.

In any event, counsel's failure to request a *Simmons* instruction does not "impact[] the fundamental fairness of criminal proceedings" such that *Strickland* prejudice may be presumed. Pet. 20. This Court has observed that *Simmons* provides only a "narrow right of rebuttal … to defendants in a limited class of capital cases." *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997). Counsel's failure to request a *Simmons* instruction, therefore, does not establish that "counsel failed to

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[4] This Court decided *Weaver* in 2017, after the post-conviction court denied relief on Cropper's petition. Nevertheless, Cropper did not seek rehearing based on *Weaver* or cite *Weaver* in his petition for review to the Arizona Supreme Court, which he filed 6 months after *Weaver* was decided. *See* Petition for Review, at 43–47.

function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666. In fact, this Court held in *O'Dell* that "[i]t is by no means inevitable that, absent application of the rule of *Simmons,* miscarriages of justice will occur." 521 U.S. at 167 n.4 (internal quotation marks and alteration omitted).

Nor does *Weaver* help Cropper, even if Cropper had not forfeited this argument. In *Weaver*, this Court held that a petitioner asserting that counsel was ineffective in failing to object to the closing of the courtroom during jury selection—which is structural error—must still demonstrate *Strickland* prejudice before he is entitled to relief on the ineffectiveness claim. *Weaver*, 137 S. Ct. at 1911 ("[W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically."). This Court further cautioned that, "[w]hen a structural error is raised in the context of an ineffective-assistance claim, … finality concerns are far more pronounced." *Id.* at 1913. Thus, "the rules governing ineffective-assistance claims must be applied with scrupulous care." *Id.* at 1912 (internal quotation marks omitted).

2. The post-conviction court correctly found that Cropper was not prejudiced by counsel's failure to request a *Simmons* instruction.

Cropper contends that, had the trial court given a *Simmons* instruction, it is "at least reasonably probable that [he] would have received a life sentence." Pet. 19 (emphasis omitted); *see also* Pet. 23 (asserting a reasonable probability of a different outcome if the court had given a *Simmons* instruction). But such a

conclusion incorrectly assumes that the court would have given a *Simmons* instruction if requested. As established earlier, by the time the trial court gave the final penalty-phase instructions in 2008, the Arizona Supreme Court had decided in *Cruz* that *Simmons* did not apply in Arizona. Thus, there is no reasonable probability that the trial court would have given the instruction had counsel requested it, and as a result there is no reasonable probability that the outcome of the sentencing would have been any different. Cropper admits as much when he argues that counsel had a duty to make a futile request for a *Simmons* instruction to preserve the claim. Pet. 17–19.[5]

In any event, the post-conviction court reasonably held that Cropper was not prejudiced by the absence of a *Simmons* instruction. As an initial matter, Cropper agrees that he, and not the State, placed his future dangerousness in issue. *See* Pet. 7 (citing R.T. 4/29/08, at 6–7). And the State's future dangerousness argument was brief. Cropper identified only eight lines from the prosecutor's 23-page closing argument as arguing future dangerousness. PCR Petition at 55 (citing R.T. 4/29/08, at 96); PCR Reply at 29 (Cropper acknowledging the brevity of any future dangerousness

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[5] To the extent Cropper believes he can establish *Strickland* prejudice by asserting he will be prejudiced in a hypothetical future proceeding, he is incorrect. *Strickland* required him to show he *was* prejudiced by counsel's performance, not that he *will be* prejudiced in the future. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would have been different*." (emphasis added)); *see* Brief for Amicus Curiae Arizona Attorneys for Criminal Justice, at 14–15.

argument).[6] Given that the vast majority of the State's closing argument disputed the mitigating value of Cropper's difficult childhood and emphasized the facts of the crime, any rebuttal of the "future dangerousness" argument accomplished by a *Simmons* instruction would not have been significant. *O'Dell*, 521 U.S. at 167 (*Simmons* provides a "narrow right of rebuttal" to some capital defendants).

Cropper's future dangerousness and parole-ineligibility would not have been compelling because Cropper demonstrated, by killing a corrections officer while he was incarcerated, that he remains a danger to society even while in prison. Thus, "[i]nforming his sentencing jury that petitioner would spend the rest of his days in prison would not … necessarily have rebutted an argument that he presented a continuing danger." *Id.* at 167 n.4; *see also Ramdass v. Angelone*, 530 U.S. 156, 170 (2000) ("Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled … he may be no less a risk to society in prison."); *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) ("[W]hen the State argues that the defendant poses a threat to his cellmates or prison guards, it is no answer to say that he never will be released from prison.").

In finding Cropper was not prejudiced, the post-conviction court first observed that the jury was

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[6] Cropper now asserts that the State placed his future dangerousness at issue in other argument. Pet. 7. But the arguments he cites still consist of only a few additional lines from the prosecutor's lengthy closing argument.

accurately instructed that, if it did not impose a death sentence, the court would impose a life sentence. Pet. App. 46a. The instructions did not reference any possibility of parole. *Id*. Cropper now complains that, by discussing the instructions, the post-conviction court "impl[ied] that the jury necessarily understood that parole was not available." Pet. 26. But the trial court merely noted that the jury was accurately instructed on the possible sentences. The post-conviction court appropriately considered that fact in determining that there was no reasonable probability that the jury would have imposed a life sentence had a *Simmons* instruction been requested and given.

The post-conviction court also reasonably considered the circumstances of the offense and Cropper's criminal history in finding Cropper was not prejudiced by the lack of a *Simmons* instruction:

> The jury was faced with a Defendant who had previously been sentenced to probation, who had been placed on parole, and who had murdered a corrections officer while in prison, as well as later had committed an aggravated assault.... The [un]availability of parole ... is unlikely to have been sufficiently substantial to suggest leniency to change the verdict of death to "life" in even a single juror's mind.

Pet. App. 46a.

Cropper asserts that his murder of Officer Lumley was no worse than "other first-degree murderers who have received life sentences." Pet. 27. But he did not argue below that the post-conviction court should have

compared his case to others in order to find he was prejudiced by the absence of a *Simmons* instruction. Nor should the court have done so. In determining prejudice, the post-conviction court considered whether there was a reasonable probability that *the jury* would have imposed a life sentence had a *Simmons* instruction been given. Because jurors could not have compared Cropper's crime to other murders in determining the appropriate sentence, it would have been inappropriate for the post-conviction court to do so in determining whether Cropper was prejudiced. Such a comparison would also have been inappropriate, given that Arizona does not conduct proportionality reviews of death sentences. *See State v. Salazar*, 844 P.2d 566, 583–84 (Ariz. 1992) (discontinuing proportionality reviews).

Cropper further downplays the seriousness of his premeditated murder of Officer Lumley by comparing the facts of his case to those in other cases this Court has reversed. Pet. 24–25. But this Court reversed those cases based on errors unrelated to the facts of the offenses or any ineffectiveness of counsel in failing to request a *Simmons* instruction. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (reversing for error under *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Kelly*, 534 U.S. at 257 (failure to give requested parole-ineligibility instruction); *Simmons*, 512 U.S. at 181 (same). Cropper provides no authority requiring the post-conviction court to judge his case against a "baseline norm of all first-degree murders"—or even that such a "norm" exists—before finding he was not prejudiced. Pet. 24.

Cropper also did not assert below, as he does now, that the Arizona Supreme Court's "harmlessness finding" (apparently referring to the Arizona Supreme Court's post-*Ring* remand of Cropper's case for jury sentencing) established he was prejudiced by the lack of a *Simmons* instruction. *See* Pet. 25. But the *Ring* remand does not establish that Cropper was prejudiced by counsel's failure to request a *Simmons* instruction. In remanding for a jury sentencing, the Arizona Supreme Court merely held that a reasonable jury could fail to find the cruelty aggravating circumstance (which the trial court had found) and could have found mitigating circumstances that the trial court had rejected. Pet. App. 86a, 89a. The remand was not relevant to the question of whether there was a reasonable probability that the 2008 jury (which did find the cruelty circumstance proven) would have imposed a life sentence had a *Simmons* instruction been given.

The 2006 jury's inability to reach a sentencing decision also does not support a finding of *Strickland* prejudice. Pet. 25, 27. That jury did not reach a decision on the cruelty aggravator and therefore had fewer aggravators to weigh against mitigation than did the 2008 jury. Pet. App. 92a. The 2006 jury's inability to reach a sentencing verdict on fewer aggravating circumstances does not suggest a reasonable probability that the 2008 jury would have imposed a life sentence had a *Simmons* instruction been given.

Nor does it matter that the 2006 jury asked (but was not told) whether a parole-eligible sentence was possible. *See* Pet. 25. That jury failed to reach a

sentencing verdict—thus, it did *not* impose a death sentence based on any fear that Cropper might be released one day. The fact that the jury asked this question, therefore, does not establish that Cropper was prejudiced by the absence of a *Simmons* instruction.

CONCLUSION

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

Respectfully submitted

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