No. 19-1100

In The
Supreme Court of the United States

LEROY D. CROPPER,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF ARIZONA,
MARICOPA COUNTY

REPLY BRIEF OF PETITIONER

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Leroy Cropper was constitutionally entitled to a *Simmons* instruction or to otherwise inform the jury of his parole ineligibility—if his counsel had just asked. *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion). This case is different from *Lynch v. Arizona*, *only* because his counsel did not. 136 S. Ct. 1818 (2016) (per curiam). And the evidence makes clear that if counsel had asked, this exceedingly close case for death may well have come out the other way—as it had in 2006. One holdout juror, and Cropper would have been sentenced to life (without parole).

On the merits of Cropper's ineffective assistance of counsel claim, the State has no good response. Instead, it argues that the Court should deny review because this is just a "mine-run, fact-specific claim" that is not a "*Simmons* error." Opp. 1. But there is nothing "mine-run" about an unconstitutional death sentence. And an ineffective assistance claim premised on counsel's failure to ask for a *Simmons* instruction is not somehow less worthy of this Court's time. That the State's primary defense rests on Arizona's decade of *Simmons* errors makes that much clear. This Court's intervention is needed.

1. The showing of prejudice is overwhelming.

a. It took the State three attempts to obtain a death sentence in Cropper's case. The first attempt ended in the Arizona Supreme Court throwing out a judge-imposed death sentence because it could not say that the judicial sentencing error was harmless. The second ended in a jury hanging on the question of death. And that jury asked during deliberations: "[Is] 'Life' without parole or with a chance for parole?" RT

2007-01-08 at 3. If one juror had not voted for death in the State's third attempt, Cropper would have received a life sentence. *See* Ariz. Rev. Stat. Ann. § 13-752(K). This is powerful evidence that the case is close; that jurors cared about Cropper's parole eligibility; and that at least one properly instructed juror would have refused to vote for death.

The State waits until the penultimate page of its brief in opposition to confront these facts. Opp. 19-20. And when it does, the State addresses each, in piecemeal fashion, arguing that none definitively establish prejudice. That is not the correct analysis. *See Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) ("[W]e have emphasized" that *Strickland*'s prejudice inquiry looks to "the 'totality of the evidence.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)); *Williams v. Taylor*, 529 U.S. 362, 396-98 (2000). Viewed holistically, the evidence provides strong indicia of prejudice.

The State argues that the Arizona Supreme Court's decision is "not relevant" because that court "merely held that a reasonable jury could fail to find the cruelty aggravating circumstance," which the 2008 jury "did find." Opp. 19. But that misses the point. That a reasonable juror could have found Cropper's crime not to be "excessively cruel" underlines the closeness of the case. As the Arizona Supreme Court explained, "Officer Lumley remained conscious for a relatively short time" and "[t]he manner in which [he] died" was not "as patently cruel as were the deaths" in other Arizona cases. App. 86a. The Arizona Supreme Court also held that a jury could have "weighed differently the established

mitigating circumstances." App. 89a. Put another way, a reasonable jury could have chosen life.

Which is in effect what the 2006 jury did when it hung on the question of death. The State suggests this too cannot "support" prejudice because that jury was unable to "reach a decision on the cruelty aggravator." Opp. 19. But the 2006 jury found the other two aggravators (which were each sufficient to impose death); heard the same physical evidence relating to the cruelty aggravator; and, still, was unable to reach a unanimous verdict on whether death was warranted. App. 92a. Surely the fact that the 2006 jury did *not* sentence Cropper to death provides at least "support" for a finding that the 2008 jury might not have sentenced Cropper to death.

That the 2006 jury cared enough about parole eligibility to ask whether "[l]ife" meant "[l]ife without parole" provides still further support. RT 2007-01-08 at 3. The State says this does not "establish" prejudice because the 2006 jury "did *not* impose a death sentence." Opp. 20. But if jurors (mistakenly) believed that Cropper was eligible for parole and still did not sentence Cropper to death, that only shows how close a case for death this truly is.

Nobody can get into the head of a single 2008 juror. *See McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (the "collective judgments" of "individual jurors" "often are difficult to explain"). And this Court's case law does not require a defendant to prove, with certainty, based on a single piece of evidence, that the jury would have reached a different result. But it blinks reality to suggest that this evidence provides no "support" for a showing of prejudice. The facts establish a real (and more than reasonable)

probability that at least one properly instructed juror would not have voted for death.

b. The State argues (Opp. 12) that the question whether "prejudice may be presumed" is not properly presented. *First*, the State says this case "does not provide a vehicle to determine whether prejudice should be presumed from a *Simmons* error" because it arises in the context of an ineffective assistance of counsel claim. Opp. 1, 12-13. That is the *only* context in which questions regarding *Strickland* prejudice arise. *Second*, the State argues that Cropper failed to make this argument below. Opp. 13. That is incorrect. MCSC Supp. to PCR Pet. 45-48, No. CR1997-003949 (Aug. 20, 2016) (section heading, "Supreme Court Jurisprudence Establishes the Inherent Prejudice of Denying Mr. Cropper the 'No Parole' Instruction"); Ariz. Sup. Ct. Pet. 43-47, No. CF-17-0566-PC (Jan. 12, 2018).[1]

On the merits, the State does not dispute that (i) jurors are inherently confused about the availability of parole; (ii) parole eligibility plays a significant role in juror decisionmaking; and (iii) erroneous death sentences are irrevocable. Pet. 20-23; *see* Legal Academics Amicus Br. 7-9. The State simply argues that "counsel's failure to request a *Simmons* instruction" does not impact "'fundamental fairness . . .' such that *Strickland* prejudice may be

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[1] *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), was decided after Cropper's petition was denied, and Cropper *did* cite *Weaver* in the Arizona Supreme Court. Ariz. Sup. Ct. Reply 8 (June 28, 2018). More fundamentally, preservation depends on whether a party pressed a claim, not whether it made a specific argument in support. *See Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

presumed." Opp. 13. But whether the very nature of *Simmons*-related errors makes prejudice inescapable, or the conventional prejudice analysis applies, this case exudes prejudice.

c. The State's remaining arguments on *Strickland* prejudice lack merit.

First, the State argues that there can be no prejudice because the state court would not have complied with *Simmons* even had counsel raised the issue. Opp. 14-15. Put another way, there can be no prejudice when a state court is intent on violating a defendant's constitutional rights. That is absurd.

A quick walk through the "but for" world reveals the fatal flaw in the State's position. If defense counsel had asked for a *Simmons* instruction, and the state court had refused, there indisputably would be constitutional error. That error could be raised on direct appeal and, ultimately, in this Court. In short, Cropper would be in the same position as the capital defendant in *Lynch*.[2]

Second, the State suggests Cropper was not prejudiced because the instruction given—which said "life"—was "accurate[]." Opp. 16-17. That just shows the State still doesn't get *Simmons*. *Simmons* and its progeny are premised on the "grievous misperception" among jurors "about the meaning of 'life imprisonment.'" 512 U.S. at 159, 161-62; *see id.* at 177-78 (O'Connor, J., concurring in the judgment);

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[2] Contrary to the State's suggestion (Opp. 15 & n.5), *Strickland* is not focused only on the initial trial court proceeding. *See, e.g.*, *Freeman v. Lane*, 962 F.2d 1252, 1258-59 (7th Cir. 1992) (explaining that "counsel's performance" cannot "be justified simply because the issue . . . may not be vindicated until later stages of the appellate process").

Kelly v. South Carolina, 534 U.S. 246, 257 (2002); *Shafer v. South Carolina*, 532 U.S. 36, 52 (2001). The issue is not whether the instruction was technically accurate; it is whether that undefined term carries an unacceptable risk that jurors will mistakenly believe parole is available and whether this misperception will unduly influence their decision. *Simmons* answers that question.

Third, the State says the post-conviction review court "reasonably *considered* the circumstances of the offense and Cropper's criminal history." Opp. 17 (emphasis added). But it doesn't say how those circumstances help the State. Cropper was in prison for non-violent drug crimes and had no prior conviction for any violent offense. Pet. 24. And the facts of Cropper's crime (while undoubtedly serious) stand in marked contrast to the death penalty cases this Court regularly considers.

Fourth, the State suggests that a *Simmons* instruction would not have mattered because "the State's future dangerousness argument was brief" and Cropper would be a danger "even while in prison." Opp. 15-16. But the State told the jury that Cropper was a "cold-blooded killer," and implored the jury to consider his "next victim" and not give Cropper "another second chance" on "probation [or] parole." RT 2008-04-29 at 91, 92-93, 96; *see* Pet. 7-8. And this Court has already rejected the argument that the importance of a *Simmons* instruction dissipates at the prison walls—as the State's reliance on a *dissent* makes clear. Opp. 16 (citing *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting)). *But see Kelly*, 534 U.S. at 254 n.4. For jurors, there is a material difference between future dangerousness inside and outside of

prison. *See id.*; *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment). That Cropper's 2006 jury asked about parole—even though Cropper pleaded guilty to killing a prison guard—proves as much.

2. The State's arguments on the deficiency prong fare no better. The State does not dispute that Cropper was constitutionally entitled to a *Simmons* instruction. It nonetheless insists that counsel was not deficient because "under Arizona law" (*i.e.*, the erroneous decision in *State v. Cruz*, 181 P.3d 196 (Ariz. 2008), *cert. denied*, 555 U.S. 1104 (2009)), "Cropper was not entitled" to a *Simmons* instruction. Opp. 10.

Cruz cannot explain counsel's failure because it was decided only 11 days before Cropper's death sentence. The State tries to dismiss this inconvenient fact in a footnote (Opp. 10 n.2), but the reality is that defense counsel never asked for a *Simmons* instruction in 2008—or in 2006—because counsel (wrongly) believed that Cropper *was* eligible for parole. Pet. 15-16 & n.4. (Counsel even offered to waive Cropper's non-existent right to parole. Pet. 15.) The related suggestion that any request would have been futile (Opp. 10-11) relies on cases that post-date *Cruz*. Put simply, counsel's failure had nothing to do with *Cruz*.

But even if *Cruz* could explain counsel's failure, it cannot excuse it. *Lynch* was a straightforward application of decade-old precedent. Pet. 17. In the State's own words: "*Lynch* . . . did not change the law, it applied existing law to an Arizona case." Supp. Br. 5, *Arizona v. Cruz*, CR-17-0567-PC (Ariz. Apr. 24, 2020). Capital defense counsel cannot reasonably

place a state court decision on an issue of federal constitutional law above decisions of this Court. Pet. 18. As amicus Arizona Attorneys for Criminal Justice explains, reasonable capital defense counsel in Arizona would have (and routinely did) ask to instruct the jury on parole ineligibility after *Cruz*. AACJ Amicus Br. 16-19; *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.11, cmt. The Defense Presentation at the Penalty Phase (counsel "should emphasize through evidence, argument, and/or instruction that the client will . . . never be eligible for parole").[3]

The State's two cases (Opp. 10) are inapposite. In *Government of the Virgin Islands v. Lewis*, the Third Circuit held that the defendant was *not* entitled to the requested instruction. 620 F.3d 359, 370-72 (3d Cir. 2010). And in *Lopez v. Thurmer*, the issue was whether the defendant was entitled to an instruction under *state* law. 594 F.3d 584, 587 (7th Cir.), *cert. denied*, 562 U.S. 845 (2010). Neither case addressed whether counsel would be deficient in failing to request an instruction that the defendant *was* constitutionally entitled to under federal law.

The court of appeals cases that do address that question generally side with Cropper. For example, in *Freeman v. Lane*, the Seventh Circuit rejected the state's "assert[ion] . . . that, under Illinois'

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[3] Contrary to the State's suggestion (Opp. 11 n.3), the Guidelines are a useful "guide[] to determining what is reasonable." Pet. 18 (alteration in original) (quoting *Strickland*, 466 U.S. at 688); *see Missouri v. Frye*, 566 U.S. 134, 145 (2012); AACJ Amicus Br. 7 (Arizona law requires counsel in capital cases be familiar with ABA Guidelines).

interpretations of the Fifth Amendment, the prosecutorial comments were permissible and that therefore counsel's failure to raise the issue was not objectively unreasonable," because the defendant "had a meritorious Fifth Amendment argument under *our* precedent." 962 F.2d 1252, 1257-58 (7th Cir. 1992) (emphasis added). Similarly, in *Orazio v. Dugger*, the Eleventh Circuit explained that, "[e]ven if there was a possibility that the [state] court would find against [the defendant] on the issue, such a constitutional claim should have been raised on direct appeal" because "[a]n adverse ruling could then have been reviewed in collateral proceedings." 876 F.2d 1508, 1513 (11th Cir. 1989). The Eighth Circuit, in contrast, has held that trial counsel was not ineffective in failing to raise a challenge to the exclusion of women from the jury even though this Court had recently found another state's comparable jury selection system unconstitutional. *See Brunson v. Higgins*, 708 F.2d 1353, 1355-59 (8th Cir. 1983). To the extent this represents a disagreement among the circuits, that is all the more reason to grant review.

3. The State asserts that the Court should deny review regardless of the merits because this is a "mine-run" case seeking to correct a case-specific error. Opp. 1. But, fortunately, there is nothing "mine run" about a constitutional error in a capital case that may well be the difference between life and death. That is presumably why this Court summarily reversed in *Lynch*. And that is why this Court has repeatedly summarily reversed or granted plenary review to correct constitutional errors—including

Simmons-related errors—in capital cases even in the absence of a circuit split.[4]

But there is also considerably more at stake here, such as the sanctity of this Court's precedents. The State acknowledges that "*Simmons* instructions were routinely refused" in Arizona from 2008 (when *Cruz* was decided) to 2016 (when *Lynch* was decided). Opp. 10-11. But the State claims this Court has nothing to worry about because, more than 25 years after *Simmons*, Arizona is now in compliance. Sure, it took a summary reversal from an eight-member Court in 2016. But at least since then, the State says, the Arizona Supreme Court has been following *Simmons*, on direct review, when it concludes the error was not harmless. Opp. 7-8 (citing five cases; three granted relief over State's continued objection).

This case proves otherwise. The State's entire defense on the deficiency prong rests on an Arizona Supreme Court decision directly contrary to *Simmons*. The State argues that Cropper cannot prove prejudice because the state court would have *wrongly* refused to give a *Simmons* instruction. And the State continues to emphasize the "accura[cy]" of the jury instruction, even though *Simmons* made clear that jurors do not understand the undefined term "life" to mean life without parole.

Contrary to the State's contentions (Opp. 1, 6, 8, 12-13), Cropper never styled this petition as raising a standalone "*Simmons* error." The error here is that

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[4] *See, e.g.*, *Kelly*, 534 U.S. 246; *Shafer*, 532 U.S. 36; *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam); *Maples v. Thomas*, 565 U.S. 266 (2012); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam).

Cropper's counsel never asked for the *Simmons* instruction to which he was entitled. The State also takes a wrong turn when it suggests that this distinction matters. Cropper's ineffective assistance of counsel claim is premised on counsel's failure to ask for a *Simmons* instruction. And ineffective assistance of counsel claims are one of the most important ways in which constitutional rules are effectuated.[5]

The question here is not the same as *Lynch*, but it is a necessary corollary if *Simmons* is to be given effect. Arizona courts refused to give *Simmons* instructions for nearly a decade and, in the State's view, reasonable defense counsel would not have even bothered to request such an instruction. The State is wrong about the latter, but the point remains the same. The State cannot hide behind years of its blatant disregard of *Simmons* and defense counsel's failures. This Court's intervention is needed to send the message that ineffective assistance of counsel is not yet another way for Arizona to evade *Simmons*. And, at the very least, it is needed to ensure that an obviously unconstitutional death sentence is not carried out.

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[5] Ineffective assistance claims are often premised on the denial of a substantive constitutional right. *See Weaver*, 137 S. Ct. at 1912-13 (public trial); *Premo v. Moore*, 562 U.S. 115, 123 (2011) (suppress confession); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (suppress evidence); *see also Virgil v. Dretke*, 446 F.3d 598, 614 (5th Cir. 2006) (biased jurors); *McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998) (right to jury trial).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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