No. _____

In The
Supreme Court of the United States

CHRISTOPHER MATHEW PAYNE,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. In 2016, the Court summarily reversed the Arizona Supreme Court for refusing to allow a capital defendant to inform the jury about his parole ineligibility. *See Lynch v. Arizona*, 136 S. Ct. 1818(2016) (per curiam). In this case, the Arizona courts again upheld a death sentence even though the jury was never told that the capital defendant was ineligible for parole. The difference between this case and *Lynch* is that the jury here was never told because defense counsel never asked.

The question presented is:

Whether a death sentence may be carried out when defense counsel unreasonably fails to inform the jury of parole ineligibility under Simmons, 512 U.S. 154, resulting in prejudice.

LIST OF RELATED PROCEEDINGS

State v. Payne, No. CR 2007-0973, Arizona Superior Court, Pima County.

State v. Payne, No. CR-09-0081-AP Arizona Supreme Court. Judgment entered August 21, 2013.

Payne v. Arizona, No. 13-8129, United States Supreme Court, Petition for Writ of Certiorari denied March 10, 2014.

State v. Payne, No. CR-18-0120-PC, Arizona Supreme Court. Petition for Review of Order Dismissing Petition for Post-Conviction Relief denied October 6, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Christopher Mathew Payne, an Arizona prisoner under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of the State of Arizona, in and for the County of Pima.

OPINIONS BELOW

The Ruling of the Pima County, Arizona Superior Court, on February 6, 2018, denying relief to Petitioner in his post-conviction proceeding is unreported, and is Appendix 1a hereto. The Amended Ruling of the Pima County, Arizona Superior Court, on February 8, 2018, further explaining its basis for denying post-conviction relief is unreported and is Appendix 7a hereto. The order of the Arizona Supreme Court, on October 6, 2020, denying a Petition for Review of the Superior Court order is unreported, and is Appendix 8a hereto. The amended opinion of the Arizona Supreme Court on direct appeal, affirming Petitioners conviction and sentence of death is reported at 314 P.3d 1239 (Ariz. 2013), and is Appendix 9a hereto.

JURISDICTION

The order of the Arizona Supreme Court denying Petitioner's Petition for Review of the Superior Court order was issued on October 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions are set forth in Appendix 33a.

INTRODUCTION

Christopher Payne's jury reached a death verdict, but only after his counsel performed deficiently, in numerous areas, but specifically in one critical respect. Despite this Court's repeated admonitions about the importance of informing the jury when the only alternative sentence to death is life without parole, the jury never received this information because counsel never asked for such an instruction. If Payne's counsel had simply asked, the Arizona court would have been constitutionally required to inform the jury that he was ineligible for parole, and there is *at least* a reasonable probability that Payne would not be awaiting an execution date today. Indeed, that conclusion should follow as a matter of law.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. And in the ensuing years, this Court has repeatedly granted certiorari to reverse death sentences where state trial courts have refused to inform the jury of parole ineligibility under *Simmons*. Most recently, six Justices voted to summarily reverse the Arizona Supreme Court for committing precisely this error. *See Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam). This petition comes to the Court from Arizona, and on state post-conviction review, without the complications of federal habeas relief or the exigencies of an impending execution date. The Court's review is needed to ensure that an unconstitutional death sentence is not carried out.

STATEMENT OF THE CASE

1. Petitioner Christopher Payne lived an unremarkable life for his first six years, except for the very significant absence of his mother, who had died of

cancer when he was fourteen months old, leaving him to be cared for by aunts and nannies. Petitioner's father, Forrest Payne remarried when Petitioner was six years old, blending his family with two step-sisters. Petitioner was a happy, polite, respectful little boy who responded to love and affection. (App. P, Q, S.)[1] Close friends and family members said that Petitioner, although insecure and shy, was a good friend and nephew. He was respectful, did chores when asked, and was basically a great child to be around. (App. S.)

Mitigation witnesses, other than family, who were available but not presented at Petitioner's mitigation hearing, would have testified that during his childhood years, before his onset of alcohol and drug abuse, Petitioner was a nice, well-mannered, respectful, polite, friendly, and affectionate child. (App. P, Q, R, S.) Petitioner's childhood was not without difficulties; yet he developed as a normal, cheerful, kind child and youth. Family and friends would have testified that prior to the onset of alcohol and drug use he had potential for success and he was very family oriented. (App. M.) But ultimately, he became heavily addicted to heroin, severely misused cocaine, and mixed them with alcohol, marijuana, Xanax, Valium and Seroquel, to the point of serious impairment contributing to, or even causing, his criminal behavior. (App. D, Alan Abrams, M.D.¶¶ 7, 8.)

[1] References to "App." followed by a letter are to Appendices to the Petition for Review filed May 31, 2018 in the Arizona Supreme Court, from the Record of the Petition for Post-Conviction Relief in the Pima County Superior Court, and part of the record in that court.

2. Before Petitioner's life progressed very far into his teenage years, alcohol and drugs began an existential attack on his life. Neither Petitioner nor those around him initially recognized his drug and alcohol use as life threatening. Petitioner turned to the use of marijuana and alcohol to feel as if he fit in, and to cope with his teenage world.

Petitioner's drug and alcohol use began between the age of ten and eleven. He also started to smoke tobacco and marijuana. (App. L.) By fifteen he was heavily drinking alcohol and smoking marijuana on a daily basis. By his sophomore year in high school he started to use cocaine regularly, and he ingested acid, mushrooms, and methamphetamines. (App. N.) Petitioner experienced black-outs, auditory hallucinations, and paranoia. Petitioner dropped out of school, due to his persistent drug use. (Trial Ex. 91.))

By the time Petitioner turned eighteen his consumption of alcohol and multi-drug usage had increased dramatically. He abused cocaine from age fifteen until his arrest at age 28, and drank alcohol excessively. About the time he turned twenty he added heroin to the long list of drugs he was using. What had begun as just teenage experimentation ultimately became an all-consuming and disabling poly-substance addiction.

In his early twenties Petitioner worked sporadically, but permanent employment was not long-lasting. Drugs rendered him incapable of steady employment. He developed an unhealthy relationship and married

unsuccessfully. The two children of the marriage, Ariana and Tyler, ultimately became the victims in this case.

In 2006 Petitioner had custody of Arianna and Tyler. He was 28 years old and in another unhealthy relationship with Reina Gonzales. He was now the father of three but his drug use had escalated to a point where he could no longer hold a job to support his family. Petitioner was ingesting about 3-4 grams of heroin a day, smoking cocaine, and drank heavily. Friends, family, and employers noticed distinct changes in his appearance and his personality. (App. L, M.) He was fired from his job as a driver, which he had been proud of. After losing his job as a driver, Petitioner's life was now consumed by drugs; getting drugs, selling drugs, and using drugs. His addiction became so intense that his entire focus was on his next fix of heroin and cocaine. He lost all control over impulsivity and responsible behaviors. He surrendered to drugs, lost his free will and completely abandoned his role as provider and care giver for his children. He became unable to be a responsible parent. He had lost his ability to perceive the peril his children were in, nor could he appreciate how dire the circumstances were that he had created for them. (App. D, Alan Abrams, M.D.)

3. In the Spring of 2006 Petitioner was unemployed. Along with his girlfriend Gonzales, he was deeply addicted to heroin and other drugs, consuming vast amounts on a daily basis. His daily regimen was dealing drugs in order both to obtain money to live on and to obtain the drugs to which he

was physically addicted. He was out of his apartment daily, from early morning until nighttime, to achieve these ends. He left the care of Tyler and Ariana to Gonzales, who was, herself, abusing drugs. Gonzales began calling Petitioner throughout the day, complaining that Tyler and Ariana would not behave.

Petitioner began disciplining Tyler and Ariana by locking them in a closet, and feeding them sparsely. By July 2006 Petitioner kept them in the closet without release; and stopped feeding them. In August 2006 Petitioner discovered that Ariana was dead. A week later, he found that Tyler had died. In September of 2006 Petitioner put the children's bodies in a tote box and moved it to a rented storage unit. Ultimately, the storage facility manager discovered the box. Upon opening the box, the remains of Ariana were discovered. She had sustained a broken shoulder, a broken neck and broken ribs. Tyler was never found. Police arrested both Petitioner and Gonzales..

4. Petitioner was indicted for the first-degree murders of Tyler and Ariana (Ariz. Rev. Stat. Ann. § 13-1105); dangerous child abuse of Tyler and Ariana under circumstances likely to produce death or serious physical injury (Ariz. Rev. Stat. Ann. § 13-3623); and abandonment or concealment of their dead bodies (Ariz. Rev. Stat. Ann. § 13-2926). (1. ROA 1, 43.)[2]

[2] References to the Trial Court Record on Appeal are noted with the volume number of the record, "ROA" indicating citation is to the Superior Court record, the identifying number of the record document, and the page number within the volume of the record locating the document.

The State allowed Gonzales to plead guilty to two counts of second-degree murder, for which she was given concurrent 22-year prison sentences in exchange for her testimony against Petitioner.

On May 2, 2007, 21 months before the commencement of jury selection for Petitioner's trial, the State gave Notice of its Intent to Seek the Death Penalty.[3] At that time, two pivotal propositions of law had been established for fourteen years. Compentent trial counsel would have known the controlling case law:[4]

- No person convicted of a murder in Arizona after 1994 was eligible for parole. Ariz. Rev. Stat. Ann. § 41-1604.09(I).
- This Court had already spoken at length five times on what is known as the *"Simmons"* rule.

Competent counsel would have known that any juror, but especially under these facts, would be concerned about future dangerousness, and the prospect of parole and release into the community.

In *this* case, jurors thought that if they did not sentence Petitioner to death, he could be paroled. The actual alternative to a death sentence was a life sentence without parole. The jury should have been told that Petitioner would never be released from prison if a natural life sentence was imposed. Voir dire

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[3] I ROA 21, p. 74 (May 2, 2007); IX ROA 190, p. 10 (February 10, 2010).

[4]Petitioner's trial attorney, John O'Brien, had been admitted to the practice of criminal defense law in Arizona for 26 years, including 13 years before *Simmons* was decided and before Ariz. Rev. State. Ann. § 41-1604.09(I) was enacted. https://azbar.legalserviceslink.com/attorneys-view/JohnAndrewOBrien (last accessed February 2, 2021.)

confirmed that Petitioners jurors thought a convicted murderer was likely to be paroled. Counsel for Petitioner had the following exchange during voir dire:

> MR. O'BRIEN: Could you explain why you believe we should have more death penalties.
>
> PROSPECTIVE JUROR COX: I feel like in a lot of cases some people just got off a lot easier. They'll get a life sentence, then get reduced later to 25 years. And I don't know, I've just seen a lot of cases where people get a life sentence and end up not serving the entire life sentence.

(RT 2009-02-18 p. 195.)[5]

Although juror Cox did not use the actual word "parole," it is obvious that learning that there could be no parole for Mr. Payne would be important information for him in order to fairly weigh a life or a death sentence.

Juror Darnell demonstrated that jurors needed to be properly instructed that the law forbade any parole for Mr. Payne:

> MS. McLEAN: Do you think that a life sentence is appropriate for an intentional killing?
>
> PROSPECTIVE JUROR DARNEL: I do. I think it can be. If it's really a life sentence.
>
> MS. McLEAN: If it's a natural life sentence?
>
> PROSPECTIVE JUROR DARNELL: Yes, *if it's not like parole* in seven years or something like that.

(RT 2009-02-19 p. 12 (emphasis added)).

Prospective juror Shannon worried about convicted people being released. He used the word "probation" instead of parole; but most potential jurors would think probation and parole were pretty much the same. He had been assaulted at work, and said:

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[5] The citation "RT" with date and page number is to the trial court transcript.

> PROSPECTIVE JUROR SHANNON: "It definitely leaves . . . a feeling in my stomach about the system. . . . this guy *got probation* out of it. Seemed pretty unfair to me."

(RT 2009-02-20 p. 133 (emphasis added)).

The jury found Petitioner guilty of three counts of child abuse, two counts of concealing a dead body, and two counts of first-degree murder. I ROA 242, p. 243. In a trial proceeding separate from both the guilt and sentencing phases, the jury also found three aggravating sentencing factors: especial cruelty, heinousness, or depravity, (Ariz. Rev. Stat. § 13-751(F)(6)); multiple homicides, (*Id.* § 13-751(F)(8)); and young age of the victims, (*Id.* § 13-751(F)(9)). I ROA 250, p. 253.

5. In the penalty phase, the State pursued evidence of the Petitioner's future dangerousness. When the State introduced this assertion to the jury Petitioner was denied his right to a fair trial because defense counsel failed to inform the jury that Petitioner would never be released from custoday.

The State made the centerpiece of its rebuttal to Petitioner's mitigation presentation that Mr. Payne was dangerous and would hurt someone else if not sentenced to death.. In summation counsel for the State focused on evidence of violence and dangerousness it had presented to the jury, and argued that Mr. Payne was not entitled to lenience, because he was a violent person and would continue to be a violent person. Her arguments included:

- Because we all know that Christopher Payne certainly doesn't have a nonviolent history. . . By the time he is in sixth grade that he gets expelled or suspended from school for fighting.

- We have Christopher Payne threatening a man, threatening to slash his throat. . . . Made terribly threatening calls . . . that he was going to kill a man by the name of Ron Hall . . , threatening to slash his throat; convicted for that.

- criminal history package [involving] [T]hree separate incidents [of] domestic violence incidents involving Jamie Hallam. . . . [D]efendant was alleged to have assaulted Jamie Hallam. We have his violent temper or his rage.

- You have his threats to Reina Gonzales.

- Debbie Reyes . . . [told] you about what he did to his, the one son that did live? Hit him so hard, slapped him so hard that little Chris flew forward, and she had to step in to intervene.

- You have what he did to the children in this case, which clearly was not nonviolent.

- And that Christopher would lose his temper and get aggressive, or get, you know, get angry during his jail visits.

(RT 2009-03-30, pp. 45 – 47.)

6. Petitioner appealed. His appellate counsel raised various questions typical of a criminal appeal, such as juror selection, change of venue, *Edwards v. Arizona* issues, and the like.[6] She did not raise the Court's failure to give a "*Simmons*" instruction. To do so appellate counsel needed to argue fundamental error. She failed to do so. The Arizona Supreme Court affirmed Petitioner's conviction and sentences. This Court denied certiorari. *Payne v. Arizona*, No. 13-8129 (Mar. 10, 2014).

7. Petitioner then sought relief in a post-conviction proceeding. In Arizona, claims of ineffective assistance of counsel may not be raised in a direct appeal.

[6] Defendant's Opening Brief, Arizona Supreme Court, August 12, 2011.

They must be asserted in a post-conviction proceeding. *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002). Accordingly, the Question Presented in this Petition was properly raised in the Arizona court.

a. In his post-conviction proceeding Petitioner alleged ineffectiveness of his trial counsel for failing to request the court to instruct the jury that, if he were given a life sentence, he would never be eligible for parole. Petition for Post-Conviction Relief, July 18, 2017, p. 98 *et. seq*. He specifically grounded his claim upon the Due Process clause and *Simmons v. South Carolina*, 512 U. S. 154 (1994). Petition for Post-Conviction Relief. at 98, *et. seq*. He further asserted that an accused who has been prohibited from telling the jury that he will never be paroled, in violation of Simmons, has suffered "inherent prejudice," or "due process prejudice." Petition for Post-Conviction Relief, *supra,* p. 104, et. seq.

b. The post-conviction court found that trial counsel was not unreasonable in failing to make a *Simmons* claim. The Court relied upon an Arizona case which did not support the post-conviction court's finding. Citing *State v. Cruz,* 181 P.3d 196, 207 (Ariz. 2008), the post-conviction court concluded that the Arizona Supreme Court had held that *Simmons* did not apply in Arizona *to a case in which the defendant was eligible for parole.* It is undisputed that of course, Petitioner was *not ever* eligible for parole.

The PCR court further held that "this was never a case about future dangerousness." (App. 4a). This cavalier statement blatantly disregarded both

the record of such evidence and the argument by the State that Petitioner was dangerous and violent. (RT 2009-03-30, pp. 45 – 47, excerpted *supra* p. 9.)

Finally, the Post-conviction court held that any *Simmons* claim was precluded because it had not been raised on direct appeal. App. a4. The court said:

> *Lynch* does not represent a change in the law. It simply applies existing law to an Arizona case. It is not a transformative event of the kind described by Arizona courts in interpreting Rule 32.1(g). *Garza v. Ryan*, 2017 WL 105983, a *3 (D. Ariz. 2017)

Actually, that was precisely the point. Trial and appellate counsel were ineffective for failing to directly raise *Simmons,* both at trial and on appeal. And the post-conviction court should have held just that. That court's failure to do so, in the face of its explicit acknowledgment that *Lynch* "does not represent a change in the law," is inexplicable. The post-conviction court clearly recognized that *Simmons* had been applicable, which implied that trial counsel had no excuse for overlooking it. The Court, then, should have granted relief on Petitioner's ineffectiveness claim.[7]

c. The post-conviction court summarily dismissed the petition in its entirety. App. 1a. In a five-page ruling the court based its decision on a general

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[7] The post-conviction court's reliance upon the *Garza* case, cited in its ruling as quoted, supra, perhaps contributed to that court's confusion. *Garza* considered whether a claim which ordinarily should have been asserted on direct review, could nonetheless be raised in a collateral proceeding, because based upon a "transformative change" of law occurring after direct review had concluded. *Garza v. Ryan*, 2017 WL 105983, a *3 (D. Ariz. 2017). That had nothing to do with the always-applicable *Simmons* in Arizona, not to mention the fact that the claim at issue was an *ineffectiveness* claim involving *Simmons*, which could *only* be asserted in a post-conviction proceeding. *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002).

and overarching statement that "no matter the challenged conduct, the Petition could never have been prejudiced." Id. Although mentioning the prejudice prong of *Strickland* several times in its ruling, App. 1a – 5a, the court never acknowledged the proper *Strickland* test for prejudice.

Strickland prejudice occurs if there is a reasonable probability – that is, even less than a 50-50 chance – that at least one juror would have declined to impose a death sentence. *Buck v. Davis*, 580 U.S. __, 137 S.Ct. 759, 776 (2017). This is not the measure applied by the trial court. Nor did it use the general test established by *Strickland*, which has been quoted and applied over and over: a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland* v. Washington 466 U.S. 694 (1984); *Wiggins v. Smith,* 539 U.S. 510, 534 (2003). That is far different than the question of whether proper representation "*would* have changed the outcome," which the post-conviction court thought was the test. App. 2a.

In fact, the post-conviction court concluded that there had been no prejudice arising from the *Simmons* issue because of its mistaken belief that "this was never a case about future dangerousness," thereby apparently concluding that because *Simmons* could not have applied, there could be no prejudice. App. 4a. But, of course, that conclusion was mistaken. The prosecutor presented evidence that Petitioner was dangerous, and then vigorously argued that he was dangerous. (RT 2009-03-30, pp. 45 – 47.)

The post-conviction court also failed to follow the procedure this Court has directed to assess the probability of a different outcome under *Strickland*. This Court considers the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas or post-conviction proceeding—and reweighs it against the evidence in aggravation. *Sears v. Upton*, 561 U.S. 945, 955, 956 (2017); *Porter v. McColllum*, 558 U.S. 30, 41 (2009). The post-conviction court didn't do that, instead assessing just the evidence which had been adduced at trial, App. 1a; and specifically bypassing compelling pharmacological, psychiatric and pharmaceutical expert mitigation testimony, App. 3a (explicitly making its assessment "aside from the experts.) App. 4a.

8. Petitioner timely filed a Petition for Review in the Arizona Supreme Court. He raised in that court the questions presented for review in this Petition.

Petitioner asserted that "future dangerousness" had been at issue in his trial, and that he would never qualify for parole. Petition for Review to the Arizona Supreme Court, May 7, 2018, pp. 8 He claimed that his counsel had been ineffective for failing to make a "*Simmons*" claim. *Id.* p. 3 et. seq.

Petitioner asserted in the Arizona Supreme Court that the *Simmons* error was structural. *Id.* p. 10, et. seq. He asserted that *Simmons* error was reversible error whether measured as structural, inherent prejudice,

Strickland prejudice, or failed a harmless error standard. Petition for Review pp. 10 – 17.

Petitioner also asserted to the Arizona Supreme Court that "the dictates of *Simmons* and *Lynch v. Arizona*, 578 U.S.1818, 136 S. Ct. 1818 (2016)] well establish the existence of inherent prejudice." *Id.* p. 17.

The Arizona Supreme Court denied Petitioner's Petition for Review without opinion or explanation. App. 7a

REASONS FOR GRANTING THE WRIT

This petition presents the latest in a series of cases where several state courts have refused to adhere to the teachings of this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). Just five years ago, six Justices of this Court voted to summarily reverse the Arizona Supreme Court for doing just that. In *Lynch v. Arizona*, the defense's trial counsel tried to inform the jury about the defendant's parole ineligibility, but the court prevented him from doing so. 136 S. Ct. 1818 (2016) (per curiam). Here, Petitioner's trial counsel did not even try to inform the jury about defendant's parole ineligibility, so the court did nothing. That is the only difference between the two cases. And that cannot be the difference between life and death.

This is an easy case of ineffective assistance. Future dangerousness was indisputably put at issue. Payne was not eligible for parole. Counsel failed to seek a *Simmons* instruction or otherwise inform the jury of that fact only

because counsel did not understand the applicable sentences under state law. Any objectively reasonable death penalty counsel would have understood the sentencing options and would have informed the jury that parole was not an option. And that is true regardless of an Arizona Supreme Court decision that grossly misread this Court's decision in *Simmons*—as this Court held in *Lynch*.

The resulting prejudice is also apparent. Prejudice is inescapable given the nature of a *Simmons* error. It is fundamentally unfair to be sentenced to death by a jury that does not understand that release is not an option and therefore that jury is more likely to vote for death if it mistakenly believes the defendant may one day roam free. In any event, prejudice is demonstrated in Petitioner's case. The nature of a *Simmons* error, paired with the facts of this case, make it *at least* reasonably probable that the outcome would have been different if the jury had been informed parole was impossible.

Indeed, several of Payne's jurors expressed concerns that a defendant who is given a "life sentence" might nonetheless be released on parole. If even one juror had been unable to vote for death in 2009, there would have been no further proceedings; Payne would have received a life sentence under Arizona law. The Arizona post-conviction court's cryptic and unexplained conclusion that "Petitioner could never have been prejudiced" cannot possibly be squared with these facts. App. 1a.

This Court's intervention is needed to ensure that an unconstitutional death sentence is not carried out.

I. COUNSEL WAS DEMONSTRABLY INEFFECTIVE UNDER *SIMMONS*.

In *Simmons*, this Court held that a capital defendant is entitled to inform the jury about his parole ineligibility when future dangerousness is at issue. 512 U.S. at 156 (plurality opinion); *id.* at 178 (O'Connor, J., concurring in the judgment). Seven years later, in *Shafer v. South Carolina*, 532 U.S. 36 (2001), the Court reaffirmed that "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, due process entitles the defendant 'to inform the jury of his parole ineligibility.'" 532 U.S. 36, 39 (2001) (alteration in original) (citation omitted). The following year, in *Kelly v. South Carolina*, the Court reiterated that same holding. 534 U.S. 246, 248 (2002).

Thus, by 2002 (at the latest), this Court's case law was crystal clear that if (i) future dangerousness was at issue, and (ii) the jury's only two choices were death or life without parole, then the capital defendant had a due process right to tell the jury that he was ineligible for parole. *Kelly*, 534 U.S. at 248.

In *Lynch*, the Court held exactly that, when it summarily reversed the Arizona Supreme Court decision that refused to follow the teachings of *Simmons* and its progeny. 136 S. Ct. at 1818-19. There was no dispute that Lynch's future dangerousness had been put at issue. *Id.* at 1819. Nor was there any dispute that, under Arizona law, "parole is available only to individuals who committed a felony before January 1, 1994," and that Lynch had committed his offense in 2001. *Id.* (citation omitted). And defense counsel

had tried to inform the jury of Lynch's parole ineligibility. *Id.* The only reasons Arizona offered for not complying with *Simmons* were the availability of executive clemency under current law, and the possibility that Arizona could make parole available in future legislation. *Id.* at 1819-20. But, as this Court explained, *Simmons* had already "expressly rejected" both arguments. *Id.* at 1819. Because the Arizona Supreme Court's decision was foreclosed by this Court's decades-old precedents, the Court summarily reversed without merits briefing or argument. *Id.* at 1820.

This case presents the same question as *Lynch* with one exception: trial counsel's failure to ask the trial court to follow the law. The jury was not informed of Payne's parole ineligibility because defense counsel did not ask for a *Simmons* instruction or otherwise attempt to inform the jury that parole was unavailable. For that reason alone, Petitioner remains sentenced to death. Despite *Lynch*, the Arizona post-conviction review court countenanced that result with minimal reasoning. And the Arizona Supreme Court declined to even review that decision. Even the most pro forma application of *Strickland v. Washington*, makes clear why Payne's death sentence cannot stand. 466 U.S. 668, 692 (1984).

A. Counsel's Failure To Ensure That The Jury Was Informed Of Payne's Parole Ineligibility Was Patently Deficient.

Payne was undisputedly entitled to inform the jury of his parole ineligibility under this Court's precedent. In 1994 the Arizona legislature abolished parole as to murders committed after 1994. Ariz. Rev. Stat. Ann. § 41-1604.09(I) Plus

Payne's "future dangerousness [was at] issue." *Shaefer*, *supra,* 532 U.S. at. 39 Payne was therefore entitled to "rebut the State's case" by presenting evidence of his parole ineligibility. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment). If counsel had asked for a *Simmons* instruction or to otherwise inform the jury of Payne's parole ineligibility, the trial court would have been constitutionally required to allow it. Had the trial court refused the request the error would have been clear. That is what this Court held in *Lynch,* and was precisely what this Court had held in *Simmons*, fifteen years before Petitioner's trial. Trial and appellate counsels inability to argue the correct law does not allow a death sentence to stand where there is a reasonable probability that the death sentence would not have been rendered by the jury.

Trial counsel's decision not to request a *Simmons* instruction or otherwise inform the jury that Payne was ineligible for parole was not strategic. It was based entirely on the fact that counsel wrongly believed that Payne *was* eligible for parole.[8] In other words, counsel did not understand the sentencing options available to the jury in the sentencing phase of Payne's death case.

The court nevertheless held that counsel's performance was not deficient because the Arizona Supreme Court had previously "held that *Simmons* did

[8] The trial court's penalty-phase instructions explicitly informed the jury that there were *three* sentencing options: "One, death by lethal injection; Two, life imprisonment with no possibility of parole or release from imprisonment on any basis; Three, life imprisonment with a possibility of parole or release from imprisonment, but only after 35 calendar years of incarceration of been served." 10 ROA 269, p. 96. Counsel made no objection. The Court gave the jury that precise instruction. (RT 2009-03-27.) Defense counsel voiced no objection. Shortly thereafter in his summation counsel said that, if not sentenced to death, Petitioner would "be in prison for a minimum sentence of 25 years. Then and only then is there any possibility, not a guarantee, a possibility that he may be paroled." (RT 2009-03-30 p. 8.)

not apply in Arizona at the time of Petitioner's trial," citing *State v. Cruz*, 181 P.3d 196, 207 (Ariz. 2008), *cert. denied*, 555 U.S. 1104 (2009). And "was not the law in Arizona until 2016 [with the decision of *Lynch*]." App. 4a. The trial court's ruling was fatally flawed.

Adverse state court precedent can neither explain nor excuse counsel's failure to request and preserve a *Simmons* instruction.

In any event, the notion that "*Simmons* did not apply in Arizona" was demonstrably wrong under *Simmons* itself. By 2009, the Court had found *Simmons* violations in three cases. *Kelly*, 534 U.S. 246; *Shafer*, 532 U.S. 36; *Simmons*, 512 U.S. 154. *Lynch* was a straightforward application of that decades-old precedent. 136 S. Ct. at 1820 ("*Simmons* and its progeny establish Lynch's right to inform his jury of that fact [that he was ineligible for parole]."). The only argument the State advanced in *Lynch* was that the possibility of executive clemency or future legislative reform made *Simmons* inapplicable. *See id.* The Court dismissed those arguments out of hand because *Simmons* had already expressly rejected them. *Id.* at 1819-20. That is presumably *why* six Justices on this Court voted to summarily reverse, rather than grant plenary review. *Id.* at 1818-20.

A competent attorney cannot disregard the precedent of *this* Court. And, here, reasonable attorneys familiar with the applicable law would have concluded, as this Court did when it summarily reversed the Arizona Supreme Court, that the unfavorable Arizona precedent was directly contrary to

Simmons, and would have attempted to inform the jury of parole ineligibility. *See id.* at 1819. The uncontested evidence below established that even before this Court's correction of the Arizona Supreme Court's misapplication of *Simmons,* in *Lynch,* reasonable lawyers defending capital cases in Arizona were requesting courts to instruct jurors that the life sentence that the jurors might be choosing did not include parole, in reliance on *Simmons*. (App. B, ¶ 52) (Decl. of Garrett Simpson) (Arizona attorney with 29 years of capital case experience, including acting as attorney of record in approximately 20 capital trial, appellate, and PCR cases (*see* App. B ¶¶ 3-5)). Indeed, even between *Cruz* (2008) and *Lynch* (2016), counsel in numerous Arizona cases attempted to inform the jury of parole ineligibility.[9]

The attorneys in all of these cases were requesting a *Simmons* instruction for good reason: it was required by "the standard of care," and "adherence to clearly established federal law and the standard of high-quality care in representation that is necessary in capital cases." (App. B. ¶52.) That is what the prevailing professional norms required. The ABA Guidelines, for example, explain that counsel should evaluate a legal claim "in light of" both "the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence" and "the importance

[9] *See, e.g.*, *State v. Escalante-Orozco*, 386 P.3d 798, 829 (Ariz. 2017), *cert. denied*, 138 S. Ct. 238 (2017); *State v. Rushing*, 404 P.3d 240, 249 (Ariz. 2017), *cert. denied*, 139 S. Ct. 66 (2018); *State v. Boyston*, 298 P.3d 887, 900-01 (Ariz. 2013), *cert. denied*, 571 U.S. 870 (2013); *State v. Benson*, 307 P.3d 19, 32-33 (Ariz. 2013); *State v. Hausner*, 280 P.3d 604, 634 (Ariz. 2012); *State v. Hardy*, 283 P.3d 12, 23-24 (Ariz. 2012), *cert. denied*, 568 U.S. 1127 (2013).

of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.8(A)(3)(b)-(c)—The Duty to Assert Legal Claims (rev. ed. 2003); *see Wiggins*, 539 U.S. at 524 (relying on ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) as a "guide[] to determining what is reasonable" (quoting *Strickland*, 466 U.S. at 688)); *see Williams v. Taylor*, 529 U.S. 362, 396-97 (2000). Recognizing the importance of preserving issues, this Court has held that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *id.* at 128-29 (petitioner's federal habeas claim was procedurally defaulted and petitioner could not demonstrate cause for the default).

Counsel's failure to request a *Simmons* instruction, or to otherwise inform the jury of Payne's parole eligibility, was "[un]reasonable[] under prevailing professional norms," *Strickland*, 466 U.S. at 688, and was "not supported by a reasonable strategy," *Massaro v. United States*, 538 U.S. 500, 505 (2003).

B. Counsel's Failure To Inform The Jury Of Payne's Parole Ineligibility Was Prejudicial.

Counsel's blatant *Simmons* violation was plainly prejudicial. Indeed, the better view is that prejudice is inescapable any time a *Simmons* instruction is clearly warranted but never requested. The same reasoning that prompted this Court to hold that information about parole eligibility is both confusing to

jurors and critical to their deliberations supports a finding of prejudice as a matter of law in instances where a jury is deprived of that information based solely on counsel's failure to provide it.

1. *Simmons* Errors Result In Inescapable Prejudice.

"The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993). In particular, "the 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 372. Consistent with notions of fairness, in *Strickland*, the Court set "a general requirement that the defendant affirmatively prove prejudice," but warned against treating "the principles [it] ha[s] stated [as] establish[ing] mechanical rules." 466 U.S. at 693, 696. Rather, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id.

This Court has found prejudice as a matter of law where an error impacts the fundamental fairness of criminal proceedings. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). When "the likelihood that the verdict is unreliable"—and therefore unfair – "is so high that a case-by-case inquiry is unnecessary," prejudice is automatic. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

The same considerations result in the conclusion that prejudice exists as a matter of law where a defendant meets the requirements for a *Simmons*

instruction but counsel deficiently fails to inform the jury of parole ineligibility. *Simmons* errors render sentencings fundamentally unfair and unreliable because (i) jurors are inherently confused about the availability of parole; (ii) parole eligibility plays a significant role in juror decision making; and (iii) an erroneous death sentence is irrevocable.

First, as this Court recognized in *Simmons*, there is a "grievous misperception" among jurors "about the meaning of 'life imprisonment.'" 512 U.S. at 159, 161-62 (plurality opinion). Because "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" *Kelly*, 534 U.S. at 257 (first alteration in original) (quoting *Shafer*, 532 U.S. at 52). And statistical evidence bears out what common sense suggests. Relying on a survey of jury-eligible adults in South Carolina, the Court in *Simmons* noted that "nearly three-quarters thought that release certainly would occur in less than 30 years." 512 U.S. at 159 (plurality opinion).

Second, this misconception is "grievous" because parole eligibility makes it far more likely jurors will vote for death. *Simmons*, 512 U.S. at 161-62 (plurality opinion). That, effectively, is the reasoning of this Court's decisions. When future dangerousness is put at issue in a capital sentencing proceeding, informing the jury of parole ineligibility "will often be the *only* way that a violent criminal can successfully rebut the State's case." *Id.* at 177 (O'Connor,

J., concurring in the judgment) (citation omitted). Put another way, "there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he never will be released on parole." *Id.* at 163-64 (plurality opinion).

Here too, studies corroborate the importance and impact of parole eligibility on juror decision-making. In *Simmons*, the Court pointed to a study showing that "[m]ore than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death." 512 U.S. at 159 (plurality opinion) (emphasis added); *see id.* at 161 (plurality opinion) ("[T]his misunderstanding . . . ha[s] the effect of creating a false choice between sentencing [a defendant] to death and sentencing him to a limited period of incarceration."); *see also Baze v. Rees*, 553 U.S. 35, 78-79 (2008) (Stevens, J., concurring in the judgment) ("[T]he available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence." (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1845 (2006))).

Third, the irrevocability of a death sentence makes the need for fairness in capital cases uniquely compelling. As this Court has explained, because of "its finality," "[t]he penalty of death is qualitatively different from a sentence of

imprisonment, however long," and "there is a corresponding difference in the need for reliability." *Lankford v. Idaho*, 500 U.S. 110, 125 n.21 (1991) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *see Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("[T]he Court[] [has] insiste[d] that capital punishment be imposed fairly . . . or not at all.").

That this Court has never hinted at (let alone performed) a harmless error analysis in a *Simmons* case is also notable. Each case in the *Simmons* line has drawn a dissent, several of which emphasize the depravity of the crime and suggest that parole ineligibility could not possibly have made a difference in the outcome. *See, e.g.*, *Simmons*, 512 U.S., at 181 (Scalia, J., dissenting) ("I am sure it was the sheer depravity of [the defendant's] crimes, rather than any specific fear for the future, which induced the . . . jury to conclude that the death penalty was justice."); *Lynch*, 136 S. Ct. at 1821 (Thomas, J., dissenting) (arguing that, "[a]s in *Simmons*, it [wa]s the 'sheer depravity of [Lynch's] crimes'" that caused the jury to sentence him to death (quoting *Simmons*, 512 U.S., at 181 (Scalia, J., dissenting)). If a *Simmons* error were susceptible to harmless error review, one might have expected the Court to remand for the state court to engage in such an analysis. *Cf. Ring v. Arizona*, 536 U.S. 584, 609 n.7 (2002) (explicitly "leav[ing] it to lower court[] to pass on the harmlessness oferror in the first instance"). And although the error here arises in the context of an ineffective assistance of counsel claim, similar concerns

about fundamental fairness lead to the conclusion that prejudice exists as a matter of law.

2. In Any Event, There Is Actual Prejudice Here.

The facts of this case underscore the prejudicial impact of *Simmons* errors—and easily establish actual prejudice. The very nature of a *Simmons* error (as set forth above), paired with the facts of this case, lead to at least a reasonable probability of a different outcome if the jury had been informed that the only alternative to death was life without parole.

Judged against the baseline norm of all first-degree murders, there is not "overwhelming record support" for death, which *Strickland* observes is a significant standard for overcoming the prejudice requirement. *Strickland* 466 U.S. at 696. While it was determined that there were three aggravating circumstances in this case, in fact each arose from the same course of behavior.

Petitioner starved and beat his children – egregious behavior, to be sure. But concluding that his acts fit within three different descriptions of aggravating circumstances – especial heinousness, cruelty and depravity of Petitioners acts; that his acts resulted in two deaths in the course of his behavior; and that the victims were of young age; ((Ariz. Rev. Stat. §§ 13-751(F)(6), (F)(8) and F(9), did not multiply a single course of behavior into three separate acts demonstrating that Petitioner had committed the "worst of the worst" murders three times over.

In addition, had trial counsel performed effectively; or even had the post-conviction court perceived the importance of the mitigation evidence of three separate experts, instead of making its assessment "aside from the experts," App. 4a, the product of the "re-weighing" of aggravating and mitigating evidence essential to a fair assessment of prejudice, would have revealed a much closer call.

Even if the measure of *Strickland* prejudice is restricted to the effect of the *Simmons* ineffectiveness claim, in determining prejudice the Court must consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the post-conviction proceeding—and reweigh it against the evidence in aggravation. *Sears v. Upton*, 561 U.S. 945, 955, 956 (2017); *Porter v. McColllum*, 558 U.S. 30, 41 (2009); *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000).

Petitioner's trial counsel failed to present available expert testimony which would have explained to the jury the impact upon Petitioner and his behavior caused by persistent and multiple-sourced addiction.

Edward D. French, Ph.D., an expert in Pharmacology and Toxicology, who had testified in criminal cases approximately fifty-eight times, was available in the city in which counsel resided. App. F. He obtained Petitioner's drug history of consuming large quantities of Heroin, Cocaine, Marijuana, alcohol and numerous other drugs over twenty years, including during his adolescence, a critical period for brain and central nervous system development. Id. ¶¶ 5, 6.

He could have educated the jury about impairments of Petitioner's brain function, structural damage, cognitive functioning, executive function, memory, problem solving, and more; their long term effects upon him, and their impact on his conduct at the time of the crimes.[10]

Alan A. Abrams, M.D., a Board-Certified psychiatrist with a specialty in addiction psychiatry, evaluated Petitioner. He has testified as an expert on that topic in federal and state courts over 500 times. App. D. After evaluating Petitioner, Dr. Abrams concluded that Petitioner was heavily addicted to heroin during the crucial time period. He could have testified that Petitioner's addictive use of heroin, cocaine and other substances when his children died would have incapacitated him from being able to focus on their needs, and render him unable to appreciate the life-threatening situation created for them, or appreciate what action was required of him to remedy that situation. Id. ¶ 11.

Ironically, the post-conviction court's comparison of this case to *Simmons* and *Lynch*, App. 5a n. 2, reinforces the fact that Petitioner suffered prejudice. By equating Petitioner's crime to those in *Simmons* and *Lynch,* the court thereby implied that because it viewed Petitioner's crime equally seriously to those, had trial counsel performed competently and a *Simmons* instruction been given, it would have made no difference. The opposite holds true. This Court found error, and reversed, in *Simmons, Lynch,* and *Kelly* over the

[10] App. F ¶¶ 5, 7, 10, 12 15, 20, 22, 25, 31.

dissents' descriptions of the heinous crimes which were involved. *If* the post-conviction court was right, and Petitioner's crime equated to those in *Simmons, Lynch,* and *Kelly*, a point which Petitioner does not concede, nonetheless the error, as in *Simmons, Lynch* and *Kelly* was serious enough in those cases to mandate reversal. So this Court held in those cases, and so it is, here.

If one is inclined to attempt to divine how important future dangerousness was in juror's minds as compared to the facts of the murder, additional evidence was available which would have reinforced in the jurors' minds the relevance and reassurance which would have arisen from *Simmons* compliance.

Petitioner's trial counsel also could have offered the expert testimony of Thomas Reidy, Ph.D. a Board-Certified Forensic Psychologist, who was expert in assessing future dangerousness. App. E ¶ 5. Dr. Reidy had qualified as an expert in prospective future dangerousness of inmates and testified as an expert in state and federal courts across the nation concerning assessment of prison violence risk, particularly in capital cases. Id. ¶ 7. After personally evaluating Petitioner, he concluded that there was a strong likelihood that Petitioner would make a positive prison adjustment if sentenced to life without possibility of release, and that he did not represent a heightened risk for committing future acts of prison violence. Id. ¶ 12.

The facts here stand in marked contrast to many in which this Court has vacated death sentences, including for *Simmons* errors. *See, e.g.*, *Foster v.*

Chatman, 136 S. Ct. 1737, 1755 (2016) (reversing denial of state habeas); *id.* at 1761 (Thomas, J, dissenting) (defendant "confessed to murdering [a 79-year-old woman in her home] after sexually assaulting her with a bottle of salad dressing"); *Simmons*, 512 U.S. at 181 (Scalia, J., dissenting) (defendant brutally murdered "79-year-old woman in her home" and had "three prior crimes . . . , all rapes and beatings of elderly women, one of them his grandmother"); *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) (defendant "bound the hands of the victim (who was six months pregnant) behind her back, stabbed her over 30 times, slit her throat from ear to ear, and left dollar bills fastened to her bloodied body"). There is adequate prejudice to comply with Strickland.

II. THIS COURT'S INTERVENTION IS NEEDED

As this Court has recognized, the *Simmons* rule is one of limited applicability. It applies only to the sentencing phase of a death penalty case. And, even in 1994, only three states (South Carolina, Virginia, and Pennsylvania) had only a "life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse[d] to inform sentencing juries of this fact." *Simmons*, 512 U.S. at 168 n.8 (plurality opinion).[11] Arizona joined those three states later—after *Ring* rendered its judge-sentencing scheme unconstitutional. 536 U.S. at 609.

[11] Virginia later changed its law to entitle capital defendants to an instruction "that the words 'imprisonment for life' mean 'imprisonment for life without possibility of parole.'" *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999).

Yet, although *Simmons* is a rule of limited applicability, it is an issue that—somewhat surprisingly—has not gone away. This Court has granted certiorari in no fewer than six cases raising a *Simmons* issue over the past twenty some years—underscoring the recurring nature of *Simmons* errors and this Court's commitment to enforcing the rule of *Simmons* itself.[12] And it has granted, vacated, and remanded several more.[13] Yet more than two decades after *Simmons*, and after a summary reversal by this Court in *Lynch*, emphasizing that *Simmons* had always applied in Arizona, the Arizona courts are still reluctant to adhere to this Court's teachings.

The issue will exist indefinitely, so long as capital punishment remains legally permitted, and so long as the capital jurisprudence of this Court involves both concerns of channeling discretion to identify defendants qualified for death, and individualized consideration of whether death is the appropriate sentence in a particular case. Jurors where parole is not a sentencing option may be faced with the "false choice" which *Simmons* was designed to cure. Moreover, it is not likely that the concerns of jurors, which *Simmons* is designed to address, will abate.

There is a more immediate reason that this case is important, and the issue appropriate for prompt resolution. In Arizona at least ten defendants

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[12] *Lynch*, 136 S. Ct. at 1818; *Rompilla v. Beard*, 545 U.S. 374, 380 n.1 (2005); *Kelly*, 534 U.S. at 248; *Shafer*, 532 U.S. at 39-40; *Ramdass v. Angelone*, 530 U.S. 156, 164-65 (2000); *O'Dell v. Netherland*, 521 U.S. 151, 155 (1997).

[13] *See, e.g.*, *Price v. North Carolina*, 512 U.S. 1249, 1249 (1994); *Wright v. Virginia*, 512 U.S. 1217, 1217 (1994); *Mickens v. Virginia*, 513 U.S. 922, 922 (1994).

sentenced to death have cases pending at various stages in the Arizona Courts. Each has a claim that counsel was ineffective for failure to raise the *Simmons* issue.[14] For this Court to review this case would not create additional claims or litigation. Instead, it would provide direction to the lower courts in these numerous cases; and probably shorten and simplify their resolution of the question presented here and in them.

As is demonstrated by the decision below, the post-conviction court here entirely disregarded *Lynch*, which had disapproved the very attempt at bypassing *Simmons* which was the court invoked in this case. Other Arizona cases have taken the same action. *See, Cropper v. Arizona*, No. 19-1100, cert. den. June 29, 2020.[15] This case is ripe for this Court to resolve the issue,

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14. *State of Arizona v. v. Scott Nordstrom*, Ariz. Supreme Ct. No. CR-170594-PC. Petition for Review Denied; federal Petition for Habeas Corpus raising same question pends, No. 4:20-cv-00248. (D. Ariz.); *State of Arizona v. Steven Newell*, Ariz. Supreme. Ct. No. CR-18-0428-PC; *State of Arizona v. Manuel Ovante Jr.*, Maricopa County Ariz. Superior Ct. No. CR-2008-144114; Pending in Ariz. Supreme. Ct. on Petition for Review, No. CR-20-0339-PC; *State of Arizona v. Edward James Rose*, Maricopa County, Ariz. Superior Ct. No. CR2007-149013-002 pending in Ariz. Supreme Ct. on Petition for Review, No. CR-20-0299-PC; *State of Arizona v. Ronnie Joseph*, Maricopa County, Ariz. Superior Ct. No. CR2005-014235; *State of Arizona v. Jahmari Manuel,* Maricopa County Ariz. Superior Ct. No. CR-2004-022846; *State of Arizona v. Brian Allen Womble*, Maricopa County, Ariz. Superior Ct. No. CR2002-010926; pending in Ariz. Supreme Ct. on Petition for Review, No. CR-20-0379-PC; *State of Arizona v. Robert Cromwell,* Maricopa County, Ariz. Superior Ct. No. CR 2001-095438; *State of Arizona v. Wayne Prince*, Maricopa County, Ariz. Superior Ct. No. CR1998-004885; *State of Arizona v. Brad Nelson*, Mohave County, Ariz. Superior Ct. No. CR-2006-0904.

15 As did the Arizona court here, the *Cropper* post-conviction court held that "[Cropper] Counsels' decision [not to raise a *Simmons* claim] tracked with subsequent precedent that remained in effect in Arizona until 2016," citing *State v. Cruz,* [181 P.3d 196] (Ariz. 2008). *Cropper v. Arizona,* Petition for Certiorari No. 19-1100, p. 44a (U.S. March 5, 2020). The *Cropper* court ignored the fact that in *Lynch* this Court had said that "*Simmons* and its progeny establish Lynch's right to inform his jury of that fact [that he was ineligible for parole]." *Lynch*, 136 S. Ct. at 1820. Here, as in *Cropper*, that *Simmons* rule applied in Arizona well before Petitioner's trial. In *Lynch*, this Court merely corrected the Arizona court's disregard of *Simmons*.

thereby providing timely guidance to the lower courts for at least ten pending cases. The solution cannot be to allow Arizona to hide behind years of blatant *Simmons* violations and defense counsel's failures; it should be to enforce *Simmons* and send the message loud and clear that Arizona courts should clean up these errors itself.

a. This Case Presents an Important Question Which is Unique to Capital Sentence Balancing of Mitigating Circumstances Against Aggravating Factors.

The question presented here is unlike virtually any other circumstance in which prejudice – of whatever nature – is to be determined. That is because both what is "balanced," and how it is to be balanced, are not defined by fixed law. Jurors each, individually, conduct for themselves the entire balancing process, of which *Simmons* constitutes a part. Jurors individually, and without being required to agree with any other juror, are instructed to:

- individually decide whether a mitigating factor has or has not been proved, and if proved, is or is not significant to the assessment of the appropriate penalty;
- apply their own, *individual*, *qualitative*, evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors;
- individually decide what mitigation is "sufficiently substantial to call for leniency," i.e. whether it is adequate "in the opinion *of the individual juror* to persuade the juror to vote for a sentence of life in prison;" and

- individually make a reasoned, moral judgment whether a defendant is to live or die. The law does not tell a juror which penalty to impose;

(RT2009-03-27 pp. 170 – 177 (penalty instructions read to jury).).*See also Boyde v. California*, 494 U.S. 370, 376 (1990) ("individualized assessment of the appropriateness of the death penalty"); *Penry v. Lynnaugh*, 492 U.S. 302, 319 (1989) (sentencer is to make an individualized assessment); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) ("a reasoned moral response").

Although jurors are asked to deliberate with each other, *every one* of the above steps in the balancing process is relegated separately to each juror. If every juror, individually, decides that death is appropriate, a death sentence will be imposed. But if *any single* juror "believes that the aggravating and mitigating circumstances are of the same quality or value, that juror . . . may . . . vote for a sentence of life in prison." A life sentence then is mandated. **[cite?]**

Given that there is no objective or legal standard, or even discretionary or qualitative standard, applicable to any juror, let alone an entire jury, the issue of whether prejudice can ever be measured for any single juror, and if so how, is important and one this Court should resolve.

b. *Simmons* Error Arises at the Very Crux of Capital Jurisprudence. This Magnifies the Importance of, And Appropriateness to Review, This Case.

One the one hand, this Court's capital jurisprudence requires that a capital punishment regime must channel the sentencer's discretion without unduly restricting it. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida,* 428 U.S.

242, 253 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). On the other, it requires individualized consideration of the nature of the offense, and the character and record of the accused. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

The Court's resolution of this dilemma has been for years to allow for jurors to be permitted, even encouraged, to make their own individual decisions, to apply their own moral code, to decide what mitigation exists, to decide whether dangerousness exists, and to decide what the balance should be. *Penry v. Lynnaugh*, 492 U.S. 302 (1989). Indeed, jurors are permitted "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg, supra*, 492 U.S. at 222.

To superimpose a prejudice yardstick, dictated by someone other than each juror, makes no sense. It would usurp individual decision-making and balancing by capital jurors. It would interfere with the indispensable mode of resolving the conflict between "channeling" the sentencer's discretion, and allowing "individualized consideration" of the defendant, which this Court has long found indispensable. *E.g. Gregg, supra, Profitt, supra, Jurek, supra*. If such is to be done, this Court should consider a case, and say so. This case is an appropriate one in which to do so.

This case comes to the Court in a state post-conviction review posture, without the federalism concerns of habeas review or the complexities of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See*

Harrington v. Richter, 562 U.S. 86, 105 (2011) (noting that in AEDPA ineffective assistance of counsel claims, "the question is not whether counsel's actions were reasonable . . . [but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard"). Because "state courts are the principal forum" for ineffective assistance of counsel claims, the Court's review in this posture is vital to ensure that the right to counsel is respected. *Id.* at 103; *see Amici Curiae* Br. of James S. Brady et al. in Supp. of Pet'r 7-10, 12-15, *Andrus v. Texas*, No. 18-9674 (July 12, 2019). And this case comes without the exigencies of an imminent execution date. Resolution of this question may well be the difference between life or death for Payne. This Court's intervention is needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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