No. 20-7373

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER MATHEW PAYNE,
PETITIONER,
-vs-
THE STATE OF ARIZONA,
RESPONDENTS.

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

In 2006, Petitioner Christopher Payne killed his two young children (Ariana, 3 years old, and Tyler, 4 years old) by locking them in a closet for more than a month and allowing them to starve to death. After Ariana died, Payne left her body in the closet with Tyler, until Tyler also succumbed about a week later. Payne eventually put the children's bodies in a plastic tub, which he placed in a storage unit he had rented. When Payne failed to pay the rent, the manager of the storage center found the tub in the unit and called police.

Despite Payne'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. Payne'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. 22–27, or whether Arizona courts are complying with *Simmons*, *see* Pet. 32. Instead, Payne 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. Payne 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

In 2006, Christopher Payne was living with his girlfriend, Reina Gonzales, and his two children, Tyler (age 4) and Ariana (age 3). R.T. 2/26/09, at 96–98; R.T. 3/3/09, at 6–16. Payne and Gonzales also had their son, Christopher Jr., living with them. R.T. 3/3/09, at 7–10. Payne and Gonzales were using drugs during this period, and Gonzales watched the children while Payne worked. *Id.* at 19–21. In April 2006, Payne was fired from his job due to his drug use, and he eventually began selling drugs. *Id.* at 21–26.

At some point, Payne started punishing Tyler and Ariana by locking them in a closet for a couple of hours each day. R.T. 3/3/09, at 29–30. Payne then began keeping Tyler and Ariana in the closet for longer periods of time. *Id.* at 30–31. By late June 2006, Tyler and Ariana began living permanently in the closet. Pet. App. 10a, ¶ 4. At first, Payne fed the children sandwiches once a day, but he stopped feeding them after about a month. *Id.* While Gonzales tried to feed the children occasionally when Payne was at work, she never seriously tried to help them because she feared losing Christopher, Jr. R.T. 3/3/09, at 75. Payne looked in on Tyler and Ariana each day, but never brought them out of the closet or bathed them; the children used the bathroom in the closet. Pet. App. 10a, ¶ 4.

Sometime in August of 2006, Ariana died. *Id.* at ¶ 5; R.T. 3/3/09, at 40. At the time of her death, she was emaciated, with her bones clearly visible through her skin. R.T. 3/3/09, at 40–41. Payne nevertheless left her body in the closet with Tyler, who was still alive. Pet. App. 10a, ¶ 5. Payne later placed Ariana's body in a Tommy Hilfiger duffel bag and put the bag in an outside storage closet. R.T. 3/3/09, at 43–45.

To Gonzales' knowledge, Tyler was still alive, but Payne never spoke of getting help for him. *Id.* at 42–43.

Payne did not regularly check on Tyler *Id.* at 45. About a week after Ariana's death, Gonzales found Tyler dead in the closet. *Id.* at 46–47. Tyler had an open wound on his head from an injury Payne had inflicted with a belt buckle several weeks earlier. *Id.* Payne left Tyler's body in the closet and moved the duffel bag containing Ariana's body back into the closet. *Id.* at 47–48, 50–51.

Gonzales and Payne moved out of the apartment, but initially left Tyler's and Ariana's bodies behind. *Id.* at 49–52. About 2 weeks later, Payne removed the bodies from the closet, placed Tyler's body in a black garbage bag, put both bodies (Ariana's body still in the duffel bag) in a blue Rubbermaid tub, and transported them to a storage unit he had rented. *Id.* at 51–55.

The general manager of the storage center discovered the Rubbermaid tub inside the storage unit after Payne failed to pay the rent. R.T. 2/25/09, at 71–81. A pungent odor emanated from the tub. *Id.* at 77. The manager moved the container to the dumpster; as she did so, she heard liquid inside, which leaked out when she lifted the tub to the dumpster. *Id.* at 80–86. Two days later, she called the police to report her suspicions about the storage unit. *Id.* at 88–90. An officer discovered the duffel bag containing Ariana's remains inside the Rubbermaid tub. *Id.* at 136–38. The police did not further search the dumpster. *Id.* at 152; R.T. 2/27/09, at 45. Tyler's body was never found. R.T. 3/2/09, at 54.

On March 1, 2007, police arrested Payne. R.T. 2/27/09, at 49–52. On March 9, 2007, they searched Payne's still-vacant apartment. *Id.* at 54–55. Inside a 6-foot by 5-

foot closet, they discovered what appeared to be bodily fluid on the carpet, blood stains on the walls, and insect larvae on the carpet. *Id.* at 58–59. The odor of decomposition was stronger inside the closet than in the rest of the apartment, and officers found a small square opening in the wall that contained human hair and feces. *Id.* at 59–61; R.T. 3/2/09, at 51. The police also searched the outside storage closet, in which an odor was noticeable; there was a large stain on the floor and blood stains on the wall. R.T. 2/27/09, at 65–66; R.T. 3/2/09, at 48–49.

A jury convicted Payne of three counts of child abuse, two counts of concealing a dead body, and two counts of first-degree murder. Pet. App. 10a, ¶ 9. It also found three aggravating factors: especial cruelty, heinousness, or depravity, A.R.S. § 13–751(F)(6) (2005); multiple homicides, A.R.S. § 13–751(F)(8) (2005); and young age of the victims, A.R.S. § 13–751(F)(9) (2005).[1] *Id.* The jury sentenced him to death for each murder. Pet. App. 9a, ¶ 1.

[1] In 2019, the Arizona legislature amended its capital sentencing statutes to eliminate some aggravators and renumber the remaining ones. The cruelty aggravating circumstance is now found at A.R.S. § 13–751(F)(4), multiple homicides is now found at A.R.S. § 13–751(F)(6), and the young age of the victims is now at A.R.S. § 13–751(F)(7).

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Payne has presented no such reason. In particular, Payne 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, Payne "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 Payne merely seeks correction of the Arizona post-conviction court's perceived error in denying his ineffectiveness claim, this Court should deny the petition.

I. PAYNE 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 grant a request to instruct the jury, when the State argues future dangerousness in capital sentencing proceedings, that the defendant cannot receive a parole-eligible sentence.

Payne asserts that, even after *Lynch*, "Arizona courts are still reluctant to adhere to" *Simmons*. Pet. 32. But the question whether Arizona courts have complied with this Court's rulings in *Simmons* and *Lynch* is not encompassed in the ineffectiveness claim Payne presents for this Court's review, which asks only whether counsel's failure to seek a *Simmons* instruction was ineffective assistance. The post-conviction court's resolution of Payne's routine ineffective-assistance claim has no bearing on the question whether Arizona courts adhere to *Simmons*' requirements, and this case does not provide a vehicle to consider that question.

In any event, Arizona courts correctly apply *Simmons.* Since *Lynch*, the Arizona Supreme Court has reviewed 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 was not harmless, and it 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 refusing 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.

Payne characterizes his case as "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*." Pet. 15. As just discussed, however, Arizona courts are complying with *Simmons*. Further, Payne 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*. Payne 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 PAYNE'S COUNSEL WERE NOT INEFFECTIVE.

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 v. Washington*, 466 U.S. 668, 687–88 (1984). 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 Payne's counsel did not perform deficiently by failing to request a *Simmons* instruction because "*Simmons* did not apply in Arizona at the time of [Payne's] trial and was not the law of the State of Arizona until 2016." Pet. App. 4a. Payne calls this ruling "fatally flawed," Pet. 20, but he does not dispute that the Arizona Supreme Court had held in *Cruz* that *Simmons* did not apply in Arizona—even if it *should* have applied under this Court's holdings. Thus, under Arizona law, which the trial court was required to apply, Payne was not entitled to a *Simmons* instruction and counsel did not perform deficiently by failing to request one.

Payne was sentenced to death almost 12 years ago, after *Cruz* established that Arizona defendants were not entitled to *Simmons* instructions. Counsel were not deficient in failing to request an instruction to which, under Arizona law, Payne 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").

Payne notes that other attorneys 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. 21–22. But this does not show deficient performance. Rather, it demonstrates that counsel's decision not to request the instruction was objectively reasonable because those requests were routinely refused. It also shows a lack of prejudice. *See* § II(B)(2), *infra*. Further, Payne cites pre-*Strickland* case law interpreting the cause and prejudice standard for excusing the procedural default of a claim in a federal habeas proceeding as authority establishing that counsel were required to make a futile request for a *Simmons* instruction. Pet. 22 (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).[2] The post-conviction court correctly held that Payne's counsel did not perform

[2] Payne also asserts that the ABA Guidelines required his counsel to make a futile request for a *Simmons* instruction. Pet. 21–22. 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").

deficiently by failing to request a *Simmons* instruction. Payne's disagreement with that conclusion does not warrant certiorari review.

In any event, as the post-conviction court held, "this was never a case about future dangerousness":

> The Prosecutor did not argue future dangerousness. At most, the prosecutor argued that Payne's violent temper toward others negated one of the many mitigating factors offered by the Defense that Payne was a non-violent child.

Pet. App. 4a. As the post-conviction court explained, "[i]n the most simple terms, it was a case where [Payne] stopped feeding two of his three children, and locked them in a closet until they died. Dangerousness ended there…." *Id.* Therefore, counsel's failure to request a *Simmons* instruction was reasonable because, even if *Simmons* applied, Payne was not entitled to the instruction.

Citing portions of the prosecutor's penalty-phase argument, Payne asserts that the state court erred in concluding that his future dangerousness was not at issue. *See* Pet. 9–10, 13, 18–19. As noted above, however, the post-conviction court held that the prosecutor's discussion of Payne's earlier violence merely rebutted Payne's mitigation purporting to show that he was a nonviolent child. Pet. 4a (citing R.T. 3/30/09, at 45–58). The argument also focused on Payne's past conduct, without raising the specter of future dangerousness. R.T. 3/30/09, at 45–48. While evidence of past violent behavior "can raise a strong implication of generalized future dangerousness," the prosecutor's argument here did not do so. *Kelly*, 534 U.S. at 253 (internal quotation marks and alteration omitted). "[F]uture dangerousness is not placed at issue under *Simmons/Kelly* merely because the prosecutor sets forth a capital defendant's history of

prior violent offenses, without graphic description of violence and without implying significance for future violent behavior." *Commonwealth v. Spotz*, 18 A.3d 244, 302–03 (Pa. 2011). The prosecutor here limited her argument to Payne's past conduct and related it to his proffered mitigating circumstance. No implication of future dangerousness was made. In any event, Payne's citation to three transcript pages of the State's 43-page closing argument does not establish that future dangerousness was a "centerpiece" of the State's rebuttal case. Pet. 9–10 (citing R.T. 3/30/09, at 45–47).

This Court should not grant certiorari merely to correct error Payne perceives in the state court's finding that counsel did not perform deficiently.

B. The post-conviction court correctly concluded that Payne was not prejudiced by any deficient performance.

The post-conviction court held that Payne "was not prejudiced by the court not giving a *Simmons* instruction." Pet. App. 4a. Given the small role (at best) future dangerousness played in the penalty phase, a *Simmons* instruction, which merely rebuts a claim of future dangerousness, is not reasonably likely to have changed the sentencing verdict. *See O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (*Simmons* offers "the narrow right of rebuttal … to defendants in a limited class of capital cases").

Payne 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, Payne presents meritless arguments he forfeited by failing to raise below. *See 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.

Payne asserts that "*Simmons* errors render sentencings fundamentally unfair and unreliable" and therefore prejudice from such errors should be presumed. Pet. 24. But no *Simmons* error is present here; as explained above, because Payne 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"). Accordingly, this case does not provide a vehicle to determine whether prejudice may be presumed when *Simmons* error is present.

Payne 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*. Pet. 23 (citing *United States v. Cronic*, 466 U.S. 648 (1984); *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); and *Mickens v. Taylor*, 535 U.S. 162 (2002)). Because Payne did not argue below that counsel's failure to request a *Simmons* instruction amounted to a complete deprivation of counsel under *Cronic* or *Mickens*, or otherwise entitled him to a

presumption of prejudice under *Weaver*, he has forfeited the argument.[3] *See Kingdomware Techs.,* 136 S. Ct. at 1978.

In any event, counsel's failure to request a *Simmons* instruction did not "impact[] the fundamental fairness of criminal proceedings" such that *Strickland* prejudice may be presumed. Pet. 23. 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 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). And Payne ignores that *Mickens* limits cases in which prejudice may be presumed to those in which "assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 535 U.S. at 166 ("[O]nly in circumstances of that magnitude do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." (internal quotation marks omitted)); *see* Pet. 23. Counsel's failure to request a *Simmons* instruction was not of "that magnitude."

[3] In his petition for review to the Arizona Supreme Court, Payne asserted that *Simmons* error was structural and "incompatible with harmless-error review." PR at 13. He did not, however, assert that counsel's failure to request the instruction amounted to a complete deprivation of counsel under *Cronic*. *Id.* at 14–15.

Nor does *Weaver* help Payne.[4] 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). The post-conviction court correctly refused to presume prejudice resulting from counsel's failure to request a *Simmons* instruction.

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

Payne contends that, had the trial court given a *Simmons* instruction, there is "at least a reasonable probability of a different outcome" at sentencing. Pet. 27. As an initial matter, however, Payne did not assert below that counsel's claimed error in failing to request a *Simmons* instruction prejudiced him under *Strickland*'s standard. Instead, he argued in his petition for review to the Arizona Supreme Court that the State had the burden to "prove beyond a reasonable doubt that this constitutional error was harmless" and that "[t]here is no basis for [the] Court to conclude 'beyond a

[4] In his petition for review to the Arizona Supreme Court, Payne asserted *Weaver* had "no application" to his case. PR at 14–15.

reasonable doubt' that [the error] did *not* contribute to" the verdict. PR at 15–16. And the "error" he referred to was not counsel's failure to request a *Simmons* instruction, but the claimed "error in misleading the jury to believe that Mr. Payne might someday receive parole." *Id.* at 15. Because Payne failed to assert below, let alone demonstrate, that he was prejudiced under *Strickland*'s standard, this Court should not consider his argument now that he suffered such prejudice. *See Kingdomware Techs.,* 136 S. Ct. at 1978.

Further, even if Payne asserted below that he had demonstrated *Strickland* prejudice, he did not argue, as he does now, that the record does not "overwhelming[ly]" support his death sentence or that the post-conviction court failed to "perceive[] the importance of the mitigation evidence of three separate experts" in determining prejudice from the lack of a *Simmons* instruction. Pet. 27–28. Nor did Payne assert that, in assessing prejudice, the post-conviction court was required to weigh the aggravation against the mitigation presented both at trial and during post-conviction. *Id.* at 28; *see* PR at 15–20. This Court should not consider those arguments. *See Kingdomware Techs.,* 136 S. Ct. at 1978.

In any event, Payne's claim of *Strickland* prejudice lacks merit. He first asserts that locking his young children in a closet for more than a month, and starving them until they died, does not provide "overwhelming record support for death." Pet. 27. And he dismisses the three aggravating factors found by the jury, arguing that they "did not multiply a single course of behavior into three separate acts demonstrating that [he] had committed the 'worst of the worst' murders three times over." *Id.* But there is no suggestion that the jury believed the aggravation findings "multiplied"

Payne's behavior into three separate acts. Instead, those aggravators served to qualify Payne for the death penalty by demonstrating that his murders were above the norm of first-degree murders. Thus, Payne is incorrect in suggesting that the aggravators indicate he committed murder "three times over."

The circumstances of the murders, however, do support a finding that Payne's two murders were the "worst of the worst." And contrary to Payne's argument, the deaths of his children did not result from a "single course of behavior." Pet. 27. Payne locked his very young children in a closet and allowed them to slowly starve to death. Every day, Payne could have chosen to release his children and feed them, and every day he made the choice not to do so. Payne's conclusion that the record does not overwhelmingly support his death sentences is simply incorrect, and he failed to allege below, let alone demonstrate, *Strickland* prejudice resulting from counsel's failure to request a *Simmons* instruction.

Payne also incorrectly argues that, in assessing prejudice resulting from counsel's failure to request a *Simmons* instruction, the post-conviction court was required to "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." Pet. 28. First, Payne did not argue below that the post-conviction court erred by failing to consider the proffered post-conviction mitigation in its analysis of prejudice on the *Simmons* ineffectiveness claim. *See* PR at 15–20. Therefore, this Court should not consider this argument. *See Kingdomware Techs.,* 136 S. Ct. at 1978.

Second, Payne conflates the prejudice analysis on his *Simmons* ineffectiveness claim with the prejudice analysis for a claim that counsel was ineffective in *investigating mitigation*, which would require considering the mitigation proffered in post-conviction. In rejecting Payne's mitigation ineffectiveness claim, the post-conviction court held that, "aside from the experts, [Payne's] proposed witnesses would have provided very similar testimony relative to his young life as occurred at trial."[5] Pet. App. 3a. Given that it found counsel were not ineffective in failing to present the proffered mitigation, the post-conviction court was not required to consider that evidence when determining whether Payne was prejudiced by counsel's failure to request a *Simmons* instruction.[6]

Payne next asserts that "the post-conviction court's comparison of this case to *Simmons* and *Lynch* … reinforces the fact that [he] suffered prejudice." Pet. 29 (citing Pet. App. 5a, n.2). Again, Payne did not make this argument below, and this Court should not consider it. *See Kingdomware Techs.,* 136 S. Ct. at 1978. Further, the post-conviction court merely quoted Justice Thomas' dissent in *Lynch*: "As in *Simmons,* it is 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.'" Pet. App. 5a, n.2 (quoting *Lynch*, 136 S. Ct. at 1821 (quoting *Simmons*, 512 U.S. at 181 (Scalia, J., dissenting))). Payne contends that because "[t]his Court found error, and

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[5] Payne incorrectly attributes the post-conviction court's assessment of prejudice on the mitigation ineffectiveness claim to its ruling on the *Simmons* ineffectiveness claim. Pet. 14, 28.

[6] Payne summarizes the opinions of his post-conviction experts and criticizes his trial counsel for "fail[ing] to present available expert testimony which would have explained … [Payne's] behavior caused by persistent and multiple-sourced addiction." Pet. 28–29. Because Payne has not presented his mitigation ineffectiveness claim for this Court's review, this Court should not consider his argument.

reversed, in *Simmons*, *Lynch*, and *Kelly*" despite the heinousness of the crimes, the post-conviction court should have granted relief to him. Pet. 29. Again, however, Payne forgets that his is not a *Simmons* claim—in which a requested instruction was rejected—but instead an ineffective-assistance claim. Thus, in granting relief in *Simmons*, *Lynch*, and *Kelly*, this Court was not constrained by *Strickland*, which allows relief only if a defendant demonstrates he was prejudiced by counsel's alleged deficient performance. Payne, on the other hand, must demonstrate both of *Strickland*'s prongs before he is entitled to relief. The post-conviction court correctly held that he had failed to do so. Pet. App. 4a. *Simmons*, *Lynch*, and *Kelly* do not support Payne's *Strickland* claim.

Payne concludes that "[t]here is adequate prejudice to comply with *Strickland*." Pet. 31 (italics added). He apparently believes he has demonstrated prejudice by citing cases in which this Court has reversed death sentences in cases involving brutal murders, even though those cases did not involve claims of ineffective assistance of counsel for failing to request a *Simmons* instruction. *Id.* at 30–31 (citing *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (reversing because the "prosecutors were motivated in substantial part by race" when they struck two potential jurors); *Simmons*, 512 U.S. at 171 (reversing because trial court refused to allow defense to inform jury of defendant's parole ineligibility); *Kelly*, 534 U.S. at 257–58 (same)). Even had he asserted this argument below, Payne does not establish *Strickland* prejudice merely by citing cases in which this Court has reversed death sentences for unrelated reasons.

III. THIS CASE DOES NOT PRESENT A UNIQUE OR RECURRING ISSUE WARRANTING THIS COURT'S REVIEW.

Payne asserts this Court should grant review because "[t]he issue will exist indefinitely," and other capital defendants in Arizona have asserted similar ineffectiveness claims.[7] Pet. 32–33. He asserts that this Court should grant review to "provide direction to the lower courts in these … cases." Pet. 33. But the mere fact that other defendants have asserted that their counsel performed ineffectively in failing to request a *Simmons* instruction does not warrant this Court's review of Payne's claim. Each claim turns on its own facts, and reviewing Payne's claim will do little to provide guidance to courts resolving claims in other cases.

Further, Payne's argument that his question presented is "unlike virtually any other circumstance in which prejudice … is to be determined" lacks merit. Pet. 34. Determining *Strickland* prejudice here requires the same analysis as any other ineffectiveness claim—assessing whether there a reasonable probability of a different result had counsel not performed deficiently. *See Strickland*, 466 U.S. at 694. And a *Simmons* ineffectiveness claim is not unique in the fact that jurors individually balance the aggravation and mitigation in determining whether to impose a death sentence. Pet. 34–35. In fact, in every capital case "[j]urors each, individually, conduct for

[7] Respondents do not concede that the defendants in all of the cases cited by Payne in fact raised *Simmons* ineffectiveness claims. *See* Pet. 33 n.14. For example, in *State v. Rose*, Maricopa County Superior Court No. CR2007-149013, counsel requested a *Simmons* instruction and the post-conviction court held that the trial court's failure to give the requested instruction violated *Lynch* and *Simmons*. That ruling is currently pending review in the Arizona Supreme Court. Similarly, in *State v. Newell*, Maricopa County Superior Court No. CR2001-009124, the defendant filed a successive petition for post-conviction relief asserting that the trial court erred by failing to give a requested *Simmons* instruction. The post-conviction court rejected this claim and its ruling is also pending on review in the Arizona Supreme Court.

themselves the entire balancing process." Pet. 34. And when evaluating claims of ineffectiveness in investigating mitigation, courts routinely assess prejudice while considering that jurors individually weigh the aggravation against the mitigation. Payne's claim is not unique in this respect.

Further, Payne apparently seeks review in the hope that this Court will establish an "objective or legal standard, or even discretionary or qualitative standard" that would apply to jurors in rendering sentencing verdicts in capital cases. Pet. 35. But this case does not present a vehicle for this Court to establish such standards for jurors, or to determine "the issue of whether prejudice can ever be measured for any single juror, and if so how." *Id.* Rather, *Strickland* required the court below to determine whether there was a reasonable probability of a different result absent counsel's alleged error in failing to request a *Simmons* instruction. This determination did not require the court to measure prejudice for any individual juror because "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Even if this Court were to reach the question of whether there is a reasonable probability that the jury would have imposed a life sentence had a *Simmons* instruction been given, Payne has not established that the post-conviction court erred by holding there is not.

Payne next asserts that "[t]o superimpose a prejudice yardstick, dictated by someone other than each juror, makes no sense" because "[i]t would usurp individual decision-making and balancing by capital jurors." Pet. 36. Payne does not, however, explain the relevance of this statement to his ineffective-assistance claim. In any event, courts routinely determine *Strickland* prejudice in cases in which jurors make

individual decisions on whether to impose the death penalty. Payne does not explain how his case is any different. Indeed, determining prejudice resulting from the failure to give a *Simmons* instruction is arguably more straightforward than determining prejudice resulting from the failure to present additional mitigation evidence. Yet this Court, and lower courts across the country, routinely make such determinations.

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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