No. 20-7373

# In The
# Supreme Court of the United States

CHRISTOPHER M. PAYNE,
*Petitioner*,

v.

STATE OF ARIZONA,
*Respondent*.

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

## REPLY BRIEF OF PETITIONER


LAURA UDALL
COOPER & UDALL
136 W. Simpson St
Tucson, Arizona 85701
(520) 770-8714
ludall@cooperudall.com

MICHAEL J. MEEHAN
*Counsel of Record*
LAW OFFICE OF
MICHAEL MEEHAN
3938 E. Grant Road
No. 423
Tucson, AZ 85712
(520) 529-1969
mmeehan.az@msn.com

*Counsel for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Rules**



## Other Authorities

## ARGUMENT

Christopher Payne was constitutionally entitled to a *Simmons* instruction or to otherwise instruct the jury of his parole ineligibility—if his counsel had just asked. This case is different from *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) *only* because his counsel did not ask. If counsel had asked, this case for death may have resulted in a life without parole verdict. One juror, and Payne would be sentenced to life (without parole).

On the merits of Christopher Payne's ineffective assistance of counsel claim, the State has no good response. Instead, it argues that the Court should deny review because this is just a "mine-run, fact-specific claim" that is not about a "*Simmons* error." Opp. 1. But there is nothing "mine-run" about an unconstitutional death sentence. And an ineffective assistance of counsel claim premised on counsel's failure to ask for a *Simmons* instruction is not somehow less worthy of this Court's time than a "*Simmons* error."

1. The State contends 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," (quoting PCR court basis for its ruling). (Opp. 8) The

State says that because the Arizona Supreme Court held in *Cruz* that Simmons did not apply in Arizona—"even if it *should* have applied under this Court's holdings," "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." Id.

The State does not contend – because it could not, particularly after *Lynch v. Arizona*, – that *Cruz* was right to ignore *Simmons*. Therefore, it argues that as long as Payne's counsel followed *Cruz* – however erroneous – and ignored any law of this Court, most particularly *Simmons*, Petitioner's trial counsel could not have performed deficiently. But that was defective performance, and for the Arizona court to hold otherwise ran completely counter to *Strickland*.

As an initial matter, the Arizona Supreme Court's incorrect decision in *Cruz* cannot explain counsel's failure. The reality is that defense counsel never asked for a *Simmons* instruction because counsel (wrongly) believed that Payne *was* eligible for parole. Pet. 19 & n.8.[1] The related suggestion that such

---

[1] *And see* R.T. 2009-03-26 pp. 102 (in chambers discussion of incorrect belief that a sentence of 35 years to life would be available, without comment by defense counsel); RT 2009-03-30 p. 9 (defense counsel wrongly telling the jury in the penalty phase closing argument that Petitioner could be paroled and that it was only a possibility that he would die in prison).

a request would have been futile because "*Simmons* instructions were routinely refused" in Arizona (Opp. 9), cannot continue to be the fig leaf for the Arizona court's refusals to honor *Simmons*. It was such refusals this Court found it necessary to direct in *Lynch*. Indeed, the continuing "routine refusal[s]" by the Arizona Courts, and continuing reliance upon *Cruz* until *Lynch*, not only require correction in this case, but in many more which pose the same question. (See, Pet. p. 33 and n. 14; and pp 14, and n. 7, Infra.)

Even if *Cruz* could explain counsel's failure, it still cannot excuse it. As the Petition explains, *Lynch* did not announce a new rule; it was a straightforward application of decades-old precedent. Pet. 20. In the State's own words: "*Lynch* did not change the law, it applied existing law to an Arizona case." Supp. Br., *Cruz v. State*, CR-17-0567-PC (Ariz. Apr. 24, 2020). Capital defense counsel cannot reasonably place a state court decision on an issue of federal constitutional law above decisions of this Court. *See* ABA Guidelines 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).[2] And, as is

---

[2] The State argues that it is not deficient performance to fail to comply with the ABA Guidelines. Opp. 9 n.2. But, as the petition already explained, this Court has repeatedly

plainly established in the Declaration of a thoroughly experienced and expert capital defense lawyer, even in the interim between *Cruz* and *Lynch,* any reasonable Arizona capital defense lawyer would have asked to instruct the jury on parole ineligibility – and indeed many were.[3] S*ee also* Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, cmt. (Am. Bar Ass'n, 2003) (counsel "should emphasize through evidence, argument, and/or instruction that the client will . . . never be eligible for parole").

The two cases the State cites, (Opp. 8, 9), are inapposite. In *Government of Virgin Islands v. Lewis*, the Third Circuit held that because of the evidence in the case, the defendant was *not* entitled to a felony murder instruction and, so, counsel was not ineffective in failing to request that instruction. 620 F.3d

---

recognized that the Guidelines are a "guide[] to determining what is reasonable." Pet. 18 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688)); *see also Missouri v. Frye*, 566 U.S. 134, 145 (2012). And the Guidelines are particularly salient to professional norms in Arizona, where an attorney must "be familiar with and guided by the[ir] performance standards" in order "[t]o be eligible for appointment in a capital case." Ariz. R. Crim. Proc. 6.8(a)(5).

[3] Declaration of Garrett Simpson, Appendix B to Petition for Review to Arizona Supreme Court, May 31, 2017 (¶¶ 1 – 3; expert and seasoned capital defense attorney ). He explained that even before *Lynch* "clearly established federal law, and standard of high-quality care" in capital cases required making *Simmons* requests notwithstanding *Cruz*. He cited seven specific case examples in which counsel had made such a request. Id ¶ 52.

359, 370-72 (3d Cir. 2010). In *Lopez v. Thurmer*, the issue was whether the defendant was entitled to a "lesser included offense" instruction as a matter of *state* law. 594 F.3d 584, 587 (7th Cir. 2010). Neither case addressed whether counsel is deficient in failing to request an instruction that the defendant *was* entitled to under federal law.

2. The state court misapplied the "future dangerousness" element of *Simmons*, and the State's argument repeats the error, Opp. 10, claiming that "[t]he 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." Id., citing Pet. App. 4a.

While acknowledging that this Court in *Kelly* held that evidence of past violent behavior "can raise a strong implication of generalized future dangerousness," *Kelly*, 534 U.S. at 253, the court below held that the prosecutor had not done so because the prosecutor had only limited her argument of Payne's past conduct to his proffered mitigating circumstance. Neither of these attempted distinctions are valid. The relevance of evidence with a tendency to prove dangerousness in the future "does not disappear

merely because it might support other inferences or be described in other terms." *Kelly,* 534 U.S. at 254.

In addition, the State argues that future dangerousness was not at issue, claiming that the prosecutor's argument focused upon "Payne's past conduct, without raising the specter of future dangerousness." (Opp. 10). But evidence of dangerous "character" may show "characteristic" future dangerousness. *Kelly,* 534 U.S. at 255.

It is irrefutable that the prosecutor, building upon evidence that she had introduced during the penalty stage, painted Petitioner as having a "dangerous character," because of his past acts or propensities. The evidence introduced in the penalty phase and argued by the prosecutor was extensive, including that he was expelled from school for fighting; was convicted of threatening to kill a man by slashing his throat; committed multiple acts of domestic violence against his first wife, multiple threats to his girl-friend and physically slapped his son hard; had a violent temper, would snap, get rageful, aggressive and angry; and, finally "[W]hat he did to the children in this case, which clearly was not nonviolent." (RT 2009-03-30, pp. 45 – 48.)

3. The State contends that Petitioner's issue of prejudice caused byfailing to make, a "*Simmons*" request is not ripe for review; and that, in any event, *Simmons* error (even where, as here, arising from counsel's ineffective performance) cannot be presumed. The State claims that issue was not presented below, and that a case of ineffective counsel failing to make a *Simmons* request is not a proper vehicle for decision of the issue. Opp. 12.

*First*, the State asserts that this case does not provide a vehicle to determine whether prejudice should be presumed or could be measured when *Simmons* error is present, because it arises in the context of an ineffective assistance of counsel claim. Opp 12, 20. That is the *only* context in which the issue whether *Strickland* prejudice may be presumed or measured can arise.

*Second*, the State argues that Payne failed to make this argument below. Opp. 12. That is simply incorrect. In his Petition for Post-Conviction Relief and Petition for Review, Petitioner claimed that "Supreme Court Precedent Establishes the Inherent Prejudice of Denying" a no-parole instruction.[4]

---

[4] Petition for Post-Conviction Relief, Pima County Superior Court, 2017-07-19 pp. 104-106. See also Reply on Petition for Post-Conviction Relief, Pima County Superior Court 2018-01-16, pp. 39, 40 (Noting that neither this Court nor any Arizona Court has decided whether *Simmons* error is structural or subject to harmless error analysis; and discussing inherent prejudice under *Simmons*). *And see*, Petition for Review to the Arizona Supreme Court 2018-05-07 p. 17

Petitioner has neither waived nor is he precluded from supporting that question by particular case citations or even arguments here, which were not precisely included in his state court claims. Preservation depends on whether a party pressed a *claim*, not whether it made a *specific argument* to support it. *See Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)(Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below).[5]

*Third*, the State ignores, (Opp. 12 – 14), that this Court finds important that "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." *Lockhart v. Fretwell*, 506 U.S. 364, 3702(1993). (Pet. 23) Petitioner invokes the "fairness" measure of

---

("Supreme Court jurisprudence establishes inherent prejudice.")

[5] The State has scattered misapplications of Rule 14.1(a) in various arguments throughout its Opposition. Opp. p. 11 (vague reference to "meritless arguments;) 12, 13 (contending that failure to rely upon facts of cases cited for overall principal of *Strickland* fairness waived argument); p. 15 (mistakenly contending preclusion by failure to argue proper method of weighing aggravation against mitigation); p. 16 (mistakenly contending that argument of failure of Arizona Court to consider post-conviction evidence waives the argument); p. 17 contending that failure to make an argument below, which is in Petition, is waiver).

*Strickland*. *Strickland* 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." 466 U.S. at 693, 696.

Petitioner cited various cases which had applied the "fairness" measure of *Strickland*, in support of his argument that *Strickland* also defines its prejudice by gauging whether a constitutional violation impairs the "fundamental fairness" of the proceeding. Pet. 23. The State ignored the general rule which these cases demonstrate that this Court eschews "mechanical rules," 466 U.S. at 696, when necessary, to ensure the "fundamental fairness" of the proceeding. Instead, the State contends that cases cited, Pet. 23, do not present the same facts as does this case. But each does elaborate the "fundamental fairness" element of *Strickland* prejudice.

4. Various arguments about prejudice in the State's Opposition lack merit.

a. *Preservation of Strickland error claim*. Contrary to the State's contention, (Opp. 14), Petitioner pressed both *Strickland* prejudice and

*Simmons inherent* prejudice. Petition for Post-Conviction Relief 2017-07-18 p. 104 (*Strickland* and inherent prejudice, same page). Petition for Review, Ariz. Supr. Ct. No. CR-18-0230-PC, May 7, 2018. P. 2., *See,* id., 75 – 79 (*Strickland* prejudice). Id. pp. 10 – 14 (discussion of denial of guarantee "without which a criminal trial cannot reliably serve its function as a vehicle for guilt [or death sentence]) under principles of structural error." Id., p. 12, citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Neder v. United States*, 527 U.S. 1 (1999).

b. *Preservation of claim that trial court improperly "weighed" mitigation and aggravation evidence.* Contrary to the Opposition, p. 16, Petitioner *did* argue below that the court "erred by failing to consider the proffered post-conviction mitigation." The court "evaluates and weighs the totality of the available mitigating evidence [which] includes both the evidence that was presented at sentencing and evidence that a competent attorney would have introduced." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (court weighs *aggravation* against the totality of the available evidence); *Wong v. Belmontes*, 538 U.S. 65 (2009)." Petition for Review pp. 77, 78.

c. *Evidence of Strickland prejudice.* The State incorrectly says that Petitioner improperly includes mitigation evidence developed in the Petition's mitigation investigation as part of the "weighing" process because the trial court rejected Petitioner's mitigation investigation process. Opp. 17. But this Court mandates weighing the *totality* of the evidence developed by a competent attorney (i.e. in post-conviction proceedings). The State and court below ignored three powerful expert declarations. Pet. 27 – 29.

The State also overlooks, Opp. 18, Petitioner's point that error in *Simmons, Lynch* and *Kelley* mandated reversal of cases which involved more egregious murders than Petitioner's, thus demonstrating *Strickland* error justifying a grant of relief here. Pet. 31.

5. The State asserts that the Court should deny review regardless of the merits because this is just a "mine-run" case seeking to correct a case-specific error. Opp. 1. The Court should reject that invitation because there is nothing "mine-run" run about a constitutional error in a capital case, as is clear from this Court's summary reversal in *Lynch*.

But there is also considerably more at stake here, such as the sanctity of this Court's precedents, and the Arizona courts' persistent holding that, so

long as trial counsel relied on *Cruz*, and ignored *Simmons*, there was no ineffectiveness. The State acknowledges that "*Simmons* instructions were routinely refused" in Arizona from 2008 (when *Cruz* was decided) to 2016 (when *Lynch* was decided). Opp. 9. But the State claims this Court has nothing to worry about because now, more than 25 years after *Simmons* was decided, Arizona is in compliance. Sure, it took a summary reversal from an eight-member Court in 2016. But at least since then, the State says, it has been following *Simmons, on direct review*, when it concludes the error was not harmless. Opp. 6-7. But the State ignores post-conviction cases.

The State's entire defense on the deficiency prong in this case rests on *Cruz*, an Arizona Supreme Court decision directly contrary to *Simmons*. The State argues that Payne cannot prove prejudice because the state court would have *wrongly* refused to give a *Simmons* instruction. The State erroneously ignores the many Arizona cases in which, based upon *Cruz*, the Arizona courts have found no ineffectiveness, even though trial counsel ignored *Simmons*. The State camouflages the import of those cases by falsely insisting that the question here is a "*Simmons*" error, not a "*Strickland*" error.

Contrary to the State's contentions (Opp. 1, 7, 12, 13), this petition does not seek review of a "*Simmons* error." As the petition repeatedly explains, there was no such error because Payne's counsel never asked for the *Simmons* instruction to which he was entitled. But the State takes a wrong turn when it suggests that this distinction matters. The ineffective assistance of counsel claim here is premised on counsel's failure to ask for a *Simmons* instruction.[6]

The question in this case is not the same as *Lynch*, but it is a necessary corollary. By the State's own admission, the Arizona courts refused to give *Simmons* instructions for nearly a decade. The State argues that, therefore, reasonable defense counsel would not have even engaged in the futile act of seeking such an instruction. The State is wrong about the latter.

The State cannot hide behind years of its blatant disregard of *Simmons* and defense counsels' failures, simply by focusing only on direct-review cases and ignoring the numerous ineffectiveness cases involving *Simmons*. It cannot

---

[6] Ineffective assistance of counsel claims are frequently premised on the denial of a substantive constitutional right. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (failing to raise Fourth Amendment issue); *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (failing to seek public trial); *Premo v. Moore*, 562 U.S. 115, 123 (2011) (failing to move to suppress confession); *see also Grueninger v. Dir., Virginia Dep't of Corr.*, 813 F.3d 517, 530 (4th Cir. 2016) (same); *Hanson v. Sherrod*, 797 F.3d 810, 836 (10th Cir. 2015) (failing to object to prosecutorial misconduct).

continue contending that Arizona courts were obliged to follow the erroneous *Cruz* case in post-conviction proceedings. Yet it does so, ignoring nine cases in each of which trial counsel ignored *Simmons* and followed *Cruz*, and in two of which the State reversed itself and argued that *Cruz* remained valid, notwithstanding *Lynch*, in order to defeat two more post-conviction petitions seeking to un-do trial counsel's ineffective failure to raise *Simmons*. Petition p. 33 n. 14.[7] If this Court does not act, capital jurisprudence in Arizona will be, and remain, in a wholly unconscionable state. Many death row inmates will be there because their counsel ineffectively ignored *Simmons*; but Arizona has ignored that unarguable fact. Others will have received proper representation, with *Simmons* having been appropriately litigated. This Court's intervention

---

[7] The State does not dispute that seven of the nine cases present the same question. Two cases are noted by the State: *State v. Rose*, Maricopa County Superior Court No. CR2007-149013; *State v. Newell*, Maricopa County Superior Court No. CR2001-009124. Each involved the defendant invoking a different procedure than making an ineffectiveness/*Simmons* claim. Instead, each invoked Ariz. R. Crim. P. 32.1(g), allowing relief when there has been "a significant change in the law" which might affect the outcome. The defendant/petitioners in *Rose* and *Newell*, acted in reliance upon the position previously taken by the State and Arizona courts, that *Cruz* had been the binding law until changed by *Lynch*. However, in order to defeat these post-conviction claims, the State reversed its position, and contended (contrary to its argument before this Court), that *Simmons* had been binding law all along, and that, therefore, *Lynch* did not represent a "significant change." They were properly cited as part of Petition fn. 14, because the central issue is the same, and would be determined by this Court confirming that *Simmons* had always been binding in Arizona.

is needed to send the message loud and clear that ineffective assistance of counsel claims are not yet another way to evade *Simmons*.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michal J. Meehan

LAURA UDALL
COOPER & UDALL
136 W. Simpson St
Tucson, Arizona 85701
(520) 770-8714
ludall@cooperudall.com

MICHAEL J. MEEHAN
*Counsel of Record*
LAW OFFICE OF
MICHAEL MEEHAN
3938 E. Grant Road
No. 423
Tucson, AZ 85712
(520) 529-1969
mmeehan.az@msn.com

*Counsel for Petitioner*

April 27, 2021