NO. _____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

JASPER PHILLIP RUSHING,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Supreme Court of Arizona err in holding that introduction of a defendant's past violent conduct in the penalty phase of a capital trial automatically requires that jurors be informed about the defendant's parole ineligibility pursuant to the Due Process Clause as interpreted in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and its progeny?

2. Does *Simmons* apply in a sentencing proceeding for capital murder committed by a defendant already in prison, a context demonstrating that incarceration is not a sufficient means of preventing future violence by that defendant?

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PETITION FOR WRIT OF CERTIORARI

Respondent Jasper Rushing, while already serving a life sentence for first-degree murder, killed his cellmate by bludgeoning him repeatedly on the face and head, slitting his throat with a razor blade, and then using the razor to methodically sever the victim's penis and testicles. This appeal concerns the limits of the Due Process Clause and the propriety of the Arizona Supreme Court's decision to vacate Rushing's death sentence merely because his jury was not told he was ineligible for parole.

The Arizona Supreme Court's decision expands a line of cases beginning with a plurality opinion in *Simmons v. South Carolina*, 512 U.S. 154 (1984), and continuing through *Kelly v. South Carolina*, 534 U.S. 246 (2002). The *Simmons* plurality held that, when prosecutors argue for a death sentence based on a defendant's future dangerousness, the capital defendant has the right to "deny or explain" his threat to the community through a jury instruction noting that he will not be eligible for parole if the jury chooses incarceration rather than the death penalty. 512 U.S. at 161. That rule raised numerous questions surrounding its scope and spawned several additional decisions by this Court. Among those was *Kelly*, which held that express allegations of future dangerousness were unnecessary; rather, any evidence supporting "a logical inference" of future dangerousness would have the same constitutional impact. 534 U.S. at 252. As one of the two dissenting opinions observed, "[i]t is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror

might make such an inference." *Id.* at 261 (Rhenquist, C.J., and Kennedy, J., dissenting).

The Arizona Supreme Court has now gone precisely where the *Kelly* dissent feared that case would lead. In doing so, the Arizona Supreme Court adds a new dimension to the lower courts' division on the meaning of *Simmons*. The law in Arizona is now irreconcilable with the law in California, South Dakota, and Pennsylvania. On the other hand, the Supreme Court of South Carolina shares the view of the Arizona Supreme Court.

This Court should grant certiorari to answer the federal question left open in *Kelly*, resolve the conflict among state supreme courts, and address the continuing validity of the plurality opinion in *Simmons*. This Court should also clarify the limits of the due process right identified in the *Simmons* line of cases and specifically hold that it does not apply to murders in prison.

OPINIONS AND ORDERS BELOW

The Arizona Supreme Court's opinion is reported at 404 P.3d 240. App. 1–31. The Arizona Supreme Court's order denying reconsideration without comment is not reported. App. 32.

JURISDICTION

The Arizona Supreme Court entered its judgment on November 6, 2017. That court denied Rushing's request for reconsideration on December 15, 2017. This Court extended Petitioner's time for filing a petition for writ of certiorari until April 16, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

While already in prison for the first-degree murder of his stepfather, Jasper Rushing murdered his cellmate, Shannon Palmer. App. 5, 19. Rushing first bludgeoned Palmer about the head with a thick, rolled-up, soft-cover book contained inside a sock which, in turn, was wrapped in a sheet. Rushing then sliced Palmer's throat with a razor blade, before finally using the razor to sever Palmer's penis and testicles. *Id.* at 3–4, 12–13.

An Arizona jury convicted Rushing of first-degree murder, and thereafter found three aggravating factors: (1) Rushing had previously been convicted of another offense for which life imprisonment or death could be or had been imposed (Ariz. Rev. Stat. § 13–751(F)(1)); (2) Rushing committed the offense in an especially heinous or depraved manner (Ariz. Rev. Stat. § 13–751(F)(6)); and (3) Rushing committed the offense while in the custody of the state department of corrections (Ariz. Rev. Stat. § 13–751(F)(7)(a)). *Id.* at 4–5.

Rushing's proffered mitigation evidence included a number of alleged mental-health issues, including bipolar disorder, attention deficit hyperactivity disorder, drug-related disorders, an unspecified personality disorder with antisocial traits, a chaotic and turmoil-filled childhood, and post-traumatic stress

disorder caused by childhood sexual abuse. *Id.* at 21. Rushing also presented mitigation evidence from "prison expert" James Aiken, who had never met Rushing, but nonetheless opined that Rushing could be "safely housed" in the Arizona Department of Corrections "for the remainder of his life without causing an undue risk of harm to staff, inmates or the community." Reporter's Tr. ("R.T.") 7/8/15 at 4, 35–36, 49–50.

As rebuttal to Rushing's mitigation, the State presented evidence of his past conduct in and out of prison. And in her closing argument, rather than argue future dangerousness, the prosecutor discredited Rushing's mitigation evidence, argued that the mitigation was insufficient to warrant leniency, and asserted that the facts of Palmer's murder warranted a death sentence. R.T. 7/20/15, at 50–140. The trial court did not instruct the jurors that Rushing would not be eligible for parole if he received a life sentence.

On direct appeal, the Arizona Supreme Court, citing *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Kelly v. South Carolina*, 534 U.S. 246 (2002), and *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), rejected the State's argument that evidence of Rushing's past misconduct was part of legitimate cross-examination of (and rebuttal to) his mitigation experts, particularly Rushing's prison expert, and concluded instead that the *State* had placed future dangerousness at issue by referring to Rushing's past misconduct. App. 17–19. The court further found that the perceived *Simmons* error was not harmless because a juror *might* have speculated that Rushing could be released (notwithstanding his prior murder conviction) and

therefore *might* have voted for death to prevent that outcome. *Id.* at 19–20. As a result, the court required a new penalty-phase trial. *Id.* at 20.

REASONS FOR GRANTING THE PETITION

By interpreting *Simmons* and *Kelly* to hold that future dangerousness is implicated any time the State mentions a defendant's prior violent, criminal, or otherwise improper acts, the Arizona Supreme Court eliminates all limitations in the precedents on which it purports to rely. Prior conduct is *always* relevant in a capital penalty phase—either as aggravating circumstances or simply as a component of the individualized sentencing mandated by the Eighth Amendment. But nothing in *Simmons* or *Kelly* suggests that juries must be educated about parole eligibility in every case. The Arizona Supreme Court has broken new ground by expanding this Court's precedents beyond every limitation. Unsurprisingly, doing so has created a conflict with the Supreme Courts of California, South Dakota, and Pennsylvania. Only the Supreme Court of South Carolina—the court directly rebuked in *Simmons* and *Kelly*—arguably agrees with the court below.

Due process, as interpreted in *Simmons* and its progeny, does not assume that past conduct is an improper backdoor to arguing about future dangerousness. The premise in *Simmons* can be construed modestly, as it has been by the high courts in three other States with the death penalty, *e.g., People v. Wilson*, 114 P.3d 758, 790 (Cal. 2005); *State v. Moeller*, 616 N.W.2d 424, 468 (S.D. 2000), *aff'd* 689 N.W.2d 1, 8 (S.D. 2004); *Commonwealth v. Spotz*, 18 A.3d 244, 300 (Pa. 2011), or it can be construed to

manufacture an absolute requirement binding on every State in every case and indifferent to the fact that parole eligibility itself changes over time, *e.g.,* App. 20; *State v. Laney*, 627 S.E.2d 726, 729–30 (S.C. 2006). Only this Court can clarify the scope of a right born of a plurality opinion 25 years ago and unhelpfully muddied ever since.

In addition, the concerns underlying *Simmons* are not present when a jury is sentencing a defendant for an in-prison murder. *Simmons* employed the Due Process Clause to permit a capital defendant to "deny or explain" the possibility that he posed a future danger to society by informing jurors that current state law prevented him from ever being released on parole. 512 U.S. at 161 (plurality opinion; quotation omitted). However, to a jury tasked with sentencing a capital defendant for an in-prison murder, it is irrelevant that current state law does not permit the defendant to be released into society. These especially violent defendants have shown a willingness and ability to kill even within the confines of a prison. To the extent any first-degree murderer's dangerousness depends on laws governing parole in effect at the time of sentencing, that consideration is wholly irrelevant for defendants like Respondent who have committed their second murder while incarcerated.

I. The Decision Below Answers a Lingering Question of Constitutional Law in a Manner that Conflicts with at Least Three Other State Supreme Courts.

Years before killing and mutilating his cellmate, Rushing shot his stepfather in the back as he slept. While in prison for his stepfather's murder, Rushing

violently threatened officers and staff, got into fights, and hid shanks in his rectum. He also affiliated with the Aryan Brotherhood, a violent and racist prison gang—even writing to his mother in 2002 that he planned to one day start a new Skinhead group in Prescott, Arizona. Much of this evidence of Rushing's past misconduct was elicited during the State's cross-examination of Rushing's mitigation witnesses, particularly his prison expert to discredit that expert's opinion that Rushing can be "safely housed" in prison. R.T. 7/7/15, at 19; R.T. 7/8/15, at 35–36, 50–92. The Arizona Supreme Court seized upon this past-conduct evidence to conclude that the State put Rushing's future dangerousness at issue and presented the jury with the "false choice" warned against in *Simmons*. App. 19–20. That holding misreads the Due Process Clause and deepens a division among the States over the boundaries of *Simmons* and *Kelly*. Because discussion of a defendant's past conduct is not automatically an argument based on future dangerousness, this Court should grant certiorari and reverse the holding below.

A. The Issue of Past Conduct Suggestive of Future Dangerousness—but Never Argued to the Jury as Such—Has Divided this Court and Evaded Review Since *Simmons*.

"The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" *Simmons*, 512 U.S. at 161 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). At issue in *Simmons* was a prosecutor's argument that the defendant posed a future danger to society, which the defendant had not

been permitted to rebut with information about his parole ineligibility. *Id.* at 161–62. A plurality of this Court held that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring in the judgment). The plurality reasoned that a capital defendant must be permitted to "deny or explain" the State's future dangerousness allegations by showing that he is not eligible for parole. *Id.* at 169.

The dissenting justices argued that while policy might recommend the judgment in *Simmons*, the Constitution did not mandate it. 512 U.S. at 178–79 (Scalia, J., dissenting). Moreover, the prosecutor had merely emphasized the nature of the defendant's crimes ("the brutal murder of a 79-year-old woman in her home, and three prior crimes confessed to by petitioner, all rapes and beatings of elderly women, one of them his grandmother"), and noted that the "sheer depravity of those crimes, rather than any specific fear for the future" had induced the jury to sentence Simmons to death. *Id.* at 181.

Simmons began a parade of divided opinions from this Court, beginning with *O'Dell v. Netherland*, 521 U.S. 151 (1997). There, this Court determined that the rule decided in *Simmons* was "new" but not "watershed" for purposes of retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989). *O'Dell*, 521 U.S. at 167. Three years later, in *Ramdass v. Angelone*, 530 U.S. 156, 167 (2000), a four-justice

plurality denied habeas relief under *Simmons* because the defendant was not definitively ineligible for parole at the time of trial. The plurality was untroubled by the fact that prosecutors had used past criminal conduct to prove the "future dangerousness aggravating factor" for earlier felonies, which then rendered the defendant ineligible for parole under Virginia's three-strikes law. *Id.* at 169–71. Thus future dangerousness was at issue in *Ramdass* because it was alleged as a specific statutory aggravating factor under Virginia state law. *Id.* at 161. Concurring in the judgment, and citing her concurrence in the judgment in *Simmons*, Justice O'Connor stated that only "where the State seeks to demonstrate that the defendant poses a future danger to society, he 'should be allowed to bring his parole ineligibility to the jury's attention' as a means of rebutting the State's case." *Id.* at 179.

Against this already confusing background, a pair of cases declined to reach the question presented here: whether evidence of prior conduct that does not refer to future dangerousness falls within the right identified in *Simmons*. First, in 2001, the Court again addressed South Carolina's sentencing scheme, finding that a divided South Carolina Supreme Court had "incorrectly limited *Simmons*" by instructing a jury that "'life imprisonment' means until death of the offender" without affirmatively instructing that the defendant was also ineligible for parole under state law. *Shafer v. South Carolina*, 532 U.S. 36 (2001). The majority, however, avoided determining whether future dangerousness was actually at issue in *Shafer*, where the prosecutor presented evidence of the defendant's prior bad acts, but did not specifically argue future dangerousness. *Id.* at 40–42, 54–55.

The same pattern repeated itself a year later in *Kelly v. South Carolina*, 534 U.S. 246 (2002). There, the Court concluded that future dangerousness is "at issue" if it is a "logical inference from the evidence." *Id*. at 252. Again overruling the South Carolina Supreme Court, the majority found that the State's introduction of evidence of Kelly's post-arrest behavior in prison, combined with the State's closing argument calling the defendant, among other things, "dangerous" and a "butcher," created an inference of future dangerousness. *Id.* at 246, 254–56. But because the prosecution had made these arguments expressly, the majority left open the question whether *Simmons* applies "when the State's evidence shows future dangerousness but the prosecutor *does not argue it*." *Id.* at 254–56 n.4 (emphasis added).

That open question is precisely the issue in the current case, assuming that the facts of Rushing's crimes "show[] future dangerousness." Indeed, all three opinions in *Kelly*—the majority and two dissents—anticipated that this question would eventually come before the Court. Chief Justice Rehnquist, joined in dissent by Justice Kennedy, observed that the majority had applied *Simmons*, "not in reference to any contention made by the State, but only by existence of evidence from which a jury might infer future dangerousness." *Id.* at 260. In a separate dissent, Justice Thomas, with whom Justice Scalia joined, characterized the majority's future-dangerousness standard as "imprecise" and predicted that, as a result, future dangerousness would always be at issue in capital cases because a prosecutor will always argue the evidence. *Id.* at 263–65. That "standard" was simply "evidence with a *tendency* to

prove dangerousness in the future," regardless of whether "it might support other inferences or be described in other terms." *Id.* at 254 (emphasis added).

The majority's standard for which evidence puts a defendant's dangerousness at issue is likely dicta because the prosecutor in *Kelly* had expressly argued future dangerousness. The question that remains unanswered is whether such evidence—under any definition—can alone trigger the rule in *Simmons*. If so, there is no discernable limit to that requirement unless prosecutors somehow pursue penalty-phase arguments without reference to aggravating circumstances or the facts of the case. The tension between that outcome, noted in the *Kelly* dissents, and the strict logic of the *Kelly* majority has led to a division in supreme courts reviewing capital sentences around the country.

B. The Arizona Supreme Court's Decision Conflicts with Decisions from the California, South Dakota, and Pennsylvania Supreme Courts.

In the absence of guidance from this Court, it comes as little surprise that States have reached different conclusions on the question left open since *Simmons*. Indeed, the dissenting justices in *Kelly* themselves wondered how courts would handle evidence of past conduct that supports "a logical inference," *Kelly*, 534 U.S. at 252, about future conduct even if prosecutors said nothing about the latter. *Id.* at 261 (Rhenquist, C.J., and Kennedy, J., dissenting) ("It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make such an inference.").

In Arizona, the Due Process Clause requires nothing more than a reference to past conduct to vacate a death sentence and require a second jury to reevaluate the appropriate penalty—at a high cost to taxpayers and an even higher cost to victims enduring delay. The prosecutor's sin in the current case was nothing more than discussing Rushing's past violent and criminal conduct and associations in her opening and closing statements in the penalty phase. App. 18–19. She did *not*, however, argue that Rushing posed a future danger to society. R.T. 7/6/15, at 74–88; R.T. 7/20/15, at 50–140. The Arizona Supreme Court concluded that the jury's mere knowledge of Rushing's prior bad conduct rose to the level of violating the Due Process Clause. App. 18–20.

Pennsylvania has a different rule. In a string of post-*Kelly* jurisprudence, the Pennsylvania court has recognized that the Commonwealth's mere reliance on a defendant's past conduct, or the facts of the crime for which he is being sentenced, to advocate for the death penalty does not constitute an appeal to future dangerousness that triggers *Simmons*. In *Commonwealth v. Chmiel*, 889 A.2d 501, 538 (Pa. 2005), the court began this line of cases with the simple recognition that "evidence regarding a defendant's past violent conviction or conduct does not implicate the issue of his or her future dangerousness." The court also rejected the defendant's argument that the prosecutor had raised future dangerousness by arguing the facts of the murder at issue, finding such argument appropriate and that, unlike the prosecutor in *Kelly*, the prosecutor had not "speculate[ed] about characteristics inherent in Appellant that implied future dangerousness." *Id.*

Likewise in *Commonwealth v. Baumhammers*, 960 A.2d 59, 90 (Pa. 2008), the defendant asserted that, while the prosecution did not argue future dangerousness, that theme was *implied* by the "nature of the general evidence itself" and specifically pointed to mental-health evidence the defendant himself had introduced. The Pennsylvania Supreme Court disagreed, finding that "the evidence Appellant cites indicates only that he will continue to suffer from his mental disorders, making him, according to [an expert], a liar, a rule-breaker, and irresponsible." *Id.* at 91. The court concluded: "This is not evidence of future dangerousness, or evidence of a 'demonstrated propensity for violence,' triggering the need for a *Simmons* instruction." *Id.*

And in *Commonwealth v. Spotz*, 18 A.3d 244, 300 (Pa. 2011), the court found that a *Simmons* parole-ineligibility instruction was not warranted where the prosecutor set forth the defendant's history of prior violent offenses, observing that "the evidence proffered to support the appellant's history of violent felony convictions addressed only his past conduct, not his future dangerousness." On this basis, the court distinguished *Kelly*, noting that, unlike the prosecutor in that case, the prosecutor in *Spotz* did not "attempt to draw any conclusions about the implications of Appellant's previous offenses for his future behavior." *Id.* at 303.

The California Supreme Court reads *Simmons* and *Kelly* even more narrowly. In *People v. Wilson*, 114 P.3d 758, 779–80 (Cal. 2005), the jury heard evidence during the penalty phase detailing the defendant's conversations with an informant, in which he discussed

his "desire to find a 'hit man' to eliminate a possibly troublesome witness in his murder case." This conversation, though occurring in the past, directly implicated future conduct, including violent conduct that could be carried out from within prison. Moreover, unlike the current case, the prosecutor expressly stated that the defendant ""continues to be a threat."" *Id.* at 790. Unmoved by these facts, the California Supreme Court held that *Simmons* and *Kelly* did not apply. *Id.*

Finally, the South Dakota Supreme Court held that "future dangerousness was not specifically raised as a concern by [the] State" in the penalty phase of a gruesome murder prosecution. *Moeller v. Weber*, 689 N.W.2d 1, 8 (S.D. 2004) (citing *State v. Moeller*, 616 N.W.2d 424, 461 (S.D. 2000)). The evidence presented to the jury concerned only the violent rape and murder of a nine-year-old girl, which was the crime for which the defendant was charged. In extensive briefing before the Eighth Circuit on habeas review, the parties chronicled the evidence introduced at the guilt phase. *See* Brief of Appellant at 34-45, *Moeller v. Weber*, 649 F.3d 839 (8th Cir. 2011) (No. 10-2069), 2010 WL 4305235; Brief of Appellee at 43-48, *Moeller v. Weber*, 649 F.3d 839 (8th Cir. 2011) (No. 10-2069), 2010 WL 5306855 (citing Pennsylvania Supreme Court precedent to support the State's interpretation of *Simmons* and *Kelly*). Like the South Dakota Supreme Court, the Eighth Circuit concluded that this evidence did not suffice to place the defendant's future dangerousness in issue. *Moeller*, 649 F.3d at 845 n.5 ("nor do we find that the State raised the future dangerousness of Moeller during either the guilt or penalty phase of his trial.").

Had any of these courts decided Rushing's case, the outcome would have been different. In fact, the conflict between Pennsylvania's jurisprudence and Arizona's is so plain that the Arizona Supreme Court has acknowledged the split. Subsequent to its opinion in *Rushing*, the Arizona court vacated yet another jury's death sentence pursuant to *Simmons* and ordered a new penalty phase for a convicted killer of a Phoenix police officer. *See State v. Hulsey*, 403 P.3d 408, 436 (Ariz. 2018) (citing *Baumhammers*, 960 A.2d at 91 n.23). The court's recognition of its departure from a sister State on a matter of federal constitutional law is a plea for clarification from this Court.

The California and South Dakota decisions reveal a similar discord. The evidence the Arizona Supreme Court cited as raising the inference of future dangerousness pertained to Rushing's past violent acts and criminal associations and to the grisly facts of the murder for which he was being sentenced. App. 18. When South Dakota presented the same argument—both in state and federal court—it successfully defeated a claimed due process violation. The record in *Wilson* is even more remarkable. If the same evidence of a defendant's willingness to hire a hit man for the purpose of "eliminate[ing]" a witness had reached the Arizona Supreme Court, that court would have concluded that the prosecution put the defendant's future dangerousness in issue. This inconsistency in constitutional decision-making is the product of *Kelly*'s reference to a jury's "logical inference" of future dangerousness. 534 U.S. at 252. This Court should clarify its meaning.

The only State that has adopted an approach similar to Arizona's is South Carolina, the State from which *Simmons* and *Kelly* arose. *State v. Laney*, 627 S.E.2d 726 (S.C. 2006). That court concluded that "the State offered evidence of Appellant's future dangerousness" by introducing evidence that "(1) detention officers forcibly restrained Appellant after a struggle with him; (2) Appellant threatened to kill a detention officer and blow up his house; and (3) . . . Appellant had dug around the vents and walls in his cell." *Id.* at 729 & n.1. Citing the trend in decisions from this Court, the South Carolina Supreme Court held that a *Simmons* instruction was required, "whether requested or not." *Id.* at 730. The court did not analyze the premise that evidence of past conduct automatically puts future dangerousness in issue.

Of the dueling interpretations of *Simmons* and *Kelly*, the Pennsylvania Supreme Court's approach makes better constitutional sense. Individualized sentencing *requires* a jury to consider "any aspect of a defendant's character or record and any of the circumstances of the offense" when determining the appropriate punishment. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *see also Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978); *Zant v. Stephens*, 462 U.S. 862, 878–79 (1983); Ariz. Rev. Stat. §§ 13–751(G); –752(G). Evidence of past violence is present in every case that reaches the penalty phase of a capital trial. The court below engaged in constitutional bootstrapping by treating the same evidence as automatically placing a defendant's future dangerousness at issue. This Court should grant certiorari to prevent this result, as well as to prevent what, as Justice Thomas warned, amounts to improper federal micromanagement of state

sentencing proceedings. *See Shafer*, 532 U.S. at 58 (Thomas, J., dissenting).

II. *Simmons* Does Not Apply to Sentencing Proceedings for a Capital Defendant Convicted of First-Degree Murder While in Prison.

The concern behind the *Simmons* plurality opinion—a jury's latent fear that the defendant will be paroled into society to kill and/or harm again—is absent when the defendant kills while already in prison. *See* 512 U.S. at 169 ("[T]he fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society."). The Court has already acknowledged as much. In *O'Dell*, the Court noted that "at the time he was sentenced to death for Helen Schartner's murder, petitioner had already been convicted of a murder committed while he was in prison. Informing his sentencing jury that petitioner would spend the rest of his days in prison would not, then, necessarily have rebutted an argument that he presented a continuing danger." 521 U.S. at 167 n.4; *see also Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) ("[W]hen the State argues that the defendant poses a threat to his cellmates or prison guards, it is no answer to say that he never will be released in prison."); *Ramdass*, 530 U.S. at 170 ("Evidence of potential parole eligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled . . . he may be no less risk to society *in prison*.") (emphasis added).

The instant case illustrates the mismatch between an alleged fear over recidivism upon release and a defendant charged with murder while in prison. The threat posed by a defendant already serving a life sentence has nothing to do with parole; it is a threat aimed at precisely the population from which Rushing drew his victim—a cellmate, fellow prisoner, or prison staff. Even assuming Rushing's jury was willing to alter its sentencing decision based on the potential for future violence, that fear would be unassuaged by the fact that Rushing might remain in prison. After all, if he could commit one horrendous killing in prison, who could say that he would never commit another? The premise underlying *Simmons* is that jurors can be influenced to choose a penalty short of death if they believe that the lesser sentence will be just as effective in preventing future harm. But for a defendant who has killed while in prison, a sentence of incarceration has already proven ineffective.

Moreover, the Arizona Supreme Court's reversal for a new penalty phase with a *Simmons* instruction ignores the fact that Rushing's vicious in-prison killing alone justifies the jury's capital sentence. A second penalty phase will yield the same result, but with unjustified additional burden to taxpayers and to the victim's family. Victims are entitled to a resolution without unreasonable delay under both Arizona and federal law. *See* Ariz. Const. art. II, § 2.1(A)(10) (victims entitled to prompt and final conclusion); *see also* 18 U.S.C. § 3771(a)(7) (right to proceedings free from unreasonable delay). The delay occasioned by a second penalty phase for the sole purpose of adding a *Simmons* instruction when Rushing committed the

homicide while already in prison is unreasonable by any measure.

The Due Process Clause does not require that a jury tasked with sentencing a capital defendant for an in-prison killing be informed about the defendant's parole eligibility under applicable state law. This Court should grant certiorari in this case to, at a minimum, impose a logical limitation on *Simmons* in the context of prison murders.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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