No. _____

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

MIKEL PATRICK STEINFELD
Counsel of Record

TENNIE MARTIN

MARICOPA COUNTY PUBLIC DEFENDER
620 W. Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
STEINFELDM@MAIL.MARICOPA.GOV
Attorneys for Petitioner

QUESTIONS PRESENTED

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court set forth a three-step process for evaluating whether peremptory strikes were used in a discriminatory manner: (1) the defendant must make a prima facie showing of discrimination, (2) the State must provide a race-neutral reason for the strike, and (3) the court must determine if the defendant demonstrated purposeful discrimination.

   Courts have split regarding how to address a trial court's failure to conduct the third step—an error that occurred here. Three approaches exist: (1) independently review the record and vacate the conviction when the record does not support the proposed race-neutral reasons, (2) remand to the trial court to conduct the third step, and (3) consider a ruling implicit and defer to that implicit ruling.

   What is the proper appellate procedure to address a trial court's failure to conduct the third *Batson* step?

2. Under *Simmons v. South Carolina*, 512 U.S. 154 (1994), when the only legal alternative sentence to death is life without the possibility of parole, upon request, the trial court must inform the jury that life without parole is the only alternative. Possible legislative changes or commutation do not obviate this requirement. While Arizona abolished parole in 1994, and life without parole is the only legally available alternative to death, the Arizona Supreme Court has continuously refused *Simmons* instructions by relying upon the availability of commutation. Has the Arizona Supreme Court decided this question in a manner that conflicts with *Simmons* and its progeny?

3. The Arizona Supreme Court had previously found that the prosecutor in this case, Juan Martinez, committed misconduct in at least two prior cases. In this case, Martinez committed misconduct on approximately seventeen occasions during trial, including two types of misconduct that the Arizona Supreme Court had previously addressed. Is a defendant's Due Process right to a fair trial secure when a prosecutor with a history of misconduct commits misconduct on several occasions through the defendant's trial?

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES Page

UNITED STATES SUPREME COURT CASES

ARIZONA SUPREME COURT CASES

FEDERAL CASES

OTHER STATE CASES

CONSTITUTIONAL PROVISIONS

United States Constitution

STATUTES

United States Code

Arizona Revised Statutes

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Shawn Lynch respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court affirming his death sentence.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 357 P.3d 119 (Ariz. 2015) (Appx. A).

JURISDICTION

The Arizona Supreme Court issued its opinion on September 10, 2015. A timely motion for reconsideration, Appx. E, was denied on November 30, 2015, Appx. F. Petitioner timely filed this petition within ninety days after the order denying reconsideration. This Court has jurisdiction per 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall … be deprived of life, liberty, or property, without due process of law ….

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

***Batson v. Kentucky* claim**

Immediately after both parties exercised peremptory strikes, the defense challenged five of the prosecutor's strikes in accordance with *Batson v. Kentucky*, 476 U.S. 79 (1986). Appx. J, 10. Half of the State's ten peremptory strikes were used to dismiss individuals who self-identified as Hispanic: panel members 8, 32, 34, 49 and 255. *Id.* at 10, 12. The State offered legitimate reasons to strike three of the prospective jurors. *Id.* at 10-11 (Juror 255), 11-12 (Juror 49), 14-15 (Juror 8).

But the prosecutor struck jurors 32 and 34 because of their appearance. The State pointed out that Juror 34 had visible tattoos. *Id.* at 12-13. The prosecutor linked this to possible mitigation: there was an indication Lynch may have gotten Hepatitis C from a tattoo. *Id.*

The prosecutor argued he struck juror 32 because juror 32 had a beard, long hair, and generally did not meet the prosecutor's hygiene standards. *Id.* at 13-14.

Although the prosecutor justified his strikes on appearance and the common trait of tattoos, the prosecutor never questioned any jurors tattoos, hair styles, or hygiene. Jurors 32 and 34 were both present for the afternoon panel on July 10, 2012. Appx. G; Appx. H, 117. The prosecutor asked the panel several questions, Appx. H, 130, and directly questioned jurors 32 and 34, *id.* at 151-53. But the prosecutor never questioned any jurors about the issues he later relied upon as bases for his peremptory strikes. *See id.*

The prosecutor did not move to strike either of the jurors for cause. *Id.* at 231. And the prosecutor did not raise any issues when asked if he passed the panel for cause; seeing a juror with exposed tattoos did not prompt the prosecutor to request an opportunity to question the remaining panel about tattoos. Appx. J, 6

When considering the prosecutor's proffered reasons, however, the trial court did not consider any of this background or ask Lynch for a response. *See id.* at 15. Immediately after the State offered its reasons, and without permitting the defense to comment on them, the trial court found the State's reasons were race neutral and permitted the strikes. *Id.* After this ruling, the Defense interjected and stated the reasons provided for jurors 32 and 34 were not satisfactory. *Id.* Without further discussion, the trial court moved on. *Id.*

On appeal, Lynch argued the trial court erred because it failed to conduct *Batson*'s third step. Appx. B, 108-20. The Arizona Supreme Court rejected this argument. *Lynch*, 357 P.3d 119, ¶¶ 67-70. The Court reasoned that the trial court had satisfied the third prong by "implicitly ruling that Lynch did not carry his burden of proving purposeful racial discrimination." *Id.* at ¶ 70.

***Simmons v. South Carolina* claim**

Arizona abolished parole on January 1, 1994. *Lynch*, 357 P.3d 119, ¶ 64; Ariz.Rev.Stat. § 41-1604.09(I). Since then, no adult convicted of a felony has been eligible for parole. The same year, this Court decided *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, this Court held, "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." *Id.* at 156 (1994).

At the time, however, Arizona still employed judicial sentencing in capital cases. It was not until this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), that jury sentencing was used in Arizona.

On September 22, 2005, before Lynch's first trial, the State filed a Motion to Preclude Testimony Concerning Availability of Parole. Appx. K. While the State conceded there was no possibility of parole, the State argued parole ineligibility should not be communicated to the jury

because other unarticulated forms of release were still available. *Id.* The trial court granted this motion. Appx. L.

In his first trial, Shawn Lynch was convicted and sentenced to death. Appealing the first trial, Lynch argued the trial court erred by precluding evidence regarding parole ineligibility. *See* Appx. M, 75-78. The Arizona Supreme Court vacated his death sentence and ordered a new sentencing phase because the trial court improperly explained the aggravating factors. *State v. Lynch*, 234 P.3d 595, ¶¶ 84-89 (Ariz. 2010). However, the Court never addressed Lynch's *Simmons* argument. *See id.* at ¶¶ 82-89 (discussing penalty phase claims).

Because the Court never addressed his *Simmons* argument and the 2005 ruling was still law of the case, Lynch filed Defendant's Waiver of Right to be Considered for Release-Eligible Sentence and Motion for Jury Instruction Regarding Release Ineligibility (*Simmons* Instruction) on March 2, 2012. Appx. N. In addition to waiving any theoretical parole, Lynch requested an instruction modeled after *Simmons*. *Id.* at 9. The State objected. Appx. O.

When the trial court addressed the issue, neither party presented additional argument. Appx. P, 6. The trial court denied the requested instruction. Appx. Q. Consequently, the trial instructions never included a *Simmons* instruction. Appx. S. To the contrary, the opening instructions incorrectly suggested parole was available. Appx. R ("Life without the possibility of release … means … [Lynch] will not be eligible for parole …."). Lynch was again sentenced to death.

On appeal, the Arizona Supreme Court agreed Lynch was not eligible for parole because parole had been abolished and that the prosecutor put Lynch's future dangerousness at issue. *Lynch*, 357 P.3d 119, ¶ 64. Despite meeting both conditions established by *Simmons*, the Court held a *Simmons* instruction was unnecessary. *Id.* at ¶ 65. The Court relied upon the availability of commutation—a form of release this Court expressly rejected in *Simmons*. *Id.*

Prosecutorial Misconduct claim

The prosecutor, Juan Martinez, committed misconduct on several occasions through every stage of Lynch's trial. The following chart summarizes the misconduct found by the Arizona Supreme Court:

Category of Misconduct	Instances	Phase	Opinion citation
Argument During Opening	Two instances: 1. Lynch's childhood should not be considered a mitigating circumstance. 2. Defense wanted to "pull at [the jury's] heart strings."	Opening	¶ 8
Improper witness examination	Eight instances of misconduct: 1. Two instances of asked and answered. 2. Two instances of interrupting witnesses. 3. Comment to expert to "just answer my question for once." 4. Additional argumentative questions. (The opening brief listed three additional questions to which the trial court sustained objections on argument grounds.)	Examination	¶ 11
Questions regarding the veracity of other witnesses	One instance: 1. Martinez's remark that Dr. Brams "can vouch for people" improper.	Examination	¶ 15
Attacks on defense experts	No additional instances: 1. "The trial court sustained Lynch's objections to many of the questions, and the court's instructions to disregard the statements cured any possible prejudice." 2. Instances repeated from improper witness examination category.	Examination	¶ 22 ¶ 19

Category of Misconduct	Instances	Phase	Opinion citation
Misstating the evidence	Three instances of misconduct: 1. Refusal to admit recording because of misstatement. 2. Mischaracterizing Dr. Brams's testimony in different case. 3. Mischaracterizing impact of renting pornographic movies.	Presentation of Evidence Examination Closing	¶¶ 25-26
Vouching	One instance: 1. "[P]rosecutor put the prestige of the government behind his evidence by saying that 'the State does not agree.'"	Closing	¶ 32
Misstating law	At least one additional instance: 1. "The prosecutor struggled … during voir dire and closing argument with the disjunctive 'or' and conjunctive 'and' in explaining the (F)(6) aggravator …." 2. "Prosecutor misstated the law by arguing that Lynch's renting pornographic videos 'shows a debasement in the part of [Lynch's] character." Also addressed in misstating evidence section.	Closing Voir Dire Closing	¶ 43 ¶ 37
Improper Personalization	One instance: 1. "The prosecutor's first comment [about imagining a person approach with a knife] was improper."	Opening	¶ 49

Lynch, 357 P.3d 119, ¶¶ 8,11, 15, 19, 22, 25-26, 32, 37, 43, 49.

In total, the Arizona Supreme Court found at least seventeen instances—and eight different categories—of misconduct. The misconduct spanned over every stage of the penalty phase retrial: voir dire, opening statements, presentation of evidence, witness examinations, and closing arguments.

Martinez's misconduct was foreshadowed by prior claims—and findings—of misconduct, including the same types of misconduct committed here. *See State v. Gallardo*, 242 P.3d 159, ¶¶ 33-47 (Ariz. 2010); *State v. Morris*, 160 P.3d 203, ¶¶ 46-67 (Ariz. 2007).

In *Morris*, Martinez encouraged the jury to place themselves in the victim's position. 160 P.3d 203, ¶ 57. The Arizona Supreme Court found Martinez's comments were misconduct. *Id.* at ¶ 58. However, because the defense failed to object, the Court reviewed for fundamental error and concluded the misconduct was not fundamental. *Id.* at ¶¶ 59- 60.

Similarly, in *Gallardo*, Martinez asked the jury to compare the victim to the defendant. 242 P.3d 159, ¶¶ 41-42. The Arizona Supreme Court presumed the conduct was improper but ruled that a standard jury instruction that the jury should not be swayed by sympathy "negated the effect of the prosecutor's statements." *Id.* at ¶ 42.

Although the Arizona Supreme Court twice considered Martinez's previous improper personalization, Martinez engaged in the exact same behavior here: Martinez again encouraged the jury to place themselves in the victim's position. The Arizona Supreme Court again found this conduct improper. And the Arizona Supreme Court again did nothing to remedy this misconduct.

In *Gallardo*, the Arizona Supreme Court also agreed Martinez committed misconduct by misstating the evidence. 242 P.3d 159, ¶ 44. The Court again relied upon standard instructions to excuse Martinez's misconduct. *Id.*

Despite *Gallardo*'s holding, Martinez again misstated evidence and law in this case. The Arizona Supreme Court again found this conduct improper. And the Court again did nothing to correct the misconduct.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues Lynch raises in this petition concern fundamental constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. These issues were presented to the Arizona Supreme Court in Lynch's appellate briefs and motion for reconsideration challenging his death sentence. Appx. B, D, E. The issues were considered by the Arizona Supreme Court in its opinion affirming Lynch's death sentence.

REASONS FOR GRANTING THE WRIT

I. During *Batson*'s third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict.

Justice Marshall heralded *Batson v. Kentucky*, 476 U.S. 79 (1986), as "a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." *Batson,* 476 U.S. at 102 (J. Marshall, concurring). But Justice Marshall warned that *Batson* would "not end the racial discrimination that peremptories inject into the jury-selection process," which could only be accomplished "by eliminating peremptory challenges entirely." *Id.* at 102-03. One of the reasons for Justice Marshall's pessimism highlights the error in this case: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.* at 106.

Here, not only was the trial court "ill equipped to second-guess" the prosecutor's asserted reasons for striking minority panelists, the trial court refused to even engage in the evaluation. Instead, the trial court denied Lynch's *Batson* claim merely upon the prosecutor's ability to conjure race-neutral reasons for the strikes—reasons that focused upon the appearance of two jurors. *See*

Appx. J, 12-15. The trial court did not even engage in the third step of the *Batson* analysis: the trial court did not assess the credibility of the reasons, the trial court did not consider whether the record supported the reasons, and the trial court did not even allow Lynch to respond.

***Discussion*:**

In *Batson*, this Court held that discriminatory use of peremptory strikes violates the Fourteenth Amendment's Equal Protection Clause. 476 U.S. at 85-86. The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group. *Holland v. Illinois*, 493 U.S. 747, 476-77 (1990). To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts engage in a three-step process: (1) the defendant makes a prima facie case of discrimination, (2) the prosecution offers race-neutral reasons for the strike, and (3) the trial court determines if the defense established purposeful discrimination. *Batson*, 476 U.S. at 96-98; *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003).

At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The second step "does not demand an explanation that is persuasive, or even plausible;" even "implausible or fantastic justifications" satisfy the second step. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

The trial court actually evaluates the given reasons during the third step. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The proffer of a pretextual reason "naturally gives rise to an inference of discriminatory intent." *Id.* at 485.

Here, the trial court erred when it refused to conduct the third step. *See* Appx. J, 15. Despite this refusal, the Arizona Supreme Court affirmed Lynch's conviction, concluding the trial court

"implicitly" ruled that Lynch had not demonstrated an improper motivation behind the strike. *Lynch*, 357 P.3d 119, ¶ 70. However, Arizona has split with the bulk of jurisdictions regarding how appellate courts should handle a trial court's failure to engage in the third step. This Court's intervention is necessary to resolve an ongoing split amongst jurisdictions.

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling.

This Court has not yet provided guidance as to the proper remedy when a trial court fails to conduct the third step of the *Batson* analysis. This has led to a split in how jurisdictions address such failures. *See* William Burgess & Douglas Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1, 2 (2011) (hereinafter "Burgess & Smith"); *State v. Scott*, 829 N.W.2d 458, ¶ 22 (S.D. 2013) (recognizing a "*Batson* violation usually compels reversal," but ordering a limited remand in light of other cases approving of such a process). Three different approaches have been used: (1) a de novo review by the appellate court and, when the record does not support a prosecutor's offered reasons, an order for a new trial; (2) an order remanding to the trial court for further findings; and (3) reliance upon the trial court's decision regardless of its failure to conduct the third step of *Batson*. Burgess & Smith, 13.

The first alternative is an independent review:

> Where a prosecutor's race-neutral explanation for a strike cannot be confirmed or rejected on the basis of the trial record, and where the trial court failed to make the required findings in the course of resolving a *Batson* objection to a peremptory strike, the Fifth and Eleventh Circuits have ordered new trials ….

Burgess & Smith, 13. The Ninth and Eleventh Circuits use this approach. *Green v. LaMarque*, 532 F.3d 1028, 1029-33 (9th Cir. 2008); *Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013);

McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252 (11th Cir. 2009); *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir. 2013).

In *McGahee*, the Eleventh Circuit reviewed the record and found "a strong prima facie case of intentional discrimination." *Id.* at 1267. The Court then evaluated the State's proffered reasons for exercising the peremptory strikes. *Id.* at 1267-68. Because the State's reasons were not supported by the record, the Eleventh Circuit vacated the conviction and ordered a new trial. *Id.* at 1268-70.

This is the remedy Lynch requested. In his briefing, Lynch discussed *Green*, Appx. B, 116, encouraged the Arizona Supreme Court to engage in an independent review, *id.* at 117-19, and asked the court to vacate his sentence, *id.* at 119-20.

Several jurisdictions have held the proper remedy is to remand the case to the trial court to perform the third step. *E.g. Dolphy v. Mantello*, 552 F.3d 236, 240 (2d Cir. 2009); *Coombs v. Diguglielmo*, 616 F.3d 255, 265 (3d Cir. 2010); *U.S. v. McAllister*, 693 F.3d 572, 582 (6th Cir. 2012); *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009); *Jones v. State*, 938 A.2d 626, 633 (Del. 2007); *People v. Davis*, 899 N.E.2d 238, 248-50 (Ill. 2008); *Edmonds v. State*, 812 A.2d 1034, 1048-49 (Md.App. 2002); *State v. Scott*, 829 N.W.2d 458, ¶ 22 (S.D. 2013). While Lynch encouraged the Arizona Supreme Court to conduct an independent review and reverse his conviction, Lynch also discussed several remand cases. *See* Appx. B, 112-18.

The third approach, endorsed sparingly, refuses a remedy even where the trial court fails to comply with *Batson*. Burgess & Smith, 20. The Eighth Circuit endorses this approach. *Id.* In *Smulls v. Roper*, the Eighth Circuit concluded *Batson* rulings are inherently factual and there is no requirement for trial courts to place their reasons on the record. 535 F.3d 853, 860 (8th Cir. 2008). The Court reasoned that by announcing a decision, the trial court made implicit findings. *Id.*

The Arizona Supreme Court chose the third option and relied upon an implicit trial court ruling. *See Lynch*, 357 P.3d 119, ¶ 70. However, by deferring to an absent ruling and depriving the challenging party any opportunity to participate in the third step of *Batson*, the Arizona Court endorsed the most constitutionally infirm option.

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons.

This Court should order appellate courts to engage in a de novo review of the record and order new trials where a prosecutor's reasons are not supported by the record. This approach best aligns with *Batson*, protects against post hoc justifications and endless judicial proceedings, and incentivizes proper trial court procedure.

At a minimum, this Court should require remand. Such a process is less consistent with *Batson* and risks reliance upon post hoc justifications and ongoing judicial proceedings. But remand at least recognizes that deference requires a prior decision and ensures defendants an opportunity to rebut the prosecutor's offered reasons.

Implicit rulings should be rejected. Implicit rulings rob defendants of the ability to rebut a prosecutor's proffered justifications, sidestep the stated requirements of *Batson*, and circumvent the core purpose of *Batson*. Ultimately, implicit rulings create the very system Justice Marshall warned against—a system wherein a prosecutor can use peremptory strikes in a discriminatory manner so long as the prosecutor can invent a race-neutral reason for the strike, regardless of how incredible or preposterous that reason might be.

1. Independent review of a prosecutor's proffered reasons and reversal where the reasons are not supported by the record, best comports with a defendant's due process right and the public's equal protection right.

Between the three alternatives, independent review is the most preferable. Independent review closely aligns with *Batson*, avoids prosecutorial use of post-hoc justifications, protects against endless judicial proceedings, and provides an incentive to follow proper procedure. *See* Burgess & Smith, 22-29.

First, independent review aligns with this Court's conclusion that *Batson* supports automatic reversal. In *Rivera v. Illinois*, this Court reviewed a trial court's improper denial of a defendant's peremptory strike. 556 U.S. 148, 151 (2009). As a remedy, the defendant asked for automatic reversal, a remedy this Court rejected. *Id.* at 156. This Court differentiated the improper denial of a peremptory strike and *Batson*. *Id.* at 161. *Batson* as automatic reversal precedent because *Batson* is a constitutional error; improper denial of a peremptory strike is not. *Id.*

More recently, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), this Court conducted an independent review. In *Snyder*, this Court evaluated a prosecutor's proffered race-neutral reasons for a strike, *id.* at 477-79, independently reviewed the record to determine if the prosecutor's reasons were supported, *id.* at 478-84, and found the prosecutor's reasons implausible and pretextual, i*d.* at 483-85. This Court also concluded that any remaining subtle question regarding the juror's nervousness could not be answered by remand years later. *Id.* at 486.

Many courts have read *Snyder* "as imposing a broad and general command regarding the proper relief when there is an absence of *Batson* findings." Burgess & Smith, 13. Even before *Snyder* though, "several … state and federal courts ha[d] ordered new trials when confronted with a situation in which the trial judge … failed to make the required findings and overruled a defendant's *Batson* objection with little or no comment." *Id.* at 17. "These courts have held that a new trial is a

natural extension of the *Batson* framework and is the appropriate remedy where a trial court fails to make required findings." *Id.*

Second, independent review avoids post hoc justifications. *See id.* at 24-25. The review is isolated to the record. Prosecutors cannot supplement additional justifications, either on appeal or remand. The Second Circuit, a remand jurisdiction, recognizes that delaying a *Batson* claim "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial." *U.S. v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990); *see also Gray v. State*, 562 A.2d 1278, 1284 (Md.App. 1989) (recognizing "the passage of considerable time between the event and the attempt at reconstruction" may increase the "danger of perfectly innocent confabulation"). The danger of post hoc justification "is perhaps even greater" on remand, at which point "the court is essentially inviting the prosecution to come up with new evidence that was not presented during the original trial, and potentially new theories, justifying the prior exercise of a peremptory challenge." Burgess & Smith, 26-27.

Third, independent review avoids ongoing judicial proceedings at the trial and appellate levels. *Id.* at 25-28. Remand requires additional proceedings before the trial court. But "such remand proceedings can often take on lives of their own and expend more judicial resources than a new trial." *Id.* at 27. At its simplest, a second appeal on the remand hearing would still be necessary.

These concerns, though, are remedied by independent review because "a bright-line rule requiring a new trial in every case in which a trial court fails to make sufficient *Batson* findings to permit appellate review would provide an ex ante incentive to trial judges and prosecutors to be

more conscientious and would give effect to the principle underlying *Batson*." *Id.* at 28. Trial courts and prosecutors would pay greater heed to *Batson* and would ensure compliance. *Id.* at 29.

2. While remand inadequately protects a defendant's due process right and the public's equal protection right, remand provides more protections than reliance upon an "implicit" ruling.

Remand does not provide the same protection to harmed parties. Remand does little to encourage compliance with *Batson*; remand creates a need for ongoing judicial involvement at both the trial and appellate levels; and remand provides an opportunity for—and even incentivizes—reliance upon post hoc justifications.

With all of its shortcomings, however, remand at least provides more protection than the implicit rulings approach, as illustrated in *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011). In *Rutledge* the trial court denied the *Batson* challenge "after saying that the government's reasons were 'nonracial,' but without making any finding on the prosecutor's credibility." *Id.* at 557. The Seventh Circuit refused to presume a justification was credible "simply because the district judge ultimately denied the challenge." *Id.* (quoting *U.S. v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009)). While deference would normally be given to the trial court, "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *Id.* at 558-59. The Seventh Circuit concluded an evidentiary gap existed which required remand. *Id.* at 560. The Sixth Circuit came to the same conclusion in *U.S. v. McAllister*, 693 F.3d 572, 581-82 (6th Cir. 2012).

Independent review and remand both recognize that deference cannot be given to an absent ruling. But the third approach does just that, defer to an inferred ruling. As will be discussed below, independent review and remand also both ensure challenging parties have the opportunity to participate in the third *Batson* step, either through the appellate or remand process. Deference to an

"implicit" ruling, however, ignores the true expanse of the third *Batson* step and deprives the challenging party an opportunity to be heard.

3. The implicit ruling approach is inconsistent with *Batson* and does not protect litigants.

While remand does not provide the same degree of protection as independent review, either is preferable to the alternative taken by the Arizona Supreme Court—the implicit ruling approach. The implicit ruling approach is the least consistent with *Batson*, ignores the full nature of *Batson*'s third step, and is accompanied by pragmatic difficulties.

In *Batson*, this Court held that prosecutors should not be permitted to rebut a discriminatory motive by merely asserting good faith. *Batson*, 476 U.S. at 98. Similarly, a prosecutor may not excuse discriminatory strikes by giving pretextual justifications. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

Initially, some courts considered pretext and plausibility during the second step. *See Purkett*, 514 U.S. at 768. But in *Purkett*, this Court clarified that the second stage was not the proper time. *Id.* "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" at the third stage. *Id.* There is a difference between when "a trial judge may choose to disbelieve a silly or superstitious reason at step three" and when "a trial judge must terminate the inquiry at step two." *Id.*

By circumventing the third step, the Arizona Supreme Court has rendered *Batson*'s protection meaningless. A trial court must accept a prosecutor's silly, implausible, and fantastic reasons without regard to pretext. If a trial court then, as here, ignores *Batson*'s third step, pretextual reasons satisfy legitimate challenge. Such a circumstance "reduces the *Batson* analysis to a superficial check only for the most egregious forms of discrimination." Joshua E. Swift, Batson*'s*

Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge, 78 Cornell L. Rev. 336, 356 (1993).

Such a system also realizes the very criticism levied by Justice Marshall. Because any silly, fantastic, and implausible reason can satisfy the second step, the only protection exists in the third step. If trial courts side-step the most crucial portion of the *Batson* mandate, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 106 (J. Marshall, dissenting).

The implicit ruling approach also ignores the full nature of *Batson*'s third step. The third step is not conducted just by the trial court. Rather, during the third step, the defense should be given an opportunity to rebut the prosecutor's proffered race-neutral reasons. While rebuttal may not be mandatory in every federal circuit, it is advised in every federal circuit. *See* Mikal C. Watts & Emily C. Jeffcott, *A Primer on* Batson, *Including Discussion of* Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana, 42 St. Mary's L.J. 337, 357-409 (2011) (reviewing the "Practical Application" of *Batson* in each circuit and advising the challenging party rebut the proffered race-neutral reasons in each circuit).

Several circuits have explicitly recognized the challenging party's role. In the Second Circuit, a third-step decision is improper unless the trial court offered the challenging party "time to identify the relevant facts and assess the circumstances necessary to decide whether the race neutral reasons given were credible and nonpretextual." *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000). In the Fourth Circuit, after the striking party offers a race-neutral reason, the burden shifts back to the opposing party "to prove that the explanations given were pretext for discrimination …." *U.S. v. Farrior*, 535 F.3d 210, 221 (4th Cir. 2008). The Sixth Circuit also requires an opportunity to "demonstrate that the purported explanation is merely a pretext for a racial motivation." *McCurdy v.*

Montgomery County, Ohio, 240 F.3d 512, 521 (6th Cir. 2001). While the Ninth Circuit does not require such an opportunity, "it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court." *Lewis v. Lewis*, 321 F.3d 824, 835 fn.27 (9th Cir. 2003).

Indeed, a defendant's failure to challenge a prosecutor's proffered reasons could weigh against the defendant. *See Miller-El v. Dretke*, 545 U.S. 231, 278 (Thomas, J., dissenting) ("Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing. He presented no evidence and made no arguments."); *Gonzalez v. Brown*, 585 F.3d 1202, 1209 (9th Cir. 2009) (noting the defendant "could 'point to no other factors other than [the first juror's race] which suggested that she was excused on [a racial] basis alone.'"). Some circuits even consider a *Batson* claim waived if the defendant did not dispute the prosecutor's proffered reason. *See U.S. v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023, 1027-28 (4th Cir. 1998); *U.S. v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993).

Finally, there is a single overarching pragmatic problem that cannot be solved by the implicit ruling approach: "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *Rutledge*, 648 F.3d at 559. This is a fundamental tenet that unites the vast majority of jurisdictions applying either the independent review or remand alternative. *See McAllister*, 693 F.3d 582 (6th Circuit ordering remand; refusing to grant deference where "the record is unclear as to whether the district court engaged in the third step of *Batson*"); *Green*, 532 F.3d at 1031 (9th Circuit applying independent review, refusing to "presume the trial court found the prosecutor's race-neutral reasons … to be genuine"); *McGahee*, 560 F.3d at 1266 (11th Circuit applying independent review, reviewing de novo).

The implicit ruling approach is inconsistent with *Batson*, ignores the full scope of *Batson*'s third step, and improperly provides deference to absent rulings. The implicit ruling approach is not consistent with due process or equal protections. Accordingly, the Arizona Supreme Court violated Lynch's, and the public's right under the Equal Protection Clause when it relied upon an implicit ruling it read into the record.

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence.

Under the correct review standard, this Court should vacate Lynch's sentence. Nothing in the record supports the prosecutor's claimed reasons. Nothing confirms Juror 32 had long hair and was unkempt, or that Juror 34 had tattoos. Moreover, the prosecutor's conduct never indicated he actually had concerns about tattoos or facial hair.

A prosecutor's failure to question prospective jurors on issues later relied upon to support strikes indicates a discriminatory intent. *Miller-El v. Dretke*, 545 U.S. 231, 244-45 (2005); *Smith v. Cain*, 708 F.3d 628, 636 (5th Cir. 2013); *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009). Here, the prosecutor never questioned any jury panel regarding tattoos or hair styles. Although he personally questioned Jurors 32 and 34, the prosecutor never asked these jurors about tattoos, hair styles, or hygiene. *See* Appx. H, 130, 151-53, 222, 230. Upon apparently seeing an exposed tattoo, the prosecutor never requested an opportunity to ask additional questions. Appx. J, 6.

The record also affirmatively disproves one of the prosecutor's proffered reasons regarding Juror 32. The prosecutor argued he asked the trial court to strike Juror 299 because of the juror's grooming. *Id.* at 13-14. But the record does not support this claim. *See* Appx. I, 128-29. Instead, the prosecutor moved to strike Juror 299 because of the 299's attitudes toward lying. *Id.* Juror 299's grooming was never mentioned. *See id.*

If the prosecutor's race-neutral justifications—tattoos, hairstyles, and grooming—were legitimate, the prosecutor would have questioned someone about the topic during voir dire. He never did. Moreover, the prosecutor would not have misrepresented his reasons for moving to strike a different juror for cause. Nothing in the record supports the prosecutor's proffered race-neutral justifications for his peremptory strikes.

The Arizona Supreme Court excused the prosecutor's misconduct by relying upon a single Arizona case which upheld a prosecutor's strikes even though the prosecutor had not conducted any voir dire on the topic. *See Lynch*, 357 P.3d 119, ¶ 70 (relying upon *State v. Canez*, 42 P.3d 564, ¶ 18 (Ariz. 2002)). First, *Canez* predates *Miller-El v. Dretke*, wherein this Court focused upon the prosecutor's failure to ask follow-up questions as evidence of pretext. 545 U.S. at 244-45 (2005). Moreover, the prosecutor's failure to follow-up had nothing to do with the resolution of *Canez*; *Canez* was affirmed because the juror in question gave inconsistent answers regarding education and employment. *Canez*, 42 P.3d 564, ¶ 26.

Finally, even if the failure to ask follow-up questions is not per se pretext, it is sufficient evidence of pretext in this case. The prosecutor's reasons are the same as those this Court already labeled as silly, fantastic, and implausible. In *Purkett*, this Court addressed a prosecutor's strike of a juror based on the juror's long, unkempt hair and facial hair. 514 U.S. at 766. Discussing the importance of the third step, justifications of this sort were considered silly, implausible, and fantastic. *Id.* at 768. This Court merely found that silly, implausible, and fantastic justifications satisfied the second step. *Id.*

But where a prosecutor offers an implausible justification, never conducts any follow-up to indicate the implausible justification was genuinely held, the record does not support the strike, and the record actively disputes the prosecutor's support for his position, the justification is pretextual.

CONCLUSION

If a trial court's ruling that a prosecutor has offered race-neutral reasons to justify a strike—reasons which need not even be credible—constitutes an implicit application of *Batson*'s third step, the third step is rendered meaningless and the protection afforded by *Batson* and the Equal Protection Clause are inert. This approach brings about the very system feared by Justice Marshall. A prosecutor can overcome *Batson* by merely inventing any race-neutral reason for the strike, regardless of how silly, fantastic, or implausible that reason is.

The proper remedy for such a failure is to conduct an independent review of the record and reverse the conviction or sentence where the record does not support the prosecutor's proffered race-neutral justifications. Applying the proper remedy, this Court should vacate Lynch's sentence. At a minimum, *Batson* requires a remand so the third prong can actually be conducted.

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to read a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons*.

In *Simmons v. South Carolina*, this Court considered a defendant's request to instruct the jury regarding his parole ineligibility if sentenced to life imprisonment under the Due Process Clause of the Fourteenth Amendment. 512 U.S. 154, 156 (1994). This Court held, "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Id.* at 163. "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.* at 169.

A *Simmons* instruction is appropriate even where future dangerousness is "a logical inference from the evidence" or "injected into the case" by the prosecutor. *Kelly v. South Carolina*, 534 U.S. 246, 252-53 (2002).

A. Lynch was entitled to a *Simmons* instruction; Lynch was not eligible for parole and future dangerousness was at issue.

The Arizona Supreme Court correctly found, "[t]he State suggested at trial that Lynch could be dangerous." *Lynch*, 357 P.3d 119, ¶ 64. The Court also correctly concluded Lynch was not eligible for parole because parole was abolished in 1994. *Id.* Because Lynch was not eligible for parole and future dangerousness was at issue, a *Simmons* instruction should have been read.

Notwithstanding the fact that Lynch satisfied both conditions set forth in *Simmons*, the Arizona Supreme Court ruled a *Simmons* instruction was unnecessary. *Lynch*, 357 P.3d 119, ¶ 65. This error is particularly egregious because the preliminary instructions incorrectly suggested parole was available. Appx. R ("Life without the possibility of release … means … [Lynch] will not be eligible for parole …."). To reach this conclusion the Court relied upon a different and irrelevant form of release—clemency. *Lynch*, 357 P.3d 119, ¶ 65.

B. The availability of executive clemency does not alter the requirements of *Simmons*.

The remaining form of release, executive clemency, is not of sufficient constitutional import to deviate from *Simmons*. However, the Arizona Supreme Court relied upon clemency to conclude, "Because § 13-703(A) permitted the possibility of Lynch obtaining release, refusing a *Simmons* instruction was not error." *Id.*

But this Court has repeatedly recognized the fundamental difference between parole, a standard deviation upon a sentence, and clemency, an ad hoc exercise of executive grace. Indeed, this Court rejected an identical argument in *Simmons*. *Simmons*, 512 U.S. at 166 (finding reliance

upon "future exigencies such as legislative reform, commutation, clemency, and escape" have "little force")

This holding reflects this Court's long-standing recognition that parole is uniquely different from clemency. *See Solem v. Helm*, 463 U.S. 277 (1983). "Parole is a regular part of the rehabilitative process" with legally established standards. *Id.* at 300. "Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards." *Id.* at 301. In *Solem*, this Court refused to give weight to the "bare possibility" of clemency, as that "would make judicial review under the Eighth Amendment meaningless." *Id.* at 303.

The Arizona Supreme Court disregarded this well-established jurisprudence and relied, instead, upon a single sentence from *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000). *See Lynch*, 357 P.3d 119, ¶ 65. The Court correctly quoted *Ramdass* for the proposition, "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* (quoting *Ramdass*, 530 U.S. at 169; emphasis by Arizona Supreme Court). In direct contravention of this Court's holdings, the Arizona Supreme Court ignored that eligibility for clemency is not a "possibility of parole."

C. Beyond an instruction, the trial court's ruling interfered with Lynch's right to present a complete defense.

The due process clause also guarantees defendants the opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," the due process clause requires "that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (internal quotation marks omitted). This was the heart of this Court's decision in *Simmons*: "sending a man to his death on the

basis of information which he had no opportunity to deny or explain violate[s] fundamental notions of due process." *Simmons,* 512 U.S. at 164 (internal quotation marks omitted).

Justice O'Connor, with whom Chief Justice Rehnquist and Justice Kennedy joined, concluded the Due Process clause required that defendants have the opportunity to "meet the State's case against him." *Id.* at 175 (O'Connor, J., concurring); *see also id.* at 174 (Ginsburg, J., concurring). When the prosecution relies upon future dangerousness, due process requires that the defendant be permitted to introduce evidence combatting the claim. *Id.* at 175 (O'Connor, J., concurring). Thus, "the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness." *Id.*

At a minimum, due process required that Lynch have the ability to inform the jury of his parole ineligibility in some manner. But the procedural history in this case precluded Lynch from introducing his parole ineligibility. The trial court's 2005 ruling precluded Lynch from introducing his parole ineligibility through testimony or argument. The 2012 ruling denied an instruction. The prosecution was permitted to introduce evidence and argument of future dangerousness; Lynch was not permitted to meet the evidence against him.

D. The Eighth Amendment supports a *Simmons* instruction.

In *Simmons* this Court limited its decision to the due process clause, "express[ing] no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment." *Id.* at 162 fn.4, 2193 fn.4. Justice Souter, however, linked the decision to the Eighth Amendment's requirement "for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 172 (Souter, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). The Eighth Amendment's protection against cruel and unusual punishment guarantees

capital defendants the right to an individualized sentencing. *Eddings v. Oklahoma*, 455 U.S. 104, 105, 112 (1982). Thus, the denial of a *Simmons* instruction not only violated Lynch's due process rights, the denial also violated Lynch's right to a reliable and individualized sentence under the Eighth Amendment.

E. Arizona has a long history of ignoring and refusing to apply *Simmons v. South Carolina*.

The Arizona Supreme Court's error is also not an isolated one driven by unique facts; the Arizona Supreme Court has steadfastly refused to apply *Simmons*. Instead, the Court has repeatedly relied upon the availability of "release" to circumvent *Simmons*, ignoring that the form of "release" available is not constitutionally adequate to justify departure from *Simmons*.

For example, in *State v. Cota*, the defendant was charged with murder after Arizona abolished parole in 1994. 272 P.3d 1027, ¶¶ 2-4 (Ariz. 2012) (murder occurred in 2003). The defense argued, "the trial court erred by instructing the jury that a life sentence might allow for release after twenty-five years, because he is not eligible for parole …." *Id.* at ¶ 75. The Arizona Supreme Court noted this argument conflated parole and release. *Id.* Because the defendant could have been eligible for executive clemency, the Court found the instruction accurately stated the law. *Id.* at ¶¶ 75-76.

This same misinterpretation has been used to circumvent *Simmons* in several Arizona capital cases after parole was abolished. The murder in *State v. Hargrave* came after Arizona abolished parole. 234 P.3d 569, ¶¶ 1-6 (Ariz. 2010) (murder occurred in 2002). Relying on *Simmons*, the defendant argued the trial court improperly advised the jury that he could be released after 25 years. *Id.* at ¶¶ 50-52. The Arizona Supreme Court rejected this argument and distinguished *Simmons*, because, "Hargrave was eligible <u>for release</u> after twenty-five years." *Id.* at ¶ 53 (emphasis added).

State v. Chappel also occurred after parole had been abolished. 236 P.3d 1176, ¶¶ 3-7 (Ariz. 2010) (murder occurred 2003). Relying on *Simmons*, the defendant argued the instructions misled the jury to believe parole was available. *Id.* at ¶ 43. The Court concluded his reliance on *Simmons* was "unavailing because Chappel was eligible for release." *Id.* (emphasis added).

State v. Hardy also post-dated the abolition of parole. 283 P.3d 12, ¶¶ 2-9 (Ariz. 2012) (murder occurred in 2005). The defendant asked for a *Simmons* instruction, which was rejected. *Id.* at ¶ 56. The Arizona Supreme Court affirmed this decision. *Id.* at ¶ 58. While the Supreme Court correctly noted that *Simmons* focused on parole, the Court relied upon the availability of "release after twenty-five years" to distinguish *Simmons*. *Id.* (emphasis added).

CONCLUSION

Lynch was not eligible for parole and the prosecution placed Lynch's future dangerousness at issue. At that point, a *Simmons* instruction was necessary to give effect to Lynch's Due Process right. But rather than overturn Lynch's sentence, the Arizona Supreme Court doubled down on its prior incorrect decisions regarding *Simmons*. Despite this Court's repeated guidance that executive clemency is constitutionally different from parole, and despite this Court's clear rulings that clemency does not obviate the need for a *Simmons* instruction, the Arizona Supreme Court again held that a defendant is not entitled to a *Simmons* instruction when the only available release mechanism is clemency. This is not a one-time oversight by the Arizona Supreme Court—the Court has now relied upon clemency to evade *Simmons* on several occasions. Because a *Simmons* instruction should have been given and the Arizona Supreme Court has repeatedly ignored this Court's mandate, this Court should vacate Lynch's death sentence.

III. Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.

Juan Martinez had a history of misconduct. By the time he prosecuted Shawn Lynch's penalty retrial, Martinez's misconduct had been found by the Arizona Supreme Court at least twice. But the Court always found standard instructions cured Martinez's misconduct. Thus, Martinez never had any incentive to correct his misbehavior.

Unsurprisingly, Martinez's misconduct was not only repeated in Lynch's penalty retrial—the misconduct surged. Where Martinez had previously committed misconduct on a handful of occasions in a trial, Martinez employed improper tactics on seventeen occasions in Lynch's sentencing.

Misconduct violates the very core of a prosecutor's duty. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Moreover, rampant prosecutorial misconduct is inconsistent with Lynch's right to a fair and reliable trial—a right guaranteed by the due process clause and rendered more important by death eligibility.

A. Lynch was denied his right to a reliable death decision by the constant and repeated misconduct in this case.

Lynch, like all defendants, is guaranteed due process under the Fifth and Fourteenth Amendments. The Due Process clauses assure the right to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A fair trial, by its nature, is a reliable one. *Nichols v. U.S.*, 511 U.S. 738, 762 (1994); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Estes v. State of Texas*, 381 U.S. 532, 583 (1965). The right to a fair and reliable trial takes on more importance in the context of death

decisions. Death, as the most severe punishment, uniquely requires reliability. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Prosecutorial misconduct can "so [infect a] trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). While insignificant misconduct is tolerated, *Greer v. Miller*, 483 U.S. 756, 765 (1987), the misconduct in this case undermines the verdict's reliability.

As discussed above, the Arizona Supreme Court found at least seventeen instances, and eight categories, of misconduct. During opening statements, the prosecutor argued Lynch wanted to "pull at [the jury's] heart strings," *Lynch*, 357 P.3d 119, ¶ 8, and encouraged the jury to place themselves in the victim's shoes, *id.* at ¶¶ 47-49. During examination of a defense expert, the prosecutor suggested the witness could "vouch for people," *id.* at ¶ 15, and twice misstated the evidence, *id.* at ¶ 25. During closing argument, the prosecutor placed the prestige of the government at issue, *id.* at ¶ 32, and misstated the law, *id.* at ¶ 37.

In each instance, the State introduced irrelevant considerations. The "pull at heart strings" comment introduced a prejudice against the defense. The "vouch for people" comment accused the expert witness through mischaracterization. Misstatements of the evidence and law introduced incorrect assertions of fact and law into the jury's minds. The prosecutor also encouraged the jury to consider the evidence as supported by the imprimatur of the State. *See U.S. v. Young*, 470 U.S. 1, 18-19 (1985). Finally, by asking the jury to place themselves in the victim's shoes, the prosecutor encouraged the jury to consider their personal fears and passions.

Because the misconduct in this case directly sought to encourage the jury to rest its decision upon improper grounds—appeals to emotion and mischaracterizations of law and evidence—the misconduct undercuts the reliability of the jury's verdict.

B. Lynch was deprived a fair and reliable trial when he was prosecuted by an attorney who has repeatedly obtained convictions through misconduct.

A defendant's right to a fair trial imposes a duty to ensure that justice is done. *Cone v. Bell*, 556 U.S. 449, 451 (2009). Thus, prosecutors must promote justice, not win at all costs. *Connick v. Thompson*, 563 U.S. 51, 71 (2011). "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). As indicated above, prosecutorial misconduct undermines a defendant's right to a fair and reliable trial.

But Lynch's right to a fair and reliable trial was further undercut by a systemic factor beyond his control: he was prosecuted by an attorney who has repeatedly committed misconduct. Had a different attorney—a more ethical attorney—been assigned, the tenor of Lynch's trial would have been very different. A more ethical prosecutor would not have argued during opening statements, improperly attacked Lynch's experts, misstated the evidence or evidence, vouched during closing argument, or encouraged the jury to place themselves in the victim's shoes. Instead, Lynch's trial was doomed from the start.

The Arizona Supreme Court has dealt with the assigned prosecutor, Juan Martinez, on several prior occasions. In *State v. Morris*, the Arizona Supreme Court found Martinez improperly encouraged the jurors to place themselves in the victim's position. 160 P.3d 203, ¶ 58 (Ariz. 2007). In *State v. Gallardo*, the Arizona Supreme Court concluded Martinez improperly attacked a defense expert and mischaracterized evidence regarding fees. 242 P.3d 159, ¶ 44 (2010). The Court, however, tolerated the misconduct in both cases. As a result, Martinez repeated both types of misconduct in this case.

Juan Martinez's repeated misconduct even became a topic during oral argument in *Gallardo*.[1] *See* Appx. E, 8. Arizona Justice Ryan recalled Martinez's misconduct from several cases. *See id.* Justice Hurwitz joined, asking expressly about improper personalization. *Id.*

To secure convictions and death sentences, Juan Martinez uses improper tactics. While the Arizona Supreme Court has repeatedly found Martinez's conduct improper in opinions, the Court has done nothing to actually reign in his misconduct. Predictably, Martinez again resorted to misconduct in Lynch's case. Martinez again misrepresented the facts and law and asked the jury to place themselves in the victim's shoes.

Martinez does not seek justice; he pursues death verdicts with unethical vigor. And this pursuit has pulled Lynch in its wake. Lynch's death verdict was not the product of a fair and reliable proceeding. Lynch's death verdict was the result of a prosecutor who has realized he can advocate far beyond the boundaries of fairness because the Arizona Supreme Court will do nothing to stop him.

CONCLUSION

Under the Due Process clauses of the Fifth and Fourteenth Amendments, Lynch had a right to a fair and reliable sentencing trial. But this right was deprived by the foreseeable actions of a prosecutor whose misconduct has been emboldened by an Arizona Supreme Court that has refused to act upon rampant misconduct. Not only did Martinez commit misconduct in this case, he repeated the very sorts of misconduct the Arizona Supreme Court admonished him for in the past. Yet the Supreme Court did nothing.

In light of the misconduct, and the weight that should be assigned to misconduct that encourages the jury to improperly decide a case, this Court should vacate Lynch's death sentence.

[1] The Arizona Supreme Court retains videos for oral arguments on its website, at https://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video. The recitation of the oral argument provided in the Motion for Reconsideration (Appx. E) was taken from this website.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

Mikel Steinfeld
Deputy Public Defender
Downtown Justice Center
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
Telephone (602) 506-7711
State Bar Attorney No. 024996
Counsel for Petitioner

GATBMMS022516P

No. _____

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PROOF OF SERVICE

I, Mikel Steinfeld, do certify that on this 25th day of February, 2016, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to each party in the above proceeding or the party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to **Jeffrey L. Sparks**, Assistant Attorney General, Office of the Attorney General, 1275 West Washington, Phoenix, Arizona, 85007, **Shawn Patrick Lynch,** #206125, Arizona State Prison Complex, Eyman-Browning Unit, P.O. Box 3400, Florence, AZ 85132; and, **Ms. Janet Johnson**, Clerk, Arizona Supreme Court, 1501 West Washington Street, Phoenix, Arizona 85007, each of them with first-class postage prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

Mikel Steinfeld
Deputy Public Defender
Downtown Justice Center
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
Telephone (602) 506-7711
State Bar Attorney No. 024996
Counsel for Petitioner

No. _____

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Shawn Patrick Lynch, requests permission to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner proceeded through all phases of the Arizona Superior Court and the Arizona Supreme Court as an indigent defendant with counsel appointed by Maricopa County. An affidavit supporting this motion is attached.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

Mikel Steinfeld
Deputy Public Defender
Downtown Justice Center
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
Telephone (602) 506-7711
State Bar Attorney No. 024996
Counsel for Petitioner

No. _____

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITIONER'S AFFIDAVIT OF MAILING

MIKEL STEINFELD deposes and says:

I am a member of the Bar of the Supreme Court of the United States. On the 25th day of February, 2016, I delivered for deposit in the mail of the United States Postal Service a package addressed to the Clerk of the Supreme Court of the United States, first-class mail, postage prepaid, containing 10 copies of the Petitioner's Writ of Certiorari in the above-entitled case.

Respectfully submitted this 25th day of February, 2016.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

Mikel Steinfeld
Deputy Public Defender
Downtown Justice Center
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
Telephone (602) 506-7711
State Bar Attorney No. 024996
Counsel for Petitioner

SUBSCRIBED AND SWORN to before me this 25th day of February, 2016.

NOTARY PUBLIC

My commission expires: