No. 15–8366

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN PATRICK LYNCH,
PETITIONER,
-vs-
STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Supreme Court commit federal constitutional error when it affirmed the trial court's denial of Petitioner's challenge of the State's exercise of peremptory strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)?

2. Did the Arizona Supreme Court commit federal constitutional error when it determined that Lynch was not entitled to an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994)?

3. Did the Arizona Supreme Court commit federal constitutional error when it rejected Lynch's claim that the prosecutor engaged in misconduct that deprived him of a fair trial?

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The Arizona Supreme Court affirmed Petitioner's convictions and sentences in an opinion reported at *State v. Lynch*, 357 P.3d 119 (Ariz. 2015), and included in the Appendix to Petitioner's petition for writ of certiorari. (Pet. App. A.)

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10. The Arizona Supreme Court entered its judgment on September 10, 2015, and denied Petitioner's motion for reconsideration on November 30, 2015. (Pet. App. A, F.) Petitioner timely filed his petition on February 25, 2016.

PROVISIONS INVOLVED

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

The Arizona Supreme Court summarized the facts of Petitioner's murder of James Panzarella in its opinion in this case:

> The victim, James Panzarella, was seen at a Scottsdale bar with Lynch and Michael Sehwani on March 24, 2001. Lynch, Sehwani, and Panzarella went to Panzarella's residence early the next morning. Later that morning, Sehwani used Panzarella's American Express card at a supermarket. Ten minutes later, the card was reported lost. Sehwani again used the card at a convenience store and unsuccessfully attempted to use it at a department store. The same day, Panzarella's Bank One card was used at a restaurant, a convenience store, and a motel. The Bank One card was used the following day to make a cash withdrawal and various purchases, including Everlast shoes.
>
> The next afternoon, Panzarella was found in his home tied to a chair with his throat slit. Police also found credit card receipts from purchases made that morning at a supermarket and convenience store.
>
> Police arrested Lynch and Sehwani that afternoon as they entered a truck in a motel parking lot. Sehwani was wearing Everlast shoes and had Panzarella's credit cards and checks in his wallet. In the truck and a motel room, police found keys to Panzarella's car, a sweater with Panzarella's blood on it, and a .45 caliber pistol belonging to Panzarella. Blood on Lynch's shoes matched Panzarella's DNA.

Lynch, 357 P.3d at 126.

A jury found Petitioner guilty of first-degree murder, armed robbery, burglary, and kidnapping. *Lynch*, 357 P.3d at 126. In the trial's first penalty phase, the jury could not reach a unanimous verdict regarding whether to sentence Lynch to death. *Id.* at 126-27. A second penalty-phase jury found that two aggravating factors existed because the murder was especially depraved and committed for pecuniary gain, and sentenced Lynch to death. *Id.* at 127. On appeal, however, the Arizona Supreme Court remanded for a new jury sentencing

because the trial court had given the jury an erroneous instruction on one of the alleged aggravating circumstances. *Id.*

During jury selection for resentencing on remand, Petitioner challenged the State's exercise of five of its peremptory strikes to exclude Hispanic prospective jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (Pet. App. J at 10.) The prosecutor provided race-neutral reasons for each of its strikes. Specifically, the prosecutor stated that he struck Number 255 because "she indicated that she is philosophically opposed to the death penalty." (Pet. App. J at 10.) He stated that he struck Number 49 because she had served on two juries that had hung and he was convinced that "if this juror is seated this woman will hang this jury and will, in fact, result in a victory for the defense." (Pet. App. J at 11.) The prosecutor further explained that he struck Number 34 because he had visible tattoos on both legs and one arm, and the prosecutor did not want to seat a juror who could identify with Petitioner, who had contracted hepatitis C from receiving a tattoo in jail. (Pet. App. J at 12-13.) With respect to Number 32, the prosecutor stated that "his facial hair resembles ZZ Top" and "looks like a billy goat," and his hair was in a "very long ponytail" that looked "like Jerry Garcia." (Pet. App. J at 13.) The prosecutor stated that he would have struck anybody with that type of grooming and noted that he had requested to strike a white juror in part because he had long hair and facial hair. (Pet. App. J at 14.) The prosecutor explained that he struck Number 8 because her brother had been convicted of child abuse, and one of the mitigating circumstances in Petitioner's case was that there was some sort of abuse in his past.

(Pet. App. J at 14.) In addition, the prosecutor stated that there was "a lot of sexual innuendo involved in this case." (Pet. App. J at 14.)

The trial court found that the "reasons given for the State's striking Juror numbers 8, 32, 34, 49 and 255 are all race neutral" and allowed the strikes. (Pet. App. J at 15.) Petitioner then claimed that the reasons given for the strikes of Numbers 32 and 34 "did not cure or justify the strikes and . . . the reasons given by the State's attorney support the contention that they were struck for reasons of ethnicity or race." (Pet. App. J at 15.) The trial court made no further comment regarding the challenge. (Pet. App. J at 15.)

At his remanded jury sentencing, Petitioner also filed a waiver of his right to be considered for a release-eligible sentence and a motion for a jury instruction regarding release ineligibility pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). (Pet. App. N.) The trial court denied the motion. (Pet. App. Q.) Lynch was again sentenced to death. *Lynch*, 357 P.3d at 127.

On appeal, Lynch argued, as pertinent here, that the State engaged in prosecutorial misconduct in several ways, individually and in combination; the trial court erred by refusing to give a *Simmons* instruction; and the trial court violated *Batson v. Kentucky*, when it permitted the State to strike five Hispanic jurors over his objection. (Pet. App. B.) The Arizona Supreme Court rejected each argument. First, the court determined that, although the prosecutor made "some improper remarks, they did not amount to persistent and pervasive misconduct that deprived Lynch of a fair trial." *Lynch*, 357 P.3d at 135. Second, the court concluded that

refusing a *Simmons* instruction was not error because the sentencing statute in effect at the time of the murder authorized the imposition of release-eligible sentences, and "'*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.* at 138 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 159 (2000)). Finally, the court found that the trial court had "implicitly rul[ed] that Lynch did not carry his burden of proving purposeful discrimination" and concluded that the fact that the prosecutor did not ask follow-up voir dire questions did not establish that the strikes were pretextual. *Id.* at 139.

REASONS FOR DENYING THE WRIT

This case presents no reason, much less a compelling one, for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10 (compelling reasons include decision that decides an important federal question in conflict with other state court of last resort or United States court of appeals, decides an important question of federal law that has not been settled by this Court, or decides an important federal question in conflict with relevant decisions of this Court). First, the Arizona Supreme Court properly concluded that the trial court had implicitly conducted step three of the *Batson* analysis when it denied Petitioner's challenge. Moreover, even if there is a split of authority regarding the reviewing court's role when the trial court fails to explain its reasoning under step three of the *Batson* analysis, Petitioner's *Batson* claim would fail regardless of which approach this Court takes. Second, the Arizona Supreme Court properly ruled that Petitioner was not entitled

to an instruction pursuant to *Simmons* because he had no right to waive his eligibility for parole, and the trial court could have imposed a release-eligible life sentence. Finally, the Arizona Supreme Court correctly determined that the prosecutor did not engage in misconduct that deprived Petitioner of a fair trial.

A. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT THE TRIAL COURT IMPLICITLY DETERMINED THAT PETITIONER HAD NOT MET HIS BURDEN OF PROVING PURPOSEFUL DISCRIMINATION.

Petitioner first asserts that the Arizona Supreme Court's conclusion that the trial court implicitly determined that Petitioner did not carry his burden of proving racial discrimination is incorrect and contrary to the approach of "the bulk of jurisdictions." (Petition at 9-10.) He contends that the Arizona Supreme Court simply failed to conduct step three of the *Batson* analysis and maintains there is a split of authority among the federal appellate courts regarding how to review such a failure. (Petition at 9-10.) He asks this Court to conduct an independent review of his *Batson* challenge and vacate his sentence. (Petition at 19.)

To succeed on a *Batson* challenge, a defendant must first make a prima facie case of racial discrimination in the prosecutor's use of peremptory strikes. *Batson*, 476 U.S. at 96. Next, the burden shifts to the State to "come forward with a neutral explanation" for its strikes. *Id.* at 97. Once the State has articulated race-neutral reasons, the trial court must determine whether the defendant has established purposeful discrimination. *Id.* at 98. The ultimate burden of persuasion always remains with the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

With respect to the third step of the *Batson* analysis, "the critical question in determining whether a [defendant] has proved purposeful discrimination . . . is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003). The trial court must determine whether the prosecutor's race-neutral explanations are credible by evaluating the prosecutor's demeanor; how reasonable, or how improbable, the explanations are; and whether the proffered rationale has some basis in accepted trial strategy. *Id.* at 339.

This Court has never held that a trial court may not implicitly complete step three of the *Batson* analysis by denying the challenge. *See McKinney v. Artuz*, 326 F.3d 87, 100 (2d Cir. 2003) (no "clearly established federal law" requires trial court to provide express reasons for each credibility determination). The Second, Fifth, Eighth, and Eleventh Circuits have followed the approach the Arizona Supreme Court took here, as have a number of state supreme courts. *See Messiah v. Duncan*, 435 F.3d 186, 201-02 (2d Cir. 2006) (holding that "as long as each side to a *Batson* dispute is provided an opportunity to make its record, a clear expression of the trial court's acceptance or rejection of a peremptory strike is an adequate adjudication of the merits of the *Batson* claim; the failure to make particularized findings in such circumstances in no sense qualifies or undermines the trial court's *Batson* ruling"); *Stevens v. Epps*, 618 F.3d 489, 499 (5th Cir. 2010) (not unreasonable for state supreme court to conclude that trial court implicitly credited prosecutor's reason for striking juror); *Edwards v. Roper*, 688 F.3d 449, 457 (8th Cir. 2012) ("The denial of

a *Batson* challenge . . . 'is itself a finding at [*Batson's*] third step that the defendant failed to carry his burden of establishing that the strike was motivated by purposeful discrimination,' and it 'includes an implicit finding that the prosecutor's explanation was credible.'") (internal citations omitted); *Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006) (court may "make 'the common sense judgment'—in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling—that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry"); *see*, *e.g.*, *Jacox v. Pegler*, 665 N.W.2d 607, 614 (Neb. 2003) ("The district court's rejection of [the defendant's] claim of discrimination embodies an implied finding under the third step of the *Batson* test that [the defendant] did not carry his burden of proving purposeful discrimination."); *State v. McCullough*, 270 P.3d 1142, 1161 (Kan. 2012) ("[T]he district court's analysis of the third step can be implied from its consideration of the prosecutor's reasons and the defendant's rebuttal of them before overruling the *Batson* challenge.").

Petitioner asserts that the federal appellate courts have taken three approaches to cases in which a trial court does not conduct the third step of the *Batson* analysis: "(1) a de novo review by the appellate court and, when the record does not support a prosecutor's 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*."

(Petition at 10.) Even if there is such a split of authority, it has no bearing on the outcome of Petitioner's case because, under any approach, his *Batson* claim fails.

If this Court were to review de novo whether the record supports the prosecutor's reasons, it would reach the conclusion that Petitioner did not meet his burden of proving purposeful discrimination. The prosecutor gave race-neutral reasons for each of his strikes, and Petitioner, given the opportunity to dispute those reasons, failed to do so. Rather, Petitioner merely stated that

> we want the record to reflect that the reasons given . . . by the State regarding Juror numbers 32 and 34 did not cure or justify the strikes and we believe the reasons given by the State's attorney supports [sic] the contention that they were struck for reasons of ethnicity or race; that's all.

(Pet. App. J at 15.) Petitioner offered no reason to believe the prosecutor's race-neutral reasons were pretextual. Petitioner now argues—based only on a cold appellate record—that the prosecutor's reasons are not supported by the record because "[n]othing confirms Juror 32 had long hair and was unkempt, or that Juror 34 had tattoos." (Petition at 19.) But Petitioner's attorney at trial (who viewed the jurors in person) did not dispute the prosecutor's factual statements that Number 32 had long hair and a long beard or that Number 34 had visible tattoos. (Pet. App. J at 12-14.) Nor did the trial judge disagree with the prosecutor's physical description of those prospective jurors. There is no reason to believe the facts as stated by the prosecutor are untrue.

Petitioner also asserts that "[a] prosecutor's failure to question prospective jurors on issues later relied upon to support strikes indicates a discriminatory

intent." (Petition at 19.) He cites *Miller-El v. Dretke*, 545 U.S. 231 (2005), for that proposition, but that case does not support his conclusion. There, the prosecutor questioned and struck a black venire member who expressed unequivocally that he could impose the death penalty on a defendant regardless of the possibility of rehabilitation, but did not further question or strike non-black venire members who stated they might not impose the death penalty if the defendant could be rehabilitated. *Id.* at 244-45. Here, the prosecutor did not question *any* prospective jurors about tattoos, hair styles, or hygiene. Thus, as the Arizona Supreme Court determined, the fact that the prosecutor did not ask questions related to Number 32's long hair and facial hair and Number 34's tattoos is not evidence of discriminatory intent. *See Lynch*, 357 P.3d at 139.

Similarly, if this Court were to remand to the trial court for further findings, the outcome would be the same. The trial court would simply make explicit its basis for concluding the prosecutor was credible and his reasons were genuine, based on the same record that exists now. *See United States v. Rutledge*, 648 F.3d 555, 560 (2011) (remanding to district court to make "explicit credibility findings"); *United States v. McAllister*, 693 F.3d 572, 582-83 (6th Cir. 2012) (same). Thus, this Court need not resolve which is the proper approach when a trial court does not explicitly state its reasons for concluding that a defendant did not meet his burden of proving purposeful discrimination. Petitioner's claim fails under any approach, and the petition for writ of certiorari should be denied.

B. PETITIONER WAS NOT ENTITLED TO A *SIMMONS* INSTRUCTION.

Petitioner next asserts that, because he was ineligible for parole, and the State placed his future dangerousness at issue, he was entitled to a jury instruction pursuant to *Simmons*. (Petition at 21-26.) Before the penalty phase, Petitioner filed a purported waiver of his "right" to be considered for a release-eligible sentence and requested an instruction stating that, if the jury decided he should be sentenced to life, the court would sentence him to natural life, "which means [Petitioner] would never be released from prison for his entire life." (Pet. App. N at 9.) The trial court rejected Petitioner's attempted waiver and instructed the jury that, "If the sentence is life imprisonment, then the court will sentence the Defendant to either life imprisonment without the possibility of release from prison, or life imprisonment with the possibility of release from prison after 25 years." (Pet. App. R.) The court further instructed the jury that "'[l]ife without the possibility of release from prison' means . . . the Defendant will never be eligible to be released from prison for any reason for the rest of his life. He will not be eligible for parole, work furlough, work release, or release from confinement on any basis, and his sentence cannot be commuted." (Pet. App. R.)

In *Simmons*, this Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156. "*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." *Ramdass*, 530 U.S. at 169. In other words, *Simmons* does not apply when no state law prohibits the defendant's release on parole. *State v. Hardy*, 283 P.3d 12, 24 (Ariz. 2012).

The sentencing statute applicable to Lynch provided:

> If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

A.R.S. § 13–703(A) (2001). Because the applicable statute does not prohibit Petitioner from ever being released on parole, the trial court did not err by instructing the jury that if it returned a life verdict, the court would sentence him to either natural life or life with the possibility of release after 25 years.

In *Simmons*, the defendant was legally ineligible for parole because he had two prior felony convictions. 512 U.S. at 156. In this case, as a *legal* matter, if the jury returned a life verdict, Petitioner could have eventually been eligible for release on each of his convictions. *See Ramdass*, 530 U.S. at 169. He could have received a parole-eligible sentence, and though there may not be a currently existing parole mechanism as Petitioner notes (Petition at 22), nothing prevents the legislature from creating a parole system in the future for which Petitioner would have been eligible had the court sentenced him to life with the possibility of release after 25 years. Whether, as a *practical* matter, he would ever be released, is

irrelevant to the inquiry. *See State v. Hargrave*, 234 P.3d 569, 583 (Ariz. 2010) (instruction that defendant was eligible for release was correct even though defendant may have been unlikely to be released).

The trial court also correctly rejected Petitioner's attempt to waive his "right" to a release-eligible sentence. Arizona law "does not confer a 'right' to parole eligibility on defendants," but leaves that decision "squarely within the trial court's discretion." *State v. Benson*, 307 P.3d 19, 32 (Ariz. 2013). In *State v. Dann*, 207 P.3d 604 (Ariz. 2009), the defendant filed a pretrial "waiver" of his statutory right to parole and stipulated that, should he receive a sentence less than death, he would agree to be sentenced to life without parole. *Id.* at 626. The Arizona Supreme Court concluded that the defendant could not "'presentence' himself" because Arizona's sentencing statute for first-degree murder "gives the trial court discretion to decide what penalty Dann should receive if spared the death penalty." *Id.* Thus, Petitioner had no "right" to parole eligibility to waive, and the trial court could have imposed a sentence of death, natural life, or life with the possibility of release.

Accordingly, because Petitioner could be sentenced to life with the possibility of release, and could not waive his eligibility for such a sentence, the trial court was not obligated to give a *Simmons* instruction, and instead had only to properly instruct the jury regarding the possible sentences. The trial court did so by instructing the jury that

> If your verdict is that the Defendant should be sentenced to death, he will be sentenced to death. If your verdict is that the Defendant should be sentenced to life, he will not be sentenced to death, and the court will sentence him to either life without the possibility of release until

> at least 25 calendar years in prison are served, or "natural life," which means the Defendant would never be released from prison.

(Pet. App. S. at 18.) The court's instructions accurately stated the law. *See* A.R.S. § 13–703(A).

The trial court correctly refused to give a *Simmons* instruction and properly instructed the jury on the possible sentences. Thus, this Court should deny the petition for writ of certiorari.

C. THE PROSECUTOR'S CONDUCT DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL.

Petitioner contends that the prosecutor's alleged misconduct, and the Arizona Supreme Court's purported refusal to recognize such misconduct, should compel this Court to grant the petition and vacate Petitioner's death sentence. (Petition at 27-30.) The Arizona Supreme Court here thoroughly considered each allegation of misconduct and determined that, individually and cumulatively, they did not deprive Petitioner of a fair trial. *Lynch*, 357 P.3d at 127-36. The court concluded that "prosecutorial misconduct, while present in some instances, was not so pronounced or sustained as to require a new sentencing trial." *Id.* at 136.

Petitioner provides no reason for this Court to reconsider the Arizona Supreme Court's conclusion that the prosecutor's actions, even if they amounted to misconduct, did not deprive Petitioner of a fair trial. Rather, he rehashes the alleged instances of misconduct in this case, without demonstrating that they were so pervasive that they deprived him of due process. (Petition at 28.) *See*, *e.g.*, *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985), *cert. denied*, *Weinstein v. United States*, 475 U.S. 1110 (1986) ("Reversal on the basis of

prosecutorial misconduct requires that the misconduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'") (quoting *United States v. Alanis*, 611 F.2d 123, 126 (5th Cir.), *cert. denied*, 445 U.S. 955 (1980)).

Petitioner also criticizes the Arizona Supreme Court for concluding that the prosecutor's conduct did not deprive him of a fair trial, when that court had previously found instances of misconduct by the same prosecutor. (Petition at 29-30.) But whether the prosecutor engaged in misconduct in *other* cases has no bearing on whether he engaged in misconduct in *this* case. Rather, it was Petitioner's burden to prove prosecutorial misconduct that deprived him of a fair trial in this case, *see*, *e.g.*, *United States v. Daychild*, 357 F.3d 1082, 1099 (9th Cir. 2004), and the Arizona Supreme Court concluded that he failed to do so. Petitioner offers no reason for this Court to reach a different conclusion.

The Arizona Supreme Court concluded that, at most, the prosecutor "made some improper remarks," and properly determined that the trial court's sustaining of a number of Petitioner's objections and its instructions to the jury cured any prejudice that might have resulted from the prosecutor's actions. *Lynch*, 357 P.3d at 135-36; *see also*, *e.g.*, *United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) ("A judge's prompt corrective action in response to improper comments usually is sufficient to cure any problems arising from such improper comments."); *United States v. McCarthy*, 54 F.3d 51, 56 (2d Cir. 1995) (concluding that alleged misconduct did not deprive defendant of a fair trial because trial court cured prejudice where it sustained objections and cautioned the jury that questions asked

by counsel are not evidence). Petitioner has not established that the Arizona Supreme Court erred in this determination, much less that it decided an important federal question in a way that conflicts with another state court of last resort, federal court of appeals, or this Court, or that it decided an important question of federal law that has not been settled by this Court. *See* Sup. Ct. R. 10(b), (c). And in fact, the Arizona Supreme Court properly set forth the standards for evaluating prosecutorial misconduct claims consistent with this Court's precedent and followed those standards in deciding Petitioner's case. *See Lynch*, 357 P.3d at 127. Petitioner has offered no reason, much less a compelling one, for this Court to second-guess the Arizona Supreme Court's decision. Accordingly, this Court should deny the petition for writ of certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Shawn Patrick Lynch's petition for writ of certiorari.

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