

No. 21-847

IN THE
Supreme Court of the United States

JOHNATHAN BURNS, STEVE BOGGS, RUBEN GARZA,
FABIO GOMEZ, STEVEN NEWELL, and STEPHEN
REEVES,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

**On Petition for a Writ of Certiorari to the
Superior Court of Arizona Maricopa County**

**REPLY IN SUPPORT OF JOINT PETITION
FOR A WRIT OF CERTIORARI**

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ARGUMENT

1. This Joint Petition, brought by six capital defendants in Arizona sentenced to death in violation of *Simmons v. South Carolina*, 512 U.S. 154 (1994), presents the same question at issue in *Cruz v. Arizona*, No. 21-846 (petition for writ of cert. filed Nov. 22, 2021). Like *Cruz*, this Joint Petition challenges the Arizona Supreme Court’s refusal to apply this Court’s decision in *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam), which in turn summarily reversed the Arizona Supreme Court’s refusal to apply *Simmons*.

This is the rare capital case involving an error that infects multiple cases. Because the Arizona Supreme

Court in *Cruz* issued a published decision, whereas it denied review without opinion in the subsequent cases at issue in this Joint Petition, this Court may conclude that *Cruz* provides the more suitable vehicle to address the important question presented. If so, this Court should hold this Joint Petition pending its disposition of *Cruz*. If the Court grants relief in *Cruz*, it should grant this Joint Petition, vacate the decisions below, and remand for further proceedings. If the Court denies review in *Cruz*, however, it should grant this Joint Petition and reverse.

2. The State's brief in opposition confirms that this Joint Petition is an excellent vehicle for review. The State's principal argument against certiorari (Opp. 16) is that *some* of the Petitioners forfeited their *Simmons* claims at trial. But the State does not dispute that other Petitioners preserved their claims. This Court could therefore grant the Joint Petition, address the question presented, then remand for the Arizona Supreme Court to address any issue of forfeiture as to particular Petitioners.

In its opposition to the petition in *Cruz*, the State contends that Cruz failed to preserve his *Simmons* claim because, though he repeatedly sought to inform the jury of his parole-ineligibility, he sought to vindicate his *Simmons* right through evidence rather than a jury instruction. As explained in the *Cruz* reply brief, the State's effort to distinguish between instruction and argument is meritless; *Simmons* itself entitles defendants to inform the jury of their parole ineligibility either through instruction or evidence. *See also State v. Rushing*, 404 P.3d 240, 250 (Ariz. 2017) (reversing death sentence where the trial court failed to give an instruction of parole-ineligibility "or permit

[the defendant] to introduce evidence to that effect”) (emphasis added). But, even if the State’s distinction between evidence and instruction made a difference, it would not be a barrier to review of this Joint Petition. The State acknowledges that at least two Petitioners here, Johnathan Burns and Stephen Reeves, “preserved the argument that they were entitled to a parole ineligibility instruction under *Simmons*.” Opp. 17.¹

3. The State maintains that, in the alternative to concluding that *Lynch* does not apply on collateral review, the Arizona superior courts “in half of petitioners’ cases” denied *Simmons* relief on the merits. *Id.* at 19. Again, this argument presents no barrier to review given the State’s concession that the courts below did not rely on alternative grounds in all cases. This Court could resolve the threshold question whether *Lynch* applies, then remand for further proceedings.

The alternative grounds invoked by the courts below, however, underscore the urgency of this Court’s review. Some of the courts below denied *Simmons* relief on grounds that cast doubt upon their efforts to appropriately apply this Court’s precedent. In one

¹ The State in *Cruz* further contends that the particular subsection of Arizona’s postconviction statute under which the defendant sought relief may bear on the question of *Lynch*’s retroactivity. See Brief in Opp. at 14, *Cruz v. Arizona*, No. 21-846 (U.S. Feb. 4, 2022) (seeking to distinguish between claims pursued under Arizona Rule of Criminal Procedure 32.1(a) and 32.1(g)). That distinction is meritless and not an obstacle to review for the reasons explained in the *Cruz* reply brief. But, again, the State concedes (Opp. 7) that at least one Petitioner here sought relief under both provisions.

case, for example, the court concluded that Petitioner’s *Lynch* claim was not “ripe” because “[b]etween now and 2024 our legislature may enact legislation that would” make parole “a possibility for this defendant,” Pet. App. 142a-143a—even though that is the *exact* error this Court corrected in *Lynch* (and in *Simmons*). See *Lynch*, 578 U.S. at 616 (“*Simmons* said that the potential for future ‘legislative reform’ could not justify refusing a parole-ineligibility instruction.”). In another case, the court below similarly found that Petitioner’s claim was “not yet ripe” and that Petitioner “lacks standing” because “[w]hen the Legislature” makes capital defendants parole eligible, “the information provided to defendant’s jury would be rendered * * * accurate,” Pet. App. 167a-169a—again, the same error this Court summarily reversed in *Lynch*.

Still other alternative grounds adopted below were even more clearly erroneous. In one case, the court posited that Petitioner’s future dangerousness was not at issue at trial, *id.* at 78a, even though the prosecution argued that Petitioner “believes in violence” and even though the prosecution’s case of future dangerousness was so effective that jurors asked the judge for more courtroom security to protect themselves, *see* Pet. 9-10. That same court added that the requirements of *Simmons* “were met by Defendant’s counsel’s arguments to the jury during the penalty phase”—even though the trial judge had “*precluded such argument and sustained an objection to such argument.*” Pet. App. 80a (emphasis added). It should go without saying that *Simmons* is not satisfied by the presentation of argument on parole-ineligibility if the prosecution’s objection to that argument is sustained. The court finally noted that any *Simmons* error was

harmless given the “aggravating circumstances surrounding the five murders Defendant committed,” *id.* at 89a—an obvious factual error given that the case involved one murder, not five.

The Arizona Supreme Court had no reason to review these plainly erroneous alternative holdings given its categorical conclusion in *Cruz* that Petitioners cannot invoke *Lynch* on collateral review. After this Court confirms that *Lynch* applies on collateral review, however, the Arizona Supreme Court will have an opportunity to correct these obvious mistakes.

4. On the merits, the State does not dispute the principles of federal retroactivity that prove Petitioners’ entitlement to relief. The State does not dispute that this Court’s decision in *Lynch* applied the “settled” rule of *Simmons*. The State does not dispute that, under federal law, decisions like *Lynch* applying settled rules must be given effect on collateral review. And the State does not dispute that state courts, no less than federal courts, “must meet” federal standards for applying federal rights retroactively. *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008).

The State nonetheless defends the decision below on the theory that it rested on an assertedly adequate and independent question of Arizona law. For the reasons explained in the Joint Petition and in the reply brief in *Cruz*, that argument is wrong. State procedural rules are not adequate and independent if they “discriminate against claims of federal rights,” *Walker v. Martin*, 562 U.S. 307, 321 (2011), or if they are “not strictly or regularly followed,” *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). The decision below flunks both requirements.

It is difficult to imagine a state rule that more clearly discriminates against federal law than the one at issue here. It *prohibits* state postconviction courts from applying decisions that federal law *requires* state postconviction courts to apply. Indeed, although the State does not dispute *Danforth's* guarantee that state courts “must meet” federal standards for applying federal rights retroactively, 552 U.S. at 288, the State never explains what that guarantee entails if state courts can merely interpret state rules to circumvent it. And the State does not even attempt to dispute that the decision below discriminates against federal claims, even though Petitioners pressed that argument in their Joint Petition. *See* Pet. 22.

The Arizona Supreme Court’s interpretation of the procedural rule at issue also flouts its own precedent, which requires relief in precisely the circumstances presented here. *See State v. Slemmer*, 823 P.2d 41, 46 (Ariz. 1991) (holding under Arizona Rule of Criminal Procedure 32.1(g) that decisions applying settled rules “should generally be applied retroactively, even to cases that * * * are before the court on collateral proceedings”); *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009) (holding that the “archetype” of a significant change in the law “occurs when an appellate court overrules previously binding case law”). The Arizona Supreme Court defended its departure from precedent by attempting to distinguish this Court’s decisions that concededly *were* significant changes in the law, Pet. App. 7a-8a—which makes its decision “influenced by a question of federal law” and therefore not “independent.” *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016). And the new interpretation of Arizona law adopted below is precisely the kind of “novel procedural doctrine[]” that is “deliberately applied to avoid

consideration of federal rights” and that accordingly cannot bar this Court’s review. 16B Wright & Miller, Federal Practice & Procedure §§ 4027, 4028 (3d ed. Apr. 2021 Update).

In conceding that at least two Petitioners preserved their *Simmons* claims, while simultaneously insisting that Arizona law bars this Court from reviewing those claims, the State reveals the extraordinary breadth of its argument. The State’s position is that it may unconstitutionally sentence a defendant to death; then, after this Court corrects the State’s earlier decision, the State may apply a procedural rule to prevent the defendant from seeking to overturn the unconstitutional death sentence on collateral review; and then, when the defendant seeks this Court’s review, the State may invoke the procedural rule as a state-law ground to prevent this Court from redressing the unconstitutional death sentence. This is nothing short of the nullification of a constitutional right for defendants sentenced to death in Arizona. This Court’s precedents make clear that “it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right.” *Young v. Ragen*, 337 U.S. 235, 238 (1949).

5. The State does not dispute the importance of the question presented for the six Petitioners or the other defendants with similar claims pending in the Arizona courts. For each defendant, this Court’s review will mean the difference between life imprisonment and death. And this case presents an exceptionally important question regarding retroactivity in state courts. To restore the supremacy of federal law in

Arizona, this Court should grant the Joint Petition and reverse.

CONCLUSION

The Joint Petition for a writ of certiorari should be held pending disposition of the Petition in *Cruz*, or, in the alternative, should be granted.

Respectfully submitted,

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