No. 21-846

IN THE
Supreme Court of the United States

JOHN MONTENEGRO CRUZ,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF OF THE ARIZONA CAPITAL REPRESENTATION PROJECT AND ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* training and consulting services, and education. ACRP tracks and monitors all capital prosecutions in Arizona.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986, in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide non-profit membership organization of criminal defense lawyers, law students, and associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature, to promoting excellence in the practice of criminal law through education, training, and mutual assistance, and to fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amici have a particularized and informed perspective on the operation of the death penalty in the United States and in the state of Arizona during the relevant time period.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties both granted blanket consent to *amicus curiae* briefs in accordance with Rule 37.3(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

For two decades, the Arizona courts have defied this Court's ruling that "fundamental notions of due process" entitle a capital defendant to inform the jury of parole ineligibility when the defendant's future dangerousness is at issue at sentencing. *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994) (plurality). This Court already stepped in once to instruct Arizona to comply with *Simmons*, in *Lynch v. Arizona*, 578 U.S. 613 (2016). The Arizona Supreme Court now again denies defendants the opportunity to benefit from *Simmons*'s constitutional protection by refusing to apply *Lynch*. The Arizona Supreme Court characterizes its ruling as one based on a state rule of criminal procedure, but it represents just the latest attempt of the Arizona courts to evade this Court's precedent and deny capital defendants the relief that *Simmons* guaranteed. The result is detrimental to capital defendants in Arizona, many of whom face execution having never had the chance to inform a jury of their parole ineligibility. That knowledge may very well have changed the jurors' minds.

A state procedural rule, such as the one at issue in this case, Arizona Rule of Criminal Procedure 32.1(g), only strips this Court of jurisdiction over questions of federal law if the rule is "adequate to support the judgment" and "independent of the federal question." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state law ground is not "adequate" where it operates to discriminate against federal law, and, in particular, where its application reflects a "purpose or pattern to evade constitutional guarantees." *Walker v. Martin,* 562 U.S. 307, 321 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 65 (2009) (Kennedy, J., concurring)).

Arizona's application of Rule 32.1(g) here reflects a long history of hostility toward *Simmons* claims and a pattern of discrimination against the important federal due process right articulated in *Simmons* and reaffirmed in *Lynch*.

Before this Court intervened in *Lynch* and confirmed that *Simmons* applies the same in Arizona as it does throughout the nation, the Arizona courts attempted to distinguish *Simmons* on a variety of grounds—none of which held water. In the Arizona Supreme Court's first decision applying *Simmons* (in the direct appeal in Petitioner's very own case), it made a complete misstatement of law when sidelining *Simmons*. Other Arizona decisions denied the claims with reasoning that this Court had already expressly rejected.

After this Court ordered Arizona in the *Lynch* decision to comply with *Simmons*, Arizona courts have bent over backwards to avoid applying *Lynch* on post-conviction review. In denying relief under Rule 32.1(g), for example, the Arizona Supreme Court in the decision below held that *Lynch* "does not amount to a significant change in the law." *State v. Cruz (Cruz II)*, 487 P.3d 991, 994 (Ariz. 2021). But in the same case (and in others), the Arizona courts took the opposite position—that *Lynch* does amount to a change in the law for retroactivity purposes because *Simmons* was "not a well-established constitutional principle" in Arizona before *Lynch*. *State v. Cruz*, CR20031740, Pima County, Ruling (Aug. 24, 2017).

In a similarly mind-boggling way, Arizona post-conviction courts have denied standalone constitutional claims under *Simmons* and *Lynch*, on the basis that the claims were not raised at trial or on

direct appeal, *see infra*, § II.A.3, while simultaneously denying ineffective assistance of counsel claims on the basis that it was reasonable before *Lynch* for counsel not to seek a *Simmons* instruction, *see infra*, § II.A.2. Even in cases that were not final before *Lynch*, Arizona courts have granted *Simmons* relief only a few times, often finding other questionable bases to deny the claims.

Having foreclosed the chance to present a *Simmons* claim at every turn, Arizona has deprived the vast majority of its capital defendants of "a reasonable opportunity" to assert their due process right. *Parker* v. *Illinois*, 333 U.S. 571, 574 (1948). The Arizona courts will have, in effect, nullified a federal constitutional right and supplanted it with state law in violation of the Supremacy Clause.

That result is dire for capital defendants in Arizona. As this Court recognized in *Simmons*, and numerous studies confirm, the knowledge that a capital defendant will not be released has a significant effect on jurors' decisions whether to sentence that person to death. Juror statements in Petitioner's own case support that fact, as several of them indicated that they would have chosen life without parole if it had been an option—which it actually was.

Because of Arizona's continued disfavor towards *Simmons*, there is a real possibility that individuals in Arizona will be executed even though jurors with a full understanding of the sentencing options would have chosen life. This Court should not tolerate that perverse result.

ARGUMENT

I. FOR YEARS, ARIZONA COURTS REPEATEDLY AND UNJUSTIFIABLY REFUSED TO APPLY *SIMMONS* TO ARIZONA'S SENTENCING SCHEME.

Until this Court stepped in to reaffirm that *Simmons* applies the same to the State of Arizona as it does to other states, in *Lynch v. Arizona*, 578 U.S. 613 (2016), the Arizona courts refused to apply *Simmons* in capital sentencing proceedings. The Arizona Supreme Court attempted to distinguish *Simmons* on various grounds, ranging from misstatements of Arizona law to reasoning that was expressly rejected by this Court in *Simmons*. This history reflects a longstanding hostility toward *Simmons* claims that continues today.

A. The Arizona Supreme Court Relied on Misstatements of Arizona Law.

The Arizona Supreme Court's refusal to apply *Simmons* began with a flat misstatement of Arizona law in the direct appeal in Petitioner's very own case, *State v. Cruz* (*Cruz I*), 181 P.3d 196 (Ariz. 2008). The Arizona courts had begun only recently to confront *Simmons* claims because the ruling had no relevance in Arizona until the Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), and Arizona juries began sentencing capital defendants. In *Cruz I*, the Arizona Supreme Court held that *Simmons* did not apply because, as compared to the South Carolina law considered in *Simmons*, "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." *Cruz I*, 181 P.3d at 207. As it turns out, that was just wrong.

The availability of parole or other release as an option in capital sentencing proceedings in Arizona depends on the date and type of the offense. Only for offenses committed on or before December 31, 1993, is life with the possibility of *parole* after 25 years (or 35 years in the case of a child victim under the age of 15) an available alternative sentence to death. Ariz. Rev. Stat. §13-703(A) (1993); Ariz. Rev. Stat. §41-1604.09(I)(1) (parole eligibility applies to felony offenses committed before January 1, 1994).

For offenses committed between January 1, 1994, and August 1, 2012 (including the offense at issue in this case), Arizona law states that the non-death sentences available are natural life and life with the possibility of *release* after 25 years (or 35 years in the case of a child victim under the age of 15). Ariz. Rev. Stat. §13-703(A) (1994); 2012 Ariz. Legis. Serv. Ch. 207 (H.B. 2373). But the Arizona legislature abolished parole entirely beginning January 1, 1994, rendering any possibility of release subject to the whim of the executive clemency process. *See* Ariz. Legis. Serv. Ch. 255 (S.B. 1049) (eliminating parole eligible sentences from Arizona's criminal code, effective January 1, 1994); Ariz. Rev. Stat. §41-1604.09(I)(1); Ariz. Rev. Stat. tit. 31, ch. 3 (executive clemency).[2]

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[2] In response to *Miller v. Alabama*, 567 U.S. 460 (2012), the Arizona legislature created an exception to this rule for juveniles who receive life sentences. *See State v. Vera*, 334 P.3d 754, 756, 759 (Ariz. Ct. App. 2014) (describing legislative enactment and applicability to juveniles). Because juveniles are also ineligible for the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), that exception is inapplicable here.

For offenses committed on or after August 2, 2012, the sentencing options depend on the theory of first-degree murder, but still render capital defendants parole ineligible. For first-degree murder based on premeditation or on the intentional or knowing murder of a law enforcement officer, the Arizona legislature removed any reference to the possibility of release, leaving natural life as the only non-death sentence available. Ariz. Rev. Stat. §13-751(A)(1). For a conviction based on a felony murder theory, a sentence of life with the possibility of release through executive clemency is still available as an alternative to natural life. Ariz. Rev. Stat. §13-751(A)(3).

The Arizona Supreme Court's statement that "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years," *Cruz I*, 181 P.3d at 207, was, therefore, inaccurate. The relevant offense took place in 2003, at which time a separate provision of law abolished release on parole. *Id.* at 155; Ariz. Legis. Serv. Ch. 255 (S.B. 1049). The Arizona Supreme Court relied on that misstatement of law in depriving Petitioner of his due process right.

In subsequent cases, the court perpetuated this misstatement when rejecting *Simmons* claims. *See, e.g.*, *State v. Benson*, 307 P.3d 19, 32 (Ariz. 2013) ("Arizona law does not make Benson ineligible for parole."); *State v. Garcia*, 226 P.3d 370, 387 (Ariz. 2010) ("Garcia was not technically ineligible for parole."). And even when the court used the correct statutory language, noting the possibility of "release" after 25 or 35 years, it still furthered the misperception that the chance of release under the Arizona statutes was meaningful, rather than just a remote possibility of executive clemency.

In *State v. Hargrave*, for example, the court stated: "Unlike *Simmons*, Hargrave was eligible for release after twenty-five years, as the jury instruction correctly stated." 234 P.3d 569, 583 (Ariz. 2010). Relying in part on *Cruz I*, the court opined that "[t]he jury instructions correctly stated the law, [and] did not mislead the jurors about Hargrave's possible penalties." *Id.*; *see also State v. Chappell*, 236 P.3d 1176, 1187 (Ariz. 2010) ("The instructions … accurately described the statutory sentencing options."); *State v. Hardy*, 283 P.3d 12, 24 (Ariz. 2012) (relying on *Chappell* to hold the same); *State v. Hausner*, 280 P.3d 604, 634 (Ariz. 2012) (listing the *Simmons* claim in an appendix of previously rejected claims and citing *Hargrave* as a basis for the rejection).

B. The Arizona Supreme Court Invoked Reasoning Rejected in *Simmons*.

The Arizona Supreme Court repeatedly relied on the possibility of release under executive clemency in refusing to apply *Simmons* to capital defendants sentenced for an offense committed after January 1, 1994—despite the fact that the *Simmons* Court "expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Lynch*, 578 U.S. at 615; *Simmons*, 512 U.S. at 166 (dismissing the argument that "future exigencies such as legislative reform, commutation, clemency, and escape might allow petitioner to be released into society" as "misplaced").

In the Arizona Supreme Court decision that was the subject of *Lynch v. Arizona*, for example, the court held that "[e]ven if parole remained unavailable,

Lynch could have received another form of release, such as executive clemency." *State v. Lynch*, 357 P.3d 119, 138–39 (Ariz. 2015), *rev'd*, 578 U.S. 613. Likewise, in *State v. Cota*, the court rejected the defendant's request for a *Simmons* instruction on the basis "that Cota would have been eligible for other forms of release, such as executive clemency, if sentenced to life with the possibility of release." 272 P.3d 1027, 1042 (Ariz. 2012); *see also State v. Boyston*, 298 P.3d 887, 900-01 (Ariz. 2013) (same).

Making matters worse, the Arizona Supreme Court not only refused to provide a *Simmons* instruction because there was a far-flung chance of clemency, but it also refused to let capital defendants inform the jury just how unlikely any such release would be. In *Cruz I*, for example, the court rejected Petitioner's request to admit testimony regarding his chances of release by the Arizona Board of Executive Clemency, noting that "[t]he witness would have been asked to speculate about what the Board might do in twenty-five years." 181 P.3d at 207; *see also State v. Dann*, 207 P.3d 604, 626 (Ariz. 2009) (rejecting speculation regarding "a future decision of the Arizona Board of Executive Clemency"). As a result, juries heard that, if they did not sentence an individual to death, one alternative sentence was life with a possibility of release after 25 years—with no additional information regarding the extreme unlikelihood that such release would ever occur. Just as in *Simmons*, jurors were "left to speculate about [capital defendants'] parole eligibility when evaluating … future dangerousness," in violation of due process. *Simmons*, 512 U.S. at 165. The Arizona Supreme Court looked the other way.

C. The Arizona Supreme Court Rejected Defendants' Efforts to Waive Release in Exchange for a Proper Instruction.

In response to the Arizona Supreme Court's refusal to follow *Simmons* based on Arizona law, some defendants took it upon themselves to render the possibility of release a nullity, by waiving any right to release in exchange for a *Simmons* instruction. This too was rejected by the Arizona courts. In *State v. Dann*, for instance, the Arizona Supreme Court found it would be "speculation" to think that a "waiver would have any effect on a future decision of the Arizona Board of Executive Clemency." 207 P.3d at 626; *Chappell*, 236 P.3d at 1187 n.10 (relying on *Dann* to reject the same argument); *State v. Prince*, 250 P.3d 1145, 1173 (Ariz. 2011) (issue raised in Appendix to preserve federal review). That is, the Court refused to provide a *Simmons* instruction not only where the only possibility of release was executive clemency, but even in the more remote circumstance where the possibility of release depended on the Board granting clemency over a defendant's prior waiver of any right to release. *Simmons* could not reasonably have been read to depend on such a narrow conception of release.

D. The Lower Courts Echoed the Arizona Supreme Court's Hostility Towards Federal Law.

The Arizona Supreme Court's hostility toward *Simmons* claims reverberated throughout the Arizona court system. Consistent with the Arizona Supreme Court decision in *Cruz I*, trial courts repeatedly denied requests to inform juries that capital defendants were parole ineligible and often erroneously instructed juries that defendants may

receive a sentence of life with the possibility of parole after 25 or 35 years. For example, in *State v. Burns*, the trial judge dismissed Burns's objection to the mention of the possibility of parole as "semantics," rejected Burns's proposed jury instructions, and erroneously informed the jury that Burns could be *paroled* in 25 years unless he was sentenced to death. CR2007-106833-001, Maricopa County, Ruling at 5 (Oct. 27, 2010) (citing *Hargrave* and *Cruz I*); *State v. Burns*, CR2007-106833-001, Amended PCR Petition, Ex. 108 (Dec. 14, 2017).

During the trial in *State v. Reeves*, the judge similarly refused to allow defense counsel to present testimony regarding parole ineligibility. *See State v. Reeves*, 310 P.3d 970, 974 (Ariz. 2013). In rejecting Reeves's argument that the state's presentation of evidence of future dangerousness violated due process absent an instruction as to Reeves's parole ineligibility, the court held that such evidence would only invite "speculation" and would "provide no meaningful mitigation information," particularly because Reeves could be released through executive clemency. *State v. Reeves*, CR2007-135527-001, Maricopa County, Ruling at 2 (Feb. 7, 2011). The judge then instructed the jury that Reeves could be sentenced "to life imprisonment with the possibility of *parole* after 25 years" unless he was executed. *Id.*, Ruling at 15 (Mar. 21, 2019) (emphasis added).

Likewise, during the trial in *State v. Newell*, notwithstanding counsel's argument that "we all know legally that there's no possibility that he would ever be released during his lifetime," the judge misinformed the jury that Newell could be eligible for *parole* unless he was executed. CR2001-9124, Maricopa County, RT 2/23/04 a.m. at 5, RT 2/24/04 at

51; *see also, e.g., State v. Garza*, CR1999-017624, Maricopa County, RT 5/27/04 at 127, RT 6/14/04 at 109-11, RT 6/16/04 at 76-77, RT 6/17/04 at 45-46 (court, defense counsel and prosecution referring to life-with-parole sentence); *State v. Womble*, CR2002-010926B, Maricopa County, RT 3/12/07 at 23, 25, 27, RT 3/15/07 at 36, 38 (court referring to possible sentence of life with the possibility of parole).

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Ultimately, in *Lynch*, this Court overruled Arizona's *Simmons* case law and held that Arizona capital defendants are in fact entitled to *Simmons* protections. The Arizona Supreme Court later recognized that its prior *Simmons* case law had been incorrect. *State v. Escalante-Orozco*, 386 P.3d 798, 828-29 (Ariz. 2017). Despite that admission, however, the Arizona courts have continued to deprive defendants of *Simmons* relief.

II. AFTER *LYNCH*, ARIZONA CONTINUES TO DISCRIMINATE AGAINST FEDERAL LAW BY ERECTING NEW BARRIERS TO RELIEF.

A. Arizona Courts Refuse to Apply *Lynch* on Post-Conviction Review.

After years of denying capital defendants their constitutional right to the protections of *Simmons*, the Arizona courts are now tying themselves in knots to avoid granting post-conviction relief under *Simmons* to individuals who were sentenced to death and whose direct appeals became final before this Court decided *Lynch*. Post-conviction capital defendants have raised their *Lynch* claims most frequently as: (1) a significant change in Arizona law, warranting post-conviction relief under Rule 32.1(g) (as in this case);

(2) as ineffective assistance of counsel claims—both trial and appellate; and (3) as standalone constitutional violations. The Arizona courts have denied relief in each context.

Together, these decisions show the length to which the Arizona courts will go to avoid granting *Simmons* relief. They reveal a continued pattern of evading the constitutional guarantees in *Simmons* and they signal discrimination against federal law. *See Martin,* 562 U.S. at 321.[3]

1. Arizona Courts Embrace Contradictory Reasoning to Hold that *Lynch* Is Not a "Significant Change in the Law" Under Rule 32.1(g) and to Deny Retroactive Relief.

In considering *Lynch* claims on post-conviction review, the Arizona courts have discarded longstanding precedent defining a "significant change in the law" and rely on novel theories in a blatant effort to foreclose relief.

Under Arizona Rule of Criminal Procedure 32.1(g), a defendant may receive post-conviction relief on the basis that "there has been a significant change in the law that, if applicable to the defendant's case, would

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[3] There are at least nine cases with *Lynch*/*Simmons* claims still pending on post-conviction review. *State v. Prince*, CR1998-004885, Maricopa County; *State v. Nelson*, CR2006-0904, Mohave County; *State v. Joseph*, CR2005-014235, Maricopa County; *State v. Naranjo*, CR2007-119504, Maricopa County; *State v. Carlson*, CR2009-3544, Pima County; *State v. Hargrave*, CR2002-009759, Maricopa County; *State v. Hernandez*, CR2008-124043, Maricopa County; *State v. Rose*, CR2007-149013, Maricopa County; *State v. Cromwell*, CR-22-0068-PC, Arizona Supreme Court.

probably overturn the defendant's judgment or sentence." Arizona case law has long provided that the "archetype" of such a significant change in the law "occurs when an appellate court overrules previously binding case law." *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009). That is precisely what happened here. This Court overruled previously binding case law in Arizona that had held that *Simmons* is inapplicable in that state.

And yet, from the get-go after *Lynch* was decided, Arizona trial courts channeled the Arizona Supreme Court's hostility toward *Simmons* claims and refused to afford relief. Employing tortured reasoning, courts simultaneously declared (1) that *Lynch does not* represent a significant change in the law for purposes of Rule 32.1(g)—focusing only on whether it was a change in *federal law*—and (2) that *Lynch* in fact *does* reflect a change in *Arizona law* for purposes of retroactivity, i.e., *Lynch*'s holding was not a well-established constitutional rule in Arizona warranting retroactive application.

In the trial court's post-conviction ruling in this case, for example, the court held that the decision in *Lynch* "is not a 'transformative event' on par with *Ring v. Arizona*, 536 U.S. 584 (2002) or *Padilla v. Kentucky*, 559 U.S. 356 (2010), which have been found to constitute significant changes in the law." *State v. Cruz*, CR20031740, Pima County, Ruling at 2 (Aug. 24, 2017). In so holding, the court focused only on whether *Lynch* realized a change in federal law, noting that *Lynch* "did not declare any change in the law representing a clear break from the past" because *Lynch* "was dictated by [this Court's] earlier decision in *Simmons*." *Id.* The court completely ignored—for purposes of Rule 32.1(g)—that the *Lynch* decision

commanded a clear break in binding Arizona law, which previously instructed that capital defendants had no due process right to inform the jury of parole ineligibility under Arizona's capital sentencing scheme.[4]

Then, in contradiction to its Rule 32.1(g) holding, the post-conviction court proceeded to hold for purposes of retroactivity that *Lynch* reflected a change in Arizona law. *State v. Cruz*, CR20031740, Pima County, Ruling at 2-3 (Aug. 24, 2017). It described the holding in *Lynch* as "not a well-established constitutional principle" in Arizona because "[i]n the years between *Simmons* and *Lynch*, no court determined that defendants facing the death penalty in Arizona were entitled to a *Simmons* instruction," and "[t]he Arizona Supreme Court consistently held otherwise in at least nine opinions." *Id.* at 2; *see also State v. Garza*, CR1999-017624, Maricopa County, Ruling at 5 (Mar. 21, 2018) (same).[5]

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[4] *See also, e.g.*, *State v. Reeves*, CR2007-135527, Maricopa County, Ruling at 16 (Mar. 21, 2019) (holding that because *Lynch* "is based exclusively on *Simmons*, the Supreme Court decision in *Lynch* is not a 'new rule' and it does not represent a significant change in the law").

[5] Arizona courts frequently misapplied federal retroactivity principles, discussed at Pet. Br. 19-27, when reaching decisions on *Lynch* retroactivity. Some post-conviction courts held that *Lynch* was not a well-established rule because it simply applied *Simmons*. *See, e.g.*, *State v. Newell*, CR2001-009124, Maricopa County, Ruling at 4 (Jun. 29, 2018) (holding *Lynch* is not retroactive because it "simply applies the rule announced in *Simmons v. South Carolina*, and so, is neither a 'well-established constitutional principle' nor a 'watershed rule of criminal procedure,' but is a procedural, non-retroactive rule"); *State v. Burns*, CR2007-106833, Maricopa County, Ruling at 52 (Apr. 4,

In other words, *Lynch* was not a change in the law for purposes of Rule 32.1(g), but it was a change in the law for purposes of retroactivity.

The Arizona Supreme Court ultimately adopted this faulty reasoning, concluding in the decision below that *Lynch* "does not represent a significant change in the law for purposes of Rule 32.1(g)" because *Lynch* merely "relied upon" *Simmons*, which "was clearly established at the time of Cruz's trial, sentencing, and direct appeal." *Cruz II*, 487 P.3d at 994. Perhaps recognizing the dramatic shift with its prior holdings, the court added an additional, novel explanation that *Lynch* was merely "a significant change in the *application* of the law," not a change in the law itself. *Id.* at 995. This distinction is intellectually dishonest and has no basis in Arizona law. The theory serves only to discriminate against federal law. *See* Pet. Br. 31 ("Where the Arizona Supreme Court overrules Arizona precedent, its decision satisfies Rule 32.1(g),

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2019) ("*Lynch v. Arizona*, simply applies the rule announced in *Simmons v. South Carolina*, and so, is neither a 'well-established constitutional principle' nor a 'watershed rule of criminal procedure,' but is a procedural, non-retroactive rule."). Other courts have held that *Lynch* does not apply retroactively because *Simmons* did not apply retroactively. *See, e.g.*, *State v. Reeves*, CR2007-135527, Maricopa County, Ruling at 16 (Mar. 21, 2019) ("[E]ven if Lynch were a significant change in the law, it would not apply retroactively because it relies on Simmons."); *State v. Womble*, CR2002-010926B, Maricopa Superior Court, Ruling at 3 (Sep. 28, 2017) (holding that *Lynch "*merely applies *Simmons* in Arizona," and therefore "is a non-retroactive procedural rule and not applicable to Womble's case"). Of course, by the time *Lynch* was decided, *Simmons* was already well-established federal law.

but where this Court overrules Arizona precedent, its decision does not").[6]

2. The Arizona Courts Apply Similarly Contradictory Reasoning in Denying Ineffective Assistance of Counsel Claims.

In addition to foreclosing relief under Rule 32.1(g), Arizona courts have applied similarly contradictory reasoning in denying ineffective assistance of counsel claims based on trial or appellate counsel's failure to request a *Simmons* instruction.

After *Lynch*, capital defendants in Arizona whose counsel had not requested a *Simmons* instruction (because of binding Arizona law) have asserted ineffective assistance of counsel claims on post-conviction review in an attempt to vindicate their due process right. In at least three cases, post-conviction courts denied such claims under *Strickland*'s reasonableness prong[7] on the basis that it was not unreasonable for trial and appellate counsel to ignore *Simmons*.

In *State v. Gomez*, for example, the post-conviction court held that, "[a]t the time of Defendant's 2010 trial

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[6] To *amici*'s knowledge, only one post-conviction court has held that *Lynch* was a significant change in the law and granted relief. *See State v. Rose*, CR2007-149013-002, Maricopa County, Ruling at 20, 27 (Aug. 17, 2020). The State sought review and the Arizona Supreme Court remanded for further proceedings in light of *Cruz II*. *State v. Rose*, CR-20-0299-PC, Arizona Supreme Court, Letter (Nov. 3, 2021).

[7] *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (holding defendants must show that "counsel's representation fell below an objective standard of reasonableness").

and his appeal decided in 2012, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. … Accordingly, any request for a *Simmons* instruction would fail, and counsel was not ineffective for failing to make a futile request." CR2000-090114, Maricopa County, Ruling at 5 (Dec. 3, 2018) (citing *Chappell*, 236 P.3d at 1187; *Garcia*, 226 P.3d at 387; *Hargrave*, 234 P.3d at 582; *Cruz I*, 181 P.3d at 207); *see also, e.g.*, *State v. Nordstrom*, CR55947, Pima County, Ruling at 36 (Jul. 14, 2017) (holding that counsel was not ineffective for failing to request a *Simmons* instruction because the law in Arizona would have required the trial court to deny that request); *State v. Womble*, CR2002-010926B, Maricopa Superior Court, Ruling at 6 (Sep. 28, 2017) ("Counsel's performance is evaluated based upon the law at the time of appeal and not in hindsight. At the time Defendant's appeal was decided in 2010, Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions." (footnote omitted)); *State v. Burns*, CR2007-106833, Maricopa County, Ruling at 53 (Apr. 4, 2019) (citing *Chappell,* 236 P.3d at 1187; *Garcia,* 226 P.3d at 387; *Hargrave,* 234 P.3d at 582; *Cruz I,* 181 P.3d at 207) (same).

This, yet again, puts capital defendants between a rock and a hard place: they have no recourse through Rule 32.1(g) because the Arizona Supreme Court says that *Lynch did not* change the law, implying that they should have raised the claim earlier; but they have no recourse through ineffective assistance of counsel claims to obtain relief for the failure to raise a *Simmons* claim, because *Lynch did* change the law that was in effect at the time of the representation.

3. Arizona Post-Conviction Courts Hold that Standalone Constitutional Claims Raising *Lynch* and *Simmons* Are Precluded, Even If Preserved on Appeal.

Finally, and further reflecting hostility towards *Simmons* relief, post-conviction courts have denied defendants' standalone constitutional claims under *Lynch* because *Simmons* claims could have been—and sometimes even were—raised on direct appeal.

Under Arizona Rule of Criminal Procedure 32.2(a), constitutional claims that could have been raised, or were raised, at trial or on appeal are precluded from consideration on post-conviction review. Arizona courts have invoked this provision to deny standalone *Lynch/Simmons* claims on post-conviction review, on the basis that they could have been raised on direct appeal under *Simmons* and were not. *See State v. Gomez*, CR2000-090114, Maricopa County, Ruling (Dec. 3, 2018); *State v. Garza*, CR1999-017624, Maricopa County, Ruling at 8 (Mar. 21, 2018); *State v. Ovante*, CR2008-144114, Maricopa Superior Court, Ruling at 6 (Jun. 10, 2019); *State v. Womble*, CR2002-010926B, Maricopa Superior Court, Ruling at 2 (Sep. 28, 2017); *State v. Prince*, CR1998-004885, Maricopa County, Ruling at 2 (Aug. 28, 2017).

Even when defendants preserved *Simmons* claims on direct appeal, post-conviction courts still have found *Lynch/Simmons* claims precluded under Rule 32.2(a). *See State v. Burns*, CR2007-106833, Maricopa County, Ruling at 49 (Apr. 4, 2019) ("This claim was raised on appeal … . [I]t is therefore, precluded by Rule 32.2(a)(3)."); *State v. Womble*, CR2002-010926B, Maricopa Superior Court, Ruling at 2 (Sep. 28, 2017) ("The Court finds that [the standalone

Lynch/Simmons claim] is also precluded pursuant to Rule 32.2(a)(2) as Womble raised an aspect of the parole/release argument on appeal, and the Court considered it.").

These decisions fail to consider the impact that *Lynch* had on the law relating to *Simmons* claims in Arizona. Even if it is technically true that a *Simmons* claim could have been raised on direct appeal before *Lynch*, the Arizona Supreme Court promptly denied those claims. *See, e.g.*, *State v. Burns*, 344 P.3d 303, 337 (Ariz. 2015); *Reeves*, 310 P.3d at 974 ("Reeves's arguments are foreclosed."); *State v. Womble,* 235 P.3d 244, 254 (Ariz. 2010). It was not until *Lynch* that defendants had a firm basis to demand relief under *Simmons*. A post-*Lynch Simmons* claim is therefore distinct from a pre-*Lynch* claim. Treating them the same for purposes of Rule 32.2(a) serves no purpose other than to perpetuate the injustice of the Arizona Supreme Court's prior holdings.

* * *

With no recourse under Rule 32.1(g), no recourse through ineffective assistance of counsel claims, and no recourse as a standalone constitutional claim, any capital defendant who faced a jury sentencing, and whose direct appeal was final prior to 2016, is completely foreclosed from obtaining the fundamental due process protections set forth in *Simmons* and *Lynch*. There is simply no pathway under Arizona's current procedures to assert a claim under *Lynch* regardless of whether, how, or when defense counsel raised the *Simmons* issue. This is not a random or accidental result. It is the product of deliberate discrimination against a federal right that this Court should not tolerate.

B. Even in Cases on Direct Appeal After *Lynch*, Few Capital Defendants Have Been Granted Relief.

The only cases in which the Arizona Supreme Court has accepted that *Simmons* and *Lynch* apply are capital direct appeals that were not final by 2016—some 14 years after Arizona began jury sentencings in capital cases. However, the Arizona courts' disposition of these cases continues to disfavor *Simmons* relief, and in most of them, the courts have found other unsubstantiated ways to deny relief.

Of the nine capital direct appeals raising *Simmons* claims in which the Arizona Supreme Court has issued an opinion since *Lynch*, only three have resulted in relief. *Escalante-Orozco*, 386 P.3d 798; *State v. Rushing*, 404 P.3d 240 (Ariz. 2017); *State v. Hulsey*, 408 P.3d 408 (Ariz. 2018).

In one case denying relief, the Arizona Supreme Court repeated the same error that the South Carolina Supreme Court made in *Kelly v. South Carolina*, 534 U.S. 246 (2002). *See State v. Sanders,* 425 P.3d 1056, 1067 (Ariz. 2018). In *Kelly*, this Court held that future dangerousness is at issue in a case where the government presents evidence of the "defendant's demonstrated propensity for violence," even if it does not expressly state that the defendant would be a "future danger *if released* from prison." 534 U.S. at 253 (internal quotation marks omitted). In *State v. Sanders*, the Arizona Supreme Court held that future dangerousness was not at issue, even though the jury heard evidence that Sanders had been previously investigated for rape and the state described the brutality of the murder and Sanders's conduct as "horrific," "cold," "ruthless," "callous," and

"mean." 425 P.3d at 1067. Just as in *Kelly*, this "strong implication of generalized … future dangerousness" warranted a *Simmons* instruction. 534 U.S. at 253.

In another case, the defendant was denied relief because the Arizona Supreme Court erroneously found that the instruction was sufficient under *Simmons*. *See State v. Johnson,* 447 P.3d 783, 801 (Ariz. 2019). In *Johnson*, the trial was already underway when *Lynch* was issued. Prior to *Lynch*, the trial court had instructed the jury that Johnson was eligible for *parole* after 25 years. *Id*. *Lynch* issued on the second day of Johnson's penalty phase and the trial court subsequently instructed the jury that "Arizona law does not provide for parole." *Id*. By that point, however, the damage had been done and the court should have granted Johnson's motion for a mistrial.[8]

In two cases, *State v. Bush,* 423 P.3d 370 (Ariz. 2018), and *State v. Riley,* 459 P.3d 66 (Ariz. 2020), the Arizona Supreme Court denied *Simmons* relief on the basis that defense counsel should have raised the issue at trial—even though *Lynch* had not yet been decided and under the Arizona courts' ineffective assistance of counsel rulings, counsel had no obligation to request a *Simmons* instruction, *see supra*, § II.A.2. In these cases, the court adopted a "narrow interpretation of *Simmons*," and held that relief under *Simmons* "is foreclosed by [the

[8] In two other cases, the Arizona Supreme Court reasonably concluded that the instructions satisfied *Simmons* and denied relief on that basis. *State v. Champagne,* 447 P.3d 297, 311-12 (Ariz. 2019); *State v. Robinson*, No. CR-18-0284-AP, 2022 WL 1634771, *14-15 (Ariz. May 24, 2022).

defendant's] failure to request a parole ineligibility instruction at trial." *Bush*, 423 P.3d at 388. As a result, these defendants (like those asserting post-conviction standalone constitutional claims) will likely have no avenue for relief on direct appeal or on post-conviction review.

In all, Arizona has made it exceedingly difficult, if not impossible, for capital defendants who went to trial pre-*Lynch* to receive the benefit of *Simmons*. Relief is available only if: (1) they are still in direct appeal proceedings; (2) future dangerousness was expressly put at issue, not just inferred; and (3) trial counsel made the request at trial, despite Arizona case law holding that *Simmons* did not apply and that it was not ineffective under Arizona law at the time if they did not.

III. WHEN JURORS ARE PROVIDED WITH ACCURATE INFORMATION ABOUT PAROLE ELIGIBILITY, THEY ARE MORE LIKELY TO RETURN LIFE VERDICTS.

Substantial research into jury decision-making demonstrates that, where jurors are uninformed about death sentence alternatives, they drastically underestimate the length of time a defendant sentenced to life will serve, thereby increasing the likelihood that they will return a death sentence.

Research by the Capital Jury Project [9] (CJP) "shows that capital jurors believe murderers are back

[9] The CJP is a long-term research project that began in 1991 with support from the National Science Foundation. Over the last 25 years, the CJP has conducted 1198 in-depth interviews with jurors from 353 capital trials in 14 states, with the goal of examining "how receptive capital jurors are to evidence and

on the streets 'far too soon.'" William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 645-46 (1999). Typically, capital jurors believe that defendants not sentenced to death will be released in approximately 15 years. *Id.*; *see also* Benjamin D. Steiner, William J. Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 Law & Soc'y Rev. 461, 476 (1999) ("Across states, jurors seem to have roughly similar ideas about how long [capital defendants not sentenced to death] usually spend in prison, quite apart from the wide variation in statutory minimums for parole eligibility in their states. For the five states that have mandatory minimums of 20 to 40 years and the four life-without-parole states, the median estimates of years usually served all fall within the range 15-20 years.").

These mistaken beliefs about parole eligibility have a real impact on the sentences that juries impose, as "[j]ury research suggests that jurors in capital cases are significantly influenced by the potential that a convicted defendant could ultimately be released on parole." Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 Notre Dame L. Rev. 1255, 1275 (2019) (citing William W.

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arguments of mitigation when making their life or death punishment decisions." University at Albany, State University of New York, *William J. Bowers, James R. Acker—Capital Jury Project and Capital Punishment Research Initiative*, https://www.albany.edu/hindelang/capital-punishment-research.php (last visited 6/16/2022).

Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624–25 (1989); Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1838 (2006) ("The existence of parole has certainly led more juries to sentence defendants to death.")). In fact, a CJP study in Georgia showed that between 1973 and 1990, 25% of juries deliberating at the capital-sentencing phase asked the judge questions about parole. Bowers & Steiner, *supra*, at 629. Up to 32% of surveyed CJP jurors report that penalty-phase deliberations "focused 'a great deal' on a variety of topics related to worries about the defendant's future dangerousness" and up to 66% "report that the jury's discussions focused at least a 'fair amount' on topics related to the defendant's future dangerousness." John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 Cornell L. Rev. 397, 406-07 (2001).

It follows that, if a juror mistakenly thinks that a defendant will be released, the juror is more likely to vote to impose a death sentence. Bowers & Steiner, *supra*, at 660 (noting that "mistaken estimates of early release appear to be decisive in the decision-making of jurors who have not made up their minds before deliberations begin or by the time of the jury's first vote on punishment"); *see also* J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 334 (1993) ("Juries frequently choose death, not because they think it is the appropriate sentence, but because they do not believe that the life-sentence alternative will adequately ensure the

defendant's incarceration."); *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) ("The available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.").

As further evidence of this effect, data shows that in some states with large death row populations, the enactment of life without parole statutes is "strongly associated" with an increase in life sentences. Desai & Garrett, *supra*, at 1275. In states that showed a weaker correlation between the enactment of life without parole statutes and life sentences, scholars note that the smaller effect may be attributed, in part, to "the fact that key death penalty states still do not fully instruct jurors on the nature or availability of a noncapital life without parole sentencing option." *Id.* at 1276 (comparing data in Florida, Ohio, Oklahoma, Missouri, Louisiana, Texas, and Virgina; not discussing Arizona).

Juror statements following the sentencing proceedings in Petitioner's own case support these research findings. Three jurors stated in a letter to the press after sentencing that, "Many of us would rather have voted for life if there was one mitigating circumstance that warranted it. In our minds there wasn't. *We were not given an option to vote for life in prison without the possibility of parole*." JA143-144 (emphasis added); Pet. Br. 11. One juror attested that, if she had known about an option of "a life sentence without parole," she "would have voted for that option." JA269.

The CJP research also affirms the reasoning underlying the Supreme Court's decision in *Simmons*. Justice Blackmun, writing for the plurality,

recognized that "[f]or much of our country's history, parole was a mainstay of state and federal sentencing regimes." *Simmons*, 512 U.S. at 169. Thus, the jury in *Simmons* was likely to mistakenly believe that the defendant could be released on parole if not sentenced to death. Justice Blackmun relied on a South Carolina public opinion survey conducted before Simmons's trial, which showed only 7.1% of South Carolina residents eligible to serve on a jury believed that a capital defendant sentenced to life imprisonment would actually remain in prison for life. *Id.* at 159. Further, Justice Blackmun noted:

> More than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death.

Id. Jurors laboring under a mistaken belief that a capital defendant has a real possibility of release face the "false choice between sentencing [a defendant] to death and sentencing him to a limited period of incarceration." *Id.* at 161.

The sociological research undertaken in the 28 years since *Simmons* affirms and extends this concern—that jurors will sentence a person to death when they otherwise would not have, had they been given complete information about the possibility of release. This Court should again reaffirm *Simmons* and safeguard against such an injustice.

CONCLUSION

The Court should vacate the judgment of the Arizona Supreme Court and remand the case for consideration of Petitioner's claim under *Simmons* and *Lynch*.

Respectfully submitted,

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