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 Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN, III
Solicitor General

JEFFREY L. SPARKS
Acting Chief Counsel for the Capital Litigation Section
**Counsel of Record*

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542–4686
CLDocket@azag.gov

Counsel for Respondent

February 4, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CAPITAL CASE
QUESTION PRESENTED

Petitioners each sought postconviction relief in the Arizona courts under Arizona Rule of Criminal Procedure 32.1(g), arguing that *Lynch v. Arizona*, 578 U.S. 613 (2016), entitled them to relief from their death sentences because their juries were not instructed about their ineligibility for parole. After the postconviction court denied relief in each of their cases, the Arizona Supreme Court summarily denied discretionary review after concluding in *State v. Cruz (Cruz II)*, 487 P.3d 991 (Ariz. 2021), that *Lynch* was not a "significant change in the law," one of the requirements for relief under Rule 32.1(g). Were the Arizona courts nonetheless required to apply *Lynch* retroactively to Petitioners' cases?

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INTRODUCTION

Each of the six petitioners was convicted of first-degree murder and sentenced to death in the Arizona courts. Most of them did not ask the trial court to instruct the jury, under *Simmons v. South Carolina*, 512 U.S. 154 (1994), that Arizona law did not allow parole for defendants who committed felonies after 1993. After this Court held in *Lynch v. Arizona*, 578 U.S. 613 (2016), however, that Arizona capital defendants were entitled to instructions under *Simmons* when the State placed future dangerousness at issue, each petitioner sought postconviction relief under Rule 32 of the Arizona Rules of Criminal Procedure based on the lack of *Simmons* instructions at their trials.

The postconviction courts denied relief for various and multiple reasons in these six cases, including, in some, because the State did not place future dangerousness at issue or because any failure to instruct the jury on parole ineligibility was harmless. The Arizona Supreme Court summarily denied review in all six cases after it decided, in *State v. Cruz (Cruz II)*, 487 P.3d 991 (Ariz. 2021), that *Lynch* did not afford postconviction relief under Arizona's procedural rules because it was not a "significant change in the law" under Arizona Rule of Criminal Procedure 32.1(g).

Petitioners now contend that the Arizona Supreme Court erred by failing to apply *Lynch* retroactively to their cases. This joint petition, however, is a poor vehicle for this Court to address the issue they present. Four of the petitioners waived the issue by failing to request a parole ineligibility instruction and in almost all of the cases the question of *Lynch*'s

retroactivity is moot because the postconviction court alternatively denied their claim on the merits. Moreover, the Arizona Supreme Court's decision in *Cruz II*, which forms the basis of their challenge, rests solely on an independent and adequate state law ground under Arizona's Rule 32.1(g).

STATEMENT OF THE CASE

A. Legal Background – *Simmons*, *Lynch*, and *Cruz II*.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), a defendant on trial for capital murder was ineligible for parole under state law due to his prior convictions for violent offenses. *Id.* at 156. In response to the State's argument that the death penalty was appropriate based on Simmons' likelihood of committing future violence, Simmons asked the judge to instruct the jury that a life sentence would mean life without parole. *Id.* at 158. The trial court refused. *Id.* at 159–60. This Court reversed Simmons' death sentence, holding 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." *Id.* at 156; *see also Shafer v. South Carolina*, 532 U.S. 36 (2001).

The Arizona Supreme Court first addressed *Simmons* in *State v. Cruz (Cruz I)*, 181 P.3d 196 (Ariz. 2008). However, Cruz did not argue on appeal that *Simmons* required the trial court to instruct the jury on his ineligibility for parole. Instead, he contended that "the trial court erred by refusing to make a pretrial ruling on whether, if the jury decided against

the death penalty, the court would sentence him to life or natural life in prison." *Id.* at 207, ¶ 40. The Arizona Supreme Court rejected this argument. It found that Cruz's case differed from *Simmons* because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence" and that the "jury was properly informed of the three possible sentences Cruz faced if convicted: death, natural life, and life with the possibility of parole after twenty-five years." *Id.* at 207, ¶ 42. The court also noted that Cruz "failed to explain how the trial court could opine on a defendant's sentence before any evidence is offered or a verdict is rendered." *Id.* at 207, ¶ 43.

Cruz also argued that the trial court abused its discretion by precluding testimony from the Chairman of the Arizona Board of Executive Clemency, who would have testified that Cruz could not be paroled if he received a life sentence. *Id.* at 207, ¶ 44. The Arizona Supreme Court concluded that the trial court did not err because "[t]he witness would have been asked to speculate about what the Board might do in twenty-five years, when Cruz might have been eligible for parole had he been sentenced to life." *Id.* at 207, ¶ 45. Thus, the trial court "could reasonably have concluded that testimony on what the Board might do in a hypothetical future case would have been too speculative to assist the jury." *Id.*

After *Cruz I*, the Arizona Supreme Court consistently held that *Simmons* did not apply in Arizona. *See, e.g., State v. Hardy*, 283 P.3d 12, 24, ¶ 58 (Ariz. 2012); *State v. Garcia*, 226 P.3d 370, 391, ¶ 111 (Ariz. 2010). It reached that conclusion because, until

2012, Arizona law had permitted the imposition of a parole-eligible life sentence for defendants convicted of first-degree murder. *See* A.R.S. § 13–703(A) (2000), *renumbered as* A.R.S. § 13–751(A). But in 1994, Arizona amended its parole statutes to effectively abolish parole for all inmates convicted of felony offenses committed after 1993. *See* A.R.S. § 41–1604.09(I). "Accordingly, at the time of [Cruz's] sentencing, defendants facing death sentences were statutorily eligible to receive life-with-parole sentences but, as a practical matter, could not be paroled." *Andriano v. Shinn*, 2021 WL 184546, *46 (D. Ariz. Jan. 19, 2021). In other words, from 1994 to 2012, the applicable *sentencing* statute for first-degree murder (A.R.S. § 13–703(A) (2000)) allowed for a parole-eligible sentence, but Arizona's *parole* statute (A.R.S. § 41–1604.09(I)) did not allow for parole for defendants who committed crimes after 1993.

In *Lynch v. Arizona*, 578 U.S. 613 (2016), this Court held that the Arizona Supreme Court had misinterpreted *Simmons* when it held that Arizona's parole laws did not entitle capital defendants to a parole ineligibility instruction. *Lynch* held that, because A.R.S. § 41–1604.09(I) prohibits parole for felonies committed after 1993, Arizona capital defendants are ineligible for parole within *Simmons*' meaning. 578 U.S. at 613–16. Thus, when the State places future dangerousness at issue, Arizona courts must instruct juries that state law does not permit the capital defendant to be released on parole. *Id*. at 615–16.

In *Cruz II*, the Arizona Supreme Court addressed whether *Lynch* could support a claim under Arizona

Rule of Criminal Procedure 32.1(g), which allows postconviction relief when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." The court concluded that it could not, holding that *Lynch* did not constitute a "significant change in the law" under Rule 32.1(g). *Cruz II*, 487 P.3d at 995, ¶ 23.

The court noted that *Lynch* "did not declare any change in the law representing a clear break from the past." *Id.* at 994, ¶ 16. The law *Lynch* relied on—*Simmons*—"was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite the misapplication of that law by Arizona courts." *Id.* at 994, ¶ 17. The state court concluded that *Lynch* "did not change any interpretation of federal constitutional law, the holding of *Simmons* did not change between Cruz's crime and his first PCR petition, and no Supreme Court precedent was overruled or modified." *Id.* at 995, ¶ 22. As a result, *Lynch* "does not represent a significant change in the law for purposes of Rule 32.1(g)" and Cruz was not entitled to collateral relief. *Id.* at 994, ¶ 17, 995, ¶ 23.[1]

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[1] Petitioners refer in passing to the Arizona Supreme Court's purported "ongoing hostility to *Simmons* and *Lynch*." Petition at 28. This accusation is baseless. After *Lynch*, the Arizona Supreme Court has remanded multiple capital cases for a new penalty phase trial based on the lack of a parole ineligibility instruction where future dangerousness was at issue. *See State v. Hulsey*, 408 P.3d 408, 439, ¶ 144 (Ariz. 2018); *State v. Rushing*, 404 P.3d 240, 251, ¶ 44 (Ariz. 2017); *State v. Escalante-Orozco*, 386 P.3d 798, 830, ¶ 127 (Ariz. 2017).

B. Factual and Procedural Backgrounds of Petitioners' cases.

1. Johnathan Burns.

Petitioner Johnathan Ian Burns was convicted of sexual assault, kidnapping, first-degree murder, and misconduct involving weapons arising from the 2007 murder of Jackie H. Several weeks after Jackie met Burns for a date, Jackie's body was found in a remote area with two fatal gunshot wounds to her head, several skull fractures from blunt force impact, and sperm matching Burns' DNA in her body. Jackie's blood and earring were found in Burns' truck and cellphone records showed that, on the night of Jackie's disappearance, Burns drove to the area where Jackie's body was found and stayed there for several hours. A handgun Burns' fiancé had purchased for him—and which police retrieved after Burns disposed of it—was determined to have fired a bullet found near Jackie's body. Pet. App. 209a–211a.

The jury found two aggravating circumstances: that Burns had a prior or contemporaneous felony conviction under A.R.S. § 13–751(F)(2), and that the murder was especially cruel, heinous, or depraved under A.R.S. § 13–751(F)(6). After the penalty phase, the jury determined that Burns should be sentenced to death. *Id.* at 211a.

On appeal, Burns argued that he should have been allowed to argue at sentencing that the consecutive sentences on his non-capital convictions would ensure he spent the rest of his life in prison. The Arizona Supreme Court rejected this claim because Burns "had no right to present evidence of his effective life

sentence to the jury because it would have been irrelevant as a mitigating factor." *Id.* at 254a. Burns also raised, as one of several "constitutional claims that he acknowledge[d] [the Arizona Supreme] Court ha[d] previously rejected but that he wishes to preserve for federal review," a claim that the trial court's refusal to permit evidence or a jury instruction regarding his ineligibility for parole violated his constitutional rights. *See id.* at 271a; *State v. Burns*, Ariz. Supreme Ct. No. CR-11-0060-AP, Opening Brief (Jan. 23, 2013). The Arizona Supreme Court declined to revisit its case law rejecting this claim.

In his postconviction relief proceeding, Burns argued that the trial court's failure to give a *Simmons* instruction warranted relief under Arizona Rule of Criminal Procedure 32.1(a) (conviction or sentenced was "in violation of the United States or Arizona constitutions"). He also argued that *Lynch* entitled him to relief under Arizona Rule of Criminal Procedure 32.1(g) (providing a ground for relief if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence").

The postconviction court found Burns' 32.1(a) claim procedurally precluded under Rule 32.2(a)(3) because it was adjudicated on direct appeal. The court alternatively found that Burns was not entitled to a parole ineligibility instruction under *Simmons* or *Lynch* because he failed to establish a colorable claim "that the State injected 'future dangerousness' either as a logical inference from the evidence or by argument." Pet. App. 78a. Additionally, the court found that "the requirements of *Simmons*, *Shafer*, and

Lynch were met by defense counsel 'bring[ing] [defendant's parole ineligibility] to the jury's attention by way of argument.'" *Id.* at 82a (quoting *Lynch*, 578 U.S. 613).

The court likewise denied relief under Rule 32.1(g), finding that *Lynch* was not a significant change in law, was not retroactively applicable, and the trial court's failure to address parole ineligibility "did not impact the jury's determination to impose death." *Id.* at 82a–84a. Burns petitioned for review of this decision to the Arizona Supreme Court and that court summarily denied review without explanation shortly after it issued its decision in *Cruz II*. Pet. App. 414a.

2. Steve Boggs.

Petitioner Steve Boggs was convicted and sentenced to death in 2005 for the murders of Beatriz Alvarado, Kenneth Brown, and Fausto Jimenez. On the night of May 19, 2002, Boggs and Christopher Hargrave entered a fast food restaurant where the victims worked. Boggs later admitted that "the victims were forced at gunpoint to lie down in the work area of the restaurant, ordered to remove everything from their pockets, ordered to march through the cooler into the back freezer with their hands interlaced on top of their heads, forced to kneel down, and then shot in rapid succession." Pet. App. 303a. After Boggs and Hargrave left the freezer, Boggs "heard screaming, at which point he returned to the freezer and shot some more." *Id.* Brown died almost immediately from two gunshot wounds, Jimenez escaped from the freezer and died from three gunshot wounds shortly after dialing 911, and Alvarado escaped out the backdoor and repeatedly asked for

help before dying from two gunshot wounds to her back. *Id.* at 273a–274a.

The jury convicted Boggs of three counts of first-degree murder and found three aggravating factors for each murder: expectation of pecuniary gain, A.R.S. § 13–703(F)(5) (2002), murders committed in an especially heinous, cruel, or depraved manner, § 13–703(F)(6) (2002), and multiple homicides, § 13–703(F)(8) (2002). The jury determined that Boggs should be sentenced to death for the murders. *Id.* at 280a–281a.

At trial, Boggs did not request a jury instruction stating that he was ineligible for parole. To the contrary, he explicitly asked the trial court to instruct to instruct the jurors that, "If you find the mitigation is sufficiently substantial to call for leniency, the Court will sentence the defendant either [sic] to life imprisonment without the possibility of *parole until at least twenty-five years have passed*." Defendant's Requested Penalty Phase Jury Instructions, *State v. Boggs*, Maricopa Co. Sup. Ct. No. CR2002-009759 (May 5, 2005) [R.O.A. 291], at page 5 (emphasis added).

Despite his requested instruction, in 2018 Boggs filed a successive petition for postconviction relief, arguing that *Lynch* entitled him to relief under Arizona Rule of Criminal Procedure 32.1(g). Pet. App. 114a. The court denied relief, finding that *Lynch* was neither a significant change in the law under Rule 32.1(g) nor retroactively applicable. The court also found that, even if applied to Boggs' case, Lynch would not have "probably overturned" the death sentences under Rule 32.1(g) because "given the circumstances

of the offense coupled with evidence of Defendant's character and propensities, no single reasonable juror would have imposed a life sentence rather than a death sentence." *Id.* For the same reason, the court found any error under *Lynch* was harmless beyond a reasonable doubt. *Id.* Boggs filed a petition for review in the Arizona Supreme Court, which that court denied summarily shortly after it decided *Cruz II*. *Id.* at 416a.

3. Ruben Garza.

Petitioner Ruben Garza was convicted and sentenced to death for the 1999 murders of Ellen Franco and Lance Rush. On the night of December 1, 1999, Garza knocked on the door of the home where Franco, who had recently separated from Garza's uncle, lived. Once inside, he shot and killed Franco. Garza then entered the bedroom where Lance Rush, who also lived in the home, was hiding. Rush fired at Garza, hitting him in the arm, and Garza shot and killed Rush. Before the murders, Garza had asked acquaintances if they wanted to "get a little dirty" to make some money and help him with some "family problems." Pet. App. 317a–321a.

The jury found Garza guilty of burglary and two counts of first-degree murder. It rejected pecuniary gain as an aggravating factor but found that Garza committed multiple murders. *See* A.R.S. § 13–703(F)(8) (1999). The jury declined to impose the death penalty for Ellen's murder, but imposed the death penalty for Garza's murder of Rush. The trial court sentenced Garza to life without possibility of release for Ellen's murder and 21 years in prison for burglary. Pet. App. 321a.

At trial, Garza did not request a jury instruction that he was ineligible for parole. Nor did he argue on appeal that the trial court should have given such an instruction. Instead, in 2017, he filed a successive petition for postconviction relief arguing that *Lynch* entitled him to a new capital sentencing under Arizona Rule of Criminal Procedure 32.1(g). Successive Petition for Post-Conviction Relief, *State v. Garza*, Maricopa Co. Sup. Ct. No. CR1999–017624 (Oct. 23, 2017).

The postconviction court denied relief, concluding that *Lynch* was not a significant change in the law and was not retroactive. Pet. App. 129a–133a. The court also found that applying *Lynch* to Garza's case would not have "probably overturned" his death sentence under Rule 32.1(g) and that any error was harmless beyond a reasonable doubt because a parole ineligibility instruction would not have caused the jury to impose a life sentence for Rush's murder. *Id.* at 133a–136a. Garza petitioned for review in the Arizona Supreme Court, which that court denied summarily after its decision in *Cruz II*. *Id.* at 418a.

4. Fabio Gomez.

Petitioner Fabio Gomez was convicted and sentenced to death for the 1999 sexual assault and murder of Joan Morane. Morane lived in an apartment complex where Gomez also lived with his girlfriend and infant son. In December 1999, a friend found Morane's apartment door unlocked and her furniture in disarray. That same day, Gomez's neighbor heard pounding on the wall and screaming from Gomez's apartment. When Gomez allowed police to enter his apartment, they found blood on the carpet

and walls; Gomez first said the blood came from a cut on his girlfriend's foot, and later claimed it came from a cat he had killed. Police then discovered Morane's body in a dumpster at the apartment complex; DNA testing identified Gomez's semen in Morane's body and Morane's blood in Gomez's apartment. Pet. App. 352a. The jury found Gomez guilty of first-degree murder, kidnapping, and sexual assault. The sentencing jury found that the murder was especially cruel under A.R.S. § 13–751(F)(6) (2011) and determined he should be sentenced to death. *Id.* at 353a.

At trial, Gomez did not request a jury instruction that he was ineligible for parole. Nor did he argue on appeal that the trial court should have given such an instruction. Instead, in 2018, he amended his petition for postconviction relief to include claims that the trial court erred by failing to give a parole ineligibility instruction under *Simmons*/*Lynch*, and that trial and appellate counsel were ineffective for failing to raise the *Simmons*/*Lynch* issue. Motion to Amend; Amended Petition for Post-Conviction Relief, *State v. Gomez*, Maricopa County Sup. Ct. No. CR2000–090114 (March 13, 2018).

The postconviction court found that Gomez's claim that the trial court erred by failing to instruct on parole ineligibility was precluded under Arizona Rule of Criminal Procedure 32.2(a)(3) because Gomez waived it by failing to present it on direct appeal. Pet. App. 151a. The court alternatively found that Gomez's *Simmons*/*Lynch* claim failed on the merits because the State did not place Gomez's future dangerousness at issue, *Lynch* is not retroactive, and the lack of a

Simmons instruction did not impact the jury's determination to impose a death sentence. *Id.* at 151a–155a. The court further found that trial and appellate counsel neither performed deficiently, nor was Gomez prejudiced. *Id.* at 155a–158a.

Gomez filed a petition for review in the Arizona Supreme Court, which that court summarily denied after its decision in *Cruz II*. *Id.* at 420a.

5. Steven Newell.

Petitioner Steven Newell was convicted and sentenced to death for the 2001 murder of 8-year-old Elizabeth B. On May 23, 2001, Elizabeth left for school and never returned. A neighbor saw her walking to school with Newell (who Elizabeth knew because he had dated her sister) following closely behind. Police found Elizabeth's body in an irrigation ditch, rolled up in carpeting. There was a ligature around her neck, and she had bruises and abrasions on her hands, wrists, forearms, head, and face. Injuries to her genitals were consistent with sexual assault. Newell admitted to police that he had been with Elizabeth in the field on the morning she disappeared and that "he had grabbed her and placed her between his legs while he rubbed up against her, causing him to ejaculate." A witness identified Newell as the person he saw standing in the ditch where Elizabeth's body was found. And DNA testing identified sperm that was present in Elizabeth's underwear as Newell's. Pet. App. 368a–374a.

The jury found Newell guilty of first-degree murder, sexual conduct with a minor, and kidnapping. As aggravating factors, the jury found that Newell had

a prior conviction of a serious offense, A.R.S. § 13–703(F)(2) (2003); the murder was especially heinous, cruel or depraved, A.R.S. § 13–703(F)(6) (2003); and the victim was under 15 years of age, A.R.S. 13–703(F)(9) (2003). The jury determined that Newell should be sentenced to death for Elizabeth's murder. Pet. App. 374a–375a.

At trial, Newell did not request a jury instruction that he was ineligible for parole. Nor did he argue on appeal that the trial court should have given such an instruction. In 2018, however, he filed a successive petition for postconviction relief arguing that *Lynch* entitled him to a new capital sentencing under Arizona Rule of Criminal Procedure 32.1(g). Petition for Post-Conviction Relief, *State v. Newell*, Maricopa County Sup. Ct. No. CR2001–009124 (Jan. 1, 2018). The postconviction court denied relief because the State did not place Newell's future dangerousness at issue, his counsel argued to the jury that a life sentence would result in Newell serving the entirety of his life in prison, *Lynch* is not retroactive, nothing in the record suggested that a *Simmons* instruction would have changed the jury's verdict, and any error in failing to instruct the jury on parole ineligibility was harmless beyond a reasonable doubt. Pet. App. 165a–172a.

Newell filed a petition for review in the Arizona Supreme Court, which that court summarily denied after its decision in *Cruz II*. *Id.* at 422a.

6. Stephen Reeves.

Petitioner Stephen Reeves was convicted and sentenced to death for the 2007 murder of Norma

Gabriella Contreras. On a Saturday morning in June 2007, Reeves entered an office where 18-year-old Contreras was working alone and demanded her car keys and cell phone. Contreras attempted to press an alarm button and Reeves, who was much larger, forced her to the floor and straddled her. For eight minutes, while Contreras "screamed and struggled," Reeves beat her, hit her with a piece of concrete, wrenched her neck, and attempted to strangle her with his hands and a piece of wood. Finally, Reeves slit Contreras' throat with a box cutter. Reeves was arrested shortly after he drove away in Contreras' car with her cell phone in his pocket. Pet. App. 402a–404a.

The jury found Reeves guilty of first-degree murder, armed robbery, burglary, kidnapping, and auto theft. As aggravating circumstances, the jury found that Reeves had previously been convicted of a serious offense; the murder was especially cruel, heinous, or depraved; and Reeves was on release at the time of the murder. *See* A.R.S. § 13–751(F)(2), (F)(6), (F)(7)(a). The jury could not reach a verdict on the pecuniary gain aggravating factor or the appropriate sentence, but a second jury found that aggravator proven and determined that Reeves should be sentenced to death for the murder. Pet. App. 403a–404a.

Before trial, Reeves unsuccessfully sought a jury instruction on parole ineligibility. Pet. App. 199a–200a. On appeal, Reeves argued that the trial court erred by denying his motion to preclude evidence of future dangerousness or, alternatively, to permit him to present evidence that he likely would not be released if he received a life sentence. The Arizona

Supreme Court rejected this claim, citing *State v. Benson*, 307 P.3d 19, 33 (Ariz. 2013). Pet. App. 407a–408a.

In his petition for postconviction relief, Reeves argued that *Lynch* entitled him to a new capital sentencing under Arizona Rule of Criminal Procedure 32.1(g). Petition for Post-Conviction Relief, *State v. Reeves*, Maricopa Co. Sup. Ct. No. CR2007–135527 (Nov. 29, 2017), at 39–42. The postconviction court denied relief, finding that *Lynch* was not a "significant change in the law" under Rule 32.1(g) and was not retroactively applicable. Pet. App. 201a–203a. Reeves filed a petition for review in the Arizona Supreme Court, which that court summarily denied after its decision in *Cruz II*. Id. at 424a.

REASONS FOR NOT GRANTING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Petitioners present no such reason. In particular, Petitioners has not established that the state court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, Petitioners "asser] error consist[ing] of erroneous factual findings [and] misapplication of a properly stated rule of law," for which this Court "rarely grant[s]" certiorari review. Sup. Ct. R. 10. Because the is waived or moot in most of Petitioners' cases, the operative state court decision rests on state law grounds, and Petitioners merely seek correction of the state court's denial of their petitions for postconviction relief, this Court should deny certiorari.

I. This joint petition is a poor vehicle for addressing the question Petitioners present.

Petitioners ask this Court to address the question whether *Lynch* must be applied retroactively to cases on state collateral review. Petition, at i. However, the procedural histories of their cases create insurmountable impediments to addressing that question in this joint petition. Some of the petitioners waived the *Simmons*/*Lynch* issue by failing to request a parole ineligibility instruction; the question presented is moot in several of the cases because the postconviction courts addressed their *Simmons*/*Lynch* claim on the merits and denied relief; and in a majority of the cases the postconviction courts found any error under *Simmons*/*Lynch* harmless. Thus, even if the question presented were worthy of certiorari review, this joint petition proves an unsuitable vehicle to address it.

First, only Petitioners Burns and Reeves preserved the argument that they were entitled to a parole ineligibility instruction under *Simmons* (and then *Lynch*) by requesting the instruction at trial. The other four petitioners did not ask their trial courts to inform their juries that they could not receive a parole-eligible sentence and therefore any ruling by this Court that Lynch is retroactive would not affect their cases.[2] In fact, Boggs not only failed to request such an instruction, he affirmatively asked the trial court to tell the sentencing jurors that, if they rejected

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[2] *See*, *infra*, 6–16 (describing factual and procedural background of Petitioners' cases; *see also* Petition at 9–11 (noting that Burns and Reeves requested instruction on parole ineligibility, but failing to assert the other Petitioners did so).

death, life with the possibility of parole was a potential sentence he could receive.

Error occurs under *Simmons* "where a capital defendant's future dangerousness is at issue and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole," and the trial court refuses to allow the defendant "'to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel.'" *Lynch*, 578 U.S. at 613–14 (quoting *Shafer*, 532 U.S. at 39). Because Boggs, Garza, Gomez,[3] and Newell did not request a *Simmons* instruction, the trial courts in their cases could not have erred by failing to give one. These four petitioners thus waived any claim that they are entitled to relief under *Lynch*. *See State v. Bush*, 423 P.3d 370, 388, ¶ 74 (Ariz. 2018) ("In short, *Simmons* 'relief is foreclosed by the defendant's failure to request a parole ineligibility instruction at trial.'") (quoting *Campbell v. Polk*, 447 F.3d 270, 289 (4th Cir. 2006)); *see also Townes v. Murray*, 68 P.3d 840, 850 (4th Cir. 1995) ("[T]he fact that a jury was not informed of the defendant's parole ineligibility would not violate the defendant's due process rights, as recognized by *Simmons,* if that lack of information was due to the defendant's own inaction. . . . "[T]he defendant's right, under *Simmons*, is one of opportunity, not of result."). Since the majority of Petitioners waived the issue presented, and therefore

[3] The postconviction court in Gomez's case specifically found that his claim that the trial court erred by failing to instruct on parole ineligibility was precluded under Arizona Rule of Criminal Procedure 32.2(a)(3) because Gomez waived it by failing to present it at trial or on direct appeal. Pet. App. 151a.

would not be affected by any ruling that *Lynch* is retroactive, this Court should deny certiorari.

Second, in half of petitioners' cases the postconviction court denied the *Simmons*/*Lynch* claim on the merits, rendering the question presented moot for them. As noted above, the court in Burns' case found that his *Simmons*/*Lynch* claim would have failed on the merits because the State did not place his future dangerousness at issue and because, in any event, counsel's argument that Burns would never be released from prison satisfied *Simmons* and *Lynch*'s requirement that he be permitted to tell the jury he was ineligible for parole. Pet. App. 77a–82a. *See Lynch*, 578 U.S. at 613–14 (defendant not entitled to parole ineligibility instruction unless "future dangerousness is at issue"; *Simmons* entitles defendant to inform jury of parole ineligibility "either by a jury instruction *or in arguments by counsel*") (quoting *Shafer*, 532 U.S. at 39) (emphasis added).

The court in Gomez's case likewise found that any *Simmons*/*Lynch* claim failed on the merits because "'future dangerousness' was not placed at issue by the State." Pet. App. 151a–154a.

And the court in Newell's case found that a *Lynch* instruction was not warranted because the State did not inject future dangerousness into his case, and because defense counsel's argument that Newell would spend the rest of his life imprison no matter the sentence he received satisfied any right he had under *Lynch*. Pet. App. 167a–168a.

Even if this Court granted certiorari and adopted Petitioners' position regarding the question presented,

it would not affect the judgment in Burns', Gomez's and Newell's cases because the postconviction courts addressed their *Lynch* claims on the merits and found no error. These Petitioners fail to address those findings by the state court. The question presented is thus a moot one for their cases. Because the question presented is moot in half of petitioners' cases, this Court should deny certiorari.

Similarly, any hypothetical *Simmons*/*Lynch* error was found non-prejudicial or harmless by the postconviction courts in a majority of Petitioners' cases. The postconviction judge in Burns' case found that the trial court's failure to address his parole ineligibility "did not impact the jury's determination to impose death." Pet. App. 83a–84a. In Boggs' case the court found that "given the circumstances of the offense coupled with evidence of Defendant's character and propensities, no single reasonable juror would have imposed a life sentence rather than a death sentence," had the been instructed on parole eligibility and that any error under *Lynch* was harmless beyond a reasonable doubt. Pet. App. 120a.

Garza's judge likewise concluded that any error was harmless beyond a reasonable doubt because a parole ineligibility instruction would not have caused the jury to impose a life sentence for Rush's murder. *Id.* at 133a–136a. In Gomez's case, the postconviction court found that the lack of a *Simmons* instruction did not impact the jury's determination to impose a death sentence. *Id.* at 155a.

And the postconviction judge in Newell's case found that nothing in the record suggested that a *Simmons* instruction would have changed the jury's

verdict, and that any error in failing to instruct the jury on parole ineligibility was harmless beyond a reasonable doubt. Id. at 170a–172a.

These five Petitioners fail to acknowledge or address the state-court findings that the lack of a parole ineligibility instruction was harmless. Even if this Court held that *Lynch* must be applied retroactively to all cases on collateral review (which it should not), the unchallenged harmless error findings below would nonetheless prevent five of the six petitioners from obtaining any relief. This Court should deny certiorari review.

II. The Arizona Supreme Court's decision in *Cruz II* rests on an independent and adequate state law ground.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). A state law ground is independent of the merits of the federal claim when resolution of the state procedural law question does not "depend[] on a federal constitutional ruling." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). And a state procedural rule constitutes an adequate bar to federal review if it was "firmly established and regularly followed" when applied by the state court. *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

Rule 32.1(g) of the Arizona Rules of Criminal Procedure provides for relief from judgment if a

defendant established that "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Arizona courts have defined a "significant change in the law" under that rule as a "clear break" or "sharp break with the past." *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991). "The archetype of such a change occurs when an appellate court overrules previously binding case law," such as in *Ring v. Arizona*, 536 U.S. 584, 609 (2002). *State v. Shrum*, 203 P.3d 1175, 1179, ¶ 16 (Ariz. 2009). A statutory or constitutional amendment constituting a clear break from prior law can also be a significant change under the rule. *See id.* at 1179, ¶ 17. In addition to establishing the existence of a significant change in the law, a petitioner must also show that the change applies retroactively before obtaining relief under Rule 32.1(g). *See Slemmer*, 823 P.2d at 51.

The initial determination whether there has been a significant change in the law—on which the Arizona Supreme Court rested its decision in *Cruz II*—is a question of state law. The Arizona Supreme Court's conclusion that *Lynch* was not a significant change in the law under Rule 32.1(g) did not depend on "an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The state court did not address whether a federal constitutional error under *Lynch* or *Simmons* had occurred; instead, it looked only to whether *Lynch* constituted a significant change to existing law, and concluded that it did not. *See Cruz II*, 487 P.3d at 994–95, ¶¶ 13–22. Thus, because the Arizona Supreme Court's decision did not depend on a federal

constitutional ruling, its resolution of a state law procedural question under Rule 32.1(g) is not reviewable by this Court. *See Foster*, 578 U.S. at 497.

Petitioners argue, however, that the Arizona Supreme Court was required to apply *Lynch* to their cases under federal retroactivity principles mandating application of intervening decisions involving "settled" rules. Petition at 15–22 (citing, *e.g., Yates v. Aiken*, 484 U.S. 211 (1988); and *Chaidez v. United States*, 568 U.S. 342, 347 (2013)). Their argument argument is misplaced because the Arizona Supreme Court in *Cruz II* did not reach (nor was it required to) the question whether *Lynch* applies retroactively.

Petitioners' argument concerning *Lynch*'s retroactive application ignores altogether the independent and adequate state ground doctrine. In fact, in *Yates*, on which Petitioners heavily rely, this Court acknowledged that it was permitted to engage in a retroactivity analysis in part because the state court had not "placed any limit on the issues that it will entertain in collateral proceedings." 484 U.S. at 218. Since the state court "considered the merits of the federal claim," it ha[d] a duty to grant the relief that federal law requires." *Id.*

Here, in contrast, Rule 32 places affirmative limits on the issues that Arizona courts will entertain in collateral proceedings. And because Petitioners' *Lynch* claims did not meet Arizona's procedural requirements under Rule 32.1(g), the Arizona Supreme Court (unlike the state court in *Yates*) did not consider the merits of the federal claim. The federal retroactivity decisions Petitioners rely on are thus irrelevant to the state law procedural question on

which the Arizona Supreme Court resolved *Cruz II* and Petitioners' cases.

Petitioners incorrectly assert that Arizona, like the state court in *Yates*, does not place limits on the constitutional issues it will entertain in collateral proceedings because it "broadly entitles defendants to challenge their conviction or sentence on the ground that it was imposed 'in violation of the United States or Arizona Constitutions.'" Petition at 18 (quoting Ariz. R. Crim. P. 32.1(a)). But Arizona courts will only entertain constitutional claims under Rule 32.1(a) in an initial postconviction relief proceeding. Ariz. R. Crim. P. 32.4(a) ("Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).") (2017).

Petitioners surely are aware of these state law procedural limitations. For example, as noted above, the postconviction court in Burns' case found his claim under Rule 32.1(a) procedurally barred. And most likely for that very reason, most (if not all) of the Petitioners elected to present their *Lynch* claims to the Arizona courts under Rule 32.1(g), a ground for relief that is generally exempt from preclusion for failing to have raised it in a prior proceeding. *See* Ariz. R. Crim. P. 32.2(b) (unlike claims under 32.1(a), claims under 32.1(g) (among others) not precluded for failure to present them in prior proceeding). Petitioners thus are incorrect that the Arizona courts do not place limits on the constitutional claims they will entertain in collateral—especially successive collateral—proceedings.

Petitioners also contend, in a footnote, that Rule 32.1(g) is not an adequate state law ground because it

is not "firmly established and regularly followed." Petition at 28 n.2 (quoting *Beard v. Kindler*, 558 U.S. 53, 60 (2009)). That assertion is incorrect.

A state procedural rule is consistently and regularly applied, and thus "adequate" to bar federal review, if the rule is applied in the vast majority of cases. *See Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (noting that a few cases failing to apply the procedural rule do not undermine the state's consistent application in the vast majority of cases); *Moran v. McDaniel*, 80 F.3d 1261, 1269–70 (9th Cir. 1996). And a "discretionary state procedural rule can serve as an adequate ground to bar federal habeas review … even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard*, 558 U.S. at 60–61.

Specifically, Petitioners argue that Rule 32.1(g) is not firmly established and regularly followed because in *Shrum*, the Arizona Supreme Court stated that a significant change in the law exists "'when an appellate court overrules previously binding case law,'" which they assert contrasts with *Cruz II*, and because *Slemmer*, 823 P.2d 41, "adher[es] to *Yates* even in the context of a claim under Rule 32.1(g)." Petition at 28 n.2 (quoting *Shrum*, 203 P.3d at 1178). They misconstrue these state court decisions applying Rule 32.1(g).

First, *Shrum*'s statement that a significant change in the law occurs "when an appellate court overrules previously binding case law" does not conflict with *Cruz II*. *See Shrum*, 203 P.3d at 1178. In *Cruz II*, the Arizona Supreme Court addressed that principle from *Shrum*, noting that it had found a significant change

in the law when *Ring v. Arizona*, 536 U.S. 584 (2002), overruled *Walton v. Arizona*, 497 U.S. 639, 647 (1990); and when *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), overruled case law permitting mandatory life-without-parole sentences for juveniles. *Cruz II*, 487 P.3d at 994, ¶¶ 13–15. The court found that, in contrast to those situations, *Lynch* "did not declare any change in the law representing a clear break from the past." *Id.* at 994, ¶ 16. Instead, *Simmons*, on which *Lynch* relied, "was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite misapplication of that law by Arizona courts." *Id.* at 994, ¶ 17. Thus, Petitioners are incorrect that *Cruz II* is at odds with *Shrum* or applied Rule 32.1(g) inconsistently.

Next, *Slemmer* addressed *Yates*' theory of retroactivity when discussing the *second* component of a claim under Rule 32.1(g)—whether the significant change in the law applies retroactively. *See Slemmer*, 823 P.2d at 46–47, 49–50. Significantly, the court in *Slemmer* addressed retroactivity cases like *Yates* only *after* finding that the decision at issue satisfied 32.1(g)'s first requirement because it was a significant change in the law. *Slemmer*, 823 P.2d at 49. In *Cruz II*, in contrast, the Arizona Supreme Court never reached the question of retroactivity (and therefore had no reason to address *Yates*) because it found that Cruz failed to establish the *first* requirement of a 32.1(g) claim, a significant change in the law. Consequently, neither *Shrum* nor *Slemmer* establishes that Arizona fails to consistently and regularly apply Rule 32.1(g).

Finally, because *Cruz II* rested on the independent and adequate state law procedural question of whether *Lynch* constituted a significant change in the law, Petitioners are incorrect that it creates a split with other states' courts and conflicts with "the consensus approach to federal retroactivity in state courts." Petition at 22. Other states' approaches to retroactivity analysis have no relevance to Arizona's interpretation of Rule 32.1(g)'s opening requirement of a significant change in the law. Because in *Cruz II* the Arizona Supreme Court never reached the question of retroactivity, its decision cannot have conflicted with how other states have addressed retroactive application of this Court's decisions. Petitioners' attempt to manufacture a split among state high courts thus fails.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

Brunn W. Roysden, III
Solicitor General

JEFFREY L. SPARKS
Acting Chief Counsel for the Capital Litigation Section
Counsel of Record

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
602–542–4686
CLDocket@azag.gov

Counsel for Respondent