

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MONTENEGRO CRUZ,)
)
 Petitioner,)
)
 v.) No. 21-846
)
 ARIZONA,)
)
 Respondent.)

Pages: 1 through 66
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JOHN MONTENEGRO CRUZ,)

Petitioner,)

v.) No. 21-846

ARIZONA,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 1, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:23 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

JOSEPH A. KANEFIELD, Chief Deputy Attorney General, Phoenix, Arizona; on behalf of the Respondent.

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P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 21-846, Cruz versus Arizona.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

In 2005, John Cruz was sentenced to death. The judge instructed jurors that, without a death sentence, Cruz would face "life imprisonment with a possibility of parole." The judge did so despite this Court's decision 11 years earlier in Simmons. Cruz's jury labored under a seriously wrong idea. Indeed, the jury foreman the very next day said: "We wanted a reason to be lenient, and many of us would have rather voted for life, but we were not given an option to vote for life in prison without the possibility of parole."

Cruz wasn't the only one. Twelve separate times, 12 separate times, the Arizona Supreme Court wrote decisions refusing to apply

1 Simmons. In 2016, this Court summarily reversed
2 all this in Lynch, fundamentally changing
3 capital trials in Arizona. Cruz then used Lynch
4 to seek post-conviction relief under Arizona
5 Rule 32.1(g). Yet, the Arizona Supreme Court
6 refused, saying Lynch didn't change the law; it
7 just changed the application of the law.

8 That interpretation of Rule 32 is not
9 an adequate and independent state ground for
10 three separate reasons. First, to be adequate,
11 an interpretation must be firmly established and
12 regularly followed. This hair-splitting
13 distinction between changes in the law and
14 applications of the law is entirely novel,
15 entirely hand-crafted. The state doesn't even
16 defend it.

17 Second, the decision below
18 discriminates against federal rights. It places
19 defendants like Cruz in a catch-22. To prevail
20 under federal law, they have to argue that Lynch
21 applied a settled rule, but that very argument
22 dooms their claims under state law. It also
23 discriminates against decisions of this Court by
24 giving them narrower effect. And, finally, the
25 decision below is not independent; it's

1 interwoven with federal questions.

2 The Arizona Supreme Court's analysis
3 of Rule 32 turned on its reading of this Court's
4 precedents. Simmons was the law of the land in
5 49 states, all except Arizona. Arizona is an
6 extreme outlier, and for that reason today, it
7 stands alone in this Court. None of the other
8 49 states, not a single one, is supporting them.

9 If I could start with the first point
10 about novelty.

11 JUSTICE THOMAS: Well, let's just talk
12 about what we're considering. I understand
13 Simmons and Lynch, but what I understand the
14 Arizona Supreme Court to be saying, it does not
15 -- under our rules, there's nothing more here,
16 that they simply interpreted their Rule 32. How
17 do we get from that interpretation of their rule
18 to a federal question -- federal issue?

19 MR. KATYAL: Right. Each of these
20 three arguments, Justice Thomas, are things this
21 Court has used before to get to the federal
22 issue. So, first, with respect to novelty, if a
23 state enacts a procedural rule that is only
24 about state law, but it is a barrier to federal
25 claims or is novel in some way, this Court time

1 and again, starting with Justice Holmes in 1904,
2 going to this Court's much more recent
3 decisions, have said that it's got to be firmly
4 established and regularly followed.

5 And that's so for two reasons. One
6 is, if it's a novel rule, it might be
7 discriminating against federal rights, and
8 that's a tell. The other is that you have to
9 provide fair warning to the defendant. And the
10 case law talks about both. And in case after
11 case, Your Honor, this Court has done exactly
12 that on novelty. So that's the first point.

13 The second is the other way -- the
14 second way you get to a federal issue is that
15 this Court polices, indeed, the Court in walker
16 said it's regularly said that if an
17 interpretation discriminates against a federal
18 right, even if it's purely a matter of state law
19 -- take, for example, this Court's decision just
20 last year in Espinoza versus -- versus Montana.
21 That was purely interpreting a state -- a state
22 constitutional provision, but there was a
23 federal question lurking under that. And that
24 is true here as well because of the
25 discrimination.

1 And then the third is that it's
2 interwoven with federal law. It's not actually
3 a purely -- and I would fight the premise of
4 your question -- a -- a state interpretation --
5 it's not just a state interpretation.

6 And these are three separate
7 arguments. You can disagree with me on any one,
8 but they have to run the table and win all three
9 of them.

10 JUSTICE SOTOMAYOR: Well, counsel --

11 CHIEF JUSTICE ROBERTS: Counsel, you
12 phrased this and presented, for understandable
13 reasons, as hostility to a particular federal
14 rule. What you can also look at is a neutral
15 rule, a procedural rule. I mean, the state
16 doesn't have to provide collateral review of
17 this particular claim, and they're -- they've
18 decided they're not going to. And that doesn't
19 exhibit hostility. It's just shaping the
20 availability of collateral review, just as AEDPA
21 does in the federal system.

22 MR. KATYAL: Absolutely, Your Honor,
23 it could be seen that way. But, here, of
24 course, this is a novel interpretation, and that
25 alone, even apart from whether it discriminates

1 or is neutral, that's enough to reject it under
2 this Court's precedents. And then, with respect
3 to whether or not this is even-handed, we
4 obviously don't think it is for the reasons our
5 brief says, we agree with you, Mr. Chief
6 Justice, that if it were truly a neutral rule
7 that withdrew from the field, for example, all
8 post-conviction review, that would be one thing.

9 But, here, Arizona holds out Rule 31.2
10 and says to defendants like Cruz, if there's a
11 significant change in the law, you can come and
12 bring your post-conviction proceeding. Cruz did
13 exactly that, and now it becomes a shell game
14 because then they say, oh, that rule was so
15 clearly established that it didn't -- it's not
16 actually a significant change in the law.

17 That's, of course, the opposite of
18 what the Arizona Supreme Court did in Cruz's
19 very case back in 2008. In 2008, when Cruz
20 brought this, they said -- they -- they said the
21 reverse. And so, you know, the Arizona Supreme
22 Court has been essentially talking out of both
23 sides of its mouth.

24 You said in Simmons this is the rule
25 of the land. Cruz was convicted after Simmons.

1 You said it again in Lynch after the Arizona
2 Supreme Court in 12 published opinions refused
3 to apply Simmons. And now the Arizona Supreme
4 Court turns around and says, oh, because it's so
5 clearly established, now you can't have a 31.2
6 petition. And that's pulling --

7 JUSTICE ALITO: Mr. -- Mr. Katyal, you
8 --

9 MR. KATYAL: -- the chair out from
10 under the --

11 JUSTICE ALITO: I'm sorry. You began
12 with three points, and if I remember correctly,
13 the first two require us to analyze the opinions
14 of the Arizona Supreme Court as to whether it's
15 novel and -- and I -- but -- but assume that it
16 was always the rule in Arizona that a
17 significant change in the law, whether federal
18 or state, would be covered and that a
19 significant change in the law is different from
20 a significantly new application of the law.

21 Okay. Suppose that was always the
22 rule. Then what would be -- what's -- what is
23 left of your argument?

24 MR. KATYAL: Well, Your Honor, it
25 would be hard for me to understand exactly what

1 they had said before. I can tell you what the
2 Arizona Supreme Court actually has said before
3 if you look at a case like Rendon, because in
4 Rendon, what the Arizona Supreme Court said --
5 and this is true in many different cases -- they
6 say the archetype of a significant change in the
7 rule -- in the law is overturning of precedent.
8 And, in Rendon, that's what happened. They --
9 they overturned an intermediate Arizona Supreme
10 Court precedent. This was just on one thing,
11 the definition of burglary.

12 And what that court said, the Arizona
13 Supreme Court said is, ha, that is something
14 that allows a 31.2(g) petition. And they said
15 this even though "it is not a new rule but
16 rather a corrected definition of the crime."

17 JUSTICE ALITO: Well, as I said, you
18 have arguments that require us to analyze what
19 they've done. And I've looked at that. We will
20 look at it again.

21 But assuming for the sake of argument,
22 this is a hypothetical, that the rule has always
23 been what the Arizona Supreme Court now says the
24 rule is, what is your remaining argument?

25 MR. KATYAL: Yeah. So -- so that

1 would make it -- take away the novelty because
2 that would be firmly established, regularly
3 followed, assuming that that's part of -- built
4 into your hypothetical -- it wasn't, but we can
5 assume that -- it would still discriminate, I
6 think, in practice and operation against federal
7 rights. And what this Court said in Walker is
8 that's the test, not whether it's neutrally
9 written or --

10 JUSTICE ALITO: Well, I meant to make
11 that part of my hypothetical too. So they say
12 that there's no discrimination. We treat
13 changes in federal law the same way we change --
14 we treat changes in state law.

15 MR. KATYAL: It's almost impossible,
16 Your Honor, to imagine that hypothetical
17 because, you know, like basically, you know, how
18 can a decision be dictated by Arizona Supreme
19 Court precedent if a decision is overruling
20 Arizona Supreme Court precedent.

21 I mean, the way in which the court
22 below got to what it did is it said at Petition
23 Appendix page 7A that when we overturn precedent
24 that's generally the archetype or the
25 significant change in law.

1 And then they said, well, it's not a
2 significant change in law because Lynch was
3 always the law of the land. It didn't change
4 anything. Simmons was always the law of the
5 land.

6 That -- I think that rationale could
7 only apply to decisions of this Court. I think
8 it's a decision handmade, you know,
9 jerry-rigged, to use Justice Kagan's word from
10 the last argument, only for really a
11 circumstance like this in which the U.S. Supreme
12 Court is overturning something.

13 JUSTICE GORSUCH: Mr. Katyal --

14 MR. KATYAL: So I just don't think it
15 could be written neutrally.

16 JUSTICE GORSUCH: -- I -- I thought I
17 had understood you to respond to the Chief
18 Justice before your colloquy with Justice Alito
19 that if there were an independent and
20 adequate state ground, if they had such a rule,
21 then it would be barred. Is that right?

22 MR. KATYAL: If -- if there were --
23 what's the --

24 JUSTICE GORSUCH: If the State of
25 Arizona had an independent and adequate rule

1 that it consistently followed, then -- then your
2 claim would be barred?

3 MR. KATYAL: If -- if there truly was
4 one.

5 JUSTICE GORSUCH: Yeah.

6 MR. KATYAL: These are three reasons
7 why --

8 JUSTICE GORSUCH: No, I understand.

9 MR. KATYAL: Yes.

10 JUSTICE GORSUCH: But you -- you can
11 see that there's a world in which --

12 MR. KATYAL: Sure.

13 JUSTICE GORSUCH: -- Arizona wouldn't
14 have to supply this.

15 MR. KATYAL: Correct. Yes.

16 JUSTICE GORSUCH: And, in fact, the
17 federal district court found this argument
18 procedurally barred under 2244, right?

19 MR. KATYAL: Oh, oh, Mr. -- Justice
20 Gorsuch, I don't think that has anything to do
21 with it. There, they found that there was --

22 JUSTICE GORSUCH: But it's plausible
23 that it could be procedurally barred.

24 MR. KATYAL: In fed -- in federal
25 habeas court, maybe there's a federal habeas

1 barrier. We don't think that there is for
2 reasons our brief explains --

3 JUSTICE GORSUCH: Well --

4 MR. KATYAL: -- but -- but --

5 JUSTICE GORSUCH: -- but 2244 speaks
6 of requiring a decision of this Court to be
7 declared retroactive by this Court.

8 MR. KATYAL: Well, we're --

9 JUSTICE GORSUCH: And the district
10 court found that there was no such decision in
11 this case.

12 MR. KATYAL: But, Justice Gorsuch, the
13 district court is a totally separate proceeding.

14 JUSTICE GORSUCH: I understand that.

15 MR. KATYAL: Here, your grant of --

16 JUSTICE GORSUCH: I guess I'm just
17 wondering how we can fault Arizona for having a
18 rule if it were consistently followed that would
19 effectively parallel the federal rule.

20 MR. KATYAL: Well, Justice Gorsuch, I
21 don't think that whatever is going on in the
22 federal habeas bears on the jurisdiction of this
23 Court under 1257. They're two separate
24 proceedings.

25 And to answer the question presented,

1 which is simply whether or not there is an
2 adequate and independent state ground from the
3 petition of the -- from the -- from the Arizona
4 Supreme Court, I don't think matters to federal
5 habeas.

6 With respect to that, look, we don't
7 doubt that there could be waiver arguments that
8 are available even from direct -- even from
9 review of a state's post-collateral review
10 proceeding. We're not questioning any of that.

11 What we're saying here is that Cruz
12 did everything right. He preserved his argument
13 at every turn, starting from when he was --
14 starting from trial and when he was convicted
15 and then for --

16 JUSTICE GORSUCH: Well, what do we do
17 about that actually? I -- that raises another
18 point in my mind, which is the trial court,
19 admittedly not the Arizona Supreme Court, but
20 the trial court here did find that your client
21 failed to present a jury instruction along these
22 lines to preserve this argument.

23 And so even if we were to find for you
24 and say there was no independent and adequate
25 state bar, all we'd be doing is sending it back

1 to the Arizona Supreme Court to find that he
2 waived the argument in the first place and we've
3 accomplished very little.

4 MR. KATYAL: Well, that -- that was
5 just wrong under this Court's decisions in
6 Simmons and in Lynch. So, in Simmons, it
7 applied --

8 JUSTICE GORSUCH: But we wouldn't be
9 able to review that. That would just be a
10 waiver under state law, and if the Arizona
11 Supreme Court were to affirm it --

12 MR. KATYAL: No.

13 JUSTICE GORSUCH: -- you think it's
14 wrong and you could appeal, I understand, but
15 that would be all state law, right?

16 MR. KATYAL: No, Justice Gorsuch.
17 That's exactly a federal question. This Court
18 in Simmons and in Lynch said --

19 JUSTICE GORSUCH: Waiver is a federal
20 question?

21 MR. KATYAL: Well, the -- the -- the
22 reason that they're claiming waiver, which is
23 you didn't seek a jury instruction --

24 JUSTICE GORSUCH: Right.

25 MR. KATYAL: -- here, Cruz sought to

1 present evidence about his parole ineligibility,
2 and at pages 163 to 167 of the plurality in
3 Simmons and at 175 to 179 of Justice O'Connor's
4 concurrence, it says either suffices, seeking
5 evidence of parole ineligibility or a jury
6 instruction. It definitely can't be the case
7 that you couldn't or a federal court couldn't
8 review that. That is a purely federal matter.

9 JUSTICE GORSUCH: Last question, I
10 hope. In Beard, Justice Kennedy said that when
11 we -- when we approach the question of the
12 consistency of state courts' decision-making in
13 this area, adequate -- interpreting their own
14 laws, their own procedural rules, 32.1, whatever
15 it is, we have to give those state supreme
16 courts some leeway to develop their own
17 jurisprudence that we would expect to allow
18 ourselves and other federal courts.

19 What's your response to that?

20 MR. KATYAL: We -- we absolutely agree
21 with all of that, Justice Gorsuch. The test has
22 always been --

23 JUSTICE GORSUCH: So we should take
24 that as a given?

25 MR. KATYAL: -- firmly established,

1 regularly followed. That's what Justice Kennedy
2 says in that case. That's what their own brief
3 in opposition admits at page 11 is the standard.
4 There is no way you can get to regularly
5 followed and firmly established, this
6 application of the law concept. That's entirely
7 hair splitting.

8 And if you want to note just how hair
9 splitting it is, because you mentioned the trial
10 court proceedings, look at what these
11 prosecutors said to the trial court. This is
12 Joint --

13 JUSTICE GORSUCH: But I -- I -- I -- I
14 just -- on my question is, just you agree with
15 Justice Kennedy in Beard?

16 MR. KATYAL: Yes.

17 JUSTICE GORSUCH: Okay.

18 MR. KATYAL: I mean, so you could --
19 you know, so as long as it's predictable,
20 provides fair warning and firmly established,
21 absolutely. This is the opposite.

22 This is what the prosecutor said at
23 Joint Appendix page 307: "Lynch overruled a
24 well-established line of Arizona Supreme Court
25 opinions holding Simmons did not apply in

1 Arizona. It was an unambiguous rule that the
2 Defendants were not entitled to Simmons
3 instructions."

4 That's what they said then. Take a
5 look at now what they're saying at red brief,
6 page 1. They say the exact opposite. They say
7 Simmons was well-established.

8 JUSTICE JACKSON: Can I ask you, how
9 much of your -- the -- the firmly established
10 and regularly followed principle relies on bad
11 faith by Arizona?

12 Does it -- does it matter? You know,
13 you say novelty is one thing and you define it
14 in this way, and then discrimination, the result
15 is unfair. Does any of that turn on Arizona
16 doing this on purpose?

17 MR. KATYAL: No, no, not at all. So
18 it's purely about whether it's regularly
19 established and firmly -- firmly established and
20 regularly followed.

21 And the reason for that is it's kind
22 of almost like, you know, other doctrines in law
23 in which you're using it as a tell. You can't
24 actually figure out motivations. You're not
25 worried about that.

1 You just simply ask, is there fair
2 warning for the Defendant? Is this a
3 predictable rule? This is the very opposite of
4 a predictable rule and, indeed, it's so
5 unpredictable that after the prosecutor said
6 this in the trial court, the trial court on
7 post-conviction review said, quote, and this is
8 at Petition Appendix 15A, "The rule announced in
9 Simmons and Lynch is not a well-established
10 constitutional principle."

11 The Arizona Supreme Court's
12 consistently held otherwise in at least nine
13 separate opinions. So this is essentially --

14 JUSTICE GORSUCH: Mr. Katyal, I
15 thought -- I thought -- I'm sorry to interrupt,
16 but I -- I thought that -- that why they were
17 doing this was important. Whether we're looking
18 for hostility or just finality is kind of the
19 question.

20 And Justice Kennedy in Beard said that
21 what we should be looking for is a showing of a
22 purpose or pattern to evade constitutional
23 guarantees. I thought you agreed with that.

24 MR. KATYAL: Oh, he certainly does --
25 so that's essentially gravy, Justice Gorsuch.

1 So we don't need to show hostility. That's what
2 he's saying is one way in which you can show
3 that the novelty doctrine is enough. But it is
4 certainly not the only means.

5 And I think going all the way back to
6 Justice Holmes' opinion in Rodgers in 1904 all
7 the way through all of the different cases,
8 sure, some of them, like the NAACP cases, do
9 talk about hostility, but it has never been a
10 requirement, and for one very simple reason,
11 half of the novelty doctrine is based on fair
12 warning to the defendant. Another part is based
13 on hostility to federal rights.

14 JUSTICE GORSUCH: Okay. Thank you.

15 MR. KATYAL: And so --

16 JUSTICE KAGAN: Could you show a
17 hostility in this case?

18 MR. KATYAL: Oh, absolutely. This is,
19 I think, the quintessential example, Justice
20 Kagan. Again, it doesn't turn on it. It's
21 sufficient but not necessary.

22 And so, if you think about just what
23 the Arizona Supreme Court did here and, you
24 know, Cruz brings his direct review petition,
25 they say Simmons doesn't apply in 2008. Twelve

1 separate defendants bring their cases, all of
2 them, they say Simmons doesn't apply.

3 This Court then summarily reverses
4 that in Lynch in 2016, so then now they've said
5 twice, hey, Simmons does apply, this rule does
6 apply, and then the Arizona Supreme Court turns
7 on a dime and says, oh, actually, Simmons has
8 been the law all along, the exact opposite of
9 what they've been saying, the exact opposite of
10 what even the trial court on post-conviction
11 review in this case said. This is a very
12 unusual case, which is why I suspect Arizona
13 stands alone in this Court.

14 And to be sure, there are broader
15 arguments we're making about discrimination in
16 federal law and so on. We don't think you have
17 to reach any of that.

18 We think you can just simply say this
19 is a jerry-rigged interpretation for this case
20 only. There's not -- the opposite of regularly
21 followed and firmly established and leave it at
22 that.

23 JUSTICE SOTOMAYOR: Counsel --

24 JUSTICE ALITO: Mr. Katyal, whether
25 Arizona stands alone or not doesn't have much to

1 do with the question that we have to decide.
2 But why would we expect other states to file in
3 a case that involves the kind of stuff that
4 you've been talking about the interpretation of
5 a -- one particular state procedural rule?

6 MR. KATYAL: Well, because my friend
7 on the other side says, if you do this, it's
8 going to open federal court review to other
9 states and things like that.

10 And our only point here is to just
11 simply say, you know, no other state's worried
12 about it because I think this is a really unique
13 fact pattern. There are 27 states that have the
14 death penalty. Nothing about that. Sixteen
15 states have --

16 JUSTICE ALITO: Okay. Well, I -- I
17 don't --

18 MR. KATYAL: -- parole ineligibility.

19 JUSTICE ALITO: -- if it's a really
20 unique fact pattern, then I don't know what --
21 whether -- why it matters whether other states
22 are here or not.

23 To get back to the question I was
24 trying to address in my prior question, suppose
25 Arizona says or any state says that we will

1 limit this form of collateral review to
2 situations in which we, in our judgment, believe
3 that there has been a significant change in the
4 law, including federal law. So it's solely
5 their judgment as to whether there's been a
6 significant change or not. Is there anything
7 wrong with that?

8 MR. KATYAL: I think there could be
9 under this Court's precedents in Danforth and
10 Yates. We don't think you have to get there,
11 but I think those cases do set forth a minimum
12 amount -- a minimum floor of retroactivity. And
13 if the state post-conviction review proceeding
14 isn't open to them, to certain federal claims,
15 then I think it could present a problem under
16 this Court's decisions.

17 JUSTICE ALITO: So this is your
18 argument about independence?

19 MR. KATYAL: It's an argument -- I
20 think it would probably be more about adequacy,
21 Justice Alito, that basically the state is not
22 offering an adequate ground because that -- that
23 forum is only open to certain claims.

24 Now, again, our point is you don't
25 need to have post-conviction review, but if you

1 do so, it's got to be even-handed. It's got to
2 be done in advance with notice for a defendant.
3 Someone like Cruz did everything right, making
4 his objection at the trial, making it at
5 sentencing, making it after sentencing on direct
6 review, filing his post-conviction review
7 proceeding soon after this Court's decision in
8 Lynch. And yet they turn on a dime and say, oh,
9 no, now there's a new interpretation of 32.1.

10 And I think you should, if you'd like,
11 ask my friend on the other side, name one
12 precedent ever when the Arizona Supreme Court,
13 indeed, any court in Arizona, said 31.2(g) is
14 not met when precedent has been overturned.

15 They can't point to a single example.
16 We point to many the other way, including most
17 prominently the Rendon decision. And so --

18 JUSTICE ALITO: Mr. Katyal, before
19 your time, your regular time is up, why isn't
20 the situation that I posited the same as the
21 situation in Stewart versus Smith?

22 MR. KATYAL: I'm so sorry, Justice
23 Alito. I'm not familiar with Stewart versus
24 Smith.

25 JUSTICE ALITO: Okay.

1 MR. KATYAL: I don't think that was
2 briefed in this case.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

7 JUSTICE SOTOMAYOR: Just one question,
8 Mr. Katyal. I think underlying some of Justice
9 Alito's questions and Justice Gorsuch's
10 questions was a view, not a belief, that the
11 Arizona Supreme Court interpretation of Rule
12 32.1(g) isn't completely novel interpretation
13 but only a reasonable extension of that court's
14 Rule 32.1(g) jurisprudence to a new context.

15 Why do you think that's wrong?

16 MR. KATYAL: Because it's literally
17 the opposite of the rule that's been applied in
18 cases like Rendon, in which they say overturning
19 precedent is the archetypal example of a
20 significant change in law. This idea that
21 there's -- that application of the law is
22 somehow the distinction, whatever that is, it's
23 not regularly followed. It's certainly not
24 firmly established.

25 This rule, 31.2(g), has been around

1 for decades. Not a single court has ever
2 interpreted it this way. And it has been the
3 time-honored rule, Justice Sotomayor, of this
4 Court, starting with Justice Holmes in 1904 but
5 going to Ward versus Board, going to Patterson,
6 going to Flowers, going to Bouie, going to Ford
7 versus Georgia, in which Justice Thomas was on
8 that unanimous decision. All of these cases are
9 ones in which this Court says that's a novel
10 interpretation, you can't do it. Maybe going
11 forward you can, but certainly not to people
12 like Cruz, and we know it made a difference in
13 this case.

14 JUSTICE SOTOMAYOR: Now Stewart versus
15 Smith was briefed in the red -- was mentioned in
16 the red brief on page 16. Do you want to take a
17 look at it? After your --

18 MR. KATYAL: I'll have a rebuttal --

19 JUSTICE SOTOMAYOR: Okay.

20 MR. KATYAL: -- if I could.

21 JUSTICE SOTOMAYOR: Oh, you will.

22 Okay.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 Okay. Thank you, counsel.

25 Mr. Kanefield.

1 ORAL ARGUMENT OF JOSEPH A. KANEFIELD
2 ON BEHALF OF THE RESPONDENT

3 MR. KANEFIELD: Mr. Chief Justice, and
4 may it please the Court:

5 On May 26, 2003, the Petitioner
6 murdered Tucson Police Officer Patrick Hardesty
7 in the line of duty by shooting him five times
8 at point-blank range. He comes here today on
9 appeal of a successive state post-conviction
10 judgment to obtain a new penalty phase so that
11 he can request the parole ineligibility
12 instructions under Simmons v. South Carolina, a
13 case which predated his trial by over a decade.

14 The Arizona Supreme Court's holding
15 that Rule 32.1(g) precludes Petitioner's request
16 for successive post-conviction relief is
17 grounded in the core principle of finality
18 and is adequate and independent state ground for
19 its judgment.

20 The holding is adequate because Rule
21 32.1(g) has been firmly established and
22 regularly followed. Under the rule, Arizona's
23 indisputable interest in finality of criminal
24 convictions can only yield to a claim based on
25 those rare decisions announcing a new rule of

1 law or a significant statutory or constitutional
2 amendment. Here, Petitioner did not make that
3 showing.

4 This Court's 2016 decision in Lynch
5 did not change the Simmons right. Instead, it
6 merely corrected the Arizona Supreme Court's
7 erroneous application of the Simmons rule in the
8 unique context of Arizona's sentencing and
9 parole statutes. Thus, the Arizona Supreme
10 Court held that Lynch was not a significant
11 change in the law under the rule, which is a
12 state law holding.

13 The Arizona Supreme Court's holding is
14 also independent because its significant change
15 analysis under the first prong of Rule 32.1(g)
16 does not require any determination on the merits
17 of Petitioner's federal law claim. This Court
18 looked only to whether Lynch significantly
19 changed existing law, which is a state
20 procedural question.

21 For these reasons, this Court should
22 find that the Arizona Supreme Court's ruling was
23 adequate and independent.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: If the Arizona

1 Supreme Court had decided Lynch, would it have
2 been a significant rule?

3 MR. KANEFIELD: No, Your Honor. It
4 would have --

5 JUSTICE THOMAS: Significant change?

6 MR. KANEFIELD: It -- it would have
7 been the same as this Court, same analysis.

8 JUSTICE THOMAS: Have there been
9 examples where the Arizona Supreme Court changed
10 one of its precedents or overruled one of its
11 precedents and then said it wasn't a significant
12 change?

13 MR. KANEFIELD: We haven't found any
14 specific example of where that's occurred, Your
15 Honor. But this -- that doesn't say --

16 JUSTICE JACKSON: So then how can you
17 so -- be so confident that if they had decided
18 Lynch, that wouldn't be a significant change? I
19 mean, if that's not the way the rule has been
20 applied in other situations, then -- then why
21 was the answer to Justice Thomas's first
22 question I know for sure that if Arizona had
23 decided Lynch, that would not count?

24 MR. KANEFIELD: Well, I guess we don't
25 know for sure, but we --

1 JUSTICE JACKSON: Okay.

2 MR. KANEFIELD: -- we can only
3 speculate, Your Honor. But I -- I -- this just
4 doesn't come up that often. So I want to make
5 sure I'm -- I'm understanding the Court's
6 question.

7 There are situations where the Arizona
8 Supreme Court has applied the rule where a case
9 has interpreted a statute for the first time,
10 like the Shrum case, and said that that was not
11 a significant --

12 JUSTICE JACKSON: But what about the
13 -- so what about the application of 32.1(g)? In
14 situations in which Arizona announces a new
15 legal rule, substantively, are those situations
16 in which 32.1(g) has ordinarily been applied
17 because there was a significant -- there was a
18 change in the law?

19 MR. KANEFIELD: Yes, Your Honor. I
20 guess the case that comes to mind is the Slemmer
21 case cited where -- it wasn't a court decision.
22 It was -- well, let me make sure I'm getting
23 this right. The Arizona Supreme Court -- there
24 was a subsequent decision involving the
25 burden-shifting self-defense instruction where

1 the court, an Arizona appellate court,
2 determined that it had been getting it wrong,
3 and the court did hold that that was a -- a
4 significant change because the rule changed
5 before --

6 JUSTICE JACKSON: But that -- why
7 isn't that this very situation if you take
8 Justice Thomas's hypothetical? I understood him
9 to say Arizona had been applying -- had been
10 rejecting the Simmons principle so that the law
11 in Arizona was that you don't get this jury
12 instruction, and then, hypothetically, if -- if
13 the Arizona court decided Lynch, suddenly
14 they're saying, okay, now you do get that
15 principle, why isn't that the case in which
16 32.1(g) would apply?

17 MR. KANEFIELD: Because, Your Honor,
18 the rule only applies in significant changes,
19 and the -- and the Arizona Supreme Court has
20 made that very clear, that that requires a clear
21 break from the past, a transformative event.
22 And, yes, the archetype is overruling prior
23 precedent, but, here, the rule was the rule in
24 Simmons. It has never changed. This --

25 JUSTICE KAGAN: Well, but it wasn't --

1 JUSTICE BARRETT: But doesn't the --

2 JUSTICE KAGAN: -- the rule in Simmons
3 in Arizona. I mean, you know, maybe I'm just
4 being simple-minded about this, but at point A,
5 Simmons was not operative in Arizona, and in
6 point B, Simmons was operative in California. A
7 change in the law.

8 MR. KANEFIELD: Well, not a -- every
9 precedent is a change to some extent, but they
10 --

11 JUSTICE KAGAN: That's a big change.

12 MR. KANEFIELD: Yes. Well --

13 JUSTICE KAGAN: I mean, the right is
14 not there to be invoked. Now the right is there
15 to be invoked. And that happened as a result of
16 Lynch. Now it's true it should have happened
17 earlier, but in Arizona, Simmons could not be
18 invoked. The -- you know, the -- the defendant
19 would have been told too bad. Now the right can
20 be invoked. That's as big a change of law that
21 there is.

22 MR. KANEFIELD: Your Honor, I just
23 respectfully disagree. That's not the way
24 the -- the Arizona Supreme Court approaches the
25 interpretation of the significance for purposes

1 of Rule 32.1(g). It has to be a change to the
2 underlying rule, not just a change to the
3 application, which Arizona clearly got it wrong.
4 This Court told the Arizona Supreme Court so.

5 I think the other thing I would point
6 out was just, obviously, the rule in Simmons
7 never changed, but the -- the --

8 JUSTICE KAGAN: The rule in Arizona
9 was that Simmons did not apply. Then the rule
10 in Arizona became Simmons did apply.
11 Significant change?

12 MR. KANEFIELD: Not --

13 JUSTICE KAGAN: It sounds like a
14 significant change.

15 MR. KANEFIELD: It's not a significant
16 change. It's a -- it's a -- it was a
17 misinterpretation. And maybe it would help to
18 look back at what happened in Simmons, where the
19 South Carolina law clearly said that if you had
20 a prior conviction, you were parole ineligible.
21 And this Court held in Simmons that the state
22 law has to absolutely prohibit the defendant's
23 release on parole. So that was clear. But, in
24 Arizona, it wasn't -- it wasn't clear because --

25 JUSTICE JACKSON: So you're saying

1 it's a change, it's just not significant, we're
2 focused on the significant.

3 MR. KANEFIELD: Absolutely, Your
4 Honor, that -- that is what -- that's a
5 threshold to coming into state habeas court in
6 Arizona, that there has --

7 JUSTICE JACKSON: So what are your
8 hallmarks for significant? So, as we're all
9 agreeing now, there's definitely a shift in
10 Arizona because now they're recognizing Simmons,
11 but in order to be significant for the purpose
12 of Rule 32.1(g), what -- what do we have to see?
13 Or what does Arizona say they have to see?
14 Because, I mean -- yeah.

15 MR. KANEFIELD: So the -- the --
16 it's -- the Shrum case of 2009, Arizona Supreme
17 Court case which you cited, that's where the
18 court set forth what the -- how -- what the rule
19 is in interpreting that, and that's that there
20 has to be a clear break from the past. There
21 has to be a transformative event. It has to be
22 a rare occurrence where the rules actually
23 change.

24 JUSTICE JACKSON: A clear break from
25 whose's perspective? I mean, clearly -- it's a

1 clear break from the courts of Arizona's
2 perspective. Do you at least concede that?

3 MR. KANEFIELD: It's -- yes.

4 JUSTICE JACKSON: Okay.

5 MR. KANEFIELD: And the example that
6 the court give is -- gave below is the Ring case
7 from this Court. Before Ring, jury
8 aggravator -- death sentence aggravators could
9 be decided by a judge. After Ring, they had to
10 be decided or determined by a jury. That was a
11 significant change.

12 JUSTICE BARRETT: But, counsel, don't
13 you think this distinction -- I mean, as I
14 understand it, it's this application of law
15 versus the underlying law itself that drives
16 your determination that this wasn't a
17 significant change for purposes of 32.1(g).

18 It seems kind of artificial, and as I
19 understand it, you know, the -- the novelty of
20 it is you hadn't had it before. This was an
21 extension of the law, extension of interpreting
22 32.1(g).

23 It just seems like hair splitting.

24 MR. KANEFIELD: Well, Your Honor, it's
25 not -- we just don't read this Court's

1 interpretation of novelty the same way. This
2 obviously is the first situation that it's been
3 presented to the Arizona Supreme Court in this
4 context.

5 I think Justice Gorsuch is pointing
6 out how this Court said in Beard it's got to --
7 you've got to give the state some flexibility,
8 especially when it's applying and it's fleshing
9 out its rule for the first time.

10 So, here, you've got a situation where
11 the rule in Simmons was never changed, but this
12 Court came in and summarily reversed the Arizona
13 Supreme Court and said you've got -- you've got
14 it wrong. You're -- you're looking at your
15 statutes the wrong way in light of what we said
16 in Simmons. So they clarified that going
17 forward.

18 But the underlying rule never changed.
19 So I -- I -- it -- it doesn't seem to be novel.
20 And one thing I'd point out --

21 JUSTICE SOTOMAYOR: How can you say
22 that, counselor? Up until this decision, all
23 prior Arizona cases applying Rule 32.1(g) asked
24 whether there had been a significant change in
25 Arizona law.

1 And Mr. Katyal is right that it was
2 always was precedent overruled. And we even had
3 it in a federal case, State versus -- this is an
4 Arizona case, State versus -- I'm pronouncing it
5 wrong, Poblete -- P-O-B-L-E-T-E -- federal
6 law --

7 MR. KANEFIELD: Poblete.

8 JUSTICE SOTOMAYOR: How do you say it?

9 MR. KANEFIELD: Poblete.

10 JUSTICE SOTOMAYOR: Poblete. Okay. I
11 should have said it in Spanish to start with.
12 It is Poblete.

13 MR. KANEFIELD: I had it wrong too,
14 Your Honor.

15 JUSTICE SOTOMAYOR: That's what
16 happens when -- that's what happens when I try
17 to Americanize phrases.

18 (Laughter.)

19 JUSTICE SOTOMAYOR: Poblete. Federal
20 law changed Arizona's view, okay, changed
21 Arizona's law on the Padilla question. And
22 there Arizona applied 32.1(g). Here, however,
23 Arizona says, nah, it asks whether there's been
24 a significant change in Supreme Court -- Supreme
25 Court law, not on Arizona law.

1 How is that not a novel
2 interpretation? It's not a different context.
3 It's a different test altogether.

4 MR. KANEFIELD: Yes.

5 JUSTICE SOTOMAYOR: So, when you're
6 applying a new test, you're missing all the
7 issues of why novelty is important because we
8 want to give people fair notice, right, and how
9 could anyone have imagined the hair splitting
10 that Arizona went through right now. All it has
11 said in the past is, if our precedents have been
12 overturned, that's 32.(g).

13 MR. KANEFIELD: Well -- well, Your
14 Honor --

15 JUSTICE SOTOMAYOR: 1.(g) I mean.

16 MR. KANEFIELD: Sorry. I didn't miss
17 --

18 JUSTICE SOTOMAYOR: Yeah. I guess the
19 bottom line is, how is that not merely something
20 radically different? It's a new test, it's not
21 a new context.

22 MR. KANEFIELD: Your Honor, I just
23 respectfully disagree. I mean, we --

24 JUSTICE SOTOMAYOR: I know you
25 disagree, but explain it to me.

1 MR. KANEFIELD: Yes. The -- again,
2 the -- we see that test as simply a restatement
3 or an extension of the test that the Arizona
4 Supreme Court long ago said was how the court
5 was going to approach interpretation --

6 JUSTICE SOTOMAYOR: Show me one
7 Arizona case before this one where either the
8 Supreme Court of the United States or the
9 Supreme Court of Arizona had overruled a
10 precedent and it had not applied 32.1(g).

11 MR. KANEFIELD: I -- I can't point you
12 to that, Your Honor. I -- all I can is echo the
13 point made by Justice Gorsuch that in this
14 Court's decision in Beard and subsequently in
15 Walker that these -- at -- at some level, you've
16 got to give the Arizona Supreme Court a chance
17 to flesh out its own rule, and that's what it
18 was doing. This was a very unique situation.
19 You know, once it --

20 JUSTICE SOTOMAYOR: But it's the only
21 unique situation where, for seven cases, it
22 refused to apply a precedent where today there
23 is an amicus brief by the Arizona Capital
24 Representation Project that says that it's even
25 refusing to apply Lynch today. It's finding

1 every reason not to apply Lynch.

2 MR. KANEFIELD: Yeah.

3 JUSTICE SOTOMAYOR: At a certain
4 point, don't we say stop?

5 MR. KANEFIELD: Well, Your Honor, I
6 don't -- I disagree with that characterization.
7 The -- the Arizona Supreme Court has absolutely
8 applied Lynch, and we cite to all the cases
9 where they have. There -- there's -- and
10 remember, there's factual issues that underlie
11 the Simmons claim. There has to be a showing of
12 future dangerousness.

13 And so there's issues that have --
14 that have to be vetted in these cases. It's
15 not -- it's not simply just you get a new
16 resentencing as a result of the Lynch case. So
17 every case has to stand on its own facts and is
18 going to apply differently.

19 JUSTICE JACKSON: But can I go back
20 to -- to Justice Sotomayor's main point there,
21 which is I understand the concept of we have to
22 give states flexibility, this is a new
23 situation, in -- the idea of application versus
24 something else is kind of new and so we're
25 announcing it here for the first time.

1 But I wonder whether this isn't a
2 place where the bad faith part of it comes in,
3 that to the extent that you would have otherwise
4 had a presumption that you needed some time to
5 work out your interpretation of this rule, in
6 this very unique situation, why shouldn't we say
7 you don't really get that presumption because
8 your friend on the other side says 12 times the
9 court told you what the law was and you refused
10 to apply it?

11 MR. KANEFIELD: Well, Justice Jackson,
12 maybe -- it might help by putting some context
13 into how this came about, because before 2002 --
14 before Ring, this was really a nonissue in
15 Arizona, so even though Simmons was decided in
16 1994, until -- from 1994 to 2002, judges
17 made these determinations --

18 JUSTICE JACKSON: I'm sorry, what is
19 the "this"? This is -- you mean whether or not
20 you get to have this instruction?

21 MR. KANEFIELD: Well, before -- yes,
22 before it ever was an issue in Arizona,
23 because -- because judges made the determination
24 of -- of death and aggravators and sentencing,
25 right.

1 So then Ring comes out and now Arizona
2 now has to apply Ring. Juries are going to make
3 the -- the aggravator determination. So the
4 first time that the issue came up was actually
5 in this case itself. So this is -- now we're
6 in -- the crime was committed in 2003. His
7 trial was in 2005.

8 So the Arizona Supreme Court's trying
9 to figure out how the -- the Simmons claim
10 applies here. It -- it was not properly
11 presented below. I'd respectfully disagree with
12 my friend --

13 JUSTICE JACKSON: So why doesn't that
14 undermine your claim then? I thought you were
15 saying ultimately that the reason why this is
16 not a -- a significant change is because this
17 was the way the law always was and so that's how
18 our rule -- why our 32(g) now bars him.

19 But you're suggesting with this part
20 of the story that Arizona wasn't really sure of
21 what the law was before, that they can't now
22 say, oh, it was so settled that you don't get
23 the benefit of collateral review because they
24 hadn't really sorted it out early on.

25 MR. KANEFIELD: Yes, Your Honor, I

1 understand the question, but the -- the -- I
2 mean, the Simmons rule is -- is clear. I mean,
3 the holding is clear. But if the future
4 dangerousness is at issue, then the defendant
5 can ask for a parole-ineligibility instruction
6 through -- either instruction or argument. What
7 was unclear was whether parole was unavailable
8 in Arizona. It -- because the problem was the
9 -- in the criminal sentencing statutes, these
10 are the statutes that the judges and the -- and
11 the prosecutors and the defense counsel are
12 looking at, it said at the time that there were
13 three options. There was either -- there was
14 either the death penalty, there was a natural
15 life sentence, or there was life with the
16 possibility of release or parole after 25 years.
17 It said that.

18 The -- the issue was in a separate
19 title, Title 41, the administrative section for
20 how parole is actually undertaken by the Arizona
21 Board of Executive Clemency. The legislature --
22 the Arizona legislature flipped off the switch.
23 So it's not even clear to us if -- if -- if
24 anyone was necessarily even aware of that early
25 on in the case.

1 So -- and then -- and then take -- you
2 have to remember in Simmons, and as I -- as I
3 read this before, this Court, you know, very
4 clearly said that the state law has to prohibit
5 the defendant's release on parole, so -- it
6 didn't though. It had that that --

7 JUSTICE JACKSON: I see. So you're
8 not at fault. It was confusing. You didn't
9 really know. It was possible that he wasn't
10 getting parole, or he would -- would get parole,
11 and so it may not apply.

12 MR. KANEFIELD: He might get it after
13 --

14 JUSTICE JACKSON: I understand.

15 MR. KANEFIELD: -- 25 years, but --

16 JUSTICE JACKSON: All right. So
17 forget the bad faith, then. I mean, you were --
18 you were doing your best in all of this time.

19 MR. KANEFIELD: It was definitely not
20 bad faith.

21 JUSTICE JACKSON: Okay.

22 MR. KANEFIELD: Absolutely not bad
23 faith by the Arizona Supreme Court.

24 JUSTICE JACKSON: So then we come now
25 to today, and this Supreme Court makes, this

1 Court, makes very clear that in this situation
2 he is supposed to get it. I'm just still
3 wondering why the rule for collateral review
4 does not allow for that to be considered a
5 change from -- a significant change from the
6 time in which Arizona was confused about whether
7 he gets it or not.

8 MR. KANEFIELD: I -- I understand.
9 It's just not the way the Arizona Supreme Court
10 approaches significance. I mean, this is a --
11 the Arizona -- remember, and this point was made
12 in some of the questioning to my colleagues,
13 that the -- Arizona doesn't have to allow for
14 this PCR process to begin with, but they do in
15 Rule 32.1(g). They allow for a successive PCR
16 to occur, and in that rare situation -- and I'm
17 quoting Justice Hurwitz's majority opinion in
18 the Shrum case -- it's got to be a rare
19 situation where the underlying rule of law has
20 changed.

21 It's not going to happen very often,
22 so it doesn't mean just because it doesn't
23 happen very often or it has to be this -- this
24 -- the way -- the context in which it's come up
25 here, that it's -- that it's somehow inadequate.

1 JUSTICE JACKSON: I thought --

2 JUSTICE KAGAN: Mr. --

3 JUSTICE JACKSON: -- we -- I thought
4 we agreed there was a change, that was just not
5 significance. So now we're saying it has to
6 change?

7 MR. KANEFIELD: Every -- every
8 appellate decision interpreting a statute is --
9 is a change in some respect. So that it's not
10 just whether there's a new case that maybe a
11 defendant would have benefited from, had that
12 case been in existence at the time of his trial.
13 That's -- that happens all the time. They --
14 you know, they -- they -- they finalize their
15 direct appeal. They finalize their as-of-right
16 habeas. Maybe they're even finalizing their
17 federal habeas. But it doesn't mean that a
18 subsequent case, just because it comes out and
19 may -- maybe it involved an interpretation of
20 statute that would have benefited the defendant,
21 that that's a significant change. That's just
22 not how the Arizona Supreme Court approaches
23 that rule.

24 JUSTICE KAGAN: Mr. Kanefiend --

25 MR. KANEFIEND: Yes.

1 JUSTICE KAGAN: -- bad faith or not, I
2 think could have Kafka would have loved this.
3 Cruz loses his Simmons claims on direct appeal
4 because the Arizona courts say point-blank
5 Simmons has never applied in Arizona. And then
6 he loses the next time around because the
7 Arizona courts says Simmons always applies in
8 California. I mean, tails you win, heads I
9 lose, whatever that expression is? I mean, how
10 -- how can you run a railroad that way?

11 MR. KANEFIELD: I -- Your Honor, it's
12 the nature of successive habeas, that he
13 absolutely had an opportunity. He was never
14 deprived of his ability to exercise his claim.
15 He didn't do it right. He didn't -- he didn't
16 do like the defendant in Lynch did. On direct
17 appeal, on habeas; he didn't even do it in his
18 federal habeas. And so --

19 JUSTICE KAGAN: Well, he didn't have a
20 claim in Arizona. I mean, Arizona had made it
21 completely clear you don't have a Simmons claim.
22 Then, after Lynch, after this Court says we
23 don't know what Arizona is doing -- I mean, a
24 summary reversal is pretty -- that's a high --
25 that's a high bar. We don't know what Arizona

1 is doing. It's clearly violating our law. And
2 then Arizona says, well, we're still not going
3 to allow you to bring the claim because Simmons
4 always applied. I mean, they just said Simmons
5 never applied.

6 MR. KANEFIELD: Your Honor, I -- in --
7 in -- in this context, obviously it applied to
8 Lynch, it applied to every defendant whose
9 appeal are pending on direct appeal
10 subsequently. It's -- this -- it's a very
11 unique situation with this rule that the Arizona
12 Supreme Court has said in these rare
13 situations --

14 JUSTICE KAGAN: Well, I hope it's a
15 unique situation, honestly, because this kind of
16 -- it's not really consistent with the legal
17 system, is that, you know, you win no matter
18 what.

19 MR. KANEFIELD: But, Your Honor, I --

20 JUSTICE KAGAN: You win when -- when
21 they say they -- it never applied. You win when
22 you say it always applied. Whatever you say,
23 you win.

24 MR. KANEFIELD: But, Justice Kagan,
25 had he -- had he presented the claim properly

1 like Lynch -- he did it in a -- he tried --
2 whether he tried or not, we don't think he did.
3 They say he did. He -- he asked the judge
4 before the trial even began to presentence him,
5 before any evidence was heard. Well, that
6 obviously wasn't proper. And then -- and then
7 he -- during the sentencing phase, he -- he
8 tried to get testimony from the clemency --
9 chairman of the Arizona Board of Executive
10 Clemency, which would have been totally
11 speculative.

12 But at the time when he needed to
13 raise this issue, when the jury -- actual jury
14 instruction was being drafted and presented,
15 there was no objection. And -- and the judge --
16 you know, instruct -- that was the time to say,
17 Your Honor, this violates Simmons. There's --
18 we don't believe there's any parole eligibility
19 ever, despite what the statute says, because the
20 statute in Title 41 says otherwise. But nobody
21 did that. He didn't do that. So to imply --

22 JUSTICE SOTOMAYOR: I -- I'm sorry,
23 counsel, 12 other people did before Lynch. And
24 each and every one of them, at least one, and I
25 think multiple ones of them, told you you were

1 wrong. They all said you're misstating in
2 Simmons -- you're misstating the rule in this
3 state. And Arizona repeatedly refused to look
4 at that. It took Lynch finally before we
5 granted cert. Some of those other people asked
6 for cert and didn't get it.

7 So you can't say that somehow Arizona
8 was sandbagged by Mr. Cruz. It had a rule that
9 Simmons didn't apply. It took us telling them
10 in Lynch all your reasons are wrong. We have
11 said why they were wrong before. Your state
12 law's clear. Now get it straight. Now Arizona
13 is given enough opportunity knowing everything
14 that's available to apply a rule it's always
15 said when our laws are overruled, you get
16 32.1(g). And it's saying no.

17 So I don't know where -- why what
18 Mr. Cruz did or didn't do before should inform
19 how we read what Arizona's doing under 32.1(g).

20 MR. KANEFIELD: Justice Sotomayor, I
21 -- I think it -- it just comes back to the
22 context the question present -- that the
23 Court asked us to -- it's not the question they
24 presented. You asked us whether the Arizona
25 court's judgment -- the Arizona Supreme Court's

1 judgment below was independent and adequate. So
2 we approached the answer to that question from
3 this Court's jurisprudence in -- under adequacy,
4 where there certainly is an interest, a state
5 interest, in finality.

6 And -- and here the -- there's nothing
7 to show that -- that -- the way the -- the way
8 we read the adequacy cases from this Court is
9 that if the state courts are -- are trying to
10 deprive defendant of exercising a federal right
11 or claim, then that's when this Court will
12 intervene and say that the state rule, even
13 though it's a valid procedural rule --

14 JUSTICE SOTOMAYOR: But -- but --

15 MR. KANEFIELD: -- is inadequate.

16 JUSTICE SOTOMAYOR: -- don't you think
17 that all of the factors we've ever talked about
18 working together here do suggest that we should
19 find this inadequate?

20 MR. KANEFIELD: No.

21 JUSTICE SOTOMAYOR: And not
22 independent? I mean, there's pieces in this
23 that it's totally novel, no notice given that
24 there would be this new thing, this new test
25 created. Federal law seems to be discriminated

1 against because it's now a new test on what --
2 federal law has to be new in some substantial
3 way. There is some elements of bad faith here.
4 What is the third factor? I've forgotten it
5 now, but there's at least a third factor where
6 there's arguments being raised.

7 Wouldn't the combination of all of
8 this suggest that we shouldn't?

9 MR. KANEFIELD: I don't -- I just
10 disagree, Your Honor. I mean, one thing I would
11 point out, I failed to mention earlier, is to
12 the extent there's this idea that the Arizona
13 Supreme Court was doing something unusual by
14 coming -- by -- by using the application
15 language.

16 JUSTICE SOTOMAYOR: Well, it's
17 certainly a new test.

18 MR. KANEFIELD: Well, and so, if the
19 -- if you look at the Arizona Supreme Court's
20 opinion below paragraph 17, you will see that
21 Justice Montgomery cites to four federal habeas
22 cases where, post-Lynch, where defendants in
23 habeas asked their habeas proceedings to be
24 stayed so that they could file a successive PCR
25 in Arizona Supreme Court and raised the Rule

1 32.1(g) argument.

2 And in every case, the court said no,
3 that that's not -- Lynch is not a significant
4 change in the law. So three different federal
5 court judges in four different cases before the
6 Arizona Supreme Court held the exact same thing.
7 So this isn't just the Arizona Supreme Court --

8 JUSTICE SOTOMAYOR: Yeah, except that
9 Arizona got it wrong 12 times before Lynch.

10 JUSTICE KAVANAUGH: Mr. Katyal makes a
11 big point, that you don't have any amicus
12 support from other states. Do you want to
13 respond to that?

14 MR. KANEFIELD: Your Honor, we're not
15 aware of any other state that has a rule similar
16 to Rule 32.1(g), so it didn't surprise us -- you
17 know, I don't -- neither did we solicit other
18 states, which is common for Attorney Generals
19 offices to do, if we think that there was --
20 that would help the Court in some way, but we
21 don't -- we don't see the reason other than we
22 certainly would have enjoyed having some more
23 support.

24 We thought we got some pretty good
25 support from the professors who made some

1 excellent points about why taking the case in
2 this posture is sort of unusual rather than
3 letting it play itself out through the direct
4 appeal, state habeas, and then federal habeas,
5 but --

6 JUSTICE JACKSON: But, with respect to
7 other states, one thing I'm a little worried
8 about is that if we rule in your favor in this
9 case, that it will be giving other states
10 essentially a roadmap for defying this Court's
11 criminal law decisions because that, you know,
12 bad faith or no, that's what happened as a sort
13 of conceptual matter in this case, that we had
14 so many times in which the Supreme Court made
15 clear, you know, Simmons made clear that this is
16 what the law was.

17 So many times Arizona said we're not
18 following it. And we had to have Lynch in order
19 to really cinch the deal. And what I'm a little
20 worried about is that that ultimately, when we
21 read our rule, if we read our -- your rule in
22 the way that you're saying, amounts to Arizona
23 having said no one convicted between 1994 and
24 2016 is going to get the benefit of Simmons,
25 that that's sort of the ultimate way in which it

1 plays out.

2 And that is a little troubling because
3 why couldn't another state do the same thing
4 with respect to a criminal law rule that -- of
5 this Court that they don't like. They just read
6 their procedural rule in this way.

7 MR. KANEFIELD: Justice Jackson, I
8 think the way I'd answer that is just to remind
9 the Justice that the state doesn't even have to
10 have this post-habeas process. That's pretty
11 clear. My -- my colleague on --

12 JUSTICE JACKSON: But, if they do --
13 if they do, can they read it, can they read the
14 rules related to it to deny federal criminal --
15 deny state defendants their federal rights as
16 announced by the Supreme Court?

17 MR. KANEFIELD: They can't deny
18 federal rights. That's crystal clear. And I
19 thought I made that point that -- that Mr. Cruz
20 was never denied his ability to exercise his
21 federal claim.

22 It's just in the context of a
23 successive PCR there has to be a significant
24 change before the court's going to allow, you
25 know, to -- to reopen a long final judgment.

1 JUSTICE KAGAN: Mr. Kanefield, can I
2 ask you about a footnote in your brief? So this
3 is on 27 at Footnote 1, and it says: The state
4 maintains that Lynch was wrongly decided. And
5 then you associate yourself with Justice
6 Thomas's dissent in that case. And it says:
7 Lynch perpetuated the court's error in Simmons
8 by imposing a magic words requirement.

9 I mean, I guess I was a little bit
10 shocked by that that you're still arguing that
11 Lynch was wrongly decided because, to me, it
12 suggests that the -- the state in its -- in its
13 many forms, many actors, is -- is just insisting
14 on not applying Lynch.

15 You know, first, you didn't apply
16 Lynch -- excuse me, not applying, you know,
17 Simmons or Lynch. You know, first, you don't
18 apply Simmons. We come in. We summarily
19 reverse you. We say, you know, here's -- here's
20 the deal. Simmons applies. That's what we say
21 in Lynch.

22 Then you contort your procedural rule
23 to say, oh, well, you know, there's a difference
24 between changes in law and changes in
25 application in law. And then, in this case,

1 you're still saying, like, Lynch is wrongly
2 decided. Simmons is wrongly decided. We can't
3 really -- we just really hate all this stuff.
4 It sounds like you're thumbing your nose at us.

5 MR. KANEFIELD: Justice Kagan,
6 absolutely no disrespect was intended by that
7 footnote to the Court, and I apologize if that's
8 the way it came across.

9 I -- I think the state -- we -- we
10 were surprised by the Lynch ruling, I think
11 because of the fact that this Court had to get
12 in, a little bit into the weeds of Arizona,
13 interpreting Arizona statutes, even though it
14 was in the context of applying the Simmons rule.
15 And I think this may be a remnant of that, of
16 that confusion.

17 But understand we absolutely respect
18 the Lynch decision and the Arizona Supreme Court
19 has applied it. But we don't think that that
20 implies any kind of bad faith or any effort to
21 deprive a defendant, this Defendant, of his
22 ability to exercise his federal rights.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. You said in response to a question
25 that Arizona courts may not deny federal rights.

1 You correctly answered yes.

2 MR. KANEFIELD: Yes, Mr. Chief
3 Justice.

4 CHIEF JUSTICE ROBERTS: But isn't the
5 issue here whether the Arizona -- Arizona can
6 limit the availability of collateral review to
7 particular types of claims? That's a very
8 different question, isn't it?

9 MR. KANEFIELD: It -- it can limit the
10 -- the successive claim to particular -- well, I
11 don't know how -- I want to make sure I say this
12 right. I want to make sure I'm answering your
13 question, Your Honor, Mr. Chief Justice. It
14 just has to --

15 CHIEF JUSTICE ROBERTS: Either one
16 works.

17 MR. KANEFIELD: -- it has to be -- it
18 has to be across the board. I mean, obviously,
19 we wholeheartedly agree that the Arizona Supreme
20 Court cannot promulgate a PCR rule in -- in a
21 way that treats the precedent from this Court
22 any different from the precedent of its own
23 court.

24 And so I think the -- the -- the
25 petitioner is incorrect to read the way this

1 Court -- the Arizona Supreme Court applied its
2 rule in this context to be -- to mean any kind
3 of disrespect or any kind of mistreatment. It
4 just found itself in a very unique situation
5 with the -- with the summary reversal in Lynch.
6 And so I hope I answered your question.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 Justice Alito?

11 JUSTICE ALITO: I thought that the
12 point of the Chief's question, maybe I -- I
13 didn't understand it, was -- concerns the -- the
14 distinction between your obligation to apply
15 federal retroactivity rules if you, at least
16 federal retroactivity rules, if you entertain
17 the claim. If you entertained this claim, you
18 couldn't apply a retroactivity rule different
19 from the federal retroactivity rule.

20 But you say that we don't have to
21 entertain it at all because of a procedural rule
22 that categorizes claims in a way that we choose
23 to adopt, correct?

24 MR. KANEFIELD: Yes, Your Honor.
25 Well, I -- again, if I'm not answering the

1 question, it's only because I don't understand.

2 JUSTICE ALITO: Okay.

3 MR. KANEFIELD: So let me just -- can
4 I just make a point, though, that Rule 32.1,
5 there's three prongs to it. So the Arizona
6 Supreme Court never got past one. It has to be
7 a significant change. It has to apply. And
8 that's where the retroactivity question would --
9 would -- would ordinarily be addressed.

10 And then it has to probably change the
11 outcome. So even if we get past significance,
12 there's a very real possibility that Mr. Cruz
13 will not survive the other components of that
14 rule.

15 JUSTICE ALITO: You could -- no one
16 contest, I -- I assume, that you could impose
17 some sort of temporal limitation or whatever --
18 whatever you choose, right? That the --

19 MR. KANEFIELD: Yes, and that's what
20 -- that was what the -- sorry.

21 JUSTICE ALITO: No, go ahead.

22 MR. KANEFIELD: That's what the Court,
23 you know, essentially addressed in Walker versus
24 Martin. And we see some parallels because
25 there, there was a note, the time to bring

1 habeas in California was without substantial
2 delay, so the Court had to wrestle with what was
3 substantial and what was insubstantial and there
4 was arguments that it wasn't being applied in a
5 -- in a -- in a uniform way. We see a lot of
6 parallels to the significance and insignificance
7 distinction in Rule 32.1(g). So the court has
8 to be given the opportunity to flesh that out in
9 -- in -- in case -- on a case-by-case
10 determination.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 Justice Kagan?

14 Thank you, counsel.

15 Rebuttal, Mr. Katyal.

16 REBUTTAL ARGUMENT OF NEAL K. KATYAL

17 ON BEHALF OF THE PETITIONER

18 MR. KATYAL: Thank you. Four points.

19 First, my friend began by -- began his
20 argument by admitting that there's "no example
21 of what Justice Barrett called a hair-splitting
22 application and interpretation. He later
23 conceded this was the "first time" this
24 interpretation of Rule 32.1(g) had ever been
25 given. That is the opposite of regularly

1 followed and firmly established every day of the
2 week.

3 Rule 32 has been around for decades.
4 It's never once been interpreted this way. It's
5 always been interpreted as overturning
6 precedent. And you don't need to speculate
7 about this because the Arizona Supreme Court in
8 Rendon had a very similar circumstance, except
9 it involved state law. That was a burglary
10 statute. The law had always stayed the same.
11 The statute always stayed the same. What
12 changed was the interpretation of the statute.
13 That court found -- the Supreme -- the Arizona
14 Supreme Court said obvious significant change in
15 the law.

16 Lynch works the same way, as Justice
17 Kagan said, at point A, the law is one wing
18 thing; at point B, it's another. At point A, 12
19 different criminal defendants are -- their death
20 sentences are affirmed. At point B, they should
21 now be reversed under this Court's decision in
22 Lynch.

23 Second, with respect to the question
24 about Stewart versus Smith, Justice Alito,
25 there's no novelty issue at all in that case, no

1 discrimination against federal law issue in that
2 case. That was just about a procedural rule
3 that just categorized a claim. It wasn't about
4 applying that law or applying that rule in any
5 way to federal law, which is, I take it, why my
6 friend never even mentioned it during his oral
7 argument.

8 Third, the jury instruction point that
9 he made. As I said to Justice Gorsuch, as a
10 matter of federal law, it's wrong under Simmons
11 and Lynch, and also it's wrong factually. Cruz
12 cited Simmons by name in his trial, Joint
13 Appendix page 54 and 55. And also, there's
14 another cert petition pending with six more
15 criminal defendants from Arizona raising the
16 same issue, and his brief in opposition admits
17 that two of them don't even have the jury
18 instruction issue because they sought the jury
19 instruction. So I think this case is briefed
20 and decided -- ready to -- you've got the merits
21 there.

22 And, finally and most importantly, I
23 want to pick up on what Justice Kagan about the
24 Kafkaesque rule here. It is striking that they
25 still have not explained why they are so

1 resistant to giving Cruz his Simmon rights --
2 Simmons rights, rights that they now say he was
3 always entitled to. They're now calling them
4 well established, but they've been arguing the
5 contrary for decades. In the end, this is about
6 one thing, making sure that Simmons rights
7 aren't extended to Cruz and people like him,
8 even though we know in this very case, from the
9 jury foreman, it would have made a massive
10 difference.

11 I know this argument gets technical
12 about all this stuff about application of rules
13 and stuff, but here's what the state is saying.
14 In plain English, they're saying that John Cruz
15 should be put to death even though, in fact,
16 because his claim was too good, that it was so
17 powerful, that it was well established at the
18 time. That is not something the Arizona Supreme
19 Court has ever said anything like before. It is
20 the essence of novel. It is the essence of
21 discrimination against decisions of this Court.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 12:25 p.m., the case
2 was submitted.)
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Official - Subject to Final Review

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