No. 21-846

In the
Supreme Court of the United States

JOHN MONTENEGRO CRUZ,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Petitioner John Montenegro Cruz sought successive 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 him to relief from his death sentence. The Arizona Supreme Court denied relief on state law procedural grounds because it found that *Lynch* was not a "significant change in the law," one of the prerequisites for relief under Rule 32.1(g). Was the Arizona Supreme Court nonetheless required to apply *Lynch* retroactively to Cruz's case?

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INTRODUCTION

Cruz was convicted of first-degree murder and sentenced to death for shooting Tucson Police Officer Patrick Hardesty five times at close range in 2003. Cruz did not ask the trial judge to instruct the jury, under *Simmons v. South Carolina*, 512 U.S. 154 (1994), that Arizona law did not allow parole for defendants, like Cruz, who committed felonies after 1993. In 2017, however, after this Court held in *Lynch v. Arizona*, 578 U.S. 613 (2016), that Arizona capital defendants were entitled to instructions under *Simmons* when the State places future dangerousness at issue, Cruz filed a successive petition for postconviction relief arguing that the lack of a *Simmons* instruction at his trial entitled him to relief under Arizona Rule of Criminal Procedure 32.1(g). Cruz now contends that the Arizona Supreme Court erred by denying relief on the basis that his claim did not qualify for relief under Rule 32.1(g) because it was not based on a "significant change in the law." Cruz has presented no compelling reason for this Court's review because he waived any error under *Simmons* or *Lynch* by failing to request a parole ineligibility instruction, the Arizona Supreme Court's decision below rests on an independent and adequate state law ground under Rule 32.1(g), and any theoretical error in his case would have been harmless.

STATEMENT OF THE CASE

A. Murder of Officer Hardesty and Cruz's trial.

On the day he was killed, Officer Patrick Hardesty was questioning Cruz as part of a hit-and-run

investigation. App. 2a. During the questioning, Cruz ran from Officer Hardesty and Officer Hardesty gave chase on foot. *Id.* at 202–03, ¶¶ 2–4. At some point during the chase, Cruz shot the officer five times, emptying the five-shot revolver he was carrying. Two shots struck Officer Hardesty's protective vest, two others struck him in the abdomen below the vest, and one entered his left eye, killing him almost instantly. *Id.* at 203, ¶¶ 5–7. Four of the shots were fired from no more than a foot away. *Id.* at 203, ¶ 6.

Cruz was indicted on one count of first-degree murder, and the State alleged as an aggravating factor supporting the death penalty that "[t]he murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer." *Id.* at 203, ¶ 8 (quoting A.R.S. § 13–703(F)(10) (2003)). The jury convicted Cruz of first-degree murder and found the aggravating factor proven. It found Cruz's mitigation insufficient to call for leniency and determined that Cruz should be sentenced to death. *Id.* at 203, ¶ 9.

B. *Simmons v. South Carolina* and Cruz's trial and appeal.

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. 512 U.S. 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).

Citing *Simmons*, Cruz requested, before his trial, that the judge decide whether he would sentence Cruz to a natural life sentence or a life sentence with the possibility of release after 25 years if the jury did not return a death sentence. *See* Motion for the Court to Determine Whether it will Sentence the Accused to Life or Natural Life Before the Jury Deliberates on the Sentence, or Alternatively, to Strike the Death Penalty, *State v. Cruz*, Pima Co. Sup. Ct. No. CR2003-1740, Sept. 17, 2003 [ROA 65]; Amended Motion for the Court to Determine Whether it will Sentence the Accused to Life or Natural Life Before the Jury Deliberates on the Sentence, or Alternatively, to Strike the Death Penalty, *State v. Cruz*, Pima Co. Sup. Ct. No. CR2003-1740, Sept. 26, 2003 [ROA 77]. Cruz argued that if the court denied this request, he would be deprived of a fair trial and "the opportunity to present the mitigating factor that he will not be released from prison," and the jury would "speculate about what the possibilities for parole would be for [him] in the event a life sentence is imposed." *Id.* Cruz also proffered mitigation testimony from the Chairman of the Arizona Board of Executive Clemency that the Board could only recommend release after 25 years, but could not order Cruz's release on parole. R.T. 1/10/05, at 62; Notice Re:

Anticipated Testimony, *State v. Cruz*, Pima Co. Sup. Ct. CR2003-1740, Jan. 12, 2005 [ROA 427], at 3.

The trial court declined to decide between the available types of life sentences before trial and also precluded the Chairman's testimony. R.T. 3/1/05, at 6. The court offered, however, to "give an instruction of the consequences of a life or natural life sentence … if the defendant so requests." R.T. 3/1/05, at 6. Cruz never so requested—he did not ask the trial court instruct the jury about his parole-ineligibility. *See, e.g.,* Objections and Proposed Modifications to the Court's Instructions Re: Phase Three, *State v. Cruz*, Pima Co. Sup. Ct. CR2003-1740, March 7, 2005 [ROA 606].

Cruz also 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." App. 30a. 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 31a. 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.*

Cruz also argued that the trial court abused its discretion by precluding testimony from the Chairman of the Arizona Board of Executive Clemency. *Id.* 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.* 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.*

The Arizona Supreme Court rejected Cruz's remaining claims and affirmed his conviction and death sentence. *Id.* at 57a. Cruz filed his first petition for postconviction relief in 2012; the postconviction court denied relief and the Arizona Supreme Court denied discretionary review. App. 3a. In 2014, Cruz initiated federal habeas corpus proceedings. *Id.* The district court denied habeas relief on March 31, 2021. *Cruz v. Shinn*, 2021 WL 1222168 (D. Ariz. March 31, 2021). His appeal to the Ninth Circuit is stayed pending these certiorari proceedings. *Cruz v. Credio et al.*, No. 21–99005, Dkt. # 17 (9th Cir. Nov. 9, 2021).

C. *Lynch v. Arizona* and Cruz's successive postconviction proceeding.

After its decision in Cruz's direct appeal, the Arizona Supreme Court consistently held in multiple cases 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 in part 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. *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, when Cruz was sentenced, the applicable *sentencing* statute (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 release on parole for defendants, like Cruz, who committed crimes after 1993.

In *Lynch*, this Court held that the Arizona Supreme Court had misinterpreted *Simmons* when it concluded 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 March 2017, Cruz filed a successive petition for post-conviction relief in Pima County Superior Court,

arguing that *Lynch* entitled him to a new sentencing proceeding under Arizona Rule of Criminal Procedure 32.1(g). Under Rule 32.1(g), a defendant may obtain relief if "[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."

The postconviction court denied relief, finding that *Lynch* was not a significant change in the law under the rule, was not retroactively applicable, and even if applied to his case it would not have "probably overturned" his sentence. App. B. On the latter point, the court noted that Cruz never asked the trial court for the relief *Simmons* and *Lynch* afford—the ability, if future dangerousness is at issue, to inform the jury of his parole ineligibility through jury instructions or argument by counsel. App. 15a–16a. The court also found that, in light of the weak mitigation Cruz presented and his murder of a police officer in the line of duty, "[n]othing in the record nor the exhibits suggest that had Mr. Cruz' jury been informed of his parole ineligibility, his sentence would have 'probably' been overturned." *Id.* at 16a–17a.

Cruz filed a petition for review in the Arizona Supreme Court. The Arizona Supreme Court granted review, but affirmed the denial of relief, holding that *Lynch* did not constitute a significant change in the law under Rule 32.1(g). App. 2a.

The court noted that, under state law, a Rule 32.1(g) "significant change in the law" "requires some transformative event, a clear break from the past." App. 6a (quoting *State v. Shrum*, 203 P.3d 1175, 1178

(Ariz. 2009)). *Lynch*, however, "did not declare any change in the law representing a clear break from the past." App. 8a. 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 9a. The state court concluded that this Court's decision in *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 11a. As a result, under Arizona law, *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 9a, 11a.[1]

Cruz now seeks certiorari review of the Arizona Supreme Court's decision.

REASONS FOR NOT GRANTING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Cruz presents no such reason. In particular, Cruz has not established that the state court has "decided an important federal question in a way that conflicts with relevant decisions of this

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[1] Cruz refers twice in passing to the Arizona Supreme Court's purported "ongoing hostility to *Simmons* and *Lynch*." Pet. at 27; *see also id.* at 3. 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).

Court." Sup. Ct. R. 10(c). Rather, Cruz "assert[s] 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 decision below rested entirely on state law grounds and Cruz merely seeks correction of the state court's denial of his petition for postconviction relief, this Court should deny certiorari

I. Cruz waived any claim under *Simmons* or *Lynch*.

At trial, Cruz waived the argument he now makes—that he was entitled to a jury instruction on parole-ineligibility. He never argued that the State placed his future dangerousness at issue and did not request a parole-ineligibility instruction in rebuttal. 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. 613, 613–14 (2016) (quoting *Shafer*, 532 U.S. at 39). Cruz waived the issue because he made no request for parole-ineligibility instruction or permission to argue parole ineligibility. Accordingly, the trial court did not refuse a parole-ineligibility instruction or prevent counsel from arguing the matter. *Simmons* error thus did not occur.

Instead, Cruz requested remedies *Simmons* does not afford. As noted previously, he asked the judge before trial to decide whether he would sentence Cruz

to natural life or life with the possibility of release after 25 years if the jury did not return a death sentence, and he proffered mitigation testimony from the Chairman of the Arizona Board of Executive Clemency that the Board could only recommend release after 25 years, but could not order Cruz to be paroled. Then, although the trial court offered to "give an instruction of the consequences of a life or natural life sentence … if the defendant so requests," R.T. 3/1/05, at 6, Cruz failed to act on the judge's offer—he "never requested to inform the jury, through instructions or argument, that, under state law, he was ineligible for parole." *Cruz v. Ryan*, 2018 WL 1524026, *49 (D. Ariz. March 28, 2018). On direct appeal to the Arizona Supreme Court, Cruz similarly failed to argue that, under *Simmons*, he should have been permitted to inform the jury of 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 Cruz did not request a *Simmons* instruction, the trial court did not err by failing to give one, and Cruz thereby waived any claim that he is 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."). Given Cruz's waiver of the issue, this Court should deny certiorari.

II. The Arizona Supreme Court's decision rested 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).

As relevant here, when Cruz initiated his successive postconviction relief proceeding in 2017, Rule 32 of the Arizona Rules of Criminal Procedure provided 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." Ariz. R. Crim. P. 32.1(g) (2017). 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 here—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." *See 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. App. 6a–11a. 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.

Cruz argues, however, that the Arizona Supreme Court was required to apply *Lynch* to his case under federal retroactivity principles mandating application

of intervening decisions involving "settled" rules. Petition at 14–21 (citing, *e.g., Yates v. Aiken*, 484 U.S. 211 (1988); and *Chaidez v. United States*, 568 U.S. 342, 347 (2013)). His argument is misplaced because the Arizona Supreme Court did not reach (nor was it required to) the question whether *Lynch* applies retroactively.

Cruz's argument concerning *Lynch*'s retroactive application ignores altogether the independent and adequate state ground doctrine. In fact, in *Yates*, on which Cruz heavily relies, 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 especially a successive collateral proceeding such as this one. And because Cruz's claim 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 Cruz relies on are thus irrelevant to the state law procedural question on which the Arizona Supreme Court resolved Cruz's petition.

Cruz incorrectly asserts that Arizona, like the 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 17 (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).

Cruz is surely aware of these state law procedural limitations. In fact, undoubtedly because a claim under Rule 32.1(a) would have been procedurally barred under state law, Cruz did not present his *Lynch* claim to the Arizona courts under that provision, but rather under Rule 32.1(g). *See* Successive Petition for Post-Conviction Relief, State v. Cruz, Pima Co. Sup. Ct. CR2003-1740 (March 9, 2017) (seeking relief under *Lynch* solely pursuant to Rule 32.1(g)). Cruz is thus incorrect that the Arizona courts do not place limits on the constitutional claims they will entertain in collateral proceedings.

Cruz also contends, 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 27 n.2 (quoting *Beard v. Kindler*, 558 U.S. 53, 60 (2009)). His assertion is incorrect.

A state procedural rule is consistently and regularly applied, and thus "adequate" to bar federal review, if it 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, Cruz argues that Rule 32.1(g) is not firmly established and regularly followed because in *Shrum*, 203 P.3d 1175, the Arizona Supreme Court stated that a significant change in the law exists "when an appellate court overrules previously binding case law," which he asserts contrasts with the decision below, 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 27 n.2. He misconstrues 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" is consistent with the decision below. *See* 203 P.3d at 1178. In its decision below, the Arizona Supreme Court addressed that principle from *Shrum*, noting that it had found a significant change in the law when *Ring*, 536 U.S. 584, 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. App. 6a–8a. 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 8a. 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 9a. Thus, Cruz is incorrect that the decision below 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 which the defendant sought to apply retroactively met Rule 32.1(g)'s first requirement because it was a significant change in the law. *Slemmer*, 823 P.2d at 49. Here, 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 the decision below rested on the independent and adequate state law procedural question of whether *Lynch* constituted a significant change in the law, Cruz is incorrect that it creates a split with other states' courts and conflicts with "the consensus approach to federal retroactivity in state courts." Petition at 21. 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 the court below never reached the question of retroactivity, its decision cannot have conflicted with how other states have addressed retroactive application of this Court's decisions. Cruz's attempt to manufacture a split among state high courts thus fails.

III. Even if *Lynch*'s retroactivity were at issue, Cruz's case presents a poor vehicle to address it.

As explained previously, Cruz failed to request a jury instruction on parole ineligibility and therefore no *Simmons* error occurred in his case. And the question Cruz asks this Court to address—whether *Lynch* must be applied retroactively to cases on collateral review—is irrelevant because, even if this Court were to hold that *Lynch* is retroactive, this would not affect the outcome of this case. Neither *Simmons* nor *Lynch* required the trial court to sua sponte give a parole-ineligibility instruction. Moreover, the court below denied relief on an independent and adequate state law ground, never reaching the federal retroactivity question.

But even if Cruz had requested a parole-ineligibility instruction, and the trial court rejected it, any hypothetical *Simmons*/*Lynch* error was harmless.[2]

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[2] In support of his argument that the lack of a *Simmons* instruction prejudiced his case, Cruz cites to a letter from a juror stating that she would have voted for a sentence of life without parole if that had been an option. Petition at 31. Cruz's citation to

Accordingly, Cruz's case presents a poor vehicle to address the federal question he attempts to present.

First, the State did not place Cruz's future dangerousness at issue, which must occur before *Simmons* entitles a capital defendant to inform the jury of his parole ineligibility. *See* 512 U.S. at 156 ("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"). A defendant's future dangerousness is at issue if it is "a logical inference from the evidence, or was injected into the case through the State's closing argument." *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002) (quotation omitted).

Here, the State did not present evidence of prior arrests or convictions for violent acts, and there was no suggestion that Cruz had a history of violent or assaultive behavior. *See, e.g., Kelly*, 534 U.S. at 249, 252–53 (jury was encouraged to consider future dangerousness based on evidence defendant had created a shank in prison, made escape attempt that included plan to use a female guard as a hostage, and had developed inclination to kill anyone who "rubbed

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the juror's letter violates "the near-universal and firmly established common-law rule in the United States flatly prohibit[ing] the admissibility of juror testimony to impeach a jury verdict," *Tanner v. United States*, 483 U.S. 107, 117 (1987), and should be disregarded. *See also* Ariz. R. Crim. P. 24.1(d) ("[T]he court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict.").

him the wrong way"). Officer Hardesty's murder did not involve a random, unprovoked attack on a stranger, which might suggest future dangerousness, but was committed during Cruz's attempt to evade arrest. Nor did the prosecutor emphasize the murder's brutality; for example, the State did not allege as an aggravating circumstance that the murder was cruel, heinous, or depraved. *See* A.R.S. § 13–751(F)(6). Instead, the victim's status as a police officer in the line of duty was the sole aggravating factor.

The purpose of a parole-ineligibility instruction under *Simmons* is to "rebut the prosecution's argument that [the defendant] posed a future danger." *Lynch*, 578 U.S. at 615; *see also O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (characterizing *Simmons* as affording a "narrow right of rebuttal … in a limited class of capital cases"). Here, there was little, if anything, for a parole ineligibility instruction to rebut since the State did not present future dangerousness as a reason to impose a death sentence.

Moreover, the Arizona Supreme Court found on direct review that Cruz's mitigation evidence was less than compelling:

> The evidence presented on most of these mitigating circumstances was weak, and Cruz established little or no causal relationship between the mitigating circumstances and the crime. Moreover, much of the mitigating evidence offered by Cruz was effectively rebutted by the State.

App. 57a, ¶ 138. There is thus little reason to think that a parole ineligibility instruction is likely to have changed the jury's sentencing verdict.

In light of the State's failure to assert future dangerousness, Cruz's murder of a police officer in the line of duty, and the weak mitigation evidence, the lack of a parole ineligibility instruction in Cruz's case was harmless beyond a reasonable doubt. *See Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) (harmless-beyond-a-reasonable-doubt standard applies to constitutional trial error). This case thus presents a poor vehicle to address *Lynch*'s retroactivity, even if that issue were properly before the Court.

CONCLUSION

The petition for writ of certiorari should be denied.

February 4, 2022

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