No. 21-____

IN THE
Supreme Court of the United States

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

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), this Court held that in cases where a capital defendant's future dangerousness is at issue, due process entitles the defendant to inform the jury that he will be ineligible for parole if not sentenced to death. For many years thereafter, the Arizona Supreme Court refused to apply *Simmons*. In *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam), this Court summarily reversed the Arizona Supreme Court's misapplication of *Simmons* and confirmed that the *Simmons* rule applies in Arizona.

This joint petition is brought by six capital defendants in Arizona whose convictions became final after *Simmons* but before *Lynch*. Petitioners were sentenced to death after being denied their right under *Simmons* to inform the jury that they were parole-ineligible. After this Court in *Lynch* applied *Simmons* to Arizona, all six petitioners sought postconviction relief in state court seeking the relief that *Simmons* and *Lynch* require. Relying on its decision in *State* v. *Cruz*, 487 P.3d 991 (Ariz. 2021), the Arizona Supreme Court denied review in all six cases.

This joint petition presents the same question presented in the pending certiorari petition in *Cruz* v. *Arizona* (petition filed Nov. 22, 2021): Whether this Court's decision in *Lynch* applied a settled rule of federal law that must be applied to cases pending on collateral review in Arizona.

PARTIES TO THE PROCEEDING

Johnathan Ian Burns, Steve Boggs, Ruben Garza, Fabio Evelio Gomez, Steven Ray Newell, and Stephen Douglas Reeves were defendants/petitioners in the proceedings below.

The State of Arizona was the plaintiff/respondent in the proceedings below.

RELATED PROCEEDINGS

Arizona Supreme Court:

State v. *Burns*, No. CR-19-0261-PC (Ariz. June 30, 2021) (unreported)

State v. *Boggs*, No. CR-18-0580-PC (Ariz. June 30, 2021) (unreported)

State v. *Garza*, No. CR-18-0207-PC (Ariz. July 30, 2021) (unreported)

State v. *Gomez*, No. CR-20-0354-PC (Ariz. July 30, 2021) (unreported)

State v. *Newell*, No. CR-18-0428-PC (Ariz. Aug. 30, 2021) (unreported)

State v. *Reeves*, No. CR-19-0182-PC (Ariz. June 30, 2021) (unreported)

Arizona Superior Court Maricopa County:

State v. *Burns*, No. CR-2007-106833-001 DT (Ariz. Super. Ct. Apr. 4, 2019) (unreported)

State v. *Boggs*, No. CR-2002-009759 (Ariz. Super. Ct. Nov. 5, 2018) (unreported)

State v. *Garza*, No. CR-1999-017624 (Ariz. Super. Ct. Mar. 15, 2018) (unreported)

State v. *Gomez*, No. CR-2000-090114 (Ariz. Super. Ct. Dec. 3, 2018) (unreported)

State v. *Newell*, No. CR-2001-009124 (Ariz. Super. Ct. June 20, 2018) (unreported)

State v. *Reeves*, No. CR-2007-135527-001 DT (Ariz. Super. Ct. Mar. 21, 2019) (unreported)

U.S. Court of Appeals for the Ninth Circuit:

Boggs v. *U.S. Dep't of Just.*, No. 20-16941 (9th Cir.) (pending)

Boggs v. *Shinn*, No. 20-99006 (9th Cir.) (pending)

Newell v. *Ryan*, No. 19-99006 (9th Cir.) (pending)

U.S. District Court for the District of Arizona:

Burns v. *Shinn*, No. 2:21-cv-1173-SPL (D. Ariz.) (pending)

Boggs v. *U.S. Dep't of Justice*, No. 2:19-cv-5238-JJT-JZB (D. Ariz. Aug. 4, 2020) (unreported, available at 2020 WL 4464369)

Boggs v. *Shinn*, No. 2:14-cv-2165-GMS (D. Ariz. Mar. 27, 2020) (unreported, available at 2020 WL 1494491)

Newell v. *Ryan*, No. 2:12-cv-02038 (D. Ariz. Mar. 20, 2019) (unreported, available at 2019 WL 1280960)

Garza v. *Shinn*, No. 2:14-cv-1901-SRB (D. Ariz.) (pending)

Gomez v. *Shinn*, No. 2:21-cv-01529-MTL (D. Ariz.) (pending)

Reeves v. *Shinn*, No. 2:21-cv-1183-DWL (D. Ariz.) (pending)

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Petitioners Johnathan Burns, Steve Boggs, Ruben Garza, Fabio Gomez, Steven Newell, and Stephen Reeves jointly petition for a writ of certiorari to review judgments of the Superior Court of Arizona Maricopa County. This joint petition is permitted by Supreme Court Rule 12.4 and is appropriate in light of the identical question of federal law presented in each case.

This joint petition is brought by six defendants sentenced to death in Arizona even though this Court's precedent at the time of their trials made clear that their death sentences violated due process. The petition presents the same question as the pending

petition in *Cruz* v. *Arizona* (petition filed Nov. 22, 2021). This Court should hold this joint petition pending its disposition of the petition in *Cruz*. If the Court grants relief in *Cruz*, it should grant this joint petition, vacate the judgments below, and remand for further proceedings consistent with its opinion in *Cruz*. If this Court declines to grant relief in *Cruz*, the Court should grant this joint petition.

OPINIONS BELOW

The Arizona Supreme Court's orders denying discretionary review in petitioners' cases are unpublished. *See* Pet. App. 414a-415a (Burns); *id.* at 416a-417a (Boggs); *id.* at 418a-419a (Garza); *id.* at 420a-421a (Gomez); *id.* at 422a-423a (Newell); *id.* at 425a-426a (Reeves).

The Arizona trial courts' decisions denying petitioners' requests for postconviction relief are unpublished. *Id.* at 1a-112a (Burns); *id.* at 113a-125a (Boggs); *id.* at 126a-148a (Garza); *id.* at 149a-163a (Gomez); *id.* at 164a-174a (Newell); *id.* at 175a-207a (Reeves).

The Arizona Supreme Court's decision affirming Burns's sentence on direct review is reported at 344 P.3d 303. *Id.* at 208a-271a. Its decision affirming Boggs's sentence on direct review is reported at 185 P.3d 111. *Id.* at 272a-315a. Its decision affirming Garza's sentence on direct review is reported at 163 P.3d 1006. *Id.* at 316a-350a. Its decision affirming Gomez's sentence on direct review is reported at 293 P.3d 495. *Id.* at 351a-367a. Its decision affirming Newell's sentence on direct is reported at 132 P.3d 833. *Id.* at 368a-401a. Its decision affirming Reeves's sentence on direct review is reported at 310 P.3d 970. *Id.* at 402a-413a.

JURISDICTION

The Arizona Supreme Court entered judgment against Burns, Boggs, and Reeves on June 30, 2021; against Garza and Gomez on July 30, 2021; and against Newell on August 30, 2021. Burns, Boggs, and Reeves had 150 days to seek certiorari. Newell had 90 days. Justice Kagan extended the time for Garza and Gomez to seek certiorari to December 13, 2021. Petitioners filed a joint petition for certiorari on November 22, 2021, which the Clerk ordered refiled. The refiled petition is timely under Supreme Court Rule 14.5. This Court's jurisdiction as to all petitioners is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend. XIV, provides in relevant part:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law."

The Supremacy Clause, U.S. Const. art. VI, para. 2, provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT

A. Legal Background

1. In *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), this Court held that where a capital

defendant's future dangerousness is placed at issue at trial, due process entitles the defendant to inform the jury that he will be ineligible for parole if not sentenced to death.

The *Simmons* plurality explained that when a jury mistakenly believes that a capital defendant "could be released on parole if he were not executed," that belief results in a "grievous misperception" and creates "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161-162. The plurality reasoned that because "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole," a "trial court's refusal to apprise the jury of information so crucial to its sentencing determination" violates due process. *Id.* at 163-164.

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, concurred in the judgment. They agreed that a defendant must be permitted to "introduce factual evidence tending to disprove the State's showing of future dangerousness." *Id.* at 176 (O'Connor, J., concurring in judgment). And they concluded that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible." *Id.* at 178.

This Court repeatedly affirmed the holding of *Simmons* in the years that followed. Thus, when "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, due process entitles the defendant to inform the jury of his parole ineligibility." *Shafer* v. *South Carolina*, 532 U.S. 36, 39 (2001) (quotation marks and alteration omitted); *see also Kelly* v. *South Carolina*, 534 U.S. 246, 248, 252 (2002); *Ramdass* v. *Angelone*, 530 U.S. 156, 166 (2000).

2. As of the date relevant here, Arizona provided two alternatives to a death sentence for defendants convicted of capital murder—first, "natural life," under which a defendant was "not eligible for commutation, parole * * * or release from confinement on any basis," and, second, "life," under which "the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years." Ariz. Rev. Stat. § 13-703(A) (2004) (recodified as Ariz. Rev. Stat. Ann. § 13-751(A)(2)). But a separate provision of Arizona law abolished parole for felons who committed their crimes as of January 1, 1994. *See id.* § 41-1604.09(I)(1). Hence, capital defendants in Arizona who committed their crimes after 1993 were ineligible for parole—regardless of whether they received a "natural life" sentence or a "life" sentence.

Nonetheless, the Arizona Supreme Court "repeatedly held that even when a defendant's future dangerousness is at issue," a trial court need not follow *Simmons*. *State* v. *Escalante-Orozco*, 386 P.3d 798, 828 (Ariz. 2017). The Arizona Supreme Court believed that *Simmons* did not apply because capital defendants in Arizona could receive "another form of release, such as executive clemency," *State* v. *Lynch*, 357 P.3d 119, 138-139 (Ariz. 2015), or because it would be improper to "speculate" about parole-ineligibility given that a change in law might render defendants "eligible

for parole" in the future, *State* v. *Cruz*, 181 P.3d 196, 207 (Ariz. 2008) (*Cruz I*).

3. In *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam), this Court corrected the Arizona Supreme Court's misapplication of *Simmons* in a summary reversal. This Court explained that, as in *Simmons*, the defendant in *Lynch* "was ineligible for parole under state law." *Id.* at 615. And, as in *Simmons*, the defendant's future dangerousness was at issue. *Id.* Accordingly, under a straightforward application of *Simmons*, the defendant in *Lynch* was entitled to inform the jury of his parole-ineligibility. *Id.*

This Court rejected the Arizona Supreme Court's contrary conclusion, explaining that it "conflicts with this Court's precedents." *Id.*

This Court rejected the theory that a *Simmons* instruction was unnecessary because the defendant was eligible for release other than parole after 25 years. As the Court explained, "the only kind of release for which Lynch would have been eligible" was "executive clemency," and "*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Id.*

This Court also rejected the state's attempt to distinguish *Simmons* on the theory that "nothing prevents the legislature from creating a parole system in the future for which Lynch would have been eligible." *Id.* at 616 (alteration omitted). The Court noted that *Simmons* itself "said that the potential for future 'legislative reform' could not justify refusing a parole-ineligibility instruction"—and that otherwise "a State could always argue that its legislature might pass a law rendering the defendant parole eligible." *Id.*

Thus, "*Simmons* and its progeny establish[ed] Lynch's right to inform his jury" of the fact that "parole was unavailable." *Id.*

The Arizona Supreme Court subsequently recognized that its decisions refusing to apply *Simmons* had been incorrect. As the Arizona Supreme Court explained, although it had "repeatedly held" that refusing to inform the jury about parole-eligibility "does not violate *Simmons*," "the Supreme Court recently rejected this holding" in *Lynch*. *Escalante-Orozco*, 386 P.3d at 828.

B. Factual Background

This joint petition arises from six Arizona death sentences that became final after this Court decided *Simmons* but before this Court corrected the Arizona Supreme Court's misapplication of *Simmons* in *Lynch*. Each petitioner's future dangerousness was placed at issue at trial; each petitioner was parole-ineligible; and each petitioner was deprived of his right under *Simmons* to inform the jury that he would never be paroled if spared the death penalty.

After this Court decided *Lynch*, all six petitioners petitioned for postconviction relief in Arizona seeking the proper evaluation of their *Simmons* claims in light of *Lynch*. Relying on its decision in *State* v. *Cruz*, 487 P.3d 991 (Ariz. 2021) (*Cruz II*), however, the Arizona Supreme Court denied relief in all six cases. Because the Arizona Supreme Court denied relief after issuing its decision in *Cruz II*, this joint petition summarizes *Cruz II* before addressing petitioners' cases.

1. Direct Review Proceedings

a. Cruz was convicted of capital murder and sentenced to death in 2005. At trial, the state placed

Cruz's future dangerousness at issue by (among other things) vigorously seeking to impeach an expert witness who testified that Cruz was unlikely to pose a danger in prison. *See* Transcript at 162-169, *Arizona* v. *Cruz*, No. CR-2003-1740 (Ariz. Super. Ct. Mar. 4, 2005). But while Cruz repeatedly urged the judge to allow him to inform the jury that he would be parole-ineligible if spared execution, the judge denied every request. Accordingly, the jury was never informed that Arizona had made parole unavailable to Cruz. Instead, the jury instructions affirmatively misled the jury into believing that Cruz *could* be eligible for parole. The court instructed the jury that, unless Cruz were sentenced to death, he could be sentenced to "[l]ife imprisonment *with a possibility of parole* or release from imprisonment" after 25 years. *Id.* Ex. 7, at 8 (emphasis added).

In Cruz's direct appeal in 2008, the Arizona Supreme Court concluded that *Simmons* did not apply in Arizona. The court declared—incorrectly—that "Cruz's case differs from *Simmons*" because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years." *Cruz I*, 181 P.3d at 207. The court also concluded—also incorrectly—that the trial judge was right to exclude testimony regarding parole-ineligibility because such testimony would have required "speculat[ion] about what the [Clemency] Board might do in twenty-five years, when Cruz might have been eligible for parole had he been sentenced to life." *Id.*

b. Petitioners, like Cruz, were sentenced to death in violation of *Simmons*. Like Cruz, the state placed their future dangerousness at issue. And, as in Cruz's

case, the trial judge in each case failed to properly instruct the jury regarding parole-ineligibility.

During Burns's trial, for example, defense counsel objected to any suggestion "that if Mr. Burns receives a life sentence, then he may receive a sentence that allows him to be paroled" after 25 years. Defendant's Objection at 1, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Sept. 28, 2010). He explained that any suggestion that Burns could be paroled "misrepresents Arizona law and unconstitutionally injects baseless speculation regarding release from prison into the jurors' decision-making process." *Id.* at 2. He added that jurors may be deterred from "voting for a life sentence because they believe[] that person would get released, and that's clearly wrong under *Simmons*." Transcript at 28, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Oct. 26, 2010).

The trial judge nonetheless declined to follow *Simmons*. The judge dismissed the issue as "semantics," rejected Burns's proposed jury instructions, and erroneously instructed the jury that Burns could be paroled or released in 25 years unless he was sentenced to death. *See* Ruling at 5, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Oct. 27, 2010); Amended PCR Petition Ex. 108, *State* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Dec. 14, 2017) ("Burns PCR Petition"). The state's argument regarding Burns's future dangerousness was so vivid that jurors asked the judge for more courtroom security, and the state declared as part of its closing argument that Burns should be executed because he "believes in violence." *See* Transcript at 61-62, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Feb. 10, 2011);

Transcript at 71, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Feb. 15, 2011).

During Reeves's trial, the judge similarly refused to allow defense counsel to present testimony regarding parole-ineligibility. Reeves's future dangerousness was plainly at issue at trial: the prosecution presented evidence that Reeves had "an underlying personality structure that has" "violence" and "recklessness" "at its roots," and a prosecution witness testified that Reeves was surveying the courtroom during the trial and knew which keys opened which passageways, suggesting he was an escape risk. PCR Petition at 15, 25, *Arizona* v. *Reeves*, No. CR-2007-135527-001 (Ariz. Super. Ct. Nov. 29, 2017) ("Reeves PCR Petition"). Defense counsel argued that it violated due process for the state to present evidence of Reeves's future dangerousness while concealing the true meaning of non-capital sentencing alternatives.

But the trial judge refused to allow Reeves to present evidence of his parole-ineligibility, concluding that such evidence would invite "speculation" and would "provide no meaningful mitigation information," particularly because Reeves could be released through executive clemency. Minute Entry at 2, *Arizona* v. *Reeves*, No. CR-2007-135527-001 (Ariz. Super. Ct. Feb. 7, 2011). The judge then instructed the jury that Reeves could be sentenced "to life imprisonment with the possibility of parole after 25 years" unless he was executed. Pet. App. 201a.

Likewise during Newell's trial, notwithstanding counsel's argument that "we all know legally that there's no possibility that he would ever be released during his lifetime," the judge misinformed the jury that Newell could be eligible for parole unless he was

executed. Transcript at 5, *Arizona* v. *Newell*, No. CR-2001-9124 (Ariz. Super. Ct. Feb. 23, 2004 AM); Transcript at 51, *Arizona* v. *Newell*, No. CR-2001-9124 (Ariz. Super. Ct. Feb. 24, 2004). The juries for Garza, Gomez, and Boggs were similarly never informed that parole was unavailable even though the state placed their future dangerousness at issue. *See* Transcript at 11-12, *Arizona* v. *Gomez*, No. CR-2000-90114 (Ariz. Super. Ct. Sept. 21, 2010 AM); Transcript at 48-55, *Arizona* v. *Boggs*, CR-2002-9759-001 (Ariz. Super. Ct. May 12, 2005); Transcript at 106-108, *Arizona* v. *Garza*, No. CR-1999-017624 (Ariz. Super. Ct. Sept. 16, 2004).

On direct review in these cases, the Arizona Supreme Court adhered to the conclusion that *Simmons* did not apply in Arizona. In Burns's case, the last of the six, the Arizona Supreme Court flatly declared that Burns had no right to present evidence of parole-ineligibility "because it would have been irrelevant." Pet. App. 254a.

2. Post-Lynch *Proceedings*

After this Court decided *Lynch*, Cruz and the six petitioners in this case each sought postconviction relief in Arizona state court. Their petitions sought the proper application of *Simmons*, as this Court had reaffirmed it in *Lynch*.

a. Cruz invoked both federal law and state law to support his argument that he was entitled to the benefit of *Lynch*. Under federal law, Cruz cited the rule of federal retroactivity articulated in *Teague* that a judicial "decision is retroactive if the decision 'was dictated by precedent existing at the time the defendant's conviction became final.' " Petition for Review at 12, *Arizona* v. *Cruz*, No. CR-17-0567-PC (Ariz. June 4,

2021) (hereinafter "Cruz Pet."). He noted that Arizona courts "adhere[] to the *Teague* retroactivity framework" and that state courts must honor federal retroactivity "under the Supremacy Clause." *Id.* at 12 n.3, 15. And he explained that because *Lynch* applied the settled rule of *Simmons*, *Lynch* "must be applied retroactively." *Id.* at 13.

Cruz also argued that he was entitled to the benefit of *Lynch* under state law. He argued that he satisfied Arizona Rule of Criminal Procedure 32.1(g), which provides that a defendant may seek postconviction relief if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g). Under Arizona law, the "archetype of such a change occurs when an appellate court overrules previously binding case law." *State* v. *Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009). Cruz argued that he qualified for relief because *Lynch* "engendered a significant change in [the Arizona Supreme] Court's application of federal constitutional law" by overruling that court's "misapplication of *Simmons* in prior Arizona capital cases." Cruz Pet. at 2.

The Arizona Supreme Court denied relief in *Cruz II*. 487 P.3d at 995-996. Despite Cruz's insistence that he was entitled to relief under both federal and state law, the Arizona Supreme Court did not address federal law at all. The court did not cite any federal retroactivity case; did not respond to Cruz's argument that *Lynch* applies on collateral review under federal law; and did not attempt to explain how *Lynch* could be anything other than a straightforward application of *Simmons*.

Instead, the Arizona Supreme Court concluded that Cruz failed to satisfy Rule 32.1(g), which requires a "significant change in the law." *Id.* at 994. The court declared that *Lynch* "does not represent a significant change in the law for purposes of Rule 32.1(g)" because *Lynch* merely "relied upon" *Simmons*, which "was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite the misapplication of that law by Arizona courts." *Id*. The court further maintained that *Lynch* was not a significant change in the law, but instead was "a significant change in the *application* of the law." *Id.* at 995. Thus, Cruz could not obtain the benefit of *Simmons* now because it had been clearly established when he was sentenced to death, even though Cruz had been denied the benefit of *Simmons* when he was sentenced to death because the Arizona Supreme Court had misapplied it.

The Arizona Supreme Court went further still, citing Cruz's argument under federal law as a reason why Cruz must lose under state law. The court seized on Cruz's argument that this Court's "*Lynch* decision was dictated by its earlier decision in *Simmons*"—an argument made in the course of explaining why Cruz was entitled to relief under federal law—as evidence that *Lynch* could not have produced "a significant change in the law"—as needed to obtain relief under state law. *Id.* at 994.

b. Petitioners, like Cruz, sought postconviction relief in Arizona state court under *Simmons* and *Lynch*. The trial court denied relief in all six of petitioners' cases. Then, after issuing its decision in *Cruz II*, the Arizona Supreme Court denied review in all six cases in unpublished orders.

REASONS FOR GRANTING THE PETITION

For years, the Arizona Supreme Court defied this Court's decision in *Simmons* by refusing to apply the *Simmons* rule to capital defendants in Arizona. This Court was forced to correct the Arizona Supreme Court's error in *Lynch*, a summary reversal of the Arizona Supreme Court's obvious misapplication of *Simmons*. The Arizona Supreme Court has now responded by defying *Lynch*.

The decisions below are wrong. Under federal law, decisions like *Lynch* that apply a settled rule must be given effect in cases adjudicating federal claims on collateral review. The Arizona Supreme Court's refusal to apply *Lynch* creates a square split by departing from the approach that at least four other state high courts have taken in materially identical circumstances. And this petition, brought by six petitioners whose claims were improperly denied for the same putative reason, is an appropriate vehicle for addressing this question of life-or-death importance.

This joint petition presents the same question as the pending petition in *Cruz* v. *Arizona* (petition filed Nov. 22, 2021). Because the Arizona Supreme Court issued a published opinion in Cruz's case and then denied review to petitioners in unpublished orders, the Court may conclude that the petition in *Cruz* presents a more suitable vehicle for review. If so, the Court should hold this joint petition pending its disposition of *Cruz*. But if the Court denies review in *Cruz*, it should grant this joint petition and correct the Arizona Supreme Court's refusal to apply *Simmons* and *Lynch* on collateral review.

I. THE ARIZONA COURTS' REFUSAL TO APPLY *LYNCH* DEFIES THIS COURT'S PRECEDENTS.

Under federal law, *Lynch* applies to cases in Arizona pending on collateral review. *Lynch* followed the settled rule of *Simmons* and therefore applies to cases on direct review and collateral review alike. The Supremacy Clause requires state courts, no less than federal courts, to apply settled federal rules to cases adjudicating federal claims on collateral review.

A. *Lynch* Applied A Settled Rule.

Under *Teague*, the retroactivity of this Court's "criminal procedure decisions turn[s] on whether they are novel." *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013). When this Court announces a "new rule" of criminal procedure, "a person whose conviction is already final may not benefit from the decision" on collateral review. *Id.*; *see Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554 (2021). By contrast, an "old" or "settled" rule "applies both on direct and collateral review." *Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007). Thus, unless an exception to *Teague* applies, a defendant seeking the benefit of an intervening decision must show "as a threshold matter that the court-made rule of which he seeks the benefit is not 'new.' " *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

While cases applying settled rules are sometimes described as warranting a "retroactive" application, they are more accurately described as raising no retroactivity issue at all. When a decision merely applies "settled precedents to new and different factual situations, no real question" arises "as to whether the later decision should apply retrospectively." *Yates* v. *Aiken*, 484 U.S. 211, 216 n.3 (1988) (quoting *United States* v. *Johnson*, 457 U.S. 537, 549 (1982)). Instead, it is "a

foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.*; *accord Desist* v. *United States*, 394 U.S. 244, 263-264 (1969) (Harlan, J., dissenting).

A decision applies an "old" or "settled" rule when the decision "is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez*, 568 U.S. at 348 (quotation marks and alteration omitted); *see Vannoy*, 141 S. Ct. at 1555 (a rule is settled if it was "*dictated* by precedent" (quotation marks omitted)). Here, it appears undisputed that *Lynch* was dictated by *Simmons*.

Lynch did not break new ground. Instead, it concluded that "*Simmons* and its progeny establish Lynch's right to inform his jury" of the fact that "parole was unavailable." 578 U.S. at 616. This Court rejected the contrary conclusion by applying *Simmons* rather than extending it, noting that the Arizona Supreme Court's decision "conflicts with this Court's precedents." *Id.* at 615. And the Court added that *Simmons* itself "expressly rejected" the arguments that the state had advanced for distinguishing it. *Id.*

That *Lynch* was a summary reversal underscores that it cannot have announced a new rule. Generally, this Court "will reverse summarily when a lower court decision is not just wrong but reflects fundamental errors." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(C) (11th ed. 2019) (quotation marks omitted). Summary reversals are reserved for situations where "the law is settled and stable" and where "the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (per curiam) (Marshall,

J., dissenting). This Court does not announce new rules through summary reversals.

The state appears to agree that *Lynch* applied a settled rule. The state acknowledged in its brief in *Cruz II* that *Lynch* "simply applied *Simmons*." Resp. to Petition for Review at 5-6, *Arizona* v. *Cruz*, No. CR-17-0567-PC (Ariz. June 4, 2021); *see also* Oral Arg. at 22:15-21 (Ariz. June 4, 2021) ("*Lynch* * * * is doing nothing more than restating its holding in *Simmons*."). And the Arizona Supreme Court similarly recognized the obvious: "the Supreme Court's *Lynch* decision was dictated by its earlier decision in *Simmons*." *Cruz II*, 487 P.3d at 994 (alteration omitted).

The question whether a particular decision applies a "new" or "settled" rule can be vexing. *See Mackey* v. *United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring). But the question in this case is easy. *Lynch* applied the rule of *Simmons*, which was settled in 1994 and reaffirmed repeatedly before petitioners' convictions became final.

B. State Postconviction Courts Must Give Effect To This Court's Decisions Applying Settled Rules.

Under the Supremacy Clause, state courts, no less than federal courts, must apply settled rules of federal constitutional law in collateral proceedings adjudicating federal rights.

This Court so held in *Yates*, a decision that dictates the result here. In *Yates*, a state prisoner sought the benefit of a due-process rule that this Court had announced in a decision issued before his conviction became final—*Sandstrom* v. *Montana*, 442 U.S. 510 (1979)—and then reaffirmed in a decision issued after

his conviction became final—*Francis* v. *Franklin*, 471 U.S. 307 (1985). *Yates* presented the question whether, in state habeas proceedings, federal law required the state supreme court to apply *Francis* even though that decision postdated the prisoner's conviction. *See* 484 U.S. at 217.

The answer was a unanimous yes. As the Court explained, it was not necessary to address the question of "the retroactivity of cases announcing new constitutional rules to cases pending on collateral review" because "*Francis* was merely an application of the principle that governed our decision in *Sandstrom* * * *, which had been decided before petitioner's trial took place." *Id.* at 215-217. The Court rejected the state's argument that it had "the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding." *Id.* at 217. The Court noted, first, that "*Francis* did not announce a new rule." *Id.* at 217-218. And the Court added, second, that the state supreme court did not place "any limit on the issues that it will entertain in collateral proceedings" and it therefore "has a duty to grant the relief that federal law requires." *Id.* at 218.

What was true in *Yates* is true here. Like the state in *Yates*, Arizona does not place any limit on the constitutional issues it entertains in collateral proceedings. To the contrary, Arizona 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." *See* Ariz. R. Crim. P. 32.1(a). Having chosen to open its collateral review proceedings to federal constitutional claims, the state in those proceedings must correctly apply

federal law. As *Yates* makes clear, a state may not create a collateral forum for adjudicating federal constitutional claims, yet refuse in that forum to apply settled federal rules.

This Court has affirmed *Yates* time and again. In *Danforth* v. *Minnesota*, 552 U.S. 264, 288 (2008), the Court clarified that while state courts may be *more* generous in their retroactivity decisions than federal courts, they may not be *less* generous. In dissent, the Chief Justice, joined by Justice Kennedy, would have gone further to hold that state courts are "bound by our rulings on whether our cases construing federal law are retroactive." *Id.* at 292 (Roberts, C.J., dissenting). Every Justice in *Danforth* thus agreed that state courts at least "must meet" federal requirements in applying settled federal rights on collateral review. *Id.* at 288 (quotation marks omitted).

This Court extended *Yates* in *Montgomery* v. *Louisiana*, 577 U.S. 190 (2016), requiring state courts to give new substantive rules of constitutional law "retroactive effect in [their] own collateral review proceedings." *Id.* at 197. The Court explained that "[u]nder the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Id.* at 204. Thus, "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.' " *Id.* at 204-205 (quoting *Yates*, 484 U.S. at 218).

Justice Scalia—joined by Justices Thomas and Alito—dissented in *Montgomery*, but that dissent distinguished *Yates* rather than disputing it,

emphasizing "the critical fact" that the claim in *Yates* "depended upon an *old rule*, settled at the time of [the defendant's] trial." *Id.* at 219 (Scalia, J., dissenting). Justice Scalia—a member of the unanimous majority in *Yates*—agreed that "when state courts provide a forum for postconviction relief, they need to play by the 'old rules' announced *before* the date on which a defendant's conviction and sentence became final." *Id.*

That principle—accepted by every Justice in *Yates* and undisputed since—required the Arizona Supreme Court to apply *Lynch* in the proceedings below.

C. The Arizona Supreme Court Had No Basis To Ignore Federal Law.

The only justification the Arizona Supreme Court has ever provided for refusing to apply *Lynch* on collateral review is found in its opinion in *Cruz II*. In that case, Cruz squarely presented the question of federal law. He stressed that *Yates* "controls the disposition of the retroactivity issue" and that "the Supremacy Clause" requires state courts to abide by federal law in adjudicating federal rights. Reply to Resp. at 4, *Arizona* v. *Cruz*, No. CR-17-0567-PC (Ariz. June 4, 2021); Cruz Pet. at 15.

But when the Arizona Supreme Court issued its decision in *Cruz II*, its response to the extensive argument over federal law was: Nothing.

The court's refusal to address federal law was inexcusable. The Supremacy Clause "does not allow federal retroactivity doctrine to be supplanted" by a more restrictive approach under state law. *Harper* v. *Va. Dep't of Tax'n*, 509 U.S. 86, 100 (1993). To the contrary, "States are independent sovereigns with plenary authority to make and enforce their own laws *as long as they do not infringe on federal constitutional*

guarantees." *Danforth*, 552 U.S. at 280 (emphasis added). In *Yates* itself, this Court rejected the argument that a state may provide a forum for adjudicating federal constitutional claims on collateral review but then "refuse to apply" a decision of this Court involving a settled rule. 484 U.S. at 217. The Arizona Supreme Court had no response to this basic lesson of *Yates*, which may explain why the court did not attempt to address it.

The Arizona Supreme Court's refusal to address federal retroactivity was particularly inappropriate in the circumstances here. Arizona Rule of Criminal Procedure 32.1(g), on which the Arizona Supreme Court relied in denying Cruz relief, allows prisoners to benefit only from intervening decisions that mark a "significant change" in the law. But, as interpreted by the Arizona Supreme Court, this rule conflicts with the federal approach, which requires courts to apply intervening decisions involving "settled" rules. *See Chaidez*, 568 U.S. at 347. Defendants seeking to benefit from *Lynch* on postconviction review therefore confront a Catch-22—they must argue that *Lynch* applied a "settled" rule for federal-law purposes and yet was a "significant change" in the law for state-law purposes.

The Arizona Supreme Court did not hesitate to spring this Catch-22 on Cruz. The court cited Cruz's accurate statement that *Lynch* "was dictated by" *Simmons* (as needed under federal law) as evidence that *Lynch* could not have produced "a significant change in the law" (as needed under state law). *Cruz II*, 487 P.3d at 994. But the Supremacy Clause does not permit a state to consider constitutional claims in its postconviction proceedings and then to close those

proceedings to exactly the kind of claim that federal law requires courts to consider. By refusing to apply settled federal rules on collateral review, Arizona's scheme discriminates against federal claims in a manner that this Court has not hesitated to invalidate. *E.g.*, *Testa* v. *Katt*, 330 U.S. 386, 394 (1947).

Because federal law is dispositive here, this Court has jurisdiction to review the judgments below. It is "well settled that the failure of the state court to pass on the Federal right" renders its decision reviewable where "the necessary effect of the judgment is to deny a Federal right." *Chi., B. & Q. Ry. Co.* v. *Illinois*, 200 U.S. 561, 580 (1906) (Harlan, J.); *see also Young* v. *Ragen*, 337 U.S. 235, 238 (1949) ("[I]t is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right."). The necessary effect of the judgments below was to deny petitioners the federal right announced in *Simmons* and affirmed in *Lynch*. These judgments are subject to this Court's review.

II. THE ARIZONA COURTS' REFUSAL TO APPLY *LYNCH* CREATES A SPLIT ON A RECURRING FEDERAL QUESTION.

The decisions in these cases conflict with the decisions of at least four state high courts that have reached the opposite conclusion in materially identical circumstances. Moreover, the decisions below conflict with the consensus approach to federal retroactivity in state courts. Even setting aside the grave stakes that this joint petition raises for the six petitioners, this Court's intervention is needed to bring uniformity to this important issue of federal law.

A. The Decisions Below Squarely Conflict With Decisions Of At Least Four State High Courts.

In *Lynch*, this Court applied a settled rule of federal law—*Simmons*—to correct Arizona's misapplication of that rule. In the *Teague* era, at least four state high courts have confronted a materially identical situation—where this Court has applied a settled federal rule to correct the state high court's misapplication of that rule. In the wake of each of those decisions, each state high court recognized that defendants were entitled to rely on this Court's corrective decision although the decision was issued after the defendant's conviction became final. Application of the corrective decision did not give the defendant the benefit of a change in the law, but merely applied the law that should have governed to begin with.

Texas: In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), this Court invalidated a Texas sentencing scheme that did not allow jurors to give meaningful effect to mitigating evidence. *Id.* at 318-319. Because *Penry* arrived at this Court on habeas rather than direct review, this Court was required to determine whether granting relief would create a "new rule." *Id.* at 313. The Court concluded that granting relief did not amount to "a 'new rule' under *Teague*," but merely involved an application of prior decisions. *Id.* at 319.

Because *Penry* applied a settled rule, the Texas Court of Criminal Appeals repeatedly authorized state habeas petitioners to rely on *Penry* "although [their] trial, direct appeal, and filing of [their] writ application all preceded the Supreme Court's decision in *Penry*." *Ex parte Goodman*, 816 S.W.2d 383, 384 (Tex. Crim. App. 1991); *accord Black* v. *State*, 816 S.W.2d

350, 364 (Tex. Crim. App. 1991). And petitioners in Texas could similarly rely on this Court's decisions further refining the settled rule applied in *Penry*. In one case, for example, the Texas high criminal court took "the unusual step of reconsidering" *sua sponte* a prisoner's *Penry* claim on the basis of this Court's intervening decisions. *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008). In another, the court allowed a prisoner to rely on intervening decisions notwithstanding a state rule—much like the Arizona rule at issue in this case—that required prisoners to point to "newly available law." *Ex parte Hood*, 304 S.W.3d 397, 406 (Tex. Crim. App. 2010). The court recognized that there "is no logical way in which [cases] can simultaneously be both 'newly available law' for state-court purposes and 'clearly established law' for federal-court purposes." *Id.* The court correctly concluded that federal law must govern. *Id.*

Mississippi: In *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), this Court invalidated a Mississippi sentencing scheme that relied on unconstitutionally vague aggravating circumstances. Two terms later, in *Stringer* v. *Black*, 503 U.S. 222 (1992), this Court held that *Clemons* did not announce a "new rule," but instead applied the settled rule of prior decisions.

The Mississippi Supreme Court allowed prisoners to invoke *Clemons* on state habeas review even where their convictions became final before *Clemons*. In light of *Stringer*, the court rejected the argument that prisoners may not rely on *Clemons* "based on a 'new rule' theory of federal retroactivity under *Teague*." *Irving* v. *State*, 618 So. 2d 58, 61 (Miss. 1992). And the court also rejected the argument that prisoners are "not entitled to rely on * * * *Clemons* as intervening

authority" under state law, which would "trap[]" prisoners "in the web" of conflicting state and federal law. *Id.* at 61-62. The court explained that, just as the prisoner in *Stringer* itself was entitled to benefit from *Clemons* on collateral review, "similarly situated petitioners" may also rely on *Clemons*. *Id.* at 61; *see also Woodward* v. *State*, 635 So. 2d 805, 811 (Miss. 1993); *Gilliard* v. *State*, 614 So. 2d 370, 376 (Miss. 1992).

California: In *Cunningham* v. *California*, 549 U.S. 270 (2007), this Court applied the rule of *Blakely* v. *Washington*, 542 U.S. 296 (2004), to invalidate a provision of California's sentencing scheme that gave judges rather than juries the "authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Cunningham*, 549 U.S. at 274-275.

Because *Cunningham* "did not extend or modify the rule established in *Blakely*, but merely applied it to the California sentencing scheme," the California Supreme Court held that *Cunningham* involved a settled rule. *In re Gomez*, 199 P.3d 574, 575, 578 (Cal. 2009). Accordingly, the California Supreme Court held that *Cunningham* must "appl[y] on collateral review of a judgment that became final before *Cunningham* was decided but after *Blakely* * * * was decided." *Id.* at 575. The California Supreme Court explained that this Court in *Cunningham* "simply applied to California's sentencing law what it viewed as a bright-line rule" of *Blakely*, and that *Cunningham* was "dictated by *Blakely*, regardless of any previous disagreement among jurists on the merits of the issue." *Id.* at 579-580. The court added that "it would not make sense for our state courts to reject claims grounded upon *Cunningham* if those claims would be granted in the federal courts." *Id.* at 576.

Florida: In *Hurst* v. *Florida*, 577 U.S. 92 (2016), this Court applied the rule of *Ring* v. *Arizona*, 536 U.S. 584 (2002), to invalidate a Florida sentencing scheme that authorized judges rather than juries to find certain facts necessary to impose a death sentence. As this Court explained, the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 577 U.S. at 98.

Following *Hurst*, the Florida Supreme Court recognized that petitioners may obtain the benefit of *Hurst* on collateral review if their convictions became final after *Ring*. The Court explained that "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time." *Mosley* v. *State*, 209 So. 3d 1248, 1280 (Fla. 2016) (per curiam); *see also id.* at 1283 (defendants sentenced to death "under Florida's former, unconstitutional capital sentencing scheme" should not be prejudiced by the "fourteen-year delay in applying *Ring* to Florida"). The Florida Supreme Court reached this result applying state law rather than federal law. But its decision—which applied the settled rule of *Hurst* retroactively to the date it was announced in *Ring*—is consistent with the approach that would govern under federal law, and thus comports with the *Danforth* principle that federal law sets "minimum requirements that States must meet but may exceed." 552 U.S. at 288.

B. The Decisions Below Conflict With States' Consensus Approach To Retroactivity.

In addition to conflicting with decisions reached by at least four state high courts in materially identical circumstances, the decisions below conflict more

broadly with the consensus approach to retroactivity in state courts.

State courts broadly agree that decisions applying settled rules must be given effect in state postconviction proceedings adjudicating federal rights. These courts correctly recognize that while "a *new* rule" is applicable "only to cases that are still on direct review," "an *old* rule applies both on direct and collateral review." *Acra* v. *State*, 105 So. 3d 460, 466 (Ala. Crim. App. 2012) (quotation marks and alteration omitted) (emphases added).[1] In refusing to apply a settled rule to cases on collateral review, the Arizona courts have departed from the overwhelming weight of state court precedent.

The Arizona Supreme Court itself has recognized its obligation to give effect to decisions applying settled rules. Even in the context of Rule 32.1(g)—the same rule the Arizona Supreme Court relied on in denying relief in *Cruz II*—the court observed that "new

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[1] *See People* v. *Smith*, 66 N.E.3d 641, 651 n.13 (N.Y. 2016) ("[A]n 'old rule' is * * * always retroactive."); *Winward* v. *State*, 355 P.3d 1022, 1025 (Utah 2015) ("decisions that are dictated by precedent * * * are retroactive"); *In re Yung-Cheng Tsai*, 351 P.3d 138, 143 (Wash. 2015) ("[O]ld rules apply to matters on both direct and collateral review."); *Beach* v. *State*, 348 P.3d 629, 638 (Mont. 2015) (defendant on collateral review "can benefit from an old rule"); *Siers* v. *Weber*, 851 N.W.2d 731, 735 (S.D. 2014) ("If the decision simply restates an old rule, the rule should be applied retroactively."); *State* v. *Sosa*, 733 S.E.2d 262, 264 (Ga. 2012) (decision applies retroactively "if it is an old rule"); *Perez* v. *State*, 816 N.W.2d 354, 359 (Iowa 2012) (decision "applies retroactively if it is not deemed a new rule"); *In re State*, 103 A.3d 227, 232 (N.H. 2014) ("[A]n old rule applies both on direct and collateral review."); *Flamer* v. *State*, 585 A.2d 736, 749 (Del. 1990) (cases "which are merely an application of the principle that governs a prior case" apply retroactively).

decisions applying 'well established constitutional principles to govern a case which is closely analogous' * * * should generally be applied retroactively, *even to cases that have become final and are before the court on collateral proceedings*." *State* v. *Slemmer*, 823 P.2d 41, 46 (Ariz. 1991) (quoting *Yates*, 484 U.S. at 216) (alteration omitted) (emphasis added). Such decisions apply on collateral review in light of "the supremacy of the United States Supreme Court on federal issues" and because they "simply explain and apply the rules that actually existed at the time the case was first decided." *Id.* at 47, 49. The Arizona Supreme Court's refusal to follow this precedent underscores its ongoing hostility to *Simmons* and *Lynch*.[2]

III. THE JOINT PETITION IS AN EXCELLENT VEHICLE TO ADDRESS THIS IMPORTANT QUESTION.

1. Because the Arizona Supreme Court issued a published opinion in Cruz's case and denied review to petitioners in unpublished orders, this Court may conclude that the pending petition in *Cruz* is a more suitable vehicle to address the important question presented. If so, this Court should hold this petition pending *Cruz*. The Court should then grant the joint petition, vacate the decisions below, and remand for

[2] In addition to its incompatibility with federal law, the Arizona Supreme Court's reliance on Rule 32.1(g) in *Cruz II* was not an "adequate" state ground because its interpretation of Rule 32.1(g) was not "firmly established and regularly followed." *Beard* v. *Kindler*, 558 U.S. 53, 60 (2009); *see Shrum*, 203 P.3d at 1178 (holding, in contrast to the decision below, that Rule 32.1(g) is satisfied "when an appellate court overrules previously binding case law"); *Slemmer*, 823 P.2d at 46 (adhering to *Yates* even in the context of a claim under Rule 32.1(g)).

the Arizona courts to reevaluate this case in light of the Court's disposition of *Cruz*.

2. Alternatively, if the Court declines to grant review in *Cruz*, this joint petition would be an excellent vehicle to address the Arizona Supreme Court's refusal to apply the settled rule of *Simmons* and *Lynch*.

This joint petition is brought on behalf of six petitioners entitled to relief under *Simmons* and *Lynch*. In this posture, even if an unforeseen vehicle problem existed as to one petitioner, that problem would not prevent this Court from reaching the question presented. And given the multiple petitioners, it would not be necessary for this Court to address the merits of each petitioner's *Lynch* claim. Instead, the Court could reject the conclusion that *Lynch* does not apply on collateral review—the only basis for the Arizona Supreme Court's decision in *Cruz II*—then remand for application of *Lynch* to the facts of each case.

3. This joint petition presents a question of life-or-death importance for the six petitioners and for the nearly two dozen other defendants with similar claims pending in Arizona. Each defendant was sentenced to death by jurors operating under the "grievous misperception" that the defendant "could be released on parole if he were not executed." *Simmons*, 512 U.S. at 161-162 (plurality opinion).

Refusing to inform the jury that a defendant will never be paroled makes an enormous practical difference in the jury room. The jury's assessment of future dangerousness is among the most important factors governing the decision to impose a death sentence. *See* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 Cornell L. Rev. 397, 404 (2001). And a wealth of research confirms

that jurors believe that a "life sentence" is normally a misnomer because even defendants sentenced to life will eventually become eligible for parole. *See id.* at 397. "Forced to choose, jurors would prefer to see the defendant executed rather than run the risk that he will someday be released." *Id.* Failing to inform the jury that a defendant is parole-ineligible invites the jury to operate on the mistaken premise that a death sentence is the only way to ensure the defendant will never again pose a danger to society. *Id.* This, in turn, heightens the risk that "powerful racial stereotype[s]" regarding dangerousness will infect jury deliberations. *See Buck* v. *Davis*, 137 S. Ct. 759, 776 (2017); *Turner* v. *Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) ("there is a unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing).

The *Simmons* errors at issue here were all the more damaging where the judge did not merely *decline* to inform the jury that the defendant was ineligible for parole (as in *Simmons*), but *affirmatively and erroneously* informed the jury that the defendant could be eligible for parole. Reeves's jury, for example, was instructed that Reeves could be sentenced to "life imprisonment *with the possibility of release from prison after 25 years*" unless he was sentenced to death. Reeves PCR Petition at 25-26 (emphasis added). Burns's jury was similarly instructed that Burns could "ask to be paroled after serving 25 years," Burns PCR Petition Ex. 108 (voir dire), and that he could be sentenced to life "with the possibility of release from prison after 25 years," Transcript at 14, *Arizona* v. *Burns*, No. CR-2007-106833-001 (Ariz. Super. Ct. Dec. 20, 2010) (penalty phase). As this Court has recognized, such an affirmative instruction cannot help but

"focus[] the jury on the defendant's probable future dangerousness." *California* v. *Ramos*, 463 U.S. 992, 1003 (1983). The prejudice to the defendant cannot be overstated when, as here, such an instruction is false.

This is not idle speculation. At Boggs's trial, a juror opined during voir dire "that dangerous criminals should be put to death" because "after a certain amount of time dangerous people get paroled." Petition for PCR at 6, *State* v. *Boggs*, No. CR-2002-009759 (June 25, 2018). The juries for all six petitioners may well have imposed life sentences had they been told that parole was not an option.

4. In addition to the life-or-death importance of this issue for petitioners, this case presents an exceptionally significant question regarding the application of federal law in state courts. State courts must be at least as generous as federal courts in applying federal rights retroactively. In light of state courts' duty to provide the relief "that federal law requires," *Yates*, 484 U.S. at 218, it is surpassingly important that state courts abide by their obligation to "play by the 'old rules' announced *before* the date on which a defendant's conviction and sentence became final." *Montgomery*, 577 U.S. at 219 (Scalia, J., dissenting). Most state courts abide by this obligation. But in these cases, the Arizona Supreme Court did not.

CONCLUSION

The joint petition for a writ of certiorari should be held pending this Court's disposition of the petition in *Cruz*. In the alternative, the joint petition should be granted.

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