

**In the
Supreme Court of the United States**

MANUEL OVANTE, JR.,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

—————
*On Petition for Writ of Certiorari
to the Superior Court of Maricopa County, Arizona*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. If a capital defendant's future dangerousness is at issue and state law makes the defendant ineligible for parole, the defendant has the right to inform the jury of that fact. *See Simmons v. South Carolina*, 512 U.S. 154 (1994). Ovante did not request to inform his jury of his parole-ineligibility, and his counsel in fact informed the jury that Ovante would spend the rest of his life in prison if not sentenced to death. Given that Ovante does not challenge these facts, should this Court nonetheless vacate that court's rejection of his *Simmons* claim and order the court to again consider it?
2. During Ovante's guilty-plea colloquy, the trial court inaccurately advised him that he could receive a parole-eligible life sentence, and it later imposed such a sentence for one of the murders. The Arizona Supreme Court subsequently held that such an illegally lenient sentence is enforceable. Did the trial court's advice that Ovante could receive a parole-eligible life sentence render his guilty plea involuntary?

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INTRODUCTION

Without the benefit of a plea agreement, Petitioner Manuel Ovante pleaded guilty to two counts of first-degree murder and one count of aggravated assault, and he admitted to both aggravating circumstances alleged by the prosecution. App. 9a–10a. During the colloquy at the change of plea hearing, the court informed Ovante that the possible sentences for first-degree murder were death, natural life, and life with the possibility of parole after serving 25 years. App. 122a. During deliberations at the conclusion of the penalty phase of the trial, the jury submitted the following written question to the judge: “Does a life sentence mean a life sentence or would parole be available?” App. 78a. In a written response, and with approval from the parties, the judge stated that “a ‘life sentence’ may mean a natural life sentence with no possibility of parole or a life sentence with the possibility to apply for parole after serving 25 calendar years.” App. 78a.

The jury imposed a death sentence for the murder of one victim and a life sentence for the murder of the other. App. 9a–10a. The trial court subsequently ordered that the life sentence include the possibility of parole. App. 2a–6a.

STATEMENT OF THE CASE

The Arizona Supreme Court summarized the facts underlying Ovante's convictions and sentences as follows:¹

On June 11, 2008, Ovante and three friends drove to Jordan Trujillo's house, hoping she would give them methamphetamine. Trujillo refused, but Ovante returned repeatedly that day attempting to obtain drugs. When Ovante and his friends entered Trujillo's home the last time, they encountered Trujillo, who was asleep on a living room couch, Damien Vickers, and Gabriel Valenzuela. Without expressing anger or distress, Ovante suddenly pulled out a gun.

Ovante pointed the gun at Valenzuela and yelled "[W]ho left the safety on?" Ovante released the safety, pointed the gun again at Valenzuela, and told him not to move. He then shot the sleeping Trujillo twice in the head and began shooting at Valenzuela and Vickers, wounding both of them. Trujillo appeared to die almost instantly, but Vickers begged for help and Valenzuela called the police.

After the shooting, Ovante and two of his friends got into a truck and tried to convince the third friend, Nathan Duran, to leave Vickers behind. Duran instead dragged Vickers into the back of the truck. Vickers was bleeding from his bullet wounds, holding onto Duran, and asking to be taken to a hospital. Ovante refused to do so. After Vickers died in the truck, Ovante decided to abandon his body in an alley. Valenzuela, who remained in the apartment, survived the attack.

The State charged Ovante with two counts of first degree murder and one count of aggravated assault. The State sought the death penalty, alleging as aggravating circumstances that Ovante had been previously convicted of a serious offense (the aggravated assault of Valenzuela), see A.R.S. § 13-751(F)(2) (2008), and had been convicted of one or more other homicides committed during the commission of the offense, see *id.* § 13-751(F)(8).

¹ The presumption of correctness applies to factual and credibility determinations made by the state appellate court. See *Wainwright v. Goode*, 464 U.S. 78, 85 (1983); *Sumner v. Mata*, 449 U.S. 539, 546-57 (1981).

At the conclusion of the penalty phase, the jury determined Ovante should be sentenced to life in prison for the murder of Trujillo and sentenced to death for Vickers' murder. Accordingly, the trial court entered sentences of life with a possibility of parole after twenty-five years for Trujillo's murder, death for Vickers' murder, and a mitigated term of six years in prison for the aggravated assault on Valenzuela.

App. 8a–10a. The Arizona Supreme Court unanimously affirmed Ovante's convictions and sentences. App. 27a.

Ovante asserted in state court post-conviction relief proceedings, as relevant here, that (1) his due process rights were violated pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), because the jury was not instructed that he was ineligible for parole and the trial court erroneously stated, in response to a jury question, that a life sentence could include the possibility of parole; and (2) his guilty plea was involuntary because the trial court incorrectly advised him during the plea colloquy that he could be eligible for parole if not sentenced to death. App. 37a–38a.

The post-conviction court summarily dismissed Ovante's claim of *Simmons* error. First, the court found that because Ovante failed to raise a claim of *Simmons* error on direct appeal, this claim was precluded under Arizona Rule of Criminal Procedure 32.2(a)(3).² App. 40a. The court alternatively rejected the claim on the merits. The court held that Ovante failed to establish that he was entitled to

² The court also found that *Lynch v. Arizona*, 578 U.S. 613 (2016), was not a significant change in the law under Arizona Rule of Criminal Procedure 32.1(g), a holding that is no longer tenable after this Court's decision in *Cruz v. Arizona*, 143 S. Ct. 650 (2023).

Simmons relief because Ovante’s future dangerousness was not at issue, but even if it was at issue, his counsel’s arguments to the jury that he would never be released from prison if sentenced to life satisfied *Simmons*’ requirements. App. 40a–43a.

Finally, the court held that Ovante’s claim challenging the trial court’s response to a jury question was precluded, and in any event Ovante was not prejudiced by the response, which informed the jury that Ovante could be sentenced to a parole-eligible life sentence. App. 53a. The court explained that the answer “obviously did not impact the jury’s decision that Life was the appropriate penalty for the murder of [Jordan] Trujillo.” App. 53a–55a. The court further noted that Ovante failed to object to the court’s answer to the jury’s question. App. 53a–55a.

Regarding Ovante’s voluntariness claim, the post-conviction court granted an evidentiary hearing to determine his “essential objective” in pleading guilty to the crimes as charged; whether the guilty pleas were knowing, voluntary, and intelligent; and whether counsel provided erroneous legal advice that was material to Ovante’s decision to plead guilty. App. 39a. At the evidentiary hearing, the trial court heard testimony from Ovante’s trial attorneys, the trial mitigation specialist, Ovante, and two lay witnesses. App. 68a–71a. Ovante testified that he would not have pleaded guilty if he had been informed that he could not receive a parole-eligible life sentence. App. 179a, 182a. The post-conviction court credited this testimony, finding that parole eligibility was a material factor to Ovante’s decision to plead guilty, among “other compelling factors.” App. 60a. Nonetheless, the court dismissed Ovante’s petition for post-conviction relief because subsequent

developments in Arizona law established that an illegally-lenient parole-eligible life sentence was enforceable. App. 59a–65a.

While acknowledging that Arizona law does not provide for a parole-eligible sentence, the post-conviction court noted that the Arizona Supreme Court had held that a parole-eligible sentence, imposed by a trial court under the mistaken impression that such a sentence was available, is enforceable. *See Chaparro v. Shinn*, 459 P.3d 50, 51–52, ¶ 2 (Ariz. 2020); App. 63a–65a; App. 68a–73a. Indeed, the trial court imposed a parole-eligible life sentence for one of Ovante’s murder convictions. Although that sentence was “illegally lenient” at the time it was imposed, *Chaparro* dictates that it must be enforced as it was imposed. Accordingly, the post-conviction court found that the incorrect information did not render Ovante’s guilty pleas involuntary.

The Arizona Supreme Court denied discretionary review of Ovante’s post-conviction claims on November 8, 2022, in an unpublished order. App. 76a.

REASONS FOR DENYING THE PETITION

This Court grants certiorari “only for compelling reasons.” Sup. Ct. R. 10. Ovante has presented no such reason for this Court to grant the writ here. While the post-conviction court’s finding that Ovante’s *Simmons* claim was precluded is at least partially overruled by *Cruz v. Arizona*, 143 S. Ct. 650 (2023), the court also rejected the claim on the merits. Ovante devotes little effort in his brief to challenging the merits of that decision. *See* Pet. at 1, 16–18. Nor does he assert that the court “decided an important federal question in a way that conflicts with relevant decisions of this Court” in rejecting the claim. Sup. Ct. R. 10(c).

Likewise, Ovante has offered no compelling reason for this Court to review the post-conviction court’s finding that his guilty pleas were not rendered involuntary by the trial court’s misstatement that he could receive a parole-eligible life sentence. Instead, he “assert[s] error consist[ing] of erroneous factual findings [and] the misapplication of a properly stated rule of law,” for which this Court “rarely grant[s]” certiorari review. Sup. Ct. R. 10. Ovante merely seeks correction of the Arizona post-conviction court’s perceived error in denying his voluntariness claim. This Court should deny Ovante’s certiorari petition.

I. The court below did not err in denying Ovante’s claim that his due process rights were violated pursuant to *Simmons* and *Lynch*.

Ovante claims that he is similarly-situated to defendants in other cases which this Court recently vacated and remanded to the state court for further consideration in light of its ruling in *Cruz*. Pet. at 17. He asks this Court to grant the same relief here, and to “remand to allow the state court the opportunity to

properly consider his *Simmons/Lynch* claim.” Pet. at 18. He ignores, however, that the state court has already addressed the merits of his *Simmons/Lynch* claim, finding no error. Ovante fails to show that the state court was wrong on the merits. As discussed below, the post-conviction court correctly found that no *Simmons* error occurred at Ovante’s trial. Remand is unnecessary.

A. No *Simmons* error is present because the trial court did not prevent Ovante from informing the jury of his parole ineligibility, and counsel informed the jury that Ovante would spend the rest of his life in prison.

In *Simmons*, this Court held that, in a capital case “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.” *Simmons*, 512 U.S. at 156. In those narrow circumstances, the defendant is entitled to inform the jury of his parole ineligibility “by way of argument by defense counsel or an instruction from the court.” *Simmons*, 512 U.S. at 169. However, *Simmons* places no affirmative duty on the court to instruct the jury absent a request from the defendant.

Here, Ovante failed to request a *Simmons* instruction or otherwise ask to inform the jury of his parole ineligibility at trial. As a result, “the trial court neither refused to instruct, nor prevented [Ovante] from informing, the jury regarding his parole ineligibility.” *State v. Bush*, 423 P.3d 370, 388, ¶ 75 (Ariz. 2018). In particular, the trial court did not prevent Ovante from arguing that he was ineligible for parole—and Ovante did so argue. Therefore, even assuming Ovante’s

future dangerousness was at issue, his due process rights under *Simmons* were not violated.

Because Ovante did not seek to inform the jury that he was ineligible for parole, his reliance on this Court's decision in *Cruz* is unavailing. There, this Court noted that at "trial, Cruz repeatedly sought to inform the jury of his parole ineligibility," but was thwarted by the trial court. 143 S. Ct. at 656. Here, in contrast, the trial court did not deprive Ovante of the ability to inform the jury that he was ineligible for parole.

Moreover, as the post-conviction court observed, *Simmons*' requirements were satisfied by counsel's argument. App. 42a–43a. Ovante's counsel argued that, if sentenced to life, Ovante would spend the rest of his life in prison, and the prosecutor did not dispute this assertion. R.T. 2/16/2010 at 61, 88–89, 91, 99, 103. Ovante does not assert that the post-conviction court erred by finding that counsel's argument satisfied *Simmons*' requirements. Because Ovante did not request that the jury be informed of his parole-ineligibility, and counsel did in fact inform the jury that Ovante would spend the rest of his life in prison, this Court should not vacate the state court's ruling or remand for the state court to again consider the merits of this claim.

B. This Court lacks jurisdiction to consider Ovante's claim of error in the trial court's response to the jury question about parole.

When the jury began deliberations, it sent the court a series of questions, including the following: "Does a life sentence mean a life sentence or would parole

be available?” App. 78a. With approval from the parties, the trial court responded that a life sentence “may mean a natural life sentence with no possibility of parole or a life sentence with the possibility to apply for parole after serving 25 calendar years.” App. 78a. In his post-conviction relief proceedings, Ovante argued that this response constituted prejudicial and reversible error. The post-conviction court found the claim precluded under Arizona law because it could have been raised on appeal but was not. App. 53a; *see* Ariz. R. Crim. P. 32.2(a)(3). The court also rejected the claim on its merits. App. 53a–55a.

This Court has “long recognized that ‘where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [its] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.’” *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). Here, the state court ruling rests upon the independent and adequate finding that the claim was precluded under Arizona law.

In Arizona, a petitioner is precluded from post-conviction relief based on any ground that: (1) could have been raised on direct appeal or in a post-trial motion; (2) was finally adjudicated on the merits on appeal or in any previous collateral proceeding; or (3) was waived at trial, on appeal, or in any previous collateral proceeding. Ariz. R. Crim. P. 32.2(a). This Court has found Arizona’s preclusion rules to be adequate and independent state grounds to preclude federal review. *See Stewart v. Smith*, 536 U.S. 856, 860–61 (2002) (determinations made under

Arizona’s preclusion rules are “independent” of federal law); *see also Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir. 1998) (rejecting argument that Arizona courts have not “strictly or regularly followed” Rule 32). Accordingly, this Court lacks jurisdiction to consider any challenge to the state court’s rejection of Ovante’s claim that the trial court incorrectly responded to a jury question.

In any event, Ovante does not clearly challenge the state court’s alternative ruling rejecting this claim on the merits. Thus, even if the state court’s ruling did not rest on adequate and independent state ground, Ovante has not provided any reason for this Court to review the claim. This Court should therefore deny certiorari on this claim.

II. The state court correctly rejected Ovante’s claim that his guilty plea was involuntary.

During Ovante’s guilty-plea colloquy, the trial court inaccurately advised him that he could receive a parole-eligible life sentence. App. 72a. The post-conviction court found, after an evidentiary hearing, that the “prospect of a release before Defendant died was a material factor to him to choose to admit guilt and eligibility factors.” App. 60a. Nonetheless, the post-conviction court held that any incorrect information about Ovante’s parole-eligibility did not render his guilty pleas involuntary. App. 72a. Ovante argues that this Court should summarily reverse the state court’s rejection of this claim, asserting it is “plainly wrong” under *Lynch* and “squarely foreclosed by this Court’s clear precedent.” Pet. at 18. He is incorrect. *Lynch* has no application to a determination of the voluntariness of a guilty plea.

The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Even assuming the possibility of receiving a parole-eligible sentence was critical to Ovante’s decision to plead guilty, that possibility did in fact exist in the end. As explained above, Ovante did receive a parole-eligible life sentence on the conviction for which he was not sentenced to death. In *Chaparro*, the Arizona Supreme Court held that the sentence is enforceable even though it was more lenient than the sentences authorized by law at the time: “Regardless of [the parole eligibility statute], Chaparro is eligible for parole after serving 25 years pursuant to his sentence, and his illegally lenient sentence is final under Arizona law.” *Chaparro*, 459 P.3d at 55, ¶ 23.

That makes this case analogous to others in which courts have declined to permit rescission of a guilty plea where the problem associated with the plea was subsequently remedied. *See, e.g., Pickens v. Howes*, 549 F.3d 377, 382 (6th Cir. 2008) (“[W]e hold that when a sentence is modified to make it consistent with state law and to give the defendant the benefit of his original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea.”); *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) (holding that rescission of the plea may be “unnecessary when the sentence is “corrected to give the defendant the benefit of the bargain”); *United States v. Roberts*, 5 F.3d 365, 368–70 (9th Cir. 1993) (remanding the case to district court to either delete the three-year term of

supervised release from the sentence or allow defendant to withdraw from his guilty plea as a remedy for court's failure to inform defendant of supervised release ramifications); *State v. Villegas*, 281 P.3d 1059, 1062, ¶ 13 (Ariz. Ct. App. 2012) (failure of court to advise the defendant correctly before entry of guilty plea was cured by the court fashioning a remedy that gave defendant "the benefit of his bargain"); *State v. Gourdin*, 751 P.2d 997, 999–1000 (Ariz. Ct. App. 1988) (defendant suffered no prejudice from illegal sentence that was modified by the court to give the defendant the benefit of his bargain). Because Ovante actually received a parole-eligible life sentence, and that sentence is enforceable under Arizona law, the post-conviction court did not err in finding that Ovante "got the benefit of the bargain" in his guilty plea.

The post-conviction court correctly rejected Ovante's voluntariness claim. Ovante was told that he could receive a parole-eligible sentence, and ultimately received such a sentence. Even if what he was told was incorrect at the time of his guilty plea, his plea was not involuntary because his parole-eligible life sentence is enforceable. This Court should deny certiorari.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

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