No. 22-7229

IN THE
Supreme Court of the United States

MANUEL OVANTE, JR.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF ARIZONA MARICOPA COUNTY

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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In this capital postconviction case, the State has conceded that the denial of Mr. Ovante's *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion) claim was based on a holding that is "no longer tenable" in light of *Cruz v. Arizona*, 143 S. Ct. 650, 657 (2023). And it does not contest that Mr. Ovante is similarly situated to the six petitioners in *Burns v. Arizona*, 143 S. Ct. 997 (2023), a case that resulted in a GVR after *Cruz*. These facts alone warrant a GVR in Mr. Ovante's case.

The State has also conceded both that the trial court wrongly advised Mr. Ovante during his guilty-plea colloquy, and that the postconviction court found that this wrong information regarding parole was a "material factor" in Mr. Ovante's decision to surrender his right to a jury trial and plead guilty. These two critical facts demonstrate that Mr. Ovante's guilty plea could not be knowing, intelligent, or voluntary. This Court should therefore grant certiorari and summarily reverse the decision holding otherwise.

I. The lower court's disposal of the *Simmons* issue is inconsistent with this Court's clear precedent. Because the issue in Mr. Ovante's case is no different than the issue presented by petitioners in *Burns v. Arizona*, this Court should grant certiorari, vacate the judgment, and remand for further consideration in light of *Cruz v. Arizona*.

The postconviction court rejected the *Simmons* issue under Rule 32.1(g) of the Arizona Rules of Criminal Procedure because the court held that *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam) was not a significant change in the law. And the State has now admitted—as it must—that the holding is "no longer tenable" after this Court's decision in *Cruz v. Arizona*. (Brief in Opposition ("BIO") at 7, n.2.) This fact alone makes Mr. Ovante similarly situated to the petitioners in *Burns v. Arizona*.

But instead of addressing the fact that until this Court's *Lynch* decision, the Arizona Supreme Court failed to apply the constitutionally required rule in *Simmons*, the State argues that the *Simmons/Lynch* issue raised below was denied on the merits and alternatively on an adequate and independent procedural basis, since the claim was not raised on direct appeal. The State's arguments, which adopt the conclusions of the lower court's decision, cannot be reconciled under this Court's precedents. As such, the State's arguments do *not* weigh against granting certiorari, but instead they highlight why a remand is critical here—so the state courts can *finally* conduct a proper and fair application of this Court's law as dictated by *Cruz*, *Lynch*, and *Simmons*.

1. Perhaps most tellingly, the State fails to explain why this Court should not treat Mr. Ovante's case as it did six similarly situated Arizona petitioners in *Burns v. Arizona*. Rather, it argues that a GVR is improper because "the state court already addressed the merits" of his claim. (BIO at 11.) But so was the case for *five* of the six petitioners in the *Burns* case. *See* App. to Joint Pet. for a Writ of Cert. at 76-82a, *Burns v. Arizona*, No. 21-847 (U.S. Oct. 24, 2021) (order in *State v. Burns* addressing the merits of *Simmons* claim and also finding the claim precluded because it could have been addressed on direct appeal); *id.* at 120a (order in *State v. Boggs* finding that "no single reasonable juror would have imposed a life sentence" had they been informed about parole ineligibility); *id.* at 136a (order in *State v. Garza* considering evidence at trial and concluding that proper juror instructions "would not 'probably overturn the defendant's conviction or sentence'"); *id.* at 155a (order in *State v. Gomez*

finding no prejudice because the defendant was not entitled to *Simmons* instruction where State failed to present evidence of future dangerousness); *id.* at 172a (order in *State v. Newell* finding "beyond a reasonable doubt, that any error in failing to give a *Lynch III* instruction 'did not contribute to or affect the verdict or sentence'").

In fact, in the *Burns* case, the State urged this Court to deny certiorari because in "almost all of the cases," the state court had "alternatively denied their claim on the merits." Br. in Opp'n, *Burns v. Arizona*, No. 21-847, 2022 WL 394740 at *1-2 (U.S. Feb. 4, 2022). But the Court rejected that argument. Thus, the fact that the lower court ostensibly reached a merits determination should not preclude this Court from treating Mr. Ovante any differently than it treated the petitioners in *Burns*.

2. Moreover, any purported merits decision below is fundamentally flawed, as it cannot be untangled from the improper application of *Simmons* and its progeny—law that Arizona courts have continued to ignore. First, relying simply on the lower court's finding that future dangerousness was not at issue (BIO at 8), the State fails to rebut the prosecutor's examination of witnesses *and* the closing argument where the State implied that Mr. Ovante would be a future danger if given a life sentence. (Pet. at 8-9.) The State also ignores the fact that the jury asked the court what "life" meant; this question alone demonstrates that future dangerousness was at the forefront of the jurors' minds during deliberations. *Shafer v. South Carolina*, 532 U.S. 36, 53 (2001) (noting that the jury's question during deliberations "left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means").

And the State remains silent on the fact that the jury was repeatedly told—incorrectly—that Mr. Ovante could be paroled if given a life sentence. The State's silence is not surprising, given that it recently admitted "that in the unique circumstance where the Court incorrectly instructs the jury that the defendant could receive a parole-eligible sentence (when legally he could not), *the instruction alone* puts future dangerousness at issue." State of Arizona's Suppl. Br., *State v. Cruz*, CR 17–0567–PC (Ariz. Apr. 13, 2023) at 14 (emphasis added). There is no question that future dangerousness was at issue during Mr. Ovante's capital sentencing.

Second, the State adopts the lower court's defective reasoning by asserting that trial counsel cured any *Simmons* violation because his closing argument asked the jury to sentence Mr. Ovante to live in prison for the rest of his life. (BIO at 12; App. 42a-43a.) That position is squarely foreclosed by this Court's precedent—precedent that Arizona courts have repeatedly refused to apply. *See Kelly v. South Carolina*, 534 U.S. 246, 257 (2002) (reiterating that defense statements to jury that defendant would die in prison are "inadequate to convey a clear understanding of [defendant's] parole ineligibility"). Perhaps more obvious, because counsel's argument occurred *prior to* the jury deliberations and thus *prior to* the jury's questions regarding parole, that argument could not ameliorate the court's subsequent erroneous instruction that Mr. Ovante could be parole eligible if sentenced to life. Because Mr. Ovante was *not* legally eligible for parole, his jury should have been correctly informed as much.

3. Finally, the State's argument that this Court lacks jurisdiction because the *Simmons* issue was denied on an adequate and independent state ground

demonstrates, once again, Arizona's attempt to evade this Court's clear precedent. (BIO at 13-14.) The idea that Mr. Ovante *could* have raised on direct appeal a claim attempting to vindicate his rights recognized under *Simmons* is belied by then-in-effect Arizona Supreme Court precedent, as well as the postconviction court's opinion itself. From the time of Mr. Ovante's capital sentencing in 2010, App. 1a, through the time that his direct appeal proceedings ended in 2013, App. 7a, the Arizona Supreme Court refused to apply *Simmons* in capital cases. *State v. Cruz*, 181 P.3d 196, 207 (Ariz. 2008); *State v. Lynch*, 357 P.3d 119, 138-39 (Ariz. 2015), *rev'd*, 578 U.S. 613 (2016). Had he attempted to raise the issue in an earlier proceeding, the state courts would have rejected it. Even the postconviction court recognized this fact:

> At the time of Defendant's 2010 penalty trial and his appeal decided in 2013, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. Accordingly, any request for a *Simmons* instruction would have failed[.]

App. 44a. (citations omitted)

The State's argument that Mr. Ovante could have vindicated his *Simmons* right on direct appeal is also in conflict with the plain language of Arizona's preclusion rules and its own precedent applying those rules. The preclusion rule that the State relies upon—Rule 32.2(a)(3) (BIO at 13)—prevents a petitioner from raising claims that were "waived at trial or on appeal, or in any previous post-conviction proceeding." Ariz. R. Crim. P. 32.2(a)(3). However, the State fails to mention Rule 32.2(b), which includes an exception to preclusion: "Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3)[.]" Ariz. R.

Crim. P. 32.2(b). Mr. Ovante sought relief under Rule 32.1(g), and thus Rule 32.2(a)(3) does not apply to him.

Further, a claim brought under Rule 32.1(g) requires there to have been a "significant change in the law," and therefore could not have been raised sooner. Under those circumstances, the Arizona Supreme Court has said that "[a] defendant is not expected to anticipate significant future changes of the law in his of-right [postconviction] proceeding or direct appeal." *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009); *see also id.* (noting that Arizona's postconviction rules do not "encourage defendants to raise a litany of claims clearly foreclosed by existing law in the faint hope that an appellate court will embrace one of those theories"). Rule 32.1(g) provides an avenue for review of Mr. Ovante's *Simmons/Lynch* claim, and the preclusion rule relied upon by the State does not deprive this Court of jurisdiction.

Mr. Ovante is entitled to have the state courts review his claim under Rule 32.1(g), as they should have done in the first instance, to assess whether *Lynch* would "probably overturn" his sentence. A GVR is warranted here.

II. The State concedes that the trial court erroneously informed Mr. Ovante regarding the possibility of parole and that the court's mis-advice was material to Mr. Ovante's decision to plead guilty. Under these circumstances, the plea is involuntary, and this Court should summarily reverse the judgment below.

In its BIO, the State does not dispute that the trial court was wrong in informing Mr. Ovante that the consequence of his plea included life with parole sentence, and it does not dispute that Mr. Ovante's decision to forgo his right to trial was based on the court's misstatement of the law. Nor does the State present a plausible explanation as to how these undisputed facts could amount a voluntary

plea. Instead, it relies upon a non-capital case decided by the Arizona Supreme Court more than a decade after the plea was entered to urge this Court to overlook the blatant constitutional error in this capital case. Similarly, the State's reliance on lower court decisions involving plea agreements in support of the idea that Mr. Ovante somehow received the "benefit of the bargain"—when no plea bargain existed here—is irrelevant. Accordingly, where the constitutional violation itself and the lower court's failure to correct that violation, directly contradicts this Court's precedents, summary reversal is warranted. *Cf. Lynch*, 578 U.S. at 615 (summarily reversing where state court's "conclusion conflicts with this Court's precedents").

1. This Court has made clear that a defendant must have a full understanding of the consequence of his plea, including the "actual value of any commitments made to him by the court," *Brady v. United States*, 397 U.S. 742, 755 (1970), as "defendants obviously weigh their prospects at trial in deciding whether" to plead guilty, *Lee v. United States*, 582 U.S. 357, 367 (2017). And to do so, they must be provided accurate information to "assess[ ] the respective consequences of a conviction after trial and by plea." *Id.* Here, when Mr. Ovante was "assessing the consequences," he was incorrectly informed of the actual, legal punishment he faced, and as a result, he made a decision that he would not have otherwise made had he been correctly informed by the court. App. 179a, 181a-83a. Just as this Court held in *Lee*, a conviction cannot stand if the defendant is provided wrong information regarding the consequences of pleading guilty where "the consequences of taking a chance at trial were not markedly harsher than pleading," and "could make all the difference." 397

U.S. at 371. The fact that it was the trial judge—and not defense counsel (as it was in *Lee*)—providing the erroneous information regarding parole eligibility makes no difference. *Cf. Libretti v. United States*, 516 U.S. 29, 51 (1995) (noting that "judge must not mislead a defendant" during change of plea).

But for the court's wrong information regarding parole, Mr. Ovante would have known that pleading guilty to first-degree murder "would *certainly*" lead to either a sentence of life without parole or death. *Lee*, 582 U.S. at 371. And while going to trial would "*[a]lmost* certainly" lead to the same result, the certainty was *not* absolute. *Id.* If he went to trial, he would have at least had a chance of being convicted of a crime less than first-degree murder, which would have not only removed the death penalty but would have provided him sentencing options other than life without parole. *See id.* at 367 ("When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive."). Therefore, no matter how small the chances were of getting a conviction less than first-degree murder, the record is undisputed that *Mr. Ovante would have gone to trial had he been correctly informed of the true consequences of his plea.* App. 179a, 182a-83a. His guilty plea was not knowingly, intelligently, or voluntarily made.

2. Even though Mr. Ovante entered his guilty plea in 2009, the postconviction court, and the State in its response, focus on the 2020 decision in *Chaparro v. Shinn*, 459 P.3d 50 (Ariz. 2020), which is merely a red herring. In *Chaparro*, the Arizona Supreme Court held that it lacked jurisdiction to correct an illegal sentence where the State failed to timely appeal and thus the illegal sentence could be enforced. *Id.*

at 143. However, that holding does not change the fact that at the time Mr. Ovante pleaded guilty, he was not eligible as *a matter of law* for any kind of parole. Nor did he have any way of knowing whether the state would appeal an illegally lenient sentence that carried the possibility of parole. In short, he did not know that if the judge imposed an illegally lenient sentence, that sentence could later ultimately be enforceable because the state would not end up appealing it. Thus, *Chapparo* has no bearing on whether Mr. Ovante entered a knowing, voluntary, and intelligent guilty plea *in 2009*.

3. Nor do the lower court decisions cited in the BIO have any bearing on the voluntariness of Mr. Ovante's guilty plea. In those cases, the defendants entered plea agreements with the state. *See Pickens v. Howes*, 549 F.3d 377 (6th Cir. 2008) (sentences to run consecutively in exchange for guilty plea); *United States v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002) (set term of imprisonment in exchange for guilty plea); *United States v. Roberts*, 5 F.3d 365 (9th Cir. 1993) (same); *State v. Villegas*, 281 P.3d 1059 (Ariz. Ct. App. 2012) (receive set term of imprisonment with eligibility for early release in exchange for guilty plea); *State v. Gourdin*, 751 P.2d 997 (Ariz. Ct. App. 1988) (same). However, here, Mr. Ovante never entered a plea bargain with the State, a fact that undermines the State's argument that Mr. Ovante's guilty plea is somehow cured because he received the "benefit of the [non-existent] bargain." Moreover, in several of the cases relied upon by the State, the courts attempted to correct the error by considering remedies such as vacating the plea itself or the original charges. *See Pickens*, 549 F.3d 377 (considering whether the

defendant was negatively affected by vacating one charge and allowing the sentence for the second charge to which the defendant was sentenced to the agreed upon term of years); *Greatwalker*, 285 F.3d at 729-30 (8th Cir. 2002) (vacating the defendant's plea based on the illegal sentence).

Here, the lower court did not attempt to fashion a remedy in its decision but rather adhered to now-overruled Arizona Supreme Court cases to justify the court providing Mr. Ovante with factually incorrect material information during the plea colloquy:

> The Supreme Court has ruled twice that this Court's advisement to Defendant of the prospect of release from a conviction for first degree murder at the time of his crimes was proper based on the appropriate and operative statutory language. *State v. Garcia*, 224 Ariz. 1, 18 ¶ 77 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶ 42 (2008)[.]

App. 60a.

As this Court has previously detailed, Arizona did not in 2009—nor does it now—have a statute authorizing parole. *See Cruz*, 143 S. Ct. at 655 ("Arizona amended its parole statute to abolish parole for all felonies committed after 1993."). The lower court refused to accept what this Court had made clear in *Lynch*: under Arizona law, "parole is available only to individuals who committed a felony before January 1, 1994." *Lynch*, 578 U.S. at 614 (citing Ariz. Rev. Stat. Ann. § 41–1604.09(I)). Instead, the court below held steadfast to incorrect statements of law in the face of this Court's clear precedent holding—*literally*—the opposite. The State fails to address this fact. Because Mr. Ovante's guilty plea was not knowing, intelligent, or voluntary, this Court should summarily reverse the judgment below holding otherwise.

CONCLUSION

For the reasons set forth in the Petition and this Reply, Mr. Ovante respectfully requests that this Court grant his petition for a writ of certiorari, vacate the lower court's judgment, and remand accordingly.

Respectfully submitted: August 17, 2023.

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