No. _____

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

PETITION FOR A WRIT OF CERTIORARI

GARRETT W. SIMPSON
Counsel of Record
Garrett Simpson, PLLC
Post Office Box 6481
Glendale, Arizona 85312
(623) 910-7216
garrettsimpson@outlook.com

VIKKI M. LILES
The Law Office of Vikki M. Liles, P.L.C
Post Office Box 5877
Sun City West, Arizona 85376
(602) 252-2110
lileslaw@msn.com

Counsel for Petitioner

QUESTIONS PRESENTED

CAPITAL CASE

Petitioner pleaded guilty to two counts of capital murder in Arizona after repeated assurances from the trial judge that one of the sentencing options was life with the possibility of parole. The same judge would later find that this information was a "material factor" in Petitioner's decision to forego a guilt-or-innocence phase trial. Petitioner's penalty-phase jurors were likewise told, both during selection and in the court's answer to their question during deliberations, that if not sentenced to death, Petitioner could be sentenced to life with the possibility of parole. Petitioner was later sentenced to death on one count and to life with the possibility of parole on the other count.

As this Court made clear in *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam), the trial court's statements to Petitioner and his jury about parole eligibility were wrong. In fact, Arizona had abolished parole in 1994, and Petitioner, whose charges arose in 2008, could only legally be sentenced to natural life in prison or death.

In state post-conviction proceedings, Petitioner challenged the voluntariness of his guilty plea and argued that he was sentenced to death in violation of his due process rights under *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion), and *Lynch*. The state court denied both claims on the ground that neither Petitioner nor his jury had actually been misinformed regarding parole eligibility—a position that was by then already squarely foreclosed by *Lynch*. And the state court avoided the impact of *Lynch* by declining to apply that decision retroactively or to treat it as a "change in the law under [Arizona] Rule [of Criminal Procedure] 32.1(g)"—two positions now squarely foreclosed by *Cruz v. Arizona*, 143 S. Ct. 650, 657 (2023).

This case presents two questions:

1. Should this Court grant certiorari, vacate the decision below, and remand this case, as it did with six similarly situated petitioners in *Burns v. Arizona*, No. 21-847, 2023 WL 2357300 (U.S. Mar. 6, 2023) (mem.), because the lower court's opinion is inconsistent with *Cruz*?

2. Are Petitioner's guilty pleas involuntary thus warranting summary reversal where they are predicated upon the trial judge's misrepresentation that life with the possibility of parole was a sentencing option, when in fact, it was not?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Manuel Ovante, Jr., and respondent the State of Arizona. The petitioner is not a corporation.

STATEMENT OF RELATED PROCEEDINGS

State v. Ovante, No. CR2008-144114 (Maricopa Cnty. Super. Ct. Feb. 24, 2010) (convictions and sentences)

State v. Ovante, 291 P.3d 974 (Ariz. Jan. 11, 2013) (opinion affirming convictions and sentences on direct appeal)

Ovante v. Arizona, No. 12-10156 (U.S. Oct. 7, 2013) (order denying petition for writ of certiorari seeking review of direct appeal)

State v. Ovante, No. CR2008-144114 (Maricopa Cnty. Super. Ct. May 19, 2020) (ruling and order denying petition for post-conviction relief)

State v. Ovante, No. CR-20-0339-PC (Ariz. Nov. 8, 2022) (order denying review of lower court's order denying post-conviction relief)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Manuel Ovante, Jr., an indigent prisoner sentenced to death in Arizona, respectfully requests that this Court grant certiorari to correct yet another of the Arizona state courts' violations of this Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion), and *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam).

Decisions Below

The Arizona Supreme Court denied discretionary review of Mr. Ovante's post-conviction claims on November 8, 2022, in an unpublished order. App. 76a. The Maricopa County Superior Court issued several rulings during the post-conviction proceedings: (1) factual findings regarding the change of plea hearing in an unpublished minute entry issued on March 26, 2018, App. 30a-33a; (2) dismissal of relief on Mr. Ovante's *Simmons/Lynch* claim in an unpublished minute entry issued on June 10, 2019, App. 35a-57a; (3) denial of merits relief on Mr. Ovante's involuntary plea claim in an unpublished ruling issued on May 19, 2020, App. 59a-65a; and (4) denial of Mr. Ovante's motion for rehearing in an unpublished ruling on September 22, 2020, App. 67a-74a.

The Arizona Supreme Court's decision affirming Mr. Ovante's convictions and sentences on direct review is reported at *State v. Ovante*, 291 P.3d 974 (Ariz. 2013). App. 8a-28a. The Maricopa County Superior Court entered its sentence in an unpublished order on February 24, 2010. App. 2a-6a.

Statement of Jurisdiction

The Arizona Supreme Court entered judgment against Mr. Ovante on November 8, 2022, when it denied review of his post-conviction case. App. 76a. Mr. Ovante applied for additional time to file the instant petition, and Justice Elena Kagan extended the time to seek certiorari to April 7, 2023. *Ovante v. Arizona*, No. 22A620 (U.S. Jan. 10, 2023). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) and 28 U.S.C. § 2106.

Constitutional Provisions

The Fifth Amendment, U.S. Const. amend. V, provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself[.]

The Sixth Amendment, U.S. Const. amend. VI, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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 of the Case

The issue in this case is the same issue on which this Court recently vacated and remanded *Cruz v. Arizona*, 143 S. Ct. 650 (2023), and *Burns v. Arizona*, No. 21-847, 2023 WL 2357300 (U.S. Mar. 6, 2023). Arizona has refused, once again, to apply this Court's unambiguous precedent. The state courts below failed to accept a simple fact: parole eligibility does not exist for first-degree murder in Arizona. Legislation has stated as much since 1994, and this Court reiterated the same in *Lynch*, years before the decision challenged here. Mr. Ovante's case is another installment in a string of cases since *Lynch* in which Arizona courts ignored or defied this Court's decisions in *Simmons* and *Lynch*. In this case, the state trial court's misapprehension of *Simmons*'s applicability in Arizona manifested at both the front of petitioner's trial-stage proceedings, as a decidedly "material" factor in his decision to plead guilty, and at the end, as misinformation provided to sentencing jurors during jury selection and again during deliberations.

Despite the simple, clear, and well-documented errors that occurred at both ends of the case in the trial court, the state post-conviction court—in the person of the same judge who presided at trial—failed to recognize or remedy either error. The court demonstrated the same recalcitrance that the Arizona Supreme Court propagated in *State v. Cruz*—a decision that this Court recently vacated. *Cruz*, 143 S. Ct. 650; *see also Burns*, 2023 WL 2357300 (granting review, vacating judgments, and remanding to the Maricopa County Superior Court of Arizona for further

consideration in light of *Cruz* in six similarly situated Arizona cases). As in *Cruz* and *Burns*, certiorari should be granted here, both to correct the obvious violations of Mr. Ovante's constitutional rights, and to ensure equal treatment among similarly situated petitioners.

A. Facing capital murder charges, Petitioner pleaded guilty because the trial judge told him parole was available in Arizona.

One evening, then twenty-one-year-old Manuel Ovante, his cousins George and Rick, and Rick's acquaintance, were driving around Phoenix looking for methamphetamine; several times they stopped at the home of a known drug dealer. App. 8a-9a; Transcript at 66-69, *State v. Ovante*, No. CR 2008-144114 (Maricopa Cnty. Super. Ct. Feb. 1, 2010).[1] During their last visit to the home, Mr. Ovante—high on meth and sleep deprived for more than four days, Tr. Feb. 9, 2010 at 4-5—suddenly pulled out a gun and began shooting, App. 9a. Two people died and a third was injured. App. 9a.

The Maricopa County Attorney charged Mr. Ovante with two counts of first-degree murder and one count of aggravated assault. App. 9a.[2] The prosecutor sought the death penalty and alleged two aggravating circumstances: (1) that Mr. Ovante was previously convicted of a serious offense (the aggravated assault resulting from

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[1] All transcript citations are to Maricopa County Superior Court proceedings in *State v. Ovante*, No. CR 2008-144114. All subsequent transcript citations will be abbreviated as "Tr." followed by the date of proceeding and cited page numbers.

[2] The three other people involved in the incident entered plea agreements, in which they pleaded guilty only to hindering prosecution. Tr. Feb. 1, 2010 at 51.

the instant crime), Ariz. Rev. Stat. Ann. § 13-751(F)(2) (2008), and (2) that Mr. Ovante was convicted of "one or more other homicides committed during the commission of the offense," Ariz. Rev. Stat. Ann. § 13-751(F)(8) (2008). App. 10a.

Despite a colorable argument that the homicides were not premediated, App. 101a-06a,[3] Mr. Ovante pleaded guilty—without a plea agreement—to the three charges and the two aggravating factors.[4] By doing so, he subjected himself to a mandatory sentence of either life or death, App. 10a; App. 116a-39a. He chose this course because he was led to believe that if he received a life sentence, he could have a chance at getting parole, which was his one hope in developing a relationship outside of prison with his only child born shortly after his arrest. App. 175a, 179a.

At the change of plea hearing, the trial court told Mr. Ovante that the three possible sentences for first-degree murder would be "no less than life without -- with the possibility of parole after serving 25 years," "natural life," or "the death penalty." App. 122a. And the judge unequivocally told Mr. Ovante—not just once, but twice—that life *with* parole was a possible sentence for each count. App. 123a ("[I]f you got life with a possibility of probation -- sorry -- possibility of parole, that still is a service of 25 calendar years."). By the time of Mr. Ovante's offense in 2008, parole had been

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[3] Even the transcript from his change of plea hearing raises questions regarding premeditation. When asked if there was "some thought" before he shot the victim, Mr. Ovante responded, "Like, yes, I think so." App. 128a.

[4] The guilty plea was entered ten days before Christmas on the initial date set for trial; capital cases are almost always continued multiple times as the defense prepares its case.

abolished for more than a decade; parole was *not* an option if he received a life sentence. Ariz. Rev. Stat. Ann. § 41-1604.09(I) (2002). But both the prosecutor and defense counsel stood silent as the judge misinformed Mr. Ovante about the state law. As described more fully below, the state post-conviction court would later conclude that the trial court's misrepresentation—that parole was possible under the law—was a "material" factor in Mr. Ovante's decision to plead guilty. App. 177a-79a.

B. The jury sentenced Petitioner to death after being told that a life sentence carried the possibility of parole.

After Mr. Ovante pleaded guilty, a jury was empaneled to determine whether he would be sentenced to life or death. The jurors were (mis)informed from the outset that the sentence options would be death, life in prison, or life *with* the possibility of parole after twenty-five years. App. 93a.

During the penalty phase, defense counsel presented more than a dozen witnesses who described Mr. Ovante's life as having been "filled with poverty, violence, crime, molestation, and drug use." App. 26a. Mr. Ovante was the eldest of six children of Manuel Ovante, Sr. and Bridget Ovante. Tr. Feb. 2, 2010 at 55-57, 72. When she was fifteen, Mr. Ovante's mother was "basically raped" by Mr. Ovante's father, a 28-year-old family friend who she was then forced to marry. Tr. Feb. 2, 2010 at 31, 56; Tr. Feb. 9, 2010 at 23-25.

Mr. Ovante's childhood was chaotic. Tr. Feb. 2, 2010 at 40. His father "would rage and threaten to kill [his wife] Bridget and the kids," Tr. Feb. 2, 2010 at 34, 83; Tr. Feb. 3, 2010 at 129-30, and throw anything he could get his hands on—light bulbs,

lamps, utensils, plates of food, and even refrigerators, Tr. Feb. 2, 2010 at 83. Mr. Ovante's mother was also "very violent and abusive," Tr. Feb. 2, 2010 at 28; she repeatedly told him, "I hate you," and that she wished she would have aborted him, Tr. Feb. 2, 2010 at 28. She also kicked him and his siblings "out into the street[s] for days, weeks," Feb. 2, 2010 at 84, leaving them "to find their own place to stay," Tr. Feb. 2, 2010 at 85.

When Mr. Ovante was twelve, his father went to prison for life after being convicted of sexually abusing a four-year-old niece. Tr. Feb. 2, 2010 at 43, 54; Feb. 11, 2010 at 20. His father had also sexually abused his sisters and his own children but was never charged. Tr. Feb. 2, 2010 at 31, 43. Even though Mr. Ovante's mother knew that her husband was sexually abusing their children, "she never did anything about it." Tr. Feb. 2, 2010 at 86.

Not long after his father went to prison, Mr. Ovante followed in the footsteps of his other relatives and began using methamphetamine as "kind of a way to get out." Feb. 9, 2010 at 15; Tr. Feb. 2, 2010 at 10. He used meth with his aunt and her son George—the same cousin who was driving the truck the night of the crime. Tr. Feb. 3, 2010 at 142. He tried on his own to stop, but he "just got too sick from it, so he went back on." Tr. Feb. 3, 2010 at 17; Tr. Feb. 4, 2010 at 31; Tr. Feb. 8, 2010 at 69. Unable to overcome his addiction, Mr. Ovante continued to use meth including in the days before—and on the day of—the crime. Tr. Feb. 9, 2010 at 4-5.

In addition to lay mitigation witnesses, the defense also presented an expert in neuropsychology to explain Mr. Ovante's childhood trauma and his corresponding extensive drug use, including how they affected his brain. Tr. Feb. 11, 2010 at 4-78. The expert testified that Mr. Ovante has "significant brain impairment," Tr. Feb. 11, 2010 at 49, which could have been caused by the drug use, by his childhood exposure to "severe levels of stress," or both, Tr. Feb. 11, 2010 at 21. As a child, while his brain was still developing, Mr. Ovante was using extremely high doses of methamphetamine that likely affected the part of his brain that regulates "impulse control [and] decision making." Tr. Feb. 11, 2010 at 25. On the night of the crime, Mr. Ovante had been awake for days and had been using meth. Tr. Feb. 11, 2010 at 64; Tr. Feb. 9, 2010 at 5. When asked how those factors would impact someone with brain impairment like Mr. Ovante, the expert said "[i]t is kind of like pouring gasoline on a fire." Tr. Feb. 11, 2010 at 64.

To rebut the defense's mitigation case, the State emphasized Mr. Ovante's potential future danger to others. For example, when cross-examining many of the defense's mitigation witnesses, the State methodically asked the same question about Mr. Ovante's propensity for violence. *See* App. 144a-145a; App. 146a; App. 147a; App. 152a; App. 153a. The State elicited specific testimony from Mr. Ovante's brother that he was "scared" of Mr. Ovante, App. 158a, and that the family was afraid Mr. Ovante would hurt someone, App. 160a.[5]

[5] And the jury learned from the State's cross-examination about an uncharged act

In its closing argument, the State continued its future dangerousness theme by urging the jury to stop Mr. Ovante before he could "poison further generations." App. 171a. The State used the (F)(2) aggravating factor to support Mr. Ovante's violent behavior, arguing that "he committed another serious offense" because "two people wasn't enough." App. 169a.[6]

A few hours into deliberations, the jury signaled concern regarding the possibility of parole. App. 84a-86a. In a written question to the judge, the jury asked whether a life sentence meant "a life sentence or would parole be available." App. 78a. The jury also asked, "If parole is an option what is the minimum sentence? And are the sentences consecutive or concurrent?" App. 80a.

Consistent with the misinformation Mr. Ovante had been given at the change of plea hearing, the trial judge answered the jurors' questions by telling them that "under Arizona law, 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; *see also* App. 78a, 80a (trial judge adding that he would decide whether to make a life sentence parole-eligible, and whether

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of violence—that Mr. Ovante and his brother "robbed a cousin because they were mad at him." App. 165a.

[6] Even the Arizona Supreme Court's Capital Sentence Guide recognizes that the "F2 aggravating factor (current or previous serious offense convictions) implicates 'future dangerousness.'" NOT A FUTURE DANGER, AZCOURTS.GOV ARIZONA JUDICIAL BRANCH, https://www.azcourts.gov/ccsguide/MitigatingCircumstances/NOTAFUTUREDANGER.aspx (last visited Mar 29, 2023).

sentences would be concurrent or consecutive). The judge's answer to Mr. Ovante's jury was the same as the instruction given to Cruz's jury, *Cruz*, 143 S. Ct. at 656—an instruction later determined to be clearly erroneous, *id.* (citing *Lynch*, 578 U.S. at 615).

After receiving the misinformation regarding parole eligibility, the jurors sent another note asking for the definition of first-degree murder, Juror Question, *State v. Ovante*, No. CR 2008-144114 (Maricopa Cnty. Super. Ct. Feb. 18, 2010), IOR 140, and less than an hour later, informed the court that they were at an impasse, App. 88a. The trial judge told them to keep deliberating. App. 89a. After two more days and approximately seven hours of additional deliberations, the jury returned with its verdict: life on count one and death on count two. App. 95a; App. 97a. As required by Arizona law, the judge followed the jury's verdict, sentencing Mr. Ovante to life *with* the possibility of parole on count one and to death on count two. App. 2a-6a; Tr. Feb. 24, 2010 at 6. The Arizona Supreme Court affirmed the judgment on direct appeal. App. 11a-14a, 27a.

C. Despite *Lynch*'s clear holding that parole was unavailable in Arizona after 1993, the state post-conviction courts refused to apply the decision in Petitioner's case.

Three years after Mr. Ovante's direct appeal had ended (making his conviction final), this Court decided *Lynch,* 578 U.S. 613. And more than fifteen years before Mr. Ovante's sentencing, this Court made clear that capital defendants whose future dangerousness is at issue are entitled to inform the jury that they will never be

eligible for parole. *Simmons*, 512 U.S. 154. The *Simmons* rule has been continuously upheld. *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000); *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001); *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002). Even though Arizona abolished parole in 1994, it refused to comply with *Simmons* until told to do so by this Court in *Lynch*. But even then, the Arizona courts—including in this case—continued to reject *Simmons/Lynch* claims raised in post-conviction proceedings.

Mr. Ovante entered state post-conviction proceedings in 2013. Notice for Post-Conviction Relief (Death Penalty), *State v. Ovante*, No. CR-10-0085-AP (Ariz. Oct. 18, 2013). While his case was pending, *Lynch* squarely recognized that parole was *not* available to anyone who committed a crime in Arizona after January 1, 1994. 578 U.S. at 614. This Court held that *Simmons* applies in Arizona and rejected the State's argument that it was somehow exempt from *Simmons* because of the potential for either executive clemency or the legislative creation of a future parole system. *Id.* at 615-16. Indeed, *Lynch* "change[d] the operative (and mistaken) interpretation of *Simmons*" in the state courts. *Cruz*, 143 S. Ct. at 660.

Lynch's impact upon Mr. Ovante's post-conviction challenges to his guilty pleas and the jury's recommendation of a death sentence could not have been more direct or obvious. After *Lynch*, it could no longer be plausibly disputed that the trial court wrongly informed first Mr. Ovante and later his sentencing jury that he could be eligible for parole if sentenced to life. Or so one might have thought. As it happened,

the state post-conviction court in this case did what Arizona state courts have been doing for years: it *evaded* this Court's mandates.

1. Involuntary Plea Claim

Mr. Ovante would *not* have pleaded guilty had he known he would be ineligible for parole. App. 176a-80a. In his state post-conviction petition, Mr. Ovante argued that because his guilty pleas were predicated on the trial court's incorrect statement of law, they could not be voluntary. Petition for Post-Conviction Relief at 22-34, *State v. Ovante*, No. CR 2008-144114 (Maricopa Cnty. Super. Ct. Sept. 5, 2017), IOR 287. After the State stipulated that the involuntariness claim was colorable, the court held a hearing "to determine whether Defendant was incorrectly informed he would be eligible for parole, and if that fact was material to his decision to plead guilty." App. 39a. At the hearing, Mr. Ovante testified unequivocally multiple times that if he had been informed that his minimum sentence would be a "natural" life sentence, *i.e.*, a parole-ineligible sentence, then he *would not have pleaded guilty* but would have instead taken his chances at trial. App. 179a, 181a-83a. The impetus for his guilty pleas was to have a chance at parole, which would allow him—one day—to be with his then-infant daughter. App. 175a, 179a.

The state court found that the possibility of parole was a "material factor" in Mr. Ovante's decision to "admit guilt and [death] eligibility factors." App. 60a. Further, there was no question that the court advised Mr. Ovante that if he did not get a death sentence, then "he could be sentenced to life in prison, either for his

natural life or for life 'with the possibility of parole' after 25 years of imprisonment." App. 31a. Nor was there any dispute that Mr. Ovante was never informed by the court that "he would be *ineligible* for parole if he pleaded guilty to first-degree murder," App. 32a (emphasis added), which would have been the accurate statement of law.

Despite the clarity and one-sidedness of the record indicating that the information provided to Mr. Ovante had been "plainly wrong," *Cruz*, 143 S. Ct. at 656, the state court below failed even to consider the obvious defects in the guilty pleas pursuant to *Boykin v. Alabama*, 395 U.S. 238, 244 (1969) (requiring a defendant to have "a full understanding of what the plea connotes"), *Brady v. United States*, 397 U.S. 742, 748 (1970) (defendant must understand the "likely consequences" of a plea), and their progeny.[7]

Instead, the state court reached for a theory this Court had already rejected in *Lynch*: that parole remained a possible sentence "based on the appropriate and operative statutory language" and the controlling Arizona case law at the time. App. 60a (citing *State v. Cruz*, 181 P.3d 196, 207 (Ariz. 2008); *State v. Garcia*, 226 P.3d 370 (Ariz. 2010)). Although that state court case law—which clung stubbornly to the proposition that capital defendants are "not technically ineligible for parole," *Garcia*,

[7] Mr. Ovante also raised an ineffective assistance of counsel claim related to his counsel's failure to advise him of the correct sentencing law at the time he entered his guilty pleas. The state court denied that claim by finding there was no prejudice because Mr. Ovante received a sentence—*albeit an illegal one*—of life with the possibility of parole; the court ignored the fact that Mr. Ovante received a death sentence as well. App. 63a.

226 P.3d at 387—had been abrogated by *Lynch* four years before the denial of relief in this case, the state court here, like the courts in *Cruz* and the *Burns* cases, had already determined that *Lynch* "d[id] not apply retroactively to Defendant's case." App. 45a. As *Cruz* has now made unmistakably clear, the state post-conviction court was wrong about that as well.[8]

2. Simmons/Lynch Claim

Mr. Ovante also alleged in his post-conviction proceedings that the state court violated *Simmons/Lynch*, because due process required the jury to be told the correct law—that parole was *not* an option in Arizona.[9] The court dismissed the *Simmons/Lynch* claim, finding on one hand that the substantive due process claim

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[8] The state court also reached an absurd post-hoc justification for its voluntariness finding: because the trial court actually imposed an (illegal) sentence of life with the possibility of parole, Mr. Ovante "got the benefit of the bargain that he knowingly and voluntarily agreed to." App. 60a. The court relied on the recent Arizona Supreme Court decision in *Chaparro v. Shinn*, 459 P.3d 50, 54 (Ariz. 2020)—a civil-rights action brought by a prisoner seeking to have his illegally imposed life with parole sentence enforced; the 2020 decision is irrelevant to Mr. Ovante's knowledge at the time of his pleas. App. 72a. The court identified no plausible basis that Mr. Ovante should have known at the time he pleaded guilty that an illegally lenient sentence premised on a state court decision entered more than a decade later would be a "likely consequence" of his pleas. *Brady*, 397 U.S. at 748.

[9] The issue was presented below as two claims. Claim C alleged that Mr. Ovante's rights were violated "because the jury was not given an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994) regarding Defendant being ineligible for parole." App. 40a. Claim J alleged that Mr. Ovante's "due process rights were violated when the trial court committed reversible error in responding to a jury question regarding the definition of a 'life sentence' during the jury's penalty phase deliberations." App. 53a. In this petition, Mr. Ovante refers to the claims collectively here as a *Simmons/Lynch* claim.

was precluded because it should have been raised in an earlier proceeding, App. 40a, and on the other hand that any attempt to have raised the claim on direct appeal "would have been futile under Arizona Supreme Court precedent" and thus "would have been rejected," App. 44a.[10] Mr. Ovante had argued that the claim should still be considered under Rule 32.1(g) of the Arizona Rules of Criminal Procedure, because *Lynch* was a "significant change in the law." App. 45a. But the state court disagreed and held that *Lynch* was *not* a change in law—a holding that cannot stand in light of *Cruz*.

Further ignoring this Court's precedent, the state post-conviction court found that the trial court's answer to the jury's question—that life with parole *is* a possible sentence in Arizona—"may still prove correct, since the Legislature still has decades to enact enabling legislation to support the 'possibility of release.'" App. 54a. Once again, the court made no attempt to reconcile its reasoning with this Court's clear holding otherwise. *Lynch*, 578 U.S. at 616 (holding that "potential for future 'legislative reform'" did not prevent a defendant from being entitled to a *Simmons* instruction).

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[10] The court likewise denied Mr. Ovante's argument related to trial and appellate counsel's ineffectiveness because "long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions." App. 44a; *see also* App. 55a.

Mr. Ovante petitioned the Arizona Supreme Court for review, contending that the lower court's denial of relief rested on the clearly erroneous finding that parole *is* an available sentence. Petition for Review at 17-33, 46-53, *State v. Ovante*, No. CR-20-0339-PC (Ariz. Nov. 23, 2020), Docket 81. He also urged the Arizona Supreme Court to find that *Lynch* was a "significant change in the law" under Rule 32.1(g). *Id.* at 49. In an order dated November 8, 2022, one week after this Court heard oral argument in *Cruz*, the Arizona Supreme Court declined review. App. 76a. In February 2023, this Court issued its opinion in *Cruz*, holding that *Lynch* "overruled previously binding Arizona Supreme Court precedent preventing capital defendants from informing the jury of their parole ineligibility," 143 S. Ct. at 660, and that—contrary to the Arizona Supreme Court's decision in that case (and the state post-conviction court's decision in this one)—*Lynch* "changed the law in Arizona in the way that matters for purposes of Rule 32.1(g)," *id.*

Reasons for Granting Certiorari

A. Because the state court below refused to apply this Court's unambiguous precedent in *Simmons* and *Lynch*, principles of fairness mandate the same result here as in *Cruz v. Arizona* and *Burns v. Arizona*.

This Court has previously recognized that there is a need to treat virtually identical cases alike to prevent unnecessarily discriminatory outcomes. *See, e.g.*, *Roper v. Weaver*, 550 U.S. 598, 601-02 (2007) (per curiam) (finding that it is within the Court's discretion to prevent "three virtually identically situated litigants from being treated in a needlessly disparate manner"); *Henderson v. United States*, 568

U.S. 266, 274 (2013) (finding that the interpretation of "plain error" must not result in unjustifiably varying treatment of similarly situated individuals). The Court has also recognized that a GVR order is appropriate in cases where there have been "intervening developments" since the lower court's decision. *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam). Indeed, a GVR order serves to "alleviate[] the potential for unequal treatment that is inherent in [the Court's] inability to grant plenary review of all pending cases raising similar issues." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (cleaned up).

Less than two months ago, this Court vacated Arizona precedent directly relevant to the resolution of Mr. Ovante's claims. *Cruz*, 143 S. Ct. at 661-62. And two weeks after *Cruz*, this Court granted, vacated, and remanded the cases of six Arizona death-sentenced petitioners whose *Simmons/Lynch* claims had been denied for similar reasons as Cruz's claim. *Burns*, 2023 WL 2357300. As was true of the petitioners in *Cruz* and *Burns*, Mr. Ovante's convictions became final after *Simmons* but before *Lynch*. And like each of those petitioners, Mr. Ovante's attempts to secure the benefits of the *Simmons* and *Lynch* decisions were thwarted by the Arizona state courts' insistence upon evading rather than applying this Court's clear precedent. As a result, like the petitioners in *Cruz* and *Burns*, Mr. Ovante's *Simmons/Lynch* claim has never been properly reviewed by the state courts.

Mr. Ovante is identically situated to the petitioners in *Cruz* and *Burns*, and there is no justifiable reason for the Court to treat him differently. The state post-

conviction court dismissed Mr. Ovante's claim by relying on the wrong assumption that life with the possibility of parole *was* a valid sentencing option in Arizona and upon the same interpretation of Rule 32.1(g)—an interpretation this Court found inadequate in *Cruz*. Therefore, principles of fundamental fairness should guide this Court to reach the same outcome as it did in *Burns*. Because there have been "intervening developments"—this Court's *Cruz* decision—since the lower court's decision, and to avoid the unequal and unfair treatment of Mr. Ovante who is similarly situated to the petitioners in *Cruz* and *Burns*, the Court should grant certiorari, vacate the decision below, and remand to allow the state court the opportunity to properly consider his *Simmons/Lynch* claim.

B. Summary reversal is warranted on the voluntariness claim because the state court's decision is plainly wrong under *Lynch* and squarely foreclosed by this Court's clear precedent.

Summary reversal is warranted in cases involving obvious legal errors. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam). This Court has summarily reversed when a lower court commits an error it "has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam). Because the Arizona court's decision finding Mr. Ovante's plea voluntary is "obviously wrong and squarely foreclosed by [this Court's] precedent, this case merits summary reversal." *Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari).

It is axiomatic that "a guilty plea must be both knowing and voluntary." *Parke*

v. Raley, 506 U.S. 20, 28 (1992). Before pleading guilty and giving up his constitutional rights, a defendant must have "a full understanding of what the plea connotes and of its consequence," *Boykin*, 395 U.S. at 244, including "the sentencing and parole requirements," *Parke*, 506 U.S. at 37. A defendant must likewise appreciate the "relevant circumstances" and "likely consequences" of the plea, *Brady*, 397 U.S. at 748, including "the actual value of any commitments made to him by the court," *id.* at 755.

Among the likely consequences of a guilty plea are the potential penalties, including sentencing consequences that are "severe," *Padilla v. Kentucky,* 559 U.S. 356, 365 (2010); "automatic," *id.* at 366; and an "integral part" of the overall penalty, *id.* at 364; *see also United States v. Ruiz*, 536 U.S. 622, 630 (2002) (noting that the *Boykin* inquiry turns on whether a defendant is aware of "critical information" relevant to decision to enter plea). A sentence of life imprisonment without the possibility of parole is "far more severe" than a life sentence *with* the possibility of parole and is—with the exception of the death penalty—"the most severe punishment that the State could have imposed on any criminal for any crime." *Solem v. Helm*, 463 U.S. 277, 297 (1983).

In this case, during the plea colloquy, Mr. Ovante was misled by the trial court's repeated, erroneous declarations that the mandatory minimum sentence for first-degree murder was life *with* the possibility of parole after twenty-five years. In reality, parole had been abolished almost fifteen years prior; thus the "reference to

parole" being an option was "plainly wrong." *Cruz*, 143 S. Ct. at 656. If anything, "the only 'release' available to capital defendants convicted after 1993 was, and remains, executive clemency." *Id*. at 655. Yet the trial court did not inform Mr. Ovante of this during the plea colloquy. And as this Court held in *Lynch*, neither the possibility of executive clemency nor the "potential for future 'legislative reform'" were reasons to exclude a jury from being instructed that an Arizona capital defendant was parole ineligible. *Lynch*, 578 U.S. at 616. If a defendant is entitled to inform his jury that he is parole ineligible, then he should be no less entitled to be informed, when waiving his constitutional rights, that he will be parole ineligible if sentenced to life.

Mr. Ovante relinquished his rights and pleaded guilty with the fundamental misunderstanding—as dictated to him by the trial judge—that the mandatory minimum sentence for first-degree murder was life *with* the possibility of parole. Mr. Ovante lacked full understanding of the direct and "likely consequences" of his guilty pleas, *Brady*, 397 U.S. at 748, namely that the only available penalties were death or "the most severe punishment" short of death: life without parole. *Solem*, 463 U.S. at 297. There's no dispute that Mr. Ovante would not have pleaded guilty had he known the possibility of parole was *not* a sentencing option. Indeed, as the state post-conviction court found after the evidentiary hearing, the chance of obtaining a parole-eligible sentence was a material factor underlying Mr. Ovante's decision to plead guilty. Had the trial court not misinformed him regarding the consequences of his plea, Mr. Ovante would have gone to trial and presented a defense challenging

premeditation. And had he succeeded, Mr. Ovante could have been convicted of second-degree murder, which would have, in turn, resulted in him being sentenced to a term of years. *See* Ariz. Rev. Stat. Ann. § 13-710(A) (2008) (presumptive sentence for second-degree murder is 16 years).

By concluding that Mr. Ovante's pleas were voluntary, the Arizona courts were "plainly wrong." A guilty plea entered in reliance upon the court's erroneous instruction regarding the minimum sentence, even in a non-capital case, would be involuntary under *Boykin* and its progeny. But here, Mr. Ovante's guilty pleas had the added consequence of making him automatically eligible for the death penalty. Because "heightened procedural protections [are] accorded capital defendants," *Monge v. California*, 524 U.S. 721, 733 (1998), this Court should correct the clear violation of Mr. Ovante's rights, by summarily reversing the lower court's decision, and vacating Mr. Ovante's guilty pleas that materially rely upon the trial court's misrepresentation that the minimum sentence was life with the possibility of parole after twenty-five years.

CONCLUSION

For the foregoing reasons, Mr. Ovante respectfully requests that this Court grant his petition for a writ of certiorari, vacate the lower court's decisions, and remand accordingly.

Respectfully submitted: April 3, 2023.

Garrett W. Simpson
Counsel of Record
Garrett Simpson, PLLC
Post Office Box 6481
Glendale, Arizona 85312
(623) 910-7216
garrettsimpson@outlook.com

Vikki M. Liles
The Law Office of Vikki M. Liles, P.L.C
Post Office Box 5877
Sun City West, Arizona 85376
(602) 252-2110
lileslaw@msn.com

Counsel for Petitioner