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IN THE SUPERIOR COURT

MARICOPA COUNTY, STATE OF ARIZONA

STATE OF ARIZONA, Respondent, vs. ABELARDO CHAPARRO, Petitioner.	NO. CR1995-005120-A AMENDED PETITION FOR POST-CONVITION RELIEF/SPECIAL ACTION PETITION

Through counsel, petitioner, Abelardo Chaparro, presents this Amended Petition for Post-Conviction Relief/Special Action Petition pursuant to Rule 32.1 of the Arizona Rules of Criminal Procedure and Rule 3 of the Special Action Rules of Procedure. Consistent with the minute entry issued August 30, 2017, this amended Petition serves to supplant the petition previously filed in this case.

This amended Petition will address the four questions, set out in this Court's August 30, 2017 minute entry, and it will show (a) that under *State v. Bryant*, 219 Ariz. 514, 200 P.3d 1011 (App. 2008) and *State v. Dawson*, 164 Ariz. 278, 792 P.3d 741 (1990), this Court – and the Arizona Department of Corrections – do not have the power to change the sentence that

Mr. Chaparro received in 1996, and (b) that Mr. Chaparro is therefore entitled to Rule 32 or Special Action relief.

I. IS MR. CHAPARRO'S RULE 32.1(C) ARGUMENT PRECLUDED?

Whether a claim for relief under Rule 32.1(c) would be precluded is a moot point, because Mr. Chaparro does not have a claim under Rule 32.1(c). Rule 32.1(c) provides a defendant a remedy when "the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law." Ariz. R. Crim. P. 32.1(c). The rule is intended to allow defendants to attack a sentence even though the defendant does not contest the validity of the underlying conviction. Ariz. R. Crim. P. 32.1. Put another way, this rule protects defendants from illegal sentences imposed to their detriment. Mr. Chaparro does not claim that the sentence imposed on him "exceeded the maximum authorized by law" or is "otherwise not in accordance with the sentence authorized by law." Instead, Mr. Chaparro requests the State to recognize the sentence that actually was imposed.

However, Mr. Chaparro does have a claim for post-conviction relief under Rule 32.1(d) or a claim for special action relief (see section V below).

II. HAD ARIZONA LAW ABOLISHED A SENTENCE OF "LIFE WITHOUT THE POSSIBILITY OF PAROLE AFTER 25 YEARS" FOR MR. CHAPARRO'S CRIME AS OF THE DATE MR. CHAPARRO WAS SENTENCED?

Parole was abolished in Arizona effective January 1, 1994 – more than one year before the occurrence of the offense for which Mr. Chaparro was convicted, and before the date on which he was sentenced. A.R.S. § 41-1604.09(I); *Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016).[1]

[1] In *Lynch*, the Court noted the abolishment of parole for offenses committed in Arizona after 1993, and affirmed the holding in *Simmons v. South Carolina,* 512 U.S. 154, 156 (1994) (plurality opinion), that the possibility of executive clemency is not the equivalent of parole, thus rejecting the State's argument that the trial court's ruling should stand because the legislature could make parole available in the future. *Lynch*, 512 U.S. at ___, 136 S.Ct. at 1819.

III. IS MR. CHAPARRO'S SENTENCE LAWFUL?

Because parole had been abolished prior to Mr. Chaparro's offense (and prior to the time of sentencing), the sentence that the trial court imposed – life without the possibility of *parole* for 25 years – was not lawful at the time of imposition. Nevertheless, that sentence is lawful *now,* in the sense that this court does not have the jurisdiction to make the sentence more severe. This is because the State did not avail itself of any of the prescribed means for it to challenge the legality of the sentence: an appeal within 20 days of the judgment [A.R.S. 13-4032], a cross-appeal within 20 days of service of Defendant's notice of appeal [A.R.S. 13-4032], or a motion under Rule 24.3 to correct an unlawful sentence. In that regard, this case is fully and directly governed by *State v. Dawson*, 792 P.2d 741, 164 Ariz. 278 (1990).

In *Dawson*, the defendant was convicted of 8 counts of child abuse. The trial court "imposed 8 presumptive sentences totaling 60 years without possibility of parole for 25 years." *Id*. at 742, 164 Ariz. 279. Six of the sentences were "imposed concurrently but consecutively to the other two counts." *Id.* The State did not object to those sentences in the trial court or file an appeal or cross-appeal. However, when the defendant appealed, the State's answering brief pointed out that the trial court had failed to follow mandatory sentencing provisions that required "consecutive sentences of life imprisonment without possibility of parole for 35 years on 4 of the 8 counts." *Id.* And the State argued that appellate courts had "a duty to correct an illegally lenient sentence that appear[ed] on the appellate record." Id. at 743, 164 Ariz. at 280.

Even though it assumed that the State was correct about the illegality of the sentences imposed by the trial court, the Arizona Supreme Court rejected the State's argument because "appeals by the state in criminal matters . . . will be entertained only when that right is clearly provided by constitution or statute." *Id*. The Court then held that because the State had not pursued an appeal or cross-appeal, and because the sentencing error "inure[d] to the benefit of a criminal defendant," the Arizona courts did not have jurisdiction to correct that error." *Id*. at 749, 164 Ariz. at 286. This holding obviously applies fully to Mr. Chaparro's case, in which the State did not pursue any of the avenues for challenging the legality of the sentence when those avenues were available, and in which the magnitude of the error was considerably less than in *Dawson*. Thus, the sentence imposed by the trial court is now lawful and enforceable.

The Arizona Department of Corrections [ADC] – which is responsible for certifying inmates' eligibility for parole -- has informed Mr. Chaparro and his counsel that he has not been given a parole eligibility date, and that ADC does not certify inmates "with dates of offense on or after 01/01/94 and were 'adults' (18 or older) at the time of the offense." (See Exhibit 1). Petitioner therefore believes it appropriate to point out that the *Dawson* rule – that the State cannot challenge the legality of a sentence unless it files an appeal, a cross-appeal, or a Rule 24.3 motion – applies to all departments and agents of the State. *State v. Bryant, 200* P.3d 1011, 1013, 219 Ariz. 514, 516 (App. 2008).

IV. IS THERE SUPPORT FOR THE CONCLUSION THAT THE USE OF THE TERM "PAROLE" IS NOTHING MORE THAN A CLERICAL ERROR, AND THAT THE SENTENCE SHOULD BE RESTATED AS "LIFE WITHOUT THE POSSIBILITY OF RELEASE FOR 25 YEARS"?

Under Ariz. R. Crim. P. 24.4, this Court has the power to correct "clerical errors, omissions, and oversights in the record." In this case, however, it is clear that the sentencing Judge's use of the word "parole," rather than "release," in sentencing Mr. Chaparro to "life imprisonment without the possibility of parole" was not a "clerical" error, because the difference between "parole" and "release" is highly substantive, rather than technical or mechanical, and because the Judge's repeated use of "parole" indicates that the word was not an inadvertent slip of the tongue.

There is little Arizona case law regarding Rule 24.4. However, the Comment to Rule 24.4 indicates that it is "derived from" Fed. R. Crim. P. 36, and there is a considerable amount of federal case law that makes it clear that federal Rule 36, and therefore Arizona Rule 24.4, apply only to technical corrections, and not to substantive changes. *See, e.g., United States v. Kaye*, 739 F.2d 488, 490-91 (9th Cir. 1984); *United States v. Werber*, 51 F.3d 342, 347-48 (2d Cir. 1995).

In *Kaye*, the defendant was convicted on 20 counts. At the original sentencing, the trial court separated the counts into two groups, with the sentences in each group imposed concurrently with each other but consecutively to the sentences in the other group. 739 F.2d at 489. The total term of imprisonment was eight and one-half years. *Id.* at 489-90. On appeal, the Ninth Circuit affirmed 13 of the convictions but reversed the other seven – and noted that

two of the affirmed counts had not been included in the judgment. *Id*. at 490. The court of appeals therefore remanded for correction of the judgment under Rule 36. *Id*. Although the trial court "could have included the missing count numbers in one of the existing [sentence] groups, thus making no substantive change in the prison term," it created a new consecutive category of sentences, which increased the total term of imprisonment by six months, to nine years. *Id*. On a second appeal, the court of appeals reversed, holding that "the provisions of Rule 36 do not permit a substantive change in the period of incarceration," and that "[w]hen the district court added the additional six month term it made a substantive alteration." *Id*.

Similarly, in *United States* v. Werber, supra, the sentencing judge relied on Rule 36 to lower two defendants' sentences several months after those sentences had been imposed, explaining that the original sentences were based on his own misinterpretation of the federal sentencing guidelines. 51 F.3d at 345-48. On appeal (by the Government), the Second Circuit held that the substantive amendments of the sentences were not valid "clerical" corrections under Rule 36 because they were not mechanical changes, but rather a reassessment of the merits. *Id*. at 347-48.

With respect to Mr. Chaparro's sentence, changing the word "parole" to "release" would be highly substantive. Since January 1, 1994, when parole was eliminated (prospectively), the only form of early "release" available to a defendant convicted of first degree murder and sentenced to life without possibility of "release" for 25 years is commutation pursuant to A.R.S. 31-401 et seq. and 31-441 et seq. As a matter of law, parole and commutation are distinct concepts. See *Solem v. Helm*, 463 U.S. 277, 300, 103 S.Ct. 3001, 3015 (1983). And the distinction between parole and commutation is both substantive and substantial, for several reasons:

1. The criteria for parole are less stringent than those for commutation: A prisoner seeking parole must show that "there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state"; but an applicant for commutation must show that there is "a substantial probability that when released the offender will conform the offender's conduct to the

requirements of the law **and** that there is "**clear and convincing evidence** that the **sentence imposed is clearly excessive**."

2. Decisions to grant or deny parole are made by the Board of Executive Clemency [BOEC], without any review by the Governor. However, final decisions on the granting of commutation are made by the Governor – but only if the BOEC first recommends commutation (after its own two-step process).
3. It is far more difficult to get commutation than parole. The BOEC's Report for FY 2017 indicates that there were 253 hearings for prisoners seeking parole to the street (rather than to a consecutive sentence), and that parole was granted in 24 of those cases (9.5%). [2017 Rpt. At 15]. Although the FY 2017 Report does not show how many commutation recommendations were approved by the Governor in FY 2017, it does indicate that there were 281 Phase I commutation hearings in FY 2017 – only *one* of which resulted in the prisoner's being passed on to Phase II. [Rpt. At 15]. And BOEC Reports for FY 2012-FY 2014 indicate that in those years the Governor approved 23 out of 1,820 applications for commutation (or about 1%) -- and that 18 of those approvals were based on "imminent danger of death." In FY 2012-2014, the BOEC granted parole to the streets in 161 out of 803 cases [20%]. (See Exhibit 2).
4. The difference between parole and commutation is of constitutional dimension. In *Graham v. Florida*, 130 S.Ct. 2011, 2027 (2010), the Supreme Court held that a life sentence for a juvenile non-homicide offender was required to include some reasonable possibility of release on parole, and that executive clemency – "the remote possibility of which does not mitigate the harshness of the sentence" -- was not a constitutionally adequate substitute for parole eligibility.

While the foregoing is sufficient to show that this is not a case involving "clerical" error, it is also worth noting that the record uniformly indicates that the sentencing Judge meant to say "parole." In explaining the possible sentences to Mr. Chaparro, the Judge included "life imprisonment without the possibility of **parole** for 25 years; and the Judge used "parole" again when he actually pronounced sentence. (Sentencing Tr. at 10, ll. 5-12, and 16, ll 6-11).

moreover, the sentencing order of September 20, 1996 (at 23) also used the word "parole." There is no evidence that the Judge meant to say "release."

In short, the difference between "parole" and "release" in this case is no more "clerical" than the difference between "concurrent" and "consecutive" in *State v. Dawson*, *supra.*

V. THE PROPER REMEDY

The foregoing sections of this Amended Petition have shown that Mr. Chaparro is legally entitled to the sentence that was imposed in 1996, including parole eligibility after serving 25 years, and that this entitlement operates against all State departments and agents. In this connection, it may be worth noting that even though the Truth in Sentencing law eliminated parole for offenses committed on or after January 1, 1994, the Board of Executive Clemency still was – and is – authorized to "pass upon and recommend . . . paroles." A.R.S. 31-402(A). Until recently, that power was exercised only with regard to prisoners incarcerated for offenses committed prior to January 1, 1994; but as of July 24, 2014, juvenile offenders sentenced to "life imprisonment with the possibility of relief after serving a minimum number of calendar years" also became eligible for *parole* after serving the minimum terms. Consequently, a mechanism for granting and denying parole is in existence. *See also* A.R.S. 31-411(A), 31-412(B), and 41-1604.09(D).

The remaining question is the proper procedural authority for this Court to grant relief, at this point primarily against ADC. The answer is that there are two possible procedural avenues, at least one of which must be available.

One possibility is relief under Ariz. R. Crim. P. 32.1(d), under which a prisoner may obtain post-conviction relief when he "is being held in custody after the sentence imposed has expired." Under A.R.S. 31-412(A), the sentence Mr. Chaparro received will make him eligible for home arrest, parole, or *absolute discharge* from ADC custody after serving 25 years. If he is not certified for 31-412(A) eligibility at that time, then he will lose the opportunity for discharge from custody to which he is entitled – which arguably qualifies him for Rule 32.(d) relief. And a Rule 32.1(d) claim is exempted from preclusion under Rule 32.2(b).

If this Court concludes that Mr. Chaparro is not eligible for relief under Rule 32.1(d), then he certainly is entitled to Special Action relief, because (1) there would be no other equally,

speedy, and adequate remedy (by appeal or otherwise), and (2) the issue is whether the defendant (in this case the State, through ADC) "has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority." *See* Special Actions Rules 1(a) and 3(b). In light of the Arizona Court of Appeals' decision in *Sims v. Ryan*, 890 P.2d 625, 18 Ariz. 330 (App. 1995), Mr. Chaparro believes that Special Action relief is appropriate in his case. The petitioner in *Sims* challenged the rescission of his parole by means of a petition for habeas corpus. The Court of Appeals held that because Sims was seeking "not discharge from custody but transfer from one type of custody to another," he "should have petitioned for special action." *Id*. at 627, 18 Ariz. at 332. But the Court also stated that the trial court should have "looked beyond formal defects" and treated the habeas petition as a special action petition. Similarly in this case, the choice between Rule 32.1 and special action jurisdiction is a formality that should not impact Mr. Chaparro's right to relief under *Dawson*.

VI. CONCLUSION

Mr. Chaparro has a legitimate expectation in the finality of his originally imposed sentence. Mr. Chaparro requests that the Court order ADC to adhere with the terms of his sentence.

RESPECTFULLY SUBMITTED this 19th day of January, 2018.

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ORIGINAL of the foregoing filed with the Clerk of the Court, and COPIES delivered/mailed this 19th day of January 2018, to the Maricopa County Attorney's Office

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