IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SANTINO RAMON DURAZO,
Petitioner.

No. 2 CA-CR 2016-0198-PR

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20100112
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF GRANTED

SANTINO RAMON DURAZO,
Petitioner,

v.

HON. CHRISTOPHER BROWNING, JUDGE OF THE
SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2016-0030
Filed September 15, 2016

Special Action Proceeding
Pima County Cause No. CR20100112

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

Steven R. Sonenberg, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Petitioner

Mark Brnovich, Arizona Attorney General
By Paul E. Carter and Claudia Acosta Collings,
Assistant Attorneys General, Tucson
Counsel for Arizona Department of Corrections

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Santino Durazo seeks review of the respondent judge's denial of his "Writ of Habeas Corpus and/or Motion Pursuant to Rule 32[, Ariz. R. Crim. P.]" (the "Motion") in which he maintained the Arizona Department of Corrections (ADOC) had erroneously failed to afford him earned release credits pursuant to A.R.S. § 41-1604.07. In a contemporaneously filed petition for special action, he seeks relief from the same ruling, asserting his appellate remedy is unclear due to "the manner in which this issue was raised before and ruled upon by the superior court." On its own motion, this court consolidated the two proceedings.

¶2 We agree that the manner in which Durazo has presented his claims has created some confusion, not only for this court, but perhaps for the respondent judge as well.[1] After full review of the arguments and the record, we accept special action jurisdiction, as both Durazo and ADOC have urged, with respect to Durazo's claim that the respondent judge exceeded his authority by "effectively modif[ying] the sentence more than five years after it was imposed" and had become final. As explained below, that claim is contingent on whether his sentence for sexual assault was imposed pursuant to A.R.S. § 13-702(D) and in accordance with his plea agreement, or pursuant to the mandatory flat-time sentencing provision in A.R.S. § 13-1406(B).[2] Because we conclude sentence was imposed pursuant to § 13-1406(B), as ADOC maintains, we deny special action relief.

---

[1]Although we review Durazo's claims under both Rule 32.9 and the Arizona Rules of Procedure for Special Actions, when referring to any action taken by the respondent judge, we refer to him as such throughout this decision.

[2]"A 'flat time' sentence requires that a defendant serve each day of the sentence imposed and renders the defendant ineligible for early release credits." *Galaz v. Stewart*, 207 Ariz. 452, n.1, 88 P.3d 166, 167 n.1 (2004).

¶3 But Durazo also claims, in the alternative, that he is entitled to specific performance of his plea agreement under the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971). This claim, that his sentence was imposed in violation of his constitutional rights, is properly considered under Rule 32.1(a). Accordingly, we review Durazo's *Santobello* claim in the context of Rule 32.9 and, for the reasons that follow, we grant relief.

Factual and Procedural Background

¶4 Pursuant to a plea agreement, Durazo was convicted in March 2011 of one count each of sexual assault, sexual abuse, and kidnapping, and sentenced to concurrent terms of imprisonment, the longest of which is 7.5 years. According to Durazo's plea agreement and the presentence report prepared for the court, the range of sentences available was consistent with that provided in § 13-702(D), the general sentencing statute for first-time felony offenders. Thus, the agreement provided that, for the sexual assault, a class two felony, Durazo would be sentenced within the range of three years, a "Substantial[ly] Mitigated Sentence," and 12.5 years, a "Substantially Aggravated Sentence," with a presumptive term of five years' imprisonment. *See* § 13-702(D).

¶5 In addition, the plea agreement included the following provision:

> If sentenced to prison, the defendant must serve approximately 85 percent of the sentence imposed before (s)he is eligible for release on any basis. Upon completion of the prison sentence, the defendant will be placed on community supervision. The duration of community supervision is one day of community supervision for every seven days of the prison sentence imposed, not actually served. Violation of the terms of community supervision could result in the defendant being required to complete the prison term imposed by the Court.

¶6 Before accepting Durazo's guilty plea, the trial court[3] informed him of the above range of sentences for "the sexual assault and the kidnapping," both class two felonies, and then stated, "I need also to advise you that if you are sentenced to prison you have to serve 85 percent of the judge's sentence. After you would be released you would be on community supervision for one day per week in that sentence."

¶7 In pronouncing judgment, the respondent judge noted the "determination of guilt . . . [was] by way of a plea entered on or about February 4th, 2011" and entered judgments of conviction for "sexual assault, a class two felony, . . . in violation of ARS 13-1406"; "sexual abuse, a class five felony, . . . in violation of ARS 13-1404"; and of "kidnapping, a class two felony, . . . in violation of ARS 13-1304." In imposing sentence, the respondent judge did not identify any specific sentencing statutes, and he did not state Durazo's sentence for sexual assault was a flat-time sentence to be served in full. Nor was there any mention of specific sentencing statutes in the sentencing portions of the court's minute entry. Durazo has not previously sought post-conviction relief pursuant to Rule 32.

¶8 In May 2014, Durazo sent a letter to the trial court stating, "It has recently come to my attention that [ADOC] has my sentence entered in their system as 100%-flat time; that is, day for day," contrary to the terms of his plea agreement and the sentence he believed had been imposed by the respondent judge. The court forwarded the letter to counsel and, in June, Durazo sent another letter to the court stating his attorney had responded by telling him the relief available under Rule 32 would require withdrawal from his plea and proceeding to trial. In his June letter, Durazo stated,

> I do not wish to withdraw from my plea, nor do I wish to go to trial. I merely inquire [sic] proof of my sentence (i.e. a

[3]The Honorable Roger Duncan, judge pro tempore, conducted the change-of-plea hearing and accepted Durazo's plea; the Honorable Christopher Browning entered the judgments of conviction and imposed Durazo's sentences.

> motion for a "correction of sentence" and/or clarification of my sentence), so I may provide proof to [ADOC] of my 85% sentence, not flat time.

¶9 In March 2016, Durazo again wrote to the court, stating that he had attempted to address the matter between April and July 2014, presumably with ADOC, and had been told "this would be resolved," but that ADOC had not yet applied earned release credits to his sentence. He further stated that, if earned release credits were applied, he would be eligible for release near the end of May 2016. He again emphasized that he did not wish to withdraw from his plea, but instead sought a clarification of his sentence, so that ADOC's "miscalculated 'flat-time'" release date could be corrected to reflect "the 85%" sentence imposed by the court.

¶10 Durazo's counsel then filed the Motion alleging ADOC was wrongly denying him "earned release credit[s] of one day for every six days served" pursuant to § 41-1604.07(A).[4] Relying on the plea agreement's provision that he "was to serve a minimum of 85 percent" of his sentence, Durazo argued he was entitled to early release credits under that statute. He asked the respondent judge to "either bring [the director of ADOC] before the Court to determine why [he] should not be required to fulfill his duty and thereby release [Durazo] on or about May 16, 2016," or, in the alternative, to reduce Durazo's sentence "by roughly 2.25 years" to provide "the benefit of his bargain reached with the State."

---

[4]Section 41-1604.07(A) provides:

> Pursuant to rules adopted by the director, each prisoner who is in the eligible earned release credit class shall be allowed an earned release credit of one day for every six days served, including time served in county jails, except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court.

¶11 Rather than respond to Durazo's Motion, the Pima County Attorney's Office deferred to the Arizona Attorney General's Office, which filed a response on behalf of ADOC. In that response, ADOC correctly pointed out that the language Durazo quoted from his plea agreement had not been included in the respondent judge's sentencing minute entry. Because Durazo had "pleaded guilty to a Sexual Assault under A.R.S. § 13-1406," ADOC argued he was ineligible for earned release credits under a mandatory sentencing provision in § 13-1406(B).[5] Based on this statutory provision, it maintained the respondent judge had necessarily "sentenced [Durazo] to a flat term of incarceration." It argued Durazo "is not eligible to earn release credits," because § 13-1406(B) limits early release to the "temporary" removal or release authorized by A.R.S. § 31-233(A) or (B).[6] And, citing ADOC

---

[5]In relevant part, § 13-1406(B) provides,

> Sexual assault is a class 2 felony, and the person convicted shall be sentenced pursuant to this section and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by [A.R.S.] § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

[6] Pursuant to § 31-233(A), the director of ADOC "may authorize" an inmate's temporary removal from prison, not to exceed one day, for certain work details, cooperation in medical research, or participation in "community betterment programs." Pursuant to § 31-233(B), the director may also authorize, pursuant to "specific rules established by the director," an inmate's temporary removal or release for compassionate leave, for medical treatment not available at the prison, for disaster aid, or, within ninety days of the inmate's release date, for "purposes preparatory to a return to the community."

Department Order 1002.09, § 1.1.1.2,[7] a rule that precludes eligibility for supervised, discretionary, temporary release under § 31-233 for inmates who "have a conviction for a sex offense," ADOC argued that Durazo's "sentence expiration date, July 2, 2017, remains his only permissible release date."

¶12 Durazo filed a reply maintaining he "was sentenced under the provisions of ARS 13-702," noting the respondent judge had not ordered a "flat time" sentence, and alleging the state apparently was "not willing to stand by . . . part of the bargained for disposition in this case." The following day, Durazo filed a "supplemental reply" in which he asserted the respondent judge had "imposed judgment and sentence in accordance with th[e] plea agreement," and that sentence, albeit illegally lenient under the provisions of § 13-1406(B), had become final and enforceable pursuant to this court's decision in *State v. Bryant*, 219 Ariz. 514, ¶¶ 13-17, 200 P.3d 1011, 1014-15 (App. 2008). Citing *Santobello*, he also maintained the state "must honor the agreement it extended to and entered with the defendant if legally possible."

¶13 In his ruling denying relief, the respondent judge acknowledged receipt of the filings listed above and noted the plea agreement's provision regarding the "'85 percent rule' . . . codified in A.R.S. § 41-1604.07(A) which allows eligible inmates an earned release credit of one (1) day for every six (6) days served." But noting that Durazo "was convicted of Sexual Assault under A.R.S. § 13-1406," the respondent then identified that section's provision limiting early release to that "'specifically authorized by section 31-233, subsection A or B.'" Finding "that the power given to the Director of the ADOC by [§ 31-233] is discretionary, not mandatory," the respondent concluded, "Based on th[e] policy of the ADOC, [Durazo] is not eligible to be considered for temporary release regardless of the terms of the Plea Agreement between the State and [Durazo]." Durazo's petitions for review and for special action relief followed.

---

[7]ADOC Department Orders Index, ch. 1002, *Inmate Release Eligibility System* (effective Jan. 8, 2003), https://corrections.az.gov/reports-documents/adc-policies/department-orders-index.

Discussion

¶14 According to our supreme court, "[i]n order to facilitate appellate review, trial judges should indicate on the record the specific statutory subsection under which a criminal sentence is imposed." *State v. Anderson*, 211 Ariz. 59, n.1, 116 P.3d 1219, 1221 n.1 (2005). This case illustrates the importance of that admonition. The central issue addressed by the parties below was the sentence imposed by the court. Durazo argued he was sentenced pursuant to § 13-702(D), in accordance with his plea agreement; ADOC maintained he was sentenced pursuant to § 13-1406 because he was convicted of violating that statute. In his special action petition, Durazo asserts that, by denying his Motion, the respondent judge acted in excess of his legal authority by "effectively modif[ying]" an illegally lenient sentence that had become final, an action proscribed by our decision in *Bryant*, 219 Ariz. 514, ¶ 13, 200 P.3d at 1014. This claim is cognizable in a special action proceeding. *See* Ariz. R. P. Spec. Act. 3(b) (special action may question whether respondent "has proceeded . . . in excess of jurisdiction or legal authority").

¶15 In contrast, Durazo's alternative claim—that his sentence for sexual assault, if imposed under § 13-1406, was contrary to his plea agreement and denied him the benefit of his bargain under *Santobello*—is appropriately addressed in a petition for post-conviction relief under Rule 32. *See State v. Georgeoff*, 163 Ariz. 434, 437, 788 P.2d 1185, 1188 (1990) (Rule 32 appropriate vehicle for alleging state's breach of plea agreement under *Santobello*). Accordingly, we review that claim in the context of Durazo's petition for review pursuant to Rule 32.9(c). Because resolution of the sentence actually imposed is critical to our further analysis, we first address Durazo's claims related to that issue, in the context of his petition for special action.

Special Action Jurisdiction

¶16 "[W]here extraordinary relief (special action) is available, this court may grant the appropriate relief even though the writ applied for was not properly drawn." *Salstrom v. State*, 148 Ariz. 382, 384, 714 P.2d 875, 877 (App. 1986), *citing State v. Davis*, 148 Ariz. 62, 712 P.2d 975 (App. 1985), *and Brown v. State*, 117 Ariz. 476,

573 P.2d 876 (1975). But relief by special action is available only when a party has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a).

¶17 Although the denial of habeas corpus relief is an appealable order, *see* A.R.S. § 12-2101(A)(11), ADOC argues Durazo's Motion should not be characterized as a petition for writ of habeas corpus because he had not alleged he was entitled to immediate release. *See Brown*, 117 Ariz. at 477, 573 P.2d at 877. We agree.[8]

¶18 After full review of the filings and the record, we conclude Durazo's Motion is best characterized, at least in part, as one for clarification of the sentence imposed by the respondent judge, as he requested in his correspondence to the trial court. To a large extent, the relief sought was contingent on his assertion that

---

[8]Similarly, although Durazo maintains that his claim below "invoke[d] the spirit of Rule 32.1(d), which provides for post-conviction relief where 'the person is being held in custody after the sentence imposed has expired,'" and that such claim, although premature below, is now "ripe for the courts to address," we cannot agree. In *Long v. Arizona Board of Pardons & Parole*, this court explained that "[c]ommunity release, like parole, 'is in legal effect imprisonment.'" 180 Ariz. 490, 494, 885 P.2d 178, 182 (App. 1994), *quoting Mileham v. Ariz. Bd. of Pardons & Paroles*, 110 Ariz. 470, 472, 520 P.2d 840, 842 (1974). Like Durazo here, "[w]hat Long sought . . . was not discharge from custody but transfer from one type of custody to another—from inmate status to community release," a claim not cognizable for habeas corpus relief under A.R.S. § 13-4132. Notwithstanding Durazo's reliance on *Davis*, that case is not inconsistent with *Long*. In *Davis*, this court concluded relief was unavailable pursuant to Rule 32.1(d) under then-applicable statutes providing for "good time credit," stating "that mere challenges to the [ADOC's] computation of good time credit are not cognizable under Rule 32 unless they result in the defendant remaining in custody when he should otherwise be free." 148 Ariz. at 64, 712 P.2d at 977 (construing claim for "good time credit" as one for special action relief).

the respondent judge imposed a sentence for sexual assault in accordance with his plea agreement and pursuant to § 13-702(D). Construing Durazo's Motion as one for clarification that his sentence was imposed pursuant to § 13-702(D), and not § 13-1406(B), we conclude the respondent judge's denial of relief is not subject to appeal. *Cf. Rasmussen v. Munger*, 227 Ariz. 496, ¶¶ 2-3, 260 P.3d 296, 296-97 (App. 2011) (accepting special action jurisdiction to challenge non-appealable order denying inmate's motion for release); *State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996) (denial of motion to modify probation conditions not appealable). Accordingly, in our discretion, we accept special action jurisdiction. *See Rasmussen*, 227 Ariz. 496, ¶ 3, 260 P.3d at 297 (accepting jurisdiction to address legal issues "not addressed fully by existing case law").

The Sentence Imposed

¶19 As noted above, Durazo and ADOC dispute the character of the sentence actually imposed here and the statutory basis for it. In his petition for special action, he concedes a sentence imposed pursuant to § 13-702(D) would be illegally lenient in light of the special flat-time sentencing provision for sexual assault in § 13-1406(B). We agree with Durazo, however, that if the state permits an illegal sentence "to become final without challenging it on appeal or pursuant to Rule 24.3," Ariz. R. Crim. P., it is "binding and enforceable" and may not thereafter be vacated or modified to the defendant's detriment. *Bryant*, 219 Ariz. 514, ¶¶ 13, 15, 200 P.3d at 1014-15.

¶20 But to the extent Durazo seems to contend that any sentencing order entered pursuant to a plea agreement implicitly incorporates that agreement's terms, we cannot agree. As ADOC maintains, it "must determine whether a prisoner is eligible for release pursuant to the terms of a sentencing order," and it is not required to "review the legality of the prisoner's sentencing order." *Stein v. Ryan*, 662 F.3d 1114, 1118 (9th Cir. 2011); *see also* Ariz. R. Crim. P. 26.16(b) (providing "exact terms of the judgment and sentence" to be entered "in the court's minutes" and "no other authority shall be necessary to carry into execution any sentence entered therein").

¶21 In his recent ruling on Durazo's Motion, the respondent judge did not address the conflict between the plea agreement, which he found provided for release eligibility under § 41-1604.07, and § 13-1406(B), which limits release eligibility to temporary removal or release under § 31-233.[9] Because the respondent's recent order and the sentencing minute entry were both silent regarding the statutory basis for the sentence imposed, we consulted the sentencing hearing transcript to determine whether there was any discrepancy in the documents showing the respondent's oral rendition of sentence. When such a discrepancy exists, "a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). "[T]he '[o]ral pronouncement in open court controls over the minute entry,'" and this court "can order the minute entry corrected if the record clearly identifies the intended sentence." *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013), *quoting State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989) (second alteration in *Ovante*); *see also State v. Jefferson*, 108 Ariz. 600, 601, 503 P.2d 942, 943 (1972) (discrepancy between sentencing transcript and minute entry "requires investigation" to discern "which . . . represents what the judge actually said"); *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (same; considering change-of-plea transcript to resolve discrepancy between sentencing transcript and minute entry to determine court's "true sentence").

---

[9] The respondent judge concluded only that, under § 13-1406(B) and ADOC policy, Durazo "is not eligible to be considered" for discretionary "temporary release" pursuant to § 31-233. In this regard, ADOC's argument regarding § 31-233—which was adopted by the respondent—misses the point of Durazo's claim. Durazo never asserted he was wrongly denied eligibility for compassionate leave, a work furlough, or any other occasion for discretionary, temporary release pursuant to § 31-233. He argued only that his sentence rendered him eligible for earned release credits under § 41-1604.07(A) and that ADOC has erroneously classified him as ineligible for those credits.

¶22 But the transcript of the sentencing hearing is of no assistance in determining whether Durazo's sentence entitled him to earned release credits, as provided in his plea agreement; as in the sentencing minute entry, the respondent judge did not identify any applicable sentencing statute when imposing sentence for the sexual assault. Nor does the transcript include any reference to the sentence of imprisonment having been imposed pursuant to the plea agreement.

¶23 We next consider whether the omission of reference to the statutory basis for the sentence creates an internal ambiguity that must be resolved by inquiry into the respondent judge's intent. "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them," but "[t]he elimination of every possible doubt cannot be demanded." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). "In criminal proceedings, the judgment and sentence are 'complete and valid' upon oral pronouncement, Ariz. R. Crim. P. 26.16(a), and cannot be modified thereafter except as provided by Rule 24.3, Ariz. R. Crim. P." *State v. Serrano*, 234 Ariz. 491, ¶ 9, 323 P.3d 774, 777 (App. 2014).

¶24 We cannot presume, from a silent sentencing record, that a trial court intended to impose an illegal sentence, even when that sentence was called for by a plea agreement. *See*, *e.g.*, *State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982) (affirming twenty-two-year sentence that "fail[ed] to include a provision th[e defendant] serve no more than 15 years, as provided in the plea agreement," because term actually imposed was lawful and "absolute discharge [from imprisonment] is not for courts to decide—it is within the control of the board of pardons and paroles . . . or the department of corrections"); *cf. State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982) (noting distinction between supplying judicial action and correcting record to accurately reflect oral pronouncement of sentence).

¶25 Had a flat-time sentence been a matter within the respondent judge's discretion, it would not have been imposed in the absence of an express direction by the judge at sentencing. As

Justice Cardozo explained in *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 464 (1936),

> The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment.

In *Wampler*, the Court held a requirement that a defendant remain in prison until his fine was paid, although permissible if ordered by the trial court at sentencing, had no effect when added by the clerk after the pronouncement of sentence, notwithstanding the common "practice" of local courts. *Id.* at 461-63, 465-66.

¶26 This court has held that when an aspect of a trial court's sentence is discretionary, its omission does not render a sentence illegal and subject to modification pursuant to Rule 24.3; nor may the omission be "corrected" as a "[c]lerical mistake[]" pursuant to Rule 24.4, Ariz. R. Crim. P. *E.g.*, *Serrano*, 234 Ariz. 491, ¶¶ 6, 11, 323 P.3d at 776, 778 (court lacked authority to amend sentence or judgment to enter discretionary order requiring sex offender registration); *cf. State v. Suniga*, 145 Ariz. 389, 395, 701 P.2d 1197, 1203 (App. 1985) (court lacked authority to increase legal sentence imposed under "misapprehension as to the presumptive sentence"); *Pyeatt*, 135 Ariz. at 143, 659 P.2d at 1288 (nunc pro tunc order may not be used "to cause an order or judgment that was never previously made or rendered to be placed upon the record of the court").

¶27 But § 13-1406(B) does not merely authorize a sentencing court to impose a flat-time sentence as a matter within the court's discretion. Its terms are mandatory; it requires the court to impose a mandatory, flat-time sentence for any "person convicted" for violation of that statute. *Id.* We agree with the United States Court of Appeals for the Ninth Circuit that a "negative implication" may be gleaned from *Wampler*:

> [W]hen a requirement . . . follow[s] automatically from the conviction, such as

> when the choice to impose it was made by the legislature rather than the judge at sentencing, the "choice of pains and penalties" is *not* part of the judicial function and need not have expression in the sentence and judgment.

Maciel v. Cate, 731 F.3d 928, 934 (9th Cir. 2013).

¶28 We thus conclude that in the absence of reference to any "specific statutory subsection under which [the] criminal sentence [wa]s imposed," *Anderson*, 211 Ariz. 59, n.1, 116 P.3d at 1221 n.1, or a discrepancy between the sentencing transcript and minute entry, the sentence here imparted "with fair certainty the intent of the court" to ADOC, which had the duty to execute it. *Daugherty*, 269 U.S. at 363. Durazo's sentence for sexual assault was imposed pursuant to § 13-1406(B), and the respondent judge did not impermissibly "modif[y]" the sentence or abuse his discretion by declining to reach the contrary conclusion urged in Durazo's Motion.

***Santobello* Claim under Rule 32**

¶29 As noted above, Durazo's Motion also raises a claim for specific performance of a plea agreement pursuant to *Santobello*. When, as here, a defendant applies for a writ of habeas corpus but raises a claim therein which attacks "the validity of his . . . conviction or sentence," the trial court "shall treat it as a petition for relief under this rule." Ariz. R. Crim. P. 32.3.

¶30 Accordingly, Durazo's Motion, to the extent it sought specific performance of the plea agreement under *Santobello*, constituted a petition for relief pursuant to Rule 32. And, although that post-conviction petition was subject to all the procedural requirements of Rule 32, *see* Ariz. R. Crim. P. 32.3, the state has never asserted that consideration of Durazo's claim was precluded on any procedural ground. *See* Ariz. R. Crim. P. 32.2(c) ("The state shall plead and prove any ground of preclusion by a preponderance of the evidence."). Nor did the respondent judge ever determine that any procedural defect prevented him from addressing the claim. *See*

id. ("[A]ny court . . . may determine and hold that an issue is precluded regardless of whether the state raises preclusion.").

¶31 Moreover, the record before us demonstrates no obvious procedural defect with the petition which would bar consideration of Durazo's claim other than a potential allegation that the petition was untimely. *See* Ariz. R. Crim. P. 32.4(a) (requiring of-right post-conviction proceeding to be initiated within ninety days after entry of judgment and sentence). And, notwithstanding the facial untimeliness of the petition, undisputed portions of the record demonstrate that Durazo bore no fault for his failure to file the petition sooner. *See* Ariz. R. Crim. P. 32.1(f).[10] On the record before us, we must therefore assume that when the respondent judge denied Durazo's motion in full without expressly addressing the *Santobello* claim, he either implicitly rejected the claim on its merits or declined a fair opportunity to do so. We now hold that the respondent erred in failing to grant Durazo relief on that claim.

¶32 In *Santobello*, the Supreme Court concluded that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. After full review of the record, the circumstances here appear similar to those we addressed in *State v. Villegas*, 230 Ariz. 191, 281 P.3d 1059 (App. 2012), an of-right Rule 32 proceeding in which the trial court found that "'no party, . . . or indeed the Court[,] recognized that the sentence [for participating in a criminal syndicate using a minor, A.R.S. § 13-2308(A), (E),] would be flat-time.'" *Villegas*, 230 Ariz. 191, ¶ 3, 281 P.3d at 1060 (third alteration added, remaining alterations in *Villegas*). In that case, we approved the court's remedy of reducing Villegas's sentences to

[10]The delay clearly arose from Durazo's reasonable belief that the trial court had sentenced him in conformity with his plea agreement—a plea agreement which unambiguously entitled him to earned release credits. He therefore pursued his grievance first with ADOC to administrative resolution on the understandable but erroneous assumption that ADOC misunderstood the sentence imposed by the court.

afford him "'the benefit of his plea bargain as he understood it.'" *Id*. ¶¶ 3, 13. We also noted that this court had employed a similar approach in *State v. Gourdin*, 156 Ariz. 337, 339, 751 P.2d 997, 999 (App. 1988). *Villegas*, 230 Ariz. 191, ¶ 14, 281 P.3d at 1063.

¶33 In this case, the record is clear that the state offered Durazo an illegally lenient plea agreement that provided he be sentenced for sexual assault under the range of sentences provided by § 13-702(D)[11] and authorized to receive earned release credits pursuant to § 41-1604.07, such that he could be "eligible for release" after serving "approximately 85 percent of the sentence imposed." The respondent judge acknowledged as much in his recent order, and, throughout these proceedings, neither ADOC nor the state's prosecuting agency has ever disputed these provisions of the agreement or that they were "part of the inducement or consideration," *Santobello*, 404 U.S. at 262, offered in exchange for Durazo's guilty plea.

¶34 Durazo entered his plea of guilty pursuant to that agreement after being advised by the trial court that he would "have to serve 85 percent of the judge's sentence" before being released to community supervision.[12] The court accepted his plea, and the presentence report provided a range of sentences consistent with the agreement and § 13-702(D), without mention of a flat-time sentence. Importantly, there is no evidence in the record that the respondent

---

[11]Section 13-1406(B) not only provides for flat-time sentences for those convicted of sexual assault; it mandates a different range of sentences than those found in § 13-702(D) and in Durazo's plea agreement, providing, for first offenders, a "Minimum" sentence of 5.25 years, a "Presumptive" term of 7 years, and a "Maximum" term of 14 years.

[12]Before accepting a guilty plea, a trial court must advise a defendant of "any special conditions regarding sentence, parole, or commutation imposed by statute," Ariz. R. Crim. P. 17.2(b), including a condition requiring a defendant to serve the actual sentence imposed before release eligibility. *See State v. Lamas*, 143 Ariz. 564, 567, 694 P.2d 1178, 1181 (1985).

judge thereafter rejected the plea agreement as impermissibly lenient or that he provided Durazo "an opportunity to withdraw his or her plea," as would have been required had he found the plea agreement's sentencing terms unacceptable. Ariz. R. Crim. P. 17.4(e).

¶35 Pursuant to *Santobello*, "a criminal defendant has a due process right to enforce the terms of his plea agreement." *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc). Where, as here, a defendant "has already fulfilled his obligations under the plea agreement" by "serving his bargained-for sentence . . . , he has 'paid in a coin that the state cannot refund,'" and specific performance affords the only viable remedy. *Id.* at 699 (pleading defendant entitled to specific performance of determinate sentence "notwithstanding" its illegality under California law), *quoting Brown v. Poole*, 337 F.3d 1155, 1161 (9th Cir. 2003).

¶36 Pursuant to A.R.S. § 13-4037(A), "we can modify the sentence to give [Durazo] exactly what he bargained for without prejudice to him and without any necessity for withdrawal of the plea." *Gourdin*, 156 Ariz. at 339, 751 P.2d at 999; *cf. State v. Davis*, 206 Ariz. 377, ¶¶ 47-48, 79 P.3d 64, 74-75 (2003) (where mandatory sentences under Dangerous Crimes Against Children statute unconstitutional as applied, requiring resentencing under general sentencing statutes). Accordingly, we modify the sentencing minute entry by adding, with respect to count one, that Durazo's partially aggravated term of 7.5 years was imposed "pursuant to A.R.S. § 13-702(D)." So modified, Durazo is eligible for earned release credits despite the nature of his sexual assault conviction. His sentence is not a flat-time sentence under § 13-1406(B) or § 41-1604.07(A).

Disposition

¶37 To the extent Durazo claims that he was not sentenced pursuant to § 13-1406(B), and that the respondent judge abused his discretion or exceeded his authority in concluding otherwise, we accept special action jurisdiction but deny relief.

¶38 To the extent Durazo alleges he was denied due process by the state's breach of his plea agreement, a claim properly considered pursuant to Rule 32, we grant relief as provided in this decision.