



3409(B). The record does not indicate whether the trial court and counsel failed to recognize this or if they believed the plea agreement coupled with the sentencing minute entry would afford Dippre the benefit of earned release credit despite the applicable law. Regardless, the parties now concede this provision of the plea agreement was unlawful. According to the parties, the Arizona Department of Corrections ("ADOC") awarded Dippre earned release credit for the first few years of his sentence despite the applicable law. The parties further represent that in December 2007, ADOC determined that Dippre was not entitled to earned release credit and recalculated his release date based on a flat time sentence. In response, Dippre filed a "Motion to Correct Error in Sentencing Order" and asked the trial court to advise ADOC he was entitled to earned release credit. The trial court denied the motion, holding there was no error in the sentencing order to correct.

Dippre filed a motion for reconsideration in which he pointed out that eligibility for earned release credit was a term of the plea agreement. The court denied the motion, stating, "The Court assumes that the officials at the Department of Corrections are aware of the plea agreement and the Court's

sentencing order. Given all the information provided by the defendant in his motion, the Motion for Reconsideration is denied." When Dippre informed ADOC of the court's ruling, ADOC refused to award Dippre earned release credit, citing the flat time provisions of A.R.S. § 13-3409(B).

Dippre then filed a Petition for Writ of Habeas Corpus in the Arizona Supreme Court. The supreme court ordered that Dippre's previous Motion to Correct Error in Sentencing Order be treated as a timely petition for post-conviction relief and that Dippre be appointed counsel. The court remanded the matter to allow the trial court to determine whether Dippre was "entitled to relief on his claim that a sentencing provision in the plea agreement allowing for earned release credit violated A.R.S. § 13-3409(B)."

Pursuant to the supreme court's order, Dippre filed a petition for post-conviction relief. Dippre argued he should be allowed to withdraw from the plea agreement because the ability to earn release credit was one of the primary terms that induced him to accept the plea. The trial court did not rule on whether Dippre presented a colorable claim for relief, did not hold an evidentiary hearing and did not actually grant, deny nor

summarily dismiss the petition. Instead, the trial court ruled:

[T]he sentence imposed by the Department of Corrections in December 2007 [] exceeds the maximum allowed by law since the plea agreement made the defendant eligible to earn a release credit day for every six days served.

The court orders the Department of Corrections to calculate the sentence for Involving a Minor in a Drug Offense as to this defendant in this case so that he is eligible for earned release credits as indicated.

Dippre then filed the instant petition for review. Dippre argues ADOC has already demonstrated it will not award him earned release credit and, therefore, the trial court should have allowed him to withdraw from the plea agreement. While this petition for review was pending, ADOC wrote a letter to the Yavapai County Attorney and explained it could not comply with the trial court's order. ADOC noted the statutes providing for earned release credit prevented it from recalculating Dippre's sentence as ordered. ADOC took the position, however, that it could recalculate Dippre's sentence as ordered if the trial court amended the original sentencing order to remove any reference to A.R.S. § 13-3409, the statute which defines the offense of involving a minor in a dangerous drug offense. There

is nothing in the record to indicate any action was taken by the court or the parties in response to this letter. In a supplemental pleading filed with this court, however, Dippre argues there is now no doubt ADOC will not comply with any order to grant him earned release credit and, therefore, he should be allowed to withdraw from the plea agreement.

A colorable claim in a petition for post-conviction relief is one that, if the allegations are true, might have changed the outcome. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Dippre presented a colorable claim that he should be allowed to withdraw from his plea agreement based on the inclusion of an unlawful sentencing provision which contributed to his decision to accept the plea. "The sentencing provisions enacted by our legislature are mandatory and may not be circumvented by agreements between prosecutors and defendants." *State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990). Further, where the parties to a plea agreement are mistaken as to the existence of a material factor which caused the parties to enter into the agreement and that factor was discovered after sentence was imposed, the defendant may be allowed to withdraw from the plea if it "is necessary to prevent

