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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JESUS DANIEL GODINEZ, Petitioner.	2 CA-CR 2013-0114-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2008136250001DT

Honorable Michael W. Kemp, Judge

REVIEW GRANTED; RELIEF GRANTED; REMANDED WITH INSTRUCTIONS

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H O W A R D, Chief Judge.

¶1 In 2010, pursuant to a plea agreement, petitioner Jesus Godinez was convicted of two counts of first-degree murder and four counts of aggravated assault in exchange for the state's agreement, inter alia, to withdraw its notice of intent to seek the

death penalty. The trial court sentenced Godinez to multiple terms of imprisonment, including two concurrent sentences of "life with possibility of parole after 25 years." In his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., Godinez asserted his guilty plea was not knowingly, voluntarily and intelligently entered because the court and his attorney "misadvised" him that he would be eligible to apply for release on parole at the completion of his twenty-five year sentences for first-degree murder, and that counsel was ineffective for so advising him. The court summarily denied relief, and this petition for review followed. We will not disturb the court's ruling absent an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons set forth below, we grant relief and remand with instructions.

¶2 Several times during the April 2010 settlement conference the trial court, defense counsel, and the prosecutor referred intermittently to the possibility of "release" and "parole" after twenty-five years, including references to possible appearances in front of the parole board. At the settlement conference, Godinez's mother asked, "If he signs this . . . plea agreement, he's never going to get out" to which the prosecutor responded, "Under the plea agreement, we're talking about 25 to life. . . . But after that 25 to life is up . . . you have the possibility of going before a parole board at some point in time, and then you can ask for release." The prosecutor added, "And again, I'm not an expert in regards to how that works or the information or what . . . argument you can make at that point, but it is a distinct possibility that you could get out after the 25 years." The court then stated, "So the advantage of the plea is it does give [Godinez] some hope that he

could be released after roughly 27 years[1] as he sits here today." Additionally, although the written plea agreement provided "[t]he parties stipulate that in regard to Counts 1 and 2 [first-degree murder], the defendant shall be sentenced to life imprisonment with the possibility of parole after 25 calendar years," it also defined "calendar years" as "365 days actual time . . . without release, suspension or commutation of sentence or release on any basis."

¶3 At the change-of-plea hearing, the trial court asked Godinez if anyone had promised him anything that was not contained in the plea agreement and Godinez responded, "It says after 25, I'll be eligible. I just want it to be, you know what I mean, after I do this 30 to life, will I be eligible?" The judge responded, "You will be eligible. . . . If you are sentenced to life with a possibility of parole, and that's what you are pleading to, you shall not be released on any basis until the completion of 25 calendar years." The judge then explained, "You're going to have to do the 25 calendar years, no early release or anything before you'll be eligible for release," and added, "The sentence for the 25 calendar years mean[s] that 365 days of actual time will be served without release, suspension or commutation of sentence or release on any basis. Do you understand that?" Godinez responded, "Yes." The court subsequently referred to "a possibility of release after 25 years," and "life imprisonment with the possibility of parole after 25 calendar years." At sentencing, the court imposed concurrent sentences of "life

[1]The trial court ordered Godinez to serve the sentences for aggravated assault before serving the twenty-five year sentences for first-degree murder.

in prison with the possibility of parole after 25 years" on the first-degree murder counts, sentences that were reflected in the written sentencing order.

¶4 In its minute entry ruling dismissing the petition for post-conviction relief, the trial court noted that if Godinez had not entered a guilty plea, he "faced not only potential death sentences on the two murder counts, but at least 95.5 years and as much as 205 years in prison on the remaining counts." Citing A.R.S. § 31-402(C)(4), the procedure by which a defendant who receives a life sentence may be released if recommended by the Board of Executive Clemency (the "board") and the sentence is commuted by the governor, the court concluded Godinez "was correctly informed during the settlement conferences, in the plea agreement, and during the plea colloquy that he would have the possibility of being released from prison after serving his five-year aggravated assault sentences and 25 years of his life sentences." *See State v. Womble*, 225 Ariz. 91, ¶ 41, 235 P.3d 244, 254 (2010) ("Arizona law does not prohibit the release of a defendant given a life sentence once that defendant serves twenty-five years."). Concluding that Godinez's "claims lack any support in the record" and that he "was correctly advised about the law applicable to his sentences and clearly understood the plea agreement," the court found he was not entitled to an evidentiary hearing. The court explained its decision as follows:

> [T]he use of the term "parole" in the plea agreement and the settlement conferences did not so confuse the defendant as to render his pleas involuntary. This term was used interchangeably with the term "release" during all the proceedings and in the plea agreement. It was clear that the defendant was concerned about whether he would have the possibility of being released from prison at some future date

> and not the specific mechanism for obtaining that release. The Court finds of no import the fact that it is no longer the "parole board" but rather the Board of Executive Clemency to whom a petition for release must be sought in the first instance. As noted, Arizona law does clearly provide a mechanism for release, and the defendant was clearly advised that he would be eligible for that release in approximately 30 years after serving the concurrent five-year sentences for aggravated assault followed by the concurrent 25-year to life sentences for murder.

¶5 Quoting the affidavit of defense counsel Rick Miller, the trial court similarly found Godinez had not established that counsel was ineffective by misinforming him he might be eligible for parole. In his affidavit, Miller stated that "[t]he death penalty allegation . . . made the risk of trial too great," and further attested:

> Mr. Godinez and I discussed the meaning of twenty-five years to life during the time leading up to the guilty plea hearing. Mr. Godinez was concerned that he would never get out of prison. He was also concerned that parole no longer existed. My memory (and my practice) is that I told Mr. Godinez that no-one [sic] knows whether he would ever get out of prison if sentenced to twenty-five to life, but at least there was a chance of release. I informed him that he may never get out of prison even with a twenty-five to life stipulation. I contrasted the twenty-five to life plea offer to that of natural life which meant no hope of release. I explained that I felt some prison authority would have to make the determination about release, whatever that authority might be called in the future. I never told him that commutation was the only available means of release.

¶6 On review, Godinez argues that because he was misinformed that he would be eligible for parole after twenty-five years, and because release on "parole" is not synonymous with "commutation" or "pardon," the only forms of release available to him,

he did not knowingly, voluntarily, and intelligently plead guilty.[2] *See* A.R.S. § 41-1604.09(I) (parole eligibility classification and certification "applies only to persons who commit felony offenses before January 1, 1994"); *State v. Rosario*, 195 Ariz. 264, ¶ 26, 987 P.2d 226, 230 (App. 1999) (Arizona legislature has eliminated possibility of parole for crimes committed after January 1, 1994).[3] Godinez further asserts "[t]he record is devoid [sic] of any mention of possible commutation or pardon, nor is there any warning that these would be his only avenues for release." He points out that although former A.R.S. § 13-703,[4] the statute under which he was sentenced, provides that a defendant not sentenced to natural life "shall not be released on any basis until the completion of the service of twenty-five calendar years," it does not provide a specific mechanism for release after serving twenty-five years. He also maintains that, if he had been informed he was not eligible for parole, he would not have pled guilty. He argues he is entitled to an evidentiary hearing and asks that the court vacate his convictions and permit him to withdraw from the plea agreement. *See* Ariz. R. Crim. P. 17.5 ("The court, in its

[2]On review, Godinez urges us to consider an unpublished decision order of this court addressing "an identical issue in an almost identical case" to "better decide if conflicting decisions in the lower courts are a problem." We note that counsel misstates Rule 111(c), Ariz. R. Sup. Ct., and counsel's request does not fall within the rule's intended use. *See* Rule 111(c) (memorandum decision "shall not be regarded as precedent nor cited in any court except" to establish res judicata, collateral estoppel, or law of the case, or to inform appellate court of other memorandum decisions so court can decide whether to issue published opinion, grant motion for reconsideration, or grant petition for review). We therefore do not consider the cited decision in determining whether to grant relief in this case.

[3]Godinez committed the underlying offenses on May 3, 2008.

[4]*See* 1993 Ariz. Sess. Laws, ch. 153, § 1; *see also* 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38 (renumbering former § 13-703 as current A.R.S. § 13-751).

discretion, may allow withdrawal of a plea of guilty or no contest when necessary to correct a manifest injustice.").

¶7 A defendant's decision to plead guilty must be voluntary, knowing, and intelligent. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *State v. Brown*, 212 Ariz. 225, ¶ 15, 129 P.3d 947, 951 (2006); *see also* Ariz. R. Crim. P. 17.1(b). Pursuant to Rule 17.2(b), Ariz. R. Crim. P., before accepting a guilty plea, a trial court must inform the defendant of "[t]he nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute." A plea may be rendered involuntary if the trial court fails to adequately explain the material consequences of a guilty plea or if the state materially breaches the plea agreement. *See State v. Pac*, 165 Ariz. 294, 295-96, 798 P.2d 1303, 1304-05 (1990) (plea involuntary if defendant "lacks information of 'true importance in the decision-making process'"), *quoting State v. Crowder*, 155 Ariz. 477, 481, 747 P.2d 1176, 1180 (1987).

¶8 The trial court found that despite the interchangeable use of the terms "parole" and "release" during the proceedings and in the plea agreement, Godinez nonetheless was informed "correctly" he would be eligible for release. The record supports the court's finding that Godinez "was clearly advised that he would be eligible for . . . release." But, to the extent the court suggests parole and release are synonymous, further suggesting that parole and commutation, the only form of release that applies to Godinez are also the same, we disagree. As we explain below, "[p]arole . . . is a different

creature than commutation." *Arnold v. Ariz. Bd. of Pardons and Paroles*, 167 Ariz. 155, 158, 805 P.2d 388, 391 (App. 1990).

¶9 Prisoners eligible for parole may apply to the board, which will authorize release if "it appears to the board, in its sole discretion, 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." A.R.S. §§ 31-412(A), 31-402(A), 31-411(A). In contrast, prisoners seeking commutation may apply to the board, which then may recommend to the governor commutation of sentence "after finding by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform the offender's conduct to the requirements of the law." A.R.S. § 31-402(C)(2). Notably, "the governor retains ultimate authority to grant or deny a recommended commutation." *McDonald v. Thomas*, 202 Ariz. 35, ¶ 12, 40 P.3d 819, 824 (2002). Based on the obvious differences between parole and commutation, and the erroneous advice Godinez received suggesting he would be eligible for parole, we find the trial court abused its discretion by concluding it had informed Godinez "correctly" about Arizona law, and that his claims "lack[ed] any support in the record."

¶10 In addition, Godinez maintains in his petition for review, as he did in his petition below, that he "asserted in his affidavit that he would not have entered into the plea agreement had he known that he would never have the possibility of obtaining release by parole at the end of twenty-five calendar years," and further argues that "he

would not have pled guilty but for advice of counsel that by law he would someday after 25 years be eligible for release on parole for his first degree murder conviction." He also contends he relied on the promise "he would have an avenue to apply for release on parole with the expectation that some actual mechanism or statutory scheme allowed such release," and that "[t]he Court cannot deem [his] affidavit not credible without a hearing."

¶11 However, Godinez failed to comply with the requirement of Rule 32.5, Ariz. R. Crim. P., that "facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. . . . [And a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."[5] Notably missing from Godinez's affidavit is any statement that he accepted the plea offer in reliance on counsel's and the trial court's assurances he was eligible for parole rather than some other form of release.[6] Nor did Godinez avow in his affidavit that he would not have pled guilty if he had been told his only avenue of release was by means of executive clemency rather than by parole. *See State v. Jenkins*, 193 Ariz. 115, ¶ 19, 970 P.2d 947, 952-53 (App. 1998) (information defendant lacked "must have been relevant to the decision-making process" for plea to be

[5]Although Rule 32.5 was amended effective January 13, 2013, we refer to the version of the rule in effect when Godinez filed his petition for post-conviction relief. *See* Ariz. Sup. Ct. Order R-12-0009 (Aug. 30, 2012).

[6]Counsel has mischaracterized both Rule 111 and Godinez's affidavit. Although our record does not conclusively establish that counsel acted deliberately, we caution counsel that attempting to mislead the court violates ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

involuntary). Other than stating he "always wanted to go to trial," and that he "reluctantly and doubtfully agreed to plead guilty," Godinez's affidavit merely sets forth his understanding of the potential sentences he will face, including the death penalty, if his plea agreement is set aside.

¶12 And, based on the record, it appears that neither the trial court nor the state noticed that Godinez's affidavit did not contain the assertions Godinez made in his petition below,[7] nor did the state point out this deficiency to the court. If the court had been so advised, it would have had the opportunity to address the obvious discrepancy between Godinez's petition and his affidavit before it had ruled.

¶13 The trial court not only erroneously permitted the interchangeable use of the terms parole and release, it misadvised Godinez that he was eligible for parole. In addition, the court and parties apparently believed that Godinez's affidavit stated something it did not. For these reasons, we remand this matter to give the court the opportunity to address these problems. The court shall then determine whether Godinez's guilty plea was in fact knowingly, voluntarily and intelligently entered, and whether he established that competent counsel would have advised him that commutation, rather than parole, was the only available option for release and whether that advice was material to his decision to plead guilty. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985); *see also State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998).

[7]In addition to his affidavit, Godinez attached an undated, unsworn "Certification" to his petition.

¶14 Finally, if the trial court denies post-conviction relief on remand, we instruct the court to correct the sentences for counts one and two for first-degree murder as follows. Instead of providing for "life with possibility of parole after 25 years," the sentences shall provide for life in prison without the possibility of release on any basis until the completion of twenty-five calendar years. The remainder of the sentencing order shall remain in full force and effect.

¶15 For the reasons stated, we grant the petition for review, grant relief, and remand this matter for proceedings consistent with this decision.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Michael Miller
MICHAEL MILLER, Judge