IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

EARL FELTON CRAGO JR.,
Respondent.

No. 2 CA-CR 2021-0011-PR
Filed March 25, 2021

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Cochise County
No. S0200CR94000471
The Honorable Laura Cardinal, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

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By Doyle B. Johnstun, Deputy County Attorney, Bisbee
Counsel for Petitioner

Cochise County Office of the Legal Advocate, Bisbee
By Xochitl Orozco, Legal Advocate
Counsel for Respondent

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

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

¶1 The state seeks review of the trial court's ruling granting Earl Crago Jr.'s successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. In its ruling, the court ordered that Crago is eligible for release from prison and placed him on community supervision. We will not disturb the ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Because the state has established such abuse here, we grant review and relief.

Factual and Procedural Background

¶2 In 1994, a defendant convicted of first-degree murder could be sentenced to prison for natural life or for life without the possibility of release "on any basis until the completion of the service of twenty-five calendar years." 1993 Ariz. Sess. Laws, ch. 153, § 1. The statutes at the time did not provide for community supervision after a term of life imprisonment. *See* 1994 Ariz. Sess. Laws, ch. 358, § 5 (prisoners shall earn release credits "except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court"); 1993 Ariz. Sess. Laws, ch. 255, § 87 (same).

¶3 After a jury trial, Crago was convicted of first-degree murder committed in September 1994. The sentencing court imposed a term of "life" in prison, ordering that Crago "must serve every day of twenty-five (25) years of the sentence imposed before he is eligible for any type of release." The court also ordered that Crago was "required to do mandatory community supervision sentence—one day for every seven days sentenced to, for a total of 3 years, 7 months."

¶4 This court affirmed Crago's conviction and sentence on appeal, denied relief in part on a consolidated petition for review of the denial of his first petition for post-conviction relief, and remanded for an

evidentiary hearing on two claims of ineffective assistance of counsel. *State v. Crago*, Nos. 2 CA-CR 95-0488, 2 CA-CR 98-0230-PR (consol.) (Ariz. App. Mar. 18, 1999) (mem. decision). We subsequently denied relief on Crago's petition for review of the denial of post-conviction relief after the evidentiary hearing. *State v. Crago*, No. 2 CA-CR 00-0259-PR (Ariz. App. Mar. 13, 2001) (mem. decision). In the years that followed, we also denied relief on seven additional petitions for review from the denials of post-conviction relief. *State v. Crago*, No. 2 CA-CR 2019-0234-PR (Ariz. App. Mar. 26, 2020) (mem. decision); *State v. Crago*, No. 2 CA-CR 2014-0379-PR (Ariz. App. Feb. 25, 2015) (mem. decision); *State v. Crago*, No. 2 CA-CR 2013-0402-PR (Ariz. App. Mar. 11, 2014) (mem. decision); *State v. Crago*, No. 2 CA-CR 2011-0162-PR (Ariz. App. Sept. 9, 2011) (mem. decision); *State v. Crago*, No. 2 CA-CR 2008-0396-PR (Ariz. App. May 12, 2009) (mem. decision); *State v. Crago*, No. 2 CA-CR 2004-0224-PR (Ariz. App. Mar. 29, 2005) (decision order); *State v. Crago*, No. 2 CA-CR 01-0381-PR (Ariz. App. Feb. 19, 2002) (mem. decision).

¶5 In December 2019, Crago filed the current petition for post-conviction relief. Relying on Rule 32.1(d), Crago argued that he was being held beyond the term of his sentence.[1] He reasoned that, by imposing community supervision of three years and seven months, the sentencing court effectively "capped [his] sentence to the minimum allowed of 25 years," which he had completed. Thereafter, Crago filed a notice of supplemental authority, citing *Chaparro v. Shinn*, 248 Ariz. 138 (2020), for the proposition that "if the state fails to timely correct or appeal an illegally lenient sentence then the illegally lenient sentence is final under Arizona law." The trial court sua sponte appointed counsel for Crago. Counsel subsequently filed a memorandum in support of Crago's pro se petition, arguing that, like in *Chaparro*, Crago's "illegally lenient sentence" of twenty-five calendar years "must now stand" because the state had failed to timely challenge it.

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[1] In his petition, Crago also raised several claims of ineffective assistance of counsel under Rule 32.1(a). The trial court, however, concluded that those claims were precluded as previously adjudicated or waived. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). Because Crago does not seek review of the court's denial of relief on those claims, we do not address them further. *See* Ariz. R. Crim. P. 32.16(c)(4) ("A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.").

¶6 In response, the state maintained that the issue raised in Crago's latest petition was precluded because he had raised it previously and courts had addressed it on the merits. The state further asserted that *Chaparro* was not a significant change in the law warranting relief because it was previously settled in *Arizona v. Dawson*, 164 Ariz. 278 (1990), that an appellate court cannot correct an illegally lenient sentence that was not timely appealed. The state argued that the sentencing court had ordered Crago to serve a term of life in prison without the possibility of release for twenty-five years, not twenty-five calendar years, and that the imposition of community supervision was "not illegally lenient" but was "illegally harsh" because "there is no legal requirement for any community supervision, let alone three years and seven months" thereof.

¶7 After an evidentiary hearing, the trial court ruled Crago was "eligible for release after serving 25 years pursuant to his sentence" and ordered he "be placed on community supervision for the term imposed by the sentencing judge."[2] The court explained that it could "find the issue of sentencing terms imposed in 1995 . . . precluded pursuant to Rule 32.2," because it had been previously raised in post-conviction proceedings, unless Crago had "raised grounds for relief on the issue which are not precluded." The court then determined that Crago's timely argument that *Chaparro* was a significant change in the law that would affect his sentence under Rule 32.1(g) was not subject to preclusion. In so finding, the court relied on the district court's decision certifying the issue in *Chaparro* to the Arizona Supreme Court—the district court's decision described the issue as "novel or unsettled." The court then found that application of *Chaparro* was "appropriate, fair and just" in this case, noting that Crago was "similarly situated to Chaparro." Based on the sentencing minute entry, transcript, and clerk's notes, the court concluded that the sentencing court had intended "to impose a life sentence with the possibility of parole or other release (work furlough or work release, but distinct from 'commutation') after [Crago] had served 25 years in prison." This petition for review followed.

Discussion

¶8 The state argues the trial court erred in concluding that Crago's sentencing claim was not precluded under Rule 32.2. As it did

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[2]The ruling originally specified that Crago was "eligible for parole after serving 25 years," but the trial court later clarified that he was "eligible for release after serving 25 years."

below, the state maintains that Crago's current petition for post-conviction relief "alleged that he was sentenced to a determinate 25-year term of imprisonment and that he was still imprisoned after 25 years" but Crago had "raised that same issue in his fourth and fifth Rule 32 petitions." And the state points out that both the trial court and this court "adjudicated that issue on the merits in conjunction with [Crago's] fifth Rule 32 proceeding." The state therefore reasons that Crago is precluded "from raising the issue a third time."

¶9 Rule 32.1(d) provides post-conviction relief when "the defendant continues to be or will continue to be in custody after his or her sentence expired." However, such claims are subject to preclusion if they were "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding." Ariz. R. Crim. P. 32.2(a)(2), (b).

¶10 As part of his fifth post-conviction proceeding, Crago argued that he was "being required to serve a sentence beyond the sentence which was imposed" because the Arizona Department of Corrections (ADOC) had "essentially converted his sentence from one of life imprisonment without the possibility of release for twenty-five years to one of natural life." *Crago*, No. 2 CA-CR 2011-0162-PR, ¶ 3. He pointed out that, while ADOC's release-date form originally reflected that his community-supervision term began on September 17, 2019, it had been amended in 2006 to show "a life sentence without community supervision." *Id.* In its response, the state argued that, "because Crago was not sentenced to a determinate twenty-five year term, but can only 'be considered for a recommendation for release' in twenty-five years, the original sentence erroneously provided that he serve community supervision upon his release in 2019." *Id.* ¶ 4. The state thus asked the trial court to strike the community-supervision order from Crago's sentence. *Id.*

¶11 The trial court denied Crago's fifth petition, reasoning that the community-supervision order was illegal but it was unable to correct the order in the absence of a timely request by the state. *Id.* ¶ 5. The court further determined that, because Crago had been "sentenced to serve life in prison, with the possibility that after serving twenty-five years, he could achieve his release if recommended by the Board of Executive Clemency and the sentence [is] commuted by the Governor." *Id.* The court observed: "[E]ven after he has served twenty-five calendar years, he could not be held in custody after the expiration of the sentence because the sentence is one of life imprisonment." *Id.*

¶12 On review, this court determined that Crago's claim was precluded because he had raised it "to some extent in two prior pleadings." *Id.* ¶ 7. We nonetheless addressed the merits of his argument, explaining that Crago's "sentence expires at the end of his life, an indeterminate period, not in twenty-five years," and that "ADOC's 2006 time computation memorandum did not change Crago's sentence to one of natural life" or "make him ineligible for release." *Id.* ¶ 8. We agreed with the trial court that the imposition of community supervision was contrary to the law. *Id.* ¶ 9. But we noted, "[t]he imposition of community supervision had no bearing on Crago's life sentence or his eligibility to have that sentence commuted." *Id.* ¶ 11.

¶13 In his current petition for post-conviction relief, Crago again argues that the sentencing court had imposed a determinate twenty-five-year prison term and that ADOC, at the direction of the Arizona Attorney General, had improperly disregarded the community-supervision clause of his sentence. Although the language may be slightly different, this amounts to the same issue we addressed in Crago's fifth proceeding for post-conviction relief. *See id.* ¶¶ 7-11.

¶14 Crago nevertheless contends that he is not precluded from raising this claim because "it was not ripe until 2019" after he had served his twenty-five-year term. But the question is not one of ripeness. The relevant inquiry under Rule 32.2(a)(2) is whether the issue was previously raised and addressed on the merits. *Compare State v. Martinez*, 226 Ariz. 464, ¶ 7 (App. 2011) (claim for post-conviction relief precluded under Rule 32.2(a)(2) where allegation encompassed by previous claim and adjudicated on merits), *with In re Estate of Stewart*, 230 Ariz. 480, ¶ 12 (App. 2012) (ripeness "prevents a court from rendering a premature judgment or opinion on a situation that may never occur"). As discussed above, that happened here.

¶15 That said, Rule 32.1(g) provides post-conviction relief when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence."[3] And such a claim may be raised in an untimely or successive

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[3]Crago did not characterize *Chaparro* as a significant change in the law under Rule 32.1(g) until he filed his reply to the state's response below. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7 (App. 2009) (no abuse of discretion where trial court declined to address issues first raised in reply to state's response and defendant failed to seek leave to amend petition). However,

petition for post-conviction relief. Ariz. R. Crim. P. 32.2(b), 32.4(b)(3)(B). Thus, as the trial court pointed out, Crago's claim may proceed if *Chaparro* is a significant change in the law that would probably affect his sentence.

¶16 Our post-conviction relief rules do not define what constitutes "a significant change in the law." Ariz. R. Crim. P. 32.1(g); *see also State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009). "But plainly a 'change in the law' requires some transformative event, a 'clear break from the past.'" *Shrum*, 220 Ariz. 115, ¶ 15 (quoting *State v. Slemmer*, 170 Ariz. 174, 182 (1991)). "Such change occurs, for example, 'when an appellate court overrules previously binding case law' or when there has been a 'statutory or constitutional amendment representing a definite break from prior law.'" *State v. Werderman*, 237 Ariz. 342, ¶ 5 (App. 2015) (quoting *Shrum*, 220 Ariz. 115, ¶¶ 16-17).

¶17 Our supreme court announced two holdings in *Chaparro*: (1) "a sentence imposing 'life without possibility of parole for 25 years' means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite [A.R.S.] § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994," and (2) "a court lacks jurisdiction to correct an illegally lenient sentence absent timely correction or appeal." 248 Ariz. 138, ¶ 2. As to the former, the issue centered on the defendant's sentence of "life without possibility of parole for 25 years." *Id.* ¶ 1. The supreme court conducted a fact-specific review of the record to ascertain the sentencing court's intent with regard to parole. *Id.* ¶¶ 11-12, 23. It was not overruling previously binding case law or interpreting a statutory or constitutional amendment. *See Werderman*, 237 Ariz. 342, ¶ 5; *cf. State v. Poblete*, 227 Ariz. 537, ¶ 10 (App. 2011) (United States Supreme Court's rejection of approach to ineffective assistance of counsel claim constituted significant change in law).

¶18 As to the supreme court's latter holding—that courts cannot correct illegally lenient sentences without a timely challenge—that rule was well established at least twenty years earlier. Indeed, in *Chaparro*, the court cited *Dawson*, 164 Ariz. at 283-84, and Rule 24.3, Ariz. R. Crim. P., for the proposition that "[i]llegally lenient sentences are final under Arizona law absent timely appeal or post-judgment motion." 248 Ariz. 138, ¶ 19. It therefore cannot be seen as "a clear break from the past." *Shrum*, 220 Ariz. 115, ¶ 15 (quoting *Slemmer*, 170 Ariz. at 182).

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because *Chaparro* was decided after Crago had filed his current petition and because the trial court addressed the issue on the merits, we do as well.

¶19 Here, the sentencing court imposed a term of "life" in prison, explaining that Crago "must serve every day of twenty-five (25) years of the sentence imposed before he is eligible for any type of release." Unlike in *Chaparro*, the court did not mention parole. We thus fail to see how the fact-specific inquiry in *Chaparro* constitutes a significant change in the law that would probably affect Crago's sentence. *See State v. Pandeli*, 242 Ariz. 175, ¶ 4 (2017) (court abuses discretion if it makes error of law).

¶20 The district court's decision certifying the issue in *Chaparro* to the Arizona Supreme Court does not convince us otherwise. While the district court may have viewed the issue presented as "novel" and "unsettled," the supreme court did not overrule previously binding caselaw or otherwise break new ground in its opinion. *Chaparro v. Ryan*, No. CV 19-00650-PHX-DWL, 2019 WL 3361244 (D. Ariz. July 25, 2019). In determining whether a case represents a significant change in the law under Rule 32.1(g), the focus is on the language and holdings of that decision, not how it was initially assessed by another court.

¶21 As we have previously stated, Crago's sentence "expires at the end of his life, an indeterminate period, not in twenty-five years." *Crago*, No. 2 CA-CR 2011-0162-PR, ¶ 8. Given that he has now served twenty-five years, he is eligible to be considered for release. *See id.* ¶ 10 (discussing board of clemency's decision to recommend commutation and governor's decision to grant commutation). "The imposition of community supervision had no bearing on Crago's life sentence or his eligibility to have that sentence commuted." *Id.* ¶ 11. Because we previously addressed on the merits the issue raised in Crago's current petition for post-conviction relief, it is now precluded.[4] *See* Ariz. R. Crim. P. 32.2(a)(2); *see also State v. Whelan*, 208 Ariz. 168, ¶ 8 (App. 2004) ("law of the case" is "practice of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court") (emphasis omitted) (quoting *Davis v. Davis*, 195 Ariz. 158, ¶ 13 (App. 1999)).

Disposition

¶22 For the reasons stated above, we grant review and relief.

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[4]Because we agree with the state that the issue is precluded, we need not address the state's additional arguments that the trial court erred in concluding Crago was eligible for parole and erred in ordering his release on community supervision.