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## NO INDETERMINATE SENTENCING WITHOUT PAROLE

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## NO INDETERMINATE SENTENCING WITHOUT PAROLE

KATHERINE PUZAUSKAS<sup>α</sup> & KEVIN MORROW<sup>β</sup>

### ABSTRACT

*This article looks critically at the indeterminate sentencing system that survived after the elimination of parole in Arizona in 1993. It begins by exploring the purpose and history of indeterminate sentencing and parole as well as its earliest constitutional challenges and eventual decline. Next it compares two commonly confused forms of “release”: parole and executive clemency. The article then examines the three types of defendants affected by indeterminate sentences without parole: death row defendants denied parole eligibility instructions at trial, defendants sentenced with parole at trial, and defendants whose plea agreement includes parole. Finally, the article argues that without parole, indeterminate sentencing systems like the one used in Arizona should be ruled unconstitutional.*

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This article does not address Arizona Senate Bill 1211 (2018) which may permit parole eligibility for pleading inmates sentenced to life with the possibility of parole after a minimum number of years.

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## I. INTRODUCTION

In the early days of American criminal law, prisoners guilty of crimes received and served a fixed, determinate sentence.<sup>1</sup> As the nation developed, sentence reformers introduced a new system where, generally, prisoners were sentenced to an indeterminate range of years or to “life.”<sup>2</sup> Then a parole board would select those prisoners who would be released once they had served the minimum term.<sup>3</sup> In the past thirty years across the country, determinate sentencing has returned and the process of parole has been abolished in many states under the banner of “Truth-in-Sentencing.”<sup>4</sup>

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1. Warren v. U.S. Parole Comm’n, 659 F.2d 183, 189 (D.C. Cir. 1981).

2. *Id.* at 190.

3. *See id.* at 195-96 (noting that the punishment handed down by the court was service of a minimum term plus whatever additional term the parole board came up with).

4. *See* 1993 Ariz. Sess. Laws 1404 (explaining that the purpose of S.B. 1049 was “to promote truth and accountability in sentencing.”).

For states that chose to implement Truth-in-Sentencing by returning to determinate sentencing, this presents no issue. However, if a state eliminates parole without altering the system of indeterminate sentencing, it creates a paradox; an indeterminate sentencing scheme is a system that requires parole.<sup>5</sup> Parole is the hallmark of an indeterminate sentencing system.<sup>6</sup> Parole determines the end of an indeterminate sentence; parole allows for “the state to be able to adjust the length of sentence so that a person will be supervised as long as he constitutes an unreasonable threat to life or property, but no longer.”<sup>7</sup>

When Arizona implemented Truth-in-Sentencing on January 1, 1994, it eliminated parole for all offenses but did not eliminate indeterminate sentencing.<sup>8</sup> A limited number of Arizona criminal statutes still mandate indeterminate life sentences, and although parole was eliminated, defendants routinely received, or pled to, sentences with parole eligibility.<sup>9</sup>

The United States Supreme Court recently shed light on this situation in *Lynch v. Arizona (Lynch III)*, which upheld the right of defendants eligible for the death penalty to inform the jury of their parole eligibility.<sup>10</sup> The court sentenced Shawn Lynch under an Arizona statute that allows for natural life or an indeterminate sentence of life with the possibility of “release” after twenty-five years as alternatives to the death penalty.<sup>11</sup> In *Lynch III*, the Court found that parole is not available for adult defendants in Arizona, despite over two hundred defendants whose sentences include parole eligibility.<sup>12</sup> This creates a significant problem in Arizona’s sentencing structure; defendants are receiving sentences or pleading guilty to crimes with stipulated sentences of “life” with the possibility of *parole* after serving a minimum term of years.<sup>13</sup> Otherwise unheard of in

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5. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, 17 FED. SENT’G. REP. 60, 61 (2004) (defining “determinate sentencing” as “a system in which there is no discretionary releasing authority and an offender may be released from prison only after expiration of the sentence imposed (less available good or earned time).”).

6. *Id.*

7. *Anderson v. Nelson*, 352 F. Supp. 1124, 1129 (N.D. Cal. 1972).

8. See *Lynch v. Arizona (Lynch III)*, 136 S. Ct. 1818 (2016) (noting that under Arizona law, “parole is only available for individuals who committed a felony before January 1, 1994. . .”).

9. See generally 1993 Sess. Laws of Ariz. (many of the Arizona laws no longer mandate indeterminate life sentences).

10. *Lynch III*, 136 S. Ct. at 1820.

11. *Id.* at 1821-22 (citing ARIZ. REV. STAT. ANN. § 13-703(A)). Arizona’s sentencing statutes permitting a sentence of natural life are not addressed by this article. For a discussion of natural life sentences see Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1105 (2013); Danya W. Blair, *A Matter of Life and Death: Why Life Without Parole Should Be a Sentencing Option in Texas*, 22 AM. J. CRIM. L. 191, 199 (1994).

12. *Lynch III*, 136 S. Ct. at 1818.

13. Michael Kiefer, *Hundreds in Arizona got Life with Parole, a Sentence Barred by Law. Did State Prisons Just Fix the Problem?*, THE REPUBLIC (Mar. 30, 2017, 10:05 PM),

American criminal law, this system of indeterminate sentencing without parole has created three substantial issues that this paper will address: (1) capital defendants denied their due process right to inform the jury of their parole ineligibility under *Lynch III* are now entitled to a new jury sentencing; (2) defendants sentenced by the court to an indeterminate life sentence with the possibility of parole have a due process right to be heard by a parole board; and (3) defendants are able to withdraw from plea agreements that promised parole eligibility if the state is unable to provide the parole hearing or else demand specific performance on their pleas.<sup>14</sup> Considering these issues and the due process interest in a parole hearing, it seems clear that a system of laws that allows for defendants to serve indeterminate sentences without parole must be unconstitutional.<sup>15</sup>

## II. HISTORY OF INDETERMINATE SENTENCING AND PAROLE

Parole and indeterminate sentencing arose as part of the prison reform movement led by Zebulon Brockway in the latter half of the nineteenth century.<sup>16</sup> The movement aimed to shift the focus of prisons from the actions of a prisoner's past, to the cure and prevention of crimes.<sup>17</sup> Rehabilitation replaced raw vengeance as the principal theoretical basis for imprisonment.<sup>18</sup> A new sentencing structure with indeterminate sentences and parole became the most influential product of this movement.<sup>19</sup> In an indeterminate sentencing structure, an administrative board decides the amount of time actually served while the prisoner is serving time, rather than a judge deciding the time the prisoner will serve at the time of sentencing.<sup>20</sup> Indeterminate sentences have always included parole and there has never been a purely indeterminate sentencing scheme put into effect.<sup>21</sup>

Brockway receives credit for the first application of indeterminate sentencing and parole, which he incorporated during his time as superintendent of the Detroit House of Corrections.<sup>22</sup> "In 1869, Brockway

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<https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/31/arizona-department-corrections-life-with-parole/99850694/>.

14. See *infra* Part IV.

15. See *infra* Part V.

16. James J. Beha II, *Redemption to Reform: The Intellectual Origins of the Prison Reform Movement*, 63 N.Y.U. ANN. SURV. AM. L. 773, 786 (2008).

17. Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 311 (1974).

18. *Warren*, 659 F.2d at 189.

19. Beha, *supra* note 16, at 789.

20. Dershowitz, *supra* note 17, at 298.

21. See Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 9 (1925).

22. Beha, *supra* note 16, at 789.

drafted, and the Michigan legislature enacted, the ‘three years law,’ which provided for a mandatory three-year sentence for ‘common prostitutes.’”<sup>23</sup> Those defendants would have the opportunity for conditional release subject to the “managing authorities of the house of correction.”<sup>24</sup> “Brockway described this system as ‘the first attempted practical application in America of the profound principle of the indeterminate sentence system, which substitutes both in the laws and in prison practice reformatory in place of the usual punitive regime.’”<sup>25</sup>

In 1870, the First National Prison Congress endorsed Brockway’s new system, declaring that “[p]reemptory sentences ought to be replaced by those of indeterminate duration; sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.”<sup>26</sup> The new indeterminate sentencing system also required a specialized bureaucracy to make decisions regarding early release upon the prisoner’s rehabilitation.<sup>27</sup> This abandonment of proportionality rejected any retributive justification for punishment and allowed for a prisoner’s release immediately upon effective “cure,” regardless of the severity of the underlying crime.<sup>28</sup>

In 1876, Brockway became superintendent of the new Elmira Prison in New York.<sup>29</sup> Brockway turned Elmira into “the laboratory where the leaders of the movement toward reformatory rehabilitation put their scientific theories about crime into practical effect.”<sup>30</sup> Under the Elmira system, the convict was sentenced to a statutory-maximum sentence, below which the time of imprisonment was up to the discretion of the managers of the Reformatory.<sup>31</sup>

By 1900, Brockway’s parole system had been adopted in some form by twenty states.<sup>32</sup> Territorial Arizona first offered parole in 1901.<sup>33</sup> By 1925, parole systems could be found in all forty-eight states and in the federal system.<sup>34</sup>

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23. *Id.* at 789-90.

24. *Id.* at 790.

25. *Id.*

26. TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 551 (E.C. Wines ed., 1871).

27. Beha, *supra* note 16, at 797.

28. *Id.* at 796.

29. *Id.* at 799.

30. *Id.* at 798.

31. Lindsey, *supra* note 21, at 22.

32. *Id.* at 40.

33. *History of the Arizona Board of Executive Clemency*, ARIZ. BOARD EXECUTIVE CLEMENCY, <https://boec.az.gov/node/727> (last visited Oct. 30, 2016).

34. Beha, *supra* note 16, at 806.

The legal community also supported the new sentencing system. Charlton T. Lewis, Harvard Law lecturer and President of the Prison Association of New York, declared in an influential article that indeterminate sentencing was “the one right method of dealing with crime.”<sup>35</sup> He wrote,

[t]here are but two conceivable ways of protecting the community against its enemy, the criminal; to disarm him or to reconcile him. But the [determinative] sentence does neither. It restrains him until the term ends, as if one should cage a man-eating tiger for a month or a year, and then turn him loose. There is nothing in such a sentence which tends to reconcile him to his fellows. It commonly aims at nothing more than to restrain him and hold him safely for the term, and in most cases he is discharged more the foe of mankind than before.<sup>36</sup>

The courts have followed the view that the parole system serves the public-interest purposes of rehabilitation and deterrence.<sup>37</sup> The courts describe the indeterminate sentencing scheme, which leaves the task of determining when it is safe to release an offender to the trained parole board, as one that keeps prisoners confined until they show themselves fit for membership in a free community.<sup>38</sup> The courts have also found that “[t]hese laws place emphasis upon the reformation of the offender . . . [i]nstead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong.”<sup>39</sup> Parole boards focus on the likelihood the prisoner will transgress again, the prisoner’s response to rehabilitative efforts to assist with a lawful future career, and the degree to which he does or does not deem himself at war with his society.<sup>40</sup>

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35. Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L. J. 17, 17 (1899).

36. *Id.* at 18.

37. See *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 8 (1979); see also *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (explaining that “[u]nder indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner.”); *United States v. Grayson*, 438 U.S. 41, 46 (1978) (explaining that “[a] fundamental proposal of [the prison reform movement] was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism.”); *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that “one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee.”); ARIZ. REV. STAT. § 1-211(A) (2016) (directing statutes be construed consistently with the intent of the legislature).

38. *Warren*, 659 F.2d at 190.

39. *Ex parte Lee*, 171 P. 959 (Cal. 1918).

40. *Grayson*, 438 U.S. at 51.

Scholars and experts consistently agree that parole is essential to a system where prisoners are sentenced to a range of years and not a definite term. In Commissioner Samuel Barrows' 1899 report to the International Prison Commission, he believed "[t]he definite sentence deals wholly with a convict's past . . . [and] [u]nder the indefinite sentence the attention of the prisoner and of the state is fixed upon the future."<sup>41</sup> Edwin Abbott, as Secretary of the American Institute of Criminal Law and Criminology, wrote in 1912, "[i]n some states a model prisoner is automatically entitled to parole upon the expiration of his minimum sentence; in other states no time is specified and it is entirely within the discretion of the parole board."<sup>42</sup> Wilbur LaRoe, former chairman of the Board of Indeterminate Sentence and Parole of the District of Columbia, wrote an authoritative book on the parole systems of the United States in 1939.<sup>43</sup> LaRoe describes indeterminate sentences where, "the sentencing judge shares with the board of parole responsibility for deciding the length of sentence, the court fixing the minimum and maximum, but the board determining at what precise point between the minimum and maximum the prisoner is ready for release."<sup>44</sup> Professor Martin Gardner wrote in 1980 that the indeterminate sentence, in short, "'describe[s] any prison sentence for which the precise term of confinement is not known on the day of judgment but will be subject within a substantial range to the later decision of a parole board or some comparable agency under whatever name."<sup>45</sup> Criminologist Michael Tonry, noted in 1999 that the Bureau of Justice Assistance's central distinction between determinate and indeterminate "systems was whether parole release remained available for a sizable fraction of cases."<sup>46</sup> No scholars or experts have considered a system of indeterminate sentencing without parole as a legal possibility.

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41. WARREN SPALDING, *THE INDETERMINATE SENTENCE: ITS HISTORY AND DEVELOPMENT IN THE UNITED STATES*, in *THE INDETERMINATE SENTENCE AND THE PAROLE LAW: REPORTS PREPARED FOR THE INTERNATIONAL PRISON COMMISSION* 7, 13 (Samuel Barrows ed., 1899).

42. See Edwin M. Abbott, *Indeterminate Sentence and Release on Parole*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 543, 546 (1913) (questioning whether indeterminate sentencing is a beneficial feature of the parole system).

43. See WILBUR LAROE, *PAROLE WITH HONOR* 187 (1939).

44. *Id.*

45. Martin R. Gardner, *The Determinate Sentencing Movement and The Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1103 n.1 (1980).

46. Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, NAT'L INST. JUST., Sept. 1999, at 7-8.

*A. Early Judicial Challenges to Indeterminate Sentencing and Parole Systems*

The change from the judicially imposed determinative sentences to the new indeterminate sentences with parole boards did not happen without challenges.<sup>47</sup> Brockway's indeterminate sentences in Michigan did not last long.<sup>48</sup> The Michigan Supreme Court held indeterminate sentences unconstitutional, reasoning that under the state constitution "[t]he Governor has the undoubted right to pardon."<sup>49</sup> The court further reasoned that "this parole system is as obnoxious to the Constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, those conditions may be made so trifling as in fact to be no conditions at all."<sup>50</sup> Michigan subsequently amended its constitution in 1901, which authorized the legislature to provide for indeterminate sentencing laws as punishment for crime, and the Michigan Supreme Court upheld the amendment.<sup>51</sup> Other state courts similarly held the early indeterminate sentences and parole unconstitutional.<sup>52</sup>

In 1902, the Supreme Court of the United States upheld indeterminate sentencing and parole.<sup>53</sup> In *Dreyer v. Illinois*, the indeterminate sentencing statute in the State of Illinois was challenged for conferring "judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with the pardoning power committed by the constitution to the Governor of the State."<sup>54</sup> The Court held that the Illinois statute "presents no question under the Constitution of the United States."<sup>55</sup> The Court reasoned that "[w]hether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State."<sup>56</sup> *Ughbanks v. Armstrong*,<sup>57</sup> quickly followed *Dreyer*, and the Court upheld the new Michigan constitutional amendment

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47. See *People v. Cummings*, 50 N.W. 310, 314 (Mich. 1891); see also *Brownbridge v. People*, 38 Mich. 751, 754, 755 (1878).

48. See *Cummings*, 50 N.W. at 314; see also *Brownbridge*, 38 Mich. at 754.

49. See *Cummings*, 50 N.W. at 313; see also *Brownbridge*, 38 Mich. at 754 ("The common law has always condemned vague and indefinite sentences and has not inclined to the introduction of any involving conditional punishments.")

50. *Cummings*, 88 N.W. at 313.

51. *In re Campbell*, 101 N.W. 826-28 (Mich. 1904).

52. See *In re Conditional Discharge of Convicts*, 51 A. 10, 15 (Vt. 1901) (determining a board of parole violates power of executive); see also *State ex rel. Bishop v. State Bd. of Corrections*, 52 P. 1090, 1091, 1092 (Utah 1898) (also, determining a board of parole violates power of executive).

53. *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902).

54. *Id.* at 71, 83.

55. *Id.* at 83-84.

56. *Id.* at 84.

57. 208 U.S. 481 (1908).

authorizing indeterminate sentences, holding that states have the power to exempt a person twice convicted of a felony from parole eligibility.<sup>58</sup>

### *B. End of Federal Parole and Return to Determinate Sentencing*

As the twentieth century progressed, issues with indeterminate sentencing emerged. The system received criticism for allegations of racism.<sup>59</sup> Data showed that “black offenders receive[d] somewhat longer sentences for the same offenses than [did] white offenders.”<sup>60</sup> Scholars also noted there was substantial gender disparity in indeterminate sentencing in favor of women.<sup>61</sup> The most prominent criticism came from the system’s “failure to remedy the situation for which it was designed: recidivism.”<sup>62</sup> According to the 1967 report of the President’s Crime Commission, nearly everyone who goes to prison is eventually released and between one-half and two-thirds of all those released are eventually later arrested and convicted again.<sup>63</sup> These repeat offenders are called recidivists.<sup>64</sup> In one study on recidivism, “[n]early one-third of the subjects failed in the first year to remain free of arrest or of parole or mandatory release violations.”<sup>65</sup> To address the problems of high recidivism rates and disparity in sentencing, the federal government passed the Sentencing Reform Act (SRA) of 1984, creating the Federal Sentencing Guides and abolishing parole for federal prisoners sentenced after November 1, 1987.<sup>66</sup> Twenty-eight states followed by implementing sentencing guidelines and Truth-in-Sentencing statutes between 1996 and 1998.<sup>67</sup> Its success in reducing recidivism is disputed.<sup>68</sup>

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58. *Id.* at 487.

59. Richard Singer, *In Favor of “Presumptive Sentences” Set by a Sentencing Commission*, 5 CRIM. JUST. Q. 88, 88 (1977).

60. *See id.*; *see also Blakely*, 124 S. Ct. at 2544 (O’Connor, J., dissenting) (“Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.”).

61. Tonry, *supra* note 46.

62. Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 CRIM. & CIV. CONFINEMENT 89, 95 (1990).

63. *Id.* at 111-12 n.146.

64. *Id.*

65. Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 797 (1993).

66. Admin. Office of the U.S. Courts, *Federal Probation*, 55 J. CORRECTIONAL PHIL. & PRAC., Dec. 1991, at 1; *see* Mark H. Luttrell, *The Impact of the Sentencing Reform Act on Prison Management*, 55 J. CORRECTIONAL PHIL. & PRAC., Dec. 1991, at 54.

67. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 76 (1999).

68. *See* William D. Bales et al., *An Assessment of the Development and Outcomes of Determinate Sentencing in Florida*, JUST. RES & POL.: FLA., May 2010, at 41, 61 (finding that truth-in-sentencing has contributed to Florida’s recidivism reduction); *but see* Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO

The inherent impossibility of an indeterminate sentencing system without parole was recently recognized in the fallout over the Federal Sentencing Guides in the mid-2000s.<sup>69</sup> A pair of Supreme Court decisions limited the applicability of the SRA, causing speculation that the United States might return to an indeterminate sentencing system.<sup>70</sup> In *Blakeley v. Washington*, the Court required that any fact increasing a sentence beyond the maximum sentence a judge may impose without making any additional findings of fact “must be proved to a jury beyond a reasonable doubt, unless the defendant waives his Sixth Amendment rights in this regard.”<sup>71</sup> *Blakeley* was quickly followed by *United States v. Booker*, in which the Court struck down two provisions of the SRA: the section making the Sentencing Guidelines mandatory and the establishment of appellate review standards for the Guidelines’ sentences.<sup>72</sup> Scholars noted an evolution in the definition of indeterminate sentences from a broad range set by a judge with a parole board determining the ultimate release date, to a post-*Blakeley* definition which allows judges to set a definite sentence anywhere below the statutory maxima.<sup>73</sup> Arizona’s statute does neither.<sup>74</sup> It creates a broad indeterminate range set by the judge, without a parole board, to determine the ultimate release date.<sup>75</sup> This sentencing structure as it stands rejects the entire premise that parole boards and indeterminate sentences were built upon and is completely contrary to both the academic and the legal understanding of how indeterminate sentences work.

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L. REV. 1, 45, 46 (2011) (arguing that indeterminate sentencing is the most cost-effective means of reducing recidivism).

69. *Blakely*, 124 S. Ct. at 2549-50; see *United States v. Booker*, 543 U.S. 220, 235, 245-46, 264-65 (2005).

70. *Blakely*, 124 S. Ct. at 2549-50; see *Booker*, 543 U.S. at 235, 245-46, 264-65.

71. *United States v. Einstman*, 325 F. Supp. 2d 373, 374-75 (S.D.N.Y. 2004) (citing *Blakely*, 124 S. Ct. at 2536); see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 322 (2013).

72. *Booker*, 543 U.S. at 227, 259.

73. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377, 382 n.18 (2005) (identifying a number of cases where judges use an incorrect definition of ‘indeterminate sentencing’). These cases include: *United States v. Hakley*, 2004 U.S. Dist. LEXIS 15784, at \*21 (W.D. Mich. Aug. 12, 2004) (displaying an incorrect understanding of “indeterminate” sentencing); *United States v. Agett*, 327 F. Supp. 2d 899, 906 (E.D. Tenn. 2004) (same); *United States v. Sisson*, 326 F. Supp. 2d 203, 205 (D. Mass. 2004) (finding the Federal Sentencing Guidelines unconstitutional in light of *Blakely* and erroneously describing the Court’s “return to an indeterminate sentencing scheme” when the context indicates that the court will employ a discretionary, determinate sentencing system and apparently treat the Guidelines as fully voluntary); *United States v. Lockett*, 325 F. Supp. 2d 673, 677-78 (E.D. Va. 2004)); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 n.12 (2004) (referring to both modern and traditional definitions of indeterminate and determinate sentencing).

74. See ARIZ. REV. STAT. § 41-1604.09 (LexisNexis 2017).

75. See *Lankford v. Idaho*, 500 U.S. 110, 116 (1991) (noting that the state, “recommended an indeterminate life sentence with a minimum of ‘somewhere between ten and [twenty] years.’”); *In re D.*, 617 P.2d 1087, 1089, 1092, 1093 (Cal. 1980) (“[C]onstitutes an indeterminate [twenty-five] years to life sentence.”).

In the fallout from the Supreme Court's *Blakely* decision, several federal courts held the entire SRA unconstitutional and some referred to a reversion to indeterminate sentencing.<sup>76</sup> In *United States v. King*, the Middle District of Florida held that "the unavoidable result of finding the [Federal Sentencing] Guidelines unconstitutional in their entirety is a return to an indeterminate system."<sup>77</sup> However, the court defined the indeterminate system as selecting a determinate sentence from an indeterminate range.<sup>78</sup> The court in *King* relied on *United States v. Einstman*, which defined an indeterminate sentencing system as one where "judges are free to consider all relevant factors and to sentence the defendant anywhere between the statutory minimum (if there be one) and the statutory maximum[.]"<sup>79</sup> Neither the court in *King* nor the court in *Einstman* proposed anything like the system currently employed in Arizona.<sup>80</sup>

The District of Massachusetts, in *United States v. Mueffelman*,<sup>81</sup> rejected the idea that an indeterminate sentencing system could exist without parole, stating "plainly there is a problem with reinstating an indeterminate system, when there is no longer parole."<sup>82</sup> The District of Utah reached the same conclusion as *Mueffelman* in *United States v. Wilson*.<sup>83</sup> While recognizing the sentencing guidelines as unconstitutional, the court held it will continue to give the guidelines considerable weight and that without parole "rehabilitation is a subordinate consideration to just punishment and crime control."<sup>84</sup> The courts in *Mueffelman* and *Wilson* thus considered and rejected the system currently in place in Arizona.<sup>85</sup> Heritage Foundation fellow Paul Larkin, commenting on the end of the SRA and a possible resurrection of federal parole, wrote in 2013, "[a]n advisory Sentencing Guidelines system without parole would have resulted in a far worse punishment mechanism, one with no check on system-wide sentencing disparities[.]"<sup>86</sup> Every scholar since the start of sentencing

76. See *Einstman*, 325 F. Supp. at 381; see also *United States v. King*, 328 F. Supp. 2d 1276, 1284 (M.D. Fla. 2004).

77. *King*, 328 F. Supp. 2d at 1284.

78. See *id.* at 1287 (utilizing a sentencing range of five to forty years, the first defendant received forty-eight months, the second defendant received sixty months).

79. *Einstman*, 325 F. Supp. 2d at 381.

80. See *id.*; see also *King*, 328 F. Supp. at 1284.

81. 327 F. Supp. 2d 79 (D. Mass. 2004).

82. *Id.* at 96.

83. 350 F. Supp. 2d 910, 922 (D. Utah 2005).

84. *Id.* at 921.

85. See *Mueffelman*, 327 F. Supp. at 96; *Wilson*, 350 F. Supp. at 922; see also ARIZ. STATE SENATE, TRUTH IN SENTENCING 1-2 (2010), <http://www.azleg.gov/briefs/Senate/TRUTH%20IN%20SENTENCING.pdf>.

86. Larkin, *supra* note 71, at 333.

reform in the nineteenth century recognizes what the court in *Mueffelman* concluded, that parole is required for an indeterminate sentencing system.<sup>87</sup>

*C. Arizona after Truth-in-Sentencing: Indeterminate Sentencing without Parole*

The Arizona legislature passed the state's Truth-in Sentencing statute in 1993.<sup>88</sup> The law eliminated parole and reintroduced determinative sentences with the opportunity for earned release credits.<sup>89</sup> Most Arizona criminal defendants can expect to be released for good behavior after serving 85% of their sentence.<sup>90</sup> However, the new Truth-in Sentencing law did not amend Arizona's indeterminate sentencing statutes; it only eliminated parole for all offenses committed on or after January 1, 1994.<sup>91</sup> Four statutes in Arizona still impose indeterminate sentences of "life with the possibility of [release] after twenty-five [or thirty-five] years."<sup>92</sup> Under the current sentencing scheme, release possibilities are limited to executive clemency or a future legislative change. The first Arizona prisoners will reach their minimum time served in 2019, and will be able to challenge the limited possibilities of release.<sup>93</sup>

"Release" is not clearly defined by statute, but includes "parole, work furlough, community supervision[.]" for the purpose of offenses committed while released from confinement.<sup>94</sup> For Arizona's indeterminate sentencing scheme the two commonly used types of release are parole and executive clemency, which the courts have repeatedly conflated.<sup>95</sup> Some Arizona

87. *Mueffelman*, 327 F. Supp. at 96.

88. See 1993 Ariz. Sess. Laws 1404 (explaining that the purpose of S.B. 1049 was "to promote truth and accountability in sentencing"); see also ARIZ. STATE SENATE, *supra* note 85 (encouraging the Arizona law with a new program, the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grant Program). "During a five-year period, [the Arizona Department of Corrections] received a total of \$57,923,000 in VOI/TIS grants, which are nonappropriated, for the development of additional medium and maximum security prisoner bed space." *Id.* at 2.

89. ARIZ. STATE SENATE, *supra* note 85.

90. ARIZ. REV. STAT. § 41-1604.07(LexisNexis 2017).

91. See 1993 Ariz. Sess. Laws 746 (amending Arizona's capital-sentencing statute creating, among other changes, a sentence of natural life, which "[i]s not subject to commutation or parole, work furlough or work release.") (emphasis added); see also ARIZ. REV. STAT. § 13-716 (LexisNexis 2017) (extending eligibility has since been extended to juvenile offenders serving "life" sentences); see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

92. See ARIZ. REV. STAT. § 13-751 (LexisNexis 2016) (murder); § 13-705 (LexisNexis 2016) (sexual conduct with a minor) §13-706 (LexisNexis 2016) (serious offenders); § 13-1003 (LexisNexis 2016) (conspiracy).

93. See, e.g., *State v. Sperberg*, No. 2 CA-CR 2010-0156-PR, 2010 WL 4286203, at \*191, \*195 (Ariz. Ct. App. Oct. 27, 2010) (involving a 1994 murder plea).

94. ARIZ. REV. STAT. § 13-708.

95. See ARIZ. REV. STAT. § 41-1604.09 (LexisNexis 2017); see also ARIZ. REV. STAT. § 31-403 (LexisNexis 2017).

courts have upheld sentences of “life with a possibility of *parole*,”<sup>96</sup> while others have upheld sentences of “life with a possibility of *release*.”<sup>97</sup>

In the pre-*Lynch III* line of death penalty cases, when the courts refused to allow the defendants to inform the jury of their parole ineligibility, courts held that the defendants “would have been eligible for other forms of release, such as executive clemency[.]”<sup>98</sup> However, the court is mistaken. Release is not the same as executive clemency.<sup>99</sup> Arizona’s Truth-in-Sentencing law only eliminated the mechanism for parole eligibility.<sup>100</sup> Prisoners sentenced to “life with the possibility of *release*” should still be entitled to a hearing before the parole board and not limited to an application for clemency.

### III. POSSIBILITY OF RELEASE: PAROLE OR CLEMENCY?

A threshold issue needs to be addressed before examining the validity of Arizona’s indeterminate “life” sentences: whether executive clemency offers a suitably equivalent opportunity for release as parole. It does not.

#### *A. From ‘Parole’ to ‘Release’*

Arizona has provided a system of parole since statehood.<sup>101</sup> A “life” sentence has provided the possibility of parole since at least 1973, when the legislature amended section 13-751 of the Arizona Revised Statute (then titled section 13-453) to make defendants who are sentenced to life imprisonment eligible for parole after twenty-five years.<sup>102</sup> In 1985, the Arizona legislature passed House Bill 2218, Crimes Against Children, which removed the word “parole” from section 13-751 of the Arizona Revised Code (then titled section 13-703) and replaced it with the phrase “release on any basis,” language identical to that can be found in the parole eligibility statute section 41-1604.09 of the Arizona Revised Statute (then

96. See *State v. Ovante*, 291 P.3d 974, 977 (Ariz. 2013) (sentencing for a 2008 murder).

97. See *State v. Brown*, 310 P.3d 29, 32 (Ariz. Ct. App. 2013) (sentencing for a 2010 murder).

98. See, e.g., *State v. Cota*, 272 P.3d 1027, 1042 (Ariz. 2012).

99. *Release*, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/release> (last visited Feb. 21, 2018); *Executive Clemency*, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/executive+clemency> (last visited Feb. 21, 2018).

100. ARIZ. STATE SENATE, *supra* note 85, at 1.

101. See *Laird v. Sims*, 147 P. 738, 742 (Ariz. 1915) (“all prisoners who have served the minimum sentence, when it is an indeterminate sentence, as well as those serving definite or fixed sentences, may appear and apply for a parole or an absolute discharge.”); see also *State ex rel. Murphy v. Super. Ct. of Maricopa Cty.*, 246 P. 1033, 1035 (Ariz. 1926) (“The Legislature having provided for a minimum and a maximum term of sentence, it certainly accords with reason to assume that it had a purpose in so doing . . . The reason and the language of the legislation can point to but one conclusion, and that is that a prisoner sentenced to an indeterminate sentence should at all events serve the minimum thereof.”).

102. 1977 Ariz. Sess. Laws 719.

titled section 41-1604.06).<sup>103</sup> “Release on any basis” is also the phrase found in the conspiracy to commit murder statute, last amended in 1978.<sup>104</sup> As part of the 1985 law, the legislature amended the parole eligibility statute, section 41-1604.09 of the Arizona Revised Statute, to require defendants sentenced under section 13-751 to serve the full minimum term instead of two-thirds of the sentence.<sup>105</sup> The 1985 Arizona Legislative Report includes no reference to parole,<sup>106</sup> nor did courts change their criminal sentencing practices.<sup>107</sup> In 1985, “release” still meant “parole,” but the new law worked to prohibit release on parole, or any other means, until the prisoner served the mandatory twenty-five years.<sup>108</sup>

In 1993, the Arizona legislature passed House Bill 2048, adding the possible sentence of “natural life” for murder defendants in addition to the death penalty and the indeterminate “life” sentence.<sup>109</sup> The legislature indicated that a defendant sentenced to “natural life” is, among other things, not eligible for parole.<sup>110</sup> This change in the law kept “without possibility of release” for indeterminate sentences, which is the phrase used to refer to parole eligibility since 1985 for murder, and since 1978 for conspiracy to commit murder.<sup>111</sup> Two days after passing House Bill 2048, the legislature passed Senate Bill 1049, Truth-in-Sentencing, which limited eligibility for parole under Title 41 to defendants who committed their crime after January 1, 1994, but did not alter the four sentences under which defendants receive parole eligibility and have historically received parole eligibility.<sup>112</sup>

During the period between the establishment of Truth-in-Sentencing in Arizona in 1994 and the Court’s *Lynch III* decision in 2016, Arizona courts

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103. 1985 Ariz. Sess. Laws 1438.

104. ARIZ. REV. STAT. § 13-1003(D) (“Conspiracy to commit a class 1 felony is punishable by a sentence of life imprisonment without possibility of release on any basis until the service of twenty-five years. . .”).

105. 1985 Ariz. Sess. Laws 1454.

106. See ARIZ. LEGISLATIVE REPORT 1985 145.

107. Compare *State v. Nardi*, 2015 WL 503219, at \*1 (Ariz. Ct. App. Feb. 5, 2015) (convicting defendant of 1991 murder sentenced by trial court to life imprisonment with a possibility of parole after twenty-five years) with *State v. Villa*, 2010 WL 2892889, at \*1 (Ariz. Ct. App. July 23, 2010) (convicting defendant of 1995 murder and sentenced by trial court to life imprisonment with a possibility of parole after twenty-five years).

108. 1985 Ariz. Sess. Laws 1454.

109. 1993 Ariz. Sess. Laws 746; see also *State v. Ring*, 65 P.3d 915, 933 (Ariz. 2003) (noting that “[i]n 1993, the Arizona Legislature amended A.R.S. section 13–703 to add a ‘natural life’ sentencing option for defendants convicted of first degree murder.”).

110. *State v. Barreras*, 892 P.2d 852, 860 n.7 (Ariz. 1995) (“A.R.S. § 13-703(A) now permits a sentence of life without possibility of parole.” (citing 1993 Ariz. Sess. Laws 746)).

111. ARIZ. REV. STAT. § 13-703 (1985); ARIZ. REV. STAT. § 13-1003(D).

112. 1993 Ariz. Sess. Laws 1486.

treated “parole,” “release” and “clemency” interchangeably.<sup>113</sup> Part of the overall confusion likely stems from the transfer of power from the former Board of Pardons and Paroles to the Board of Executive Clemency.<sup>114</sup> Additional confusion comes from Arizona statutes that aggravate sentences for crimes committed while on any form of release.<sup>115</sup> However, as a matter of law and practice, parole and clemency are different concepts.<sup>116</sup> A defendant is far less likely to obtain clemency than parole.

### *B. Differences in Clemency and Parole Procedures*

Parole and clemency are distinct legal terms.<sup>117</sup> Parole is defined as “[t]he conditional release of a prisoner from imprisonment before the full sentence has been served.”<sup>118</sup> Clemency is “the power of the President or a governor to pardon a criminal or commute a criminal sentence.”<sup>119</sup> The two typical forms of clemency are commutation, which is the reduction in the severity of punishment, and pardon, or the nullification of the punishment.<sup>120</sup> Arizona uses significantly different procedures to evaluate clemency and parole applicants.<sup>121</sup> Additionally, parole and clemency fulfill separate purposes.

Clemency applications must meet a higher legal burden than parole applications. Prisoners seeking clemency may apply to the Board of Executive Clemency which then

may make recommendations to the governor for commutation of sentence after finding by clear and convincing evidence that the

113. See, e.g., *State v. Boyston*, 298 P.3d 887, 901 (Ariz. 2013) (defendant “would have been eligible for other forms of release, such as executive clemency, if sentenced to life with the possibility of release.”).

114. ARIZ. REV. STAT. § 31-402(C)(1) (LexisNexis 2016) (“The board of executive clemency . . . is vested with the powers and duties of the board of pardons and paroles as they existed before January 1, 1994.”); see *State v. Godinez*, No. 2 CA-CR 2013-0114-PR, 2013 WL 3788427, at \*2 (Ariz. Ct. App. July 17, 2013) (finding “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.”).

115. See *State v. Melcher*, No. 2 CA-CR 2012-0158, 2013 WL 2378573 at \*1 (Ariz. Ct. App. May 29, 2013). The court relied improperly on *Bruggeman* to hold that the word parole is not legally significant and is instead synonymous with “release from confinement,” when *Bruggeman* found “no error because there is no distinction between parole and probation under [the crimes committed while on any form of release statute].” See *id.*; see also *State v. Bruggeman*, 779 P.2d 823, 826 (Ariz. Ct. App. 1989).

116. *Solem v. Helm*, 463 U.S. 277, 300 (1983).

117. Compare *Parole*, BLACK’S LAW DICTIONARY (10th ed. 2014), with *Clemency*, BLACK’S LAW DICTIONARY.

118. *Parole*, BLACK’S LAW DICTIONARY.

119. *Clemency*, BLACK’S LAW DICTIONARY.

120. *Commutation*, BLACK’S LAW DICTIONARY; *Pardon*, BLACK’S LAW DICTIONARY. This paper focuses exclusively on the commutation form of clemency.

121. Compare ARIZ. REV. STAT. § 31-402 (C)(2), with ARIZ. REV. STAT. 31-412(A) (LexisNexis 2016).

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.<sup>122</sup>

If a commutation of sentence is denied by the Board or if the governor denies a commutation recommendation by the Board, the person must wait at least three years before re-applying for commutation, whereas parole consideration is generally every six months to a year.<sup>123</sup> Persons who apply for clemency face several restrictions for consideration by the Board, and the governor may not grant a commutation of sentence without a recommendation from the Board.<sup>124</sup>

An Arizona commutation hearing occurs in two phases. Phase I is held in-absentia (the inmate is not in attendance); however, the hearing is open to the public who may present statements in support or opposition to the prisoner's application.<sup>125</sup> If the prisoner has legal representation, his or her counsel may also appear at a Phase I hearing.<sup>126</sup> The Phase I hearing is limited to a consideration of whether the sentence is excessive in light of the prisoner's crime and record (the former part of the statute).<sup>127</sup> If the Board agrees by majority vote that the sentence is excessive, the prisoner is passed to Phase II.<sup>128</sup> At a Phase II hearing, the prisoner appears by video.<sup>129</sup> The public and the prisoner's counsel may also appear.<sup>130</sup> The primary question at a Phase II hearing is whether the prisoner will remain law-abiding upon release from prison, generally focusing on the prisoner's prison record and plans upon release.<sup>131</sup> If, after hearing all of the information, the Board determines that a reduction in time served is appropriate, the Board will transmit the recommendation to the governor for a final determination.<sup>132</sup>

In contrast, the decision to grant parole is governed by a requirement to consider the prisoner's entire record, "including the gravity of the offense in the particular case."<sup>133</sup> The inmate is entitled to "an opportunity to be

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122. ARIZ. REV. STAT. § 31-402(C)(2).

123. Compare ARIZ. REV. STAT. § 31-402(C)(2), with ARIZ. REV. STAT. § 41-1604.09(G).

124. ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. § 31-403 (LexisNexis 2016).

125. ARIZ. BD. OF EXEC. CLEMENCY, ANNUAL REPORT 13 (2015).

126. *Frequently Asked Questions*, ARIZ. BOARD OF EXECUTIVE CLEMENCY (last visited Feb. 21, 2018), <https://boec.az.gov/helpful-information/frequently-asked-questions>.

127. ARIZ. BD. OF EX. CLEMENCY, *supra* note 125.

128. *Id.*

129. *Id.*

130. *Id.*

131. ARIZ. REV. STAT. § 31-402(C)(2).

132. ARIZ. BD. OF EXEC. CLEMENCY, *supra* note 125.

133. *Cooper v. Ariz. Bd. of Pardons and Paroles*, 717 P.2d 861, 864 (Ariz. 1986) (citing *Greenholtz*, 442 U.S. at 15).

heard” on the parole application.<sup>134</sup> The Board must “either approve, with or without conditions, or reject the prisoner’s application for parole[.]”<sup>135</sup> In determining whether to grant parole, the Board must consider whether “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.”<sup>136</sup> When parole is denied, the Board provides the Director with “a written statement specifying the individualized reasons for the denial of parole,” and the inmate has the opportunity to review the Board’s statement.<sup>137</sup> If the inmate remains eligible for parole, recertification occurs between one and four months after the hearing at which parole was denied.<sup>138</sup>

Finally, parole and clemency fulfill separate purposes in the criminal justice system.<sup>139</sup> The purpose of clemency is to reduce a sentence if it is excessive, while the purpose of parole is to release prisoners if they will be law abiding.<sup>140</sup> Clemency for those with the possibility of release after twenty-five years instead of parole is meaningless because the possibility of parole in twenty-five years is already the most lenient alternative to a natural life term or death.<sup>141</sup>

### *C. Parole is Distinct from Clemency as a Matter of Constitutional Law*

The most significant difference between parole and clemency involves a prisoner’s constitutional right to due process during the proceedings.<sup>142</sup> The Supreme Court of the United States has held, as a matter of law, that “parole and commutation are different concepts, despite some surface similarities.”<sup>143</sup>

A state statute can create a right to be heard by a parole board.<sup>144</sup> In *Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, the Supreme Court of the United States determined that states can create a

134. ARIZ. REV. STAT. § 31–411(B) (LexisNexis 2016).

135. *Id.* (C).

136. ARIZ. REV. STAT. § 31–412(A) (LexisNexis 2016).

137. ARIZ. REV. STAT. § 31–411(G).

138. ARIZ. REV. STAT. § 41–1604.09(G). However, the Board may prescribe that the inmate shall not be recertified for a period of up to one year after the hearing. *See id.*; *see also* Ariz. Att’y Gen. Op. No. H4-007 at \*4 (Oct. 3, 2014).

139. *Compare* *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993) (reasoning “[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”), *with* *Greenholtz*, 442 U.S. at 8 (stating that the “parole system serves the public-interest purposes of rehabilitation and deterrence . . .”).

140. *Compare* *Herrera*, 506 U.S. at 411–12, *with* *Greenholtz*, 442 U.S. at 8.

141. *See* *State v. Fell*, 97 P.3d 902, 912 (Ariz. Ct. App. 2004), *aff’d*, 115 P.3d 594 (Ariz. 2005) (referring to defendants sentenced under A.R.S. § 13-703 (1999), now A.R.S. § 13-751 (2016)).

142. *See generally* *Solem*, 463 U.S. 277 (comparing parole and clemency).

143. *Id.* at 300.

144. *Greenholtz*, 442 U.S. at 16.

liberty interest in parole, therefore granting prisoners the right to due process.<sup>145</sup> Under *Greenholtz*, a statute that “affords an opportunity to be heard” satisfies due process.<sup>146</sup> Additionally, parole revocation is always entitled to due process.<sup>147</sup> However, unlike parole, the power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.<sup>148</sup>

There is no general right to clemency.<sup>149</sup> In *Connecticut Bd. of Pardons v. Dumschat*, the Supreme Court of the United States contrasted a prisoner’s clemency application with the parole statute in *Greenholtz*.<sup>150</sup> The Court found that, while a commutation decision shares some of the characteristics of a decision whether to grant parole,<sup>151</sup> “there is a vast difference between a denial of parole . . . and a state’s refusal to commute a lawful sentence.”<sup>152</sup> The Court reasoned that the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, “create no right or ‘entitlement.’”<sup>153</sup>

Arizona employs two different standards for parole and clemency.<sup>154</sup> The standard to be released is much higher for commutation than for parole; commutation requires that the Board must find by clear and convincing evidence that the sentence itself is excessive given the nature of the original offense and the record of the prisoner.<sup>155</sup> The Arizona courts have adopted the definition of “‘clear and convincing’ that requires the jury to “‘be persuaded that the truth of the contention is ‘highly probable.’”<sup>156</sup> This standard requires the Board to consider the relationship of the sentence to the nature of the offense and the record of the prisoner.<sup>157</sup> Unless the Board determines by high evidentiary standard that the sentence is excessive given the nature of the offense it cannot recommend commutation and, “while the

145. *Id.* at 24-25.

146. *Id.* at 16.

147. See *Morrissey v. Brewer*, 408 U.S. 471 (1972) (noting that a parolee’s liberty involves significant values within the protection of the *Due Process Clause of the Fourteenth Amendment*).

148. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998).

149. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981).

150. *Id.* at 466.

151. *Id.* at 464.

152. *Id.* at 466.

153. *Id.* at 467.

154. Compare ARIZ. REV. STAT. § 31-412(A) (the standard for release on parole is 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), with ARIZ. REV. STAT. § 31-402(C)(2) (requiring a finding of clear and convincing evidence that the imposed sentence is “clearly excessive given the nature of the offense” . . .).

155. ARIZ. REV. STAT. § 31-402.

156. *State v. Roque*, 141 P.3d 368, 390 (Ariz. 2006), *abrogated by State v. Escalante-Orozco*, 386 P.3d 798 (Ariz. 2017), (quoting *In re Neville*, 708 P.2d 1297, 1302 (Ariz. 1985)) (internal citations omitted).

157. ARIZ. REV. STAT. § 31-402(C)(2).

Courts can compel the Board to act, the Court cannot compel the Board to act in any particular manner.”<sup>158</sup>

In Arizona, the decision to release a prisoner on parole focuses primarily on what a man is and what he may become rather than simply what he has done.<sup>159</sup> The Board considers “the entire record . . . to the time of the sentence, *including the gravity of the offense* in the particular case.”<sup>160</sup> Arizona’s parole statute states that the board “shall authorize the release” of eligible applicants and 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.”<sup>161</sup> The power of parole rests with the Board and not in the governor.<sup>162</sup> Arizona’s parole statute “uses mandatory language (‘shall’) to ‘creat[e] a presumption that parole release will be granted’ when the designated findings are made.”<sup>163</sup> Arizona’s parole statute, like Nebraska’s in *Greenholtz*, grants a recognized liberty interest in parole.<sup>164</sup>

#### *D. Clemency is not a Meaningful Opportunity for Release*

In addition to the higher standards, more difficult procedures, separate public policy principles, and constitutional distinctions, data from the Arizona Board of Executive Clemency demonstrates just how rare commutation is as compared to parole.<sup>165</sup> The Supreme Court of the United States has previously examined the statistical likelihood of clemency and

158. *State ex rel. Ariz. State Bd. of Pardons & Paroles v. Super. Ct. of Maricopa Cty.*, 467 P.2d 917, 920 (1970).

159. *Cooper v. Ariz. Bd. of Pardons and Paroles*, 717 P.2d 861, 864 (Ariz. 1986) (citing *Greenholtz*, 442 U.S. at 8 (1974)).

160. *Id.* (quoting *Greenholtz*, 442 U.S. at 15) (emphasis in original).

161. ARIZ. REV. STAT. § 31-412(A).

162. *See State ex rel. Ariz. State Bd. of Pardons & Paroles*, 467 P.2d at 920; *see also State v. Wagstaff*, 794 P.2d 118, 121 (Ariz. 1990) (“The exclusive power to grant parole rests with the Board of Pardons and Paroles.” (quoting *State v. Wagstaff*, 775 P.2d 1130 (Ariz. Ct. App. 1988))).

163. *Bd. of Pardons v. Allen*, 482 U.S. 369, 377–78 (1987) (quoting *Greenholtz*, 442 U.S. at 12) (alteration in original) (comparing a Montana statute to a Nebraska statute, both of which used the word “shall” to indicate that the provision was mandatory)). Likewise, the Arizona parole statute is mandatory: “If a prisoner is certified as eligible for parole pursuant to § 41-1604.09 the board of executive clemency *shall* authorize the release of the applicant on parole . . .” if the statute’s requirements are met. ARIZ. REV. STAT. § 31-412 (emphasis added).

164. *See Stewart v. Ariz. Bd. of Pardons & Paroles*, 753 P.2d 1194, 1199 (Ariz. Ct. App. 1988) (“Because we conclude that A.R.S. § 31-412 creates a protected liberty interest in parole release, we must determine what due process rights should have been accorded [the petitioner] and whether the Board observed them.”); Ariz. Att’y Gen. Op. No. 114-007, 2014 WL 5017942, at \*4 (Oct. 3, 2014).

165. Terry Reid, *Miller v. Alabama: Is Arizona’s Sentencing Scheme Unconstitutional as Applied to Juvenile Offenders Convicted of First Degree Murder?*, 24 FOR THE DEFENSE, Feb. 2014, at 1, 5-6, <https://www.maricopa.gov/DocumentCenter/View/2443/For-the-Defense—February-to-April-2014-PDF>.

parole to determine if they provide a meaningful opportunity for release.<sup>166</sup> Clemency in Arizona is not a meaningful opportunity for release.<sup>167</sup>

A meaningful opportunity for release is required under the due process clause.<sup>168</sup> The Court held in *Solem v. Helm*, that a statutory scheme which only provides for release by commutation does not provide a meaningful opportunity for release.<sup>169</sup> The Court recognized parole as a regular part of the rehabilitative process and that, assuming good behavior, it is the normal expectation in the vast majority of cases.<sup>170</sup> In contrast to commutation, which is an ad hoc exercise of executive clemency that may occur at any time for any reason without reference to any standards, the law generally specifies when a prisoner will be parole eligible, and details the standards and procedures applicable at that time.<sup>171</sup> Thus, it is possible to predict, at least to some extent, when parole might be granted.<sup>172</sup>

The Court in *Solem* compared clemency in South Dakota for prisoners with life sentences, with the application of parole in Texas examined in *Rummel v. Estelle*,<sup>173</sup> to determine if the sentence violated the Eighth Amendment.<sup>174</sup> “In South Dakota, no life sentence has been commuted in over eight years, while parole—where authorized—has been granted regularly during that period.”<sup>175</sup> Texas had “a relatively liberal policy of granting ‘good time’ credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years.”<sup>176</sup> The Court analyzed the statistical difficulty in obtaining commutation compared with parole and based on those differences the Court concluded that “[t]he possibility of commutation of a life sentence under South Dakota law [was] not sufficient to save respondent’s otherwise unconstitutional sentence on the asserted theory that this possibility matches the possibility of parole.”<sup>177</sup> The Court reasoned

166. *Id.*

167. *See* State v. Vera, 334 P.3d 754 (Ariz. Ct. App. 2014).

168. *See Reid, supra* note 165, at 2 (noting that “[i]n 2010, the Supreme Court held that a juvenile convicted of a non-homicide offense could not be sentenced to life without parole, but must be given some ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’” (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010))).

169. *See Solem*, 463 U.S. at 282, 300, 301 (holding that life imprisonment without possibility of parole imposed upon defendant convicted of uttering no account check for \$100 prohibited by Eighth Amendment).

170. *Morrissey*, 408 U.S. at 477 (“[t]he practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system.”).

171. *See* ARIZ. REV. STAT. § 31-412.

172. *Solem*, 463 U.S. at 300.

173. 445 U.S. 263 (1980).

174. *Solem*, 463 U.S. at 297-98.

175. *Id.* at 279.

176. *Rummel*, 445 U.S. at 280.

177. *Solem*, 463 U.S. at 278.

“that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.”<sup>178</sup>

Statistics provided by the Arizona Board of Clemency show that between 2004 and 2016 the Board heard an average of 594.9 clemency hearings per year, recommended an average of 48.2 prisoners a year to the governor who granted clemency to an average of 6.7, or 1.5% of all applicants.<sup>179</sup> During that same period, the Board granted an average of 88 out of 436 parole applications a year, or 21.3%.<sup>180</sup> The data in Figure 1 and Figure 2 clearly shows that parole offers a significantly higher opportunity for release than clemency.<sup>181</sup>

**Figure 1: Clemency in Arizona 2004-2016**

| FY   | Phase I Hearing | Phase II Hearings | Recommendations Governor | Granted | %     |
|------|-----------------|-------------------|--------------------------|---------|-------|
| 2004 | 960             | 87                | 87                       | 11      | 1.10% |
| 2005 | 972             | 110               | 101                      | 13      | 1.30% |
| 2006 | 604             | 84                | 52                       | 9       | 1.50% |
| 2007 | 704             | 102               | 70                       | 4       | 0.60% |
| 2008 | 586             | 94                | 63                       | 7       | 1.20% |
| 2009 | 656             | 97                | 61                       | 9       | 1.40% |
| 2010 | 406             | 53                | 41                       | 6       | 1.50% |
| 2011 | 303             | 54                | 47                       | 8       | 2.60% |
| 2012 | 398             | 70                | 50                       | 9       | 2.30% |
| 2013 | 115             | 60                | 24                       | 6       | 0.50% |
| 2014 | 305             | 55                | 26                       | 2       | 0.66% |
| 2015 | 200             | 15                | 2                        | 1       | 0.50% |
| 2016 | 483             | 19                | 2                        | n/a     | <0.41 |

178. *Id.* at 300.

179. *Reid, supra* note 165.

180. *See Policies and Reports: Annual Reports Fiscal Years 2014-2017* ARIZ. BOARD EXECUTIVE CLEMENCY (last visited Feb. 21, 2018), <https://boec.az.gov/agendas-reports-and-policies/policies-and-reports>; *see also Reid, supra* note 165, at 6 (2013 statistics are through July only).

181. *Reid, supra* note 165, at 5-6.

| <b>Figure 2: Parole in Arizona 2004-2016</b> |          |         |       |
|--|----------|---------|-------|
| FY   | Hearings | Granted | %     |
| 2004   | 694      | 242     | 34.9% |
| 2005   | 574      | 47      | 25.6% |
| 2006   | 485      | 126     | 26%   |
| 2007   | 427      | 72      | 16.9% |
| 2008   | 458      | 83      | 18.1% |
| 2009   | 472      | 88      | 18.6% |
| 2010   | 439      | 68      | 15.5% |
| 2011   | 313      | 82      | 26.2% |
| 2012   | 329      | 72      | 21.9% |
| 2013   | 326      | 80      | 24.5% |
| 2014   | 370      | 95      | 25.7% |
| 2015   | 390      | 46      | 11.8% |
| 2016   | 397      | 47      | 11.8% |

Clemency in Arizona does not offer the same consideration for release that parole does. Prisoners described by the Arizona courts as “eligible for other forms of release, such as executive clemency,”<sup>182</sup> are denied a fundamental requirement of due process.<sup>183</sup> Unlike the Arizona courts, the Supreme Court of the United States’ *Solem* decision determined the defendants’ “argument that he is not likely to actually be released” is relevant.<sup>184</sup> Arizona data comparing the likelihood of obtaining a commutation of sentence versus parole shows that a prisoner is fifteen times more likely on average to be released on parole than clemency and in some years parole applicants are thirty-one times more likely to be released.<sup>185</sup> Clemency is neither legally nor factually comparable to parole as an opportunity to be heard or released.

182. *Cota*, 272 P.3d at 1042. However, there remains speculation as to what the Arizona Department of Corrections will actually do when faced with this issue. See Letter from Amy Bjelland, Gen. Counsel for the Ariz. Dep’t of Corr., to Judge Hotham, RE: Joyce, Justin Jacob (Jan. 14, 2004). [hereinafter Letter].

183. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)) (“A fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”) (internal citations omitted).

184. *Solem*, 463 U.S. at 302-03; see, e.g., *State v. Hargrave*, 234 P.3d 569, 583 (Ariz. 2010) (“Hargrave’s argument that he is not likely to actually be released does not render the instruction legally incorrect.” (citing *State v. Dann*, 207 P.3d 604 (Ariz. 2009)); *id.* (citing *State v. Cruz*, 181 P.3d 196 (Ariz. 2008) (finding that trial court did not err in precluding Board chairman from testifying as to how life sentences are handled in Arizona, finding that such testimony was too speculative to be relevant)).

185. Reid, *supra* note 165 (2004 statistics).

## IV. ANALYSIS

Arizona's lack of parole consideration after Truth-in-Sentencing creates three legal deficiencies depending on the sentenced imposed: (1) capital defendants denied their due process right under *Simmons* and *Lynch III* to inform the jury they would be ineligible for parole are entitled to a new jury sentencing; (2) prisoners sentenced by the court to life with the possibility of "parole" after twenty-five years that are denied a parole hearing are denied a due process right to be heard; and (3) defendants who pled guilty with a stipulated sentence of life with the possibility of "parole" after twenty-five years are likely able to either withdraw from their plea agreements when those deals are breached by the state's inability to uphold the promised parole hearings or request the judiciary to order specific performance on their pleas.<sup>186</sup>

*A. Death Row Simmons Cases after Lynch III*

The Supreme Court of the United States addressed the first problem when it overturned the death sentence of Shawn Patrick Lynch in 2016.<sup>187</sup> Two different juries convicted Lynch of first degree murder for the 2001 murder of James Panzarella.<sup>188</sup> Lynch faced the possibility of death, natural life, or "life with the possibility of *release* after 25 years."<sup>189</sup> The first jury failed to come to a unanimous verdict,<sup>190</sup> but the second and third juries sentenced Lynch to death.<sup>191</sup> During the trial, prosecutors suggested that Lynch could be dangerous in the future.<sup>192</sup> The Supreme Court previously held in *Simmons v. South Carolina*, that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."<sup>193</sup> Although Arizona law does not currently offer Lynch the possibility of parole, the Arizona Supreme Court denied the *Simmons* instruction and proceeded on the theory that Arizona's statute

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186. See, e.g., *State v. Olague*, 381 P.3d 269, 271 (Ariz. Ct. App. 2016). Additionally, prisoners sentenced to life without the possibility of release for twenty-five years are only able to apply for clemency as long as Truth-in-Sentencing remains. ARIZ. STATE SENATE, *supra* note 85, at 1-2; see generally Matthew B. Meehan, *A Gathering Storm: Future Challenges Necessitate Reform of Arizona's Dysfunctional Post-Conviction Regime*, 9 ARIZ. SUMMIT L. REV. 1 (2016) (arguing that Truth-in-Sentencing and clemency create a de-facto natural life sentence which implicate the Eighth Amendment).

187. *Lynch III*, 136 S. Ct. at 1818 (2016).

188. *State v. Lynch (Lynch II)*, 357 P.3d 119, 127.

189. See ARIZ. REV. STAT. § 13-751(A) (emphasis added).

190. *State v. Lynch (Lynch I)*, 234 P.3d 595, 601 (Ariz. 2010).

191. *Lynch II*, 357 P.3d at 127, *rev'd*, 136 S. Ct. 1818 (2016).

192. *Id.* at 138.

193. *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994).

authorized the imposition of release-eligible sentences, thus creating a possibility of parole, even though parole is not currently available.<sup>194</sup> Lynch attempted to waive his right to be considered for a release-eligible sentence and requested that the jury be instructed regarding his ineligibility for release, but the Arizona Supreme Court stated that “[p]arole eligibility is not a right that can be waived” and executive clemency created a possibility of release.<sup>195</sup> In its brief opposing Lynch’s petition for writ of certiorari, the State suggested that “nothing prevents the legislature from creating a parole system in the future for which [Lynch] would have been eligible had the court sentenced him to life with the possibility of release after 25 years.”<sup>196</sup>

However, in *Simmons* the Court stated “that the potential for future ‘legislative reform’ could not justify refusing a parole-ineligibility instruction.”<sup>197</sup> Although the trial court’s jury instruction was an accurate statement of Arizona law,<sup>198</sup> “*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant’s right to inform a jury of his parole ineligibility.”<sup>199</sup> The Court granted the petition and overturned the decision of the Arizona Supreme Court.<sup>200</sup>

The Court’s *Lynch III* decision creates an immediate problem for Arizona’s courts by providing an opening for death row inmates to challenge their sentences.<sup>201</sup> Before *Lynch III*, the Arizona Supreme Court rejected a *Simmons* jury instruction for at least nine eligible defendants,<sup>202</sup> while at least four more preserved the issue for appeal.<sup>203</sup> Other defendants who failed to preserve the issue may be able to argue that they received ineffective assistance of counsel.<sup>204</sup> Unlike juvenile offenders sentenced to natural life before *Miller*, the *Lynch III* decision opens a path for several

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194. *Lynch II*, 357 P.3d at 138.

195. *Id.* at 103-04.

196. *Lynch III*, 136 S. Ct. at 1820.

197. *Id.* (citing *Simmons*, 512 U.S. at 166).

198. *Id.* at 1822 (Thomas, J., dissenting).

199. *Id.* at 1819.

200. *Id.*

201. See, e.g., *Escalante–Orozco*, 386 P.3d at 828-29; *State v. Hulseley*, 408 P.3d 408 (Ariz. 2018); *State v. Rushing*, 404 P.3d 240 (Ariz. 2017), *petition for cert. docketed* (U.S. April 19, 2018).

202. See *State v. Burns*, 344 P.3d 303, 325 (Ariz. 2015); *State v. Benson*, 307 P.3d 19, 30 (Ariz. 2013); *Boyston*, 298 P.3d at 901; *State v. Hardy*, 283 P.3d 12, 24 (Ariz. 2012); *State v. Cota*, 272 P.3d 1027, 1042 (Ariz. 2012); *Hargrave*, 234 P.3d at 582-83; *State v. Chappel*, 236 P.3d 1176, 1184-85 (Ariz. 2010); *State v. Dann*, 207 P.3d 604, 617 (Ariz. 2009); *Cruz*, 181 P.3d at 213.

203. See *State v. Reeves*, 310 P.3d 970, 976 (Ariz. 2013); *State v. Prince*, 250 P.3d 1145, 1160 (Ariz. 2011); *State v. Womble*, 235 P.3d 244, 253 (Ariz. 2010); see also *State v. Hausner*, 280 P.3d 604, 631 (Ariz. 2012) (however, Dale Hausner committed suicide in prison on June 19, 2013).

204. See *Strickland v. Wash.*, 466 U.S. 668, 675 (1984) (examining the effectiveness of counsel at the sentencing proceeding).

death row prisoners to gain post-conviction relief.<sup>205</sup> *Miller* created a new interpretation of constitutional law.<sup>206</sup> *Lynch III* upheld an interpretation of constitutional law existing since the *Simmons* decision in 1994,<sup>207</sup> and reversed the incorrect application of constitutional law by Arizona's Supreme Court going back in a string of cases to at least *Cruz* in 2008.<sup>208</sup> Post-conviction relief is always available to prisoners whose sentence violates the United States Constitution.<sup>209</sup> Unlike with juvenile offenders sentenced to life in prison, it remains to be seen whether death row prisoners denied due process during sentencing can be precluded from having their convictions resentenced by a legislative fix reinstating parole for first degree murder.<sup>210</sup> In 2016, Lynch's case went again before the Arizona Supreme Court on two issues: (1) whether a *Simmons* error is subject to harmless-error analysis and, if so, (2) whether the *Simmons* error was harmless.<sup>211</sup> However, the court dismissed the case after Lynch died in prison on November 4, 2017.<sup>212</sup>

Arizona death row inmates are already using *Lynch III* to secure new sentences.<sup>213</sup> A jury sentenced Joel Randu Escalante–Orozco to death for first degree murder, sexual assault, and first-degree burglary which occurred in 2001.<sup>214</sup> At trial, Escalante–Orozco objected to the jury instructions, arguing that the jurors should not consider his potential for release when

205. See *Lynch III*, 136 S. Ct. at 1820 (discussing that the Arizona Supreme Court confirmed that parole was unavailable to Lynch under its law, while *Simmons* and its progeny established Lynch's right to inform his jury of that fact).

206. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 724 (2016) (noting that *Miller* announced a substantive rule of constitutional law after analyzing that the vast majority of juvenile offenders faced a punishment that the law could not oppose on them).

207. See *Garza v. Ryan*, No. CV-14-01901-PHX-SRB, 2017 WL 105983, at \*3 (D. Ariz. Jan. 11, 2017) (noting that “[*Lynch III*] does not represent a change in the law. It simply applies existing law to an Arizona case.”).

208. See, e.g., *Cruz*, 181 P.3d 196; *Ring v. Arizona*, 536 U.S. 584 (2002). Before the Arizona Supreme Court's *Cruz* decision in 2008, the Court considered *Simmons* inapposite, as “[i]t involved a sentencing jury . . . [i]n Arizona, the trial judge determines punishment.” *State v. Mott*, 931 P.2d 1046, 1057 (Ariz. 1997). Juries started determining punishment in murder cases only after the Supreme Court held Arizona's capital sentencing statute unconstitutional in *Ring v. Arizona* and the legislature granted the jury, not the judge, the responsibility in determining whether to sentence a defendant to death or life in prison. See 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001) (West).

209. ARIZ. R. CRIM. P. 32.1(a).

210. See *Montgomery*, 136 S. Ct. at 736 (suggesting that a “State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”).

211. See Appellant's Supplemental Brief Regarding Harmless Error at 3, *State v. Lynch (Lynch IV)* (Ariz. Sept. 30, 2016) (No. CR-12-0359-AP) (on file at the Arizona Supreme Court).

212. See Dismissal Order, *Lynch IV* (Ariz. Nov. 13, 2017) (No. CR-12-0359-AP) (on file at the Arizona Supreme Court).

213. See generally *Escalante–Orozco*, 386 P.3d 798 (depicting a recent case using *Lynch III* to secure a new sentence).

214. *Id.* at 809.

deciding whether to impose the death penalty.<sup>215</sup> “The trial court denied the objection and refused the requested instruction because it speculated about the future availability of parole.”<sup>216</sup> The court found that “the prosecutor did not have to explicitly argue future dangerousness for it to be an issue.”<sup>217</sup> The prosecutor made future dangerousness an issue by introducing evidence that Escalante–Orozco attacked his wife on two previous occasions.<sup>218</sup> The court relied on *Lynch III* and held that the trial court must conduct new penalty phase proceedings, reasoning that even if the error was harmless, the state did not prove “beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.”<sup>219</sup>

### B. Opportunity to be Heard Protected by Due Process

Prisoners sentenced to life with the possibility of parole can have a recognized right to appear before a parole board under the due process clause of the United States Constitution.<sup>220</sup> While there is no inherent right to parole, a state can create a recognized liberty interest by statute, requiring due process.<sup>221</sup> Minimal due process includes an opportunity to be heard.<sup>222</sup> Arizona’s parole statute grants a recognized liberty interest in parole, protected by the due process clause.<sup>223</sup> Accordingly, the Board of Executive Clemency “must afford Arizona inmates who become eligible for parole an ‘opportunity to be heard.’”<sup>224</sup> As written, Arizona’s parole eligibility statute only applies to a “person who commits a felony offense before January 1, 1994,” or a juvenile offender sentenced to life imprisonment.<sup>225</sup> However, since 1994 the Arizona judiciary has sentenced more than two hundred defendants to life imprisonment with a *possibility of parole* after twenty-five or thirty-five years.<sup>226</sup> Many of these prisoners are sentenced under section 13-751 of the Arizona Revised Statute, which grants the sentencing judge discretion in sentencing a defendant to either life or natural life.<sup>227</sup>

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215. *Id.* at 828.

216. *Id.*

217. *Id.* at 829.

218. *Escalante-Orozco*, 386 P.3d at 829.

219. *Id.* at 830.

220. *Greenholtz*, 442 U.S. at 5.

221. *Id.* at 7, 12.

222. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (“[A] prisoner subject to a parole statute . . . received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied.”).

223. *Stewart*, 753 P.2d at 1199.

224. *Ariz. Attorney Gen. Op. No. 14-007* (Oct. 3 2014) at 3.

225. ARIZ. REV. STAT. ANN. § 41-1604.09(1).

226. List of defendants generated with information provided by the Arizona Department of Corrections (on file with author).

227. ARIZ. REV. STAT. ANN. § 13-751(A)(2).

Other prisoners are sentenced under section 13-1003(D) of the Arizona Revised Statute, which allows for no discretion and mandates a twenty-five to life sentence.<sup>228</sup>

The issue remains whether defendants sentenced to life imprisonment with a possibility of parole after twenty-five years for crimes committed after 1994 are *eligible* for parole, which would entitle them to due process protections, including the opportunity to be heard by a parole board.<sup>229</sup> To determine if the defendants are eligible for parole one must first determine if a sentence with a possibility of parole after twenty-five years is a lawful or unlawful sentence.<sup>230</sup> Under Arizona law, “[a] trial court has no inherent power to change a sentence already lawfully imposed.”<sup>231</sup> “An unlawful sentence is one that is outside the statutory range.”<sup>232</sup> If life imprisonment with a possibility of parole after twenty-five years is a valid sentence for the trial judge to impose, then the *ex post facto* alteration of that sentence denies the due process right to a parole hearing and violates the prisoner’s rights under the double jeopardy clause by increasing a lawfully imposed sentence.<sup>233</sup> In Arizona, “[o]nce a defendant begins to serve a lawful sentence, he may not be sentenced to an increased term. To do so violates the constitutional proscription against double jeopardy.”<sup>234</sup> This includes a defendant’s parole eligibility since, “parole eligibility is a function of the length of the sentence fixed by the [court].”<sup>235</sup> A sentence of life imprisonment with a possibility of parole after twenty-five years for a crime committed after 1994 should be considered a lawful sentence because the sentence has been continuously imposed in the same manner under the exact

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228. *Id.* § 13-1003(D).

229. *See generally* Ariz. Attorney Gen. Op. No. 14-007 (Oct. 3, 2014) (describing the due process protection to be heard by the parole board).

230. *State v. Suniga*, 701 P.2d 1197, 1201 (Ariz. Ct. App. 1985).

231. *Id.*; *see State v. Falkner*, 542 P.2d 404, 406 (Ariz. 1975) (holding the trial court does not have inherent power to modify a sentence); *cf. State v. Powers*, 742 P.2d 792, 796 (Ariz. 1987) (“[T]rial court apparently overlooked its statutory duty to impose a felony assessment. Because the court was required to impose the assessment, its initial sentence was unlawful under the statute and it could correct the sentence to reflect the felony assessment without violating the prohibition against double jeopardy.”).

232. *State v. House*, 821 P.2d 233, 234 (Ariz. Ct. App. 1991).

233. *See Suniga*, 701 P.2d at 1203 (showing that alteration of an already imposed life sentence is a violation of double jeopardy).

234. *Id.*; *see Ex Parte Lange*, 85 U.S. 163, 168 (1873).

235. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 658 (1974); *see United States v. Paskow*, 11 F.3d 873, 879 (9th Cir. 1993) (“[P]arole eligibility is part of the sentence for the underlying offense, its terms and conditions are fixed at the moment the underlying offense is complete. Therefore, like the length of a term of incarceration, the conditions affecting parole eligibility cannot be retrospectively altered.”); *Lynch II*, 357 P.3d at 126 (“Parole eligibility is not a right that can be waived. To the contrary, the eligibility decision is within the trial court’s discretion.”); *Benson*, 307 P.3d at 32 (“Section 13-751(A) does not confer a ‘right’ to parole eligibility on defendants. Indeed, the statute’s plain language leaves the eligibility decision squarely within the trial court’s discretion.”).

same sentencing statutes going back to 1978. The situation is demonstrated clearest by Arizona's conspiracy to commit murder sentence.<sup>236</sup>

Since 1978, under Arizona's conspiracy statute, the proper sentence is life without possibility of parole for twenty-five years.<sup>237</sup> In 1993, the court found in *State v. Milke* that section 13-1003(D) of the Arizona Revised Statute seemed clear and unambiguous.<sup>238</sup> In *Milke*, the defendant "was convicted of conspiracy to commit first degree murder."<sup>239</sup> The conspiracy statute provides that "[c]onspiracy to commit a class 1 felony is punishable by a sentence of life without possibility of release [for] 25 years."<sup>240</sup> The court found the language of section 13-1003(D) of the Arizona Revised Statute is "precise, unambiguous, and leaves no room for interpretation."<sup>241</sup> The trial court imposed "a concurrent life sentence without possibility of parole for 25 years for conspiracy[.]"<sup>242</sup> The court reasoned that the sentence imposed by the trial court on the conspiracy count was proper.<sup>243</sup>

Under Arizona's conspiracy statute, the proper sentence is life without possibility of parole for twenty-five years, even if the crime occurred after 1994.<sup>244</sup> In *State v. Anderson*,<sup>245</sup> the court sentenced Frank Anderson for murder, armed robbery, and conspiracy occurring in 1996.<sup>246</sup> The court sentenced Anderson to "life imprisonment without the possibility of parole for twenty-five years for conspiracy to commit first-degree murder[.]"<sup>247</sup> Upholding the sentence, the Arizona Supreme Court reasoned that "the sentence imposed for the conspiracy conviction—life imprisonment without the possibility of parole for twenty-five years—was authorized without any finding of aggravating circumstances."<sup>248</sup>

Section 13-1003(D) of the Arizona Revised Statute, last amended in 1978, provides a mandatory indeterminate life sentence for defendants

236. See generally ARIZ. REV. STAT. ANN. § 13-1003(D) (indicating the length of imprisonment for conspiracy to commit a felony).

237. See, e.g., *Date v. Schriro*, 619 F. Supp. 2d 736 (D. Ariz. 2008) (2000 conspiracy); *State v. Milke*, 865 P.2d 779 (Ariz. 1993) (1989 murder & conspiracy); *State v. Bigger* 254 P.3d 1142 (Ariz. Ct. App. 2011) (2002 murder & conspiracy); *State v. Robles*, 901 P.2d 1200 (Ariz. Ct. App. 1995) (1991 conspiracy).

238. *Milke*, 865 P.2d at 791.

239. *Id.*

240. *Id.* (quoting ARIZ. REV. STAT. § 13-1003(D) (1993)).

241. *Id.* (citing *State v. Reynolds*, 823 P.2d 681, 682 (Ariz. 1992)) ("If a statute's language is clear and unambiguous, the court will give it effect without resorting to other rules of statutory construction." (citing *State v. Arnett*, 579 P.2d. 542, 555 (1978))).

242. *Id.* at 782 (emphasis added).

243. *Milke*, 865 P.2d at 791.

244. ARIZ. REV. STAT. ANN. § 13-1003(D).

245. 111 P.3d 369 (2005).

246. *Id.* at 377.

247. *Id.*

248. *Id.* at 401.

convicted of conspiracy to commit first-degree murder.<sup>249</sup> It is an indeterminate sentence, with the court fixing the minimum and maximum term, in these cases a twenty-five (or thirty-five) year minimum and a maximum life term, but a parole board determines at what precise point between the minimum and maximum that the prisoner is ready for release.<sup>250</sup> The court, in both *Milke* and *Anderson*, imposed identical sentences of life imprisonment without the possibility of parole for twenty-five years for conspiracy to commit first degree murder.<sup>251</sup> At first, this situation appears to conflict with section 41-1604.09(I) of the Arizona Revised Statute, which only applies parole eligibility to a “person who commits a felony offense before January 1, 1994,” or juvenile offenders sentenced to life imprisonment.<sup>252</sup> However, if a sentence of life without possibility of parole for twenty-five years is a lawful sentence, then the State of Arizona concedes that there is a recognized liberty interest in parole protected by due process.<sup>253</sup> Failing to honor the sentence with parole eligibility imposed by the trial court in cases like *Anderson* would result in the increase of a sentence from one with parole, to a sentence without parole. The Supreme Court of the United States previously held that “life without parole is ‘the second most severe penalty permitted by law,’ . . . [and] share[s] some characteristics with death sentences that are shared by no other sentences.”<sup>254</sup> Additionally, any alternative interpretation would lead to an indeterminate sentence without parole, a concept not contemplated by the Arizona legislature or any legislature before in American penal history,<sup>255</sup> and in fact is the opposite of the legislation’s apparent purpose.<sup>256</sup> Finally, the Arizona Supreme Court held in 2008 that no state law prohibits a defendant’s release on parole after serving twenty-five years,<sup>257</sup> referring to section 13-751 of the Arizona Revised Statute, a statute that provides for the possibility of the same sentence as section 13-

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249. ARIZ. REV. STAT. ANN. § 13-1003(D); see *Lankford v. Idaho*, 500 U.S. 110, 116 (1991).

250. See *LAROE*, *supra* note 43.

251. *Milke*, 865 P.2d at 790; *Anderson*, 111 P.3d at 377.

252. ARIZ. REV. STAT. ANN. § 41-1604.09(I).

253. *Stewart*, P.2d at 1199; Ariz. Attorney Gen. Op. No. 14-007 (Oct. 3, 2014).

254. *Graham v. Florida*, 560 U.S. 48, 69, (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

255. See *Phoenix v. Superior Court*, 696 P.2d 724, 729 (Ariz. Ct. App. 1985) (“The courts will avoid statutory interpretations that lead to absurd results which could not have been contemplated by the legislature.”).

256. See *Vera*, 334 P.3d at 760 (“[I]n imposing a sentence of ‘life without parole for twenty-five (25) years,’ the court clearly believed this alternative sentence would provide Vera with a meaningful opportunity of release . . .”).

257. *Cruz*, 181 P.3d at 207 (citing A.R.S. § 13-703(A) (2004), renumbered as § 13-751 in 2009).

1003(D).<sup>258</sup> Regarding a murder in the year 2000 under the same statute the Court:

conclude[d] the statute is equally clear that the legislature intended to provide one sentencing option for persons convicted of first-degree murder other than death: a life term of imprisonment. The legislature gave trial judges the discretion to choose alternative conditions for that life term—natural life or life *with the possibility of parole in twenty-five or thirty-five years*].<sup>259</sup>

Therefore, it seems clear that a sentence with a parole possibility after twenty-five years is a valid sentence, entitling prisoners thus sentenced a guaranteed due process right to a parole hearing. Any statute to the contrary is unconstitutional under the due process clause.

Even if a sentence is unlawful, unless the original sentence is vacated, the trial court can only correct the sentence within “60 days of the entry of judgment and sentence” but before the defendant’s appeal, if any, is perfected.<sup>260</sup> The state must appeal (or cross-appeal) in order to challenge an illegally lenient sentence otherwise the court has no subject matter jurisdiction to alter such a sentence.<sup>261</sup> However, on a number of occasions the Arizona appellate courts appear to be acting without lawful jurisdiction.<sup>262</sup> When a sentence is vacated, “the court may not impose a sentence for the same offense . . . which is more severe than the earlier sentence unless . . . the earlier sentence was unlawful and it is corrected so the court may impose a lawful sentence.”<sup>263</sup> Nor is there precedent that the court is required to vacate a sentence just because it is unlawful. In an ineffective assistance of counsel case, the Arizona Supreme Court held that “[a]lthough defendant was improperly advised that he was statutorily entitled to parole eligibility in 25 years, this error is harmless because he actually received the illegally lenient sentence promised.”<sup>264</sup> Finally, if a sentence is unlawful, an *ex post facto* alteration of the sentence by amending

258. Compare ARIZ. REV. STAT. ANN. § 13-1003(D) ( which says, “punishable by a sentence of life imprisonment without possibility of release on any basis until the service of twenty-five years . . . .”), with ARIZ. REV. STAT. ANN. § 13-751(A)(3) (which says, “If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years . . . .”).

259. *Fell*, 97 P.3d at 912, *aff’d*, 115 P.3d 594 (Ariz. 2005) (emphasis added).

260. ARIZ. R. CRIM. P. 24.3.

261. *State v. Dawson*, 792 P.2d 741, 749 (Ariz. 1990) (holding that the court will not correct sentencing errors that benefit a defendant, in the context of his own appeal, absent a proper appeal or cross-appeal by the state).

262. See, e.g., *Godinez*, 2013 WL 3788427, at \*14; *State v. Schwartz*, No. 2 CA-CR 2006-0213, 2008 WL 4516336, at \*1 (Ariz. Ct. App. Mar. 31, 2008).

263. ARIZ. R. CRIM. P. 26.14.

264. *State v. Kinslow*, 799 P.2d 844, 848 (Ariz. 1990).

the minute entry is inappropriate.<sup>265</sup> Considering the large number of cases with defendants sentenced to a specific parole eligibility state, if the sentences are held unlawful, the courts should also follow the precedent that “[a] sentence that is ‘so ambiguous that it fails to reveal its meaning ‘with fair certainty,’ is illegal.”<sup>266</sup> Regardless of the sentence’s lawfulness, the government cannot seek the death penalty on resentencing from a life sentence,<sup>267</sup> and if a prisoner is released on parole, the government is estopped from re-incarcerating an erroneously released prisoner.<sup>268</sup>

### C. *When the Absence of Parole Voids Plea Deals*

Arizona’s indeterminate sentencing scheme is also problematic for defendants whose plea agreements specify parole eligibility, if parole does not exist.<sup>269</sup> “Plea agreements are contractual in nature and subject to contract interpretation.”<sup>270</sup> Ambiguities in the terms of the plea agreement are construed against the government, “in light of the parties’ respective

265. See *State v. Bowles*, 841 P.2d 209 (Ariz. Ct. App. 1992) (holding that when there is discrepancy between oral pronouncement of sentence and minute entry that cannot be resolved by reference to the record, remand for re-clarification of sentence is appropriate); cf. *State v. Heri*, No. 1 CA-CR 11-0612, 2012 WL 3761561, \*2 (Ariz. Ct. App. Aug. 30, 2012) (“It is clear that the trial court was sentencing Heri to life in prison with the possibility of parole after 35 years. To avoid any possible ambiguity, we hereby order that the formal sentence be clarified to be life in prison *with possibility of parole* after 35 years.”) (2007 murder) (emphasis added).

266. See *United States v. Contreras-Subias*, 13 F.3d 1341, 1344 (9th Cir. 1994) (requiring defendant to serve the sentence both concurrently and consecutively to another federal sentence was so ambiguous as to be illegal).

267. See *Arizona v. Rumsey*, 467 U.S. 203 (1984) (considering a sentence of life imprisonment an acquittal of the death sentence for the purpose of the double jeopardy clause).

268. See *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982) (where a prisoner had been led to believe he was to be eligible for parole at the time that he was released); see also *United States v. Merritt*, 478 F. Supp. 804, 807 (D.D.C. 1979) (recognizing, that in some cases, “fundamental principles of liberty and justice,” would be violated if a person were required to serve the remainder of a prison sentence after he had been released prematurely from custody through no fault of his own, and had made a good adjustment to society).

269. See *State v. Rosario*, 987 P.2d 226, 230 (Ariz. Ct. App. 1999) (stating that Rosario committed his crimes after the date on which the legislature enacted laws eliminating the possibility of parole for crimes committed after that date, but Rosario’s plea agreement provided that he would not be eligible for release from confinement until serving at least one-half the sentence imposed by the court.).

270. *State v. Rivera*, 109 P.3d 83, 88 (Ariz. 2005) (citing *Coy v. Fields*, 27 P.3d 799, 802 (Ariz. Ct. App. 2001); see *United States v. Frownfelter*, 626 F.3d 549, 555-56 (10th Cir. 2010) (applying the contract law principle of mutual mistake of fact to evaluate a challenge to a guilty plea); *United States v. Williams*, 198 F.3d 988, 993 (7th Cir. 1999) (same); *United States v. Johnson*, 187 F.3d 1129, 1134 (9th Cir. 1999) (“Plea agreements are contracts, and the government is held to the literal terms of the agreement.”); *United States v. Standiford*, 148 F.3d 864, 868 (7th Cir. 1998) (applying the contract law principle of condition subsequent to a challenge to a guilty plea); *Margalli-Olvera v. Immigration and Naturalization Serv.*, 43 F.3d 345, 351 (8th Cir. 1994) (“Plea agreements are contractual in nature, and are interpreted according to general contract principles.”); *Brooks v. United States*, 708 F.2d 1280, 1281 (7th Cir. 1983) (“A plea bargain is, in law, just another contract.”); see generally John F. Gallagher, *Criminal Law - Constitutional Contract - Courts Can Vacate Plea Agreements if State Proves Material Breach* (*State v. Rivest*), 66 MARQ. L. REV. 193 (1982) (analyzing constitutional contract theory).

bargaining power and expertise.”<sup>271</sup> One of the possible remedies for a breach in a plea agreement contract is specific performance.<sup>272</sup> The state’s inability to provide the promised parole eligibility likely requires specific performance for the parole hearing, otherwise the plea agreement is likely void, thereby necessitating a new plea or trial.<sup>273</sup>

### *1. Breach*

A guilty plea is void if it is induced by promises or threats which deprive it of the character of a voluntary act.<sup>274</sup> When a defendant enters into a plea agreement, he waives his Sixth Amendment right to a jury trial.<sup>275</sup> A defendant may not waive this constitutional right unless he does so knowingly, voluntarily, and intelligently.<sup>276</sup> A plea does not qualify as intelligently accepted unless a criminal defendant first receives “real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.”<sup>277</sup> The defendant must also be advised by competent counsel, be in control of his mental faculties, and be made aware of the nature of the charges against him.<sup>278</sup> A plea is voluntarily accepted if the defendant accepts with “an awareness of its ramifications, and to that end . . . is apprised of the range of sentence and the rights forfeited by a plea of guilty.”<sup>279</sup> Before accepting a guilty plea in Arizona, a trial court must inform the defendant of the nature and “range of possible sentence for the offense to which” the plea is offered, including “any special conditions regarding sentencing, parole, or commutation imposed by statute.”<sup>280</sup> If the record is silent, the burden shifts to the government to prove that the waiver was knowingly, voluntarily and intelligently made.<sup>281</sup>

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271. *United States v. De La Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993).

272. *See Santobello v. New York*, 404 U.S. 257, 263 (1971) (stating that the state court was in a better position to decide whether the circumstances required only that there be specific performance of the plea agreement); *see also Hovey v. Superior Court*, 798 P.2d 416, 420 (Ariz. Ct. App., Div. 1 1990) (“Specific performance provides the only appropriate relief.”); *State v. Georgeoff*, 788 P.2d 1185, 1188 (Ariz. 1990) (stating that a defendant may seek specific performance if he or she learns of a breach at or before sentencing).

273. *Hovey*, 798 P.2d at 420.

274. *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (citing *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986)).

275. *Santobello*, 404 U.S. at 264.

276. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (holding that the standard under which an accused has waived the right to counsel also applies to determining whether a guilty plea was voluntarily made).

277. *Bousley v. United States*, 523 U.S. 614, 618 (1998).

278. *Id.* at 619.

279. *State v. Contreras*, 542 P.2d 17, 19 (Ariz. 1975).

280. ARIZ. R. CRIM. P. 17.2 (a)(1)-(2).

281. *United States v. Pricepaul*, 540 F.2d 417, 423 (9th Cir. 1976).

If a defendant bases his decision to plead guilty upon his belief that he could be paroled at one-half of his incarceration terms, he has raised a colorable claim.<sup>282</sup> Edward Rosario's plea agreement provided "if sentenced to a term of imprisonment, the Defendant is not eligible for release from confinement on any basis until having served not less than one-half the sentence imposed by the court. Eligibility or release shall be determined by the Board of Pardons and Paroles."<sup>283</sup> However, Rosario committed his crimes after January 1, 1994 and is not eligible for parole under section 41-1604.09 of the Arizona Revised Statute.<sup>284</sup> The court held that "[i]f Rosario based his decision to plead to the offenses based upon his belief that he could be paroled at one-half of his incarceration terms, he has raised a colorable claim."<sup>285</sup> The court reasoned that "[a] defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome."<sup>286</sup>

A plea may be rendered involuntary not only if the court fails to adequately explain the material consequences of a guilty plea, but also if the state materially breaches the plea agreement.<sup>287</sup> In 2010, Jesus Godinez pled guilty to two counts of first-degree murder and four counts of aggravated assault.<sup>288</sup> The Court sentenced Godinez to two concurrent sentences of "life imprisonment with possibility of parole after 25 calendar years," as indicated in the written plea agreement.<sup>289</sup> During settlement, both 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."<sup>290</sup> Despite this, the trial court found "Godinez nonetheless was informed 'correctly' that he would be eligible for release."<sup>291</sup> The appellate court disagreed and remanded the case to determine if parole eligibility was material to Godinez's decision to plead guilty.<sup>292</sup>

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282. *Rosario*, 987 P.2d at 230; see *State v. Agboghidi*, No. 2 CA-CR 2013-0103-PR, 2013 WL 1955858, at \*2 (Ariz. Ct. App. May 13, 2013) (defendant arguing that the trial court erred in concluding that "he would have accepted the plea agreement even had he understood the distinction between commutation and parole.").

283. *Rosario*, 987 P.2d at 230 (citing A.R.S. § 41-1604.09).

284. *Id.*

285. *Id.* (citing Appeal in Yuma County Juvenile Action J-95-63, 902 P.2d 834 (Ariz. Ct. App.1995)); *State v. Bryant*, 650 P.2d 1280, 1281 (Ariz. Ct. App.1982).

286. *Rosario*, 987 P.2d at 230 (quoting *State v. Watton*, 793 P.2d 80, 85 (Ariz. 1990)).

287. *State v. Ross*, 804 P.2d 112, 116-17 (Ariz. Ct. App. 1990).

288. *Godinez*, 2013 WL 3788427, at \*1.

289. *Id.*

290. *Id.*

291. *Id.* at \*3.

292. *Id.* at \*5.

While the courts in *Rosario* and *Godinez* require that the defendant would not have accepted the plea agreement if he had known that parole was not a real possibility, a defendant who is unaware he would not be parole eligible until he served his minimum sentence when he pled guilty, is prejudiced by his lack of understanding of the sentencing statute and the failure to inform him is reversible error.<sup>293</sup> In cases like *Godinez*, the defendants are unaware they will never be parole eligible.<sup>294</sup> Since the sentences contain provisions affecting the manner in which the sentence or date of parole is to be computed, a defendant who is not aware of the impossibility of parole should have his guilty plea vacated.<sup>295</sup> Even if the state argues that the word parole should equate to “release,” if the defendant believed that parole referred to the statutory definition found under Arizona law then *consensus ad idem* is impossible and therefore there is no plea agreement.<sup>296</sup>

## 2. Remedy

Failure to provide a parole hearing after a defendant serves twenty-five years would constitute a breach of the plea agreement and entitle the defendant either to specific performance, or to have the sentence vacated.<sup>297</sup> Specific performance is desirable from a public policy perspective,<sup>298</sup> and has legal precedence.<sup>299</sup> Otherwise, vacating the plea agreement after serving twenty-five years in prison could possibly subject the defendant to a new indictment,<sup>300</sup> and the state would then be left to attempt to retry a

293. *State v. Dishong*, 594 P.2d 84, 85 (Ariz. 1979); *State v. Cuthbertson*, 570 P.2d 1075, 1077 (Ariz. 1977).

294. *See, e.g., State v. Ware*, No. 2 CA-CR 2015-0124-PR, 2015 WL 2131107 (Ariz. Ct. App. May 7, 2015) (stating that the defendant was sentenced to life imprisonment without possibility of parole pursuant to a plea agreement); *Sperberg*, 2010 WL 4286203 (stating same statement as *Ware*).

295. *See State v. Ellis*, 572 P.2d 791, 795 (Ariz. 1977) (“If the sentence contains any provision that the defendant was not aware of, that affects the manner in which the sentence or date of parole is computed, either the guilty plea should be vacated or the case remanded to determine if the defendant was actually aware of the provision absent from the record.”); *see also State v. Brock*, 789 P.2d 390, 393 (Ariz. Ct. App. 1989) (“[I]neligibility to earn release credits is a special condition regarding sentence imposed by statute, of which a defendant must be made aware under Rule 17.2(b), and not . . . merely a ‘collateral matter’ of which a defendant need not be informed.”).

296. *See Coy*, 27 P.3d at 803 (holding the state accountable for knowing Arizona law when it negotiates, drafts, and enters into plea agreements); *see also Raffles v. Wichelhaus*, EWHC Exch. J19, (1864) 2 Hurl. & C. 906 (interpreting a contract against the Draftsmen).

297. *Santobello*, 404 U.S. at 263; *see State v. Bloom*, 669 P.2d 1027, 1029 (Ariz. Ct. App. 1983) (stating that flagrant violations of a plea agreement are never harmless error.).

298. *See supra* Part II.

299. *See United States ex rel. Ferris v. Finkbeiner*, 551 F.2d 185, 187 (7th Cir.1977) (“Since [Defendant] has substantially begun performing his side of the bargain, it would not be fair to vacate the plea and require him to go through the procedure anew. Fundamental fairness can be had by limiting his term of custody to that portion of the sentence which comports with the bargain made.”).

300. *See United States v. Moulder*, 141 F.3d 568, 572 (5th Cir. 1998) (applying the frustration of purpose doctrine to permit the government to re-indict the defendant); *United States v. Bunner*, 134 F.3d

twenty-five year old murder case.<sup>301</sup> However, if the Arizona Legislature remedies the appropriate statutes and grants parole eligibility to all prisoners sentenced to indeterminate life sentences, the state will not be in breach of its plea agreements.<sup>302</sup>

A court can order specific performance on a plea agreement, even if the sentence would be otherwise unlawful.<sup>303</sup> In *Buckley v. Terhune*, the defendant entered into a plea agreement believing he was being sentenced to a maximum of fifteen years in prison for second degree murder, but was subsequently sentenced to a prison term of fifteen years to life, the mandatory term for the offense.<sup>304</sup> The Ninth Circuit Court of Appeals held that the agreement had been breached and that specific performance was the only viable remedy because the defendant had already fulfilled his obligations under the plea agreement, including testifying against his co-defendants, and serving his bargained-for sentence of fifteen years.<sup>305</sup> In granting habeas relief, the court noted that it had arrived at its decision “notwithstanding the state’s argument that a determinate fifteen year prison term is not a lawful sentence for second degree murder.”<sup>306</sup> It also noted that, “[c]onsistent or not with the state’s sentencing statute . . . [the defendant] has fulfilled his promises and it is now too late for the state to argue that it was not in a position to offer him a fifteen year sentence in exchange.”<sup>307</sup>

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1000, 1004 (10th Cir. 1998) (same). *But see* *United States v. Gaither*, 926 F. Supp. 50, 52 (M.D. Pa. 1996) (holding that while the defendant’s challenge to his guilty plea was like the application of the impracticability doctrine, the government was not free to re-indict); *see also* *DiCesare v. United States*, 646 F. Supp. 544, 546-48 (C.D. Cal. 1986) (holding that the government could not re-indict the defendant because the defendant’s successful habeas corpus challenge to conviction did not amount to a breach of the agreement).

301. *See e.g.*, *Echols v. State*, 373 S.W.3d 892, 902 (Ark. 2010); Gavin Lesnick, *Plea Reached in West Memphis Murders*, ARK. ONLINE (Aug. 19, 2011, 2:46 PM), <http://www.arkansasonline.com/news/2011/aug/19/breaking-plea-reached-west-memphis-murders/?breaking> (after sixteen years in prison, convicted murderer released on time-served plea after state supreme court reversed conviction).

302. *Ramirez v. Autosport*, 440 A.2d 1345, 1349 (N.J. 1982) (“Within the time set for performance in the contract, the seller’s right to cure is unconditional.”).

303. *See* *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (noting that the trial court failed to “fulfill petitioner’s reasonable understanding of the plea agreement . . . .”); *see also* *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2d Cir.1976) (holding that under *Santobello*, unauthorized prosecutorial promise of parole for prior offense was entitled to specific performance). *But see* *Craig v. People*, 986 P.2d 951, 959 (Colo.1999) (holding that plea agreement calling for an illegal sentence invalidated the guilty plea and could not be specifically enforced).

304. *Buckley*, 441 F.3d at 691-93.

305. *Id.* at 699.

306. *Id.*

307. *Id.*

It is also possible for the court to order the defendant released from prison at the end of the sentence for which the defendant bargained for.<sup>308</sup> In *Rodriguez v. United States*, after the defendant's plea was vacated due to a change in law, the district court denied the government's motion to restore the original indictment.<sup>309</sup> The court reasoned that the parties cannot be restored to their positions prior to the plea agreement.<sup>310</sup> The court further reasoned that "the restoration of the former indictment would have the effect of conferring upon the Government the sizable benefit of Rodriguez's incarceration without obligating the Government to provide anything in return, a scenario the Court finds to be impermissible."<sup>311</sup>

A defendant who pleads guilty in exchange for parole eligibility after twenty-five years may be entitled to release after twenty-five years.<sup>312</sup> If the defendant is given reasonable reason to believe that twenty-five years was the maximum sentence pled to, then under *Buckley*, that defendant should be ordered released from prison, for the defendant would have upheld his part of the contract.<sup>313</sup> However, if a defendant is denied a parole hearing, it is in the interest of both the state and the defendant for the court to order specific performance for the defendant to be heard by the parole board.<sup>314</sup> Specific performance is in accordance with the public policy goal of parole, even if it might be contrary to statutory text.<sup>315</sup> Specific performance also prevents the state from unduly benefiting from the defendant's twenty-five years of imprisonment if the defendant is allowed to withdraw but the state is permitted to re-indict.<sup>316</sup> Finally, specific performance puts both the government and the defendant in the position they believed they were in when the plea was originally negotiated.<sup>317</sup> All of these remedies will be moot if the legislature fixes the unintended vagueness of the indeterminate sentencing statutes and authorizes those prisoners to be parole eligible with a statutory fix similar to the one used to make juvenile defendants parole eligible.

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308. See *Rodriguez v. United States*, 933 F. Supp. 279, 283 (S.D.N.Y. 1996) (denying the Government's motion to restore the original indictment).

309. *Id.* at 280-83.

310. *Id.* at 283.

311. *Id.*

312. See *Buckley*, 441 F.3d at 692. (*Buckley* pleading guilty in exchange for a lesser sentence of a maximum of fifteen years).

313. *Id.* at 699.

314. See *id.* at 702 n.11 (noting that in a case in which the state has already received the benefit of the bargain, the harm caused by its breach is generally best repaired by specific performance of the plea agreement).

315. *United Steelworkers, Etc. v. Weber*, 443 U.S. 193, 194 (1979). It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. See *id.*

316. *Rodriguez*, 933 F. Supp. at 283.

317. *Id.*

## V. ARIZONA'S INDETERMINATE SENTENCING LAWS ARE UNCONSTITUTIONALLY VAGUE

Neither the Arizona executive nor the judicial branch have been able to establish the consequences for a criminal defendant sentenced to “life with the possibility of release.”

The Due Process Clause requires a criminal statute “give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.”<sup>318</sup> Therefore, a criminal sentencing scheme can be challenged on vagueness grounds, and the scheme is void for vagueness if it fails to state with “sufficient clarity the consequences of violating a given criminal statute.”<sup>319</sup> Any statute can be found unconstitutionally vague if it does not provide persons of ordinary intelligence reasonable notice of prohibited behavior and if it “fails to provide explicit standards for those who apply it,” allowing for arbitrary and discriminatory enforcement.<sup>320</sup> The Arizona judicial and executive branches have offered conflicting and contradictory interpretations of whether inmates sentenced to “life with parole” or “life with release” are actually entitled to parole and therefore any statute that provides for these sentences are unconstitutional and must be voided for vagueness.<sup>321</sup>

A statute that provides two conflicting penalties for the same conduct is unconstitutionally vague.<sup>322</sup> In 2000, Arizona’s stalking statute punished indistinguishable conduct as both a class three and as a class five felony.<sup>323</sup> In *Anderson*, the court held the stalking statute unconstitutionally vague.<sup>324</sup> The court further held that, “[w]here a statute is subject to more than one interpretation, the rule of lenity requires that doubts be resolved in favor of the defendant and against imposing the harsher punishment.”<sup>325</sup>

A statutory scheme providing for mandatory lifetime parole and conviction, that does not provide a penalty for violation of parole, is unconstitutionally vague and violates separation of powers.<sup>326</sup> In *State v.*

318. *Musser v. Utah*, 333 U.S. 95, 97 (1948).

319. *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

320. *State v. Tocco*, 750 P.2d 874, 876 (Ariz. 1988) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

321. *See State v. Anderson*, 16 P.3d 214, 220 (Ariz. Ct. App. 2000) (noting that Arizona Revised Statute § 13-2923 is unconstitutionally vague); *see also Wagstaff*, 794 P.2d at 125 (noting that the Court is left the task of interpreting a vague penalty provision without any reasonably alternatives from which to choose).

322. *Anderson*, 16 P.3d at 220.

323. *Id.*

324. *Id.*

325. *Id.* (citing to *Cawley v. Arizona Bd. of Pardons & Paroles*, 701 P.2d 1195, 1196 (Ariz. Ct. App. 1984)).

326. *Wagstaff*, 794 P.2d at 126.

*Wagstaff*, a criminal statute mandated, “that lifetime parole be imposed by the court as part of a convicted offender’s sentence.”<sup>327</sup> The court found that the executive agencies are responsible “for executing the judgment and sentence as well as for determining the terms and conditions upon which parole may be granted.”<sup>328</sup> The Court further found that,

[b]y including a parole provision as part of the sentence but failing to state with sufficient clarity the consequences of violating a condition of the sentence, the legislature left the task of discerning those consequences to the judiciary.<sup>329</sup> The task of resolving ambiguity and filling gaps in this statute goes beyond the proper judicial task of construing statutes.<sup>330</sup>

The court held the statute providing for mandatory imposition of lifetime parole without fixing a penalty for violation of that part of the sentence violated the separation of powers.<sup>331</sup> The court further held that “the statute creates the potential for conflict between the executive and judicial branches and places the judiciary in a constitutionally impermissible position. By its very words, the statute gives power to both the courts and the Board of Pardons and Paroles to dictate different parole conditions.”<sup>332</sup> The court reasoned that, “statutory language must be sufficiently definite so that those responsible for executing the law may do so in a rational and reasoned manner.”<sup>333</sup>

Even Arizona’s high court has displayed confusion over whether or not the possibility of parole still exists after the 1994 statute. In *Wagner*, the Arizona Supreme Court upheld Arizona’s capital sentencing statute after rejecting a void for vagueness challenge in the context of arbitrary judicial decision-making during sentencing proceedings; however, in doing so the court erroneously cited to previous versions of the statute that have been superseded by its current iteration.<sup>334</sup> The defendant challenged his sentence of life without the possibility of parole under the void for vagueness doctrine, alleging the statute “does not provide sentencing guidelines for a judge to use in deciding whether to impose a life or a

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327. *Id.* at 121.

328. *Id.* at 121-22. Recall that “parole eligibility is a function of the length of the sentence fixed by the [court].” *Warden*, 417 U.S. at 658.

329. *Wagstaff*, 794 P.2d at 126.

330. *Id.* “[T]here are limits beyond which we cannot go in finding what [the legislature] has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning.” *United States v. Evans*, 333 U.S. 483, 486 (1948)).

331. *Wagstaff*, 794 P.2d at 126.

332. *Id.* at 122.

333. *Id.* at 125.

334. *State v. Wagner*, 982 P.2d 270, 270 (Ariz. 1999).

natural life sentence and therefore permits arbitrary enforcement of the law.”<sup>335</sup> Wagner committed the murder in 1994, when the applicable statute forbade the possibility for parole.<sup>336</sup> Curiously, the Supreme Court’s *Wagner* opinion did not cite to the murder statute as it existed at the time of Wagner’s offense,<sup>337</sup> and concluded that the statute “states with clarity that the punishment for committing first degree murder is either death, natural life, or life in prison with the *possibility of parole*.”<sup>338</sup> The *Wagner* Court’s failure to accurately define the statutory range of punishment(s) someone faces for committing first degree murder is ironic in the face of a void vagueness challenge; if the statute is too vague for a state’s highest court to understand, then “a person of mere ordinary intelligence”<sup>339</sup> will be unable to determine the meaning of the law.

Confusion over the possibility of parole extends to the trial courts. In 2001, Justin Joyce pled guilty to first degree murder and received a sentence of life with the possibility of parole after twenty-five years.<sup>340</sup> In 2003 the Arizona Department of Corrections informed Joyce that he was not parole eligible.<sup>341</sup> Joyce’s sentencing Judge, Jeffrey A. Hotham, stated in a minute entry, “although currently not eligible for parole consideration, the Defendant **will** be eligible for parole consideration after serving twenty-five calendar years.”<sup>342</sup> In response, the Department of Corrections sent a letter to Judge Hotham, stating that “there was no stated review for release from a Life sentence after twenty-five calendar years[.] The [Arizona] Department of Correction has asked and has not yet received an opinion from the Attorney General’s Office on how to review and release this type of inmate.”<sup>343</sup> Judge Hotham made it expressly clear that Joyce is eligible for a parole hearing in 2026, and “[t]rial judges ‘are presumed to know the law and to apply it in making their decisions.’”<sup>344</sup>

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335. *Id.* at 271.

336. 1993 Ariz. Sess. Laws 745-46 (“If the court does not sentence the defendant to natural life, the defendant shall not be *released on any basis* until the completion of the service of twenty-five calendar years.”).

337. *See generally Wagner*, 982 P.2d 270. Additionally, in a footnote in the opinion, the court quoted the 1988 version of the sentencing statute. *Compare Id.* at 274 n.1 with 1988 Ariz. Sess. Laws 455.

338. *Wagner*, 982 P.2d at 273 (emphasis added).

339. *Id.*

340. Docket Entry, *State v. Joyce*, (Ariz. Super. Ct., Maricopa Cty. Dec. 5, 2003).

341. Minute Entry, *State v. Joyce*, (Ariz. Super. Ct., Maricopa Cty. Dec. 5, 2003), <http://www.courtminutes.maricopa.gov/docs/Criminal/122003/m1224317.pdf>.

342. *Id.* (emphasis in original).

343. *See Letter, supra* note 182.

344. *State v. Lee*, 944 P.2d 1222, 1230 (Ariz. 1997) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

The conflict over parole eligibility received attention in the *Arizona Republic* on March 19, 2017.<sup>345</sup> Within eleven days after the first article, the newspaper reported that the Arizona Department of Corrections had issued an update to its Department Order Manual for Inmate Release Eligibility.<sup>346</sup> The updated order now includes “inmates who were sentenced to Life with a minimum number of years to serve (i.e., 25 or 35 years)” as eligible for parole.<sup>347</sup> A statement from the Arizona Governor’s Office said, “the intent is to provide additional clarity, not to modify existing statute.”<sup>348</sup> However the new order does not reflect the text of the Department of Correction’s authorizing statute.<sup>349</sup> Nor does the order require the Board of Executive Clemency to grant a parole hearing under the Board’s authorizing statute.<sup>350</sup> Instead of providing “additional clarity” the Board policy update deepens the uncertainty in whether parole is available and furthers the conflict between different parts of Arizona’s government.

While the executive branch fails to offer clarity, the Arizona Supreme Court has a long history upholding a defendant’s parole eligibility when the statutes would suggest otherwise.<sup>351</sup> As the Court recently indexed in *Benson*, where the defendant committed two murders in 2004, under section 13-751, “Arizona law does not make Benson ineligible for parole.”<sup>352</sup> There are other occasions where this has been called into question. Hardy committed murder in 2005, Cruz committed murder in 2003, and Hargrave committed murder in 2002.<sup>353</sup> The court held that each of them could be eligible for parole, even though the statute these men were charged under provides for an ‘opportunity for release,’ and Arizona’s parole eligibility statute applies to a “person who commits a felony offense before January 1, 1994.”<sup>354</sup>

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345. See *Generally*, Michael Kiefer, *supra* note 13 (stating that in 1994 Arizona replaced parole with a system that essentially forecloses parole eligibility).

346. *Id.*

347. ARIZ. DEP’T OF CORR., DEPARTMENT ORDER MANUAL: No. 1002, INMATE RELEASE ELIGIBILITY SYSTEM, at 2 (Apr. 10, 2017).

348. Michael Kiefer, *supra* note 13.

349. See *generally* ARIZ. REV. STAT. ANN. § 41–1604.09.

350. See *Id.* § 31–412.

351. See *generally Benson*, 307 P.3d 19 (finding that Petitioner was eligible for parole).

352. *Id.* at 32 (citing ARIZ. REV. STAT. § 13–751(A)) (“Consequently, the trial court did not err by refusing to instruct the jury in accordance with *Simmons* (citing *Hardy*, 283 P.3d at 24)). “*Simmons* instructions are not required when “[n]o state law . . . prohibit[s] the defendant’s release on parole.”” *Id.* (alterations in original) (citing *Cruz*, 181 P.3d at 207 (noting that, “[n]o state law would have prohibited Cruz’s release on parole after serving twenty-five years.”); see also *Id.* (citing *Hargrave*, 234 P.3d at 582–83 (“noting a *Simmons* instruction is not required even when a defendant is not likely to be released if given a life sentence.”)).

353. *Hardy*, 283 P.3d at 16; see *Cruz*, 181 P.3d at 203; see also *Hargrave*, 234 P.3d at 575.

354. ARIZ. REV. STAT. ANN. § 41–1604.09.

With the understanding that ‘release’ includes ‘parole,’ Arizona’s murder statute should become clear, but conflict remains. In a recent 2018 federal district court Report and Recommendation, the magistrate judge found that a plain reading of Arizona’s first degree murder sentencing statute indicates that the types of release excluded from a natural life sentence (commutation, parole, work furlough, work release, or release from confinement) are not excluded from a sentence of life with “release.”<sup>355</sup> The court concluded that it logically follows that “since these forms of release are not excluded, they are included.”<sup>356</sup> Other Arizona statutes also indicate that ‘post-conviction release,’ means “*parole*, work furlough, community supervision, [and] probation[.]”<sup>357</sup> But as the exchange between the trial judge and the Department of Corrections in the *Joyce* case shows, Arizona’s indeterminate sentencing system has put the executive and judicial branches into conflict.<sup>358</sup> The judicial branch is sentencing defendants under the same laws that existed years before Truth-in-Sentencing came into effect, and yet the Department of Corrections is given no statutory mechanism to review these parole eligible inmates. If neither the life and natural life sentences of section 13-751 of the Arizona Revised Statute afford an opportunity for release, then the statute is providing two identical penalties for the same conduct.<sup>359</sup> The confusion caused by Arizona’s indeterminate sentencing statutes is so great, that not only does its meaning evade people of “ordinary intelligence,” their interpretation has confused and befuddled Arizona’s highest court. Therefore, Arizona’s indeterminate sentencing statutes, sections 13–705, 13-706, 13-751, and 13-1003, must be found unconstitutionally vague.

## VI. RECOMMENDATION

Arizona has already gone through a recent change in its laws relating to “life” sentences and parole eligibility.<sup>360</sup> In 2012, the Supreme Court of the United States held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders in *Miller v. Alabama*.<sup>361</sup> This ruling effectively makes Arizona’s capital sentencing statute

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355. *See* *Viramontes v. Ryan*, CV-16-00151-TUC-RM, at 18 (D. Ariz. May 4, 2018) (Questioning “the propriety of sentencing a defendant to life with the possibility of “release” after 25 years without permitting any significant possibility of release.”).

356. *Id.* at 15.

357. *Id.* § 13-4401 (for the purposes of Chapter 40) (emphasis added).

358. *See* Minute Entry, *State v. Joyce*, Ariz. Super. Ct., Maricopa Cty. (Dec. 5, 2003); *see also* Letter, *supra* note 182.

359. *See* ARIZ. REV. STAT. ANN. § 13-751.

360. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

361. *Id.*

unconstitutional when applied to juveniles.<sup>362</sup> Therefore, in 2014, the Arizona legislature extended parole eligibility to juveniles serving life sentences in prison.<sup>363</sup> This change keeps seventy-five convicted juvenile offenders in prison until they are given an opportunity to be heard by a parole board.<sup>364</sup> If Arizona's adult indeterminate sentences are overturned, then Arizona's legislature will be forced again to amend the statute and give the defendants a mechanism to be heard by a parole board. The legislature could preempt the resulting rush of litigation by amending the parole statute before the sentencing statutes are overturned. This would have the effect of keeping the death sentences for capital defendants intact, saving the state from re-prosecuting old cases after the plea bargains are vacated and restoring Arizona's indeterminate sentencing systems to their designed public interest purpose of rehabilitation and deterrence.

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362. *Vera*, 334 P.3d 754, 759 (Ariz. Ct. App. 2014); see *State v. Valencia*, 386 P.3d 392, 393 (Ariz. 2016), *cert. denied*, 138 S.Ct. 467 (2017) (ongoing litigation regarding juvenile non-mandatory natural life sentences).

363. See ARIZ. REV. STAT. ANN. § 13-716; see also *Montgomery*, 136 S. Ct. at 718 (determining that *Miller* is a new substantive constitutional rule that was retroactive on state collateral review).

364. Michael Kiefer, *Arizona Supreme Court Reviews Life Sentences for Minors*, AZCENTRAL (Dec. 23, 2016, 2:00 PM), <http://www.azcentral.com/story/news/local/arizona/2016/12/23/arizona-court-rule-sentencings-tucson-murder-cases-asdfa/95790448/>.