NOT FOR PUBLICATION

FILED

JUL 28 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL GEORGE KOGIANES; CECIL T. KINKADE, Petitioners-Appellants, v. EDWARD JENSEN; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 21-15152 D.C. No. 2:20-cv-02186-DLR-DMF MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted July 19, 2021**

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

Arizona state prisoners Michael George Kogianes and Cecil T. Kinkade appeal pro se from the district court's orders dismissing their 28 U.S.C. § 2241 petition and denying reconsideration. We have jurisdiction under 28 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291, and we affirm.

Appellants' § 2241 petition alleged due process claims challenging their parole denials and the procedures for review thereof. The district court correctly determined that, because appellants were in custody pursuant to state court judgments, they must bring habeas petitions through 28 U.S.C. § 2254, not § 2241. *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004), *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc). Our decisions in *Stow v. Murashige*, 389 F.3d 880, 886 (9th Cir. 2004), and *Wilson v. Belleque*, 554 F.3d 816, 821 (9th Cir. 2009), do not change this result because, unlike appellants, Stow and Wilson brought double jeopardy challenges to charges in pending retrials.[1] *See Wilson*, 554 F.3d at 822-24; *Stow*, 389 F.3d at 885.

The district court also correctly determined that appellants cannot pursue their request for release under the authorities they invoke. The provisions of 34 U.S.C. § 60541(g)(5)(a) and the CARES Act apply only to inmates in federal custody, and thus do not extend to appellants. The Prison Litigation Reform Act

[1] Insofar as a certificate of appealability is required for this claim, *see Hayward*, 603 F.3d at 554, *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 859 (2011), we treat the arguments raised in the opening brief as a request for such. *See* 9th Cir. R. 22-1(e). So treated, the request is denied because appellants have not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999).

permits the release of prisoners only after procedural steps that have not been completed in this case. *See Brown v. Plata*, 563 U.S. 493, 512 (2011) (discussing requirements found in 18 U.S.C. §§ 3626(a)(3)(A)-(C)). Finally, as the district court concluded, appellants' Eighth Amendment claims must be raised in a civil rights action under 42 U.S.C. § 1983. *See Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016) (en banc) (holding that a state prisoner's claims must lie at the core of habeas corpus to be raised in habeas, and claims challenging "any other aspect of prison life" must be raised in a § 1983 action).

AFFIRMED.

JL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael George Kogianes,

Petitioner,

v.

Edward Jensen, et al.,

Respondents.

No. CV 20-02186-PHX-DLR (DMF)

ORDER

On November 12, 2020, Petitioners Michael George Kogianes and Cecil T. Kinkade, who are confined in the Arizona State Prison Complex-Yuma, filed a pro se Petition Pursuant to 28 U.S.C. § 2241 in Review of Conditions of Confinement (the "Petition"). In a November 24, 2020 Order, the Court dismissed the Petition and this action because Petitioners are in state custody, and their claims for release must therefore be brought in a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254; their claims regarding the denial of parole must be brought in *separate* petitions that set forth each individual's claims, not in a joint petition; and their claims regarding their conditions of confinement must be brought in separate civil rights actions pursuant to 42 U.S.C. § 1983.

On December 28, 2020, Petitioners filed a Motion for Relief (Doc. 6) from the November 24, 2020 Order and Judgment. In their Motion, Petitioners assert the Court erred in dismissing the § 2241 Petition because a denial of due process "occurred in the [state court's] acquiescence to the State's motion" to treat their Notices of Appeal from the denial of parole as special actions. Petitioners argue the state court's decision significantly

reduced the "scope and vigor" of the pending proceedings. They ask the Court to "either grant of the writ to effect release," or, "at a minimum, remand to the state supreme [court] with orders to transfer to the superior court to re-engage at the point where the proceedings were derailed."

The Court will construe the Motion as a Motion to Alter or Amend Judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b), which sets forth the grounds for relief from judgment, "provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted). The moving party bears the burden of proving the existence of a basis for Rule 60(b) relief. *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988). It is within the Court's discretion to grant or deny a motion pursuant to Rule 60(b).

Petitioners have not demonstrated that they are entitled to relief from judgment based on the specific reasons set forth in grounds (b)(1) through (b)(5). Petitioners also have not satisfied the standard for relief pursuant to ground (6). "[A] party merits relief under Rule 60(b)(6) if he demonstrates 'extraordinary circumstances which prevented or rendered him unable to prosecute his case." *Cmty. Dental Servs. v. Tani*, 282 3d 1164, 1168 (9th Cir. 2002). To show extraordinary circumstances, the party must "demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Id.* "Such circumstances 'rarely occur in the habeas context.'" *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)).

Petitioners have not identified any extraordinary circumstances that warrant reopening this case. First, to the extent that Petitioners seek release from custody or wish to challenge the denial of parole, they may not do so in a § 2241 petition because they are in custody pursuant to state court judgments. *See White v. Lambert*, 370 F.3d 1002, 1009

(9th Cir. 2004) ("We adopt the majority view that 28 U.S.C. § 2254 is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction.") *Benny v. United States Parole Commission*, 295 F.3d 977, 988 (9th Cir. 2002) (recognizing § 2241 as the proper method for *federal* prisoners to seek judicial review of parole-related decisions). Thus, relief under § 2241 is not available.

Second, to the extent that Petitioners challenge the state court's decisions concerning their appeals from the denial of parole, the United States Supreme Court has held that federal habeas relief is not available for an error of state law. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). In the Petition, Petitioners assert that each appealed the denial of parole by separately filing Notices of Appeal pursuant to the Rules for Judicial Review of Administrative Decisions in Maricopa County Superior Court.[1] The state court issued administrative review orders in each case, which required "procedural obligatory filings" by Petitioners and the Arizona Board of Executive Clemency. Rather than submit the state court record or file a notice of appearance for the State, the Board "ignored" the order, and the Assistant Attorney General filed an Objection to each Notice of Appeal and asked the state court to treat each Petitioner's Notice of Appeal as a special action.[2] The state court granted the State's request. Petitioners assert the state court erred in doing so. This is a quintessential error of state law, for which this Court does not have jurisdiction to

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[1] *See* http://www.superiorcourt.maricopa.gov/docket/CivilCourtCases/caseInfo.asp?caseNumber=LC2019-000234 (last accessed Jan. 5, 2021); http://www.superiorcourt.maricopa.gov/docket/CivilCourtCases/caseInfo.asp?caseNumber=LC2019-000271 (last accessed Jan. 5, 2021).

[2] The Arizona Supreme Court has rejected application of the statute governing judicial review of administrative remedies to parole decisions. *See State ex rel. Arizona State Board of Pardons and Paroles*, 467 P.2d 917 (Ariz. 1970). In addition, "(t)he courts have the jurisdiction to review actions of the parole board only for the purpose of determining whether or not there has been a denial of due process in a parole hearing. The court may not, however, invade the province of the parole board in determining who is to be paroled." *Foggy v. Eyman*, 516 P.2d 321 (Ariz. 1973). Thus, by giving the Board the "exclusive power to pass upon . . . paroles," Arizona Revised Statutes § 31-402(A), it is clear that the legislature intended "to deny the courts the right to review the decisions of the parole board." *Foggy v. Arizona Board of Pardons and Paroles*, 501 P.2d 942 (Ariz. 1972).

grant habeas relief.

In addition, the *Rooker-Feldman* doctrine prevents the Court from interfering in state court proceedings. "The *Rooker-Feldman* doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments." *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858-59 (9th Cir. 2008); *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The Ninth Circuit has recognized that "'[t]he clearest case for dismissal based on the *Rooker-Feldman* doctrine occurs when a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.'" *Id.* at 859 (quoting *Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007)). The *Rooker-Feldman* doctrine also applies "where the parties do not directly contest the merits of a state court decision, as the doctrine 'prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a *de facto* appeal from a state court judgment.'" *Id.* (quoting *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004)). "A federal action constitutes such a *de facto* appeal where 'claims raised in the federal court action are inextricably intertwined with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules." *Id.* (quoting *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003)). In such a case, "'the district court is in essence being called upon to review the state court decision.'" *Id.* (quoting *Feldman*, 460 U.S. at 483 n.16).

Petitioners in this case ask this Court to substitute its judgment for that of the state court. The Court cannot do so, nor can it "order[]" the state supreme court to take any action in the state court proceedings.

The Court has considered the Petition, the November 24, 2020 Order, and Petitioners' Motion. The Court finds no basis to reconsider its decision. The Court will therefore deny Petitioners' Motion for Relief.

. . . .

IT IS ORDERED that Petitioners' Motion for Relief (Doc. 6) is **denied**. This case must remain **closed**.

Dated this 8th day of January, 2021.

Douglas L. Rayes
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 21 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL GEORGE KOGIANES; CECIL T. KINKADE,

Petitioners-Appellants,

v.

EDWARD JENSEN; MARK BRNOVICH, Attorney General,

Respondents-Appellees.

No. 21-15152

D.C. No. 2:20-cv-02186-DLR-DMF
District of Arizona,
Phoenix

ORDER

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Kogianes's petition for rehearing en banc (Docket Entry No. 11) is denied.

No further filings will be entertained in this closed case.

SUPREME COURT OF ARIZONA

MICHAEL GEORGE KOGIANES,	)	Arizona Supreme Court
	)	No. CV-19-0293-PR
Plaintiff/Appellant,	)	
	)	Court of Appeals
v.	)	Division One
	)	No. 1 CA-CV 19-0708
ARIZONA BOARD OF EXECUTIVE	)	
CLEMENCY, et al.,	)	Maricopa County
	)	Superior Court
Defendants/Appellees.	)	No. LC2019-000234-001
	)	
	)	**FILED 10/30/2020**

O R D E R

On October 28, 2020, Appellant Kogianes, Pro Se, filed a "Petition for Writ of Special Action" that this Court will treat as a second Motion for Reconsideration of this Court's March 26, 2020 Order denying Appellant's Petition for Review. Rule 22(f), Arizona Rules of Civil Appellate Procedure bars a party from filing a motion for reconsideration of an order denying a petition for review unless permitted by specific order. Therefore,

IT IS ORDERED denying the motion.

IT IS FURTHER ORDERED no further filings in this matter will be accepted.

DATED this 30th day of October, 2020.

/s/
CLINT BOLICK
Duty Justice

SUPREME COURT OF ARIZONA

MICHAEL GEORGE KOGIANES, Plaintiff/Appellant, v. ARIZONA BOARD OF EXECUTIVE CLEMENCY, et al., Defendants/Appellees.	)	Arizona Supreme Court No. CV-19-0293-PR Court of Appeals Division One No. 1 CA-CV 19-0708 Maricopa County Superior Court No. LC2019-000234-001 **FILED 05/22/2020**

O R D E R

On April 9, 2020, this court filed an order denying Appellant's "Motion for Reconsideration/Rehearing of Order 3/27/20." On April 29, 2020, Appellant Kogianes filed a "Motion for Leave to Determine Reconsideration Filed 4/6/20 [RPSA9;ARCAP 3(a), 22,23,29]." After consideration and for the reason set forth in the April 9, 2020 order,

IT IS ORDERED denying the motion.

DATED this 22nd day of May, 2020.

/S/
ANDREW W. GOULD
Duty Justice

TO:
Michael George Kogianes, ADOC 104341, Arizona State Prison, Yuma - Cibola Unit
Kelly Gillilan-Gibson
pm

MICHAEL G. KOGIANES, 104341
ASPC YUMA - CIBOLA, 6 B 3
P. O. BOX 8909
SAN LUIS, AZ 85349
APPELLANT PRO SE

COPY

JUL - 8 2019

CLERK OF THE SUPERIOR COURT
K. WHITSON
DEPUTY CLERK

IN THE
MARICOPA COUNTY SUPERIOR COURT

MICHAEL GEORGE KOGIANES, MD,
APPELLANT,

V.

BOARD OF EXECUTIVE CLEMENCY;
DR. C.T. WRIGHT, CHAIRMAN;
D. NEAL, MEMBER; L. QUINONEZ,
MEMBER; G. RITTENHOUSE, MEMBER;
M. JOHNSON, MEMBER,
APPELLEES.

Nº LC20.9-000234-001

NOTICE OF APPEAL FOR
JUDICIAL REVIEW OF
ADMINISTRATIVE DECISION
ARS § 12-901 et seq.

PURSUANT TO ARS § 12-904, MICHAEL GEORGE KOGIANES, MD APPEALS FROM THE FINAL ADMINISTRATIVE DECISION DENYING RELEASE ON PAROLE UNDER ARS §31-412(A) OR OTHERWISE, ENTERED ON 13 MAY 2019, AND RECEIVED BY THE APPELLANT ON 21 MAY 2019.

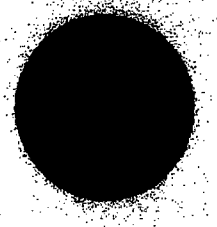
PURSUANT TO RULE OF PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS 4 (JRAD 4), THE FOLLOWING ITEMS ARE INCLUDED IN THIS NOTICE OF APPEAL:

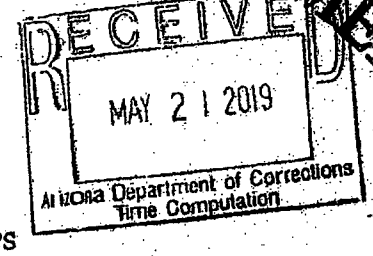
1. THE APPELLANT IS NOT AWARE OF ANY AGENCY/BOARD CASE NUMBER OR CAPTION, OTHER THAN "BOARD HEARING RESULTS", UNDER HIS ASSIGNED DEPT. OF CORRECTIONS NUMBER, Nº 104341.
2. THE PARTY FILING THIS APPEAL IS MICHAEL GEORGE KOGIANES, MD.
3. THE FINAL ADMINISTRATIVE DECISION FROM WHICH THE APPEAL IS TAKEN IS A PAROLE RELEASE DECISION UNDER ARS §31-412(A) ENTERED 5/13/19. A TRUE AND CORRECT COPY THEREOF IS ATTACHED.
4. THE FINDINGS AND DECISION OR PART OF THE FINDINGS AND DECISION SOUGHT TO BE REVIEWED IS: THE DENIAL OF ANY TYPE OF AVAILABLE RELEASE, ALTHOUGH CERTIFIED AND QUALIFIED UNDER LAW.
5. THE ISSUES PRESENTED FOR REVIEW ARE AS FOLLOWS:
   A. WERE THE PROCEEDINGS IN VIOLATION OF GUARANTEES AGAINST EX POST FACTO LAWS VIOLATED FOR ONE WHOSE OFFENSES WERE ALLEGED IN 1992, BY AMENDMENTS EFFECTIVE 1/1/94:
      (1) AS TO THE PROCEDURAL BASIS UPON WHICH PAROLE WAS AFFORDED?
      (2) THE PERIOD BETWEEN CERTIFICATION REVIEWS WAS MADE AVAILABLE?
   B. WAS THE BOARD AS CONSTITUTED ABSENT OF JURISDICTION UNDER ARS § 31-401(B)?
   C. WAS DUE PROCESS VIOLATED WHEN THE BOARD IGNORED CLEAR EVIDENCE OF QUALIFICATION FOR RELEASE?
6. TRIAL DE NOVO BEFORE A JURY IS REQUESTED, WITH THE ADMINISTRATIVE RECORD, SUPPLEMENTED AS NECESSARY UNDER ARS § 12-910(C) AND (D). THE RECORD IS REQUESTED UNDER JRAD 5(D).
7. THE APPELLANT REQUESTS COSTS OF THIS APPELLATE ACTION.

DATED THIS 10th DAY OF JUNE, 2019.

/S/ MICHAEL G. KOGIANES, MD
APPELLANT PRO SE

ARIZONA BOARD OF EXECUTIVE CLEMENCY





BOARD HEARING RESULTS

TO: KOGIANES, MICHAEL G. ADC # 104341 ASPC-Y CIBOLA UNIT

YOU WERE CERTIFIED TO THE BOARD FOR RELEASE CONSIDERATION UNDER ARIZONA REVISED STATUTE 31-412A. IF APPROVED BY THE BOARD, ONLY ONE TYPE OF RELEASE MAY BE GRANTED. THE FOLLOWING ARE THE RESULTS OF THE HEARING HELD ON 05/13/19.

ACTION TAKEN:		
	PAROLE 31-412(A)	DENIED
	HOME ARREST	DENIED
	ABSOLUTE DISCHARGE	DENIED

THE BOARD BELIEVES THAT YOU WOULD NOT REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW FOR THE FOLLOWING REASONS:

SERIOUS & VIOLENT OFFENSE	LOSS OF HUMAN LIFE
SERIOUS & DEVIANT OFFENSE	TRAUMA TO THE VICTIM
SERIOUS BODILY INJURY	MULTIPLE VICTIMS
VICTIM HARASSMENT	

PANEL CHAIRMAN

MAY 13 2019
DATE

Clerk of the Superior Court
*** Electronically Filed ***
07/11/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2019-000234-001 DT

07/10/2019

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
J. Eaton
Deputy

MICHAEL GEORGE KOGIANES

MICHAEL GEORGE KOGIANES
ASPC YUMA CIBOLA 6 B 3 #104341
PO BOX 8909
SAN LUIS AZ 85349

v.

BOARD OF EXECUTIVE CLEMENCY (001)
C T WRIGHT (001)
D NEAL (001)
L QUINONEZ (001)
G RITTENHOUSE (001)
M JOHNSON (001)

JUDGE GERLACH
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

ADMINISTRATIVE REVIEW ORDERS

On July 8, 2019, **Appellant**, Michael George Kogianes, filed a Notice of Appeal for Judicial Review of Administrative Decision against **Appellee**, Board of Executive Clemency, **Appellee**, C.T. Wright, **Appellee**, D. Neal, **Appellee**, L. Quinonez, **Appellee**, G. Rittenhouse, and **Appellee**, M. Johnson, pursuant to Arizona Revised Statutes Annotated (A.R.S.) §§ 12–901 to 12–914.

IT IS ORDERED that **Appellant** serve all **Appellees** with a copy of the Notice of Appeal for Judicial Review of Administrative Decision in the manner provided by A.R.S. § 12–906.[1]

[1] A.R.S. § 12–906 incorporates the Arizona Rules of Civil Procedure for service of process. *See* Rules 4 and 4.1, Ariz. R. Civ. P.

IT IS FURTHER ORDERED that **Appellant** shall file proof of service with the Clerk of the Superior Court of Maricopa County as required by Rules 4(g) and 4(i) of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED that **Appellant** provide all **Appellees** with a copy of this minute entry.

IT IS FURTHER ORDERED that **Appellant** shall file a notice of action as required by A.R.S. § 12–904(B).

IT IS FURTHER ORDERED that **Appellant** shall order and make arrangements to pay for the preparation of pertinent portions of the record as required by A.R.S. § 12–904(B).

IT IS FURTHER ORDERED that a Notice of Appearance from all **Appellees** shall be due 20 days from the date of service of **Appellant's** appeal.

Appellant is advised that, if **Appellant** fails to effectuate service or to order the record or the transcripts as ordered herein, this Court may dismiss these proceedings.

IT IS FURTHER ORDERED that the administrative agency or board shall transmit its record to the Clerk of this Court as required by A.R.S. § 12–904(B) and provide a Certification of Record on Review to **Appellant** and a notice to this Court that the transmittal has occurred.

IT IS FURTHER ORDERED that **Appellant** and **Appellees** are to file briefs in accordance with Rule 6 of the Rules of Procedure for Judicial Review of Administrative Decisions.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

MARK BRNOVICH
Attorney General
(Firm State Bar No. 14000)

KELLY GILLILAN-GIBSON
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Assistant Attorney General
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Fax Number: (602) 542-4385
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Attorneys for the Arizona Board of Executive Clemency

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

MICHAEL GEORGE KOGIANES, Plaintiff, v. ARIZONA BOARD OF EXECUTIVE CLEMENCY, et al., Defendants.	Case No. LC2019-000234-001 DT **MOTION TO TREAT KOGIANES' NOTICE OF APPEAL FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION AS A SPECIAL ACTION**

The Arizona Board of Executive Clemency and Board Members, Dr. C.T. Wright; David Neal; Louis Quinonez; Michael Johnson; and Gail Rittenhouse (hereinafter referred to jointly as the "Board") hereby moves this Court to treat Michael George Kogianes ("Kogianes")' Notice of Appeal for Judicial Review of Administrative Decision as a special action because the Administrative Review Act is not applicable to

Board decisions. Although Kogianes' notice is improper, it is not necessarily fatal and this Court can treat his notice as a special action. *State ex rel. Ariz. State Bd. of Pardons & Paroles v. Superior Court,* 12 Ariz. App. 77, 82 (1970).

Kogianes filed a notice for judicial review of the Board's decision to deny him parole. He contends that the Board wrongly denied him parole at the May 13, 2019, hearing, but it is well established in Arizona that the merits of the Board's parole decisions and reasons for denying parole are beyond the scope of judicial review. *See, e.g., Cooper,* 149 Ariz. at 186, 717 P.2d at 865; *Stinson*, 151 Ariz. at 61, 725 P.2d at 1095 ("in upholding the decision of the Board, we recognized that by enacting § 31-412(A), the legislature intended to give the Board "sole discretion" to grant or deny parole. . . As such, the courts of this state are precluded from reviewing the decision of the Parole Board").

Thus, judicial review of the Board's actions is available for the limited purpose of insuring that the Board met any applicable due process requirements and acted within the scope of its powers. *Cooper v. Ariz. Bd. of Pardons & Paroles*, 149 Ariz. 182, 184 (1986); *Stinson v. Ariz. Bd. of Pardons & Paroles*, 151 Ariz. 60, 61 (1986). The courts are not permitted to act as a "super parole board." *Cooper*, 149 Ariz. at 184. They may not substitute their view of the facts for that of the Board. *Id.* at 187 (Feldman, J., concurring); *see also Stewart v. Ariz. Bd. of Pardons & Paroles,* 156 Ariz. 538, 540 (App. 1988)(stating that the courts cannot

substitute their view for that of the Board). While the courts may compel the Board to act, they cannot compel the Board to act in any particular manner. *State v. Schlarp*, 25 Ariz. App. 85, 88 (1975).

Kogianes is attempting to improperly use the administrative review act to challenge the Board's decision. The act is inapplicable to Board decisions and inmates do not have a right to a jury trial on the issue of whether they should be released on parole. The administrative review act applies to:

> Every action to judicially review a final decision of an administrative agency except public welfare decisions pursuant to title 46, or if the act creating or conferring power on an agency or a separate act provides for judicial review of the agency decisions and prescribes a definite procedure for the review.

A.R.S. § 12-902 (A). The statutory language does not specifically exclude Board decisions from judicial review. (*Id.*) However, in *State ex rel. Ariz. State Bd. of Pardons & Paroles v. Superior Court*, the court of appeals found that the act is not available to review Board's decisions, so it was not necessary for the Legislature to exempt the Board from the administrative review act. 12 Ariz. App. at 81. The court of appeals concluded that the nature of the Board's decision, i.e. to make a recommendation to the Governor which he is not bound by is not a "contested case" or adjudication under the Administrative Review Act. *Id.* at 81-82. The court of appeals reasoned that under the administrative review act, the complainant

is entitled to a trial and that conducting a trial in commutation cases is inconsistent with the Board's exclusive power to make a recommendation to the governor. *Id.* at 81. Because of the limited nature of judicial review of the Board's decisions, the Administrative Review act is not available to review Board's decisions. *Sheppard v. Ariz. Bd. of Pardons & Paroles*, 111 Ariz. 587, 588 (1975); *State ex rel. Ariz. State Bd. of Pardons & Paroles v. Superior Court,* 12 Ariz. App. 77, 82 (1970).

Although Kogianes improperly seeks relief under the Administrative Review Act, the court may treat his complaint as a special action. *Id.* In this matter, the superior court has jurisdiction to review the Board's decision to determine whether due process was provided during the parole hearing. The procedural requirements under the Arizona parole statutes are simply that eligible inmates must be given an opportunity to be heard and the Board must provide a written statement of the reasons for the denial of parole. A.R.S. § 31-411(B) and (G); *Cooper*, 149 Ariz. at 186.

The proper avenue for seeking relief from a Board's decision is through a special action. Therefore, it is respectfully requested that this Court treat Kogianes' notice of appeal as a special action governed by the Arizona Rules of Procedure for Special Actions and not by Title 12 which governs judicial review

of administrative decisions.

RESPECTFULLY SUBMITTED this 15th day of August, 2019.

MARK BRNOVICH
Attorney General
Kelly Gillilan-Gibson
Kelly Gillilan-Gibson
Assistant Attorney General

The heading of Chapter 3 was changed from "Pardons and Paroles" to "Executive Clemency" by Laws 1995, Ch. 199, § 8A, eff. July 13, 1995.

Termination under Sunset Law

The board of executive clemency shall terminate on July 1, 2025, unless continued. See §§ 41–3025.13 and 41–2955.

Title 31, Chapter 3, relating to executive clemency, is repealed on January 1, 2026, by § 41–3025.13.

ARTICLE 1. BOARD OF EXECUTIVE CLEMENCY

The heading of Article 1 was changed from "Board of Pardons and Paroles" to "Board of Executive Clemency" by Laws 1995, Ch. 199, § 8B, eff. July 13, 1995.

For termination under Sunset Law, see italic note, ante.

§ 31–401. Board of executive clemency; qualifications; appointment; officers; quorum; meeting

A. The board of executive clemency is established consisting of five members who are appointed by the governor pursuant to this subsection and § 38–211.

B. The members of the board shall serve on a full-time basis and receive compensation as determined pursuant to § 38–611, subsection A. Beginning from and after December 31, 2013, members of the board are eligible for any benefits that are provided to state employees pursuant to § 38–651. Each member shall be appointed on the basis of broad professional or educational qualifications and experience and shall have demonstrated an interest in the state's correctional program. No more than two members from the same professional discipline shall be members of the board at the same time.

C. Each member appointed to the board shall complete a four-week course relating to the duties and activities of the board. The course shall be designed and administered by the chairman of the board and shall be conducted by the office of the board of executive clemency and the office of the attorney general. The course shall include training in all statutes that pertain to the board and participation in a decision making workshop.

D. Members shall be appointed for a term of five years to expire on the third Monday in January of the appropriate year.

E. A member of the board may be removed by the governor for cause.

F. The governor shall select a member of the board as chairman. The chairman shall select other officers as are advisable. The term of the chairman is two years, except that the chairman may be removed as chairman at the pleasure of the governor. If a board member's term expires while the member is serving as chairman, the chair shall be deemed vacant and a new chairman shall be selected.

G. The board may adopt rules, not inconsistent with law, as it deems proper for the conduct of its business. The board may from time to time amend or change the rules and publish and distribute the rules as provided by the administrative procedures act.[1]

H. The board shall meet at least once a month at the state prison and at other times or places as the board deems necessary.

I. The presence of three members of the board constitutes a quorum, except that the chairman may designate that the presence of two members of the board constitutes a quorum.

J. If two members of the board constitute a quorum pursuant to subsection I of this section and the two members do not concur on the action under consideration, the chairman of the board, if the chairman is not one of the members who constituted the quorum and after reviewing the information considered by the two members, shall cast the deciding vote. If the chairman of the board is one of the two members constituting a quorum at a hearing under subsection I of this section, and there is not concurrence on the action under consideration, the action fails.

K. The board shall employ an executive director whose compensation shall be determined pursuant to § 38–611. The executive director serves at the pleasure of the board and reports to the board through the chairman of the board.

Amended by Laws 1966, Ch. 21, § 1; Laws 1968, Ch. 198, § 4, eff. July 1, 1969; Laws 1970, Ch. 204, § 89; Laws 1972, Ch. 163, § 25, eff. July 1, 1969; Laws 1978, Ch. 164, § 12, eff. Oct. 1, 1978; Laws 1982, Ch. 254, § 1; Laws 1984, 1st S.S., Ch. 8, § 2, eff. July 1, 1984; Laws 1989, Ch. 300, § 1, eff. June 28, 1989; Laws 1990, Ch. 127, § 1; Laws 1990, Ch. 161, § 1, eff. April 30, 1990; Laws 1993, Ch. 255, § 64, eff. Jan. 1, 1994; Laws 1997, Ch. 134, § 1, eff. Jan. 20, 1998; Laws 2010, 7th S.S., Ch. 6, § 12; Laws 2012, Ch. 321, § 40, eff. Sept. 29, 2012; Laws 2013, 1st S.S., Ch. 5, § 4, eff. Sept. 12, 2013, retroactively effective to July 1, 2013; Laws 2016, Ch. 143, § 1.

1 Section 41–1001 et seq.

oner released except that the department may revoke the release of the prisoner until the final expiration of the prisoner's sentence if the department believes that the released prisoner has engaged in criminal conduct during the term of the prisoner's release.

D. The board of executive clemency may revoke the prisoner's release if the prisoner violates the conditions of supervision that are imposed by the board or the state department of corrections.

Added by Initiative Measure approved election Nov. 5, 1996, eff. Dec. 6, 1996. Amended by Laws 1997, Ch. 6, § 2, eff. March 6, 1997; Laws 1997, Ch. 246, § 4.

§ 31-412. Criteria for release on parole; release; custody of parolee; definition

A. 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 applicant has reached the applicant's earliest parole eligibility date pursuant to § 41-1604.09, subsection D and 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. The applicant shall thereupon be allowed to go on parole in the legal custody and under the control of the state department of corrections, until the board revokes the parole or grants an absolute discharge from parole or until the prisoner reaches the prisoner's individual earned release credit date pursuant to § 41-1604.10. When the prisoner reaches the prisoner's individual earned release credit date the prisoner's parole shall be terminated and the prisoner shall no longer be under the authority of the board but shall be subject to revocation under § 41-1604.10.

B. Notwithstanding subsection A of this section, the director of the state department of corrections may certify as eligible for parole any prisoner, regardless of the classification of the prisoner, who has reached the prisoner's parole eligibility date pursuant to § 41-1604.09, subsection D, unless an increased term has been imposed pursuant to § 41-1604.09, subsection F, for the sole purpose of parole to the custody of any other jurisdiction to serve a term of imprisonment imposed by the other jurisdiction or to stand trial on criminal charges in the other jurisdiction or for the sole purpose of parole to the custody of the state department of corrections to serve any consecutive term imposed on the prisoner. On review of an application for parole pursuant to this subsection the board may authorize parole if, in its discretion, parole appears to be in the best interests of the state.

C. A prisoner who is otherwise eligible for parole, who is not on home arrest or work furlough and who is currently serving a sentence for a conviction of a serious offense or conspiracy to commit or attempt to commit a serious offense shall not be granted parole or absolute discharge from imprisonment except by one of the following votes:

1. A majority affirmative vote if four or more members consider the action.

2. A unanimous affirmative vote if three members consider the action.

3. A unanimous affirmative vote if two members consider the action pursuant to § 31-401, subsection I and the chairman concurs after reviewing the information considered by the two members.

D. The board, as a condition of parole, shall order a prisoner to make any court-ordered restitution.

E. Payment of restitution by the prisoner in accordance with subsection D of this section shall be made through the clerk of the superior court in the county in which the prisoner was sentenced for the offense for which the prisoner has been imprisoned in the same manner as restitution is paid as a condition of probation. The clerk of the superior court, on request, shall make the prisoner's restitution payment history available to the board, victim, victim's attorney and department without cost.

F. The board shall not disclose the address of the victim or the victim's immediate family to any party without the written consent of the victim or the victim's family.

G. For the purposes of this section, "serious offense" includes any of the following:

1. A serious offense as defined in § 13-706, subsection F, paragraph 1, subdivision (a), (b), (c), (d), (e), (g), (h), (i), (j) or (k).

2. A dangerous crime against children as defined in § 13-705. The citation of § 13-705 is not a necessary element for a serious offense designation.

3. A conviction under a prior criminal code for any offense that possesses reasonably equivalent offense elements as the offense elements that are

listed under § 13–705, subsection Q, paragraph 1 or § 13–706, subsection F, paragraph 1.

Amended by Laws 1968, Ch. 198, § 5, eff. July 1, 1969; Laws 1978, Ch. 164, § 15, eff. Oct. 1, 1978; Laws 1979, Ch. 206, § 1; Laws 1980, Ch. 45, § 1; Laws 1983, Ch. 123, § 3; Laws 1986, Ch. 217, § 1; Laws 1987, Ch. 113, § 2; Laws 1988, Ch. 98, § 2, eff. May 24, 1988; Laws 1989, Ch. 134, § 3; Laws 1991, Ch. 29, § 2; Laws 1992, Ch. 141, § 3; Laws 1993, Ch. 37, § 1; Laws 1993, Ch. 255, § 67, eff. Jan. 1, 1994; Laws 1994, Ch. 188, § 2; Laws 1994, Ch. 189, § 3; Laws 1996, Ch. 51, § 2; Laws 1997, Ch. 179, § 4; Laws 1998, Ch. 281, § 7; Laws 1998, Ch. 289, § 24; Laws 1999, Ch. 261, § 47; Laws 2004, Ch. 29, § 8; Laws 2005, Ch. 188, § 9; Laws 2007, Ch. 248, § 9, eff. June 13, 2007; Laws 2008, Ch. 24, § 4; Laws 2008, Ch. 301, § 105, eff. Jan. 1, 2009; Laws 2017, Ch. 8, § 5; Laws 2018, Ch. 181, § 2.

Application

Laws 1993, Ch. 255, § 99, as amended by Laws 1994, Ch. 236, § 17, effective July 17, 1994, retroactively effective to January 1, 1994, provides:

*"**Sec. 99. Applicability***

"The provisions of §§ 1 through 86 and §§ 89 through 95 of this act apply only to persons who commit a felony offense after the effective date of this act."

§ 31–413. Duty of department of corrections to assist in securing employment for parolees and prisoners

The department of corrections shall assist in securing employment for prisoners paroled, on work furlough, eligible for any release from confinement or discharged. The department of corrections shall maintain a report on the conduct of the prisoners when upon parole or work furlough and shall make such reports available to the board of pardons and paroles upon request.

Amended by Laws 1968, Ch. 198, § 6, eff. July 1, 1969; Laws 1970, Ch. 45, § 2; Laws 1978, Ch. 201, § 526, eff. Oct. 1, 1978; Laws 1982, Ch. 322, § 8; Laws 1984, 1st S.S., Ch. 9, § 2, eff. July 1, 1984.

Application

Laws 1993, Ch. 255, § 99, as amended by Laws 1994, Ch. 236, § 17, effective July 17, 1994, retroactively effective to January 1, 1994, provides:

*"**Sec. 99. Applicability***

"The provisions of §§ 1 through 86 and §§ 89 through 95 of this act apply only to persons who commit a felony offense after the effective date of this act."

§ 31–414. Absolute discharge of parolee; effect; notice to victim

A. If, upon application by the state department of corrections on behalf of a prisoner on parole, it appears to the board of executive clemency that there is reasonable probability that the prisoner on parole will live and remain at liberty without violating the law, and that his absolute discharge from parole is compatible with the welfare of society and is in the best interest of the state, then the board may authorize the absolute discharge of the prisoner from parole. On notification of the board's decision, the director of the state department of corrections shall issue to the prisoner an absolute discharge from parole which shall be effective to discharge the parolee from the sentence imposed.

B. At least fifteen days before holding a hearing on the absolute discharge from parole of a parolee, the board on request shall notify the victim of the offense for which the parolee was incarcerated and inform the victim of his right to be present and to submit a written report to the board expressing his opinion concerning the absolute discharge of the parolee. The notice shall state the name of the parolee, the offense for which the parolee was sentenced, the length of the sentence and the date of admission to the custody of the state department of corrections.

Amended by Laws 1970, Ch. 210, § 4; Laws 1978, Ch. 164, § 16, eff. Oct. 1, 1978; Laws 1987, Ch. 113, § 3; Laws 1991, Ch. 29, § 3; Laws 1993, Ch. 37, § 2; Laws 1993, Ch. 255, § 68, eff. Jan. 1, 1994; Laws 1994, Ch. 189, § 5.

Application

Laws 1993, Ch. 255, § 99, as amended by Laws 1994, Ch. 236, § 17, effective July 17, 1994, retroactively effective to January 1, 1994, provides:

*"**Sec. 99. Applicability***

"The provisions of §§ 1 through 86 and §§ 89 through 95 of this act apply only to persons who commit a felony offense after the effective date of this act."

§ 31–415. Violation of parole or community supervision; warrant for retaking parolee or offender on community supervision

If the parole clerk of the department of corrections or the director of the department of corrections, or the board of executive clemency or any member thereof, has reasonable cause to believe that a paroled prisoner or an offender on community supervision has violated his parole or community supervision and has lapsed or is probably

administrative hearing shall be considered, unless either of the following is true:

1. The exhibit, testimony or objection was withheld for purposes of delay, harassment or other improper purpose.

2. Allowing admission of the exhibit or testimony or consideration of the objection would cause substantial prejudice to another party.

C. For review of final administrative decisions of agencies that are exempt from §§ 41-1092.03 through 41-1092.11, pursuant to § 41-1092.02, the trial shall be de novo if trial de novo is demanded in the notice of appeal or motion of an appellee other than the agency and if a hearing was not held by the agency or the proceedings before the agency were not stenographically reported or mechanically recorded so that a transcript might be made. On demand of any party, if a trial de novo is available under this section, it may be with a jury, except that a trial of an administrative decision under § 25-522 shall be to the court.

D. The record in the superior court shall consist of the record of the administrative proceeding, and the record of any evidentiary hearing, or the record of the trial de novo.

E. After reviewing the administrative record and supplementing evidence presented at the evidentiary hearing, the court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion. In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

F. Notwithstanding subsection E of this section, if the action arises out of title 20, chapter 15, article 2,[1] the court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

G. This section does not apply to any agency action by an agency that is created pursuant to article XV, Constitution of Arizona.

Amended by Laws 1980, Ch. 72, § 1; Laws 1996, Ch. 102, § 16; Laws 2000, Ch. 312, § 3; Laws 2012, Ch. 322, § 8, eff. July 1, 2013; Laws 2017, Ch. 329, § 2; Laws 2018, Ch. 180, § 1.

1 Section 20-25.30 et seq.

§ 12-911. Powers of superior court

A. The superior court may:

1. With or without bond, unless required by the statute under authority of which the administrative decision was entered, and before or after the filing of the notice of appearance, stay the decision in whole or in part pending final disposition of the case, after notice to the agency and for good cause shown, except that the court shall not stay an administrative decision wherein unemployment compensation benefits have been allowed to a claimant pursuant to title 23, chapter 4.[1]

2. Make any order that it deems proper for the amendment, completion or filing of the record of the proceedings of the administrative agency.

3. Allow substitution of parties by reason of marriage, death, bankruptcy, assignment or other cause.

4. Dismiss parties or realign parties appellant and appellee.

5. Modify, affirm or reverse the decision in whole or in part.

6. Specify questions or matters requiring further hearing or proceedings and give other proper instructions.

7. When a hearing has been held by the agency, remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just.

8. In the case of affirmance or partial affirmance of an administrative decision requiring payment of money, enter judgment for the amount justified by the record and for costs, on which execution may issue.

B. Technical errors in the proceedings before the administrative agency or its failure to observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the superior court that the error or failure affected the rights of a party and resulted in injustice to him.

C. On motion of a party before rendition of judgment, the superior court shall make findings of

filing of a notice of appeal pursuant to § 41-1092.03.

D. The director shall not require legal representation to appear before an administrative law judge.

E. Except as provided in subsection F of this section, all state agencies supported by state general fund sources, unless exempted by this article, and the registrar of contractors shall use the services and personnel of the office to conduct administrative hearings. All other agencies shall contract for services and personnel of the office to conduct administrative hearings.

F. An agency head, board or commission that directly conducts an administrative hearing as an administrative law judge is not required to use the services and personnel of the office for that hearing.

G. Each state agency, and each political subdivision contracting for office services pursuant to subsection I of this section, shall make its facilities available, as necessary, for use by the office in conducting proceedings pursuant to this article.

H. The office shall employ full-time administrative law judges to conduct hearings required by this article or other laws as follows:

1. The director shall assign administrative law judges from the office to an agency, on either a temporary or a permanent basis, at supervisory or other levels, to preside over contested cases and appealable agency actions in accordance with the special expertise of the administrative law judge in the subject matter of the agency.

2. The director shall establish the subject matter and agency sections within the office that are necessary to carry out this article. Each subject matter and agency section shall provide training in the technical and subject matter areas of the section as prescribed in subsection C, paragraph 7 of this section.

I. If the office cannot furnish an office administrative law judge promptly in response to an agency request, the director may contract with qualified individuals to serve as temporary administrative law judges. These temporary administrative law judges are not employees of this state.

J. The office may provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this article. The director may enter into contracts with political subdivisions of this state, and these political subdivisions may contract with the director for the purpose of providing administrative law judges and reporters for administrative proceedings or informal dispute resolution. The contract may define the scope of the administrative law judge's duties. Those duties may include the preparation of findings, conclusions, decisions or recommended decisions or a recommendation for action by the political subdivision. For these services, the director shall request payment for services directly from the political subdivision for which the services are performed, and the director may accept payment on either an advance or reimbursable basis.

K. The office shall apply monies received pursuant to subsections E and J of this section to offset its actual costs for providing personnel and services.

L. The office shall receive complaints against a local government or video service provider as defined in § 9-1401 and shall comply with the duties imposed on the office pursuant to title 9, chapter 13.[2]

Added by Laws 1995, Ch. 251, § 14, eff. Oct. 1, 1995. Amended by Laws 1996, Ch. 102, § 45; Laws 1997, Ch. 221, § 185; Laws 1998, Ch. 57, § 59; Laws 2012, Ch. 321, § 132, eff. Sept. 29, 2012; Laws 2018, Ch. 331, § 2.

1 Section 41-741 et seq.

2 Section 9-1401 et seq.

§ 41-1092.02. Appealable agency actions; application of procedural rules; exemption from article

A. This article applies to all contested cases as defined in § 41-1001 and all appealable agency actions, except contested cases with or appealable agency actions of:

1. The state department of corrections.
2. The board of executive clemency.
3. The industrial commission of Arizona.
4. The Arizona corporation commission.
5. The Arizona board of regents and institutions under its jurisdiction.
6. The state personnel board.
7. The department of juvenile corrections.
8. The department of transportation, except as provided in title 28, chapter 30, article 2.[1]
9. The department of economic security except as provided in § 46-458.
10. The department of revenue regarding:

(a) Income tax or withholding tax.

(b) Any tax issue related to information associated with the reporting of income tax or withholding tax unless the taxpayer requests in writing that this

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