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STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0071

GEORGE WILLIAM PARRISH,

Defendant and Appellant.

v.

STATE OF MONTANA,

Plaintiff and Appellee,

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Ted Lympus, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
JENNIFER ANDERS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ED CORRIGAN
Flathead County Attorney
LORI A. ADAMS
Deputy County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

GEORGE WILLIAM PARRISH
AO # 26642
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

DEFENDANT AND
APPELLANT PRO SE

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STATEMENT OF THE ISSUES

Did the district court err in denying Parrish's motion to amend the judgment to excuse his compliance with sex offender treatment when the motion was filed years after sentencing, and none of the statutory circumstances warranting modification are present?

STATEMENT OF THE CASE

George Parrish appeals from an order of the Eleventh Judicial District Court, Flathead County, denying his motion to amend the judgment to delete the requirement that he complete Phase II of sex offender treatment prior to becoming eligible for parole.

STATEMENT OF THE FACTS

In September 2003, a jury convicted George Parrish of two counts of sexual intercourse without consent and two counts of sexual assault. (D.C. Doc. 113.) The victims were Parrish's stepdaughters, both of whom were under age 16 at the time of the offenses. Parrish was 37 years old. (D.C. Docs. 4, 132.)

District Judge Ted Lympus sentenced Parrish to a total of 60 years, with 25 years suspended. Parrish was declared parole ineligible for a period of 10 years, with the requirement that he complete sex offender treatment, Phases I

and II, prior to being eligible for parole. (D.C. Doc. 135.) This Court affirmed the conviction on direct appeal, although the Court remanded for the limited purpose of reassessing witness costs. State v. Parrish, 2005 MT 112, 327 Mont. 88, 111 P.3d 671. A new judgment complying with the Court's order was entered in December 2006. (D.C. Doc. 155.)

According to documents attached to his motion to amend, Parrish completed Phase I in 2004. (D.C. Doc. 162.) He began Phase II in 2009. Phase II requires an offender to admit guilt to the offenses for which he/she was convicted. (D.C. Doc. 162, Ex. B.) Parrish refused to do so, stating: "This of course is not an option for me because as I have maintained since the day I was charged, I did not commit these crimes." (D.C. Doc. 162, Ex. A-1.) Parrish offered instead to discuss sexually offensive behavior with his ex-wife, but steadfastly refused to discuss any offending history involving his stepdaughters. (D.C. Doc. 162, Ex. C-1.) The treatment providers found this to be unacceptable and recommended that he be removed from Phase II until his is willing to acknowledge his guilt. Id. Parrish was suspended from the program in November 2009.

Following his suspension from Phase II, Parrish filed a motion to amend the judgment asking the district court to remove the requirement that he complete Phase II before becoming eligible for parole. (D.C. Doc. 162.) Judge Lympus denied Parrish's motion, noting that he lacked authority to amend a valid sentence,

and that the time to correct any clerical errors had long since passed. (D.C. Doc. 166.) Parrish appeals.

SUMMARY OF THE ARGUMENT

Sentencing judges are limited in their ability to amend a sentence once it is pronounced. Here, the district court properly denied Parrish's motion to amend judgment because the statutory circumstances for modification are absent, and because the request was untimely.

This Court should not be persuaded by Parrish's other arguments, which are nothing more than an attempt to bypass the rules that foreclose sentence modification. Parrish's Fifth Amendment claim is without merit because he is not being compelled to answer any questions that might incriminate him in a future criminal proceeding. The fact that he chooses not to fully participate in sex offender treatment, which in turn may affect his parole eligibility, does not amount to compulsion. Parole is a discretionary grant of freedom, to be exercised when the Board of Pardons determines that the offender "can be released without detriment to himself or the community," when release is in "the best interests of society," and when the offender is "able and willing to fulfill the obligations of a law-abiding citizen." Mont. Code Ann. § 46-23-201. Parrish cannot make an end-run around this statutory requirement by proclaiming that his Fifth Amendment right to remain

silent trumps society's interest in rehabilitation and public safety. In short, Parrish's motion to amend the judgment would have been denied--even if the district court had authority to consider it--because sex offenders are not entitled to a tailor-made treatment program that allows them to remain in denial.

ARGUMENT

I. THE DISTRICT COURT LACKED AUTHORITY TO MODIFY THE JUDGMENT

A legal sentence, once imposed, cannot be amended unless the amendment is authorized by statute. State v. Hanners, 254 Mont. 524, 526, 839 P.2d 1268, 1268 (1992). Montana Code Annotated § 46-18-116 sets forth the circumstances in which a judgment may be modified: first, if there is a discrepancy between the written judgment and the oral pronouncement of sentence, the court may modify the written judgment within 120 days after its filing. Mont. Code Ann. § 46-18-116(2). The court may also correct a factually erroneous sentence or judgment at any time. Mont. Code Ann. § 46-18-116(3). Neither of these circumstances is present here.

Parrish refused to comply with the program requirements for sex offender treatment Phase II and was suspended from the program. Parrish requested modification of the judgment to delete the Phase II requirement, presumably because he does not want to disclose his offending history or have that fact affect

his parole eligibility. He does not allege that the Phase II requirement is illegal, he does not claim a discrepancy between an oral pronouncement of sentence and the written judgment, and he does not claim his sentence is factually erroneous. Obviously, there is no statute which compels a sentencing judge to remove a parole eligibility restriction simply because the offender is unwilling to comply. The district court was thus without authority to modify the judgment under Mont. Code Ann. § 46-18-116, and Parrish's motion was properly denied.

II. NONE OF PARRISH'S ARGUMENTS WARRANT SENTENCE MODIFICATION EVEN IF THE DISTRICT COURT HAD AUTHORITY TO DO SO.

A. The Department of Corrections Has Not Impermissibly Modified Parrish's Sentence.

Parrish mistakenly believes that his sentence has been "modified" by the Department of Corrections (DOC) and is thus invalid under State v. Field, 2000 MT 268, 302 Mont. 62, 11 P.3d 1203. In Field, the DOC imposed restrictions on a sex offender's freedom of association as a condition of his suspended sentence. This Court held that such constitutional restrictions can only be imposed by a sentencing judge as an explicit part of the sentence--not the DOC as an administrative matter. Id. ¶ 15-19. There is no similarity between Field and Parrish. The requirement for sex offender treatment is explicit in Judge Lympus'

sentencing order and, unlike the freedom of association, has no constitutional implications.

B. The Sentencing Court Was Not Required to Delete the Requirement That Parrish Complete Sex Offender Treatment Simply Because Parrish Insists on Asserting His Fifth Amendment Privilege.

Parrish complains that his Fifth Amendment privilege against compelled self-incrimination is violated insofar as he is required to disclose his current offenses as part of sex offender treatment, and that this warrants removal of the Phase II requirement from his sentence. In effect, Parrish would have the sentencing court ignore the interests of rehabilitation and public safety so that he may continue his denial, or would require the DOC to provide him (and presumably all other sex offenders who proclaim their innocence) with a specialized treatment program to suit his own desires.

The Fifth Amendment privilege has two components: incrimination and compulsion. See Minnesota v. Murphy, 465 U.S. 422, 429 (1984). Parrish meets neither component. Parrish was not asked to disclose information or answer questions which might incriminate him in future criminal proceedings. See Minnesota v. Murphy, supra (the Fifth Amendment not only allows a person to refuse to testify against himself at a criminal trial, but also privileges him not to answer official questions put to him in any other proceeding where the answer might incriminate him in future criminal proceedings). According to Parrish, he

was asked to disclose his offending history regarding the four offenses of which he was already convicted. He was not asked to disclose any uncharged conduct, and the State concedes that any statements relating to new offenses or uncharged conduct could not be used against Parrish in a subsequent criminal proceeding. See State v. Fuller, 276 Mont. 155, 160, 915 P.2d 809, 812 (1996); see also State v. Imlay, 249 Mont. 82, 813 P.2d 979 (1991), cert. dismissed as improvidently granted, 506 U.S. 5 (1992). As a result, Parrish was not faced with any real risk of self-incrimination. See Murphy, 465 U.S. at 435 n.7 (explaining that the State may compel answers "as long as it . . . eliminates the threat of incrimination.").

Likewise, Parrish faced no compulsion because there was no penalty attached to his exercise of the privilege. The State was not attempting to gain admissions from Parrish to punish him--the sole aim of sex offender treatment is rehabilitation. The fact that Parrish's parole eligibility may be affected unless he successfully completes Phase II is not a "penalty" because parole is nothing more than a privilege in the form of a "discretionary grant of freedom from incarceration." McDermott v. McDonald, 2001 MT 89, ¶ 24, 305 Mont. 166, 24 P.3d 200. It is assumed that offenders who committed their offenses prior to 1989 must serve the entire sentence, and have no liberty interest in parole. Id. Parrish cannot claim any "entitlement" that would qualify his suspension from sex offender treatment as punishment for purposes of the Fifth Amendment. This is no

different than inmates who are transferred from Montana State Prison to another facility where sex offender treatment is not available. In that instance, the Court has deferred to the administrative determinations of DOC, even if it means the inmates do not receive the treatment that would render them parole eligible. See Wright v. Mahoney, 2003 MT 141, 316 Mont. 173, 71 P.3d 1195.

Ultimately, the Board of Pardons determines whether Parrish is entitled to serve something less than his full sentence, but only upon a finding that he "can be released without detriment to himself or the community," when release is in "the best interests of society," and when the offender is "able and willing to fulfill the obligations of a law-abiding citizen." Mont. Code Ann. § 46-23-201. Parrish turns these statutory requirements on their head by insisting that his Fifth Amendment privilege trumps any state effort toward his rehabilitation, and that the sentencing court must delete Phase II in honor of his Fifth Amendment rights. But sentencing judges are tasked with deciding what restrictions on release are appropriate, Mont. Code Ann. § 46-18-101, and the importance of sex offender treatment cannot be denied. See McKune v. Lile, 536 U.S. 24, 40-41 (2002) ("An important component of [sex offender] rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct. . . . Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity.")

Parrish is not entitled to insist on something less than program compliance on the basis of the Fifth Amendment (i.e., disclose sexually offensive behavior with his ex-wife as opposed to his stepdaughters). If sex offenders were allowed to customize treatment for their own convenience, the rehabilitative goals of society and the sentencing judge would be in serious jeopardy. The fact remains that sex offenders are a serious threat, see McKune v. Lile, 536 U.S. at 34, and society has an interest in preventing recidivism which, among sex offenders, is "frightening and high." Id. Parrish's arguments fail to take these objectives into account.

Parrish claims that he is only asking the Court to "allow him the same relief given to other similarly situated offenders," citing State v. Kelly Dale Clark, DC-02-99. (Appellant's Brief at 4.) It appears that the sentencing judge in Clark was sympathetic to Clark's complaints and removed from the judgment the requirement that he complete sex offender treatment prior to his release from prison (even though there was no legal requirement that she do so). Instead, the court fashioned a longer term sentence to address the concerns of rehabilitation prior to release.

Whatever happened in Clark has no bearing on this case. Here, Judge Lympus imposed the requirement that Parrish complete sex offender treatment, and he subsequently refused to modify the judgment to remove that requirement because he determined he had no authority to do so. As discussed

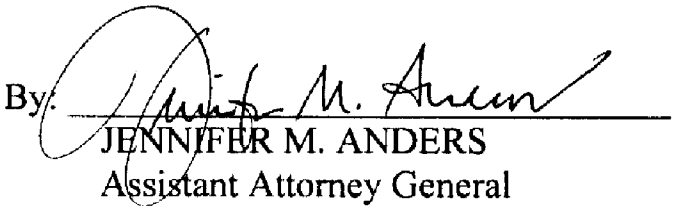
previously, this ruling is sound and should be affirmed on procedural grounds, irrespective of whatever equitable remedy was fashioned in Clark.

CONCLUSION

This Court should affirm the district court's order denying Parrish's motion to amend the judgment for the simple reason that the district court had no authority to do so.

Respectfully submitted this 2nd day of June, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

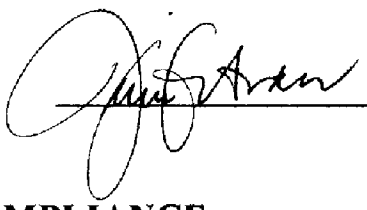
By: 
JENNIFER M. ANDERS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. George William Parrish
AO # 26642
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

Ms. Lori A. Adams
Deputy County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

DATED 10-2-10 

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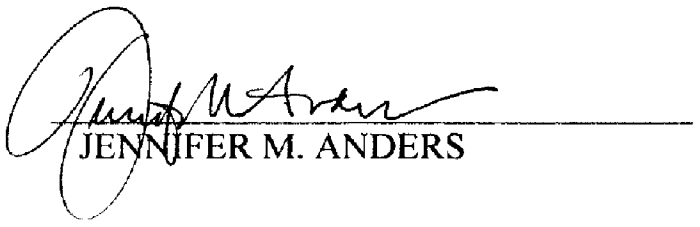

JENNIFER M. ANDERS