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### State v. Custodio Respondent's Brief Dckt. 48581

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LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MARK A. KUBINSKI  
Deputy Attorney General  
Chief, Criminal Law Division

KENNETH K. JORGENSEN  
Deputy Attorney General  
P. O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534  
E-mail: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 48581-2021
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-FE-1998-333
	)	
ELIAS MANUEL CUSTODIO,	)	
	)	RESPONDENT’S BRIEF
Defendant-Appellant.	)	
_____	)	

Has Elias Manuel Custodio failed to show that the district court erred when it denied, in relevant part, his motion to correct an illegal sentence?

ARGUMENT

Custodio Has Failed To Show That The District Court’s Ruling That It Lacked Jurisdiction To Review Parole Decisions Was Error

A. Introduction

“A jury found Custodio guilty of voluntary manslaughter, involuntary manslaughter, aggravated battery, and burglary.” (R., p. 33.) The district court imposed aggregate concurrent sentences of 30 years with 15 years determinate. (R., p. 33.) The Idaho Court of Appeals affirmed

Custodio's convictions, reversed his sentences for involuntary manslaughter and aggravated battery because the sentencing enhancement of use of a deadly weapon was improperly applied, and affirmed his sentence for voluntary manslaughter, enhanced by the deadly weapon enhancement, of 30 years with fifteen years determinate. (R., pp. 32-47.) On remand, the district court imposed concurrent sentences of ten years determinate for involuntary manslaughter and 15 years with five years determinate for aggravated battery, leaving intact the aggregate sentences of 30 years with 15 years determinate. (R., pp. 57-59.)

Nineteen years later, Custodio filed a Rule 35 motion alleging his sentences were illegal. (R., pp. 70-74.) The district court granted the motion in part and denied it in part (R., pp. 230-34) as follows: (1) the sentence of fifteen years for burglary was facially illegal and therefore reduced to ten years (R., pp. 232, 236); (2) any requests for discretionary reduction of the sentences was untimely and the district court lacked jurisdiction to consider them (R., pp. 232-33); and (3) the district court lacked jurisdiction to consider Custodio's challenge to the actions of the Commission of Pardons and Parole (R., pp. 233-34).

Custodio timely appealed. On appeal he asserts that the Unified Sentencing Act is unconstitutional because it results in racial discrimination in the parole decisions of the Commission of Pardons and Parole. (Appellant's brief, pp. 4-11.) Custodio has failed to show that the district court erred when it concluded it did not have jurisdiction to consider this claim.

#### B. Standard Of Review

"Where the lower court's decision turns on the interpretation of a criminal rule, this Court exercises free review." State v. Castro, 145 Idaho 173, 175, 177 P.3d 387, 389 (2008). "Whether a sentence is illegal is a question of law over which we exercise free review." State v. Meier, 159 Idaho 712, 713, 366 P.3d 197, 198 (Ct. App. 2016). "This Court exercises free review over

questions of jurisdiction.” State v. Lute, 150 Idaho 837, 840, 252 P.3d 1255, 1258 (2011) (quotation marks omitted).

C. Custodio Has Not Shown The District Court Had Jurisdiction To Consider His Claim

“[T]he term ‘illegal sentence’ under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” State v. Clements, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009) (citing I.C.R. 35). “A sentence is ‘illegal’ within the meaning of Rule 35 only if it is in excess of statutory limits or otherwise contrary to applicable law.” State v. Peterson, 148 Idaho 610, 613, 226 P.3d 552, 555 (Ct. App. 2010).

“Moreover, Rule 35’s purpose is to allow courts to correct illegal sentences, *not* to reexamine errors occurring at trial or before the imposition of the sentence.” State v. Wolfe, 158 Idaho 55, 65, 343 P.3d 497, 507 (2015) (emphasis original). “The district court cannot usurp the power of the executive branch or the power of the legislative branch by unreasonably retaining jurisdiction for itself.” State v. Parvin, 137 Idaho 783, 786, 53 P.3d 834, 837 (Ct. App. 2002). A trial court may not utilize Rule 35 “to infringe upon the duties of the parole board.” State v. Chapman, 121 Idaho 351, 355, 825 P.2d 74, 78 (1992). A “mechanism within the judicial system” that would grant ongoing authority to the judiciary to review parole decisions “would clearly violate the separation of powers, Idaho Constitution art. 2, by allowing the judiciary to encroach upon the pardoning and paroling authority of the executive branch.” Brandt v. State, 118 Idaho 350, 352, 796 P.2d 1023, 1025 (1990).

The district court correctly concluded that Rule 35 did not confer jurisdiction upon it to “review and modify the Commission of Pardons and Parole’s decision denying [Custodio’s] request for parole.” (R., p. 233.) First, such an action would have required an evidentiary hearing

and factual findings beyond the scope of the existing record. Second, it would have required the district court to improperly review and infringe upon the duties of the parole board. Custodio may have a legal vehicle for asserting his claim that the Board denied him parole because of racial animus, but it is not a Rule 35 motion.

On appeal Custodio argues that “racial disparities” in the granting of parole renders unified sentencing an “illegal statute.” (Appellant’s brief, pp. 8-10.) He does not present any argument or authority that this claim was properly brought under Rule 35. (See Appellant’s brief.) Having failed to challenge the district court’s determination it lacked jurisdiction under Rule 35, Custodio has shown no error.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 22nd day of July, 2021.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 22nd day of July, 2021, served a true and correct paper copy of the foregoing RESPONDENT’S BRIEF by placing the copy in the United States mail, postage prepaid, addressed to:

ELIAS MANUEL CUSTODIO  
IDOC #56658  
I.M.S.I. – B14  
P. O. BOX 51  
BOISE, ID 83707

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/dd