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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILBUR MEDLEY, Plaintiff-Below, Appellant, v. STATE OF DELAWARE Defendant-Below, Appellee.	)))))))))))	No. 315, 2021

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: February 22, 2022

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I. THE JUDGE DENIED MEDLEY HIS CONSTITUTIONAL AND OTHER PROCEDURAL RIGHTS WHEN HE, *SUA SPONTE* AND OUTSIDE MEDLEY'S PRESENCE, AMENDED THE ORIGINAL SENTENCE ORDER TO IMPOSE A HARSHER SENTENCE THAT DID NOT REFLECT THE ORIGINAL INTENT SIMPLY TO COMPLY WITH ONE DOC EMPLOYEE'S EQUIVOCAL UNDERSTANDING OF THE LAW.

Argument

The State erroneously argues that this appeal from a decision denying, on the merits, Medley's 4 unopposed *pro se* motions and defense counsel's unopposed motion must be reviewed on a plain-error standard.[1] The amended sentence that increased Medley's length of incarceration by 563 days was issued without any hearing and outside Medley's presence on June 29, 2021. Medley, *pro se*, filed motions that directly responded to that particular order on August 18, 2021,[2] August 25, 2021,[3] August 31, 2021[4] and September 13, 2021.[5] Defense counsel filed her motion on September 17, 2021.[6] The judge's September 23, 2021 decision is the decision being appealed. That decision denied ***all of these motions*** which asserted the same claim.[7] Thus, contrary

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[1] See State's Ans. Br. at pp. 9-10, 12.
[2] C1.
[3] C3.
[4] C8.
[5] C10.
[6] A85.
[7] Ex.D to Appellant's Opening Brief.

to the State's claim, the proper standard of review in this case is "abuse of discretion" to the extent the "trial judge has 'ignored recognized rules of law or practice so as to produce injustice.'" [8] And, "[t]o the extent a claim involves a question of law, [this Court must] review the claim *de novo*."[9]

Even assuming this Court finds that plain error is the proper standard, reversal is required. In *Bartone v. United States*, the defendant was in the courtroom, with his attorney, when he was sentenced to one year in prison. Later, in the defendant's absence "the court enlarged the penalty by one day."[10] The defendant appealed the enlargement of the sentence, which the appellate court did not address, even though the government conceded error. On certiorari, in a very short decision, the Court held, "[t]his error, in enlarging the sentence in the absence of petitioner, was so plain in light of the requirements of Rule 43 that it should have been dealt with by the Court of Appeals, even though it had not been alleged as error."[11] Thus, increasing Medley's sentence in our case rises to plain error.

The State does not contest any of the facts with respect to the

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[8] *Longford-Myers v. State*, 213 A.3d 556, 558 (Del. 2019) (quoting *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007*); Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994); *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).
[9] *Downs v. State*, 259 A.3d 1272 (Del. 2021).
[10] *Bartone v. United States*, 375 U.S. 52, 53 (1963).
[11] *Id.*

correspondence between court administrative personnel and DOC. There is no dispute that the record lacks any indication as to whether the judge was aware of the reasons for the increase of Medley's sentence prior to signing off on it. There is no dispute that DOC personnel sought the judge's "intent." There is no dispute that, court staff, without copying the judge, responded that the court would defer to DOC. There is no dispute that court staff told defense counsel that the sentence was changed "per DOC policy."[12] And, there is nothing in the record indicating that, in fact, DOC policy required the amendment in the sentence. Thus, to the extent "Medley's argument that the judge was unaware of the reasons for amending his sentence order to reduce his credit" requires any speculation, it speaks to the silence of the record.[13]

The State also claims that "Medley's sentence order reducing his credit time stated the quantum of incarceration that he had to serve, which was not changed in correcting the sentence, and the form of his sentence otherwise met the requirements of Section 3901."[14] Yes, the judge stated a quantum of incarceration, but, in fact, it did change when he amended it. Here, the judge put the time served calculation in the sentence.

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[12] Compare State's Ans. Br. at pp. 15-19 with Appellant's Op.Br. at pp. 5-10.
[13] See State's Ans. Br. at p.22.
[14] See *id.* at p.26.

For example, with respect to the incarceration portion of the June 22nd sentence, the judge sentenced Medley to Level V "for 8 years with credit for 576 days previously served." This is just another way of saying 6 years and 7 months. On the other hand, the incarceration portion of the June 29th requires that Medley remain at Level V "for 8 years with credit for 13 days previously served." This is just another way of saying "7 years 11 months and17 days." Thus, there was one definite period issued by the judge amended to another definite period.

The State is simply wrong in its claim that Medley was not required to be present when the judge stripped him of the 563 days credit from his sentence. While an individual may not have "a constitutionally protected interest in misapplied or miscalculated credit time[,]" there is no doubt that there is "a fundamental right to be present at the imposition of a final sentence following a criminal conviction."[15] The State confuses the rights asserted in *Evans*[16] and *Bryant*[17] with that asserted in our case. In those cases, the defendants asserted they had an actual right to be released based on the

[15] *Jones v. State*, 672 A.2d 554, 555 (Del. 1996).
[16] *Evans v. Secretary Pennsylvania Department of Corrections*, 645 F.3d 650 (3d 2011).
[17] *Bryant v. State*, 931 A.2d 436 (Del. 2007) (the judge announced it correctly, it was a scrivener's error).

miscalculated time. Here, Medley argues that: 1) when he was originally given the 576 days credit, his time was not misapplied or miscalculated because the judge had discretion to do so; and 2) he had the right to be present when that time was taken away so that he could have the "opportunity to comment upon" it as it is a "matter[] relating to the appropriate sentence."[18]

The State also attempts to compare Medley's amended sentence to a sentence corrected due to a "clerical mistake," under Rule 36, which does not require his presence.[19] However, a "clerical error" is not "one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature. Rule 36 has been consistently interpreted as dealing only with clerical errors, not with mistakes or omissions by the court." [20] Rule 36 "is not a vehicle for the vindication of the court's unexpressed sentencing expectations, or for the correction of errors made by the court itself[.]"[21] Here, the error was not clerical. Nor was it a simple correction of sentence under Rule 35.

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[18] Del. Super. Ct. Crim. R. 32

[19] See State's Ans. Br. at 35.

[20] *United States v. Robinson*, 368 F.3d 653, 656 (6th Cir. 2004)(citing *United States v. Coleman*, 229 F.3d 1154, 2000 WL 1182460, at *2 (6th Cir. Aug.15, 2000) (unpublished) (quoting *United States v. Burd,* 86 F.3d 285, 288 (2d Cir.1996))).

[21] *Robinson*, 368 F.3d at 656 (citing *Coleman,* 229 F.3d 1154, 2000 WL 1182460, at *2 (quoting *United States v. Daddino,* 5 F.3d 262, 264 (7th Cir.1993)); *see also United States v. Werber,* 51 F.3d 342, 343 (2d Cir.1995)

In our case, DOC's actions had consequences that should have been considered by the judge. Interestingly, after defense counsel filed the September 17th motion for Level V credit, the judge reached out to the same individuals at DOC that had communicated with court personnel months earlier. He sought information regarding the various cases on which he had been held.[22] Based on that information, he denied the motion.[23] He concluded that the 563 days were applied to his VOP sentence imposed at the hearing that occurred after the resolution of this case. However, that time was only available to be applied to the VOP sentence because of the judge's erroneous June 29th order in this case. As it turned out, credit for time upon which he was held for other cases was all applied to one sentence in one case. Thus, the DOC employee's surmise was apparently incorrect, and the judge did have discretion to apply credit time as he deemed appropriate.

The State claims that even if Medley's substantive due process rights were violated and he should have been present when the order was issued, he suffered no prejudice.[24] The State claims there is no actual prejudice

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("Rule 36 authorizes a court to correct only clerical errors in the transcription of judgments, not to effectuate its unexpressed intentions at the time of sentencing.")).

[22] A-98.

[23] A-99.

[24] State's Ans. Br. at p.41.

sustained by Medley as a result of his absence from a hearing on sentencing. However, "[t]he right of presence under Rule 43 is not discharged, [], by an inability to demonstrate actual prejudice arising from a violation of the right. The right is so fundamental that it exists unless waived even though no actual prejudice may be provable."[25] Therefore, this Court must remand Medley's sentence for a new sentencing after a hearing.

[25] *Shaw v. State*, 282 A.2d 608, 610 (Del. 1971) (absence from verdict); *Bradshaw v. State*, 806 A.2d 131, 139–40 (Del. 2002) (finding prejudice resulting from defense counsel's waiver of defendant's presence at the time the attorney decided to issue an *Allen* charge and at the time the actual charge was given); *United States v. Ammar*, 919 F.2d 13, 16 (3d Cir. 1990) (finding, while the sentence appeared legal as it stood, remand appropriate for resentencing as amended sentence added special parole term outside his presence).

CONCLUSION

For the reasons and upon the authorities cited herein, Medley's sentence must be reversed and remanded and a sentencing hearing must be conducted upon notice, with Medley and his attorney present.

Respectfully submitted,

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