IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA ASTON,
Petitioner.

No. 2 CA-CR 2016-0201-PR
Filed July 20, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2004006474001DT
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Deputy County Attorney, Phoenix
Counsel for Respondent

James J. Haas, Maricopa County Public Defender
By Tennie B. Martin and Mikel Steinfeld,
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Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Petitioner Joshua Aston challenges the trial court's order denying his request for resentencing on the concurrent life terms of imprisonment he is serving pursuant to Rule 32, Ariz. R. Crim. P., based on the Supreme Court's decision in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012). In light of *Miller* and the Supreme Court's recent decision in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), we grant relief in part, vacating the natural-life prison term and remanding this matter for resentencing. But because Aston has not established the court abused its discretion by denying relief as to the remaining term of life with the possibility of parole after twenty-five years, we deny relief on that sentence. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (appellate court will not disturb trial court's denial of post-conviction relief absent abuse of discretion).

¶2 After a jury trial, Aston was convicted of first-degree murder and conspiracy to commit first-degree murder, offenses he committed in January 2004 when he was sixteen years old. Pursuant to former A.R.S. § 13-703(A), renumbered effective January 1, 2009, as A.R.S. § 13-751, 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38, the statute in effect at the time of the offenses, the trial court sentenced Aston in May 2007 to concurrent life terms of imprisonment, a natural-life term for the murder conviction and life with the possibility of parole after twenty-five years for conspiracy to commit first-degree murder. This court affirmed the convictions and the

sentences on appeal. *State v. Aston*, No. 1 CA-CR 07-0409 (Ariz. App. Jun. 23, 2009) (mem. decision).

¶3 In this successive post-conviction proceeding, Aston argued the life terms were unconstitutional, relying on *Miller*, in which the Supreme Court held that "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at ___, 132 S. Ct. at 2469.[1] Although Aston was sentenced on the conspiracy conviction to a life term of imprisonment with the possibility of parole after twenty-five years, parole had been eliminated in 1994, 1993 Ariz. Sess. Laws, ch. 255, §§ 86, 101, and the only means of obtaining early release was through clemency or commutation of the sentence by the Governor. *See* A.R.S. §§ 31-402(C), 31-443. Aston argued in this post-conviction proceeding that the sentence was tantamount to a natural-life term and both terms were imposed without consideration of proper factors under *Miller*.

¶4 After considering Aston's request for post-conviction relief together with that of twenty-one other defendants who were seeking relief based on *Miller*, and following extensive briefing and a hearing, the trial court correctly found *Miller* applied retroactively. As the Supreme Court recently concluded in *Montgomery*, ___ U.S. ___, ___, 136 S. Ct. at 736, *Miller* "announced a substantive rule of constitutional law" to be applied retroactively to all cases. *See also*

[1]The trial court initially dismissed Aston's notice of post-conviction relief in which he stated he wished to assert a claim pursuant to Rule 32.1(e) and (g) based on *Miller*. The court found *Miller* only prohibits mandatory life imprisonment without the possibility of parole, and the term was not mandatory here, rather, the court had imposed it after considering various factors, including Aston's age. The court subsequently permitted amicus curiae, The Arizona Justice Project, to file a motion for reconsideration in support of Aston's petition and a memorandum in support of post-conviction relief. Additionally, appointed counsel filed a supplemental brief regarding *Miller*'s retroactivity.

State v. Valencia, 239 Ariz. 255, ¶ 17, 370 P.3d 124, 128 (App. 2016) (concluding *Montgomery* "constitutes a significant change in Arizona law that is retroactively applicable").

¶5 The trial court also agreed with Aston and other defendants that clemency or commutation of sentence did not provide a "meaningful opportunity" for obtaining early release as contemplated by *Miller*. But, the court found the legislature's passage of House Bill 2593, which the Governor had signed just weeks earlier, resolved Aston's claim. *See* 2014 Ariz. Sess. Laws, ch. 156, §§ 2-3; House Fact Sheet, H.B. 2593, 51st Leg., 2d Reg. Sess. (Ariz. 2014). Newly enacted A.R.S. § 13-716 and amended A.R.S. § 41-1604.09(I) establish parole eligibility for juveniles sentenced to life imprisonment. The court denied relief but directed the Department of Corrections to set a date on which Aston was eligible for parole after the statutes went into effect.

¶6 Aston contends on review that the trial court erred by depriving him of the opportunity to raise issues regarding the application of H.B. 2593. He asserts that by refusing to allow him to thoroughly research and raise these arguments at a resentencing proceeding, the court "has forced Petitioner to raise potential issues before this Court . . . ." Among the issues he states he would have raised and now presents to this court are that H.B. 2593 was not intended to apply retroactively, its retroactive application violates separation of powers and ex post facto principles, and parole availability under the statutes does not satisfy *Miller*.

¶7 We considered and rejected this retroactivity theory, and the argument that resentencing is required, in *State v. Vera*, 235 Ariz. 571, ¶¶ 21-22, 26 & nn.6–7, 334 P.3d 754, 759–61 & nn.6–7 (App. 2014), *cert. denied*, ___ U.S. ___, 136 S. Ct. 121 (2015). Aston has not persuaded us that *Vera* is meaningfully distinguishable.[2] In

[2] Nor are we persuaded that the decision by another department of this court in *State v. Randles*, 235 Ariz. 547, 334 P.3d 730 (App. 2014), provides Aston with a basis for relief. In *Randles*, the court referred to § 13-716 as "appl[ying] retroactively." *Id.* ¶ 10. To the extent that statement conflicts with our holding in *Vera*, we

addition, the Supreme Court suggested in *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 736, that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." No purpose would be served by remanding this case for further proceedings on these claims. *See* Ariz. R. Crim. P. 32.6(c) (summary disposition appropriate when "no purpose would be served by any further proceedings"). Nor do we believe Aston has been prevented from making a record of his objections to the application of H.B. 2593.

¶8 We reach a different conclusion with respect to the natural-life term imposed on the first-degree murder conviction. Aston asserts in his petition for review that the trial court failed to address the propriety of the natural-life term imposed for first-degree murder in light of *Miller*. The state concedes in its response that the court did not address this issue, and acknowledges that this court generally will not address claims that have not been addressed first by a trial court. Relying in part on our decision in *Vera*, however, it maintains we may nevertheless address the issue because the propriety of the natural-life term under *Miller* is a question of law subject to our de novo review.[3]

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conclude that *Vera* properly characterizes § 13-716 as a remedial statute that affects future events and is not a retroactive statute. 235 Ariz. 571, ¶ 21, 334 P.3d at 759. And, in any event, whether the statute is classified as retroactive or remedial does not change whether Aston is entitled to be resentenced on this count.

[3]Aston appears to raise arguments regarding the propriety of the natural-life term that differ from the arguments he made below. The state urges us to nevertheless address the propriety of the natural-life term "[i]n the interest of judicial economy", stating it "does not take issue with the fact that [Aston] did not raise some or all of these arguments in the court below." We generally do not address claims raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980). The gravamen of Aston's argument below was that § 13-703 was unconstitutional because it did not truly give sentencing judges the option of imposing anything but a natural-life prison term, since

¶9 We are not convinced the trial court failed to consider this issue. We agree with the parties that in the final ruling, the court did not specifically address and reject Aston's challenge to his natural-life term. But it did so implicitly by denying relief on the claims Aston had raised in the proceeding. The court did appear to disregard the natural-life term when it stated, "[T]his defendant was NOT sentenced to life imprisonment without the possibility of release." But that was in the context of deciding whether the life term with the possibility of parole was nevertheless a natural-life term given current legislation that makes parole available again. And the court also stated, *Miller* "[n]ot only . . . preclude[s] a mandatory life sentence without the possibility of a meaningful opportunity for release, it also suggests that the special class of defendants (juvenile offenders) should be given additional consideration at sentencing that goes well beyond what is considered for a similarly situated adult defendant." We therefore conclude the court rejected any *Miller*-based challenge to the natural-life term.

¶10 Aston argues that in light of *Miller*, former § 13-703 and natural-life terms as applied to juveniles are unconstitutional because (1) the only alternative sentence—life with the possibility of commutation after twenty-five years—did not provide a meaningful opportunity to obtain release based on maturity and rehabilitation; and, (2) the statute permitted the court to impose a natural-life term without the individualized sentencing inquiry required by *Miller*. The state argues that *Miller* did not categorically prohibit life terms without the possibility of early release for juvenile offenders, it only prohibited mandatory natural-life terms. And, it asserts, the court considered Aston's age as well as other factors, including his lack of judgment because of his youth and his difficult childhood, before

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parole was not available. But he did argue he did not receive the specific kind of individualized inquiry that *Miller* requires before any natural-life term may be imposed. Thus, the propriety of the natural-life term in light of *Miller* was sufficiently preserved and we address it.

exercising its discretion to impose a natural-life term on the first-degree murder conviction rather than a life term with the possibility of early release.

¶11 As we stated above, in *Montgomery*, which was decided while this case was pending on review, the Supreme Court determined it had announced a substantive constitutional rule in *Miller*, directing that it be applied retroactively. ___ U.S. at ___, 136 S. Ct. at 735-36. The Court also clarified and expanded its decision in *Miller*. It stated that the Eighth Amendment requires sentencing courts to consider more than just "a child's age before sentencing him or her to a lifetime in prison," and permits a natural-life term only for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." ___ U.S. at ___, 136 S. Ct. at 734. We concluded in *Valencia* that *Montgomery* "constitutes a significant change in Arizona law that is retroactively applicable." 239 Ariz. 255, ¶ 17, 370 P.3d at 128.

¶12 Because we are able to conduct the same review of the sentencing in this case in light of *Miller* and *Montgomery* as the trial court, we see no purpose in remanding this matter for the trial court to consider whether Aston is entitled to be resentenced on the first-degree murder conviction. The facts and arguments presented at Aston's sentencing hearing and in the parties' sentencing memoranda would not necessarily require a finding that Aston's offenses reflect permanent incorrigibility. The state conceded at sentencing that Aston's youth, his difficult childhood, and the influence of his codefendant were mitigating circumstances. But as aggravating circumstances warranting a natural-life term, the state emphasized Aston's "core belief system," which included a hatred of the government and his expressed goal of overthrowing it by committing murder and other crimes. Trial counsel emphasized the codefendant's influence, Aston's father's sexual abuse of members of his family in front of him and possibly of Aston, and his age and attendant lack of maturity based on mental health literature and case law, including *Roper v. Simmons*, 543 U.S. 551 (2005).

¶13 In imposing the natural-life term, the trial court found the following constituted aggravating circumstances: the emotional

and financial harm to the victim's wife and the rest of the family, and the "cold, calculated manner in which this murder was" committed. The court found Aston's age and the codefendant's influence mitigating. Thus, the court's assessment of the relevant factors did not include a finding that was tantamount to a determination that this was among the rare circumstances in which the defendant's permanent incorrigibility warranted a natural-life term. And as we stated in *Valencia*, "[i]n any event, in light of the heretofore unknown constitutional standard announced in *Montgomery*, the parties should be given the opportunity to present evidence relevant to that standard." 239 Ariz. 255, ¶ 16, 370 P.3d at 127.

¶14 For the reasons stated herein, we grant the petition for review but deny relief as to the life term on the conviction for conspiracy to commit first-degree murder. We grant relief, however, on the natural-life prison term, vacating that sentence and remanding this matter for resentencing.