IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BOBBY JERRY TATUM,
Petitioner.

No. 2 CA-CR 2014-0460-PR
Filed February 18, 2015

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NOT FOR PUBLICATION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. CR1994005821
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Bobby Jerry Tatum, San Luis
In Propria Persona

Greenberg Traurig, LLP, Phoenix
By Stacy F. Gottlieb
Counsel for Amicus Curiae The Arizona Justice Project

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

V Á S Q U E Z, Judge:

¶1 Bobby Tatum seeks review of the trial court's order summarily dismissing his notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Tatum has not sustained his burden of establishing such abuse here.

¶2 Tatum was convicted of conspiracy to commit armed robbery, first-degree murder, attempted armed robbery, and aggravated assault. He was seventeen at the time he committed the offenses in 1994. Tatum was sentenced to a prison term of natural life for his murder conviction. We affirmed his convictions and sentences on appeal. *State v. Tatum*, No. 1 CA-CR 96-0887 (memorandum decision filed May 19, 1998).

¶3 Before the instant proceeding, Tatum previously has sought and been denied post-conviction relief on at least two occasions. In his most recent notice of post-conviction relief, he asserted that the United States Supreme Court's decision in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was a significant change in the law rendering his "mandatory life without parole sentence[] . . . unconstitutional." The trial court summarily

dismissed the notice, concluding *Miller* did not entitle Tatum to relief. Tatum filed a motion for rehearing, and the Arizona Justice Project (AJP) filed a brief in support of that motion. After considering Tatum's motion and the AJP's brief, the court denied the motion for reconsideration, and this petition for review followed. AJP has again filed an amicus brief in support of Tatum's petition for review.

¶4 On review, Tatum and amicus curiae argue *Miller* applies retroactively and entitles Tatum to relief. In *Miller*, the Court determined mandatory life sentences for juvenile offenders violated the Eighth Amendment. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469. Instead, a sentencing court must be able to take into account "the offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at ___, 132 S. Ct. at 2467.

¶5 Tatum and amicus curiae contend Arizona's first-degree murder sentencing scheme as a whole is unconstitutional when applied to juvenile defendants and there was no constitutional sentencing option available to the trial court. Indeed, in *State v. Vera*, we determined that because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." 235 Ariz. 571, ¶ 14, 334 P.3d 754, 758 (App. 2014). But we further concluded in *Vera* that the legislature's 2014 enactment of A.R.S. § 13-716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. *Id.* ¶ 27. That statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. § 13-716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied.

¶6 Tatum and amicus curiae also contend that, based on *Miller*, imposition of a natural life sentence for a juvenile offender violates the Eighth Amendment. But the *Miller* Court held only that a *mandatory* life sentence violated the Eighth Amendment and

expressly declined to address any "argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Miller,* ___ U.S. at ___, 132 S. Ct. at 2469. We decline to extend *Miller*'s holding further than the Supreme Court was willing to extend it. Thus, a natural life sentence with no opportunity for release is permitted if a sentencing court, after considering sentencing factors, could have imposed a lesser sentence.

¶7 Tatum and amicus curiae further maintain, however, that the mitigating factor of age was not given the necessary weight and that the court did not adequately consider Tatum's chances for rehabilitation. We disagree. Arizona's sentencing scheme requires a court to "determine whether to impose" a natural life sentence or a sentence without the possibility of release for twenty-five or thirty-five calendar years only after considering aggravating and mitigating circumstances, including the defendant's age. A.R.S. §§ 13-701, 13-751(A)(2), 13-752(A), (Q)(2). In Tatum's case, after doing so, the sentencing court imposed the more severe sentence.

¶8 We presume a sentencing court considered any mitigating evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), and we leave to the court's sound discretion how much weight to give any such evidence, *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). Under *Miller*, before imposing a natural life sentence, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." ___ U.S. at ___, 132 S. Ct. at 2469.

¶9 The trial court expressly found age was a mitigating factor. And, although a psychologist opined that Tatum might be "amenable to treatment and rehabilitation services," that psychologist also noted Tatum was capable of controlling his impulses despite his age and that Tatum presented an ongoing risk to the community. After considering that evidence, as well as evidence presented at trial and by the state, the court determined a natural life sentence was appropriate. We cannot say *Miller* requires more, and therefore conclude the trial court did not abuse its

discretion in dismissing Tatum's notice and denying his subsequent motion for rehearing.[1]

¶10 For these reasons, although we grant review, we deny relief.

[1]Because we conclude Tatum is not entitled to relief in any event, we need not determine whether *Miller* is applicable retroactively to his case under the analysis outlined in *Teague v. Lane*, 489 U.S. 288 (1989). Nor need we address the additional claims raised by Tatum in his petition for review, namely that he should have been tried in juvenile court and that a natural life prison term should not have been imposed because he had no previous felony convictions. To the extent Tatum raised those claims below, they are precluded by Rule 32.2(a), Ariz. R. Crim. P.