IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VERONICA TORRES,
Petitioner.

No. 2 CA-CR 2015-0052-PR
Filed May 20, 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NOT FOR PUBLICATION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 Pima County
No. CR047395
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

James E. Rogers College of Law Wrongful Conviction Clinic, Tucson
By Vanessa M. Buch, an assistant clinical professor appearing pursuant to Rule 38(d), Ariz. R. Sup. Ct.
Counsel for Petitioner

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 Petitioner Veronica Torres seeks review of the trial court's summary dismissal of her successive petition for 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). We find no such abuse here.

¶2 Following a jury trial, Torres was convicted of first-degree murder, drive-by shooting, and four counts of aggravated assault.[1] The trial court sentenced Torres to life in prison with no eligibility for release for twenty-five years for murder and to concurrent prison terms on the other charges. We affirmed her convictions and sentences on appeal. *State v. Torres*, No. 2 CA-CR 95-0728 (memorandum decision filed Jan. 31, 1997). And we denied relief on review of the court's summary dismissal of Torres's second Rule 32 petition, *State v. Torres*, No. 2 CA-CR 2009-0302-PR (memorandum decision filed Mar. 1, 2010), and vacated the court's order dismissing her third notice of post-conviction relief and remanded for further proceedings, *State v. Torres*, No. 2 CA-CR 2013-0535-PR (memorandum decision filed Apr. 30, 2014). This petition for review followed the court's summary dismissal of Torres's petition on remand.

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[1]Although Torres was fourteen years old when she committed the offenses, she was tried as an adult.

¶3 In her petition below, Torres argued her sentence violates *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), which she maintained applies retroactively to cases on collateral review. Torres also argued the enactment of A.R.S. § 13-716[2] "does not cure the constitutional invalidity" of her sentence because it does not apply retroactively to her; the statute "violates both *ex post facto* and separation of powers principles"; and, the imposition of lifetime parole and a mandatory minimum sentence violates the Eighth Amendment.

¶4 In *Miller*, the United States Supreme Court determined that mandatory life sentences for juvenile offenders violated the Eighth Amendment. ___ U.S. at ___, 132 S. Ct. at 2469. The Court concluded a sentencing court instead must be able to take into account "an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at ___, 132 S. Ct. at 2467. In *State v. Vera*, 235 Ariz. 571, ¶ 17, 334 P.3d 754, 758-59 (App. 2014), the trial court determined that Vera's sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*," because parole had been eliminated and the only possibility of release would be by pardon or commutation. But on appeal, we concluded that the legislature's

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[2]Section 13-716 provides:

> Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994. If granted parole, the person shall remain on parole for the remainder of the person's life except that the person's parole may be revoked pursuant to [A.R.S.] § 31-415.

2014 enactment of § 13-716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. *Vera,* 235 Ariz. 571, ¶ 27, 334 P.3d at 761.

¶5 Relying on *Vera*, 235 Ariz. 571, ¶¶ 18, 21-22, 334 P.3d at 759-60, the trial court determined that § 13-716 resolved any problem with Torres's sentence, that § 13-716 is not "an unconstitutional remedy to the issues raised in *Miller*," and that applying § 13-716 to Torres does not violate the separation of powers doctrine. The court also concluded Torres's *ex post facto* argument was not ripe and, because *Miller* does not prohibit mandatory minimum terms and the mandatory imposition of lifetime parole, Torres was precluded from raising these claims in a successive petition. The court also noted it had considered individual factors about Torres at sentencing, consistent with the Supreme Court's opinion in *Miller*.

¶6 On review, Torres asserts she raises only "one claim," that her "mandatory" sentence of life without parole violates *Miller*, and asks that we vacate that sentence and remand for consideration of "a sentencing option below the mandatory 25-year term." Acknowledging that we previously had determined in *Vera* that § 13-716 remedies the issue raised in *Miller*,[3] Torres nonetheless asserts: (1) the statute's provision for lifetime parole violates the prohibition against *ex post facto* laws; and, (2) mandatory minimum sentences, which apply a "one-size-fits-all" sentencing scheme to juveniles offenders, and the imposition of lifetime parole are unconstitutional. We address each of these arguments in turn.

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[3]Although Torres did not acknowledge *Vera*'s application to her arguments in her petition below, in our discretion we address the related arguments on review. We additionally note that counsel's sole reference to *Vera* in her petition below followed an improper citation to the unpublished memorandum decision of Torres's codefendant, which counsel again cites on review. We admonish counsel to read Rule 111(c), Ariz. R. Sup. Ct., which sets forth the limited circumstances in which an unpublished memorandum decision may be cited.

¶7 "The [United States] Constitution prohibits both federal and state governments from enacting any '*ex post facto* Law.'" *Peugh v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2072, 2081 (2013), *quoting* U.S. Const. art. I, § 9, cl. 3 & § 10; *see also* Ariz. Const. art. II, § 25; *State v. Noble*, 171 Ariz. 171, 173 n.4, 829 P.2d 1217, 1219 n.4 (1992) (concluding analysis of prohibition "under both constitutions is the same"). This prohibition encompasses any law "'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,'" *Peugh*, ___ U.S. at ___, 133 S. Ct. at 2078, *quoting Calder v. Bull*, 3 U.S. 386, 390 (1798) (emphasis omitted in *Peugh*), "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). "The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Id.* at 29 n.10.

¶8 In *Vera*, we concluded § 13-716 did "not alter [a defendant's] penalty, create an additional penalty, or change the sentence imposed" but instead was remedial in nature, affecting only the future implementation of a juvenile's sentence by establishing her eligibility for parole after her minimum term had been served. 235 Ariz. 571, ¶ 21, 334 P.3d at 759. For similar reasons, we concluded the legislature's enactment of § 13-716 had not violated the separation of powers doctrine. *Id.* ¶ 22. And, based on the same analysis, it does not violate the prohibition against *ex post facto* laws. *See State v. Carver*, 227 Ariz. 438, n.10, 258 P.3d 256, 262 n.10 (App. 2011) (stating "*ex post facto* analysis is substantially similar to retroactivity analysis").

¶9 Torres additionally argues that, because the statute's requirement of lifetime parole "arguably takes away a juvenile offender's vested right to petition the Board [of Executive Clemency] for an absolute discharge from parole," and "appears" to remove any hope of commutation, it constitutes an *ex post facto* violation, a claim she contends the trial court improperly determined was "not ripe" for consideration. Notably, when Torres committed her

offense in 1994, relevant statutes prohibited her release on parole;[4] the enactment of § 13-716, therefore, appears to have provided her a new benefit of parole eligibility.

¶10 In any event, we need not resolve whether § 13-716 forecloses Torres's ability to apply for absolute discharge from parole in the future pursuant to A.R.S. § 31-414, and we express no opinion on the issue. Assuming, without deciding, Torres is correct that she will never be able to apply for absolute discharge from parole, this fact still would not render § 13-716 unconstitutional. In *Miller*, the Supreme Court did not address the constitutionally permissible duration of parole for a juvenile sentenced to life imprisonment with the possibility of early release on parole. Rather, it held that Alabama and Arkansas statutes violated the Eighth Amendment by mandating sentences of life imprisonment without parole for juvenile offenders, and it remanded the cases to those state courts for further proceedings. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2475.

¶11 Moreover, the Supreme Court has rejected the proposition that a judicial declaration of a statute's constitutional infirmity, issued after the commission of an offense, renders the statute a nullity for the purpose of considering whether a subsequent remedial statute violates the *Ex Post Facto* Clause. *See Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). In *Dobbert*, the defendant had argued "that at the time he murdered his children there was no death penalty 'in effect' in Florida . . . because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid." *Id.* at 297. The Court stated such "sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would in the future, withstand constitutional attack, . . . its existence on the statute books provided fair warning" of applicable penalties. *Id.* Similarly, when Torres committed the underlying offense, existing

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[4]Offenders who committed offenses before January 1, 1994, *see* A.R.S. § 41-1604.09(I)(1), may be considered for such a discharge. *See* A.R.S. § 31-414.

statutes absolutely prohibited her release on parole. *See* 1993 Ariz. Sess. Laws, ch. 255, § 88. Section 13-716, which establishes Torres's eligibility for lifetime parole after her minimum sentence is served, does not impose an "additional burden" greater than the law in effect when she committed her offense, and its enactment did not violate *ex post facto* principles.

¶12 Additionally, asserting the sole "claim" she raised was that her sentence violates *Miller*, Torres maintains her "arguments regarding the constitutional inadequacy of a mandatory minimum term of incarceration and mandatory lifetime parole are not *claims*" but instead "deal with the inadequacy of § 13-716 as a remedy for the *Miller* violation." Therefore, Torres contends the trial court abused its discretion by finding these matters precluded. To the extent we understand Torres's novel assertion that her arguments do not constitute "claims" subject to preclusion, we reject it.[5]

¶13 And, to the extent Torres is arguing *Miller* was a significant change in the law under Rule 32.1(g) that invalidated the imposition of mandatory minimum sentences for juvenile offenders, she is mistaken. As the trial court correctly noted, "[t]he *Miller* Court did not declare mandatory minimum terms . . . unconstitutional." Rather, the Supreme Court held only that a mandatory life sentence violated the Eighth Amendment. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469. Nor are we willing to extend *Miller*'s holding further than the Court was willing to extend it. In addition, as previously noted, in *Vera*, we determined that § 13-716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. 235 Ariz. 571, ¶ 27, 334 P.3d at 761. Furthermore, Torres does not assert she was not provided with individualized consideration at sentencing, as *Miller* requires, nor would the record support such a finding. *See Miller*, ___ U.S. at ___, 132 S. Ct. at 2467. Thus, *Miller* is not a

[5]In her reply to the state's response to her petition below, Torres argued the state's reliance on *Vera* was misplaced because that case only rejected two "[o]f the seven basic points/arguments in the Petition," arguments she now maintains are not actual "claims."

"significant change in the law" that would afford relief on Torres's claim that mandatory minimum sentences are unconstitutional. And, because she could have raised this argument previously, and she identifies no other basis for an exception to preclusion under Rule 32.2(b), the court correctly found it precluded. *See* Ariz. R. Crim. P. 32.2(a)(1), (3).

¶14 Finally, to the extent Torres asserts that she could not have challenged the lifetime parole provision of § 13-716 before the statute was enacted, and that the trial court thus improperly found that claim precluded, we agree. However, other than a brief reference to "Rule 32.1(g)" in the first paragraph of her petition below and in her reply to the state's response thereto, Torres did not expressly argue that *Miller* is a significant change in the law that excepts her claim from preclusion, nor does she do so on review, although it appears her argument is based on that rule. In any event, because § 13-716 now affords Torres an opportunity for release on parole after twenty-five years have been served, her *Miller* claim is moot, and we thus find no abuse of discretion in the court's dismissal of that claim. *Cf. State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) (appellate court must uphold trial court's ruling "if legally correct for any reason").

¶15 For all of these reasons, we grant review but deny relief.