IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GREGORY NIDEZ VALENCIA,
Appellant.

No. 2 CA-CR 2019-0207
Filed August 14, 2020

Appeal from the Superior Court in Pima County
No. CR051447
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

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By Adam N. Bleier and Steven P. Sherick
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Gregory Valencia appeals the sentence resulting from his first-degree-murder conviction, arguing it violates both the federal and Arizona constitutions because it is based on an illegal ex post facto law, and also because it constitutes cruel and unusual punishment. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In 1995, when Valencia was seventeen, he and an accomplice were attempting to steal a bicycle from a residence when its owner confronted them and Valencia shot and killed him. *State v. Valencia*, 241 Ariz. 206, ¶¶ 2-3 (2016); *see also State v. Valencia*, 2 CA-CR 96-0652, ¶ 2 (Ariz. App. Apr. 30, 1998) (mem. decision). At Valencia's sentencing for first-degree murder, the trial court expressly considered his age, observing "[h]e was just barely [seventeen] when he did this murder." But noting Valencia's "lengthy, intensely serious juvenile history" and his inability "to rehabilitate himself through [the juvenile court] system before this crime was done," the court believed Valencia represented "a continuing threat to the community" and "the only way to protect the public" was a natural life sentence of imprisonment, which the court imposed.

¶3 After the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and the initiation of post-conviction proceedings by Valencia and other juveniles sentenced to life in prison, we determined, and the Arizona Supreme Court agreed, that Valencia had presented a colorable claim that his natural life sentence was unconstitutional and he was entitled to an evidentiary hearing. *Valencia*, 241 Ariz. 206, ¶ 18; *State v. Valencia*, 239 Ariz. 255 (App. 2016), *vacated*, 241 Ariz. 206, ¶ 20. In June 2019, following remand by our supreme court, the trial court conducted a hearing, applied the factors described in *Miller*, *Montgomery*, and *Valencia*, and found Valencia had met his burden of establishing that his crime reflected "transient immaturity" rather than "irreparable corruption." Valencia was thereafter

resentenced to life with the possibility of parole after twenty-five years. We have jurisdiction over Valencia's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(4).

Ex Post Facto Law

¶4 Valencia argues that his life sentence with the possibility of parole after twenty-five years "constitutes an illegal sentence," because A.R.S. § 13-716 is retroactive, and therefore, an unconstitutional ex post facto law. The state counters that this court has repeatedly held to the contrary, determining § 13-716 is not an impermissible ex post facto law, and that Valencia fails to demonstrate why we should "depart from the principle of *stare decisis*." We review questions of statutory and constitutional interpretation de novo. *State ex rel. Thomas v. Klein*, 214 Ariz. 205, ¶ 5 (App. 2007).

¶5 When Valencia committed first-degree murder, he was subject to the following sentence:

> A person guilty of first degree murder . . . shall suffer death or imprisonment in the custody of the state department of corrections for life . . . . If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

1993 Ariz. Sess. Laws, ch. 153, § 1. In its determination, the trial court was also required to consider the defendant's age as a possible mitigating circumstance. *Id.* Thus, at the time of the murder, Valencia faced two possible sentences, "natural life," and "life" with the possibility of parole after twenty-five years. *See State v. Vera*, 235 Ariz. 571, ¶ 15 (App. 2014); *see also Roper v. Simmons*, 543 U.S. 551, 578 (2005) (invalidating death penalty for all juvenile offenders under eighteen). However, "[b]ecause the Arizona legislature had eliminated parole for all offenders who committed offenses

after January 1, 1994," "a sentence of life imprisonment without parole was, in effect, mandatory" for juvenile homicide offenders. *Vera*, 235 Ariz. 571, ¶ 17.

¶6 Later, in *Miller*, the Supreme Court held that before sentencing juvenile offenders to a lifetime sentence without the possibility of parole, courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 479-80. The Arizona legislature subsequently reestablished parole for all persons "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." § 13-716. Under the new system of parole, such offenders were required to "remain on parole for the remainder of the person's life," thus restoring the possibility of parole for juvenile offenders sentenced to life imprisonment. *Id.*

¶7 On appeal, Valencia argues § 13-716 "is an unlawful ex post facto law" because it imposes a more severe sentence than the one initially annexed to his crime. He acknowledges, however, that we have repeatedly held § 13-716 "affects only the implementation of [a defendant's life] sentence by establishing his eligibility for parole after he has served a minimum term of twenty-five years," and that the statute affects future events, rendering it remedial rather than retroactive. *Vera*, 235 Ariz. 571, ¶ 21; *see also State v. Healer*, 246 Ariz. 441, ¶ 9 (App. 2019) (holding that *Vera* "remains controlling authority"). Further, § 13-716 does not "impair a vested right," but instead "affords an additional opportunity for release for juveniles sentenced to life imprisonment, available only after their mandatory minimum terms have been served." *Vera*, 235 Ariz. 571, ¶ 22; *see Healer*, 246 Ariz. 441, n.2 (expressing skepticism that § 13-716 disadvantages a resentenced juvenile defendant).

¶8 Valencia nevertheless suggests that we abandon our previous holdings in *Vera* and *Healer* that § 13-716 is not an unlawful ex post facto law, circularly asserting they were wrongly decided because § 13-716 is an "unconstitutional retroactive law." The state objects on grounds of stare decisis. Although the doctrine of stare decisis is one "of persuasion," and "not a rigid requirement," any departure from settled precedent requires a "'special justification'" that is more than an assertion "that a prior case was wrongly decided." *State v. Hickman*, 205 Ariz. 192, ¶ 37 (2003) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Accordingly, stare decisis "is entitled to great weight and should be adhered to unless the reasons of the prior decisions have ceased to exist or the prior decision was clearly

erroneous or manifestly wrong." *White v. Bateman*, 89 Ariz. 110, 113 (1961). Valencia provides no argument, nor is there any reason to conclude, that either *Vera* or *Healer* was clearly erroneous or that the reasons for their decision have ceased to exist. *See id.* Thus, because both cases remain controlling, § 13-716 is not an impermissible ex post facto law, and Valencia's sentence is not infirm on that basis.

¶9 Valencia further argues that as a result of *Miller*, his "sentence was vacated [and] there remained no lawful sentence for first-degree murder that could have been imposed." But, as noted above, at the time he committed first-degree murder, Valencia faced two possible sentences: natural life and life with the possibility of parole. *See* 1993 Ariz. Sess. Laws, ch. 153, § 1; *Valencia*, 241 Ariz. 206, ¶ 10. Thus, both before and after *Miller* the applicable sentencing statute provided that Valencia could be sentenced to life with the opportunity for release from confinement after serving twenty-five years' imprisonment, *see* 1993 Ariz. Sess. Laws, ch. 153, § 1, which included parole after the passage of § 13-716, *see State v. Randles*, 235 Ariz. 547, ¶¶ 6, 9-10 (App. 2014).

¶10 Valencia additionally contends that parole conditions under § 13-716 are "actually harsher than what exists for all other eligible offenders" because the statute requires that juveniles remain on parole for the remainder of their lives. The state responds, and we agree, that Valencia essentially takes issue with the legislature "prescrib[ing] a more onerous punishment for those convicted of first-degree murder than for those convicted of less serious offenses." And notwithstanding that our legislature is entitled to prescribe harsher punishments for more serious offenses, *see State v. Marquez*, 127 Ariz. 98, 103 (1980) (defining crimes and sanctions is a legislative function), Valencia's argument ignores the fact that parole did not exist for any offenses at the time he committed first-degree murder, *see* 1993 Ariz. Sess. Laws, ch. 255, § 88 (regarding former § 41-1604.09(I), stating parole applies only to felony offenses committed before January 1, 1994). By reestablishing a parole system for juvenile homicide offenders, the legislature enacted a system of punishment that was less harsh than the existing system for similarly situated non-juvenile homicide offenders.

¶11 Because this court has previously held in *Vera* and *Healer* that § 13-716 is not an ex post facto law, and because Valencia has not provided any compelling reason to depart from those precedents, we find no error in Valencia's sentence pursuant to § 13-716.

Cruel and Unusual Punishment

¶12 The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. at 560). This right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id.* (quoting *Roper*, 543 U.S. at 560) (internal quotation marks omitted). Valencia argues his new sentence is unconstitutional because "Arizona's vague parole procedures allow a juvenile offender to potentially be incarcerated for life or be under a sentence of life time parole even if it has been determined that the crime was the product of transient immaturity."[1] He maintains that *Miller* requires a court to specifically consider a defendant's youth in determining his eligibility or ineligibility for parole. The state counters that Valencia's sentence mirrors the type of sentence and statutory scheme expressly endorsed by the Supreme Court in *Montgomery*, 136 S. Ct. at 736. We review constitutional issues de novo. *State v. Nordstrom*, 230 Ariz. 110, ¶ 17 (2012).

¶13 We note that *Miller* does not require a court to account for a defendant's youth at all when determining whether he is eligible for parole; only that a sentencer "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. at 734. A mandatory life sentence without parole for juvenile offenders is unconstitutional, in part, because it "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 567 U.S. at 478. "A State may [therefore] remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," because it "ensures that juveniles whose crimes reflected only transient

[1]Valencia alternatively argues we should extend the protections of the Arizona Constitution beyond those of the Eighth Amendment. But as we have repeatedly noted, *see Healer*, 246 Ariz. 441, ¶ 12; *State v. Florez*, 241 Ariz. 121, n.10 (App. 2016); *State v. McPherson*, 228 Ariz. 557, ¶ 16 (App. 2012), our supreme court has declined to do so, *see State v. Davis*, 206 Ariz. 377, ¶ 12 (2003) (finding no "compelling reason to interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution"). And because this court is bound by our supreme court's decisions, "[a]ny change in that approach would be in the exclusive purview of that court." *McPherson*, 228 Ariz. 557, ¶ 16.

immaturity—and who have since matured—will not be forced to serve a disproportionate sentence." *Montgomery*, 136 S. Ct. at 736.

¶14 In contrast, "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences." *Id.* Opportunity for release is reserved only for "those who demonstrate . . . that children who commit even heinous crimes are capable of change." *Id.* Accordingly, while a juvenile homicide offender's age is material to whether or not he receives life with the possibility of parole, he must subsequently demonstrate sufficient rehabilitation and reformation to secure release from confinement and show that he has developed beyond the immaturity of youth that led him to commit homicide. *See id.* at 736-37 (juvenile offenders who fail to show ability to reform will continue to serve life sentences; those who demonstrate transient immaturity and rehabilitation may be considered for parole); *Miller*, 567 U.S. at 477-78. Because the trial court at sentencing considered Valencia's youth at the time he committed the murder, his sentence of life with the possibility of parole after twenty-five years' imprisonment does not constitute cruel or unusual punishment.

Disposition

¶15 For the foregoing reasons, Valencia's sentence is affirmed.