IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

JOHN BERNARD JOHNSON,
*Petitioner*.

No. 2 CA-CR 2022-0048-PR
Filed June 8, 2022

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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NOT FOR PUBLICATION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. 31.19(e).

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Petition for Review from the Superior Court in Pima County
No. CR041327
The Honorable Renee T. Bennett, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Arizona Capital Representation Project
By Amy Armstrong, Director/Staff Counsel and
Sam Kooistra, Staff Counsel
*Counsel for Petitioner*

**MEMORANDUM DECISION**

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

E S P I N O S A, Judge:

**¶1** John Johnson seeks review of the trial court's order dismissing his petition and amended petition for post-conviction relief,[1] filed pursuant to Rule 32, Ariz. R. Crim. P., and its order denying his motion for rehearing. Johnson argues that his de facto life-without-parole sentence (LWOP) is unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012), we should not follow our supreme court's holding in *State v. Soto-Fong*, 250 Ariz. 1 (2020), and the imposition of the felony murder rule to a then juvenile like him is unconstitutional. He also contends that his sentence is disproportionate to the sentence of his co-defendant, Daniel Landrith. We will not disturb a trial court's order in a Rule 32 proceeding absent an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Johnson has shown no such abuse here.

**¶2** Johnson was convicted after a jury trial of first-degree murder and kidnapping, offenses he committed in 1993 when he was seventeen years old. The trial court sentenced him to life imprisonment for the murder and an aggravated, consecutive term of twenty-one years for the kidnapping.[2] We affirmed Johnson's convictions and sentences on appeal. *State v. Johnson*, No. 2 CA-CR 94-0049 (Ariz. App. Mar. 31, 1995) (mem. decision). Johnson sought but was denied post-conviction relief multiple times between 1996 and 2012; we granted review but denied relief on his petitions for review in two of those proceedings. *State v. Johnson*, No. 2 CA-

[1] Johnson filed his Rule 32 petition in 2019, followed by a supplemental brief and an amended Rule 32 petition in 2021. His Rule 32 proceeding was twice stayed, first while the petition for review was pending in our supreme court in *State v. Helm*, 245 Ariz. 560 (App. 2018), and subsequently pending the mandate of that court's ruling in *State v. Soto-Fong*, 250 Ariz. 1 (2020).

[2] Although it is not part of the record before us, it appears Johnson has been granted parole on the murder charge.

CR 2013-0202-PR (Ariz. App. Sept. 11, 2013) (mem. decision); *State v. Johnson*, No. 2 CA-CR 97-0057-PR (Ariz. App. Nov. 25, 1997) (mem. decision).

**¶3** In 2015, Johnson filed a successive Rule 32 petition arguing *Miller* was a significant change in the law rendering his life sentence with the possibility of release in twenty-five years unconstitutional. The trial court dismissed his petition, acknowledging that *Miller* held mandatory sentences of life without the possibility of parole are unconstitutional for juveniles, but finding that case inapplicable because Johnson was sentenced to life *with* the possibility of parole. *See Miller*, 567 U.S. at 465. Johnson did not file a petition for review of that ruling.

**¶4** In 2017, Johnson initiated the post-conviction proceeding now before us. Basing his claims on Rule 32.1(c), (g), and (h), he argued that *Miller* constitutes a significant change in the law that applies to his de facto sentence of LWOP, which he maintained is unconstitutional. He asserted *Soto-Fong* should not be followed because it was wrongly decided and is contrary to binding precedent set forth in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller*, and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). He also argued that applying the felony murder rule to juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment and due process, and contended that his sentence is disproportionate to Landrith's resentence,[3] rendering it arbitrary and capricious and thus unlawful. This petition for review followed the trial court's summary dismissal of Johnson's petitions and its denial of his motion for rehearing.[4]

**De Facto Sentence of Life Without Parole**

**¶5** On review, Johnson argues because he was a juvenile when he committed the offenses, his sentence, which he maintains is a de facto sentence of LWOP, is not authorized by law under Rule 32.1(c), and is

[3]Johnson and Landrith initially received the same sentence. The original sentencing judge, who is not the Rule 32 judge in this proceeding, denied Johnson's Rule 32 claim based on *Miller* in 2015, granted post-conviction relief to Landrith in 2016, apparently based on his *Miller* claim, and in 2017 reduced Landrith's sentence for kidnapping from twenty-one years to a mitigated term of seven years.

[4]The trial court found Johnson's 2017 petition was not precluded, "to the extent [it] relie[d] on caselaw developed after" the denial of his 2015 petition based on *Miller*.

subject to constitutional scrutiny under *Graham* and *Miller*. He contends the court erroneously relied on *Soto-Fong* in denying his claim, which he maintains was wrongly decided and is contrary to controlling United States Supreme Court precedent, asserting we are "not free" to follow that case. He requests a new trial on his murder conviction or that he be resentenced.

**¶6** Consistent with our decision in *State v. Helm*, 245 Ariz. 560, ¶ 8 (App. 2018), our supreme court determined in *Soto-Fong* that *Graham* and *Miller* are inapplicable to defendants, like Johnson, who received a parole-eligible life sentence, irrespective of whether that defendant had been sentenced to consecutive prison terms for other offenses.[5] 250 Ariz. 1, ¶¶ 2, 4, 28, 31, 47, 49, 50. Although Johnson argues *Soto-Fong* was incorrectly decided, we have no authority to reach that question. *See State v. Smyers*, 207 Ariz. 314, n.4 (2004) (court of appeals cannot disregard established Arizona Supreme Court precedent). Rather, we must follow our supreme court's decisions, particularly in a case like this, where the court ruled based on decisions issued by the United States Supreme Court before *Soto-Fong*. *See State v. Zamora*, 220 Ariz. 63, n.7 (App. 2009) ("On questions of federal constitutional law, we are bound by decisions of our supreme court absent a subsequent decision of the United States Supreme Court on the same subject."). We thus find no abuse of discretion by the trial court's dismissal of this claim and do not address it further.

**Felony Murder**

**¶7** Basing his argument on a significant change in the law pursuant to Rule 32.1(g), Johnson contends the trial court erroneously dismissed his claim that felony murder cannot constitutionally be applied to juvenile offenders, asserting it violates the Eighth Amendment and due process. He maintains applying felony murder to a then juvenile like him violates those very principles, which he claims are "squarely a part of *Miller*'s holding as its prohibition on lifetime incarceration for most juvenile offenders."

**¶8** However, as the trial court correctly observed in its ruling, none of the cases Johnson cited for this argument, including *Miller*, addressed whether the felony murder rule may be constitutionally applied to juveniles. Notably, the court also found that, "*Miller* involved a juvenile offender convicted of felony murder." *See* 567 U.S. at 466; *see, e.g., Bear Cloud v. State*, 334 P.3d 132, ¶ 47 (Wyo. 2014) (noting Supreme Court's unwillingness in *Miller*, a felony murder case, to extend Eighth

[5]*But see Helm*, 245 Ariz. 560, ¶¶ 13-22 (Eckerstrom, J., dissenting).

Amendment's protections to accomplices); *see also State v. Jefferson*, 798 S.E.2d 121, 121-22, 125-26 (N.C. Ct. App. 2017) (mandatory life sentence with possibility of parole after twenty-five years not unconstitutional as applied to defendant convicted of murder under felony murder rule for crime committed when he was fifteen years old). In light of its ruling dismissing Johnson's felony murder argument, the court likewise rejected his derivative claims based on Rule 32.1(c) and (h). Because Johnson failed to establish that juveniles are exempt from prosecution for felony murder in Arizona or to persuade us that the court erred in so finding, we find no abuse of discretion in the court's summary dismissal of this claim.

**Disparate Sentences**

**¶9** Johnson argues his twenty-one year sentence for kidnaping is disproportionate to Landrith's resentence of seven years for the same offense, pointing out that he was less culpable than Landrith in the commission of the murder, thus rendering his harsher sentence arbitrary and capricious. He maintains Landrith's resentencing in 2017 rendered his sentence unlawful because it not only created a disparity in the length of their sentences, but it was not considered as a mitigating factor at sentencing, an error he contends the trial court would have corrected had it not mistakenly believed it lacked jurisdiction to do so. *See State v. Carlson*, 202 Ariz. 570, ¶ 65 (2002) (unexplained sentencing disparity between defendant and accomplice may be mitigating circumstance); *see also State v. Schurz*, 176 Ariz. 46, 57 (1993) (disparity in sentences is mitigating only when not adequately explained).

**¶10** Johnson further asserts, "[t]he disparity is not that [he] was denied relief that was granted to Landrith, but rather the arbitrary disparity in [Johnson's] sentence created after Landrith's resentencing." He contends the "legally significant fact here is that [Landrith's] sentence was reduced while [Johnson's] is unchanged and lengthier," giving "rise to an unexplained (and unexplainable) disparity between [Landrith's] sentence and [Johnson's], which renders the latter arbitrary, disproportionate, and therefore unauthorized by law." Relying on our ruling in *State v. Szpyrka*, 223 Ariz. 390, ¶¶ 2-4 (App. 2010) (defendant entitled to post-conviction relief where prior conviction supporting sentence enhancement reversed on appeal), Johnson contends that a lawfully imposed sentence "can later become unlawful due to an intervening judicial act and therefore present grounds for relief under Rule 32.1(c)."

**¶11** In its ruling, the trial court stated that, "[f]actually, Johnson presents a compelling case for a reduced sentence," adding that "the

concepts of fairness and equal treatment of similarly situated defendants support reducing Johnson's consecutive sentence, consistent with Landrith's sentence."[6] The court nonetheless reasoned, "[w]ith the benefit of hindsight, it appears neither Johnson nor Landrith were entitled to relief under the *Miller* line of cases," adding that it did not have the authority to modify Johnson's sentence "simply because it seems like the right thing to do," and that Johnson's argument "stands on shaky ground." Noting it had no authority to change a sentence lawfully imposed, like Johnson's, *see State v. Suniga*, 145 Ariz. 389, 393 (App. 1985), the court concluded it had no jurisdiction to modify his sentence absent a cognizable ground under Rule 32, which it found lacking.

**¶12** The trial court further explained:

> In 1994, the trial judge sentenced Johnson and Landrith to identical sentences. There was no disparity. An abuse of discretion cannot be predicated on failing to give weight to a disparity that did not yet exist. . . .
>
> Johnson's sentence was not fundamentally unfair, inappropriately disproportionate or a denial of equal protection, and was affirmed on appeal. It was only after Landrith was resentenced in 2017, that the sentences became disparate.
>
> We agree with counsel that a later intervening event can result in an earl[ier] sentence becoming unauthorized. . . . However, the intervening event—resentencing of Landrith—did not do so in this case.
>
> The disparity here is in the grant and denial of post-conviction relief, despite the same operative facts and applicable law. Johnson did not contest the court's 201[5] denial of his *Miller* request for post-conviction relief. No petition for review was filed and the deadline therefor has long since passed. Further, such a claim would likely have failed on the merits.

[6]As Johnson points out, the state agreed that the disparity between Johnson's and Landrith's sentences is "unjust" and that he should be resentenced.

. . . .

> In sum, Landrith was granted post-conviction relief under *Miller* in the form of a reduction in sentence, for which he was likely not entitled. That does not provide a legal basis for modifying Johnson's sentence or granting him post-conviction relief.

**¶13** Disparity in sentencing is generally only considered between co-defendants in a capital case, *see Schurz*, 176 Ariz. at 57, but even assuming without deciding that such a rule applies to non-capital cases, Johnson has failed to sustain his burden to show the trial court abused its discretion in dismissing his claim. Although an unexplained sentencing disparity between a defendant and an accomplice may be a mitigating circumstance, *Carlson*, 202 Ariz. 570, ¶ 65, as the court noted, no such disparity existed at the time of sentencing here, *see State v. Forde*, 233 Ariz. 543, ¶ 136 (2014) (no abuse of discretion for failure to consider sentencing disparity that did not exist at time of sentencing). Rule 32 does not contemplate intervening events other than those defined in the rule, *see e.g.*, Rule 32.1(e) and (g), which do not apply here. Nor can Johnson collaterally attack the court's 2015 denial of post-conviction relief on his *Miller* claim at this point. *See* Ariz. R. Crim. P. 32.2(a)(2) (defendant precluded from raising claims previously adjudicated on the merits in post-conviction proceedings). As the court correctly noted, he did not file a petition for review from the dismissal of that claim, nor does the trial court here have the authority to override that ruling. *See State v. McCann*, 200 Ariz. 27, ¶¶ 1, 16 (2001) (presumption of regularity attaches to prior final judgments). And importantly, as previously noted, Johnson has not shown that he is entitled to relief under *Miller*, despite his claim that *Soto-Fong* was wrongly decided and that we should not follow it. As the court essentially concluded, Johnson's claim simply is not cognizable under Rule 32.

**¶14** Finally, to the extent Johnson asserts Landrith's resentencing was newly discovered evidence under Rule 32.1(e), we conclude the trial court correctly found it did not satisfy the elements of such a claim, and thus do not address it further. *See State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016) (one requirement of newly discovered evidence under Rule 32.1(e) is that "the evidence must appear on its face to have existed at the time of trial but be discovered after trial").

**Disposition**

**¶15** Although we grant review, we deny relief.