IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA ASTON,
Petitioner.

No. 2 CA-CR 2022-0167-PR
Filed November 20, 2023

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NOT FOR PUBLICATION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).

Petition for Review from the Superior Court in Maricopa County
No. CR2004006474001
The Honorable Suzanne E. Cohen, Judge

REVIEW DENIED

COUNSEL

Rachel H. Mitchell, Maricopa County Attorney
By Julie A. Done, Deputy County Attorney, Phoenix
Counsel for Respondent

Pamela Nicholson PLC, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Judge Kelly authored the decision of the Court, in which Presiding Judge Brearcliffe and Judge Eckerstrom concurred.

K E L L Y, Judge:

¶1 Joshua Aston seeks review of the trial court's order vacating the resentencing ordered by this court in Aston's previous post-conviction relief proceeding. Because Aston's remedy is by appeal, we deny review.

¶2 After a jury trial, Aston was convicted of first-degree murder and conspiracy to commit first-degree murder, offenses he committed when he was sixteen years old. The trial court sentenced him to a term of natural life for murder and life with the possibility of parole after twenty-five years for conspiracy. We affirmed his convictions and sentences on appeal. *State v. Aston*, No. 1 CA-CR 07-0409 (Ariz. App. June 23, 2009) (mem. decision).

¶3 Aston sought post-conviction relief under *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibits mandatory sentences of life without parole for juvenile offenders convicted of homicide, and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which made that ruling retroactive. *See State v. Purcell*, ___ Ariz. ___, ¶ 3, 526 P.3d 146, 147 (2023). Citing *State v. Valencia* ("*Valencia I*"), 239 Ariz. 255 (App. 2016), *vacated*, ("*Valencia II*"), 241 Ariz. 206 (2016), this court determined the trial court's sentencing assessment "did not include a finding that was tantamount to [the required] determination that this was among the rare circumstances in which the defendant's permanent incorrigibility warranted a natural-life term."

¶4 In *Valencia I*, this court determined that pursuant to *Miller* and *Montgomery*, a juvenile offender could not be sentenced to a natural life prison term "unless the juvenile's offenses reflect permanent incorrigibility." 239 Ariz. 255, ¶¶ 15, 17. Because that apparent standard was "heretofore unknown," we determined that parties "should be given the opportunity to present evidence relevant to that standard." *Id.* ¶ 16. We vacated Aston's natural life sentence for first-degree murder and remanded the case for Aston to be resentenced. *State v. Aston*, No. 2 CA-CR 2016-0201-PR (Ariz. App. July 20, 2016) (mem. decision). Our supreme court later largely confirmed the conclusion we reached in *Valencia I*, holding that

juveniles sentenced to life without parole were entitled to an evidentiary hearing to "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia II*, 241 Ariz. 206, ¶ 18.

¶5 While Aston's resentencing was pending, the United States Supreme Court decided *Jones v. Mississippi*, 593 U.S. ___, 141 S. Ct. 1307 (2021). There, the Court clarified that a natural life sentence for a juvenile is constitutional "so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." *Id.* at 1314 (quoting *Miller*, 567 U.S. at 476). The Court further clarified that although a sentencing court was required to consider a juvenile offender's "youth and attendant characteristics" before imposing a sentence of life without parole, it was not required to specifically find the juvenile was permanently incorrigible. *Id.* at 1314-15 (quoting *Miller*, 567 U.S. at 483). Citing *Jones*, the state moved to vacate Aston's resentencing. The trial court granted the state's motion, and this petition for review followed.

¶6 While Aston's petition was pending, our supreme court decided *State ex rel. Mitchell v. Cooper*, ___ Ariz. ___, 535 P.3d 3 (2023). The court overruled *Valencia II* in light of *Jones*, therefore eliminating *Valencia II*'s rule that juvenile defendants seeking post-conviction relief are entitled to an evidentiary hearing to demonstrate "'that their crimes did not reflect irreparable corruption but instead transient immaturity' when a court has imposed a natural life sentence 'without distinguishing crimes that reflected irreparable corruption rather than the transient immaturity of youth.'" *Id.* ¶ 47, 535 P.3d at 14-15 (quoting *Valencia II*, 241 Ariz. 206, ¶¶ 15-18). We directed the parties to file supplemental memoranda addressing the effect, if any, of *Cooper* on the issues raised in Aston's petition for review.

¶7 In its supplemental memorandum, the state asserts we should "deny relief in this case" but vacate our previous decision in which we vacated Aston's natural life sentence, thereby reinstating that sentence. Aston asserts that, because his sentence has been vacated and his post-conviction proceeding has ended, "[t]he only way to resolve the matter is to proceed with resentencing."

¶8 However, pursuant to our supreme court's recent decision in *Purcell*, ___ Ariz. ___, 526 P.3d 146, we may neither vacate our previous decision nor direct that Aston be resentenced. The trial court's order vacating Aston's resentencing is not properly before us and we are instead required to deny review.

¶9 In *Purcell*, the two defendants were situated exactly as Aston is here—their natural life terms were vacated and they were set to be resentenced, but their resentencings were vacated because the trial court determined *Jones* had effectively overruled *Valencia II*. *Id.* ¶¶ 5-8, 16, 526 P.3d at 148-49. Their subsequent appeals, however, were dismissed for lack of jurisdiction, with the court of appeals reasoning that review was proper only under Rule 32. *Id.* ¶ 9, 526 P.3d at 148. The supreme court disagreed, reasoning that, because the defendants had "secured full relief" in their post-conviction proceeding following appellate mandates, they were "restored to the status of convicted but unsentenced defendants." *Id.* ¶ 16, 526 P.3d at 149. And, the court noted, the trial court's decision to vacate the resentencing in light of *Jones* was "a decision on the merits" that "restor[ed]" their prior sentence. *Id.* ¶ 18, 526 P.3d at 149. Thus, the court concluded, the order vacating the resentencings was appealable pursuant to A.R.S. § 13-4033(A)(3). *Id.* ¶ 19, 526 P.3d at 150. Aston, like the defendants in *Purcell*, must seek review by appeal.[1]

¶10 We deny review.

[1]Like the defendants in *Purcell*, Aston initially sought review of the trial court's order by appeal. That appeal was dismissed for lack of jurisdiction. Aston is free to seek reinstatement of that appeal.