NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

BENJAMIN BRUCE CANNON, *Petitioner*.

No. 1 CA-CR 14-0498 PRPC
FILED 7-14-2016

Petition for Review from the Superior Court in Maricopa County
No. CR2008-031252-002 DT
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin, Mikel Steinfeld
Counsel for Petitioner

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 Benjamin Bruce Cannon petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and for the following reasons grant review but deny relief. We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c) and A.R.S. § 13–4239(C).

¶2 Following a jury trial in 2010, Cannon was convicted of first-degree murder, armed robbery, theft of means of transportation, and arson for offenses he committed when he was fifteen years old. *See State v. Cannon*, 1 CA-CR 10-0052, 2011 WL 797444 (Ariz. App. Mar. 8, 2011) (mem. decision). Cannon was sentenced to concurrent prison terms, the longest of which was for the first-degree murder conviction: life with the possibility of release after twenty-five years.

¶3 While the applicable sentencing statute provided for the possibility of parole after twenty-five years, the Legislature abolished parole in 1993 when it amended A.R.S. § 41–1604.06. *See* A.R.S. § 13–751(A) (sentences for first-degree murder); 1993 Ariz. Sess. Laws, ch. 255, § 86 (1st Reg. Sess.) (amending A.R.S. § 41–1604.06). Therefore, at the time the trial court sentenced Cannon, the only way Cannon could obtain release after twenty-five years was through executive clemency or commutation of his sentence. *See* A.R.S. §§ 31–402(C) (clemency); 31–443 (commutation). A sentencing scheme that abolishes parole for life sentences and provides for release based only on executive clemency or commutation does not provide a meaningful opportunity for release from a life sentence, however. *See Graham v. Florida*, 560 U.S. 48, 57 (2010).

¶4 Cannon filed a successive notice of post-conviction relief in which he challenged his sentence based on the United States Supreme Court's decision in *Miller v. Alabama*, – U.S. –, 132 S. Ct. 2455 (2012). The Supreme Court held that "mandatory life [sentences] without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 2460.

Cannon argued that *Miller* was a significant change in the law that required the trial court to resentence him.

¶5 After consolidating post-conviction proceedings of Cannon and several other defendants who were also seeking relief pursuant to *Miller* and after extensive briefing and a hearing, the trial court denied Cannon's request to be resentenced and denied his Rule 32 petition. The court found that *Miller* applied retroactively and that clemency or commutation of sentence did not provide Cannon with a "meaningful opportunity" for obtaining early release as *Miller* contemplated. *See Miller*, 132 S. Ct. at 2469. But the court found that the Legislature's passage of H.B. 2593, which the Governor had signed just weeks earlier, resolved Cannon's claim. *See* 2014 Ariz. Sess. Laws, ch. 156, §§ 2–3; House Fact Sheet, H.B. 2593, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

¶6 Newly enacted A.R.S. § 13–716 and amended A.R.S. § 41–1604.09(I) establish parole eligibility for juveniles sentenced to life imprisonment. A.R.S. § 13–716 states that "[n]otwithstanding 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." Further, A.R.S. § 41–1604.09(I), which governs parole eligibility certification, states that the certification system applies to a person "who commits a felony offense before January 1, 1994," and a person "who is sentenced to life imprisonment and who is eligible for parole pursuant to § 13–716." Consequently, after oral argument, the trial court denied Cannon relief, but directed the Department of Corrections to set a date on which Cannon was eligible for parole after the statute went into effect.

¶7 In his petition for review before this Court, Cannon contends that the trial court erred by denying him a resentencing at which he could raise issues regarding the application of H.B. 2593. He asserts that he had intended to investigate claims and present these potential issues at a resentencing, but "the trial court plainly refused to consider" them. Cannon urges this Court not to address matters on review that the trial court has not addressed first. Among the issues he would have raised and presented to this Court are that H.B. 2593 was not intended to apply retroactively, its retroactive application violates separation of powers and *ex post facto* principles, and parole availability under the statutes does not satisfy *Miller*.

¶8 This Court has considered and rejected the retroactivity argument and the argument that resentencing is required in *State v. Vera*, 235 Ariz. 571, 576–77 ¶¶ 21–22, 26 & nn.6–7, 334 P.3d 754, 759–61 & nn.6–7 (App. 2014), cert. denied, – U.S. –, 136 S. Ct. 121 (2015). There, we held that the Legislature's enactment of A.R.S. § 13–716 provides "a juvenile sentenced to a twenty-five year to life term with 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" as contemplated by *Miller* and *Graham*. *Id.* at 576 ¶ 18, 334 P.3d at 759 (citing *Graham*, 560 U.S. at 75). We also held that A.R.S. § 13–716 was not a "retroactive statute" because it was a remedial one. *Id*. at 576 ¶ 19, 334 P.3d at 759. We reasoned that the statute served a remedial purpose because it implemented parole eligibility for a juvenile at a point in the future after he completed a minimum sentence of twenty-five years and because it did not alter the juvenile's sentence for first-degree murder, create additional penalty, or change the sentence imposed. *See id*. at 576–77 ¶¶ 19–22, 334 P.3d at 759–60. Cannon has not persuaded this Court that *Vera* is meaningfully distinguishable.

¶9 Further, "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery v. Louisiana*, – U.S. –, 136 S. Ct. 718, 736 (2016). Assuming *arguendo* that Cannon's sentence violated *Miller*, then H.B. 2593 and the resulting statutory changes remedied that violation because they permit "juvenile homicide offenders to be considered for parole[.]" A.R.S. § 13–716. As noted, the Legislature enacted A.R.S. § 13–716 and amended A.R.S. § 41–1604.09(I). 2014 Ariz. Sess. Laws, ch. 156, § 2. Any person sentenced to life imprisonment and who is eligible for parole pursuant to A.R.S. § 13–716 is now expressly subject to the parole eligibility provisions of A.R.S. § 41–1604.09. A.R.S. § 41–1604.09(I). Therefore, Cannon now has a meaningful opportunity to be placed on parole once he completes twenty-five years of his sentence. This remedies any theoretical violation of *Miller*.

¶10 Cannon's *ex post facto* argument is also meritless. He claims that A.R.S. § 13–719 violates the *ex post facto* doctrine because the statute "takes away the vested right to a hearing to be absolutely discharged from parole, instead requiring defendants to remain on parole for the remainder of their lives." But before the effective date of A.R.S. § 13–716, Cannon had no substantive right to parole eligibility; a fortiori, he had no "vested right" to a hearing regarding his absolute discharge from parole.

¶11 Consequently, Cannon has not sustained his burden of establishing that the trial court abused its discretion. Accordingly, although we grant his petition for review, we deny relief.