

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOEY LEE HEALER,
Petitioner.

No. 2 CA-CR 2013-0372-PR
Filed January 28, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR048232

The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

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

Joey L. Healer, Florence
In Propria Persona

STATE v. HEALER
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Joey Healer petitions this court for review of the trial court's order summarily dismissing his untimely notice of 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. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003); *see also State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons stated below, we grant review and relief.

¶2 Healer was convicted after a jury trial of first-degree murder, first-degree burglary, armed robbery, theft by control, resisting arrest, and criminal damage. He was sentenced to natural life for murder and presumptive prison terms for his other offenses. He committed the offenses while he was a juvenile. We affirmed his convictions and sentences on appeal. *State v. Healer*, No. 2 CA-CR 95-0683 (memorandum decision filed Dec. 24, 1996).

¶3 In June 2013, Healer filed a form notice of post-conviction relief stating he was raising a claim that the United States Supreme Court decision in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was a significant change in the law pursuant to Rule 32.1(g). He asserted that, pursuant to *Miller*, "mandatory life without parole sentences for juveniles are unconstitutional."¹ He further stated this was his first post-conviction proceeding and requested that counsel be appointed.

¹Healer also checked a box on the form notice stating he was raising a claim of actual innocence. He did not explain this claim in his notice, nor does he discuss it in his petition for review.

STATE v. HEALER
Decision of the Court

¶4 The trial court summarily dismissed Healer’s notice, concluding *Miller* did not apply to Healer. The court reasoned that *Miller* precluded only mandatory life sentences without parole for those under the age of eighteen at the time of their offenses, but in sentencing Healer the court had discretion whether to impose a sentence of natural life or life without eligibility for release for twenty-five years. This petition for review followed.

¶5 On review, Healer asserts that, pursuant to *Miller*, Arizona’s sentencing scheme for first-degree murder as applied to juveniles is unconstitutional and that *Miller* is retroactively applicable to him. We need not decide the merits of these arguments, however, because the trial court erred in summarily dismissing Healer’s notice of post-conviction relief.

¶6 As we noted above, Healer stated in his notice that this was his first post-conviction proceeding and requested that counsel be appointed. Pursuant to Rule 32.4(c)(2), a defendant is entitled to the appointment of counsel “[u]pon the filing of a timely or first notice” of post-conviction relief. See *Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 11, 15-16, 250 P.3d 551, 554-55 (App. 2011). Thus, because this apparently is Healer’s first post-conviction proceeding, he is entitled to the appointment of counsel despite the fact his notice is patently untimely. See Ariz. R. Crim. P. 32.4(a).

¶7 We recognize that a trial court is not required to appoint counsel before evaluating a defendant’s untimely notice to determine whether it meets the requirements of Rule 32.2(b). *State v. Harden*, 228 Ariz. 131, ¶ 11, 263 P.3d 680, 683 (App. 2011). In *Harden*, the petitioner claimed newly discovered material facts based on his new reading of a probation term he was given at the time of sentencing. *Id.* ¶ 2. The court concluded Rule 32.2(b) does not require appointment of counsel before the trial court can dismiss a “facially non-meritorious notice.” *Id.* ¶ 11. In contrast, Healer’s notice is not burdened by facial invalidity. But, to raise the claim, he is required not only to have provided the court with the “specific exception” permitting him to raise the claim in an untimely proceeding, but also “meritorious reasons . . . substantiating the

STATE v. HEALER
Decision of the Court

claim and indicating why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b).

¶8 The trial court did not determine in its ruling that Healer’s claim could not be raised in an untimely proceeding nor that Healer was somehow dilatory in bringing the claim approximately one year after the Supreme Court decided *Miller*. It instead made a determination that his claim could not be successful—without affording Healer either counsel or the opportunity to make an argument to support his claim.

¶9 We disagree with the trial court’s implicit conclusion that Healer had not “substantiat[ed]” his claim as required by Rule 32.2(b). In *Miller*, the Supreme Court held that mandatory life sentences “without the possibility of parole,” or automatic natural life sentences, are unconstitutional when applied to defendants who were under eighteen years old at the time of their crimes. ___ U.S. at ___, 132 S. Ct. at 2475. Arizona, however, has eliminated parole for those convicted of felony offenses committed after 1993. See A.R.S. § 41-1604.09(I). And the system of earned-release credits currently in place has no immediately apparent application to a defendant like Healer who has been sentenced to life imprisonment. See *Escalanti v. Dep’t of Corr.*, 174 Ariz. 526, 528, 851 P.2d 151, 153 (App. 1993) (“[I]t is impossible to deduct time from an indeterminate denominate—a person’s life.”); see also A.R.S. § 41-1604.07 (governing earned release credits). Thus, the only early release that is potentially available to Healer would appear to be via an application to Arizona’s clemency board. See generally A.R.S. § 31-402.

¶10 In summarily dismissing Healer’s notice, the trial court apparently concluded that any release available under a sentence the court had discretion to impose is sufficiently equivalent to parole to render *Miller* inapplicable.² But we disagree with the trial court that

²At the time of Healer’s offenses, A.R.S. § 13-703 provided for a sentence of death, natural life, or life without eligibility for release “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

STATE v. HEALER
Decision of the Court

Healer's claim is facially insufficient. No published Arizona case has addressed this question or, if *Miller* does apply, whether it is retroactively applicable to defendants like Healer whose convictions were final when *Miller* was decided. See *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) ("A defendant's case becomes final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'"), quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). As illustrated by Healer in his petition for review, these issues are non-trivial and warrant complete legal and factual development. Thus, the trial court was not permitted to summarily dismiss Healer's notice of post-conviction relief and instead was required to appoint him counsel and permit him to file a petition in order to fully develop his claim.

¶11 For the foregoing reasons, we grant review and relief. We vacate the trial court's order dismissing Healer's notice of post-conviction relief and instruct it to appoint Healer counsel pursuant to Rule 32.4(c)(2).

thirty-five years if the victim was under fifteen years of age." 1993 Ariz. Sess. Laws, ch. 153, § 1.