

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GREGORY NIDEZ VALENCIA JR.,
Petitioner.

No. 2 CA-CR 2013-0450-PR
Filed May 6, 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NOT FOR PUBLICATION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. CR051447001

The Honorable Catherine Woods, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Gregory N. Valencia, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Judge Brammer¹ concurred.

M I L L E R, Judge:

¶1 Gregory Valencia Jr. petitions this court for review of the trial court's order summarily denying the claims raised in his successive post-conviction-relief proceeding under Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Valencia was convicted of first-degree murder and two counts of first-degree burglary and sentenced to natural life in prison for murder with concurrent, 7.5-year prison terms for burglary. He was a juvenile at the time he committed his offenses. One of his burglary convictions was vacated on appeal, but we affirmed his remaining convictions and sentences. *State v. Valencia*, 2 CA-CR 96-0652 (memorandum decision filed April 30, 1998). Before initiating this proceeding, Valencia has sought and been denied post-conviction relief in the trial court at least eight times, and we have denied relief in each of his six petitions for review, most recently in *State v. Valencia*, No. 2 CA-CR 2009-0317-PR (memorandum decision filed Mar. 24, 2010).

¶3 In this most-recent proceeding, Valencia filed a form notice of post-conviction relief in which he claimed he was actually innocent and that *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), is a significant change in the law applicable to his case. Valencia also indicated he wished to raise a claim of ineffective

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

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assistance of counsel and requested that counsel be appointed. Valencia argued in an “attachment” to his notice that his convictions were the result of a “false confession” caused by the investigating detective’s “confus[ing]” questions about the burglary, which he describes as “police misconduct.” He further claimed the detective “may have had a personal vendetta against him” because Valencia knew the detective’s daughter and because Valencia’s “family had sent [Tucson Police Department] officers to the hospital during a riot with police approximately 10 years previously.”

¶4 A few days later, Valencia filed a second notice in which he again requested that counsel be appointed, asserted his confession was false, and claimed that *Miller* applied to his case because the Supreme Court had found unconstitutional “mandatory sentencing of a juvenile to life without parole.” He then filed a “supplement” to his notice in which he further claimed the trial court had not sentenced him “in accordance with [former] A.R.S. § 13-703(F)”² because it had not held a “mitigating/aggravating hearing” as required by that statute, thus “essentially wrongfully sentenc[ing him] to a mandatory life sentence without parole . . . in violation of *Miller*.”

¶5 The state filed a response asserting *Miller* did not apply because the sentencing “court could have sentenced [Valencia] to a life sentence with the possibility of parole, but chose instead to impose a natural life sentence based on the offense and the petitioner’s background.” The state additionally asserted that Valencia’s actual-innocence claim was precluded because he had raised it in a previous petition.

¶6 The trial court “construe[d] [Valencia’s] second Notice to be his Rule 32 Petition,” granted his motion to supplement his notice, but denied his request for counsel. Valencia then filed his reply and a motion for a change of judge. In his reply, Valencia

²That statute since has been revised and renumbered. We refer to the statute in effect at the time of Valencia’s offenses. *See* 1993 Ariz. Sess. Laws, ch. 153, § 1.

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argued he was entitled to file a petition in support of his claims and to the appointment of counsel, and he further explained his claim that his confession was false because the detective had confused him during an interview and had been motivated by a “personal vendetta.”

¶7 In that supplement, Valencia also asserted the sentencing court “had no option but to sentence [him] to a natural life sentence” in light of “the offense and [his] background.” Valencia further reasoned that his background, however, “is not a qualifying aggravating factor” under former § 13-703(F), thus precluding a sentence of natural life. Finally, he claimed his trial counsel and Rule 32 counsel had been ineffective for failing to raise his claims of actual innocence, police misconduct, and improper sentencing.

¶8 After Valencia’s motion for change of judge was granted, the trial court again denied Valencia’s request for appointed counsel and summarily denied his claims. The court determined Valencia’s claims of ineffective assistance of counsel were precluded and he had not identified a significant change in the law entitling him to relief. As to Valencia’s claim of actual innocence, the court determined he had not complied with Rule 32.2(b) because he had raised the same claim in previous petitions and thus had not substantiated his claim as required by that rule. Finally, the court found Valencia’s sentencing claims precluded.

¶9 On review, Valencia first asserts the state “violat[ed]” *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), because it did not “disclose to the defense that . . . the detective knew [that Valencia] used to speak to his daughter over the telephone,” which, according to Valencia, motivated the detective’s purported “misconduct” in questioning him. But we do not address claims raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

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¶10 Valencia also contends the trial court erred by rejecting his claim pursuant to Rule 32.1(h) that he is innocent of burglary and murder. But he merely restates his claim without addressing the basis for the court's ruling rejecting it. A claim of actual innocence pursuant to Rule 32.1(h) is not subject to preclusion and may be raised in an untimely, successive petition for post-conviction relief. Ariz. R. Crim. P. 32.2(b). But a defendant's claim under Rule 32.1(h) nonetheless is subject to summary dismissal unless the defendant complies with Rule 32.2(b) by providing the "specific exception" to preclusion, as well as "meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner." Valencia, however, identifies no error in the court's conclusion that he had not complied with Rule 32.2(b) because he did nothing more than restate a previously rejected claim. Accordingly, he has not established he is entitled to relief.

¶11 Valencia additionally argues that his sentence was "wrongfully aggravated" to natural life because the factors relied upon by the trial court were not permissible under former § 13-703, and that his sentence therefore violated the prohibition in *Miller* of mandatory natural life sentences for juveniles. 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. We need not reach the merits of Valencia's claim, however, because we conclude the court erred in construing his second notice as a petition for post-conviction relief and in summarily rejecting this claim.

¶12 Rule 32.2(b) requires that, when a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h) is made in an untimely proceeding, "the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner." The rule then allows a trial court to summarily dismiss a notice that fails to set forth the specific exception and meritorious reasons. Ariz. R. Crim. P. 32.2(b).

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¶13 If a notice is not dismissed pursuant to Rule 32.2(b), “[a] defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied.” Ariz. R. Crim. P. 32.4(c)(2). The petition must include “[l]egal and record citations and memoranda of points and authorities” as well as “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition.” Ariz. R. Crim. P. 32.5. “A petition which fails to comply with this rule shall be returned by the court to the defendant for revision with an order specifying how the petition fails to comply with the rule.” *Id.* A court may summarily dismiss a petition if it presents no “material issue of fact or law which would entitle the defendant to relief.” Ariz. R. Crim. P. 32.6(c).

¶14 Neither Valencia’s second notice of post-conviction relief nor the supplement—which Valencia filed before learning he would not be appointed counsel—can reasonably be construed as petitions for post-conviction relief. Valencia’s second notice contains only a few short sentences explaining his *Miller* claim. In his supplement, Valencia expressly asks permission to file a petition and provides only a brief summary of his claims. The trial court did not determine, pursuant to Rule 32.2, that Valencia’s *Miller* claim was one that could not be raised in an untimely proceeding, nor did it find he had been dilatory in bringing it. Instead, it denied Valencia’s request for counsel and summarily rejected the claim on its merits without permitting him to file a petition in compliance with Rule 32.5, which would have provided him the opportunity to develop the claim fully. This procedure does not comply with our rules. And, taking into account Valencia’s self-represented status, he adequately raised the *Miller* issue.

¶15 We further note that the Arizona Justice Project (“AJP”) requested permission to file an amicus curiae brief that raises facts and arguments not presented below. But this court does not review arguments not made below. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present

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to the appellate court for review”). Nor will we consider evidence not presented first to the trial court. *Cf. Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). The trial court should have the first opportunity to evaluate the facts in the AJP’s amicus brief, if presented there, and to apply the law to those facts.

¶16 Accordingly, we grant review and relief concerning Valencia’s *Miller* claim. We vacate the portion of the trial court’s ruling relating to that claim and remand the case for additional proceedings. We otherwise deny relief.